

In the matter of the Public Hearing into the Complaint against Constable #2742
Brian Hobbs of the Vancouver Police Department

Written Submissions of Public Hearing Counsel, Bradley Hickford

Overview

1. The allegations against Constable Hobbs are set out as follows, Constable Brian Hobbs committed the following disciplinary defaults, pursuant to section 77 of the *Police Act*:
 - (i) That on November 18, 2015, Constable Brian Hobbs, committed *Abuse of Authority* pursuant to section 77(3)(a) of the *Police Act* which is oppressive conduct towards a member of the public. Specifically, did unlawfully enter the laundry room of Mr. Fraser's residence and conduct an unlawful search of the downstairs living room.
 - (ii) That on November 18, 2015, Constable Brian Hobbs, committed *Abuse of Authority* pursuant to section 77(3)(a)(ii)(B) of the *Police Act* when in the performance, or purported performance, of duties, intentionally or recklessly detained Mr. Fraser in handcuffs.
2. The Public Hearing commenced on January 8, 2018 before Adjudicator Neal and continued for the additional dates of January 9, 11 and 12, 2018. There was testimony from five witnesses. They were as follows:
 - Andrew Fraser, the Complainant;
 - Constable Ward, who was the partner of Constable Hobbs on the date in question;
 - Constable Birzneck, who was the uniformed back up officer that was utilized by Constables Hobbs and Ward and was present for part of the events in question;
 - Sergeant Gilmore who was the officer who conducted the investigation into the complaint and completed the Final Investigation Report;
 - Constable Hobbs, who testified on his own behalf.

3. There were 15 exhibits that were entered throughout the course of the proceedings which included photographs, the CAD Report, the General Occurrence Report and transcribed earlier statements provided by Constable Hobbs, both to Sergeant Gilmore on March 10, 2016 and at a Discipline Hearing that occurred on November 4, 2016.
4. The legal test for the determination as to whether or not the allegations have been proven is, of course, on the balance of probabilities. It is my submission that the issues of credibility and reliability loom large in the determination of whether or not the allegations have been proven.
5. It is my respectful submission that when careful consideration of the evidence is given, it is readily apparent that Constable Hobbs is guilty of oppressive conduct in that he was reckless when he unlawfully entered, not only the laundry room of Mr. Fraser's residence, but also to the downstairs living area to conduct an unlawful search. It is equally apparent that the allegation of abuse of authority has been made out in that it has been proven that Constable Hobbs both intentionally and recklessly detained Mr. Fraser in handcuffs.

Summary of Events

6. A summary of the facts of this matter is as follows. Constables Hobbs and Ward became involved in an investigation into the possession of stolen property as a result of the police being called by [REDACTED] who had seen his property which had been stolen, advertised on Craigslist. [REDACTED] contacted the person advertising that property and made arrangements to meet him to facilitate the purchase of the same. [REDACTED] attended to an agreed meeting place and observed that the microphones and musical equipment that the person was selling were, indeed, his property which had been stolen. He then told the seller that he was going to go and obtain funds and return to facilitate the purchase. [REDACTED] left the company of the seller and phoned the police which initiated the involvement of Constables Hobbs and Ward.
7. Constable Ward met with [REDACTED] to interview him and to ascertain the validity of the complaint. Constable Hobbs had exited the police car earlier to attend to the location where [REDACTED] had indicated the seller would be. Of particular importance is that the description of the seller was provided by [REDACTED] and was broadcast either via police radio or on the MDT police system which enabled the officers investigating, to be in receipt

of that information. It is not contested that the description provided was that the person was a native Indian male, late 30's/early 40's, 6 ft., medium build, baseball cap, short white beard, dark Helly Hansen jacket, carrying an Apex utility case with mics and equipment. It is not contested that Constable Hobbs was fully aware of that description as provided. In his own testimony he confirmed that he read that description prior to exiting the police vehicle.

8. It was decided between the two officers who were in plain clothes that Constable Hobbs would locate and follow the seller with Constable Ward traveling in an unmarked police SUV in a parallel pattern to Constable Hobbs and the seller, so as to remain in a covert position. Constable Hobbs observed a person who he believed to be the seller in front of the 7-11 carrying a black case. When that person left the area, Constable Hobbs began to follow him on foot. The agreed plan was to follow the seller to see if he returned to a vehicle or a residence whereby the officers could then approach the seller, have a conversation with him in an effort to obtain more of the stolen property that might be at a stationary location.
9. After following the seller for a number of blocks he turned down an alleyway. As the officers were concerned that they would lose visual contact, they decided that they would proceed to stop and detain the seller. Prior to that being accomplished, the seller disappeared into the dark shadows in the alleyway and Constable Hobbs lost sight of him.
10. Constables Hobbs and Ward, while not in visual contact with each other, maintained radio contact throughout the course of these events. Once the seller was lost sight of, it was determined by Constable Hobbs that the seller had to have entered into one of two residences.
11. Constable Ward was out front and spoke with a female who had exited the Fraser residence, walking towards her car.
12. Constable Hobbs was at the rear of Mr. Fraser's residence and made the decision, after knocking on the rear door, to see if it was unlocked. It was and he entered into a laundry room. Upon entering into that area, a door further inside was opened and Mr. Fraser entered into the laundry room.

13. Ultimately Mr. Fraser was placed into handcuffs by Constable Hobbs. The same female that had spoken with Constable Ward at the front of the house, had gone back in the home and attended downstairs. She entered into the area where Constable Hobbs and Mr. Fraser were.
14. Constable Hobbs saw a black briefcase some 20 to 30 feet inside of the residence and decided to enter in and conduct a search to see if it was the briefcase that contained the musical equipment. He opened up the top of the briefcase and looked into it. It was immediately apparent that it was not the black case that Constable Hobbs had observed the seller carrying.
15. Mr. Fraser's ID was obtained from him and checked. The handcuffs were removed and the officers left his residence.
16. It was apparent they had entered the wrong residence and arrested the wrong individual. The officers then attended to the second property that was the subject of their considerations, knocked on the front door, spoke to an individual who told them that the basement was a suited residence. They obtained permission and entered into a common area and knocked on the door. They were able to make contact with the person who was the seller and negotiated the return of the stolen property. The seller was a native Indian male with a short white beard. No arrest was made.
17. In considering the decisions that were made by Constable Hobbs to enter into the laundry room of Mr. Fraser's residence and place him in handcuffs, and to then enter into his home and conduct a search of the briefcase, it is important to consider in detail the evidence of each of the witnesses who testified in these proceedings.

