PH: 2017-01
OPCC File No. 2015-11300

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

SUBMISSIONS OF CONSTABLE HOBBS

CONTENTS

1. FACTS

1. On 18 November 2015 Cst. Hobbs was on duty in plain clothes.

2. He and his partner were dispatched to a call where the complainant had been the victim of a theft of property from a storage locker at some earlier time. The property in question was customized professional DJ equipment. The complainant had seen his property for sale on Craigslist. He met the seller, [redacted], and confirmed that the DJ equipment was his.

3. The property in question was expensive, customized, professional disk jockey equipment, worth thousands of dollars. Cst. Hobbs believed, with good reason, that someone who owned thousands of dollars worth of professional disk jockey equipment must be a professional disk jockey, and the at the loss of his equipment was making it difficult for [redacted] to pursue his occupation. (**Transcript, 11 January 2018, p. 9-10; p. 66)** Thus, Cst. Hobbs' primary purpose was not to bring charges against someone, but to put a citizen back into possession of the equipment he uses to make a living. **(Ibid., p. 12)**

4. Cst. Hobbs, his partner Cst. Ward, and the complainant came up with a plan. Cst. Hobbs would follow the seller to his car or house to see if they could locate and recover more of the complainant's stolen property. Cst. Ward would act as backup. The hope was that when the seller was confronted with the fact that the property was stolen property, he would voluntarily turn it over to the police, who in turn would return it to the complainant.

5. Cst. Hobbs followed the suspect along the alley behind the houses facing East 25th Avenue approaching Cassiar St.

6. Cst. Ward had positioned himself so that he would be able to see anyone walking along 25th Ave. towards Cassiar St., and would be able to see if anyone crossed Cassiar St. from the alley in which Cst. Hobbs was following the suspect.

7. The CAD printout (Ex. 8, p. 2) set out the description of the seller given by the complainant, [redacted], was recorded as follows:

SOC NI/M,LATE 30-EARLY 40S,6',MED BLD,BBCAP,SHORT WHITE BEARD,DRKHELLY HANSEN JACKET,APEX UTILITY CASE W/MICS AND EQUIPMENT

8. This meant a Native Indian Male,aged late 30s or early 40s, medium build, baseball cap, white beard, dark Helly Hansen Jacket, Apex Utility Case, with microphones and equipment.

9. Cst. Hobbs testified about what he was able to see, and the consistency or inconsistency between what he could see of the seller, and the description of man given by [redacted]:

> Q All right. Now, if you turn to the description on page 2 of Exhibit 8, you will see a description on the last line of that description, "dark Helly Hansen jacket", do you see that?
>
> A Yeah. Yes.
>
> Q What do you understand a Helly Hansen jacket to be?
>
> A Essentially be a ski jacket or winter type jacket.
>
> Q And was this person wearing a dark ski jacket or a winter type jacket?
>
> A Yes.
>
> Q The description is that the person is wearing a BB cap, is a BB cap a baseball cap?
>
> A Yes.
>
> Q Was this person wearing a baseball cap?
>
> A Yes.
>
> Q Could you see the person's hair colour?
>
> A No.
>
> Q Why is that?
>
> A He was wearing the baseball cap.
>
> Q How high did you believe this person to be?
>
> A Approximately six feet tall.
>
> Q And is that consistent with the description that you were given of someone who's six feet tall?

A Yes.

Q Now, given that the person is wearing a ski jacket, were you able to get a -- a clear idea of the person's build?

A No, I -- I described him as slender, but like I mentioned, yeah, they are wearing a ski jacket, so . . .

Q Okay. So did you consider your description of him being slender to be consistent or inconsistent with the description medium build in the -- in the description on page 2 of Exhibit 9?

A I believed it to be consistent.

Q Going back to the jacket, from where you're standing could you tell the brand name of the jacket?

A No.

Q Whether it was Helly Hansen?

A No.

Q All right. But -- but you understood Helly Hansen to be a kind of ski jacket?

A Yes.

Q Could you tell the race of the person from where you were standing?

A No, just that I believed him to be a light-skinned male, or light skinned.

Q And did you consider your belief that the person was light skinned to be consistent or inconsistent with the person being a Native Indian?

A Consistent.

Q And did you notice whether -- or could you -- were you able to see whether the person had a beard?

A I could not see a beard.

Q And what, if anything, did you draw from that?

A Honestly, at the time I don't think I drew that much. I mean, I considered that -- I mean, as we all know [redacted] did have a beard at the end of the day, but at the time, you know, I do know that witnesses and complainants have a hard time with descriptions. Although I recognize a beard is a pretty easy thing to get,

at the time I just believed that he might have said it wrong, or that ECOM maybe could have said it wrong, or . . .

I mean, I just -- I knew the guy in front of me was the guy I was looking for, and I could not see a beard.

Q Could you see his chin?

A I don't believe so, no.

Q And why -- what would there have been that would have made it difficult to see his chin?

A As I mentioned, it was quite cold, and he had his winter jacket zipped up.

Q And it's getting a little bit ahead of ourselves, but you mentioned that [redacted] did have a beard. Can you describe the beard?

A It -- to me -- it appeared to me to be more of like a goatee type beard, but it was -- but it was longer than a normal goatee, but it was primarily on his chin, and it was -- had a little bit of length. But it wasn't a big kind of Santa Claus type beard, which had he had that I would have surely noticed that at the 7-Eleven.

Q When you're at the 7-Eleven, were you able to look at the person square on from a close distance?

A No.

Q First of all, dealing with the angles, can you describe the angles where you were observing this person, how was he standing in relation to you? Were you looking straight on, sideways, at an angle?

A Well, I had a clear unobstructed view of him, but as we've discussed, there was some distance. But as far as the angles, he kind of -- like he was moving, he was pacing a bit in front of the 7-Eleven, so I would have seen his right side, I would have seen his left side, he would have turned, and ultimately when he did leave, he crossed over, and I would have had a profile of -- or I did have a profile again of his -- of the right side of his face from a bit closer, probably about 30 feet, and then after that I was always behind him, so . . .

Q Okay, when you see him from 30 feet, did you -- were you able to see a beard?

A No. (**Transcript, 11 January 2018, p. 15ff)**

10. In short, the features that Cst. Hobbs was able to see from his vantage were consistent with the description. He was not able to see any beard, but Cst. Hobbs was not in a position to

see a beard whether or not the man before him was wearing one. This is significant because commission counsel considers it significant that Mr. Fraser did not have a beard, so Cst. Hobbs should immediately have realized that Mr. Fraser was not the man whom Cst. Hobbs had been following. However, since Cst. Hobbs could not see whether the man before him did or did not have a beard, that difference between Mr. Fraser and the man whom Cst. Hobbs was following was not apparent to him.

11. The suspect disappeared from view within three houses of Cassiar St. Cst. Ward confirmed that he had not seen anyone cross Cassiar St., so Cst. Hobbs knew the suspect had gone into one of the last two houses before Cassiar St.. Cst. Hobbs was able to eliminate the third house furthest from Cassiar St. (the first of the three houses that the suspect and he passed walking towards Cassiar St.) because of the layout of the fence and garage. There was a high fence along the back of this house. Cst. Hobbs looked over the fence into the yard, but did not see anyone in the yard.

12. That left two houses, the one closest to Cassiar St. and the one next to it.

13. As Cst. Hobbs passed the second house in from Cassiar St. he noted lights turning on and off consistent with someone in the process of entering the house.

14. Further, because Cst. Ward was watching the front of the houses facing onto 25th Ave., Cst. Hobbs believed that the person who appeared to have just come home entered by the back door, not by the front door.

15. Cst. Hobbs then proceeded to the second of the two houses that the suspect might have entered. There was a Telus worker working out back near the alley. Cst. Hobbs asked him if he had seen anyone coming into that house:

16. In other words, Cst. Hobbs thought the Telus worker was confirming that no one had gone into the rear of the house closest to Cassiar.

17. He quickly checked around the exterior of both houses, and he did not see anyone; that is, the person he was following was not hiding at the exterior of either house.

18. Cst. Hobbs was now focusing on the house we know to be the Fraser house.

19. Cst. Hobbs was very sure that the suspect had gone into one of the two houses. Therefore, without more, that put the odds that the person had gone into the Fraser house at 50/50. However, when he added the pattern of lights that suggested someone had just come into that house, and the Telus employee who negated someone going into the other house, Cst. Hobbs' assessment was that the chances that the suspect had gone into the Fraser house were well above 50/50.

20. In law, a probability greater than 50% is considered proof on a balance of probabilities. Reasonable grounds for conducting a search is a much lower standard than proof on a balance of probabilities.

