OPCC File No. 2015-11300
PUBLIC 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 DEPARTMENT

BEFORE: Adjudicator Brian M. Neal Q.C. (rt.)

PUBLIC HEARING COUNSEL: B. HICKFORD

COMMISSION COUNSEL: G. DELBIGIO, Q.C.

COUNSEL FOR CONSTABLE HOBBS (the "Member"): M.K. WOODALL

PLACE AND DATE OF HEARINGS: VANCOUVER, B.C. January 8, 9, 11, 12 and April 23, 2018

Decision Summary

This case involves a Vancouver Police Department officer who entered into a Vancouver house, detained and handcuffed a resident inside the home and then conducted a search. I am presiding as an adjudicator and my task is to determine whether the Member's actions constitute misconduct under the B.C. *Police Act*.

There are two allegations of misconduct alleged concerning the Member. The first relates to the Member's entry into the laundry room of the home of Mr. Andrew Fraser (the "Complainant") and subsequent search of the adjacent basement living area. The second

allegation relates to the Member's detention and handcuffing of the Complainant. Both are alleged to be "oppressive conduct" resulting in abuses of authority. If proven, such findings would result in disciplinary breaches of public trust and a conclusion that misconduct has been established under section 77 of the *Police Act*.

In considering all of the evidence adduced and submissions advanced, I have found that the Member's primary objective in entering the Complainant's home and detaining the Complainant was the civil recovery of certain personal property of a member of the public.

I have found that the Member's entry and subsequent search of the Complainant's home was unlawful and in breach of the Complainant's rights under section 8 of the *Charter of Rights and Freedoms* (the protection against unreasonable search and seizure). I have also found that the detention and handcuffing of the Complainant was undertaken without lawful authority and in breach of the Complainant's section 9 *Charter* rights (the protection against arbitrary detention).

Neither finding is, by itself, determinative of a misconduct finding. However, such conclusions do contribute to, and inform, the analysis of police misconduct under section 77.

I have found, with respect to the first allegation, that the Member was engaged in the lawful exercise of his duties and did not enter the laundry room or search the adjacent basement area of the Complainant's home with knowledge that his actions were unlawful. I did find, however, that in both entering the Complainant's home and searching part of the basement of that home, the Member was reckless as to his legal authority to act as he did. I have also found that those actions were not taken in good faith, or for good and sufficient cause.

There are few rights considered more important in law than the right to be free from unlawful intrusion by the state in one's own home. As a result, I have further found that the Member's actions evidenced serious blameworthy conduct inasmuch as these actions resulted in a significant unauthorized police entry into a private home in support of a civil recovery.

With respect to the second allegation, I have found that the Member was reckless as to his authority to act in proceeding with the detention and handcuffing of the Complainant in the laundry room of his home. I have also found that those actions were not taken for good and sufficient cause or in good faith. Finally, I have found that the detention and handcuffing of the Complainant was, in all the circumstances, the result of serious blameworthy conduct by the Member.

In neither the first or second allegation were the Member's actions taken as a result of mistake of law or lack of training. Rather, I have found that the Member acted in haste, and impulsively, without due deliberation in pursuit of his civil recovery goals.

In the final analysis, I have found that with respect to both allegations, the actions of the Member were oppressive conduct to a member of the public resulting in abuses of authority and disciplinary breaches of public trust.

As a result, findings of misconduct under section 77 has been made with respect to both allegations before this proceeding.

Adjudicator's Decision

I Public Hearing: The allegations of misconduct relating to the Member

(1) This is a Public Hearing convened pursuant to sections 142 and 143 of the *Police Act* relating to complaints of misconduct concerning the Member.

(2) The process giving rise to these proceedings was initiated by the Police Complaint Commissioner (the "Commissioner") on June 5, 2017. This complaint arose in connection with an incident alleged to have taken place in Vancouver on November 18, 2015 involving the Complainant, the Member and others.

(3) The allegations of misconduct raised by the Commissioner were as follows:

> (a)That on November 18, 2015, the Member, committed Abuse of Authority pursuant to section 77(3)(a) of the *Police Act* which is oppressive conduct towards a member of the public. Specifically, he did unlawfully enter the laundry room at the Complainant's residence and conduct an unlawful search of the downstairs living room; and
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> (b)That on November 18, 2015 the Member committed Abuse of Authority pursuant to section 77(3)(a)(ii)(B) of the *Police Act* when in the performance, or purported performance, of duties, he intentionally or recklessly detained the Complainant in handcuffs.

(4) The specific details concerning the allegations of misconduct concern the actions of the Member in pursuing possible stolen property to facilitate its return to a member of the public. In doing so, it is alleged that the Member, in plain clothes, entered the back of the Complainant's home, was confronted by the Complainant, then detained and handcuffed the Complainant, all without lawful authority. Furthermore, it is alleged that subsequent to the Complainant's detention, the basement living area of the Complainant's home was searched without authority.

II History of proceedings

(5) An explanation for the delay in proceeding with this matter is required.

(6) On July 17, 2017 Counsel for the Member filed a judicial-review petition to the Supreme Court, seeking orders quashing the order for a Public Hearing with respect to these allegations under the *Police Act*. Counsel sought further adjournments to obtain additional material concerning an application related to the petition.

(7) On August 15, 2017 Counsel for the Member delivered materials requesting that I recuse myself from these proceedings. Several further adjournments were sought and approved to accommodate Counsel's interest in securing additional factual content and legal argument on the recusal application.

(8) The Member's recusal application was amended, finalized and ultimately heard on November 6 and 7, 2017.

(9) Part I of my decision concerning the Member's application was released on November 10, 2017, and Part II on November 29, 2017. The decisions denied the Member's recusal application and established a further hearing date of January 8, 2018.

(10) Evidence was heard on January 8, 9, 11 and 12, 2018 with submissions concluded at a hearing on April 23, 2018.

III Misconduct and the *Police Act*

(11) Section 77 of the *Police Act* sets out the definition of "misconduct" relevant to the allegations concerning the Member. Specifically, subsection 77 of the *Police Act* provides, in part, as follows:

> 77(1) In this Part, "misconduct" means
>
> (a) conduct that constitutes a public trust offence described in subsection (2), or
>
> (b) conduct that constitutes

(i) an offence under section 86 [offence to harass, coerce or intimidate anyone questioning or reporting police conduct or making complaint] or 106 [offence to hinder, delay, obstruct or interfere with investigating officer], or

(ii) a disciplinary breach of public trust described in subsection (3) of this section.

(3) Subject to subsection (4), any of the conduct described in the following paragraphs constitutes a disciplinary breach of public trust, when committed by a member:

(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 .

(12) An important overall limitation to the definitions of misconduct in section 77 of the *Police Act* is found is subsection 77(4) as follows:

77(4) It is not a disciplinary breach of public trust for a member to engage in conduct that is necessary in the proper performance of authorized police work.

(13) It is two allegations of misconduct, arising under subsections 77(3)(a) and 77(3)(a)(ii)(B) of the *Police Act* concerning the Member's interaction with the Complainant, that are relevant to this proceeding.

(14) These proceedings are not an adjudication of claims or defences raised in other matters or an appeal of other decisions under the *Police Act*. Rather, this decision reflects an examination of all of the evidence submitted in these proceedings related to the allegations of misconduct defined by the *Police Act.*

(15) The standard of proof with respect to the allegations of misconduct is evidence beyond a balance of probabilities.

IV The Issues

(16) The issues arising in this proceeding must be considered in the context of the specific tests set out in the *Police Act* noted above. In that regard, the key issues to be addressed are whether or not the Member committed disciplinary breaches of trust by:

(a) entering and searching part of the Complainant's residence; and

(b) detaining and handcuffing the Complainant.

(17) In order to determine whether or not a disciplinary breach of trust has been proven beyond a balance of probabilities, I must first consider the evidence relating to the Member's actions in the context of his legal authority to act in this matter. This will, of necessity, include consideration of the common law and *Criminal Code* provisions relevant to the Member's actions, as well as the *Charter* rights of the Complainant.

(18) A determination of whether or not the misconduct allegations relating to the Member have been proven will be informed by the lawfulness of steps taken by the Member. Of course, findings with respect to those steps cannot by themselves be determinative of the misconduct issues: *Scott v. British Columbia (The Police Complaint Commissioner)*, 2016 BCSC 1970; *Lowe v. Diebolt*, 2013 BCSC 1092, aff'd, 2014 BCCA 280.

(19) Once I have determined the legal authority for the Member's actions, I will then turn to consideration of the more specific tests set out in the *Police Act* governing police misconduct under section 77.

V Witnesses and exhibits

(20) The following witnesses testified in the course of this proceeding:

(a) The Complainant;
(b) Cst. Sean Ward;
(c) Cst. Eric Birzneck;
(d) Sgt. Derek Gilmore; and
(e) The Member.

(21) There were 20 exhibits entered in the proceedings including photographs, transcripts, reports and submissions.

(22) Collectively these comprise the record with respect to these proceedings (the "Record").

VI Position of Public Hearing Counsel

(23) The position of Public Hearing Counsel can be summarized as follows:

(a) In considering the credibility and reliability of the witnesses, Public Hearing Counsel submits that the evidence of the Complainant should be preferred over that of the Member;
(b) It is further submitted that the Member had neither the subjective nor objective grounds to enter the Complainant's home or to detain the Complainant. Furthermore, it is submitted that the Member acted without legal authority in entering the Complainant's home, detaining and handcuffing the Complainant and finally by searching the basement living area of the home;
(c) It is submitted that the Member's actions were at best reckless and not based in ignorance of the law or mistake;
(d) Public Hearing Counsel take the position that there is no evidence to support the position that the Member had lawful grounds to enter or search the Complainant's home, nor to detain the Complainant in any manner. Furthermore, it is Counsel's submission that as a consequence, the Member demonstrated oppressive conduct towards the Complainant by recklessly acting as he did without good and sufficient cause; and
(e) Finally, Counsel maintains that the overall conduct of the Member with respect to this matter demonstrated serious blameworthy conduct, not a simple mistake of legal authority.

VII Position of Commission Counsel

(24) It is the position of Commission Counsel that the Member did not have lawful authority:

(a)to enter the Complainant's residence;
(b)to detain the Complainant;
(c)to handcuff the Complainant; or
(d)to search the basement of the Complainant's home.