Issues for Consideration

18. In my submission, when you consider the evidence of all of the witnesses other than Constable Hobbs, a number of things become clear.
19. First, it is apparent that Constable Hobbs' efforts in establishing the objective and subjective reasonableness of his actions are not supported by these witnesses' evidence.

20. Furthermore, when their evidence and the evidence of Constable Hobbs earlier recorded statements are compared with Constable Hobbs' testimony at these proceedings, it is readily apparent that Constable Hobbs' testimony simply did not have the ring of truth necessary to conclude that it was either credible or reliable.
21. His testimony as against that of other witnesses and his own prior statements demonstrated that he had a selective ability to recall events and was willing to either exaggerate or minimize his evidence to suit his own purposes. His responses to questions asked in cross-examination were often equivocal and when pressed replete with, I don't recall. In short his evidence was objectively compromised.
22. In my respectful submission the lack of quality with respect to his testimony is further demonstrated by his willingness to change his evidence to support his position.
23. The responses of Constable Hobbs to questions asked in the course of his cross-examination when compared with the testimony of other witnesses and his own prior inconsistent statements raise serious questions with respect to both the reliability and credibility of his evidence.

Review of the Evidence

24. The complainant, Mr. Fraser, testified in a very forthright and non-contentious manner. He provided a very detailed description of the events as they unfolded and, in areas where he was uncertain, he clearly stated so.
25. He told the tribunal that he had arrived home at approximately 3:00 p.m. and was down in the basement of his rented home working on his computer. He testified that his girlfriend left prior to 6:00 p.m. to go to yoga and that shortly thereafter he heard a ring at the back door. He stated that while that door was normally kept locked, he had left it open as he had been back and forth to his truck that was parked at the rear of the residence.
26. Mr. Fraser opened the door that goes into the laundry room so that he could access the door that goes to the outside and upon doing so, he entered into a completely dark laundry room, which is an area of approximately 7' by 10'. He saw a dark figure standing there. He was shocked and afraid and asked that person what they were doing there. Mr. Fraser testified

that the person said he was a police officer and flashed him something shiny in his hand but that he didn't have any particular reason to believe that the person was a police officer. He said he was afraid and agitated and asked the person what he was doing in his house as many as eight times.

27. Mr. Fraser testified that he was not aggressive, did not raise his hands to that person and that, after a very short time period he was told that he was under arrest for being combative and placed in handcuffs.
28. He testified that he cooperated, stopped talking and essentially surrendered. He did not recall being told anything about any Charter rights but indicated at that point in time, he was scared to death.
29. He said that another officer attended and then a short time later a police car with a third officer arrived. He now knew and understood that it was the police that were in attendance and that they were looking for somebody.
30. He testified that the two plain clothes officers had the uniformed officer stay with him while he was in handcuffs while they walked into the downstairs office area and conducted some type of a search. He stated that they were only in the residence for approximately one minute and that the officers then asked him for identification which he had his girlfriend retrieve.
31. He stated that his identification was given to the police and that they left the basement area to check and verify who he was and returned a couple of minutes later and that it was then that the handcuffs were removed from him. He also told the tribunal that he asked his girlfriend to take a photograph of him in the handcuffs when he was standing with the uniformed officer.
32. That photograph was entered as Exhibit 3.
33. Mr. Fraser said that Constable Hobbs then engaged in further conversation in an effort to explain to him what they were doing but that Constable Hobbs did not apologize to him and that he simply wanted the police out of his house.

34. The police left, he closed the door, locked it and then phoned the Vancouver Police Department immediately to lodge a complaint.
35. Mr. Fraser was examined by Commission Counsel, Mr. Delbigio and was cross-examined by Mr. Hobbs' counsel, Mr. Woodall. His further examinations did not in any way impeach his testimony in chief, nor were there any inconsistencies demonstrated by these examinations.
36. The next witness called was Constable Ward who was the partner of Constable Hobbs and had been working with Constable Hobbs for approximately two years at the point in time when these events occurred.
37. Constable Ward did not recall reading or knowing about the description that came across the MDT that Constable Hobbs had read. He did, however, testify that Constable Hobbs provided him a description of a light skinned male, between 30 and 40 years old wearing dark clothing and a baseball cap. He testified that Constable Hobbs provided that description after he had taken up an observation point and was looking at the individual whom he believed to be the seller.
38. Constable Ward testified that he was aware that Mr. Fraser had phoned in a complaint shortly after they had dealt with him. Constable Ward also testified that after they realized that they had arrested the wrong person and entered into the wrong house, they then attended to the second house and dealt with a person who was in fact the seller. That individual was a native Indian male with a white beard.
39. Constable Ward was asked in direct examination about the conversation he had with the female person who was an occupant of Mr. Fraser's residence and whom he had observed come out of the front door, walking towards a car. He stated that he had a conversation with her and that she told him that she and her husband lived there and they had access to the entire house. He was clear in his evidence that he was communicating that information to Constable Hobbs and that he believed the information she was providing him to be truthful.
40. He testified that at that same time he had received a broadcast from Constable Hobbs asking for another police unit to attend to the rear of the residence and that he in fact, made that broadcast and request.