21. Cst. Hobbs has experience with houses in that part of the city. In his experience, the great majority houses in that area have multiple individual dwelling rooms or suites, often on the lower floor. In such cases, what may once have been the backdoor to a single-family house when it was first built hads become a door into a semi-common area. Inside that semi-common area, there will be interior doors into the private dwelling rooms. Inside such buildings, when one first enters one comes into an area that is common to the residents of the building, not unlike the lobby of an apartment. That area is not exactly public, but it does not have the private character of, say, the living room of a house.

22. Cst. Hobbs believed, correctly, that as a police officer (or a member of the public) he could enter the semi-public lobby of an apartment building for the purpose of going to one of the apartment within. Similarly, Cst. Hobbs believed that he could lawfully enter the common area of a multi-suited house for the purpose of knocking on the door of one of the suites within.

23. At that point Cst. Hobbs did not intend to enter the house. His plan was to knock on the back door. If the seller answered the door, Cst. Hobbs would explain the situation, ask whether there was any more of the property that the complainant had described, and he would ask for the property back. Cst. Hobbs had used this approach on earlier occasions with success and, in fact, he used it later that evening at the house next door where the seller actually lived, again with success.

24. If no one answered the door, Cst. Hobbs would conclude that this was very likely one of the houses where there was a common area just inside the back door, and that he would have to go into this "lobby" so he could knock on the residential doors within.

25. With that plan in mind, Cst. Hobbs went up to the back door. Cst. Hobbs believed that that it was likely an external door that led into a common area, and that the private dwellings would be accessed by internal doors leading off the common area. Cst. Hobbs expected that if the door had led to a private area, it would have been locked.

26. Cst. Hobbs knocked on the door. There was no answer, even though he had seen lights being turned on and off a little earlier. This confirmed his expectation that this door did not lead into the inhabited part of the house, and that the suspect would be inside a more interior room behind another door. He thought he would have to walk through the common "lobby" area to get to the door that actually led into the suspect's room or dwelling.

27. At about this time Cst. Ward radioed Cst. Hobbs and told him that he, Cst. Ward, had spoken with a woman who answered the front door of the same house. Cst. Ward told Cst. Hobbs that the woman said that her husband had just returned home. (It seems that later in the conversation the wife changed her story and said that the husband had been home for a considerable period of time, but that was not communicated to Cst. Hobbs.)

28. Based on the following facts, Cst. Hobbs was very confident that the suspect had gone into the Fraser house and not the other house:

(a) Cst. Hobbs knew that the suspect must have gone into one of the two houses;

(b) the Telus employee had not seen anyone go into the other house;

(c) Cst. Hobbs had seen pattern of lights going on and then off suggesting that someone had just arrived home;

(d) the property had the unkempt appearance of a rental property;

(e) a female in the house had just said that her husband had just come home.

Cst. Hobbs thought it would have to be an impossible coincidence for a man who was not the suspect to have come home at just the same moment as the suspect went into one of the houses, yet be someone other than the suspect himself.

29. Cst. Hobbs then tried the door to see if it was locked. It was not locked. This further confirmed his belief that the door led into a common area rather than a private room. He opened the door about an inch to see whether his expectation about the interior of the house was correct. It turned out that that was an unfinished laundry room. It is not uncommon for the common room that leads into private rooms or suites to be a laundry room.

30. Cst. Hobbs entered a few feet into the room. His intention was to get to a door inside the believed would have one or more interior doors that would lead into suites or rooms. He intended to knock on the interior door that he expected to find.

31. At that point Mr. Fraser came into the room. Mr. Fraser had the same general height and build as the man he had been following. He did not have no a winter coat and hat like the suspect, but Cst. Hobbs believed he had time to take off his outerwear.

32. Cst. Hobbs was asked about differences between the description of the seller on the CAD printout, and Mr. Fraser. Cst. Hobbs testified that at that point his attention was not on the written description he had read quite some time earlier. Rather, his attention was on the similarities between the man he had been following and Mr. Fraser, who was now before him:

> Q Now, Mr. Fraser does not have a beard. Did you -- did you see a beard on the person you were following?
>
> A No.
>
> Q Did the absence of a -- of a beard cause you to believe that Mr. Fraser must be somebody different than the person you were following?
>
> A To be honest, I don't even think -- at that point once I was in the residence with Mr. Fraser, I -- I can't honestly say I even turned my mind to the beard. I think by that time I had seen the person I believed to be the seller, and I had made personal observations of that person, and I was comparing Mr. Fraser to what I had seen in my -- in real life, not to what I had read before that.
>
> Q Okay. Did -- the skin colour of Mr. Fraser, was that consistent with the skin colour of the person that you were following?

A Yes.

Q Okay. Now, the elephant in the room is that the description on the CAD printout says Native Indian male, and obviously Mr. Fraser is not a Native Indian, is that fair enough?

A Yes.

Q Okay. So I'm going to ask you some questions about that discrepancy, but I want to lay -- lay the foundation for those questions. So when you first encountered Mr. Fraser, what -- describe all of the things that you were trying to do at that point.

A So as I've discussed, my intention was to enter and to knock on the door, and upon being -- well, Mr. Fraser exiting his residence, he was understandably upset. As I -- I mean, first and foremost, I frankly want to say like I'm sorry I arrested the wrong guy. And he was upset and confrontational, and -- when we were there, but as I describe that, I'm -- I'm attaching no blame to that because I think I would have too if I was -- had some stranger in my house and being arrested. So I understand why he was that way, but I -- obviously at the time I didn't, so it's easy for me to understand now, but when I was there, I was approached -- or confronted by Mr. Fraser, I identified myself as a police officer, I believe that he understood I was a police officer, and he began to demand to know why I was in his house. And I began to try to explain that to him. And he repeatedly asked that question, and over and over again, and any time I'd try to offer an explanation, he did not seem to be understanding what was happening. And as I mentioned, understandably so, I think he was getting more and more agitated, and just the situation was not calming down.

So while I was in that room, I'd been confronted by a male who was consistent with the male that I had seen, but had taken off his clothes -- or his exterior clothes, I was aware of the fact that he was not a Native Indian male, but I was trying to consider that against the fact that he was consistent with the individual I had seen. But while doing that, I'm trying to have a -- communicate with Mr. Fraser, and most importantly I was trying to -- to de-escalate him. I was trying to explain to him what was going on. And give him an opportunity to -- to -- just to calm down a bit, and be able to understand what was happening so I could have that conversation with him. That wasn't happening.

And while I was having to talk to him and try to de-escalate him, I'm still having to listen to the radio to hear any updates from Constable Ward, I don't know where he is.

At some point during that conversation with Mr. -- or during that interaction, I should call it, with Mr. Fraser, Constable Birzneck did attend. So I was aware that he was there, and I did want to try to provide him some update or context as what was going on, but I was unable to do that.

And I was -- as always when we talk about de-escalation, but I was also considering the safety of Mr. Fraser and myself as well, as he was upset, understandably so now, but at the time I did not know why, and so I was keeping myself in a position that I had the door behind me that I could exit. I had space and distance between Mr. Fraser and myself, because I had no intention of making contact or going hands on with him while -- because it was apparent to him that I was a stranger in his house and he did not really understand what was going on.

So it wasn't like I walked in and got to hit pause and then assess all his features and compare him against what I knew. I was having to think about the fact he wasn't Native, at the same time balancing why I was there, and then balancing trying to just -- to de-escalate him as he was, as I now know, understandably upset. And it was a lot to be doing in a few seconds or minutes.

Q Were you able to have -- obtain some information about him about how long he said he had been at home?

A He did tell me he had been home -- I think something to the effect of he'd been home all night. So as I tried to explain to him why I was there, and I was able to ask him some questions to do with that, at one point he did tell me he'd been home all night.

Q And how did that information compare with what Constable Ward told you that his wife or girlfriend said about how long he'd been home?

A Well, it didn't match up, because Constable Ward had informed me that the wife or girlfriend said that he had just got home. So it appeared to me that somebody was lying at the time.

Q And could you think of -- were you aware of any reason that his wife might lie about how long he'd been home?

A No.

Q Could you think of any reason why the person who had just come in off the alley, who you believed to be the seller, might have a reason to lie about how long he'd been home?

A Yes, primarily because I believed he had been the seller, and then he was lying to me about how long he'd been home to convince me he's not the seller.

Q If the conversation had gone that you had planned, and you were actually able to have -- let me step back for a bit. You're having an interchange with Mr. Fraser, was it actually a conversation in the sense of people exchanging information back and forth?

A No.