(25) Commission Counsel further submits that:

(a) the Member either intentionally, or recklessly, ignored the physical description of the suspect made known to him while detaining the Complainant and searching part of the residence in question; and
(b) the Member violated the Complainant's section 8 and 9 rights under the *Canadian Charter of Rights and Freedoms* by entering the Complainant's residence, detaining the Complainant and searching part of the residence.

(26) Commission Counsel notes that the Member acknowledges that he would not have pursued the investigation if the information from the member of the public reporting stolen property, Mr. Invento, was false or unreliable. However, at the time the Member commenced his efforts to follow a presumed suspect, he could not determine if the presumed suspect:

(a)was wearing a "Helly Hansen" jacket,
(b)carrying an "Apex" utility case,
(c)was a Native Indian male, nor
(d)whether or not the presumed suspect had a short white beard.

(27) In summary, Commission Counsel maintains that the Member did not have good and sufficient cause to enter the Complainant's residence, to detain the Complainant, nor to search the basement and black briefcase therein. Counsel further submits that the Member's conduct demonstrates intention or recklessness evidencing a serious blameworthy element to the Member's actions.

VIII Position of Counsel for the Member

(28) The position of Counsel for the Member can be summarized as follows:

(a) Not all illegal arrests and searches are "abusive" within the meaning of the *Police Act*. The *Police Act* requires oppressive conduct. Mere errors of law or judgment are not necessarily blameworthy;

(b) The officer here had no reason to target the complainant, no ulterior purpose, and he acted in good faith. The standard of reasonable and probable grounds to arrest is lower than a balance of probabilities. Here there were reasonable grounds to arrest or in the alternative, at the lowest, there were borderline reasons. If this was an error of law, it was one that was not motivated by malice or recklessness, and it is not misconduct;

(c) For there to be misconduct, it must be proved that the officer acted intentionally or recklessly. The *Police Act* speaks of misconduct as involving a search or arrest "without good and sufficient cause", and that is a less exacting standard than "reasonable and probable grounds to arrest". Also, the "without good and sufficient cause" standard is not synonymous with "lawful authority". An arrest that may be unlawful, may nonetheless meet the standard of good and sufficient cause;

(d) On the mental element for misconduct, the evidence must establish that the officer knew he or she did not have grounds to arrest, or was reckless about it. If the conduct was unlawful or amounted to a breach of the *Charter*, but the officer acted in good faith in believing he or she had a lawful arrest, that is not misconduct. There must be evidence that the officer arrested or searched, knowing that he or she lacked the grounds to do so, or was reckless as to whether he or she had the grounds;

(e) There must be a "blameworthy element", that is, some form of bad faith, such as an ulterior purpose or malice, which was not in evidence here;

(f) Dealing with "recklessness", there is no recklessness if the officer was not trained on, or up to, the appropriate standard. In the absence of evidence that an officer had received the necessary training, the officer cannot be found to have been reckless. Here, there was no evidence of Vancouver Police Department training with respect to the powers to enter common areas of informal multiple-suite dwelling houses, relative to police powers to enter apartment building lobbies. The situation here, counsel for the Member

says, is analogous to an apartment lobby which an officer would be permitted to enter for the purpose of knocking on interior apartment doors;

(g) The fact the officer had no warrant, and therefore no authority, is not by itself enough to amount to misconduct. The officer did not enter intentionally knowing he did not have the authority, nor was it recklessness. It was based on his understanding of housing arrangements in parts of Vancouver;

(h) The briefcase search was something that arose from the plain-view doctrine. Whether the Member was required to have a warrant or could search on the plain-view doctrine, he did not search it knowing he did not have legal authority. Nor was he reckless in not caring about having authority;

(i) It is open to debate whether the Member arrested the Complainant in a manner that was legal and constitutional. But he had good faith that the plain-view doctrine was available to him, and had a reasonable basis to believe he had the power to arrest for a few seconds, while he searched the briefcase; and

(j) This was not oppressive conduct. It was a brief interaction that occurred in privacy rather than in public, and the Member gave the Complainant an explanation for what he was doing as well as an apology afterwards. There is no question it was done in good faith. If the officer had the ability to arrest, it appears axiomatic that he has the power to place the person in handcuffs at that point.

(29) In the final result, Counsel for the Member submits that misconduct has not been proven against the Member.

IX Evidence not in dispute

(30) The Record does not suggest any dispute with respect to the following facts, namely that:

(a) The Member is an officer with approximately nine years of experience in Greater Vancouver. He has worked the Downtown Eastside, District 3, on general patrol duties and most recently served in an investigative position with the Youth Squad;

(b) The Complainant is a member of the public residing at all material times in East Vancouver;

(c) On November 18, 2015 the Member and Cst. Ward were on general patrol in East Vancouver. Cst. Ward was driving a patrol car with the Member in the passenger seat monitoring dispatch communications. Both were dressed in civilian clothing;

(d) On that date at approximately 5:35 pm, a report was received by Vancouver Police from a member of the public, Mr. Invento. Mr. Invento advised that some disc jockey musical equipment had been stolen from his home. He reported that he had located an ad for part of the stolen system, a microphone, showing it for sale on Craigslist;

(e) Mr. Invento had responded to the Craigslist ad and ultimately met the seller at a 7-11 located at the corner of Rupert and East 22nd Avenue in Vancouver. After viewing the microphone, Mr. Invento told the seller that he was leaving to obtain funds and would return to complete the purchase. In fact, Mr. Invento contacted police seeking assistance in retrieving his property;

(f) Cst. Ward and the Member received a dispatch to deal with Mr. Invento's report at approximately 5:42 pm. By that time of day, it was dark;

(g) The Member contacted Mr. Invento and Cst. Ward met with him in response to the dispatch;

(h) Between the two officers, it was decided that the Member would leave the patrol car and walk to the 7-11 to meet the seller instead of Mr. Invento. The goal from the outset was not to make an arrest, but rather to return the equipment to Mr. Invento. It was a civil recovery rather than a criminal investigation;

(i) The details concerning the description of the seller were provided in the dispatch received by the officers. The description of the subject of interest was that of a slender, native Indian male, with a short white beard, approximately six feet tall, between late 30's and early 40's, wearing a dark Helly Hansen jacket and baseball cap carrying a small, black Apex utility case standing outside a 7-11 store at East 22nd Avenue and Rupert Street (the "Suspect Description");

(j) As the Member approached the 7-11, he identified an individual of interest. There is no dispute in the evidence that the individual in question was a slender male wearing a dark

hooded jacket and baseball cap waiting outside the 7-11 with a small briefcase (the "Suspect");

(k) From across the street approximately 60 to 70 away, the Member noted that almost immediately, the Suspect left the store and started walking away. The Member decided to follow on foot with Cst. Ward on a parallel track in the patrol car. Radio contact was maintained between both officers as the Member followed the Suspect;

(l) As a result of a concern over a possible loss of visual contact, the officers jointly decided to amend their plan and detain the Suspect;

(m) However, before that could occur, the Member reported to Cst. Ward that the Suspect had turned down an alleyway in the dark. As a result, the Member lost visual contact of the Suspect;

(n) The Member continued down the alleyway as Cst. Ward moved to cover the alley exit and ultimately the adjacent roads, including East 25th Avenue;

(o) Neither officer saw any sign of the Suspect. However, the Member came to the conclusion that the Suspect had to have entered one of two residences fronting on East 25th Avenue, either 3398 or 3390;

(p) The facts surrounding the Member's decision to isolate his search are in issue. However, it is not disputed that ultimately the Member approached a back door at the rear of the Complainant's two-story home at 3390 East 25th Avenue ("3390"), approximately five minutes after losing sight of the Suspect;

(q) The Member first knocked on that door and rang an adjacent doorbell without response. The Member then decided to test the door to see if it was locked. It was not;

(r) The Member decided to open the rear door and enter what he later learned was the Complainant's residence. The Member had no warrant to enter, nor was he in hot pursuit of the Suspect at that point, having lost sight of the subject at the alley entrance at least five minutes before approaching the Complainant's home;

(s) On entry, the Member noted that the door opened in to a laundry area with a further interior door closed in front of him. There was light showing under the second door;

(t) Almost immediately, the interior door opened and the Complainant entered challenging the Member as to who he was and why he was in the laundry room. The Member, in plain clothes, produced a police badge advising that he was an officer searching for a suspect. The Complainant challenged the Member repeatedly on why he was in the laundry room;

(u) The Member was not sure that the Complainant was the Suspect he had been following. He believed that the Complainant's size and general description were consistent with the Member's general perception of the Suspect. However, he had not seen the Suspect's face so as to be able to identify the person. There was no jacket in evidence, no black briefcase apparent and the Complainant's demeanor was completely different from what the Member had expected in the circumstances;

(v) Much of what happened next is in dispute, however, it is not disputed that after a brief exchange, the Complainant was detained by the Member, turned and placed in handcuffs;

(w) It is also not disputed that immediately subsequent to the handcuffing of the Complainant, Cst Birzneck entered the laundry room followed almost immediately by Cst. Ward. As Cst. Birzneck moved inside the room, he took control of the Complainant following the Member's direction;

(x) Again, the circumstances of what next took place are in dispute. However, it is not disputed that Cst. Ward and the Member moved further into the basement area of the Complainant's residence, without his consent, to search a black case seen sitting on the floor 20 -30' away from the second laundry room door after the interior laundry room door fully opened;

(y) It was quickly determined that the case did not contain a microphone or anything else relevant to the officers' search made on Mr. Invento's behalf. As such, both officers moved back to the laundry room and ultimately released the Complainant from handcuffs.

(31) Beyond these matters, most of the facts are in dispute.

X Credibility and reliability assessments with respect to evidence in dispute

(32) I have considered the evidence of all parties with respect to the evidence in dispute as set out in the Record.

A The Complainant: credibility and reliability

(33) I have no credibility or reliability concerns with respect to the evidence of the Complainant.

(34) The Complainant explained that in the early evening of November 18, 2015, he was working at home in his basement office at 3390. He had been home since approximately 3 pm and had moved back and forth to his van parked in the back carport leaving the back door to the home unlocked.

(35) The Complainant lived at the residence with his spouse, Ms. Dunnett. No other persons resided in or had access to the home nor were there any suites in the home.

(36) Just before 6 pm Ms. Dunnett had come downstairs to say goodbye as she was leaving for a yoga class. She moved up the stairs and left the home through the front door.

