PH 2018-02
OPCC File No. 2016-11766

IN THE MATTER OF THE POLICE ACT, RSBC 1996, c. 367, AS AMENDED

and

IN THE MATTER OF A PUBLIC HEARING INTO ALLEGATIONS AGAINST

CONSTABLE MARK LOBEL AND CONSTABLE VIET HOANG

OF THE VANCOUVER POLICE DEPARTMENT

BEFORE: Adjudicator Ronald McKinnon

ADJUDICATOR'S DECISION

Public Hearing Counsel:	B. Hickford
Commission Counsel:	G. DelBigio, QC
Counsel for Constables Lobel and Hoang:	M.K. Woodall
Counsel for the Vancouver Police Department:	M. McNeil

I. Introduction

1. This is my decision following a public hearing to determine whether Cst. Mark Lobel and Cst. Viet Hoang of the Vancouver Police Department ("VPD") engaged in misconduct in their dealings with the complainant in this matter, Cameron McDonald, on March 25, 2016. The specific allegation before me is that Csts. Lobel and Hoang (the "Members") committed abuse of authority pursuant to s. 77(3)(a)(ii)(B) of the *Police Act*, RSBC 1996, c. 367 (the "Act") by

intentionally or recklessly detaining and searching Mr. McDonald without good and sufficient cause.

II. Procedural History

2. The Office of the Police Complaint Commissioner ("OPCC") received a registered complaint from Mr. McDonald on April 2, 2016. Mr. McDonald reported that between 1:00 and 1:30 a.m. on March 25, 2016, he was stopped on foot by two VPD officers (later identified as the Members), who were in a police vehicle and who advised they were investigating a reported theft of mail. This was in the area of the 2800 block of Kingsway in Vancouver. Among other things, Mr. McDonald stated in his complaint that the Members hit him with their vehicle when he tried to walk away from them; that they illegally detained, handcuffed, and searched him; and that they refused to identify themselves upon request.

3. The complaint was forwarded to the VPD Professional Standards Section, and on May 27, 2016 Sgt. Patrick Kelly was assigned to investigate the matter. Sgt. Kelly investigated whether the evidence supported the following allegations against the Members: (1) that they committed an abuse of authority by intentionally or recklessly using unnecessary force on Mr. McDonald in using their police vehicle to stop him; (2) that they committed an abuse of authority by intentionally or recklessly detaining and/or searching Mr. McDonald without good and sufficient cause; and (3) that they committed neglect of duty by failing, without good and sufficient cause, to promptly and diligently provide their Personal Identification Numbers upon request.

4. Sgt. Kelly conducted an investigation and submitted a Final Investigation Report ("FIR") to VPD Inspector Jeff Harris, the Discipline Authority, on March 13, 2017. On March 24, 2017, upon a review of the FIR, Inspector Harris found that each allegation against the Members was unsubstantiated. On April 26, 2017, upon reviewing Inspector Harris's decision, the Police Complaint

Commissioner ("PCC") determined there was a reasonable basis to believe Inspector Harris was incorrect in finding the Members' alleged conduct in detaining and searching Mr. McDonald did not constitute misconduct. The PCC did not take issue with Inspector Harris's findings in respect of the allegations regarding unnecessary force and neglect of duty. Those allegations were accordingly concluded by the OPCC.

5. Next, pursuant to s. 117(4) of the *Act*, the PCC appointed the Honourable Wally Oppal, QC, retired Justice of the British Columbia Court of Appeal, to review the record in respect of the allegation concerning the detention and search of Mr. McDonald. On May 18, 2017, Mr. Oppal concluded that the evidence appeared to substantiate the allegation that on March 25, 2016, the Members committed abuse of authority pursuant to s. 77(3)(a)(ii)(B) of the *Act*, which is oppressive conduct towards a member of the public, including, without limitation, intentionally or recklessly detaining or searching any person without good and sufficient cause in the performance or purported performance of duties.

6. On March 14, 2018, following a discipline proceeding, Mr. Oppal, as Discipline Authority, determined under s. 125(1) that the Members' detention of Mr. McDonald did not rise to the threshold of misconduct, but that Cst. Hoang committed misconduct by searching Mr. McDonald without good and sufficient cause.

7. On March 15, 2018, Cst. Hoang submitted a request to the OPCC for a review on the record in respect of Mr. Oppal's finding that he committed misconduct. Cst. Hoang submitted that the allegation should not have been substantiated, arguing the VPD had not offered adequate training on the law of search and seizure.