Q If you are able at that point to have a conversation with Mr. Fraser, what would the conversation -- what was your intention the conversation would consist of?

A My intention would have been to explain to him that I was the police, and that we were investigating a report of stolen property, and that we believed he was in possession of that stolen property, and that we did not intend to charge him or take him to jail but we would like to recover all that property, and return it back to the rightful owner.

Q Now, you've described a number of things that you were doing, trying to talk to constable -- or Mr. Fraser, trying to de-escalate him, trying to find an opportunity to talk to Constable Birzneck, monitoring the earpiece with Constable Ward, and you also said you were trying to turn your mind around the fact that Mr. Fraser was not a Native Indian. If you had -- if the situation had -- was calm and Mr. Fraser was not as upset, as you put it understandably was, what would have been the course at that point?

A I would have taken a couple of seconds frankly just to breathe. Like I was confused to be honest. I -- things did not line up as I thought they would. So had it been a calmer situation, I would have happily explained everything to Mr. Fraser, I would have asked for a few moments to talk to Constable Ward to figure out how we got there. And, yeah, just would have taken more time to be able to analyze everything, and possibly ask the radio for -- the dispatch for the information again, or get Constable Birzneck to go get his computer and we could check the description, but yeah, I certainly would have done something just to take more time, and analyze it, because it was confusing. It was -- his demeanour was confusing, the description didn't line up perfectly, and yeah, it was difficult.

Q Now, in your mind when you're considering the fact that the man before you is not a Native Indian, did that mean that obvious -- that he could not be the seller, or were there some other possibilities about how the CAD printout might have the notation Native Indian?

A Well no, in itself it -- it does not mean he couldn't be the seller. I mean, first and foremost, people are -- it's hard to describe people, and specifically when it comes to -- like hair is one thing, and even height is okay, but when it comes to race, and especially in Vancouver where you have a lot of immigrants, and a lot of people from different countries, and it's -- race is difficult to describe, and people often will get it wrong, which is why when I say a light-skinned male -- I mean, a lot of different races can be light skinned, a lot of different races can be dark skinned. So race is a particularly difficult thing to describe.

And in addition to that, I considered the fact that not only could [redacted] have been wrong, but ECOM could be wrong, they could have entered it wrong, they could have entered information from another call, or I

> could be remembering it wrong. I mean, those were all possibilities in those few seconds and minutes. I didn't have time to -- to determine if they were true or not.
>
> Q While Mr. Fraser's facial features were not consistent with what one would often expect of a Native Indian, what can you say about his skin colour as compared to what we expect of a Native Indian?
>
> A Well, in my experience in policing, I've met a lot of Native Indians who were lighter in colour, in skin colour. I've met a lot who are darker in skin colour. So being -- being a light-skinned male, you can have people from different races who have similar skin colour.
>
> Q And specifically with Mr. Fraser, is his skin colour consistent or inconsistent with being a Native Indian?
>
> A He's -- he certainly has skin colour that could be the same colour as some people that are Native Indian.
>
> **Transcript, 11 January 2018, p. 42ff**

33. It is submitted that this reasoning is quite understandable. It is easy, with the benefit of hindsight and unlimited time, to suggest that Cst. Hobbs should have compared Mr. Fraser to the CAD description, but it is quite understandable that in he actual moment Cst. Hobbs would compare Mr. Fraser to the man he had been following (who was, in fact, the seller) and come to the conclusions that Cst. Hobbs actually came to.

34. It is vitally essential to note that Cst. Hobbs did not have any reason to target Mr. Fraser unfairly. This was not a ruse to get into Mr. Fraser's house for some ulterior purpose where Cst. Hobbs may have been willfully blind to reasons not to believe that Mr. Fraser was the seller, merely to have an excuse to enter the house. There is not the slightest reason to suggest, believe, or conclude that Cst. Hobbs was acting other than in complete good faith.

35. Cst. Hobbs identified himself as a police officer and told Mr. Fraser what he was doing there. He asked Mr. Fraser if he had just come home. Mr. Fraser said he had been home for hours. This did not match what Cst. Ward had just told Cst. Hobbs, that the woman of the house said the husband had just come home. Cst. Hobbs believed that Mr. Fraser was not telling him the truth.

36. At that point the woman of the house came into the laundry room from the adjoining interior room. When she opened the door between the interior room and the laundry room, Cst. Hobbs could see a black briefcase in plain view. The size, colour and shape of the briefcase was similar to the case he had seen the suspect carrying. Moreover, the position of the briefcase within the room did not look like a place where one would normally store a briefcase; rather, it looked like a place where one might put a briefcase quickly when coming home, and then put the briefcase into its normal storage place.

37. Cst. Hobbs then placed Mr. Fraser under arrest. His grounds were as follows:

(a) He was confident that the person he had been following from the 7-11 was the person who was in possession of the complainant's property.

(b) He had followed that suspect to a point where the complainant had gone into one of two houses.

(c) He ruled out one of the two houses because of a conversation with the Telus employee. Cst. Hobbs asked the employee if he had seen anyone going into the second house just previously. The Telus employee said No.

(d) Moments earlier Cst. Hobbs had seen lights turning on and off in the Fraser homes consistent with someone arriving at home.

(e) Cst. Hobbs received word from his partner that a woman in the house said that her husband or boyfriend had just come home

(f) Mr. Fraser told Cst. Hobbs that he had been in all evening, which was at odds with what his wife had told Cst. Hobbs' partner.

(g) Mr. Fraser generally matched the physical characteristics of the man he had been following, allowing for the fact that Mr. Fraser was not wearing winter apparel as he was now inside the house.

38. Of course, it is not necessary that a police officer have proof on a balance of probabilities to arrest a person. It is sufficient if the police officer has probable grounds. It is submitted that

Cst. Hobbs did have probable grounds. In the alternative, if Cst. Hobbs did not have probable grounds, his grounds were at the very worst on the borderline. As will be seen, an error of law that is not motivated by malice or recklessness is not disciplinary misconduct.

39. Cst. Hobbs then placed Mr. Fraser into handcuffs. His reasons were as follows:

(a) Mr. Fraser was annoyed and upset. Through the brief conversation between Cst. Hobbs and Mr. Fraser, Mr. Fraser was becoming more upset and annoyed (a fact confirmed by Mr. Fraser in testimony).

(b) Cst. Hobbs was concerned that when he told Mr. Fraser he was under arrest, he might react badly which, as they were in the confined space of the laundry room, could escalate to physical interaction.

(c) It would be safer for both Cst. Hobbs and Mr. Fraser to avoid any physical reaction that Mr. Fraser might have had.

40. It is submitted that these were reasonable and lawful grounds to place Mr. Fraser into handcuffs. In the alternative, if Cst. Hobbs did not have sufficient grounds, his grounds were, at worst, on the borderline.

41. Cst. Hobbs told Mr. Fraser that he wanted to check the briefcase, that he was not going to search anywhere else, or look at anything else. He told Mr. Fraser that if the property turned out not to be the stolen property Cst. Hobbs would obviously have made a big mistake, and he would apologize.

42. Cst. Hobbs then stepped into the interior room and opened the briefcase. It contained papers. Cst. Hobbs did not look around or search any other area of the house. When it became clear that the briefcase did not contain the stolen property Cst. Hobbs immediately took off the handcuffs and offered Mr. Fraser an explanation. Mr. Fraser was at first interested, but then changed his mind and asked Cst. Hobbs to leave. Cst. Hobbs did so.

43. Cst. Hobbs then went next door to second of the two houses where the suspect must have entered. He knocked on the exterior rear door. There was no answer. He went inside the door and found a common area. He knocked on a door inside the common area. A man answered. He

turned out to be the suspect. The suspect turned over the property that he had brought to the 7-11 and other property as well.

2. LAW AND ARGUMENT

2.1 NOT ALL ILLEGAL ARRESTS, SEARCHES, AND ARRESTS ARE "ABUSIVE"

1. "Abuse of authority" is defined in s. 77(3)(a) of the *Police Act* as follows:

> (a) "**abuse of authority**", which is ***oppressive conduct*** towards a member of the public, including, without limitation,
>
> (i) ***intentionally or recklessly*** making an arrest without good and sufficient cause,
>
> (ii) in the performance, or purported performance, of duties, ***intentionally or recklessly***
>
> (A) using unnecessary force on any person, or
>
> (B) detaining or searching any person without good and sufficient cause …

44. The phrase *oppressive conduct* is significant. The law has long recognized that mere errors of law or judgment are not necessarily blameworthy. An element of oppressiveness must be found before an officer will be held liable for alleged misconduct. Second, not all unlawful arrests, detentions or searches are oppressive. In order to find an unlawful act is oppressive, the Adjudicator must find either that the officer acted intentionally or recklessly.

