



Office of the
Police Complaint Commissioner

British Columbia, Canada

PH: 2018-02
OPCC File: 2016-11766

NOTICE OF PUBLIC HEARING

Pursuant to section 138(1) *Police Act*, R.S.B.C. 1996, c.267

**In the matter of the Public Hearing into the Complaint against
Constable Mark Lobel and Constable Viet Hoang of the Vancouver Police Department**

To: Mr. Cameron McDonald (Complainant)

And to: Constable Mark Lobel (#2599) (Members)
Constable Viet Hoang (#2876)
c/o Kevin Woodall - Counsel

And to: The Honourable Judge Mr. Wally Oppal, Q.C. (Discipline Authority)
Retired Judge of the Appeal Court of British Columbia

And to: Chief Constable Adam Palmer
c/o Vancouver Police Department
Professional Standards Section

WHEREAS:

Investigation

1. On April 2, 2016, the Office of the Police Complaint Commissioner (OPCC) received a registered complaint from Mr. Cameron McDonald describing his concerns with members from the Vancouver Police Department (VPD). Mr. McDonald reported that on March 25, 2016, he was walking home from a store between 1:00 am and 1:30 am on Kingsway and Moss Street, when VPD officers pulled up to him and asked him where he was going. Mr. McDonald told the officers he was on his way home and when he asked why he was being stopped, he reported the officers told him they had received a report that someone in a grey hoodie was stealing mail. Mr. McDonald advised he was wearing a black leather coat and a black hoody.

Stan T. Lowe
Police Complaint Commissioner

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2. Mr. McDonald reported that when he tried to walk in front of the police vehicle the police officers hit him with their vehicle and almost ran him over and that he laid on the hood to save himself. Mr. McDonald reported he was then detained, placed in handcuffs and searched.
3. Mr. McDonald advised that the police officers refused to identify themselves and refused to remove the handcuffs until he identified himself. Mr. McDonald reported that the officers offered to provide him with a badge number but never provided any numbers, nor showed them to him, and they would not tell him their names. Mr. McDonald advised that the officers told him that grey was close to black and that sometimes people get the description wrong.
4. The allegations contained in Mr. McDonald's complaint were reviewed and the allegations concerning the use of the police vehicle as a means to stop Mr. McDonald, the detention and search of Mr. McDonald, and the failure to provide a Personal Identification Number (PIN) upon request were determined to be admissible and, accordingly, the complaint was forwarded to the Professional Standards Section of the VPD for investigation. VPD Police Professional Standards investigator, Sergeant Patrick Kelly, conducted an investigation into this matter and on March 13, 2017, he submitted the Final Investigation Report (FIR) to the Discipline Authority.
5. On March 24, 2017, following his review of the FIR, the Discipline Authority, Inspector Jeff Harris, found that all three allegations were unsubstantiated. The allegations concerning the use of the police vehicle as a means to stop Mr. McDonald, and the failure to provide PINs upon request were not substantiated and have been concluded by this office.

Section 117 Review by Retired Judge Wally Oppal, Q.C.

6. On April 26, 2017, after reviewing Inspector Jeff Harris's decision, the Police Complaint Commissioner determined that there was a reasonable basis to believe that Inspector Harris's findings were incorrect with respect to the detention and search of Mr. McDonald. As a result, pursuant to section 117(4) of the *Police Act*, the Police Complaint Commissioner appointed the Honourable retired Appeal Court Justice Wally Oppal, Q.C., as a retired judge, to review the unsubstantiated allegation and arrive at his own decision.
7. On May 18, 2017, retired Judge Oppal, Q.C. completed his review recommending that the evidence appeared to substantiate the following allegation:
 - That on March 25, 2016, Constable Mark Lobel and Constable Viet Hoang, committed *Abuse of Authority* pursuant to section 77(3)(a)(ii)(B) of the *Police Act* which is oppressive conduct towards a member of the public, including, without limitation, in the performance, or purported performance, of duties, intentionally or recklessly detaining or searching any person without good and sufficient cause.

8. On August 15, 2017, the members, Constable Mark Lobel and Constable Viet Hoang, made a recusal application to retired Judge Oppal, Q.C. on the basis that there was a reasonable apprehension of bias. This application was reviewed and dismissed, by retired Judge Oppal, Q.C., with reasons, on November 9, 2017.

Discipline Proceeding and Proposed Discipline

9. On March 14, 2018, following the discipline proceeding, and after considering the available evidence and submissions, Mr. Wally Oppal, Q.C., as the Discipline Authority made the following determinations in relation to the allegation of *Abuse of Authority* pursuant to section 77(3)(a)(ii)(B) of the *Police Act*:

- (i) That Constable Mark Lobel and Constable Viet Hoang's detention of Mr. McDonald did not rise to the threshold of misconduct.
- (ii) That Constable Viet Hoang committed misconduct when he searched a person without good and sufficient cause.

Proposed Disciplinary Measure - Advice as to Conduct.

10. Mr. McDonald and Constable Hoang were provided a copy of the Discipline Authority's findings in relation to the allegation of misconduct and determinations on appropriate disciplinary or corrective measures that were imposed at the Discipline Proceeding. Mr. McDonald and Constable Hoang were informed that if they were aggrieved by either the findings or determinations they could file a written request with the Police Complaint Commissioner (PCC) to arrange a Public Hearing or Review on the Record.