8. After reviewing the investigation, the discipline proceeding, and the associated determinations, the PCC considered that there was a reasonable basis to believe the Discipline Authority's findings under s. 125(1) were incorrect.

The PCC expressed the view that the Discipline Authority incorrectly found that the detention of Mr. McDonald did not amount to misconduct. Based on the evidence, the PCC took the view that the Members did not point to sufficient objective facts to support a reasonable suspicion that Mr. McDonald was connected to a particular crime. The PCC was further of the view that the Members knew or were reckless to the fact they did not have the authority to detain Mr. McDonald. The PCC considered that a public hearing was necessary in the public interest, in part to allow for the examination and cross-examination of material witnesses and a thorough examination of the issue of the Members' training.

9. On April 10, 2018, the PCC arranged a public hearing pursuant to ss. 137(1) and 143(1) of the *Act*, and appointed me to preside as adjudicator pursuant to s. 142(2). On July 16, 2018, I granted an application by the VPD for a limited participatory role in the public hearing. The hearing commenced on September 18, 2018 and continued on September 19, 24-26, and November 23, 2018. I received written submissions from all counsel and a final oral hearing was held on February 1, 2019.

III. Evidence

10. During the course of the public hearing I heard evidence from the complainant, Mr. McDonald; the Members; the investigating officer, Sgt. Kelly; Gregory Neufeld and Cst. Stuart Wyatt, instructors from the BC Justice Institute where VPD members receive their initial training in the law; and Sgt. Christopher Burnham, training officer with the VPD.

11. The relevant facts concerning the Members' interactions with Mr. McDonald on March 25, 2016 are not seriously in dispute. In brief, at approximately 12:48 a.m. on that date, the VPD received a 911 call reporting a man stealing from mailboxes in the 4700 block of Moss Street in Vancouver (the "911 Call"). The caller described the suspect as wearing dark jeans and a grey

hoodie with the hood pulled up, and wearing or carrying a black Adidas backpack. The caller reported the suspect was last seen alone and walking north on Moss Street.

12. Several VPD officers were dispatched to the area, including the Members, who were working together in a marked police vehicle. Cst. Lobel was driving and Cst. Hoang was in the front passenger seat. At approximately 1:15 a.m., the Members observed a lone male (later identified as Mr. McDonald) walking west in the 2800 block of Kingsway. There were no other people in the area at the time. Mr. McDonald was wearing dark blue jeans and a black leather jacket with a hood pulled over his head. He did not have a backpack of any kind. The Members drove past Mr. McDonald in the opposite direction, and observed him look back at them twice over his shoulder. Cst. Lobel turned the car around and pulled up beside Mr. McDonald.

13. Cst. Hoang hailed Mr. McDonald, who initially ignored him and then, after Cst. Hoang further attempted to engage him, said he did not talk to the police. Cst. Hoang told Mr. McDonald about the reported theft and repeated the suspect description to him, including the fact that the suspect was reportedly wearing a grey hoodie. Mr. McDonald replied, "Grey hoodie, see ya later," and continued walking. Cst. Lobel then sped up and pulled the police car in front of Mr. McDonald such that it impeded his path. Cst. Hoang left the police car and told Mr. McDonald he was being detained for an investigation of mail theft. Cst. Lobel also left the vehicle to act as cover for Cst. Hoang.

14. Mr. McDonald quickly became hostile and argumentative, and began swearing at the Members. After a short time, Cst. Hoang handcuffed him for officer safety and to prevent him from fleeing. Mr. McDonald did not resist being handcuffed.

15. Mr. McDonald refused to identify himself when asked by Cst. Hoang. Cst. Hoang then told Mr. McDonald he was legally required to identify himself, and

searched him for identification but did not find any. Cst. Hoang also conducted a pat-down search for officer safety. At the public hearing, Cst. Hoang said his safety concerns were that he was afraid Mr. McDonald might run or become assaultive, and he did not know whether he had any weapons on him. Both Members warned Mr. McDonald, who continued to present in a hostile manner, that he would be arrested for obstruction of justice if he did not identify himself.

16. Mr. McDonald ultimately relented and provided his name and date of birth. The Members checked his information on police database resources and, finding no information that would link him to the mail theft under investigation, they removed his handcuffs and released him.