41. He further testified that he had additional conversation with the female and asked if her husband had just returned home. He stated that she initially said that he had just returned home but then when he discussed the Craigslist deal, she stated that in fact her husband had been home for some hours and would never be involved with a Craigslist deal.
42. Constable Ward testified that he informed her that there was another plainclothes officer knocking on the rear door of her residence and questioned her as to why her husband wouldn't be answering. He stated that she told him that wouldn't be a good idea for the police to be knocking on her back door because her husband hated the police.
43. Constable Ward stated that he did not immediately hear anything back from Constable Hobbs but a short time later received a broadcast from Constable Hobbs that he was dealing with an uncooperative male. Constable Hobbs asked him to come around to the rear of the property to assist him.
44. Constable Ward testified that a uniformed police car was already at the rear of the residence when he arrived and that the officer in attendance was Constable Birzneck.
45. He testified that Mr. Fraser was already in handcuffs and was standing beside Constable Hobbs. He did not recall Mr. Fraser saying anything.
46. He further testified that the female was now standing inside the interior of the residence through the laundry room and that the door was opened and Constable Hobbs pointed to him and then looked down into the residence and pointed towards the case or box that was 20' to 30' inside. He testified that neither officer asked Mr. Fraser anything about that box or briefcase. He was also clear that he did not hear Constable Hobbs telling Mr. Fraser that he was under arrest, nor did he hear him providing any Charter warnings.
47. It is important to note that on the evidence of Constable Ward, Mr. Fraser had been arrested and was in handcuffs prior to Constable Hobbs pointing out the briefcase inside the residence.
48. He testified that he and Constable Hobbs entered the residence, that Constable Hobbs opened up the box and that it was not what they thought it to be.

49. Constable Ward recalled that the female retrieved Mr. Fraser's identification and handed it to Constable Birzneck and that Constable Birzneck attended to his vehicle to check for that identification and returned to their location, advising that there was no police history that they needed to be concerned about. He stated Mr. Fraser was then taken out of handcuffs. Constable Ward further testified that Constable Hobbs was attempting to explain to Mr. Fraser the circumstances that led to them being in his house and that Mr. Fraser had interrupted and said he didn't want to hear anymore and told them to get out of his house.
50. Constable Ward was questioned by Commission Counsel, Mr. Delbigio and, in the course of that, confirmed that the interactions and discussions that he had with the female that occurred out of the front of Mr. Fraser's residence were radioed to Constable Hobbs.
51. He also agreed that when he attended to the rear of the house to assist Constable Hobbs who had a male in handcuffs, that if he had been aware of the description, that the suspect was a native Indian male with a white beard it would have been immediately apparent to him, that the person he saw in handcuffs was not the suspect.
52. It is clear from the evidence of Constable Ward that he was strictly relying on the observations made by Constable Hobbs.
53. Constable Ward was also questioned by Mr. Delbigio about the need to check Mr. Fraser's ID after determining that the briefcase or box was not the correct one before taking the handcuffs off of him. Constable Ward testified that there was still a need to check Mr. Fraser's ID because he did not have enough information of what had transpired with Constable Hobbs when he broadcast he was dealing with an uncooperative male.
54. Constable Ward was cross-examined at length by Mr. Woodall. The vast majority of the cross-examination was comprised of Mr. Woodall putting factual paragraphs to Constable Ward and having Constable Ward agree with them by saying that is fair, yes, that is correct or that is right.
55. A review of the transcript of Constable Ward's examination by Mr. Woodall clearly demonstrates that there is very little actual factual information that came out of the mouth of Constable Ward. Mr. Woodall did cross-examine Constable Ward about his relaying the

information that the female told him via the radio. Constable Ward said that he could not say with certainty whether he passed on all of those items of information to Constable Hobbs via the radio. This, again, was at the suggestion of Mr. Woodall.

56. Constable Ward agreed to that proposition despite having been clear in his direct examination by Public Hearing Counsel that he in fact did relay all of the information occurring in the conversation he had with the female to Constable Hobbs. He also confirmed that in his cross-examination by Mr. Delbigio.
57. It is my respectful submission that very little weight should be given to Constable Ward's cross-examination by Mr. Woodall as it is replete with suggestions that colour the issue of whether or not Constable Hobbs' decision to enter into the laundry room, place Mr. Fraser in handcuffs and then search the interior of his residence had subjective or objective support versus being reckless in nature.
58. Constable Birzneck was the next witness and he confirmed that he attended as a uniformed back up officer because of the request that was broadcast over the police radio.
59. He stated that he arrived, was standing outside the doorway and that Mr. Fraser was not handcuffed initially when he arrived. He stated that Constable Hobbs placed the handcuffs on Mr. Fraser sometime after he was there, but could not remember exactly when that was.
60. Constable Birzneck testified that a female came through the basement door into the laundry room and that he believed a bag became visible inside of the basement suite.
61. He testified that after that occurred Constable Hobbs went in and retrieved the bag.
62. On the evidence of Constable Birzneck, Constable Ward did not go into the suite with Constable Hobbs.
63. He testified that he was left standing with Mr. Fraser in handcuffs while the search was being conducted and that Mr. Fraser did not say anything.
64. Constable Birzneck stated that either Constable Hobbs or Constable Ward gave him Mr. Fraser's ID to run queries from his police car on CPIC and PRIME.

65. He testified that he did that, confirmed the identification and that there were no difficulties with Mr. Fraser. Constable Ward could not recall if Mr. Fraser was left waiting in handcuffs while that occurred.
66. Constable Birzneck was asked if he ever heard Constable Hobbs utter any words of arrest to Mr. Fraser or any words to do with the providing of a Charter warning. Constable Birzneck did not recall ever hearing either of those.
67. The next witness to testify was Sergeant Gilmore who was the police standards investigator who conducted the investigation into the complaint against Constable Hobbs.
68. Sergeant Gilmore was an officer of 17 years policing in Vancouver and had considerable experience working the same type of investigations that were the subject of this complaint and was also familiar with the homes in East Vancouver.
69. In the course of Mr. Woodall's cross-examinations of Constables Ward and Birzneck he questioned the officers about their experience with respect to whether or not it was common for these types of houses to be broken up into multiple suites. Both officers indicated that it was, in fact, common. This evidence was also led from Constable Hobbs by Mr. Woodall.
70. When Sergeant Gilmore was asked about Mr. Fraser's specific residence and, particularly, the rear entrance, he was asked if there was anything to indicate that it was a multi-suited dwelling. He clearly stated that the rear door of Mr. Fraser's residence simply appeared to be the rear entrance into the home.
71. The final witness to testify was Constable Hobbs who was first examined in-chief by Mr. Woodall.
72. Constable Hobbs explained in detail that his efforts in investigating this matter were focused on trying to recover as much of [REDACTED]'s stolen property as he could.
73. Constable Hobbs described the procedure utilized by he and Constable Ward whereby he was on foot, following the person who was the seller and Constable Ward was traveling parallel in the police car.