(37) Next, the Complainant heard the doorbell at the back door. He does not recall hearing a knock, although the rear entry door was separated from the basement office area by an interior door that was closed.

(38) The Complainant moved to respond to the doorbell, however, as he entered the laundry room, he found a dark figure standing there in plain clothes with the exterior door ajar. The appearance of this person scared the Complainant who immediately asked what the person, later found to be the Member, was doing in his house.

(39) The Member identified himself as a police officer and displayed a badge, however, the Complainant remained uncertain because of the officer wearing plain clothes and appearing in his house for no apparent reason.

(40) The Complainant continued to press the Member for an explanation as to why he was in the house. This exchange was reported to be brief, less than three minutes, and took place within the confines of the relatively small laundry room.

(41) The next interaction reported by the Complainant resulted in the Member arresting the Complainant. The Complainant's understanding of the reason for his arrest was "for being combative".

(42) The Member turned the Complainant and applied handcuffs. The Complainant reported that shortly after the handcuffs were applied, two other officers arrived, one in regular uniform.

(43) The next reported action by the Complainant was the movement by the Member and another plain clothes officer through the laundry room and into the adjacent basement office area. At approximately the same time, the Complainant testified that Ms. Dunnett came down the stairs to see what had happened to her spouse. As she reached the bottom of the stairs, the Complainant noted that the two officers returned from their sweep of the basement and joined the uniformed officer in the laundry room.

(44) Next, the Complainant reported that the Member asked for his identification which was retrieved by Mr. Dunnett. The driver's license was passed by the Member to the uniformed officer who left only to return shortly thereafter. At that point the Complainant testified that he was then turned again and released from handcuffs, however, before that took place, Ms. Dunnett was asked to take a photo, which the Complainant reported she did.

(45) The Complainant denies that the officers apologized for the incident. He reports that as soon as the handcuffs were released, he insisted that the officers leave the home immediately.

(46) As the door closed, the Complainant reported being startled, scared, agitated, worried and concerned by the events that had seen the officers in his home.

(47) I find that the Complainant was a credible and reliable witness unshaken on cross examination. He provided detailed and comprehensive evidence on the issues in dispute. He was also frank in acknowledging areas of evidence he did not recall. I find that the Complainant was an honest and trustworthy witness who carefully and reliably described his encounter with police on the evening of November 18, 2015.

B- Sgt Gilmore: credibility and reliability

(48) Similarly, I have no concerns with respect to the evidence of Sgt. Gilmore. I find that he too was a credible and reliable witness outlining his role in this matter.

(49) Sgt. Gilmore was responsible for investigating the Member's conduct in relation to the Complainant.

C- Cst. Birzneck: credibility and reliability

(50) Cst. Birzneck was a credible witness, however, he had a limited ability to fully observe and report on interactions with the Member. He only participated in a limited portion of the events unfolding with the Complainant, some from outside the home. Cst. Birzneck also had some difficulty in recalling specific details and the chronology of events.

(51) Cst. Birzneck reported that he initially responded to a broadcast for a uniformed officer to attend at 3390 in connection with a stolen property investigation being undertaken by the Member and Cst. Ward. On arrival at the front of 3390, he testified that he was directed by Cst. Ward to the rear of the residence where the Member was working.

(52) On arrival at the rear of the home, Cst. Ward reported that he approached the open back door of 3390 remaining outside. Cst. Ward advised that he could see the Member engaged with another male inside. Shortly thereafter, Cst. Ward reports that the Member handcuffed the other male.

(53) There are several aspects that Cst. Birzneck could not recall in terms of the next interactions between the parties. He was equivocal and uncertain on the movements of key individuals, observations made and conversations that might have taken place. Cst Birzneck's evidence, while honest and forthright, was often characterized by uncertainty and the response *"I don't recall"* when pressed for details.

(54) I find that Cst. Birzneck's inability to recall specific material details concerning the Member and others affected his reliability as a witness.

D Cst. Ward: credibility and reliability

(55) Cst. Ward was, of course, the Member's partner on the evening of November 18, 2015. His evidence raises concerns as to his reliability and credibility in recounting the events of that evening.

(56) Specifically, on one of the most important areas of evidence, the Member's knowledge concerning the status of the Complainant's home before the Member entered, Cst. Ward was inconsistent in his evidence. In direct testimony and cross examination by Commission Counsel, Cst. Ward was clear that the Member had been told the Complainant home was only occupied by Ms. Dunnett and her husband, the Complainant. He further confirmed that such information had been relayed to the Member before entry at the back door.

(57) However, on cross examination by Member's counsel, Cst. Ward was less sure. Asked if he could say with certainty that he had passed on the information concerning Ms. Dunnett and her husband having access to the whole house to the Member, Cst. Ward demurred, saying he could not say so with certainty. This material inconsistency raises concerns as to the credibility and reliability of Cst. Ward's evidence.

(58) A further concern arises from Cst. Ward's lack of notes. Using much the same justification as the Member, Cst. Ward found no time to make contemporaneous notes during the dealings with Mr. Invento, the Suspect or the Complainant. Indeed again, the duty statement and general occurrence report completed over the next two months were largely based on information provided by the Member and, of course, long after both officers knew of the Complainant's complaint. The lack of independent notes of any kind raises a concern as to the reliability of Cst. Ward's evidence.

(59) Cst. Ward's evidence was also characterized by several acknowledgments that he could not recall material facts. These gaps raise further concerns as to Cst. Ward's ability to observe, recall and report on developments concerning the allegations which are the subject of these proceedings, and hence, his reliability as a witness.

(60) In summary I cannot find that Cst. Ward was a credible or reliable witness.

E The Member: credibility and reliability

(61) The Member was a less than forthright witness. He was selective, equivocal and unreliable in his recounting of events, at times exaggerating and minimizing evidence relevant to his involvement.

(62) When pressed on cross examination concerning inconsistencies in his evidence, the Member often resorted to an admission that he did not recall specific material details. The Member also exaggerated or minimized evidence at material points in his testimony. In short, the Member was not a credible or reliable witness.

(63) Specific examples raising credibility concerns are as follows:

(a) An important factor in this case relates to the Member's knowledge before he entered the Complainant's home. The Member denies having been told by Cst. Ward, by radio, before the Member attempted entry, that he was in discussions with a female who had left 3390 who had confirmed that:

(i) the home in question was occupied solely by her husband and herself; and

(ii) that they had exclusive occupation of the whole residence.

This raises a credibility concern because Cst. Ward had been in constant radio contact with the Member since the surveillance began at the 7-11. This included:

(iii) Contact throughout the following of the Suspect;

(iv) Contact with the Member as he approached the alley;

(v) Contact by the Member to Cst. Ward advising of the Member's conclusions with respect to 3390 being the most likely home for the Suspect factoring in the observations and conversation that the Member had had to that point;

(vi) Discussions with the Member and Cst. Ward as to their expectations of the structure of 3390, i.e., a suited home;

(vii) Discussion prior to entry confirming that Cst. Ward had intercepted and was questioning a female who had exited from the front of 3390;

(viii) Near simultaneous transfer of information from Cst. Ward to the Member standing outside the basement door and before entry had been attempted, confirming that the female and her husband

were the sole occupants of the home, that her husband had just returned home;

(ix) During that conversation and prior to entry, the Member broadcast a request for a backup police officer and Cst. Ward continued his questioning of the female; and

(x) During that further questioning, Cst. Ward learned that the female denied her husband would be engaged in anything to do with stolen property and advised he would not be happy to have police knocking at the back door as he "hates police";

(b) As noted, the Member denied receiving the information as to the exclusive occupants of 3390 before trying the door and entering 3390. That position conflicts with the Member's Duty Statement and General Occurrence Report, which noted that the female had told Cst. Ward, relayed to the Member by radio, that her husband was downstairs, indicating access to both floors of the home. The Member's explanation for that inconsistency is that he misspoke. There is no ring of truth to the position of the Member that he heard all of the transmissions of Cst. Ward with the exception of the most important report, that the Complainant home was effectively a single occupancy residence. I find that the Member's evidence is this regard assists in justifying his argument for entry to the rear of 3390, however, it does not have the ring of truth;

(c) The Member's evidence is that he took no notes during the interaction with Mr. Invento, the following of the Suspect, or the entry to either 3390 or 3398. The only reports he prepared were the general occurrence and duty reports developed hours after the incident arose and after both the Member and Cst. Ward knew that a complaint had been made by the Complainant;

The argument of the Member is that it was unsafe and impractical to prepare notes while in pursuit of the Suspect. There was clearly no time to take notes once the Member entered 3390. Events moved quickly and precluded any contemporaneous note taking. Furthermore, it is submitted that the policy of the Vancouver Police Department does not require concurrent notes in all circumstances.

Notwithstanding the foregoing, I find that the Member's lack of concurrent notes prior to the entry of 3390 detracted from the reliability of his evidence, particularly where it conflicted with the Complainant and other evidence in the Record. The following factors are of relevance in considering the significance of the Member's lack of notes:

(i) First, this was not a criminal investigation but rather a civil recovery. As such, it is unclear how the preparation of ongoing notes would impair the Member's objectives as he approached the rear of 3390;

(ii) Second, before making the serious decision to enter the Complainant's residence, the Member had at least five minutes to chronicle all the developments and their timing, to confirm the grounds the Member felt he had to enter. This was the time between the last sighting of the Suspect and the decision to enter 3390. Knowledge of who lived in the home was critical in this case and there are no records from the Member beyond the general occurrence report and duty statement concerning that issue, both prepared long after the fact; and

(iii) Third, there was no urgency to enter the home negating time to make notes prior to entry.

The absence of any concurrent notes (or even notes made soon after the fact), even though apparently not required by Vancouver Police policy, adds another element of uncertainty as to reliability of the Member's evidence on critical issues;

(d) There is a conflict in the Member's evidence as to his actual beliefs on approaching the Complainant's home at 3390. During this public hearing, the Member repeatedly took the position that he believed for various reasons that the home in question was suited, perhaps with multiple suites. The theory advanced was that with shared space often associated with multiple dwelling units, an argument was created justifying entry at a "public back door". During testimony in this hearing the Member testified that he thought it was shared space so he could enter. However, he told an earlier discipline hearing Nov 4, 2016:

> I didn't want [sic] up to the house, sir, being like this is a shared space I'm going to walk right in, that's not what I thought. I walked up thinking it was a house.

