

HEARING 2017-01
**IN THE MATTER OF THE POLICE ACT,
R.S.B.C. 1996,
C. 367 AS AMENDED
*AND IN THE MATTER OF A POLICE ACT PUBLIC HEARING
INTO ALLEGATIONS AGAINST CONSTABLE BRIAN HOBBS,
VANCOUVER POLICE***

BEFORE: Adjudicator Brian M. Neal QC (rt)

PUBLIC HEARING COUNSEL: B. HICKFORD
COMMISSION COUNSEL: G. DELBIGIO, Q.C.
COUNSEL FOR CONSTABLE HOBBS: M.K. WOODALL

FINAL SUBMISSIONS OF COMMISSION COUNSEL

Overview

1. The general facts of this case cannot reasonably be in dispute.
 - a. [REDACTED] had some musical equipment stolen. This included a microphone.
 - b. [REDACTED] saw a Craigslist ad which listed a microphone for sale. He responded to the ad and he met the seller. He believed that the microphone which was offered for sale was his and had been stolen from him.
 - c. [REDACTED] described the seller as a Native Indian male with a white beard and carrying a particular brand of brief case and wearing a particular brand of jacket.
 - d. He reported his interaction with the seller to the police and Constable Hobbs and his partner, Officer Ward responded.

- e. Neither of the two police officers saw the seller. If they wished to conduct an investigation of any sort, they were required to rely upon [REDACTED] description.
- f. Constable Hobbs and Officer Ward divided duties between them. Officer Ward dealt with [REDACTED] and Constable Hobbs went to an area near a 7-11 to look for the seller.
- g. Constable Hobbs saw an individual at the 7-11. When that individual walked away, Constable Hobbs followed. Constable Hobbs believed that the person he saw and the person he followed was the seller.¹
- h. It was nighttime and Constable Hobbs followed from a distance. The individual turned into a laneway and Constable Hobbs eventually lost sight of the individual. Though he did not specifically see, he believed that the individual had entered upon one of two adjoining properties.
- i. Constable Hobbs made a decision to enter upon one of the two properties; to knock on the rear door of [REDACTED] East [REDACTED]th (Mr. Fraser's residence); to enter that residence when no one responded to the knock; to detain and handcuff Mr. Fraser inside the residence; to enter further into the residence, and; to conduct a search of a briefcase.
- j. Constable Hobbs then realized that a series of decisions he had made had resulted in him entering the wrong residence and detaining the wrong person.
- k. Mr. Fraser is not a Native Indian male and did not have a white beard.

¹ Constable Hobbs testified that he held that his belief. However, whether he reasonably held that belief or whether that belief was valid is very much at issue and a central part of this hearing.

- I. The seller was subsequently located at the residence next door to the Fraser residence.

2. The position of the Police Complaint Commissioner (PCC) is as follows:

- a. Constable Hobbs did not have lawful authority to enter the residence after the knock on the door was unanswered.
- b. Constable Hobbs did not have lawful authority to detain and handcuff Mr. Fraser.
- c. Constable Hobbs did not have lawful authority to enter further into the residence not did he have lawful authority to search the briefcase.
- d. Constable Hobbs either intentionally or recklessly ignored the clear physical description of the seller that was made known to him (Native Indian male with a white beard), and the only physical description of the seller that was available to him. Further, Constable Hobbs was either willful or reckless in ignoring information which pointed to the fact that the person he was following was not the seller.
- e. Even if Constable Hobbs had lawful authority to enter upon Mr. Fraser's property and to enter into Mr. Fraser's residence (and this is specifically not conceded), when Mr. Fraser confronted Constable Hobbs, it should have been obvious at that time that he (Constable Hobbs) was not dealing with the seller. The physical descriptions simply did not match.

- f. At that time, Constable Hobbs could have and, more importantly, should have immediately left the residence as he had no lawful authority to remain inside.
- g. As a result, Constable Hobbs acted unlawfully, he violated Mr. Fraser's section 8 and 9 Charter rights, and he abused his authority by:
 - i. Entering into the residence at [REDACTED] East [REDACTED]th without lawful authority.
 - ii. Entering into the residence at [REDACTED] East [REDACTED]th in a manner that violated Mr. Fraser's rights as guaranteed by s.8 of the Charter.
 - iii. Detaining Mr. Fraser without lawful authority.
 - iv. Detaining Mr. Fraser in a manner that violated Mr. Fraser's rights as guaranteed by s.9 of the Charter.
 - v. Continuing to detain Mr. Fraser in handcuffs, while a computer check was being conducted of Mr. Fraser, without lawful authority and in a manner that violated Mr. Fraser's rights as guaranteed by s.9 of the Charter.
 - vi. Searching the briefcase inside the residence without lawful authority.
 - vii. Searching the briefcase inside the residence in a manner that violated Mr. Fraser's rights as guaranteed by s.8 of the Charter.