Request for Adjudicative Review

11. On March 15, 2018, our Office received a request from Constable Hoang that the Police Complaint Commissioner exercise his authority to arrange a Review on the Record pursuant to the *Police Act*. Constable Hoang submitted that the allegation of *Abuse of Authority* should not have been substantiated based on *Lowe v. Diebolt, 2013 BCSC 1092*. Constable Hoang argued that the Court held that police officers who have not been trained on a particular point of the law of search and seizure cannot be found to have committed misconduct when, in the absence of training, they engage in a search that is later found to be unlawful.
12. In addition, Constable Hoang argued that there is no evidence that he ever received training on the point of law at issue: whether a person who is subject to investigative detention may be searched for identification. He further argued: "If, as here, a police officer has not been trained in an important point of the law of search and seizure, the blame should lie on those who failed to provide the training."

13. Pursuant to section 138(1) of the *Police Act*, the Commissioner must arrange a Public Hearing or Review on the Record if the Commissioner considers that there is a reasonable basis to believe: that the Disciplinary Authority's findings under section 125(1) are incorrect; the Discipline Authority has incorrectly applied section 126 in proposing disciplinary or corrective measures under section 128(1); or, if the Commissioner considers that a Public Hearing is necessary in the public interest.

Decision

14. With respect, I am of the view that the Discipline Authority incorrectly determined that the detention of Mr. McDonald did not constitute misconduct. Based on evidence contained in the investigation and the discipline proceeding, I am of the view that Constable Lobel and Constable Hoang did not point to sufficient facts, when viewed objectively, to support a reasonable suspicion that Mr. McDonald was connected to a particular crime. I am further of the view that the officers knew or were reckless to the fact that they did not have the authority to detain Mr. McDonald.
15. Regarding the lawfulness of the search, Constable Hoang has identified an issue with respect to the nature and quality of training provided to him in the area of investigative detention. Constable Hoang asserted that the Vancouver Police Department and the Justice Institute of BC are responsible for failing to adequately provide training in this area and as a result, are responsible for his conduct in conducting a search that breached Mr. McDonald's *Charter of Rights and Freedoms*.
16. I have also noted that during the discipline proceeding only Constable Lobel and Constable Hoang provided evidence. They were not cross-examined and they did not request to call any representatives of the Justice Institute of BC or the Vancouver Police Department to provide evidence regarding the shortcomings in their training. Pursuant to the *Police Act*, unless the member whose conduct is the subject of the proceeding initiates a request to call witnesses to testify in the proceeding, there is no other mechanism to allow for the participation of material witnesses. In my view, the accountability of the process and the ability to search for the truth in this proceeding have been hampered.
17. Therefore, a Review on the Record is not the appropriate form of adjudicative review for this matter but rather a Public Hearing. A Public Hearing will allow for a thorough examination of the pre-deployment training provided by the Justice Institute and the ongoing training provided by the Vancouver Police Department and will allow for the examination and cross-examination of material witnesses.
18. Having reviewed the investigation, the Discipline Proceeding and associated determinations, pursuant to section 138 of the *Police Act*, I have determined that a Public Hearing is required as I consider there is a reasonable basis to believe that the Discipline Authority's findings under section 125(1) are incorrect. Furthermore, I have determined that a Public Hearing is necessary in the public interest. In determining that a Public Hearing is

necessary in the public interest, I have considered several relevant factors, including but not limited to the following:

- a) It is necessary to examine and cross-examine witnesses and receive evidence that was not part of the record at the discipline proceeding, in order to ensure that procedural fairness and accountability is maintained;
 - b) There is a reasonable prospect that a Public Hearing will assist in determining the truth; and
 - c) A Public Hearing is required to preserve or restore public confidence in the investigation of misconduct and the administration of police discipline.
19. It is therefore alleged that Constable Mark Lobel and Constable Viet Hoang committed the following disciplinary default, pursuant to section 77 of the *Police Act*:
- (i) That on March 25, 2016, Constable Mark Lobel and Constable Viet Hoang, committed *Abuse of Authority* pursuant to section 77(3)(a)(ii)(B) of the *Police Act* when they intentionally or recklessly detained and searched Mr. McDonald without good and sufficient cause.
20. Pursuant to section 143(5) of the *Police Act*, Public Hearing Counsel, Constable Lobel, Constable Hoang, or her or his legal counsel and commission counsel may:
- a) call any witness who has relevant evidence to give, whether or not the witness was interviewed during the original investigation or called at the discipline proceeding;
 - b) examine or cross-examine witnesses;
 - c) introduce into evidence any record or report concerning the matter; and
 - d) make oral or written submissions, or both, after all of the evidence is called.
21. Pursuant to section 143(3) of the *Police Act*, a Public Hearing is not limited to the evidence and issues that were before a Discipline Authority in a discipline proceeding.
22. Pursuant to section 144(1) of the *Police Act*, a person, other than Public Hearing Counsel, commission counsel and the member or former member concerned, may apply to be a participant in a Public Hearing by applying to an adjudicator in the manner and form the adjudicator requires.

THEREFORE:

23. A Public Hearing is arranged pursuant to section 137(1) and 143(1) of the *Police Act*.
24. Pursuant to the recommendation of the Associate Chief Justice of the Supreme Court of British Columbia, the Honourable Ron McKinnon, retired Supreme Court Judge, is appointed to preside as Adjudicator in these proceedings, pursuant to section 142(2) of the *Police Act*. Dates for the Public Hearing have not yet been determined. The Public Hearing will commence at the earliest practicable date.

TAKE NOTICE that all inquiries with respect to this matter shall be directed to the Office of the Police Complaint Commissioner:

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DATED at the City of Victoria, in the Province of British Columbia, this 10th day of April, 2018.

A handwritten signature in black ink, appearing to read 'Stan T. Lowe', is enclosed in a thin black rectangular border.

Stan T. Lowe
Police Complaint Commissioner