17. Cst. Hoang testified at the public hearing that his understanding at the time was that the police could detain someone for investigative purposes provided they had a reasonable basis for suspicion that the person was connected to a specific crime under investigation. He also understood the police had the lawful authority to demand identification from a person subject to an investigative detention, and the power to search such a person for identification if he/she refused. Cst. Hoang further understood the police would have the power to arrest the detainee for obstruction if the detainee continued to refuse to provide identification after a warning. Cst. Hoang also testified that in his practical experience it was common for the police to conduct protective pat-down searches of people subject to investigative detentions as a routine matter to ensure officer safety. He said he did not recall from his training whether the power to search for officer safety was different depending on whether the subject was under arrest or investigative detention, nor did he recall being trained that in the latter situation there had to be a specific reason to believe the person may have a weapon before a search could be done. Cst. Lobel was not asked as many questions about these matters.

18. With respect to the Members' training on the issue of investigative detention and incidental powers, Cst. Wyatt testified that he taught trainees at the

Justice Institute that the standard required for an investigative detention was lower than the reasonable and probable grounds required for an arrest, and referred in his evidence to the terms "reasonable suspicion" and "articulable cause." Cst. Wyatt also testified he taught trainees they could not demand identification pursuant to an investigative detention; it could only be requested. Conversely, Mr. Neufeld testified he would teach that it was appropriate for the police to demand (as opposed to merely request) identification pursuant to some investigative detentions but not others. He said he taught trainees that the law was not entirely clear in this area, and said he would give examples of cases where the police would and would not have the authority to demand identification. At the public hearing, Mr. Neufeld said he taught that it would be lawful to demand a person's identification in determining whether they were a specific individual subject to an arrest warrant, but not when dealing with two people found acting suspiciously near the scene of a reported fight. He further testified that he would teach trainees they could arrest detainees for obstruction if they persisted in refusing to comply with a lawful demand to provide identification after a warning.

19. Both Mr. Neufeld and Cst. Wyatt testified that they taught trainees that the only search power incident to an investigative detention was restricted to addressing legitimate safety concerns, and that an investigative detention did not provide authority to search for contraband or evidence relating to the offence under investigation. Cst. Wyatt taught that a search incident to investigative detention was limited to a pat-down search for weapons or other items relevant to the particular safety concern that was raised, depending on the facts.

20. Also admitted in evidence were training materials the Members received, including materials concerning the authority to search for safety reasons incident to an investigative detention. These materials explained that in order to be lawful, an investigative detention must be based on "objectively discernible" facts, and more than a mere suspicion or hunch. These materials also explained that

officers could search a person incident to an investigative detention if there were legitimate safety concerns, and that such a search was limited to searching for things relevant to that safety concern. The materials did not specifically state whether the police could demand identification pursuant to an investigative detention.

IV. Issues

21. The issue in this public hearing is whether the following allegation, set out in the PCC's April 10, 2018 Notice of Public Hearing pursuant to s. 138(1) of the *Act*, has been proven:

> 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
>
> [My emphasis]

22. I agree with the submission by Public Hearing Counsel that the determination of this allegation requires consideration of the legality of the Members' actions in detaining, handcuffing, and searching Mr. McDonald, followed by a determination of whether any unlawful conduct by the Members as regards these actions was intentional or reckless, considered in light of their knowledge and training in the relevant areas of the law.

23. This latter consideration requires a determination as to whether the training provided to the members was sufficient to alert them to the limitations placed upon them when conducting an investigative detention.

V. Analysis

24. In the analysis that follows I do not propose to differentiate between the actions of Cst. Hoang and Cst. Lobel. I am satisfied that the Members acted in concert throughout their dealings with Mr. McDonald; indeed, in his testimony

Cst. Lobel agreed that Mr. McDonald's detention was "done jointly" by himself and Cst. Hoang. Nor do I intend to distinguish the Members by their understanding, at the material time, of the law governing the police powers engaged in this matter, since there does not appear to be any basis in the evidence upon which to draw any such distinction. These reasons will accordingly consider the conduct of the Members as a unit, as counsel have done in their submissions.

25. I will begin with an overview of the law surrounding the police power to detain for investigative purposes, and the incidental power to conduct a protective search for officer safety. The relevant principles were succinctly summarized by Iacobucci J., writing for a majority of the Supreme Court of Canada, in the leading case of *R. v. Mann*, 2004 SCC 52 at para. 45:

> To summarize... police officers may detain an individual for investigative purposes if there are reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that such a detention is necessary. In addition, where a police officer has reasonable grounds to believe that his or her safety or that of others is at risk, the officer may engage in a protective pat-down search of the detained individual. Both the detention and the pat-down search must be conducted in a reasonable manner. In this connection, I note that the investigative detention should be brief in duration and does not impose an obligation on the detained individual to answer questions posed by the police. The investigative detention and protective search power are to be distinguished from an arrest and the incidental power to search on arrest.