74. Constable Hobbs testified that once the person he was following turned down the alleyway, he disappeared into the dark shadows and that Constable Hobbs determined that the person had to have entered into one of two houses, those being Mr. Fraser's residence or the residence that they eventually attended and recovered the stolen property from.
75. Constable Hobbs testified that it was fairly likely that the seller had gone into Mr. Fraser's residence. He stated that it started out as 50/50 but eventually in the course of cross-examination, which referenced him to his earlier statements, told this tribunal that it was more like 60/40.
76. Constable Hobbs testified that they wanted to have the element of surprise and that the plan was to get a uniformed officer present prior to him knocking on the rear basement door to obtain an opportunity to speak to the resident but have a uniformed police officer present so that it was clear that it was the police that were investigating.
77. Constable Hobbs testified in direct that he knocked on the exterior door and that when there was no answer he considered the possibility that there was another door inside that he would need to knock on and so then he turned the handle and entered into a laundry room that he believed might be a common area as between multiple suites.
78. Constable Hobbs testified in direct that as he was entering into that area to go and knock on the interior door he was updated by Constable Ward that he was speaking with the wife and that she stated that her husband had just returned home and didn't like the police.
79. Constable Hobbs testified that as he entered into the laundry room, Mr. Fraser came out of the door to the residence. He stated that he identified himself as a police officer to Mr. Fraser, showed him his badge and asked him if he understood that he was a police officer and that Mr. Fraser said yes.
80. Constable Hobbs described Mr. Fraser as a light skinned male, approximately 6' tall and kind of slender build, about 40 years old. He also testified in direct that Mr. Fraser was consistent with the person he was following.
81. Constable Hobbs testified that Mr. Fraser was demanding to know why he was in his house. He stated that he tried to explain that to Mr. Fraser.

82. Constable Hobbs testified in direct that he did have concerns that Mr. Fraser was not a native Indian and there were inconsistencies with the description that he had been provided. He also stated that Mr. Fraser had told him that he'd been home all night. Constable Hobbs testified that his intention would have been to explain to Mr. Fraser that he was the police and that if he had stolen property to turn it over to Constable Hobbs and that they would not charge him or take him to jail. Constable Hobbs testified that a very short time later a female entered into the laundry room and that when she opened the door he could see a black briefcase sitting at the end of the couch which appeared to be consistent with the same case he saw the seller carrying.
83. Constable Hobbs stated at that point in time he believed he had grounds to arrest Mr. Fraser for possession of stolen property so he did and placed Mr. Fraser into handcuffs.
84. Constable Hobbs did state in direct that because Mr. Fraser was adamantly saying he didn't do anything in a very convincing manner he told Mr. Fraser that the police were going to enter into his suite, recover the plain view evidence and that if it wasn't the property that he thought it was, he was making a large mistake and would apologize for that.
85. Constable Hobbs stated that he placed Mr. Fraser into handcuffs because he thought it was the safest thing to do so that Mr. Fraser wouldn't have an opportunity to become more upset or to fight with the police.
86. Constable Hobbs testimony in direct with respect to being asked by Mr. Woodall about resolving the issue of whether or not he had the right person can best be summed up at the transcript of January 11, 2018, p. 51, ll. 4-14.
- A. Yeah, it definitely seemed like the quickest way to resolve this, whether it be in my favour or in his favour. I didn't want to go back out to the car and reread descriptions and talk to radio and call complainants and get a better description of the case, and prolong the amount of time that Mr. Fraser was standing there in handcuffs, in my opinion at the time I was lawfully allowed to recover that plain view evidence, and it seemed like the simplest way to just answer the obvious question.

In my respectful submission that particular paragraph clearly demonstrates the lack of subjective and objective support for Constable Hobbs' actions and, to the contrary, clearly demonstrates the high level of recklessness in his conduct on the night in question.

87. In his direct examination Constable Hobbs denied that he had Mr. Fraser remain in handcuffs while his ID was checked.
88. At the conclusion of his examination in-chief Constable Hobbs testified that after they released Mr. Fraser he attended to the rear door of the second home while Constable Ward attended to the front and knocked on the door. He testified that Constable Ward was told by whoever lived upstairs that there were multiple suites downstairs and that they needed to walk through the door. He testified that they did not get permission to go downstairs, nor did they seek it. This, of course, is contrary to the evidence of Constable Ward.
89. In cross-examination by Public Hearing counsel, Constable Hobbs was asked about the description that he read on the MDT and whether or not he relayed that to Constable Ward. He testified that he did not because it was not relevant in that he provided his own description of the male that he was watching from his observation point on foot. He agreed in cross-examination that the description that he provided to Constable Ward was extremely generic in nature.
90. In cross-examination Constable Hobbs agreed that he couldn't see whether the person was a native Indian male, he couldn't see a short white beard but said that those descriptors could have been provided by a person of unknown reliability at an unknown time at an unknown place. This, of course, was in reference to the description given by [REDACTED].
91. At the outset of his cross-examination he agreed that he could not identify the person's face as he was wearing a jacket with the collar up and had a baseball cap on.
92. Constable Hobbs was asked about the briefcase he saw the seller carrying and how it compared to the briefcase that he saw inside Mr. Fraser's suite. At the outset of his cross-examination he would not agree that it looked vastly difference. Later, in further cross-examination the following exchange took place (January 12, 2018, p. 2, ll. 32-47; p. 3, ll. 1-47; ll. 1-24).

