IN THE MATTER OF THE POLICE ACT, R.S.B.C. 1996, C. 367, AS AMENDED

AND IN THE MATTER OF A PUBLIC HEARING INTO THE COMPLAINT AGAINST CONSTABLE MARK LOBEL AND CONSTABLE VIET HOANG OF THE VANCOUVER POLICE DEPARTMENT

PH 2018-02
OPCC File 2016-11766
Registry: Vancouver

Before: Adjudicator R. McKinnon

Reasons for Judgment — Application by Vancouver Police Department

Public Hearing Counsel:	B. Hickford
Commission Counsel:	G. DelBigio, Q.C.
Counsel for Constables Lobel and Hoang on this application	M.K. Woodall
Counsel for Vancouver Police Department:	M. McNeil
Written submissions received from all above counsel	
Date of Decision:	July 12, 2018

[1] In this application, I am asked to allow the Vancouver Police Department (VPD) a participatory role in the upcoming Public Hearing under the BC *Police Act*. These are my reasons on the application.

[2] By way of background, 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 of the VPD. He 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.

[3] Mr. McDonald reported that when he tried to walk in front of the police vehicle, the officers hit him with their vehicle and almost ran him over and that he laid on the hood to save himself. He reported that he was then detained, placed in handcuffs and searched.

[4] According to Mr. McDonald, 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.

[5] The complaint was forwarded to the Professional Standards Section of the VPD and reviewed by Sergeant Patrick Kelly who submitted his findings to the Discipline Authority, Inspector Jeff Harris, who determined that none of the allegations had been substantiated.

[6] 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 and in the result, pursuant to section 117(4) of the *Police Act*, he appointed retired Appeal Court Justice Wally Oppal, Q.C. to review same.

[7] On May 18, 2017, Mr. Oppal 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 March 14, 2018, following the discipline proceeding, and after considering the available evidence and submissions, Mr. Oppal 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.

[9] On March 15, 2018, the OPCC 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 (aff'd 2014 BCCA 280). That Court determined 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.

[10] Constable Hoang also submitted 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.

[11] 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 Discipline 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 in the public interest.

[12] The Commissioner was 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.

[13] Insofar as the lawfulness of the search is concerned, the Commissioner noted that Constable Hoang alleges that the VPD 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 rights under the *Canadian Charter of Rights and Freedoms*.

[14] It was also noted that during the discipline proceedings only the two Constables provided evidence in respect to this issue but neither was cross-examined on it. Nor did they call any witnesses from the VPD or Justice Institute to provide evidence in respect to the alleged shortcomings in training. The Commissioner noted:

> …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.

[15] The Commissioner then determined that given all these considerations, a Review on the Record was not the proper forum to resolve issues; rather a Public Hearing was necessary. He accordingly directed a Public Hearing pursuant to sections 137(1) and 143(1) of the *Police Act*. I was appointed as Adjudicator pursuant to section 142(2) of the *Police Act* to conduct the Public Hearing.

[16] Ms. Marcia McNeil, counsel on behalf of the VPD, has applied, pursuant to section 144(1), for "interested party status" in the Public Hearing. Save for Mr. Woodall,

counsel for Constables Lobel and Hoang, no counsel involved opposes the application. I propose to summarize Ms. McNeil's position and that of Mr. Woodall.

The VPD's position

[17] Ms. McNeil refers to the challenges made by Constable Hoang to the "nature and quality of the training provided to him in the area of investigative detention", and his assertions

> … that the VPD and the Justice Institute of BC are responsible for failing to adequately provide training in this area. The VPD disputes this assertion and wishes to participate in the hearing to the extent necessary to address this issue.

[18] In her written submissions of May 10, 2018, she states:

> It is not the intention of the VPD to duplicate evidence called by Mr. Hickford (Public Hearing Counsel), or to recanvas in cross-examination of the Members any areas fully canvassed by Mr. Hickford. Instead the VPD applies for standing for the purpose of calling supplemental evidence, if necessary, to ensure the evidence and submissions with respect to investigative detention [are] fully canvassed in the hearing. The VPD would like to have the opportunity to call witnesses and to examine or cross-examine witnesses called in this matter and to make submissions with respect only to the training provided to its members generally and to Constables Hoang and Lobel specifically.

[19] Noting that the *Police Act* does not specify the test to be applied in respect to the application, she referred to *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, where the Supreme Court held that an applicant for standing as a party in an administrative proceeding must demonstrate:

a. Whether the issue is justiciable,

b. That the issue is serious, and

c. That the applicant has a genuine interest in the issue.

[20] Applying that test, Ms. McNeil states:

a. There is no dispute that the issue is justiciable as the issue is properly raised by Constable Hoang as a defence to the misconduct as

contemplated in *Lowe v. Diebolt*, 2013 BCSC 1092.

b. The determination of whether Constables Hoang and Lobel received appropriate training with respect to investigative detention goes to the heart of the alleged misconduct and therefore raises a serious issue in the context of this hearing.

c. The assertion that Constable Hoang did not receive appropriate training affects the reputation and potentially the liability of the VPD. Therefore, the VPD has a genuine and separate interest in ensuring the issue is fully addressed in the hearing. Although we anticipate that the issue will first be addressed by Mr. Hickford in his presentation of the case, the VPD has a separate interest in ensuring that findings of fact made in this hearing do not increase its exposure to public complaints.

[21] In her final written submissions made on May 18, Ms. McNeil cited section 144(2) of the *Police Act* that governs her application. That section indicates these factors:

(a) Whether, and to what extent, the person's interest may be affected by the findings of the adjudicator;

(b) Whether the person's participation would further the conduct of the public hearing; and

(c) Whether the person's participation would contribute to the fairness of the public hearing.