45. Finally, the section does not define misconduct as arresting or searching with "reasonable and probable grounds." A search or arrest constitutes misconduct only if it is conducted "without good and sufficient cause." "Good or sufficient cause" is not the same as "reasonable and probable grounds." If the legislature had intended the tests to be the same, it would have used the same language. The question then arises whether "good or sufficient cause" is a more exacting standard, or a less exacting standard. Clearly, "good of sufficient cause" could not be a more exacting standard than "reasonable and probable grounds", because officers who failed to meet the higher standard, but nevertheless met the standard imposed by the *Charter* and the Criminal Code would be guilty of misconduct. That cannot be the case. Therefore, "good or

sufficient cause" must be a more relaxed standard than "reasonable and probable grounds." That, in turn, means that a search that cannot be justified on the *Charter* and *Criminal Code* standard of "reasonable and probable grounds" may nevertheless satisfy the "good or sufficient cause" standard, and not constitute misconduct.

46. Simply establishing that the police officer did not have good and sufficient cause to make the arrest does not establish misconduct. The evidence must also establish the mental element; that is, that the police officer knew he or she did not have grounds to make the arrest, or was reckless. If an officer makes an arrest that is unlawful or that violates a person's *Charter* rights, but acted in good faith in the belief that the arrest was lawful and did not violate the person's *Charter* rights, the officer commits no misconduct notwithstanding the unlawfulness or unconstitionality of the arrest or search. Put another way, a police officer who has a good faith belief that he has the power to conduct a search or arrest may have "good or sufficient cause" to carry out the arrest or search, even if he or she does not have "reasonable and probable grounds" on the *Charter* standard.

47. This does not mean that a police officer could escape liability simply by stating that he believed he had grounds. The totality of the information and evidence available to the police officer would have to be assessed. If a police officer conducted a search or arrest on grounds so manifestly deficient that no reasonable police officer could believe them to be sufficient, then it would be open to the Adjudicator to conclude that the police officer was not in good faith, or was reckless as to his grounds. In either case that would be sufficient to substantiate an allegation of abuse of authority.

2.2 INTENTION, RECKLESSNESS, AND BLAMEWORTHINESS

48. These principles were established in *Lowe v. Diebolt* 2013 BCSC 1092, **(Book of Authorities Tab 1)** in which the police complaint commissioner sought judicial review of a decision of a retired judge under s. 117 of the *Police Act*. In that case a police officer conducted an unlawful strip search incident to arrest, mistakenly believing she had legal authority to do so. The discipline authority dismissed the allegation on the following grounds:

> [9] On November 4, 2011, Abbotsford Chief Constable Bob Rich, acting as a discipline authority (the "Discipline Authority"), issued a Notice of Discipline

> Authority's Decision pursuant to s. 112 of the *Act*. The Discipline Authority held that:
>
> > a) reasonable and probable grounds existed to stop and conduct a drug search of Ms. Gowland and her vehicle;
> >
> > b) after the initial search of Ms. Gowland's vehicle and person, there were not enough grounds to continue the detention or arrest or to perform a strip search. The strip search was therefore a violation of the *Charter*;
> >
> > c) nevertheless, Cst. Burridge "did not commit an abuse of process" and "she was acting in good faith and was not acting in an arbitrary or abusive fashion".
>
> [10] Although the Discipline Authority did not find misconduct, he directed that Cst. Burridge receive an update on the law surrounding strip searches.

49. The police complaint commissioner ordered a review of that decision under s. 117 of the *Police Act*. The retired judge (called "the Adjudicator" in the *Lowe v. Diebolt* reasons for judgment) upheld the decision of the discipline authority. The police complaint commissioner then sought judicial review of the decision of the Adjudicator. The Supreme Court defined the question under judicial review as follows:

> [32] The ultimate question that the Adjudicator had to answer was whether, paraphrasing s. 77(3)(a)(ii)(B) and 117 (9) and (10) of the *Act*, it appears that Cst. Burridge negligently or recklessly searched Ms. Gowland without good and sufficient cause (ss. 9) or whether she did not (ss. 10). A decision in the negative (ss. 10) is subject to the privative clause; an affirmative decision is not.

50. The Court then considered whether misconduct could be established solely by establishing that the strip search was in fact and law unconstitutional. The Court held as follows:

> **VI. THE SUBSTANTIVE ISSUE**
>
> [42] Although the petitioner argued that he was not saying that a *Charter* breach automatically constituted misconduct, substantively that was very close to his position.
>
> [43] The petitioner hinged his argument on the fact that the search could not be valid under the *Charter*: Cst. Burridge acknowledged she did not think she had the grounds to arrest Ms. Gowland, and she did not, in fact, make an arrest. Since

a strip search could only be conducted incidental to a lawful arrest, the search could not be justified. In his written argument, the petitioner stated:

> The fact of the strip search itself was not in dispute. Once a determination was made that the officer lacked grounds for arrest and thus had no justification for the strip search, there could be no doubt that the conduct at issue appeared to constitute misconduct. Based on the Respondent's own statements, she conducted a highly invasive search procedure knowing that she lacked grounds for arrest, but rather based only on suspicion. That conduct can only be intentional or reckless as those terms are understood in Canadian law.

[Emphasis added.]

[44] The reason why the petitioner says that Cst. Burridge's conduct could only be reckless or intentional is, quoting again from his written argument:

> Put another way, either the Respondent knew that her conduct was unlawful or she ought to have known. By the time of the events in issue, the *Golden* decision had been the law in Canada for approximately seven and half years. It was well known to all in the law enforcement and general legal community.

[45] The petitioner's conflating the legality of the search and misconduct under s. 77(3)(a)(ii)(B) is shown starkly in his argument with respect to the standard of review, with respect to which he identified one issue:

> The question at issue in this appeal (*sic*) is clearly one of law; it is the application of a legal test, as defined by the Supreme Court of Canada in *R. v. Golden*, for the circumstances in which police may lawfully conduct a strip search of an individual.

[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.)

[47] Turning to the Adjudicator's decision, as I said above (para. 18), at page 8 of his decision, he concluded that Cst. Burridge had reasonable and probable

> grounds to perform a strip search. If he meant by that that the strip search was justified, he would be incorrect because of the lack of an arrest or the subjective grounds for that arrest. Cst. Burridge concedes as much. That finding might even be unreasonable. But as the foregoing demonstrates, that is not the end of the matter for a misconduct charge under the *Act*. (In fact, it would not be the end of a matter in a criminal trial, since a s. 24(2) analysis must be done in order to determine whether evidence obtained pursuant to a *Charter* breach is admissible.)
>
> [48] The Adjudicator found that there were objective grounds for the arrest, and I do not think the petitioner takes issue with that. The Adjudicator also appears to have concluded that there were objective grounds for a strip search because Ms. Gowland wiggled around. The adjudicator concluded that Cst. Burridge acted in good faith in conducting the search in the gas station. Those are not unreasonable conclusions. (Again, this is separate from whether the search was valid.)
>
> …
>
> [52] In this case, the difficulties with the Adjudicator's approach to the validity of the search were apparent, and therefore not a "treasure hunt". However, as I have stated, that is only the starting point. On several occasions, I invited the petitioner's counsel to point me to anything in the record indicating either intentional or reckless misconduct by Cst. Burridge other than the search itself. He could not do so other than to point out her acknowledgment that she did not have grounds to arrest. But that factor merely circles back to the validity of the search. ***There was nothing in the evidence to show that Cst. Burridge knew that the lack of grounds for arrest meant she could not do the search, something might amount to intention.*** While there might be cases in which the misconduct bespeaks intention or recklessness, this is not one of them.

51. In summary, in order to substantiate an allegation of abuse of authority it is not sufficient to establish that a search or arrest was unlawful. There must also be evidence that the police officer arrested or searched knowing he lacked the grounds, or being reckless as to whether he or she had the grounds. Recklessness in this context means that the officer did not even turn his mind to whether he had grounds in circumstances where the officer knew he should turn his mind to that question.

52. In *Scott v. Police Complaint Commissioner* 2016 BCSC 1970 **(Book of Authorities tab 2)** the Supreme Court of British Columbia came to a similar result on a slightly different basis. In that case, a woman was charged with resisting arrest and assault of a police officer. Police officers had tried to enter her house to apprehend a child under the *Child, Family and Community Services Act.* The judge ruled that the police officers lacked grounds to enter the house, and acquitted the woman.