Facts

3. Constable Hobbs made the decision to conduct the investigation and conducted the investigation based upon the information provided by [REDACTED].²
4. [REDACTED] described the seller as a Native Indian male, with a white beard, wearing a Helly Hansen jacket and carrying an Apex utility case.³
5. Constable Hobbs agreed [REDACTED] had made a very specific observation though he did take issue with whether "Native Male" was a phrase of any descriptive value.⁴
6. Constable Hobbs agreed he would not have pursued the investigation if he had believed the information from [REDACTED] had been false or unreliable.⁵
7. However, at the time he decided to follow the person from the 7-11, Constable Hobbs couldn't determine if the person was wearing a Helly Hansen jacket, he couldn't determine if the person was carrying an Apex utility case, he couldn't determine if the person was a Native Indian male and he did not see a white beard.⁶
8. Constable Hobbs was asked the following questions and gave the following answers in respect of the person he decided to follow:

A I -- yes, I decided to follow the seller.
Q And at that stage in your mind did you have grounds to arrest him for possession of stolen property?
A Yes.
Q Okay. So at that stage, based upon the information that had -- [REDACTED] had given you -- when I say you, that [REDACTED] had reported, and the observations you had made at that stage, you were -- you believe you have grounds to arrest for possession of stolen property?
A Well, sorry, I guess I should rephrase. I believed that the person that I

² Transcript – January 12 p.23 (26-31)

³ Transcript – January 12 – pp.23-24

⁴ Transcript – January 12 – p.24

⁵ Transcript – January 12 – p.25 (10-24)

⁶ Transcript – January 12 pp.25-26

was watching was [REDACTED] -- was the person [REDACTED] had described.⁷

9. Constable Hobbs followed from a distance.⁸ After he lost sight of the person he had been following, he believed the person had entered onto either [REDACTED] or [REDACTED] East [REDACTED]th and he could not eliminate the possibility that the person had gone onto [REDACTED].⁹

10. After searching the exterior area of the residences, Constable Hobbs knocked on the door at [REDACTED] but there was no answer. He knew that Officer Ward was speaking to a female at the front of the residence and he believed the female lived in the residence.¹⁰

11. There was no answer to his knock and Constable Hobbs tried the door, he found it to be unlocked, he opened the door and entered into a laundry room. He agreed that the laundry room was consistent either with the residence being a single family dwelling or a residence with an upstairs and downstairs suite.¹¹

12. Constable Hobbs understood that a laundry area was not open to the public at large.¹²

13. A male (Mr. Fraser) entered into the laundry room. The male was light skinned, he did not have a white beard, he was not wearing a Helly Hansen jacket, he was not carrying an Apex bag and he did not have a microphone.¹³

⁷ Transcript – January 12 p.26 (27-41)

⁸ Transcript – January 12 p.27 (31-41)

⁹ Transcript – January 12 p.28 (4-16)

¹⁰ Transcript – January 12 p.33 (8-12)

¹¹ Transcript – January 12 p.34 (25-31)

¹² Transcript – January 12 p.37 (5-9)

¹³ Transcript – January 12 p.38 (1-26)

14. Constable Hobbs testified that at that stage "I did not believe I had grounds to arrest because I was not sure if he was the same person".¹⁴
15. A female then entered into the laundry area and Constable Hobbs observed a black bag further inside the residence. Mr. Fraser was placed under arrest for stolen property and placed into handcuffs.¹⁵
16. When Constable Hobbs entered further into the residence for the purpose of inspecting the bag, and when he opened and looked into the bag, he saw that the bag did not contain a microphone and he testified that he then realized that he had arrested the wrong person.
17. He explained his thought process, from when he saw the bag, to when he placed Mr. Fraser under arrest, to when he entered further into the residence to search the bag, as follows¹⁶:

- Q Okay. And at that stage -- but you have a decision to make, you go in to look at the black bag or you don't, right?
- A Yes, once she opened the door, and I saw a case that I believed to be the case I had seen the seller carrying, it led me to believe I now had the reasonable grounds to arrest Mr. Fraser for possession of stolen property, at which point I did, and I provided him with his *Charter*, and then I -- then I had another decision to make, whether we'd be -- to go to retrieve the plain view evidence, or we don't. And so at that point, incident to his lawful arrest, I decided to go retrieve that evidence, and I explained that to him that that's what I was doing.