Q. And I suggested to you that they were -- I think I used the word "vastly", and you didn't agree with that, is that correct?

A. Yes.

Q. Would you agree that they were significantly different?

- A. I -- they were a different material, but they were the same size and shape.
- Q. Okay. I'm going to ask you to turn to the statement that you gave to Sergeant Gilmore, and again that is the statement that you provided on March the 10th, 2016, correct?
- A. If -- yeah, I don't know, if you say so.
- Q. Well, if you look in the very -- at line 1.
- A. There it is, March the 10th, 2016, yes, that is correct.
- Q. Okay, and you -- you recall giving that statement?
- A. I do recall, yes.
- Q. And of course you were telling the truth then?
- A. Yes.
- Q. And of course it was much closer to the events and your memory probably was better?
- A. Yeah. I was actually thinking about that, since I had the night to think about it, and I don't agree that my memory is better then or with the other statement. After being able to sit here today -- or throughout this week, and being able to review everything in quite detail, and listening to other people's statements, including Mr. Fraser's, which I did not have the opportunity to do any of that before, I think my memory is at least the same, if not better now, so . . .
- Q. Okay.
- A. I've had -- I've had access to a lot more material now than I did when I gave either one of these two statements.
- Q. Okay. I'm going to ask you to go over to page 5 -
- A. Sure.
- Q. -- of that statement. And if you go to line 328.
- A. Yes.
- Q. And Sergeant Gilmore is asking you some questions about this person who's walking away, the suspected seller, and he says at line 328 [as read in]:
- Okay, and did you see him with anything, anything at all? Did he have --

You say:

Uh, he was carrying a black case.

Gilmore says:

Okay.

You say:

Yeah.

And Gilmore says:

And how would you describe that black case?

You said:

Uh, at the time I would have described it as a black suitcase. I know now that it was more of -- like it was more of a hard plastic case, and it was much skinnier, and I'm motioning like six centimetres with my hands right now. It was a lot skinnier than the suitcase that Mr. Fraser had.

A. Yes.

Q. Do you remember telling him that that was the descriptions?

A. Do I know now?

Q. Do you remember saying that?

A. Yes.

Q. Was it true?

A. That this -- that the real case was skinnier than Mr. Fraser's?

Q. Is that statement what I just read to you true and correct today?

A. Yes.

93. In the course of his cross-examination about the conversation that he had with Mr. Fraser his testimony was equivocal and there are numerous instances where his responses are inconsistent and equivocal. Furthermore, under cross-examination Constable Hobbs testified that he did not arrest Mr. Fraser prior to the door being opened by the female and his seeing the bag because Mr. Fraser did not match the description and was not the same person that he saw. This is in contradiction to what he stated to this tribunal in agreement

with Mr. Woodall's suggestion in direct. However, on January 11, 2018 at p. 72, ll. 26-31 he stated under cross-examination the following:

When he opened the door and he did not match the description of the person I saw on the street, I was unsure. I was unsure if he was the right guy, I was unsure if I was in the right house, but I had all this evidence that led me to believe that this was the right house so I was trying –

94. In the course of cross-examination by Public Hearing counsel it was suggested to Constable Hobbs that the plan was for him to be knocking on the rear door while Constable Ward was knocking on the front door. He denied that suggestion and said the plan was just to hold the front and rear while they waited for a uniformed officer and then just to knock on the rear door.

95. Constable Hobbs was then referenced to Exhibit 14 which was his testimony at the Discipline Hearing of November 4, 2016. January 11, 2018, p. 84, ll. 4-44:

Q Oh, yeah, if we can go to the first part which –

A It starts with "okay, are we recording?"

Q It says, "We're recording, November the 4th, 2016, 9:01 a.m.?"

A Yeah, got it.

Q Line 1 and 2. And if we go over to line 407, which is at page 6.

A Yes.

Q And we've got Mr. Woodall, it says "W", Mr. Woodall, at 407 [as read in]:

We'll come back to that in a moment. So with your plan to knock on the door, what did you do?

Your answer:

I knocked on the door, uh, Constable Ward went to the front door of the residence, he knocked on the front door, and while he was knocking on the front door, I knocked on the rear door.

And then down at 425 you say [as read in]:

Yeah, like I mean, your question, I didn't answer it really, but, uh, whether I thought it was a shared space or not, like I didn't -- I didn't want [sic] up to the house, sir, being like this is a shared space I'm going to walk right in, that's not what I thought. I walked up thinking it was a house.

Constable Ward was going to knock on the front door, I was going to knock on the back door.

Does that help refresh your memory or correct your memory?

A I mean, yes and no. It's possible, I guess, Your Honour -- Mr. Adjudicator that the plan was Constable Ward would knock on the front door. I

96. His response, as contained in the transcript, to being asked about the inconsistencies, is a further demonstration of his willingness to change his evidence and be evasive.
97. Constable Hobbs also testified under cross-examination that the radio transmissions that he received from Constable Ward about his conversation with the female that lives there came simultaneously at the time when he was entering the laundry room to knock on the interior door and ran into Mr. Fraser. He denied that he heard Constable Ward tell him that the female stated that it was her and her husband that lived in the house and while she initially stated that her husband had just got home she then changed her statement to say he'd been home for a couple of hours.
98. It is significant that Constable Hobbs testified that if he had that information he would no longer have continued on his course of actions.
99. Under cross-examination he stated the following (January 11, 2018, p. 87, ll. 35-47; p. 88, ll. 1-6):

Q. So you're certain that he never said those things over the radio, is that right?

A. If he had I would have had had no reason to knock on the back door because I no longer would have thought it was a separate suite so I'm certain that he did not say those things over the radio.