53. The woman then brought a complaint under the *Police Act* that the police officers police officers had committed abuse of authority. Her complaint was eventually heard by a retired judge on a review on the record under s. 117. The retired judge held, in effect, that since the provincial court judge had found the police officers lacked grounds to enter the house, therefore they had committed abuse of authority.

54. The decision of the retired judge was then considered on judicial review in the British Columbia Supreme Court. The Supreme Court judge held that the retired s. 117 judge had erred. A finding that an officer entered a house unlawfully does not, without more, amount to abuse of authority:

> The question before Rounthwaite P.C.J. [the provincial court judge who heard the assault trial of the woman] 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.***

55. A "blameworthy element" would be some form of bad faith; that is, where a police officer conducts a search or detention for some ulterior purposes (perhaps in the opportunistic hope of getting evidence for another investigation, or to put pressure on the detainee, or out of malice for the detainee). In the present case, there is no evidence whatever of bad faith, ulterior purpose, or malice.

56. The law in British Columbia is consistent with the law of other western provinces. In *Allen v Alberta (Law Enforcement Review Board),* 2013 ABCA 187 **(Book of Authorities tab 4)** a police officer conducted an unlawful strip search. As in *Lowe v. Diebolt*, *supra* the Supreme Court of Canada had provided the test for lawful strip searches many years prior to the case at

bar. The Alberta Court of Appeal ruled that a search that violates the detainee's *Charter* rights *ipso facto* constitutes misconduct:

> [32] The third question on which leave to appeal was granted is: Is an officer's conducting any search outside the *Charter* parameters set by prevailing court decisions, *ipso facto* an offence under Count 1?
>
> [33] It cannot be the case that a *Charter* breach is *ipso facto* a disciplinary offence, because it would mean that mere errors in judgment or carelessness would inevitably rise to the level of discreditable conduct. While police discipline may not require a full level of *mens rea*, and negligence may in some instances amount to a disciplinary offence, there must be some meaningful level of moral culpability in order to warrant disciplinary penalties. As noted in *Rampersaud v Ford*, January 26, 1994 (Board of Inquiry under the *Ontario Police Act*) police work would become impossible if police officers were, regardless of the circumstances, subjected to disciplinary proceedings every time a judge found a *Charter* breach.
>
> [34] At one level, this is a question of statutory interpretation. The *Police Service Regulation* Alta Reg 356/90, lists a lot of things that are discreditable conduct. Breaching *Charter* rights is not listed, but that is not conclusive, because some conduct that is caught by the *Regulation* undoubtedly also involves a *Charter* breach. That being said, there is generally not much to be gained by bifurcating the analysis of the officer's conduct. For example, it is generally not helpful to decide if there was an "unauthorized exercise of authority" during a search, and then to go on and analyze if there was a *Charter* breach, and *vice versa*. These are, generally, two sides of the same coin. The officer's conduct must be analyzed as a whole, in context, having regard to all the sources defining acceptable police conduct. Those sources include the *Charter*, the *Criminal Code*, parameters set by prevailing court and Board decisions, the standards set in the *Regulation*, the internal policies of the police service, the expertise of police officers, and any other relevant source.
>
> …
>
> [36] One must also be sensitive to the fact that police officers often have to make quick decisions without the ability to resort to legal advice or legal research: ***R. v Golub*** (1997), 34 OR (3d) 743 at p. 750, 117 CCC (3d) 193 (CA). A police officer in an alley behind a hotel, dealing with a defiant suspect, cannot be expected to hold a hearing, or sit down and do a careful analysis of the case law after consulting his law reports. It is not helpful to say that just because, with hindsight and after the careful argument of counsel, a court or tribunal is able to determine that there was a *Charter* breach based on "parameters set by prevailing court decisions", that the arresting officer has engaged in disciplinary

misconduct: ***Golden*** at para. 63, citing ***United States v Robinson***, 414 US 218 (1973) at p. 235; ***Tomie-Gallant*** at para. 58.

57. In a Manitoba case, RM v. CB (12 October 2017) **(Book of Authorities tab 5)** police officers conducted a search of an apartment. The review board found that the search was unlawful (**see para. 83 and 87-88)** , but it did not amount to misconduct.

> [98] The evidence suggests the Respondents were courteous and professional throughout their contact with the Complainant.
>
> [99] There is no basis to find that the conduct of the Respondents was abusive.
>
> [100] I have found that the general search of the suite and the search of the papers were unlawful due to there being no informed consent obtained before the search. The searches, as being "unlawful exaction" of duty, must fall within the definition of "oppressive" conduct.
>
> *4. Was the search of the suite and/or the search of the papers an abuse by the Respondents of their authority so as to constitute the commission of a disciplinary default?*
>
> [101] I have found the searches to be technically unlawful and therefore "oppressive" conduct.
>
> [102] Does this oppressive conduct by the Respondents necessarily constitute an abuse of their authority?
>
> [103] Whether conduct found to constitute "oppressive" conduct, is in fact an "abuse of authority" within section 29 of the *Act* depends on the facts of a particular case. The mere fact that the searches in this case were technically unlawful, and thereby oppressive, does not necessarily mean that they were abuses of authority by the Respondents.
>
> [104] I agree with the comments of Judge Joyal (as he then was) in *A.C. v. Constable G.S.* (LERA Complaint #6100), February 20, 2007 that, reading the *Act* in context and having regard to its purpose, one may conclude that an "abuse of authority" connotes police conduct that is exploitative. Judge Joyal states, at paragraph 52:
>
> > "The exploitative potential flows from an officer's position of authority which permits the impugned conduct to have an inappropriately and unjustifiably controlling, intimidating or inhibiting effect on a given complainant in the context of a particular fact situation. Police conduct which can be properly found as an "abuse of authority" is that exploitative conduct which, even after an examination of the factual context of a given

> case, cannot be viewed as consistent with a reasonable police officer's good faith intention to lawfully perform his duties and uphold the public trust".
>
> [105] Even the fact that the searches done may have amounted to a breach of *Charter* rights does not necessarily mean they were an "abuse of authority" within section 29 of the *Act.* Other decisions of this court have held that even Charter breaches are not necessarily disciplinary defaults under the *Act* (decision of Judge Chartier (as he then was) in *J.W.P. v. Cst. R.L.* (November 15, 2004); decision of Judge Swail in *F.D., and Cst. E.D. and Cst. M.C.* of December 12, 2005). Even Judge Smith, who found conduct she concluded was a breach of a section 10 *Charter* right to be a disciplinary default under the *Act* in *W.H. v. Det. Sgt. R.H. et al* (August 18, 2006) states that "…a Charter breach, in itself, does not automatically constitute a disciplinary default". Rather, Judge Smith says, disregard for fundamental rights guaranteed by the *Charter* can constitute an abuse of authority in certain circumstances and she suggests conduct constituting *Charter* breaches should be carefully scrutinized, in the circumstances of a particular case, to determine whether, in that case, a disciplinary default has been committed.
>
> [106] It is important that every police action that does or might constitute a breach of a *Charter* right and/or might fall within one of the enumerated grounds under section 29(a) of the *Act,* not be automatically deemed to be an abuse of authority. To do so will disturb the balance that must exist between the police being accountable to the public for their conduct and being able to do their jobs effectively in order to protect the public. Judge Swail, in *F.D. v. Constable E.D. and Constable M.C.,* December 12, 2005, paragraphs 83 to 85, accepts comments in the January 26, 1994 decision of *Rampersaud v. Ford*, Board of Inquiry (Ontario Police Services Act) of January 26, 1994, referring to the fact police officers would operate under a "disciplinary chill" if police were subject to disciplinary proceedings every time it was found that an officer had committed a breach of an accused's *Charter* rights.

58. This case makes an important point about the relationship between conduct that is "oppressive" and that which constitutes misconduct. It is understandable that a person whose apartment was unlawfully searched (*RM v CB)* or who was detained even though he was innocent (this case) may feel that the police conduct was oppressive. However, that is not sufficient to constitute misconduct on the part of the police who conducted the search or the detention.

2.3 GOOD AND SUFFICIENT CAUSE

59. A similar result may be reached by examining the concept of "good and sufficient cause." The definition of "abuse of authority" includes detaining or searching a person "without good and sufficient cause." The allegation in the Form 2 alleges that Mr. McDonald was arrested "without good or sufficient cause".

60. "Good and sufficient cause" is not synonymous with lawful authority. An arrest may be unlawful, yet be made on good and sufficient cause. In *Complaint of Catherine Crockwell* (May 26, 1998), Nfld. Adj., **(Book of Authorities tab 8)** an Adjudicator heard a discipline hearing under the *Royal Newfoundland Constabulary Act* concerning the unlawful arrest pursuant to the Newfoundland *Mental Health Act*.