18. Constable Hobbs testified that Mr. Fraser was not detained during the period of time that his ID was being checked.¹⁷

¹⁴ Transcript – January 12 p.41 (45-46)

¹⁵ Transcript – January 12 – pp.44-45

¹⁶ Transcript – January 12 – p.44 (30-44)

19. Constable Hobbs did not know the value of the microphone in question.¹⁸

20. Constable Birzneck arrived at the Fraser residence. Fraser was not in handcuffs when he first arrived. He saw Mr. Fraser being put into handcuffs by Constable Hobbs and he watched over Mr. Fraser as Constable Hobbs went to inspect the black bag.¹⁹

21. Constable Birzneck received Mr. Fraser's ID and took it to his police car so he could conduct computer queries of Mr. Fraser.²⁰

22. Mr. Fraser was still in handcuffs when Constable Birzneck went with the ID to the police car.²¹

23. Mr. Fraser testified that he was placed into handcuffs; he was asked for ID; his ID was retrieved; his ID was taken outside by a police officer; the officer returned, and; the handcuffs were then removed.²²

¹⁷ Transcript – January 12 pp.47-48

¹⁸ Transcript – January 12 p.22 (12-13)

¹⁹ Transcript – January 9 pp.34-35; 37

²⁰ Transcript – January 9 pp.37-39

²¹ Transcript – January 9 p. 50 (11-15)

²² Transcript – January 8 p.15

Issues

24. The PCC submits there are two issues for determination:

- a. Whether Constable Hobbs committed an abuse of authority, through oppressive conduct by unlawfully entering Mr. Fraser's laundry room, inside the residence and conducting an unlawful search.
- b. Whether Constable Hobbs committed an abuse of authority by intentionally and recklessly detaining Mr. Fraser in handcuffs.

Law

25. The following provisions of the Canadian Charter of Rights and Freedoms, and the Criminal Code are relevant to the determination of these issues:

Search or seizure	8.	Everyone has the right to be secure against unreasonable search or seizure.
Detention or imprisonment	9.	Everyone has the right not to be arbitrarily detained or imprisoned.
Arrest or detention	10.	Everyone has the right on arrest or detention <ol style="list-style-type: none">(a) to be informed promptly of the reasons therefor;(b) to retain and instruct counsel without delay and to be informed of that right;

- **495 (1)** A peace officer may arrest without warrant
 - (a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;
 - (b) a person whom he finds committing a criminal offence; or
 - (c) a person in respect of whom he has reasonable grounds to believe that a warrant of arrest or committal, in any form set out in Part XXVIII in relation thereto, is in force within the territorial jurisdiction in which the person is found.

26. In *R. v. Storrey*²³ the Supreme Court of Canada considered the authority to arrest. The Court held that the reasonable and probable grounds necessary for a lawful arrest must exist both subjectively and objectively.

There is an additional safeguard against arbitrary arrest. It is not sufficient for the police officer to personally believe that he or she has reasonable and probable grounds to make an arrest. Rather, it must be objectively established that those reasonable and probable grounds did in fact exist. That is to say a reasonable person, standing in the shoes of the police officer, would have believed that reasonable and probable grounds existed to make the arrest. See *R. v. Brown* (1987), 1987 CanLII 136 (NS CA), 33 C.C.C. (3d) 54 (N.S.C.A.), at p. 66; *Liversidge v. Anderson*, [1942] A.C. 206 (H.L.), at p. 228.

In summary then, the *Criminal Code* requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically they are not required to establish a *prima facie* case for conviction before making the arrest.

²³ 1990 CanLII 125 (SCC)

27. The PCC submits that in the circumstances of this case, a violation of Mr.

Fraser's rights as guaranteed by the Charter or unlawful conduct by Constable Hobbs towards Mr. Fraser is directly relevant to the issues to be determined.

28. A Charter violation must not be conflated with the question of whether there has been an abuse of authority. This means that, as a matter of law, a Charter violation will not necessarily and in all circumstances constitute an abuse of authority.

29. However, it is the position of the PCC that in the circumstances of this case Constable Hobbs acted without lawful authority and, in so doing, breached Mr. Fraser's rights as guaranteed by the Charter. Further, it is the position of the PCC that Constable Hobbs' actions in this regard were intentional or reckless and they constitute an abuse of authority.