The Member contradicted himself on that point in his evidence in these proceedings, insisting he thought that 3390 was a suited residence, raising a credibility concern as to his actual beliefs and actions;

(e) The Member's evidence concerning the arrest of the Complainant was equivocal and inconsistent. The Member vacillated between belief that he did not have grounds to arrest the Complainant to confidence that he did have such grounds. These conflicts raise concerns as to the reliability of the Member's evidence;

(f) The Member's evidence was characterized by several broad generalizations that supported his argument that entry to the residence at 3390 was lawful. These generalizations included observations based on the Member's life experience that:

(i) 3390 was a rental as result of the unkempt lawn and older Astro van parked in the back carport;
(ii) The Suspect was more likely a renter than a home owner;
(iii) 3390 was most likely an owner/tenant upstairs with another one or more tenants downstairs;
(iv) The only reasonable inferences that could be drawn from a failure to respond to the knock on the downstairs outside door were either that it was the entry to a shared public space, or that the Suspect was avoiding police;
(v) An unlocked outside door equates to a shared living space and a public entry point; and
(vi) It was necessary to enter after the knock to recover Mr. Invento's equipment, notwithstanding the fact that the Member was not engaged in a criminal investigation but rather a civil recovery.

I find that these and many other generalizations were post-entry justifications for what transpired. There is no ring of truth to the same in the context of justifying entry to the Complainant's home. In each case the assertions made were no more than guesses based on the Member's life and professional experiences. They were certainly not observations as to a state of affairs supported by fact from an experienced police officer. The Member's credibility was strained in attempting to draw together these disparate threads to create grounds for lawful entry to 3390;

(g) There is a conflict between Cst. Ward and the Member as to what they did with the briefcase in the Complainant's basement. The Member maintains that he approached it with Cst. Ward, opened the top of the case, saw papers but no DJ equipment and promptly closed the lid exiting the room. Cst. Ward denies that either of them touched the briefcase. This inconsistency, while minor, raises a further concern as to the Member's credibility and reliability of his evidence;

(h) There is an inconsistency in the Member's evidence as to whether or not he could see the Suspect's face at any point, and whether or not the Suspect was bearded. At some points in evidence in direct and cross the Member confirmed he could not see the subject's face at all. At other points, the Member maintained that he could see the face, but could not see a beard. These inconsistencies raise reliability concerns as to Member's ability to accurately observe and recall what he saw in his encounters with the Suspect at night from distant vantage points;

(i) With respect to the "briefcase", there are material inconsistencies between the various descriptions of the "suitcase" given by the Member in these proceedings, earlier statements and other related proceedings. Before Sgt. Gilmore March 10, 2016 the Member described the case observed at the 7-11 as "a black, hard plastic suitcase approximately six centimeters across". However, it was also described as being "a lot skinnier than the suitcase the Complainant had". As such, it appears that the Member knew when he entered the basement of the Complainant's home to search the briefcase in the home that it did not in fact resemble the case he had seen with the Suspect. The Member refused to acknowledge in cross examination that the case in the Complainant's home was vastly different than that first observed with the Suspect. Considering the earlier evidence of the Member, that refusal does not have the ring of truth and raises a credibility concern;

(j) When questioned about the knock on the back door and use of a doorbell, it was suggested to the Member in cross examination that the purpose of such was to seek permission to enter the home in question. The Member disagreed, with no further explanation. The Member's response defies logic and does not have the ring of truth, again raising a concern as to the Member's credibility;

(k) Finally, there are several important aspects of the Member's evidence that were couched in the phrase "I Don't recall". This includes:

i. Not recalling whether or not backup officers were requested to assist with the Invento call;
ii. Not recalling whether or not detailed reasons were provided to Cst. Ward for settling on an approach to 3390 as the most likely target house;
iii. Not recalling the specific characteristics of the backdoor entry to 3390;
iv. Not recalling specifically at what point Cst. Ward arrived at the back door; and

v. Not recalling how or under what circumstances the Complainant's identification was produced or where it went before Cst. Birzneck took it for follow up.

Collectively, these gaps raise reliability concerns as to the evidence of the Member.

(64) In summary, I do not find that the Member was either a credible or reliable witness. I reject his evidence where it conflicts with that of other witnesses, particularly the Complainant, on the basis that it lacks credibility and is unreliable.

XI Findings of fact on evidence in dispute

(65) Having considered the entire Record and the credibility of the witnesses noted therein and the reliability of their evidence, I find with respect to the evidence in dispute that:

(a) The Member knew on dispatch concerning the Invento matter that the person he was seeking was comprehensively described in the Suspect Description. This was the person the Member was seeking;

(b) However, the Member also knew at the outset of his encounter with the Suspect that the person he saw did not meet many of the elements of the Suspect Description. In particular, from his initial vantage point in the dark some 60-70 feet away from the 7-11 store, the Member could not confirm:

(i) that the person he was observing was a Native Indian male;
(ii) that the person had a short white beard;
(iii) that the person had light skin;
(iv) that the person was wearing a Helly Hansen jacket;
(iv) that the person was carrying an Apex utility case; or
(v) any facial features of details of the person in question other than a general perception that the person might be slender;

(c) The Member followed as the Suspect disappeared down a dark alley between 25th and 26th Avenues travelling east towards Cassiar Street. At this point both Cst. Ward and the Member had lost sight of the Suspect;

(d) Approximately five minutes after losing sight of the Suspect, the Member had explored the alley and was unable to locate the Suspect. Cst. Ward had confirmed that the Suspect did not exit the alley at Cassiar, or appear on either East 25th or 26th Avenues;

(e) The Member settled on two residences, 3390 and 3398 East 25th Avenue, as the most likely residences for the Suspect to have entered. He did so by eliminating other homes with closed rear yard access and in conversation with a Telus worker in the back yard of 3398;

(f) The Member and Cst. Ward were in constant contact by radio concerning developments, and jointly concluded that 3390 was the most likely target of their investigation. Cst. Ward remained in his police car, and the Member approached the rear door at 3390;

(g) The rear entry to 3390 had no unique characteristics which might identify the entry as a separate suite, such as mailboxes, multiple doorbells or a distinct address. Indeed, I find that the Member made no observations of anything concerning the rear entry of the Complainant's home other than the fact that the door lay at the bottom of a short flight of stairs with a doorbell and adjacent exterior light;

(h) At that point, Cst. Ward, positioned immediately in front of 3390, noticed a female exit the home and move to a car. He decided to engage the female in conversation concerning the home and its residents. Cst. Ward learned that the woman was Ms. Dunnett, and that she resided at 3390 with her husband. The Member was apprised of this development and updated as the discussion continued. During this process, the Member made a radio request for uniformed backup before he knocked on the rear door;

(i) The Member was specifically advised that Ms. Dunnett resided at 3390 with her husband and that they had access to the full home;

(j) Throughout this time, the Complainant was downstairs at 3390 working on his computer. He had left the back door unlocked as he had been back and forth to his truck parked in the carport that day;

(k) Notwithstanding the advice from Cst. Ward, the Member knocked on the rear door and rang the adjacent doorbell;

(l) Getting no response, the Member next tried the rear door handle and found that it was unlocked. The Member then opened the door and entered a darkened area that was obviously a laundry room with a finished floor. Another interior door lay approximately seven feet away, light emanating below the door from the room beyond. The exterior door was left partially open to the lane area;

(m) After the Member entered the laundry room almost immediately he was confronted by a male entering through the interior door. The male, the Complainant, was light skinned, slender and approximately 40 years of age. He did not, however, have a beard nor was there any apparent indication of native Indian ancestry. Furthermore, The Complainant was not wearing a Helly-Hansen Jacket, nor any of the other clothes observed on the Suspect and he was not carrying a black Apex utility case;

(n) The Complainant was shocked and afraid with the arrival of this stranger in his home. He acknowledges that the stranger in plain clothes, the Member, flashed something resembling a badge and began to explain that he was searching for a suspect. Almost immediately the Complainant demanded to know why the Member was in the house, while at the same time the Member continued to attempt to explain that he was a police officer searching for stolen property and following a suspect last seen in the alley;

(o) As noted earlier, the Complainant did not match the Suspect Description on several important points, particularly native Indian ancestry and a white beard. The Member was immediately aware of those facts. The Complainant also did not meet the limited characteristics of the Suspect observed by the Member. Specifically, the Complainant had no Helly Hansen jacket or baseball cap, nor he was carrying a black case;

(p) The Complainant told the Member that he had been home all night, which conflicted in part with information that had been relayed from Cst. Ward arising from Ms. Dunnett;

(q) The Complainant continued to demand an explanation from the Member as to why he was in the home. I am satisfied that at this stage the parties were talking over each other at several points;

(r) As the encounter continued, the Member very quickly decided to end this discussion and informed the Complainant that he was "under arrest for being combative". I find that the

Complainant had not raised his hands or physically threatened the Member in any way prior to his detention. The Member turned the Complainant around and placed handcuffs on his wrists. At this point I find that the Complainant was reasonably certain the intruder was a police officer;

(s) The handcuffs stopped the Complainant's demands for an explanation from the Member and immediately thereafter Cst. Ward and Cst. Birzneck arrived in the laundry room;

(t) Cst. Birzneck was tasked with taking care of the Complainant as Ms. Dunnett came down the stairs and into the laundry area fully opening the interior door. Beyond the door could be seen a lit room with furniture, a desk and a black case at the end of a couch;

(u) I find that the case observed by the Member in the Complainant's basement was black, but patently made of a different material and narrower than that observed with the Suspect. As such I find that the Member knew that the case was qualitatively different from that described by Mr. Invento and that observed with the Suspect;

(v) Cst. Ward and the Member moved to enter the basement area beyond the interior door leading from the laundry room in order to examine and search the black case. Neither officer had permission to enter any of these areas or search the briefcase;

(w) Cst. Ward and the Member walked over to the briefcase, quickly looked inside and determined that it was not the case they were seeking;

(x) Both officers began to return to the laundry room. The Member next asked the Complainant, still in handcuffs, for identification. The Complainant asked Ms. Dunnett to retrieve his driver's license which she did, and then passed to the same to the Member;

(y) The Member gave the driver's license to Cst. Birzneck who then returned to his patrol car to run the identification. Cst. Birzneck returned and very shortly thereafter the Complainant was released from handcuffs by the Member. The Complainant's driver's license was returned to him;

(z) The Member attempted an explanation for what had taken place and offered an apology, however, the Complainant did not want to hear further from any of the officers and insisted they leave immediately, which they did;

(aa) Subsequent to the search of 3390, Cst. Ward and the Member attended to the adjacent residence at 3398 East 25th Avenue. The officers knocked on the rear door, were told it was a suited residence, obtained permission to enter a common area, and knocked on a residence door. At that location the officers found both the Suspect and the briefcase which had been seen by the Member. The microphone was voluntarily surrendered to police for return to Mr. Invento; and

(bb) The Complainant called in a complaint to Vancouver Police concerning the entry to his home shortly after the officers left.