> Having found, therefore, that Mr. Crockwell was unlawfully detained by Constable Moss, does this mean that Constable Moss is strictly liable in the disciplinary context of this public complaint or does the concept of good faith apply in considering whether an officer has acted in a manner unbecoming a police officer as charged? …
>
> …
>
> Having considered this matter, I am not satisfied that a police officer is to be strictly liable for an offence under Section 3 for an arrest or detention that is subsequently established to be an unlawful arrest or unlawful detention. If the *Regulations* intended this result, different wording would have been used and that wording would simply have provided the offence to be established on the basis of unlawful arrest or detention and nothing more.
>
> ***Conduct necessary to establish an offence under Section 3(1)(a), however, is qualified by the words "without good or sufficient cause". An officer not guilty of this offence simply on the basis that his arrest or detention is established to be unlawful. Additionally it must be established that the officer acted without good or sufficient cause.***
>
> Case law establishes that the words "good or sufficient cause" is descriptive of behavior which is done in good faith, behavior which is not arbitrary, irrational, unreasonable or irrelevant to the duties which rests upon police officers. The phrase, in my view, is broad enough to include an officer acting in good faith but acting under mistake of fact as well as mistake of law. Mistake of law is not a defence to an offence but I have already concluded that Mr. Crockwell's arrest was unlawful in the first instance. In considering good faith conduct, it makes no difference if the reasons for an officer's mistaken belief, is prompted by a mistake of fact or by a mistake of law. I therefore do not conclude an officer is guilty of

acting "without good or sufficient cause" simply because an arrest or detention is determined to be unlawful.

61. In *A.C. and G.S.* (20 February 2007), LERA Complaint #6100**,** a Manitoba provincial court judge sat on a case under the *Law Enforcement Review Act.* The allegation was abuse of authority by being discourteous. In British Columbia *Police Act*, discourtesy is a separate charge from Abuse of Authority, but in both British Columbia and Manitoba, Abuse of Authority is defined as oppressive conduct. The facts in *A.C.* are not similar to those in the case at bar, but the discussion of abuse of authority is helpful, and is frequently cited in Manitoba decisions:

> [51] Read contextually in the entirety of the Act, it would seem that the legislators have, with section 29(a), recognized a police officer's "abuse of authority" as one category of behaviour which, along with the other sorts of behaviour and conduct set out in section 29(b)-(i), is deserving of a disciplinary default. It is only the cases where a police officer's behaviour or conduct can be concluded to be abusive of his authority that are sanctionable pursuant to section 29(a). Default is not to be found for absolutely any and all manifestations of the impunable behaviour set out in section 29(a)(i)-(vii). Each case will depend upon its own facts.
>
> [52] On a contextual reading of the Act and the consideration of its purposes, one can conclude that an " abuse of authority" connotes conduct of an ***exploitative character***. The exploitative potential flows from an officer's position of authority which permits the impugned conduct to have an inappropriately and unjustifiably controlling, intimidating or inhibiting effect on a given complainant in the context of a particular fact situation. Police conduct which can be properly found as an "abuse of authority" is that ***exploitative conduct*** which, even after an examination of the factual context of a given case, cannot be viewed as consistent with a reasonable police officer's good faith intention to lawfully perform his duties and uphold the public trust. Judicial decisions such as the one in the case at bar, continue to develop a set of reference points and criteria by which an alleged abuse of authority can be evaluated. The development of those reference points and criteria must find a way to balance the need to hold police officers to account, while not defining "abuse of authority" too broadly or vaguely.
>
> [53] In continuing to confirm the expectation of appropriate and justifiable police conduct and in giving more clear meaning to the idea of police "abuse of authority", this Court's future decisions (while not foreclosing the possibility in appropriate cases -- see LERA Complaint #6180, August 18, 2006) must take care to not encourage hearings pursuant to section 29(a) for <u>every</u> example of sub-par police behaviour. The developing definition of an "abuse of authority" must ensure, for example, that the LERA forum not become a means for attacking all

> police conduct which may have been the subject of earlier judicial determination respecting such matters as Charter breaches and the consequent exclusion of evidence. (see for example, Swail P.J.'s warning about the potential for "disciplinary chill" in F.D. v. Cst E.D. and Cst. M.C., December 12, 2005, paras. 83-85)

62. In *Rabah v. Austin* (November 23, 1995), Ont. Board of Inquiry No. PC007/97 **(Book of Authorities tab 9)**, members of a drug squad entered an apartment without a warrant to prevent the destruction of drug evidence. They entered the wrong apartment. Upon entry, they arrested the two occupants and searched the apartment, finding no drugs. The officers were charged with, *inter alia*, unlawful arrest and unlawful search. (Ontario does not have a charge of abuse of authority).

63. The search in *Rabah* followed after the decision of the Supreme Court of Canada in *R. v. Silveira*, [1995] 2 S.C.R. 297. In *Silveira* the court held that police may not enter a premises without a warrant even if it is to preserve evidence. The Board of Inquiry in *Rabah* had found that even if the officers had identified the correct apartment, they would not have had lawful authority to enter it to preserve evidence. The Board found that the officers could not be faulted for being unaware that the entry was unlawful. The Board then held:

> In *Rampersaud v. Officers Ford and Vammus* (Board of Inquiry, January 24, 1994), the Board observed that police officers should not face disciplinary action every time they may breach the Charter since these rights are constantly being refined by the courts, and police officers acting in good faith should not be held to a retroactive standard of conduct. In that case, the Board found that the subject officer did not act in good faith and findings of misconduct for unlawful arrest and unreasonable search were made.
>
> In the case before this Board, we have determined that the subject officers were acting in good faith and were not made aware of the change in the law as a result of the *Silveria* [sic] decision.
>
> *In Re P.C. Shockness* (Gillespie) (Board of Inquiry, September 27, 1994), the Board noted that not every violation of the Charter will result in a finding of misconduct against a police officer. The Board in that case stated that it was required to determine whether the Charter violation was likely to bring discredit upon the reputation of the police force. The Board stated that the test had both objective and subjective elements. The Board said that bad faith on the part of the police officers may not need to be proved in every case because recklessness or a high degree of negligence may be enough to establish misconduct.

> In the case before this Board, we find no bad faith, police officer negligence or recklessness.
>
> In the *Silveria* [sic] case, the majority found that there were factors which mitigated against the seriousness of the *Charter* violation. These factors included the exigent circumstances requiring the police officers to enter the premises in order to protect against the destruction of evidence and the lack of bad faith of the part of the police officers. In the matter before this Board, the police officers were not made aware by their police service of the decision of *Silveria*. [sic] In these circumstances, the Board finds that the officers are not guilty of misconduct by breaching the provisions of the *Charter* and the *Narcotic Control Act.*
>
> In the case before us, the police officers had an honest belief that they had the right to enter the apartment without a warrant in order to preserve evidence. This *Board* decision will make all officers on the force aware that such an entry is a violation to the right of privacy of an individual and a breach of s. 8 of the *Charter.*

64. In *R.M and C.B.* (October 12, 2007), LERB Complaint #2005/3 **(Book of Authorities tab 5)**, two officers extracted a "consent" from the complainant to search his suite, and then searched it for drugs. It was alleged that the police conduct was oppressive in that the consent was not informed consent, so the search was unlawful, and the manner of the search was oppressive. The Adjudicator agreed with the complainant that there was no true consent and therefore the search was unlawful, but did not agree that the search was excessive. The Adjudicator then considered whether the search, being unlawful, was by definition oppressive:

> [101] I have found the searches to be technically unlawful and therefore "oppressive" conduct.
>
> 102] Does this oppressive conduct by the Respondents necessarily constitute an abuse of their authority?
>
> [103] Whether conduct found to constitute "oppressive" conduct, is in fact an "abuse of authority" within section 29 of the *Act* depends on the facts of a particular case. The mere fact that the searches in this case were technically unlawful, and thereby oppressive, does not necessarily mean that they were abuses of authority by the Respondents.
>
> [104] I agree with the comments of Judge Joyal (as he then was) in *A.C. v. Constable G.S.* (LERA Complaint #6100), February 20, 2007 that, reading the *Act* in context and having regard to its purpose, one may conclude that an "abuse of authority" connotes police conduct that is exploitative. Judge Joyal states, at paragraph 52:

> "The exploitative potential flows from an officer's position of authority which permits the impugned conduct to have an inappropriately and unjustifiably controlling, intimidating or inhibiting effect on a given complainant in the context of a particular fact situation. Police conduct which can be properly found as an "abuse of authority" is that exploitative conduct which, even after an examination of the factual context of a given case, cannot be viewed as consistent with a reasonable police officer's good faith intention to lawfully perform his duties and uphold the public trust".