30. The PCC submits that Constable Hobbs entered upon Mr. Fraser's property and then, into Mr. Fraser's residence in order to pursue what was in his mind was a criminal investigation. However, he did not see the seller enter onto that property nor did he have reasonable and probable grounds to believe that the seller had entered onto that property and, more importantly, there were not objective grounds upon which to conclude that the person he followed was the seller.

31. Even if he had seen the person he had been following enter onto the property, he either knew that the person he was following did not match the description given by [REDACTED] or he was reckless in this regard.

32. Certainly, when Mr. Fraser confronted Constable Hobbs inside of his residence, the evidence that Constable Hobbs was not engaging with the seller was literally staring him in the face – it was immediately obvious that Mr. Fraser did not match the careful and likely accurate description that [REDACTED] had provided.
33. Constable Hobbs may have been motivated by a desire to recover [REDACTED]'s property. However, a laudable motive does not provide legal authorization to a police officer. Further, if that was indeed Constable Hobbs' motive, it appears that his objectivity was clouded to such an extent by this motive that he did not recognize or acknowledge facts which were demonstrably inconsistent with his belief that he was following the seller.
34. In addition, he pursued an investigation in a manner that was reckless as to whether he acted within the confines of law.
35. Finally, he was intentional in his conduct – he entered upon the property; he approached and tried the door; he opened the door and entered; he placed Mr. Fraser into handcuffs and he entered further into the residence in order to conduct a search of the black bag. There was no emergency, there was no urgency and there was no requirement for spur of the moment decision making.
36. Instead, his actions unfolded on a step by step basis.

Good Faith

37. "Good faith", as the phrase is used within Charter jurisprudence was considered by Frankel J.A. in *R. v. Caron*.²⁴

²⁴ 2011 BCCA 56

[38] "Good faith" and its polar opposite, "bad faith" (or "flagrant" disregard), are terms of art in the s. 24(2) lexicon: *Kokesch* at 30. The absence of bad faith does not equate to good faith, nor does the absence of good faith equate to bad faith. To fall at either end of this spectrum requires a particular mental state. In discussing these two concepts in *R. v. Smith*, 2005 BCCA 334 (CanLII), 199 C.C.C. (3d) 404, Madam Justice Ryan stated:

[61] To sum up, good faith connotes an honest and reasonably held belief. If the belief is honest, but not reasonably held, it cannot be said to constitute good faith. But it does not follow that it is therefore bad faith. To constitute bad faith the actions must be knowingly or intentionally wrong. [Emphasis added.]

[39] Although good faith is sometimes inaptly used as a label for other explanations that may lessen the seriousness of a *Charter* violation, such as inadvertence and urgency, it is a category unto itself. This is reflected in *R. v. Jacoy*, 1988 CanLII 13 (SCC), [1988] 2 S.C.R. 548 at 559, wherein Chief Justice Dickson, in discussing the factors pertinent to a s. 24(2) analysis that were first articulated in *Collins*, stated:

The second set of factors concerns the seriousness of the violation. Relevant to this group is whether the violation was committed in good faith, whether it was inadvertent or of a merely technical nature, whether it was motivated by urgency or to prevent the loss of evidence, and whether the evidence could have been obtained without a *Charter* violation.

See also: *Buhay* at para. 52.

[40] That good faith is distinct from other mitigating explanations is most recently evinced by the judgment of the Chief Justice and Charron J. in *Grant*:

[75] Extenuating circumstances, such as the need to prevent the disappearance of evidence, may attenuate the seriousness of police conduct that results in a *Charter* breach: *R. v. Silveira*, 1995 CanLII 89 (SCC), [1995] 2 S.C.R. 297, *per* Cory J. "Good faith" on the part of the police will also reduce the need for the court to disassociate itself from the police conduct. However, ignorance of *Charter* standards must not be rewarded or encouraged and negligence or wilful blindness cannot be equated with good faith: *R. v. Genest*, 1989 CanLII 109 (SCC), [1989] 1 S.C.R. 59, at p. 87, *per* Dickson C.J.; *R. v. Kokesch*, 1990 CanLII 55 (SCC), [1990] 3 S.C.R. 3, at pp. 32-33, *per* Sopinka J.; *R. v. Buhay*, 2003 SCC 30 (CanLII), [2003] 1 S.C.R. 631, at para. 59. Wilful or flagrant disregard of the *Charter* by those very persons who are charged with upholding the right in question may require that the court dissociate itself from such conduct. It follows that deliberate police conduct in violation of established *Charter* standards tends to

support exclusion of the evidence. It should also be kept in mind that for every Charter breach that comes before the courts, many others may go unidentified and unredressed because they did not turn up relevant evidence leading to a criminal charge. In recognition of the need for courts to distance themselves from this behaviour, therefore, evidence that the Charter-infringing conduct was part of a pattern of abuse tends to support exclusion. [Emphasis added.]