Q. So you're telling us that if you had heard those portions about Mr. Fraser and his wife living there, being the people that lived there, that they had access the whole - - to the whole suite, you never would have entered, is that right?

A. Yes, I would have radioed back to my partner, probably said something along the lines of can you please get her husband to come to the front door, and I would have walked around to the front door to meet him. So that would have been - - that would have changed the entire scenario had I been told that information.

100. Constable Hobbs was referenced to Exhibit 13 which was his recorded statement that he provided to Sergeant Gilmore on March 10, 2016. He was specifically referenced to page 3 at l. 196. (January 11, 2018, p. 89, ll. 6-26).

Um, so that's - - that - - I took one, maybe two steps inside, into this laundry room, and after getting inside, the door opened. I hadn't said anything yet, I hadn't done anything other than what I had already said previously from outside the door, and when this male who we all known now to be Mr. Fraser came out and around, at the same time my partner, Constable Ward had said something over the radio about like her - - he was talking to a woman so he had some - - said something about like, oh, her boyfriend or someone's downstairs, and not anti police - - and not anti police, that's too negative, he didn't say anti police, but uh, like she told him something like, oh, yeah, he's not going to like the police here, , or he's not going to be happy about that, and so that had been relayed to me over the ops channel in my ear, where I just heard, oh, like her boyfriend's downstairs, but he won't be happy.

101. It is significant to note that under further cross-examination Constable Hobbs agreed that Constable Ward provided him information that he was speaking with the wife out front prior to Constable Hobbs entering into the laundry room (January 11, 2018, p. 91, ll. 6-34).

Q. Which broadcast came first?

A. I'm speaking -- something to the effect of I'm speaking with the wife or somebody.

Q. And what -- and what about what -- what she was telling him?

A. There was nothing more.

Q. So the first broadcast was he said I'm speaking to the wife, nothing else, no informational component?

THE ADJUDICATOR: Sir, can we confirm when that took place because I'm unclear.

MR. HICKFORD: So am I.

THE ADJUDICATOR: Yeah.

A. While I was at the back door waiting for Constable Birzneck in uniform to provide me with cover, because we believed the seller had gone into the basement suite, Constable Ward was at the front door. At some point, I don't recall if it was ten seconds or a minute, he provided the update that he was speaking with the wife out front, that's all he said. That would be pretty standard, because something had changed, his scenario had changed.

THE ADJUDICATOR: Is this before or after you went --

A. Before I –

THE ADJUDICATOR: -- in the outside –

A. -- went -- before I went in the laundry room, yes.

THE ADJUDICATOR: Thank you, that's what I needed clarification on.

102. When Constable Hobbs was, again, referenced to Exhibit 13 and taken to p. 3, l. 200 where it was put to him that the same time that his partner, Constable Ward, was speaking to him over the radio was the same time that Mr. Fraser appeared and that Constable Ward told him that he was talking to a woman and had said that her boyfriend was downstairs. When asked about the contents of that statement, Constable Hobbs told this tribunal that it was possible he misspoke. (January 11, 2018, p. 92, ll. 24-47; p. 93, ll. 1-43)

A. From the wife, and the update consisted of I'm speaking -- I'm talking to the wife, she says her husband just got home, and he doesn't like police.

Q. What about that he's downstairs?

A. He didn't say anything about the husband being downstairs or . . .

Q. Okay, let's go back to your statement, page 3. The statement that you gave to Sergeant Gilmore.

A. What line?

Q. 200.

THE ADJUDICATOR: What -- I'm sorry, we're at the statement, page 3 where?

MR. HICKFORD: At page 3, line 200, Mr. Adjudicator, I'm sorry.

THE ADJUDICATOR: 200, thank you. I'm not sure if it's possible to create smaller font print, but –

MR. HICKFORD: Oh, tell me about it.

THE ADJUDICATOR: -- this is as good as –

MR. HICKFORD: I've had to go through it many times.

Q. I'll -- I'll begin reading, if I could, at line -- well 198 [as read in]:

Then this male . . .

-- I'm halfway in the line --

. . . who we all now know to be Mr. Fraser . . .

-- are you with me now?

A. Yes.

Q. [As read in]:

... came out, and around the same time my partner, Constable Ward said -- had said something over the radio about like -- like her.

And this was the -- this is the wife you're talking about?

A. Yes.

Q. [As read in]:

He was talking to a woman, so he had said something about like, oh, her boyfriend or someone was downstairs.

You would assume that to be the same person that she was talking about earlier, about her husband, right?

A. There was no earlier.

Q. Okay. So I take from that that her boyfriend's downstairs and he's not going to like that the police are there, correct?

A. That appears to be what I'm saying there, yes.

Q. So now you're saying that didn't happen, that's not what happened today?

A. I'm saying that Constable Ward provided me with two radio broadcasts. So I provided it in my original general occurrence, I provided it in my duty statement, and yes, during -- it appears that during my extremely longwinded answer to Gilmore, where he asked me one single open-ended question to explain the entire circumstance, I said something about someone's downstairs. But I mean, I ultimately knew that was the case, so it's possible I misspoke.

103. In my submission it was clearly established through further cross-examination that Constable Hobbs had been told the contents of the conversation that Constable Ward had with the female at the front of the house and either did not pay attention to these or chose to ignore them. His cross-examination in that regard further demonstrates how his testimony is objectively compromised.

104. Constable Hobbs eventually agreed that the statement that the female's boyfriend was downstairs and not going to be happy that the police were there indicated that the people living there had access to the whole house.