XII The legality of the Member's actions

(66) The next stage of analysis requires an examination of the legality of the actions taken by the Member.

(67) As noted above, illegality or acting without lawful authority does not in and of itself constitute misconduct. However, consideration of the authority of the Member to act as he did, informs the analysis of the alleged misconduct under section 77 of the *Police Act*.

A - The entry to 3390

(68) At the time the Member first observed the Suspect, I find that he did not, contrary to his assertion, have reasonable and probable grounds to arrest the individual in question. The limited similarities between the Suspect Description and the observations of the Suspect made by the Member could not have warranted an arrest or detention at that point. The Member had, at best, a suspicion warranting an investigative detention followed by more detailed observations and inquiries.

(69) As such, at the time the Member approached the rear entry of 3390, I find that the following factors applied:

(a) The Member was primarily engaged in a civil recovery of property as part of his duty as a police officer to keep the peace. The Member's dominant role was not to pursue a criminal investigation;

(b) The Member had observed a person meeting some of the Invento suspect descriptors, but far from all. At best, he had a suspicion that the Suspect was the person he was seeking. The Member had no grounds prior to entry to arrest the Suspect with the information he had at that point even if he had been located in 3390;

(c) The Member had followed the Suspect through several streets and lost sight of him as he entered the alley area behind the 3300 block of East 25th Avenue in Vancouver. More than five minutes had elapsed before the Member approach the rear of 3390. Under no circumstances was the Member engaged in "fresh" or "hot" pursuit of any criminal suspect warranting entry under that ground: *R. v. Feeney*, [1997] 2 S.C.R. 213;

(d) The Member had no reasonable grounds to suspect that entry into 3390 was necessary to prevent imminent bodily harm or death to any person, nor to prevent the imminent loss or destruction of evidence relating to an indictable offence;

(e) There was no urgency or immediacy compelling access to 3390 beyond routine inquiries at the doorstep by officers;

(f) The nature of 3390 and adjoining homes was universally residential. There were no apartments or commercial buildings nearby;

(g) The observations of the Member, Cst. Ward and Cst. Birzneck concerning the existence of other Vancouver residences with suites and multiple suites did not establish a proper factual foundation to conclude that the rear door to 3390 was anything other than a private entrance. The Member's entry decision based, in part, on those assumptions was both objectively and subjectively unreasonable. Any subjective belief of the Member concerning this issue was not supported by the objective facts. No reasonable officer with the Member's experience would conclude the Member's position was objectively reasonable. At best, those observations were generalizations concerning Vancouver housing stock that provided no objective foundation for any entry. In no sense could those observations and assumptions contribute to the creation of reasonable grounds warranting an unauthorized entry to 3390;

(h) The Member's assertion that a pattern of lights going on and off at 3390 somehow justified a conclusion that a person had only recently arrived home is without a foundation in logic. There are many possible explanations concerning the pattern of lights in the home, including the most obvious, that the lights were likely deactivated by

Ms. Dunnett as she left 3390 through the front door. Ms. Dunnett's recent presence in the residence was known to the Member before entry;

(i) Similarly, the fact that an older Astro van was parked in the carport of 3390 and the status of the lawn provided no reasonable grounds to conclude that the rear door of 3390 was a public entry point to the home. There is simply no reasonable objective nexus between that observation and a conclusion that renters may occupy a basement suite;

(j) I find that the rear entry door of 3390 was characterized by a light above the door, a doorbell and little else. There was no obvious or apparent lobby, discernable public entry or any indicia confirming the existence of multiple suites with a public access point to 3390. In short, there was nothing whatsoever that would provide a basis to abrogate the fundamental rights of a home's occupant to security of their home from unreasonable entry and search as guaranteed by section 8 of the *Charter of Rights and Freedoms*;

(k) The Member did not have permission to enter 3390 nor did he have a warrant authorizing his entry;

(l) Prior to opening the rear door to 3390:

(i)The Member knew that Ms. Dunnett and her husband occupied the entire residence at 3390; and

(ii)The Member tested the rear door finding it unlocked and equated that status with a public access point or an implied license to enter. Again, there is no foundation in law for any such presumption. It is a generalization made without a basis in fact or law and provided no authority or grounds for the Member to open the door and step into the laundry room;

(m)In summary, prior to entry of 3390 by the Member, I find that the cumulative result of the various observations made and conclusions drawn by the Member established no objectively reasonable grounds for his next actions. The facts known subjectively by the Member prior to entry to 3390 substantiated nothing more than a weak suspicion that the Suspect had entered that home, and as noted, even the Suspect's relevance to the Invento dispatch was questionable.

(70) The words of Cory J. in *R. v. Silveira*, [1995] 2 S.C.R. 297, at paras. 141 and 148 concerning the sanctity of private home are instructive:

> [141] [The home] must be the final refuge and safe haven for all Canadians. It is there that the expectation of privacy is at its highest and where there should be freedom from external forces, particularly the actions of agents of the state, unless those actions are duly authorized. This principle is fundamental to a democratic society as Canadians understand that term.
>
> [148] The home is the one place where persons can expect to talk freely, to dress as they wish and, within the bounds of the law, to live as they wish. The unauthorized presence of agents of the state in a home is the ultimate invasion of privacy. It is the denial of one of the fundamental rights of individuals living in a free and democratic society. To condone it without reservation would be to conjure up visions of the midnight entry into homes by agents of the state to arrest the occupants on nothing but the vaguest suspicion that they may be enemies of the state. This is why for centuries it has been recognized that a man's home is his castle.

(71) Having considered the foregoing, I find, therefore that the Member's entry to 3390 was made without lawful authority and in breach of the Complainant's rights under section 8 of the *Charter*. This constitutional provision protects against any unreasonable search or seizure by police. On the facts of this case, I find that the unlawful entry into 3390 by the Member was an unreasonable search in violation of section 8 of the *Charter*.

B - The detention and handcuffing of the Complainant

(72) Immediately after entry to the laundry room at 3390, the Member came face to face with the Complainant. At page 41 of the transcript of the Member's evidence on January 12, 2018, the Member acknowledged in relation to a question as to whether or not he was dealing with the Suspect that: "I did not believe I had grounds to arrest because I was not sure he was the same person."

(73) The Member further explained that on seeing the Complainant, he was unsure as to whether or not he even had the correct suspect.

(74) The Complainant was demanding that the Member explain what he was doing in the house. However, the Complainant made no overt physical threats to the Member, made no moves or gestures toward the Member, nor did he raise his voice in a harsh manner.

(75) Notwithstanding these factors, the Member made a decision to detain the Complainant advising him that he was "under arrest for being combative". The Complainant was instructed to turn around, which he did without dispute. The Member then applied handcuffs. The Complainant ceased his demands for explanation as to the Member's presence and complied with directions.

(76) There was no authority to arrest the Complainant arising under section 495 of the *Criminal Code*. The Member had no reasonable grounds and probable grounds to believe that the Complainant had committed or was about to commit an indictable offence. Again, all that existed was a weak suspicion of a suspect who did not appear to be the person before the Member. Nor was the Complainant committing a criminal offence when arrested. Being "combative" is not an offence known to law, even if that term could be said to describe the Complainant at the time. The Complainant's actions were simply the reasonable and justifiable actions of a homeowner dealing with an unknown intruder into his home. Finally, there was no evidence of any warrant extant relating to the Complainant, either before arrest or subsequent to Cst. Birzneck's check of the Complainant on the police computer.

(77) Considering all of the foregoing, I find that the Member had not subjectively turned his mind to conclude that he had reasonable and probable grounds to detain the Complainant. Furthermore, I cannot find that any reasonable person, or police officer with the Member's training and experience, could conclude objectively that reasonable and probable grounds existed to arrest the Complainant or, indeed, the Suspect, prior to entry into 3390. Before the detention of the Complainant, nothing had changed to vary those conclusions other than increased uncertainty as to the Complainant's connection, if any, to the Suspect. Furthermore, I find that there was nothing in the laundry room encounter with the Complainant that increased the Member's grounds for detaining the Complainant by changing the Member's subjective beliefs or the objective analysis of reasonable and probable grounds for detention.

(78) In the result, the arrest was unlawful and in breach of the Complainant's section 9 rights under the *Charter*: *R. v. Storrey*, [1990] 1 S.C.R. 241. Section 9 of the *Charter*, as noted earlier, provides: "Everyone has the right not to be arbitrarily detained or imprisoned."

C – Search of the interior room and briefcase

(79) Shortly after the Complainant's arrest, Ms. Dunnett opened the laundry room door. At the Complainant's request she assisted in locating his driver's license to comply with a demand made by the Member.

(80) As the door opened, the Member and Cst. Ward could see into the room beyond. As noted in the findings of fact above, the officers saw a black case adjacent to a couch resting 20 to 30 feet away.

(81) The Member knew that the case was a different material and slimmer than that seen with the Suspect outside the 7-11. The case in the Suspect Description was hard plastic and larger than that in the Complainant's basement. Nonetheless, seeing the case in the basement living area, the Member and Cst. Ward entered the adjacent room, again without consent or a warrant, and moved over to examine the case. It was quickly apparent that the case did not contain the microphone being sought nor did it have the characteristics of the item described in the Suspect Description.

(82) The expanded entry and search of the Complainant's home and the area of the briefcase was made without lawful authority or reasonable or probable grounds viewed either objectively or subjectively. Much like the entry to the laundry room, the Member simply acted on impulse without due consideration of all relevant facts, and with a complete lack of legal authority to complete his civil recovery objectives.

(83) I find that the Member's search of the interior living area of 3390 was made without lawful authority and in breach of the Complainant's rights under section 8 of the *Charter*. As noted earlier, this constitutional provision protects against any unreasonable search or seizure by police. On the facts of this case, I find that the unlawful search of the basement area of 3390 by the Member was an unreasonable search in violation of section 8 of the *Charter*.