[105] Even the fact that the searches done may have amounted to a breach of *Charter* rights does not necessarily mean they were an "abuse of authority" within section 29 of the *Act.* Other decisions of this court have held that even Charter breaches are not necessarily disciplinary defaults under the *Act* (decision of Judge Chartier (as he then was) in *J.W.P. v. Cst. R.L.* (November 15, 2004); decision of Judge Swail in *F.D., and Cst. E.D. and Cst. M.C.* of December 12, 2005). Even Judge Smith, who found conduct she concluded was a breach of a section 10 *Charter* right to be a disciplinary default under the *Act* in *W.H. v. Det. Sgt. R.H. et al* (August 18, 2006) states that "…a Charter breach, in itself, does not automatically constitute a disciplinary default". Rather, Judge Smith says, disregard for fundamental rights guaranteed by the *Charter* can constitute an abuse of authority in certain circumstances and she suggests conduct constituting *Charter* breaches should be carefully scrutinized, in the circumstances of a particular case, to determine whether, in that case, a disciplinary default has been committed.

[106] It is important that every police action that does or might constitute a breach of a *Charter* right and/or might fall within one of the enumerated grounds under section 29(a) of the *Act,* not be automatically deemed to be an abuse of authority. To do so will disturb the balance that must exist between the police being accountable to the public for their conduct and being able to do their jobs effectively in order to protect the public. Judge Swail, in *F.D. v. Constable E.D. and Constable M.C.,* December 12, 2005, paragraphs 83 to 85, accepts comments in the January 26, 1994 decision of *Rampersaud v. Ford*, Board of Inquiry (Ontario Police Services Act) of January 26, 1994, referring to the fact police officers would operate under a "disciplinary chill" if police were subject to disciplinary proceedings every time it was found that an officer had committed a breach of an accused's *Charter* rights.

[107] In order to decide if the conduct of the Respondents in this case, in conducting the general search of the Complainant's suite and the search of his personal papers within the suite, amounts to "abuse of authority", it is necessary to look at the facts of this case. I consider the following facts:

(i) the treatment by the Respondents of the Complainant;

> (ii) whether their conduct can be seen as consistent with a reasonable police officer's good faith intention to lawfully perform his duties;
>
> (iii) the extent and specifics of the search itself; and
>
> (iv) how the Respondents' conduct affected the Complainant.
>
> [112] The Respondents failed to obtain informed consent for the searches from the Complainant. This was an error which could have had significant legal consequences for exclusion of evidence, had this been a situation in which charges resulted from such a search (which of course was not the case here).

2.4 NO "RECKLESSNESS" IF OFFICER NOT TRAINED IN APPROPRIATE STANDARD

65. As noted earlier, in *Lowe v. Diebolt, supra* a police officer conducted a strip search that was unlawful according to the standards of *R. v. Golden* 2001 SCC 83. The Police Complaint Commissioner argued that search constituted misconduct, and the subject officer could not rely on the fact that she had never received training in the law of strip searches. The Police Complaint Commissioner argued that the police officer's ignorance amounted to reckless because: "By the time of the events in issue, the *Golden* decision had been the law in Canada for approximately seven and half years." **(*Lowe v. Diebolt, supra* at para. 44).** The Supreme Court rejected this argument. The fact that the subject officer *should* have been trained did not amount to reckless. In the absence of evidence that the police officer had received the necessary training, a discipline proceeding cannot find that the police officer was reckless.

66. The importance of the subject officers' training was discussed in Constable Tiwana, PH. File No. 2014-2; OPCC 2012-7819

> 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 outside her authority.*
>
> …

> The problem in *Lowe v. Diebolt* was that there was no evidence regarding the training within the officer's department and whether it was common or available knowledge for a trained officer in her department that a search could not be conducted without grounds for an arrest. A finding of "recklessness" on the part of the officer in relation to her search powers was not available.
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> ***Tiwana, supra*, Book of Authorities tab 3 at p. 15-16**

67. Lack of training and an error of law was also at the centre of *The Matter of Constable X* (December 22, 2010), the Discipline Authority, the Honourable Carole Lazar sat as reviewing judge in the capacity as Discipline Authority on a complaint that two officers had committed abuse of authority by arresting a cyclist without authority, and using excessive force in the arrest. The cyclist's bicycle did not have brakes. One of the officers believed, mistakenly, that the police have the authority to seize unsafe bicycles. The Discipline Authority concluded that the police officer did not have authority to seize the bicycle, but that his erroneous belief was in good faith. She wrote:

> I conclude that Constable l arrested Mr. Y illegally. He did this because he thought he had the right to seize Mr. Y's bike so he viewed Mr. Y's resistance as obstruction. He was wrong. Still, his mistake is understandable if his background and training are taken into account. I find that Constable acted in good faith. Because of this, though Mr. Y was wrongly arrested, there was no punishable misconduct on the part of Constable .
>
> **Book of Authorities, tab 6, p. 10**

68. One question here is whether a police officer has the power to enter the common area of a multi-unit house to knock on an interior door in the same way that a police officer has the power to enter into the lobby of a traditional apartment building to knock on an interior door.

69. In the present case, there is no evidence that the Vancouver Police Department trained Cst. Hobbs in the law governing his powers to enter the common areas of informal multiple suite dwelling houses relative to the powers of police to enter into the common areas of traditional apartment buildings.

3. APPLICATION TO THE FACTS

70. Consider the following hypothetical. A police officer follows a suspect who is in actual, present, possession of stolen property. The suspect enters one of two apartment buildings. The police officer has reason to believe that it is much more likely that the suspect went into the apartment building on the left than the one on the right. That is a small building with, say, four units. The police officer then tries the door to the lobby of the apartment building, and finds it unlocked. He enters into the lobby of the building with the intention of knocking on the door of an interior unit. His intention is to knock on the door of a unit and have a conversation with the occupant. There can be little doubt that a police officer would not be committing an unlawful search by entering the building for that purpose: *R. v. Roy* 2010 BCCA 448 (**Book of Authorities, tab 10)**

71. Let us change the hypothetical above slightly. Instead of entering a traditional apartment building, the police officer enters a building that was originally constructed as a single family home, but has been converted into a multi-unit dwelling, with a common hallway / laundry room at the entrance, and a number of private rooms accessible by interior doors off the hallway / laundry room. I have not been able to find any cases directly on point, but it seems likely that the same principles that would allow police officers to enter into an apartment lobby and hallways would apply to a smaller multi-unit dwelling. This would particularly be so if the exterior doors were left unlocked. Therefore, if the room that Cst. Hobbs had entered into was a common room or hallway of a multi-unit house, it is extremely likely that Cst. Hobbs would have had legal authority to enter to knock on an interior door and speak with the occupant, *entirely aside from* the question of whether he also had legal grounds to search.

72. As it turns out, however, Cst. Hobbs belief was not correct. The Fraser house was a single family home, and the laundry room was part of the private dwelling house as opposed to being a common area accessible by several individuals or the public generally. However, applying the law set out above, the fact that Cst. Hobbs was inside a private dwelling without a warrant, and therefore without authority, does not by itself constitute misconduct.

73. It could not be maintained that Cst. Hobbs entered the house knowing he did not have authority, but doing so anyway. That is, he did not "intentionally" enter a dwelling house without good or sufficient cause.

74. It is also submitted that his belief that he was entering a common area rather than a private house was not "reckless". Cst. Hobbs own experience was that it is very common in that part of Vancouver for basements to be divided into multiple rooms, and for the rear door to open onto a common area that in turn has doors into the private rooms. Reasonable persons may differ on whether, given Cst. Hobbs' experience in that part of Vancouver, they would have had the expectation that the room he entered was likely to be a common hallway or "lobby" of a multi-unit building, as opposed to an ordinary room in a private house. However, even if one were to come to the opposite conclusion, that does not mean that Cst. Hobbs' belief was reckless. It cannot be said that he did not turn his mind at all to the question of whether he had the grounds to enter. His belief had a rational basis, grounded in Cst. Hobbs actual experience. Therefore, even if one were inclined to a different view of the probabilities that the room would be a common area as opposed to a private room, it cannot be said that Cst. Hobbs belief was so baseless as to amount to recklessness.