[22] Applying (a), Ms. McNeil cited section 168 (specifically section 168(1)(b)(ii)) of the *Police Act*, which provides that any person may make a complaint to the Commissioner about "the inadequacy or inappropriateness of [a police department's] training programs or resources". In noting that section 34(1) of the Act provides that the chief constable of a municipal police department has general supervision and control of the department, the chief constable of the VPD thus has ultimate responsibility for training, and therefore has a direct interest in ensuring that the issue of training is fully canvassed in the Public Hearing.

[23] Insofar as (b) is concerned, she states that the VPD is in the best position to know whether the evidence in respect to training is complete.

[24] Finally in respect to (c), Ms. McNeil stated:

> The scheme of the Act ensures that the public has access to information regarding the conduct of municipal police departments and their members. Members of the public are entitled to attend the hearing and access any decision rendered as a result of the hearing. To ensure a fair outcome, it is critical that the evidence and arguments regarding training provided to VPD members with respect to investigative detention is complete and accurate.

Constables Lobel and Hoang's position

[25] Mr. Woodall, on behalf of the Constables, submits that the VPD has not set out what rights it hopes to exercise at the Public Hearing. He noted that the *Police Act* does not provide for persons to be "parties" to a Public Hearing, rather it refers to "participants", and he says "appears that it (the VPD) hopes to be able to introduce evidence, examine and cross-examine witnesses and make submissions."

[26] In his submission, the issue the VPD had identified was narrow and limited, i.e. what training the respondent officers received. Given that narrow issue, he questioned whether it is "necessary and fair to allow the VPD to become a full party with all the rights just enumerated, or whether the public interest served by the public hearing can be fulfilled by some other means." His answer to this rhetorical question is that the public interest could be fully served without the VPD becoming a full party.

[27] Citing section 144(2) of the *Police Act*, Mr. Woodall submits that none of the three provisions therein set out, are applicable to the VPD. He says that interests of the VPD are not engaged; that "participation" by the VPD would not further the objects of the Hearing; and that giving participant status would be "unfair".

[28] I accept that "interest" means more than a general desire for a certain result; rather it refers to the legal rights, obligations, and liabilities of a party. The VPD made reference to the possible effects of a finding that the Constables were not properly trained, which included the possibility of civil liability. Mr. Woodall pointed out that I have neither the authority nor the ability to make any finding of liability in respect to the

VPD. Nor is there any evidence that the complainant has commenced civil proceedings. Even if he is still able to do so, Mr. Woodall says that the complainant is not a participant in the Public Hearing. All of which he says leads to the conclusion that the "interests" of the VPD are not engaged by the Public Hearing.

[29] It is submitted that the VPD's participation is unnecessary as Commission Counsel will no doubt vigorously pursue the training issue, and as such, making the VPD a "participant" would therefore not "further" the objects of the hearing.

[30] Lastly, Mr. Woodall says that it would be "unfair" to the Constables to have a third party adverse to them. He notes that the respondents are entitled to a "very high standard of procedural fairness", and an Adjudicator in a Public Hearing must be very cautious in considering "participant" status.

Conclusion

[31] Mr. Hickford, Public Hearing Counsel, in his submissions in support of Ms. McNeil's application, does concede that he will be calling witnesses to provide evidence with respect to the issue of training — both from the Justice Institute and the Vancouver Police Department. However, he also points out that neither he nor Commission Counsel (Mr. DelBigio, Q.C.) is tasked with specifically addressing the interests of the Vancouver Police Department or the Justice Institute.

[32] In her submissions of May 18, Ms. McNeil stated the following:

> The VPD's interest is in ensuring that the evidence regarding the relevant training provided to its members is complete and accurate. While we anticipate that Public Hearing Counsel and possibly Commission Counsel will call evidence in this regard, we submit that the VPD is in the best position to know whether the evidence presented is complete. This will require a member of the VPD to be present throughout the proceeding to instruct its own counsel. This outcome cannot be achieved strictly by the participation of a witness or witnesses called by Public Hearing Counsel or Commission Counsel.

[33] She also advised that the VPD will not be duplicating evidence or submissions nor would it take on any role as "prosecutor"; rather its interest is "exclusively in ensuring that the panel has a complete record with respect to the relevant training."

[34] I am persuaded that the application by the VPD for "participant" status pursuant to section 144 should be granted. In my view, given that a possible finding in the hearing is that training by the VPD was deficient and thus the Constables' conduct was excused, there is a prospect that this proceeding will affect the "interests" of the VPD. I accept that I have no ability to find liability against the VPD, but a finding that their training was deficient, surely adversely affects the Department's "interests".

[35] The participation of the VPD would in my view "further the conduct of the public hearing". Section 145 gives me broad powers to ensure that there is no duplication of evidence and that the participation of the VPD is limited in the manner proposed by Ms. McNeil. The result should be that the hearing will be fully informed in respect to this issue of training. This in my view, contributes to the "fairness" consideration reflected in section 144(2)(c). Everyone benefits from full disclosure.

[36] With respect to the precise nature of the VPD's involvement in the upcoming Public Hearing, I have in mind to permit counsel for the VPD to ask questions of witnesses led by any of Public Hearing Counsel, Commission Counsel, and counsel or the Constables. That would include putting documents to witnesses. If counsel for the VPD seeks to lead additional evidence by calling further witnesses, I ask that all counsel confer, and that in the event of disagreement as to whether this should occur, I will hear the participants and decide the issue at that juncture.

[37] I also expect that insofar as the VPD participation is concerned, Mr. Woodall will no doubt voice his objections should he be of the view that there is duplication or unnecessary evidence being led, which I would then rule on.

Ronald A. McKinnon, Adjudicator