D – Conclusion: the legality of the Member's actions

(84) I have found that the Member acted without lawful authority in entering and searching the Complainant's home at 3390, lacked any grounds to detain and handcuff the Complainant and, finally, breached the Complainant's rights under sections 8 and 9 of the *Charter*.

(85) A finding of such unlawful conduct does not, of course, by itself, establish proof of misconduct: *Scott v. Police Complaint Commissioner, supra*; *Lowe v. Diebolt, supra*. It does, however, contribute to and inform a further analysis of the misconduct issues arising under section 77 of the *Police Act*.

(86) I will next turn to consider all of the foregoing in the context of the relevant provisions of the *Police Act*.

XIII *Police Act*, section 77 – alleged disciplinary breaches of public trust and misconduct

(87) In considering whether or not misconduct has been established with respect to the Member, I have been guided by the principles established by earlier case law on the subject, including the Supreme Court of Canada decision in *Hill v. Hamilton Wentworth Police Services Board*, [2007] 3 S.C.R. 129. I have also noted the additional authorities referenced at pages 14 to 16 of the decision of Adjudicator Baird Ellan in the *Tiwana* Public Hearing (B.C. *Police Act* - PH. 2014-2):

> In *Lowe v. Diebolt, supra*, the Chambers Justice, Myers J., held that "intentionally" in section 77(3)(a)(ii) modifies the mental element in paragraph (B) of "without good and sufficient cause" and found that the officer's ignorance of case law requiring her to have grounds to arrest before strip-searching a woman she had detained did not satisfy the mental element of the allegation of misconduct;
>
> In *Berntt* [*Berntt v. Vancouver (City)*, 1999 BCCA 345] and *Anderson v. Smith*, 2000 BCSC 1194 the relevant law is summarized as follows at para 51:
>
>> [51] Consideration must be given to the circumstances as they existed at the time. Allowance must be made for the exigencies of the moment,

> keeping in mind that the police officer cannot be expected to measure the force with exactitude: *Wackett v. Calder* (1965), 51 D.L.R. (2d) 598 at 602 (B.C.C.A.); *R. v. Botrell, supra* at 218; *Allrie v. Victoria (City)*, [1993] 1 W.W.R. 655 at para 20 (B.C.S.C.); *Levesque v. Sudbury Regional Police Force*, [1992] O.J. No.512 (QL) (Ont. Gen. Div); *Breen v. Saunders* (1986), 39 C.C.L.T. 273 at 277 (N.B.Q.B.); *Berntt v. Vancouver (City), supra* at 217. This may include the aura of potential and unpredictable danger: *Schell v. Truba* (1990), 89 Sask. R. 137 at 140 (Sask. C.A.) (in dissent). There is no requirement to use the least amount of force because this may expose the officer to unnecessary danger to himself: *Levesque v. Sudbury Regional Police Force, supra*.

Adjudicator Pitfield said this about the relevance of exigencies at paragraph 37 of the *Dickhout* decision [*Re: Dickhout*, PH 2010-03]:

> ...The assessment of an officer's conduct must respect the fact that his or her job is a difficult one and, in the heat of the moment, frequently does not allow for detached reflection when deciding to act: *R. v. Nasogaluak*, [cited earlier, paragraph 35] and In the Matter of Constable Smith, Victoria, January 28, 2009, p. 21.

(88) As Adjudicator my assessment of an officer's actions must:

(a) Take account the exigencies and immediacy of the moment;
(b) Consider the fact that officers are often required to make decisions quickly in the course of an evolving incident, without the detached reflection that is available to those looking back on an incident; and
(c) Consider that at law, there is no requirement that the officer perfectly calibrate his or her actions to the perceived threat.

XIV Allegation #1

(89) The first allegation of misconduct arises in connection with subsection 77(3)(a) of the *Police Act*. As noted above, the specific allegation is that by unlawfully entering the laundry room of the residence at 3390 and conducting a search of the downstairs living area, the member committed Abuse of Authority by "oppressive conduct" towards the Complainant.

(90) Earlier in this decision I found that the Member's entry and search of 3390 was unlawful.

(91) In considering subsection 77(3)(a) of the *Police Act*, all Counsel were asked to address a threshold question as to the tests to be applied in considering the Member's actions. Subsection 77(3)(a) of the *Police Act* outlines a general category of disciplinary breach of trust being an "abuse of authority" evidencing "oppressive conduct towards a member of the public". Unlike the subsections that follow, subsection 77(3)(a) does not make specific reference to requirements that conduct be found to be "intentional or reckless" or undertaken for "good and sufficient cause". Counsel were asked to address the nature of the findings required to substantiate abuse of authority under subsection 77(3)(a), in relation specifically to an allegation of misconduct arising from an improper entry and search of a residence.

(92) Submissions of Counsel concerning the nature of tests to be applied in considering subsection 77(3)(a) reflected slightly differing approaches, but all came to in essence the same conclusion. The consensus that emerged in submissions reflected the fact that any consideration of actions under subsection 77(3)(a) must incorporate both objective and subjective elements. This would include consideration of the same elements required for findings under subsection 77(3)(a)(ii)(B), that the officer concerned acted intentionally or recklessly and without good and sufficient cause. As well, the conduct in question must demonstrate a "serious blameworthy element", not a simple mistake of legal authority, in order for findings of "abuse of authority" characterized by "oppressive conduct" to be made out.

(93) I accept the submissions of Counsel on the proper interpretation of subsection 77(3)(a) and have applied the same to my analysis of the facts. There may be a different analysis for other potential misconduct allegations arising under the general subsection 77(3)(a) "catch all" route to a definition of misconduct. However, for cases involving misconduct allegations relating to an improper search of a *residence*, there is an internal logic to considering the same identified factors that apply to a search of the *person* under subsection 77(3)(a)(ii)(B). Such an approach achieves consistency in circumstances where similar considerations and requirements would seem to arise for both types of police search.

(94) The issues arising with respect to the elements of proof required for a finding of misconduct under section 77(3)(a), therefore, are as follows:

(a)Was the Member acting in the performance, or purported performance, of his duties in entering 3390 and searching the basement living area of the home of the Complainant?

(b)Did the Member intentionally or recklessly enter 3390?

(c)Did the Member enter 3390 without good and sufficient cause?

(d)Was the conduct of the Member characterized by a serious blameworthy element, not simply a mistake of legal authority or an error forgivable because of a lack of training?

(95) On the first issue, I am satisfied that the Member was indeed acting in the performance of his duties on the night in question and, of course, the member of the public affected was the Complainant. Although engaged in pursuing a civil recovery, I am satisfied that the Member was discharging his duty as a peace officer at all material times.

(96) On the second issue, I cannot find that the Member's actions in entering the rear door of 3390 were undertaken with specific knowledge or intent to act where the Member *knew* that he had no grounds to do so. As noted earlier, I am not satisfied with the credibility of the Member or the reliability of his evidence. I am, however, left with some doubt as to his subjective belief and intention to enter the Complainant's home notwithstanding the complete lack of legal authority to do so. I believe the evidence does not go so far as to allow me to conclude that subjectively the Member entered intending to proceed without lawful authority.

(97) The next consideration on the second issue is whether or not the Member's actions were reckless in all of the circumstances. As noted above, the position of Counsel for the Member is that absent evidence of training with respect to the law associated with entry to homes such as 3390 and the appropriate standard to be applied, there can be no finding of recklessness: *Lowe v. Diebolt*, *supra*. With respect, I cannot agree with that submission on the facts of this case. Adjudicator Baird Ellan noted in Tiwana, cited above, at page 15 of the decision:

> What *Lowe v. Diebolt* highlights, in my view, is the need for expert evidence, or at least evidence regarding the knowledge and training available to the officer, in

> cases where the trier of fact may not be equipped to assess the reasonableness of the officer's belief. *Lowe v. Diebolt* was such a case, as is the one before me. **In other cases, disproportion between the incident and the response may be so self-evident as to negate the need for testimony about what the reasonable officer might have done or been trained to do in the circumstances, or, as in this case, about the surrounding events. In those cases, it may be enough for the adjudicator to point to the officer's actions and using common sense, conclude that the action was intentionally or recklessly without authority.**[Emphasis added.]

(98) Adjudicator Oppal in OPCC File No 2016-11505 also considered this issue at para. 25 and noted:

> [25] I am mindful of the case of *Lowe v. Diebolt*, 2013 BCSC 109 (aff'd 2014 BCCA 280) in which the Chambers justice in the judicial review proceeding differentiated between (1) *Police Act* misconduct and (2) whether a *Charter* breach occurred and evidence from an illegal search should be excluded. I agree these two processes must be distinguished. That case involved a situation where there were objective grounds for an arrest and for a strip search; the issue was the manner of the search undertaken. As I read that decision, the suggestion is made that an officer's ignorance of the law related to searches does not, by itself, establish intent or recklessness (para. 46) I take the point that an officer's inadvertent mistake as to the law cannot standing alone be taken as misconduct in every case (or "automatic misconduct") But where a mistake as to the law is compounded by a failure to engage in necessary analysis as to the grounds for detention or arrest, it may be taken into consideration. As of course each case falls to be assessed on its own facts. Unlike *Lowe v. Diebolt*, here the record supports a conclusion that there were no objective grounds for detention or arrest. In the matter before me, the record suggests that **the officer was reckless in failing to analyze the basis for the steps he took; he simply pressed on."** [Emphasis added.]

(99) I find that on the facts of this case, common sense can be applied in order to properly consider the issue of recklessness. The basic principles protecting the sanctity of a homeowner's residence from unauthorized police incursions are fundamental to our system of law and section 8 of the *Charter*. This is not a situation where, as in *Lowe v. Diebolt*, there may well be a legitimate issue as to an officer's training in the scope and conduct of a more complex matter such as a strip search incidental to arrest. The

presence, or absence, of specific training on the issue of entering residential homes without consent cannot be determinative of the issue of recklessness as the basic principles are fundamental to our system of law. As Adjudicator Baird Ellan noted above:

> ...disproportion between the incident and the response may be so self - evident as to negate the need for testimony about what the reasonable officer might have done or been trained to do in the circumstances.