105. In further cross-examination, when Constable Hobbs was challenged on the descriptors that were provided via the MDT and the observations that he made of the seller, he was once again equivocal and willing to change, exaggerate or minimize his evidence in order to deal with the obvious inconsistencies that existed in his evidence.
106. His comments that complainants are notoriously bad with the descriptions they give of suspects and that a native Indian male could be the same as a light skinned male are clear demonstrations of why his evidence is not reliable or credible to support his having any objective or subjective grounds to undertake the actions that he did on the night in question. They are confirmatory factors as to how reckless his actions were.
107. Eventually, Constable Hobbs did agree under cross-examination that in looking at Exhibit 3, the photograph of Mr. Fraser, there was nothing about his appearance that would suggest that he was a native Indian male.
108. Another striking example of Constable Hobbs' willingness to change his testimony when challenged was the following demonstrated inconsistency that arose in the course of his cross-examination. Constable Hobbs was asked if he knew that the person who was the suspect or the seller had a short white beard, whether that would have changed his decision in dealing with Mr. Fraser once he saw him. In his direct evidence at this hearing he stated, no, but changed his answer to yes when his earlier statement at Exhibit 13, p. 5, l. 373 was put to him in the quote (January 11, 2018, p. 103, ll. 26-30),

Uh, yeah, I mean I don't really - - I mean if I knew for certain a suspect was supposed to have a short white beard then surely that would have changed my decision-making when I met Mr. Fraser.

109. Constable Hobbs' response to that when put to him was (January 11, 2018, p. 103, l. 32),

Yes. If I knew for certain.

110. He was then asked by the Adjudicator to clarify his answer and said that his answer was, no.
111. Under further cross-examination by Commission Counsel, it was clear that Constable Hobbs testified that when he first saw Mr. Fraser he did not have the grounds to arrest him because he was not sure whether Mr. Fraser was the same person that he was following.

112. It was also made clear in that cross-examination, that at the time of Constable Hobbs' interaction with Mr. Fraser he was aware that Mr. Fraser was the boyfriend of the woman who lived upstairs.

Application of the Law to the Facts

113. In the application of the law to the facts in this case, it is my respectful submission that you should begin with concluding that where Constable Hobbs' testimony differs with that of the other witnesses, it is their evidence that you should be accepting over his.
114. Even if you accept that Constable Hobbs had the subjective believe that his actions were lawful and not reckless, when an objective standard is applied it is abundantly clear that Constable Hobbs did not undertake any proper analysis of the information available to him prior to charging ahead. In a word, his actions were reckless.
115. It is not the situation that Constable Hobbs was ignorant of the law. Nor is it an issue of determining whether or not a Charter breach occurred. It is, however, a determination of the question of whether Constable Hobbs' actions were intentional and reckless.

Lowe v. Diebolt 2013 BCSC 1092

[46] I do not agree with this position. The question of misconduct is different from whether a *Charter* breach occurred, and also from whether evidence obtained from an illegal search should be excluded. That is clear from the definition of the charged misconduct, which requires recklessness or intent. The "intent" cannot refer to the physical act of the search, because it is virtually impossible to conduct a physical search non-intentionally. It must refer to the *mens rea*, or state of mind of the officer. Recklessness must be interpreted in the same manner. The fact that an officer is ignorant of the law related to searches does not, by itself, indicate intent or recklessness. It is more in line with negligence, or, for that matter, poor training. (I address actual knowledge below at para. 52)

116. Consideration must also be given to the issue of whether Constable Hobbs had good and sufficient cause to undertake the course of actions that he did as opposed to whether his conduct had a serious blameworthy element to it and was not based on a mistake of legal authority alone.

[36] The petitioner does not seek to challenge in subsequent administrative proceedings the acquittal of the complainant. The quest before Rounthwaite, P.C.J. was whether the complainant was guilty beyond a reasonable doubt of assaulting a police constable in the execution of his duty and of resisting arrest. The issue of the complainant's guilt or innocence is not the same as the issue of whether the petitioner was guilty of misconduct by abusing his authority. Provincial Court Judge Rounthwaite decided the petitioner did not have authority to enter the house of the complainant and arrest her, but made no decision that the petitioner had abused his authority within the meaning of s. 77(3) of the *Police Act*, which is reproduced at para. 7 of these reasons. "Abuse of authority" is defined for the purpose of the complaint against the petitioner as the intentional or reckless arrest of the complainant without good and sufficient cause. I do not read the phrase "without limitation" as the retired judge apparently did, to mean that intention or recklessness can be ignored when considering the petitioner's conduct. In my view, the section should be read to apply to conduct which has a serious blameworthy element and not simply a mistake of legal authority alone.

117. It is my submission that in this particular case the tribunal is well equipped to assess the reasonableness of Constable Hobbs' belief and determine whether his actions were intentionally or recklessly undertaken without the authority to do so. There has been evidence led from all parties involved and the testimony provided is more than sufficient to make the determination.

Public Hearing File No. 2014-2, Constable Tiwana, Reasons of Carol Baird Ellan, Adjudicator, pp. 15-16

Where they differ is the effect of *Lowe v. Diebolt* on that line of cases. I do not see that *Lowe v. Diebolt* is inconsistent with that line of cases or establishes an entirely subjective test of good faith. Myers, J. pointed repeatedly to the lack of evidence, and observed specifically that ignorance of the law might indicate a lack of training. Justice Myers appears to simply have been observing that the evidence in that case did not establish that the officer had training, or had been taught a standard that fixed her with knowledge that she was searching unlawfully. That is not the same as a purely subjective test; it means only that the adjudicator was not equipped to find that the officer knew her options and intentionally or recklessly acted out inside her authority.

What *Lowe v. Diebolt* highlights, in my view, is the need for expert evidence, or at least evidence regarding the knowledge and training available to the officer, in cases where the trier of fact may not be equipped to assess the reasonableness of the officer's belief. *Lowe v. Diebolt* was such a case, as is the one before me. In other cases, disproportion between the incident and the response may be so self-evident as to negate the need for testimony about what the reasonable officer might have done or been trained to do in the circumstances, or, as in this case, about the surrounding events. In those cases it may be enough for the adjudicator to point to the officer's actions and using common sense, conclude the action was intentionally

or recklessly taken without authority. In other cases, where reasonable lay people may differ as to whether a police response was appropriate, evidence will be required to show that the officer failed to adhere to a general standard imposed by his or her training and available knowledge.