26. With respect to the "reasonable suspicion" standard that will justify an investigative detention, the majority in *Mann* endorsed the standard of "articulable cause" set out by Doherty J.A. in *R. v. Simpson*, 79 C.C.C. (3d) 482 (Ont. C.A.) – that is, "a constellation of objectively discernible facts which give the detaining officer reasonable cause to suspect that the detainee is criminally implicated in the activity under investigation." Reasonable suspicion has both objective and subjective elements, and involves a lower threshold than the reasonable and probable grounds required for an arrest: *Mann* at para. 27.

27. At para. 34, the majority in *Mann* held that even where reasonable suspicion exists, the power to detain is not unfettered:

> The detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances, informing the officer's suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal offence. Reasonable grounds figures at the front-end of such an assessment, underlying the officer's reasonable suspicion that the particular individual is implicated in the criminal activity under investigation. The overall reasonableness of the decision to detain, however, must further be assessed against all of the circumstances, most notably the extent to which the interference with individual liberty is necessary to perform the officer's duty, the liberty interfered with, and the nature and extent of that interference.

28. With respect to the search powers incident to investigative detention, the majority found at para. 44 that a "limited power of protective search exists at common law." Specifically, the majority held as follows, at para. 43:

> Where an officer has reasonable grounds to believe that his or her safety is at risk, the officer may engage in a protective pat-down search of the detained individual. The search must be grounded in objectively discernible facts.

29. The majority decision in *Mann* did not recognize any additional search powers aside from the limited power to conduct a pat-down search for officer safety, based on reasonable grounds to believe safety is at risk.

30. In addition to the lawfulness of the Members' conduct in view of the legal principles relating to investigative detentions, I must consider the standard required for a finding of misconduct under the *Act*. In this regard I am guided by the words of Myers J. at para. 46 of the case of *Lowe v. Diebolt*, 2013 BCSC 1092, aff'd on other grounds 2014 BCCA 280, where he said:

> The question of misconduct is different from whether a *Charter* breach occurred, and also from whether evidence obtained from an illegal search should be excluded. That is clear from the definition of the charged misconduct, which requires recklessness or intent. The "intent" cannot refer to the physical act of the search, because it is virtually impossible to

> conduct a physical search non-intentionally. It must refer to the *mens rea*, or state of mind of the officer. Recklessness must be interpreted in the same manner. The fact that an officer is ignorant of the law related to searches does not, by itself, indicate intent or recklessness. It is more in line with negligence, or, for that matter, poor training.

31. I take further guidance from the case of *Scott v. British Columbia (The Police Complaint Commissioner)*, 2016 BCSC 1970, in which Affleck J. held, at para. 36, that s. 77(3) of the *Act*, which defines the concept of abuse of authority, "should be read to apply to conduct which has a serious blameworthy element and not simply a mistake of legal authority alone."

32. Accordingly, even if I conclude that the Members exceeded their lawful authority in the course of their detention and search of Mr. McDonald, I must go on to consider whether they did so in an intentional or reckless manner such that their conduct has a serious blameworthy element and did not simply result from a mistake of legal authority. In this respect I agree with the submission by the Members' counsel that a finding of misconduct in these circumstances requires a conclusion that the Members exercised powers of detention and/or search either knowing they had no lawful authority or not caring whether they did.

33. With regard to the detention of Mr. McDonald, I do not consider that the Members exceeded their lawful authority. The Members were on the lookout for a suspect described as a lone male, on foot, with an Adidas backpack and wearing dark jeans and a grey hoodie with the hood pulled up. Mr. McDonald was not wearing a grey hoodie but rather was dressed in dark blue jeans and a black leather jacket over top of a black hoodie with the hood pulled up. He had no backpack of any kind.

34. However, I do not find that these discrepancies are determinative of the question of whether there was a sufficient constellation of objective facts to give rise to a reasonable suspicion implicating Mr. McDonald as the suspect in the reported mail theft. Mr. McDonald matched the suspect's description in several significant respects: he was a lone male, on foot, wearing dark jeans and he had

a hood pulled over his head. He was found roughly half an hour after the 911 call in the area where the suspect was reportedly observed. It was late at night with no other people in the area. In view of these factors, I cannot conclude that the officers lacked the requisite grounds to detain Mr. McDonald for investigative purposes.