(100) I find that such is the case in these proceedings. The disproportion between the rights of a resident to the sanctity of his or her home and the unlawful entry by police into that home negates the need for evidence of training on that issue. The limitations on police officers entering personal homes are basic and obvious; indeed, it is risky for an officer to enter a home without legal authority given the occupant's power to use force to repel an unlawful intruder. What is relevant are the details surrounding the actions of the Member in analyzing his basis for proceeding in the face of these basic principles, and his rationale for acting as he did, in the face of those established general legal principles.

(101) In considering whether or not the Member acted recklessly in entering the rear door of 3390 and searching the basement area, I find that:

> (a)Objectively, the Member lacked reasonable and probable grounds, or any grounds, to enter the rear door of 3390. Subjectively, the best characterization that can be put on the Member's state of mind was that he hoped the Suspect he sought for his civil recovery might be in the house;
>
> (b)The Member's encounter with the Complainant took place in a residence occupied by the Complainant and his girlfriend, a fact known to the Member before the entry by the Member took place. Subjectively, the Member knew before entering that 3390 was not, as he had mused, a home with suites and a public rear entry door. The residence was occupied by two persons who had access to it all. Although that information was only conveyed to the Member seconds before he opened the rear door and walked through, it was known to the Member. Even before that knowledge, the conclusion reached by the Member that somehow the facts supported a public rear entry door was achieved without an objective foundation and based instead on guesses. It was also not the product of a considered or reflective analysis of the overall situation.

The Member was not in an emergency situation. There was no compelling need for him to move precipitously to return Mr. Invento's microphone. He was not even contemplating any criminal investigation. The Member's conclusions as to his right to enter the rear of 3390 would not have been seen as objectively reasonable to any officer with equivalent experience taking the time to reflect on the reality facing the Member;

(c)On entry to 3390, the Member himself was unsure as to whether or not the Complainant was even the Suspect. Subjectively, therefore, he was very uncertain of any grounds for the Complainant's detention. Notwithstanding those issues, the Complainant was detained and handcuffed by the Member. There was no considered analysis of the Member's grounds for further action once he had detained the Complainant. Seeing a black case laying beyond the laundry room, the Member again acted impetuously with Cst. Ward to further expand his search. He did so without careful deliberation and with knowledge that the case he could see differed in quality and size from that in the Suspect Description and as well from that seen with the Suspect. Subjectively, I find that the Member acted without due consideration of his legal authority to expand his search. That decision was without legal foundation and would, I find, not be justified as objectively reasonable by an officer with the Member's training and experience. Any objective reflection and analysis would confirm that:

(i) The Complainant was highly unlikely to be the Suspect as he did not meet several key suspect descriptors. As such, any property in his home was unlikely to have any relation to Mr. Invento's loss;

(ii) The case in the Complainant's basement differed in size and quality to that sought, a fact known to the Member. As such, it was very unlikely to be material to the Member's civil recovery objectives;

(iii) With the initial entry into 3390 made without lawful authority, any further incursion would only compound the breach of the Complainant's rights. Absent consent, a warrant, or much stronger grounds linked to a resident suspect, there could be no lawful entry further into the Complainant's home. There were simply no objective grounds to search the basement area.

(h)The entry into 3390 and the subsequent search of the basement were not made in good faith but rather reckless as to whether or not there were any grounds for such actions. I find that the entry undertaken at the rear door of 3390 and subsequent search of the basement were made with the Member knowing that:

(i) The matter in question was a civil recovery, not engaging the investigation of a serious crime;
(ii) The Suspect had only been partially identified in comparison to the Suspect Description;
(iii) The area into which the Suspect disappeared was a residential area;
(iv) The generalizations raised by the Member to justify opening the door to 3390 and entering were objectively unreasonable in all of the circumstances as they lacked a factual foundation linked to the character of 3390;
(v) The home was in fact occupied by only two people, not suited as the Member had suggested;

(102) This case saw the Member entering a home in order to carry out a civil recovery, rather than for a criminal investigation. This feature does not give rise to a greater power or more leeway to go into a home. The opposite is true. The fact that the officer conducted a warrantless entry to a building in such a "civil" context is aggravating. It is not motivated by or explained by the higher public interest that might arise, for instance, in investigating a serious crime.

(103) In the result, I conclude that the Member's actions in entering the rear of 3390 and subsequently searching the basement area were not taken in good faith and in all of the circumstances constituted action taken recklessly.

(104) On the third issue, the Member's expressed purpose in entering 3390 was to gain access to a home where the Suspect may have resided, perhaps with some of Mr. Invento's property. The question is whether or not entering without lawful authority to pursue a civil recovery was an entry made and search completed for "good and sufficient cause". Counsel for the Member advanced the argument that returning Mr. Invento's

equipment would have assisted returning a worker's tools to the rightful owner. Clearly such would be a laudable goal, however, the question is does such an objective warrant the unauthorized entry and search of a private home? I find that it does not.

(105) I find that by entering 3390, the Member simply made an impulsive and reckless decision to proceed hoping things would work out allowing him to recover the Invento goods. That rationale and belief were not objectively reasonable as the Member lacked any legal basis for entering the Complainant's home. Similarly, there was no legal basis to search the basement or briefcase. The entry to 3390 and subsequent search were not made for good and sufficient cause because:

(a)The Member knew that he was engaged in a civil recovery as he pursued return of Mr. Invento's microphone, not a criminal investigation. There was no emergency which required the completion of a civil recovery by entering and searching 3390;

(b) The Member had nothing more than a suspicion that the Invento property could be found in 3390. As noted earlier, I have found that the member lacked reasonable and probable grounds to arrest the Suspect, and there was no certainty that the Suspect was in 3390. As such, if the good and sufficient cause for entry and search was that it would lead to recovery of the property in question, that proposition itself lacked objective reality;

(c)The Member acted in haste and impulsively in entering. The Member's actions were not considered or part of a deliberative process examining options and risks. I find, therefore, that the Member's "cause" was unfocused and ill-conceived;

(d)Mr. Invento had reported contact and a meeting with the Suspect through a Craigslist ad. As such, contact seemed to have been available through means other than opening the rear door to 3390; and

(e)In order for a cause to be "good and sufficient", it must address the need to impair the rights of the Complainant and Ms. Dunnett to security of their residence in order to accomplish the property recovery goals. Viewed objectively, completing a civil recovery cannot, on the facts of this case, justify the incursion into the Complainant/Dunnett home that took place. Although returning tools to their rightful owner might be "good" as an objective, it is not

"sufficient" as accomplishing the goal requires the entry and search of a private home.

(106) Considered together, the context did not demonstrate that the Member was acting in good faith, but rather bad faith in pushing on impetuously despite all the warning signs before him in achieving his stated cause.

(107) As such, subjectively I find that the Member knew that there was no imminent crisis or urgency surrounding his actions relating to the entry into and search of 3390. Viewed objectively I find that those beliefs were not reasonable as "good and sufficient cause" to proceed with entry to 3390 or the search of the basement area.

(108) On the third issue, therefore, I cannot find that the actions of the Member in entering and subsequently search the basement of 3390 was done for good and sufficient cause.

(109) With respect to the final issue, I have considered whether or not in all of the circumstances the entry into 3390 and subsequent search of the basement demonstrated conduct of the Member evidencing an element of seriously blameworthy conduct, beyond a simple lack of legal authority or a lack of relevant training. I am satisfied that the facts of this case do confirm that the Member's actions demonstrated such blameworthy conduct for the following reasons:

(a)By entering 3390 and searching the basement the Member acted recklessly, impetuously and without due consideration of his legal authority. He acted as he did notwithstanding knowledge that the Complainant's home was occupied by only two residents and that the Complainant did not match much of the Suspect description;

(b)The entry and search of 3390 made without lawful authority was not conducted in good faith. It was made for the ulterior purposes of expediting a civil recovery initiative without due consideration of the impact such action might have on the residents.; and

(c)The Complainant suffered the indignity of standing in handcuffs in his own basement as his spouse arrived and the basement was searched. He remained there as the Member expanded his entry to the basement of the home pursuing what was ultimately something other than the briefcase described by Mr. Invento. The Member left the Complainant in handcuffs knowing that the

case across the basement was of different material and size than that observed with the Suspect or as detailed in the Suspect Description.

(110) In the result, the actions of the Member demonstrated serious blameworthy conduct by detaining and handcuffing the Complainant in his own home as the search of the basement proceeded. As noted, they are not actions that can be explained or justified by a mistaken understanding of police authority, nor a lack of training. Viewed objectively, such actions were demonstrably unreasonable notwithstanding the Member's expressed beliefs.

(111) Considering all of the foregoing, I find that the actions of the Member in entering and searching part of 3390 were acts of oppressive conduct affecting a member of the public and as such, result in an abuse of authority under section 77(3)(a) of the *Police Act* and a proven disciplinary breach of trust.

XV Allegation # 2

(112) The second allegation of misconduct in connection with section 77(3)(a)(ii)(B) of the *Police Act* is that the Member, acting in the performance or purported performance of his duties, intentionally or recklessly detained the Complainant in handcuffs without good or sufficient cause thereby resulting in oppressive conduct constituting an abuse of authority.

(113) As noted earlier, in order to substantiate an allegation of abuse of authority, it is not sufficient to simply establish that a search or arrest was unlawful or in breach of the Complainant's rights under the *Charter*. I am satisfied that the evidence must establish that the Member arrested and handcuffed the Complainant either knowing he lacked grounds to do so, or reckless as to whether or not such grounds existed. As well, the actions of the Member which constitute "abuse of authority" will only arise if there is serious blameworthy conduct beyond a simple mistake of legal authority which does not meet the test of good and sufficient cause: *Scott*, *supra*.

(114) The issues arising with respect to the elements of proof required for a finding of misconduct under section 77(3)(a)(ii)(B) therefore, are as follows:

(a)Was the Member acting in the performance or purported performance of his duties in dealing with the Complainant?

(b)Did the Member intentionally or recklessly detain and handcuff the Complainant?

(c)Did the Member detain and handcuff the Complainant without good and sufficient cause?

(d)Was the conduct of the Member characterized by a serious blameworthy element, not simply a mistake of legal authority or an error forgivable because of a lack of training?

(115) On the first issue, I am satisfied that the Member was indeed acting in the performance of his duties on the night in question as he dealt with the Complainant. Although engaged in what was essentially a civil recovery, there is no doubt that the Member was discharging his duty as a peace officer at all material times.