[41] The specific portions of the Supreme Court's previous decisions referred to in *Grant* reflect the fact that, for a Charter breach to have been committed in good faith, the police officers (or other state agents) involved must, at the time the breach occurred, have honestly and reasonably believed they were acting lawfully. In those decisions the Court held, in brief, that:

- While the police are not expected to have a detailed knowledge of search-warrant law, they are expected to be aware of those requirements that the courts have held are essential for the validity of a warrant: *R. v. Genest*, 1989 CanLII 109 (SCC), [1989] 1 S.C.R. 59 at 87;
- While the police are not expected to have an immediate understanding of judicial decisions affecting their powers, they will not have acted in good faith when they either knew, or ought to have known, their actions were unlawful: *Kokesch* at 32, 33; and
- "Good faith cannot be claimed if a [REDACTED] violation is committed on the basis of a police officer's unreasonable error or ignorance as to the scope of his or her authority": *Buhay* at para. 59, citing Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, 2nd ed. Toronto: Butterworths, 1999 at 450.

38. On this basis, an adjudicator or court should consider:

- a. Whether the officer's belief that he was following the seller was honestly held;
- b. Whether the officer's belief was reasonable;

- c. Whether the officer suffered from ignorance in relation to the scope of his or her authority in law;
- d. Whether the officer ought to have known relevant legal principles;
- e. Whether the violation of Charter rights was technical, inadvertent, or whether the conduct that resulted in the violation of Charter rights occurred in circumstances of urgency.

39. Once again, the PCC submits that there was no urgency in the circumstances of the present case. Attempting to recover a microphone of unknown value does not and cannot justify the violation of Charter rights.

40. The PCC further submits that Constable Hobbs ought to have known the limits of his lawful authority and, if he did not, his conduct was reckless in the course of conduct he undertook.

41. There is a difference between the evidence of Constables Hobbs and Birzneck on the issue of whether Mr. Fraser remained in handcuffs while Constable Birzneck took his ID to the police car in order to conduct queries of Mr. Fraser's name.

42. It is submitted that the evidence of Constable Birzneck is to be preferred over the evidence of Constable Hobbs on this issue.

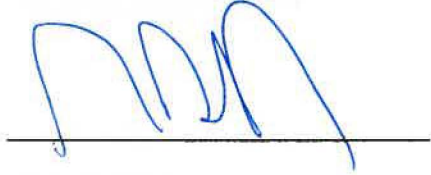
43. Constable Birzneck's testimony was clear and unequivocal and he had no incentive to be anything less than completely forthcoming on this issue. His evidence is also corroborated by Mr. Fraser's evidence on this issue.

44. In conclusion, the PCC submits that, in addition to the identification failures referred to above, Constable Hobbs had no invitation to enter the residence so his authority to do so (if it exists) must be found elsewhere in law.
45. The PCC submits that there was no authority in law to enter the residence. The Constable was not in pursuit of a suspect nor did he have grounds upon which to conduct a lawful arrest.
46. The PCC further submits that the question of whether the residence appeared to be a single family residence or a multi-family residence is of no significance. Either way, an unlocked door does not constitute a licence to enter.
47. Finally, in the circumstances of the case, the observation of a generic looking black bag could not objectively provide the grounds needed to have a lawful basis for arrest. Black bags are common, the bag observed was not an Apex and, even if it had been, this would not overcome the problems that arose from the fact that Mr. Fraser did not have a white beard and was obviously not the person [REDACTED] described as the seller.
48. Constable Hobbs is an officer of some experience and through his testimony he revealed that he is not unsophisticated. He fully understood that he intentionally made a number of choices that resulted in him being in the wrong house (without lawful authority) and arresting the wrong man (without lawful authority).
49. The facts of this case and the issues to be decided are straightforward. The PCC submits that Constable Hobbs used and relied upon his authority to enter the residence, to arrest Mr. Fraser and to search the black bag. Because he acted

without lawful authority, he violated Mr. Fraser's section 8 and 9 Charter rights
and in so doing, he committed an abuse of authority.

All of Which is Respectfully Submitted.

Dated at Vancouver this 23rd day of March 2018.



Greg DelBigio, Q.C.