118. The issue of distinguishing between an officer's ignorance of law in relation to conducting a search versus actions that are founded in intent and recklessness has been considered by other tribunals. That consideration has been of evidence from an objective perspective to determine if the officer was reckless in failing to analyze the basis for the steps they took.

OPCC File No. 2016-11505, the Honourable Wally T. Oppal, QC, January 25, 2017

[25] I am mindful of the case of *Lowe v. Diebolt*, 2013 BCSC 1092 (aff'd 2014 BCCA 280), in which the Chambers justice in the judicial review proceeding differentiated between (1) Police Act misconduct and (2) whether a Charter breach occurred and evidence from an illegal search should be excluded. I agree these two processes must be distinguished. That case involved a situation in which there were objective grounds for an arrest and for a strip search; the issue was the manner of search undertaken. As I read that decision, the suggestion is made that an officer's ignorance of the law related to searches does not, by itself, establish intent or recklessness (para. 46). I take the point that an officer's inadvertent mistake as to the law cannot, standing alone, be taken as misconduct in every case (or "automatic misconduct"). But where a mistake as to the law is compounded by a failure to engage in the necessary analysis as to the grounds for detention or arrest, it may be taken into consideration. And of course each case falls to be assessed on its own facts. Unlike *Lowe v. Diebolt*, here, the record supports a conclusion that there were no objective grounds for detention or arrest. In the matter before me, the record suggests that the officer was reckless in failing to analyze the basis for the steps he took; he simply pressed on.

OPCC File No. 2016-11766, the Honourable Wally T. Oppal, QC, May 18, 2017

[16] _____ stated in his interview, conducted _____ that officers informed him he was being detained for theft. _____ and _____ informed _____ that the description of the male suspect they were looking for could be wrong. The description the police provided was different in a number of respects from how _____ presented. He was wearing a black leather jacket over a black hoody, as opposed to a grey hoody and he was not carrying a bag. As well, it is important to note that _____ was walking in a direction different from that contained in the information given by the 911 caller. The suspect was reported to be walking North on _____. _____ had informed the officers that he had just attended the _____ on _____, which is consistent with where the officers first encountered _____. _____ stated that due to _____ animated behaviour he decided to handcuff him for officer safety incident to his lawful detention. With respect, the basis for investigative detention in these circumstances appears to be most problematic. The officer's notes are generally silent in regard to whether _____ was made of his rights under the charter before the officers made any inquiries. _____ only recorded one page of

notes, with very little detail, although he was the officer that detained and handcuffed _____.

[17] The officers appear to have varying accounts of whether _____ was arrested for obstruction of justice or not. _____ stated that he believed _____ could have been arrested for obstruction, but was not. _____ stated he could not recall if he formally arrested _____ other than giving him an obstruction warning.

[22] In considering both _____ and _____ conduct that night, based on the review of the material before me, the record suggests that the officers were reckless as to their detention (and subsequent search) of _____. From the materials I have reviewed, the officers did not adequately apply the standard; it appears they were determined to stop _____ despite the lack of connection vis-à-vis his location and appearance. _____ refused to supply his identification, which he was not required to do, although eventually he provided it as he was told it was the only way he would be released. _____ and _____ seemed to take _____ refusal to provide his identification as conducting that was obstructing police. In the circumstances, the record suggests the officer did not have a proper basis to insist that _____ supply his identification.

[23] _____ and _____ appear not to have undertaken the analysis or the reasonable steps required to meet the standard of a reasonable suspicion, as set out in Mann, to justify detention. The facts at hand suggest the absence of a clear nexus between _____ and the specific descriptors of the theft in progress or the suspect. As such it appears _____ detention was not reasonable in the entirety of the circumstances. The officers seem to have incorrectly focused on obtaining _____ identification, and interpreted his refusal as a criminal offence.

[24] It is clear to me from the record available that _____ and _____ were not acting with malicious intent, and that they subjectively believed they *could* detain and demand identification from _____. However, reviewing the entire record before me, it appears the officers were reckless in their failure to stop and assess whether they had a lawful basis for the detention and their demands. As the officer's search of _____ flowed from the reckless detention, the search must also be considered to have been conducted in a reckless and unreasonable manner. Police officers need to inform themselves of the effects of what the court said in Mann.

119. In conclusion, it is my respectful submission that the evidence heard by this tribunal clearly establishes that Constable Hobbs' actions were not based in ignorance of the law or mistake.
120. Constable Hobbs failed to analyze the information that was available to him prior to charging ahead and taking the course of action that he did. Even subjectively, there was only a 50/50 or, perhaps, 60/40 chance that he was entering the home that he believed the seller had gone into. There was nothing to indicate that Mr. Fraser's particular residence was anything other than a single family home.

121. This tribunal should conclude that Constable Hobbs had been relayed the contents of the conversations that occurred between Constable Ward and the female at the front of the house prior to Constable Hobbs entering into the laundry room.
122. There can be no question that upon Constable Hobbs seeing Mr. Fraser, there is nothing in Mr. Fraser's appearance that is consistent with either the person Constable Hobbs saw as the seller or the definitive description that was given to the police by [REDACTED]. Not only did Constable Hobbs fail to analyze this information, he intentionally and recklessly chose to disregard it and press on with the unsupported subjective belief that he held.
123. Even the description of the briefcase he sought clearly did not match the briefcase that he would have seen the actual seller carrying.
124. There is not one objective piece of criteria to establish that Constable Hobbs was not acting in an intentional and reckless manner when he entered Mr. Fraser's laundry room, arrested and handcuffed Mr. Fraser, and then entered further into Mr. Fraser's residence to conduct a search of the briefcase he saw some 20' to 30' inside of the residence.
125. In my respectful submission, the allegations of misconduct as set out in the Notice of Public Hearing clearly have been proven on a balance of probability.

All of which is respectfully submitted.

Dated this 21st day of March, 2018.



Bradley L. Hickford
Public Hearing Counsel