75. This then raises the question of whether Cst. Hobbs' reaction upon seeing the briefcase amounted to abuse of authority. Cst. Hobbs believed that Mr. Fraser had just arrived home, at about the same time that the suspect went into one of the two houses. It is submitted that Cst. Hobbs had reasonable grounds to believe that Mr. Fraser was the suspect. The momentary gap in Cst. Hobbs' observations did not turn reasonable grounds into recklessness. See, for example *R. v. Haglof* 2000 BCCA 604. The facts were set out in the head note:

> Police went to scene of hit-and-run accident and received information directing them to accused's home.
>
> ..
>
> A police officer attended upon the accused's residence after hearing a radio dispatch call concerning the hit-and-run accident. He knocked on the accused's door multiple times and identified himself as a police officer. No one answered the door, although the police officer saw someone looking at him through the window blinds. The accused's garage was closed and the police officer was unable to tell whether the accused's vehicle was in the garage, although the

> driveway travelled by the accused shortly before led to a dead end. Other police officers attended upon the scene, where they detected an odour of marijuana from an unknown source.
>
> Two police officers went around to the back of the townhouse, knocked at the rear door and identified themselves as police officers. Receiving no reply, the officers entered the townhouse of their own volition, found the accused and his girlfriend and arrested the accused for failing to remain at the scene of an accident. The police proceeded to search the townhouse for the presence of other persons and discovered a marijuana growing operation in the basement of the townhouse.
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> ***Hagflof*** **2000 BCCA 604, Book of Authorities Tab 11, p. 3**

76. In that case, the gap in observations between the accident and the location of the house did not invalidate the officers' belief that the suspect was in the townhouse. It is submitted that if Cst. Hobbs had intended to enter the house and conduct a search on doctrine the hot pursuit, he would have been justified in doing so. However, that was not Cst. Hobbs' plan. As noted earlier, his plan was simply to knock on the suspect's door, have a conversation, and hopefully convince the suspect to turn over the stolen property.

77. At the point when Cst. Hobbs saw the briefcase in plain view, the law becomes very murky. On one hand, the law appears to be clear that if one knocks on a door to a dwelling house partly with the intent of having a conversation with the occupant, but partly in the expectation of obtaining evidence, the law of search and seizure is engaged: *R. v. Evans,* [1996] 1 SCR 8. ***(*Book of Authorites, tab 12)*** If a police officer knocks on a door hoping to see or smell evidence, and he does see or smell evidence, the plain view doctrine does not apply. On the other hand, if one says that Cst. Hobbs' intention was partially investigatory, and not purely conversational, and that that engages the law of search and seizure, that body of law would likely have permitted Cst. Hobbs to enter the house on the basis of the hot pursuit doctrine. The issue here is further complicated by the fact that Cst. Hobbs' intention was simply to speak with the occupant or suspect in the hope of persuading him to do the right thing and return the property. Cst. Hobbs had not formed a plan about what to do if, upon opening the door, he could see the property in plain view.

78. Fortunately, it does not fall on the Adjudicator to resolve these interesting and complex legal questions. It is sufficient to acknowledge that the questions are complex, and that there are

reasonable arguments available on both sides of the question of whether, when Cst. Hobbs saw the briefcase, he had the power to search it at that point, or whether he should have obtained a warrant if he wished to search the briefcase. Whether Cst. Hobbs was right or wrong in his spontaneous assessment of the situation, he did not search the briefcase knowing he had no authority to do so. Nor was he reckless either in the sense he simply did not care whether he had authority, or in the sense that his belief that he had authority had no air of reality to it.

79. This raises the question of whether Cst. Hobbs had the power to arrest Mr. Fraser for the brief seconds it took to search the briefcase. The first point to note is that the arrest was very brief. If one assumes the facts against Cst. Hobbs interest, and assumes that when Cst. Hobbs saw the briefcase he did not have the power to search it immediately, it does not follow that Cst. Hobbs would have had to simply ignore the briefcase. It would have been open to Cst. Hobbs to apply for a search warrant to search the house. On the facts of this case, it is quite possible that such a search warrant would have been granted. There can be little doubt that if Cst. Hobbs had decided to obtain a warrant he would have been able to detain Mr. Fraser as an investigative detention to prevent destruction of the evidence while the warrant was being obtained and executed. The question, then, is when Cst. Hobbs cut to the chase, so to speak, and detained or arrested Mr. Fraser rather than getting a warrant and detaining Mr. Fraser while that was happening, he committed the misconduct of abuse of authority. Whether what Cst. Hobbs did was legal and constitutional is open to debate. However, it is submitted that what is not open to debate is Cst. Hobbs' good faith in believing that the plain view doctrine was available to him. The sight of the briefcase, coupled with Cst. Hobbs' belief that Mr. Fraser had entered into the house at the same time that he (Cst. Hobbs) briefly lost sight of the suspect, provided reasonable and probable grounds to believe that Mr. Fraser was at that moment in possession of stolen property. On those facts, Cst. Hobbs had a reasonable basis for believing that he had the power to arrest Mr. Fraser for a few seconds while he searched the briefcase.

80. Even if one assumes that the arrest may not have been lawful, when assessing whether it was *oppressive* one must take into account the fact that it was very brief, in privacy rather than in public, and Cst. Hobbs gave a full and reasonable explanation for what he was going to do before he arrested Mr. Fraser, and a full apology with further explanation afterward.

81. There is no question that Cst. Hobbs was acting in good faith. This was not a case of the State, in the form of a police officer, acting oppressively to create grounds to lay a criminal charge. Rather, Cst. Hobbs was trying to do what we expect police officers to do: help victims of crime. Cst. Hobbs understood that victim here, [redacted], was a professional disk jockey who had the tools of his trade stolen. Cst. Hobbs was just trying to put [redacted] back into possession of those tools so he could earn his living. The proof that this was in fact Cst. Hobbs' intention lies in the fact that when he did find the seller in the house next door to Mr. Fraser, he obtained the return of the equipment, but did not charge the seller with an offence.

82. The final question is whether Cst. Hobbs committed misconduct by placing Mr. Fraser into handcuffs. It appears axiomatic that if a police officer has the power to arrest, he has the power to place the suspect into handcuffs. I say this *appears* to be axiomatic because in a recent case neither I, nor the Crown, nor the court could find any authority for whether there is, or is not, some additional threshold a police officer must meet in addition to grounds for arrest before applying handcuffs. That case went to British Columbia Supreme Court, where the supreme court judge also did not decide the issue, and sent it back for retrial. The Crown then stayed the charges, so there never was any decision on what one would have thought to be a foundational point of the law of arrest: ***R. v.*** **[redacted], 2016 BCSC 993.** Once again, the Adjudicator does not have to decide whether an officer who has the power to arrest must meet some additional threshold before applying handcuffs. There is no clear law that says there is an additional threshold, so it cannot be argued that Cst. Hobbs failed to meet that hypothetical threshold. Much less can it be argued that Cst. Hobbs knew he did not have the power to apply the handcuffs, but did so anyway; or that he was reckless as to whether he had the power to apply the handcuffs. It must be recalled that Cst. Hobbs took special care to ensure that Cst. Hobbs opened the handcuffs before applying them, thereby minimizing the force needed to apply them, and any discomfort that Mr. Fraser might experience as the handcuffs were applied.

83. In this case, if the arrest of Mr. Fraser did not constitute misconduct (whether or not it was fully justified in law or under the *Charter*) the fact that he was placed in handcuffs for a few seconds cannot turn what is not misconduct into misconduct.

4. CONCLUSION

84. This case engages two areas of the law: (1) various branches of the law of search, seizure and arrest; and (2) the definition of abuse of authority under the *Police Act*.

85. The first area is very murky in the context of this case. If the briefcase had turned out to contain the stolen property and Mr. Fraser had been charged, the Adjudicator would be vexed with complex questions about the overlap between the law of knock-on searches, hot pursuit and the plain view doctrine, all in the context of a reasonable but mistaken belief that the door Cst. Hobbs entered gave onto a common area akin to the hallway or lobby of an apartment, rather than an ordinary room in a single family house. It is not necessary for the Adjudicator to resolve all of these questions in this case. In fact, it may not even be desirable for the Adjudicator to attempt a definite answer to these several questions of law, because that would divert attention from the real question.

86. The real question arises from the definition of abuse of authority under the *Police Act*. Errors of law, if Cst. Hobbs committed any, do not by themselves amount to abuse of authority. For a police officer to be found to have committed the misconduct of abuse of authority, there must be clear and cogent evidence that he engaged in an unlawful arrest or search, knowing he did not have the power; or he did so being reckless – essentially, indifferent – as to whether he had authority. In the present case the evidence is clear that Cst. Hobbs gave good faith consideration to the scope of his powers. If – and I emphasize the word if – Cst. Hobbs exceeded his lawful authority, it was in large part because the legal questions that were raised were themselves complex and unclear.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

M. Kevin Woodall, 6 April 2018