(116) On the second issue, I do not find that the Member's actions in detaining and handcuffing the Complainant were undertaken with specific knowledge or intent to act where the Member knew that he had no grounds to do so.

(117) The next consideration is whether or not the Member's actions were reckless in all of the circumstances. Earlier in this decision I outlined the legal basis for considering the issue of recklessness. With respect to this allegation, I find that the disproportion between the rights of the Complainant and the Member's expressed need to detain him for being "confrontational" negates the need for evidence of training on that issue. Common sense can be applied to review the Member's actions in exercising an authority common to training for all police officers, the power of arrest. What is relevant in considering this allegation are the details surrounding the actions of the Member in analyzing his rationale for acting as he did.

(118) In considering whether or not the Member acted recklessly in detaining and handcuffing the Complainant, I find that:

(a)Objectively, the Member lacked reasonable and probable grounds to detain the Suspect he had been following;

(b)The Member's encounter with the Complainant took place in a residence occupied by the Complainant and his spouse, a fact known to the Member before the entry and detention that took place;

(c)The Member himself was unsure as to whether or not the Complainant was even the Suspect. Subjectively, therefore, he was very uncertain of any grounds for the Complainant's detention;

(d)The Member himself acknowledged in cross-examination that he knew he did not have grounds to detain the Complainant as the Suspect given the differences between the Suspect Description and the physical appearance of the Complainant;

(e)The Complainant made no overt physical motions or threats directed to the Member;

(f)The detention and handcuffing of the Complainant based on the assertion that he was being "combative" did not provide grounds either at common law or pursuant to section 495 of the *Criminal Code* to arrest the Complainant. The Member may have articulated that reason for the Complainant's detention, however, I am not satisfied that subjectively he believed that to be the case. Nothing post-entry had elevated the likelihood that the Complainant was the Suspect, indeed, the opposite was true. However, the Complainant was an annoyance to the Member as he tried to sort out his next steps. The Member's articulated belief that he could detain the Complainant for being "combative" was, viewed in context, objectively unreasonable to any reasonable officer with equivalent experience to that of the Member;

(g)The Member's actions can best be characterized as impetuous based on the uncertainty of his authority to be in the Complainant's home, and knowledge that he lacked the grounds to detain the Complainant;

(h)The detention and handcuffing of the Complainant was not made in good faith but rather with the knowledge that there were no grounds for such actions.

I find that the detention of the Complainant was made for the collateral purposes of:

(i) providing the Member with a chance to maintain his position while in the Complainant's home knowing that there was little chance he was in the home lawfully;

(ii) subduing what was perceived by the Member to be an annoying resident who had challenged the Member's right to be where he was; and

(iii) re-establishing control in a situation where the Member ought to have known that he had no right to assert control over the person before him.

(119) In the result, I conclude that the Member's actions in detaining and handcuffing the Complainant were not taken in good faith and in all of the circumstances constituted action taken recklessly.

(120) On the third issue, perhaps the best insight into "good and sufficient cause" rests with the rationale for the Complainant's detention as articulated by the Member. The expressed purpose of detaining the Complainant was to give the Member time to maintain and reevaluate his position by containing a distraught homeowner who had been questioning police actions. There is, however, no objective evidence that the detention and handcuffing of the Complainant was necessary for the Member to re-examine his options. Nor were his actions taken as a mistake of law or a lack of training. Rather, subjectively, the Member was reckless in attempting to maintain his presence in the Complainant's home given the complete lack of grounds for him to be there. The lack of those grounds were readily apparent to the Member objectively as he dealt with the Complainant.

(121) I find that in detaining and handcuffing the Complainant, the Member simply made an impulsive decision to detain believing that it would be easier to deal with the situation he faced if the Complainant was subdued in that manner. That rationale and belief were not objectively reasonable, nor was the Complainant's detention made for good and sufficient cause. It was not made for good and sufficient cause because:

(a)The Member knew that he was engaged in a civil recovery as he pursued return of Mr. Invento's microphone, not a criminal investigation. There was no threat to the Member or anyone else as he engaged with the Complainant. There was no indication that the Complainant was committing or had committed any crime. The Member did not have any information flagging this man as violent, gang affiliated or otherwise of concern to police. The nature of the property theft was itself minor and non-violent. As such, subjectively I find that the Member knew that there was no imminent crisis or urgency surrounding his actions relating to the Complainant requiring his detention. The Member also knew that his identification of the Suspect as the person linked to the Suspect Description was materially incomplete. He knew that the Complainant did not match much of the Suspect Description but proceeded with a detention nonetheless. The expressed reason for the detention of the Complainant, that the Complainant was "being combative", was a construct without legal basis to allow the Member to re-evaluate his situation from a position of control. I find that the Member subjectively believed that the detention and handcuffing of the Complainant was necessary to provide him with control of a homeowner challenging police actions. Viewed objectively, however, I find that those beliefs were not reasonable as "good and sufficient cause" to proceed with an arrest.;

(b)The Member knew subjectively that there were no reasonable and probable grounds for detaining the Complainant, nor any objective basis to do so. However, the Member reacted in haste and impulsively to awareness of the fact that he had likely entered a residence without grounds and in pursuit of the wrong suspect. The Member's actions were not considered or part of a deliberative process examining options and risks. The arrest simply provided the Member with control over the homeowner facilitating his later search of the basement area; and

(c) I find that the Complainant's arrest was also not justified to allow the search of the basement to proceed. The Complainant was arrested and handcuffed before the Member saw the basement area and black case. Facilitation of the further search was not a good and sufficient cause either objectively or subjectively. The Member knew that objectively the case differed in size and material from that in the Suspect Description, and the actual case observed with the Suspect. The Member also was aware on seeing the Complainant that he may not have had the correct suspect before him. I find that the Member ought

to have known that he was in the residence without lawful grounds and yet proceeded to expand his entry and search exacerbating the extent of his unlawful acts. Taken together, the context did not demonstrate that the Member was acting in good faith, but rather bad faith in pushing on impetuously and recklessly in breach of the Complainant's rights despite all the warning signs before him.

(122) On the third issue, therefore, I cannot find that the actions of the Member in detaining and handcuffing the Complainant in his own home were done for good and sufficient cause.

(123) With respect to the final issue, I have considered whether or not in all of the circumstances the detention and handcuffing of the Complainant demonstrated conduct of the Member evidencing an element of seriously blameworthy conduct beyond a simple lack of legal authority. I am satisfied that the facts of this case do confirm that the Member's actions demonstrated such blameworthy conduct for the following reasons:

(a)The Member acted throughout the entry to 3390 and detention of the Complainant impetuously and without due consideration of his legal authority. He was reckless with respect to both his entry of 3390 and actions to detain the Complainant. He acted notwithstanding knowledge that the Complainant's home was occupied by only two residents and that the Complainant did not match much of the Suspect Description. In detaining the Complainant, the Member did so for reasons unknown to law, reckless as to his authority to do so;

(b)The detention of the Complainant without lawful authority was not made in good faith. It was made for the ulterior purpose of containing the Complainant so that the Member could regroup in terms of his civil recovery efforts.;

(c)The Member's conduct in detaining and handcuffing here was not the product of a mistaken understanding of police authority, nor can it be explained by improper or no training on these basic everyday police powers; and

(d)The Complainant suffered the indignity of standing in handcuffs in his own basement as his girlfriend arrived. He remained there as the Member expanded his entry to the basement of the home pursuing what was ultimately something other than the briefcase described by Mr. Invento. The Member left the

Complainant in handcuffs knowing that the case across the basement was of different material and size than that observed with the Suspect or as detailed in the Suspect Description.

(124) In the result, the actions of the Member demonstrated serious blameworthy conduct by detaining and handcuffing the Complainant in his own home in front of his spouse. Viewed objectively, such actions were demonstrably unreasonable notwithstanding the Member's expressed beliefs.

(125) Considering all of the foregoing, I find that the actions of the Member in detaining and handcuffing the Complainant were acts of oppressive conduct affecting a member of the public and as such, result in an abuse of authority under section 77(3)(a)(ii)(B) of the *Police Act* and a proven disciplinary breach of trust.

XVI Subsection 77(4) of the *Police Act*

(126) Finally, with respect to this matter, I have considered whether or not the actions of the Member resulting in disciplinary breaches of trust under the two allegations of misconduct before me are saved by the application of subsection 77(4) of the *Police Act*. That subsection provides as follows:

> (4) It is not a disciplinary breach of public trust for a member to engage in conduct that is necessary in the proper performance of authorized police work.

(127) I have concluded that the conduct of the Member with respect to both allegations of misconduct was *not* necessary in the performance of authorized police work. Although undertaking a civil recovery of property comes within the general scope of "authorized police work", I find that in no sense was the conduct of the Member in this case necessary for the proper performance of those responsibilities.

XVII Conclusion: finding of misconduct

(128) Considering all of the foregoing in the context of the analysis outlined above, I find that both allegations of misconduct before this proceeding involving the Member have been substantiated.

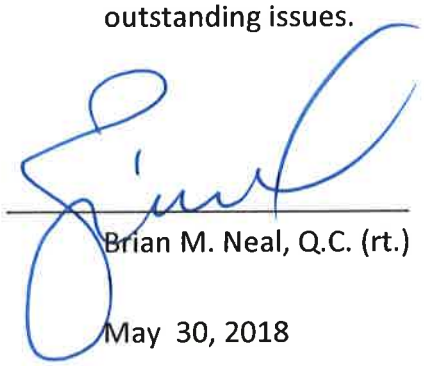
XVIII Next steps

(129) The next step is to consider submissions regarding disciplinary or corrective measures. I have asked counsel to the Public Hearing Adjudicator, Mr. Martland, to confer with Member's Counsel, Public Hearing Counsel and Commission Counsel and advise of dates that can be established to receive such submissions on the following basis:

(a) The order of written submissions should commence with Public Hearing Counsel and then move to Commission Counsel and lastly Member's Counsel;

(b) A brief continuation of this Public Hearing should be scheduled to facilitate summary submissions on the discipline outcomes. This hearing should be set not later than July 25th, 2018.;

(c) Mr. Martland will advise the Registrar In the event a consensus on timing has not been reached by June 20, 2018. In such case, a conference call will be convened with all counsel and myself at 9 am June 25, 2018 to settle any outstanding issues.



Brian M. Neal, Q.C. (rt.)

May 30, 2018
Victoria, B.C.