35. I do not agree with Commission Counsel that the descriptors did not match, or with the submission by Public Hearing Counsel that the officers had to explain away or fill in too many factual or evidentiary gaps to justify their suspicion of Mr. McDonald. I find the descriptors matched in some but not all respects and that ultimately there were sufficient grounds to support a reasonable suspicion that Mr. McDonald was the man reported in the 911 Call. In my view it is not necessary for a person to match a suspect description to a tee before they can be subject to an investigative detention. Discrepancies of the kind in this case are not fatal to an officer's grounds so long as there remain objectively discernible facts sufficient to ground a reasonable suspicion. I find the factors mentioned earlier provided enough support for the requisite grounds in this case, even after accounting for the missing backpack, the difference in the attire worn on his upper body, and the fact that he was walking in a different direction and on a different street than the suspect was last reported to be travelling. While not trivial, none of these discrepancies, either individually or taken together, so significantly undermined the basis for suspecting that Mr. McDonald was the suspect reported in the 911 Call as to render his detention unlawful. In the circumstances there were sufficient objective facts to support a reasonable suspicion and hence an investigative detention.

36. I also find that it was reasonable for the Members to act on their suspicion and detain Mr. McDonald in the circumstances given his behaviour in walking away from them when they attempted to engage with him from their vehicle. At that point it became necessary to interfere with his liberty interests, to the extent

of briefly detaining him, in order to fulfil their duty to investigate the reported mail theft.

37. With respect to the Members' conduct in handcuffing Mr. McDonald, once again I do not consider that they acted without lawful authority. Mr. McDonald was behaving in an aggressive and confrontational manner. He was animated and verbally hostile towards the Members. I find that in the circumstances Mr. McDonald's behaviour presented a sufficient safety concern that the Members were justified in using handcuffs in the course of his detention.

38. It follows that I do not find any misconduct has been proven in respect of the Members' actions in detaining and handcuffing Mr. McDonald. Because I do not consider that the Members lacked lawful authority for these actions, there is no need to determine whether their conduct was "intentional" or "reckless" as those terms are used in s. 77(3) of the *Act*. If I am incorrect in this finding, I would alternatively reach the same result on the basis that the evidence does not prove the Members engaged in blameworthy conduct. I do not agree with Commission Counsel that the Members likely detained Mr. McDonald simply out of frustration with his conduct in refusing to engage with them when they initially pulled up beside him in their police car. The evidence adduced at the public hearing does not support such a finding. Cst. Hoang was clear in his evidence that he believed he had grounds to detain Mr. McDonald. Even if objectively he did not have those grounds, the evidence satisfies me that he subjectively thought he did and that he did not detain Mr. McDonald knowing he had no grounds or being reckless as to whether he did. I make this finding based on Cst. Hoang's testimony and based on my conclusion that there was at least some objective support for his suspicion of Mr. McDonald in all the circumstances.

39. With regard to the Members' conduct in searching Mr. McDonald for identification, I do consider that they acted without lawful authority. It is well settled that the only lawful search power incident to an investigative detention is a protective pat-down search when there are reasonable grounds to believe

there is a safety risk. Cst. Hoang acknowledged in his testimony that he went further than this by searching inside Mr. McDonald's pockets for identification documents. As mentioned, on his understanding of the law at the time he felt he was authorized to demand identification from a person detained for investigative purposes, and to search that person for identification if they refused the demand.

40. This is an incorrect view of the law. The majority in *Mann* narrowly restricted the search power incident to investigative detention to protective pat-down searches where the police believe on reasonable grounds the detained person presents a safety risk. In my view it is clearly implicit from this restriction that there can be no power to search a detained person for the purposes of identifying them.

41. As a practical matter, I accept that the police will generally wish to identify a person they have detained for investigative purposes, and may ask such a person to provide identification as a basic way to advance their investigation and gather information. I consider it likely that identification is provided in many if not most cases. However, that is not to say that people subject to investigative detention can actually be compelled to identify themselves. The majority in *Mann* did not address this point directly as it did not arise in the case, but did hold at para. 45 that an investigative detention "does not impose an obligation on the detained individual to answer questions posed by the police." I have not been directed to any jurisprudential authority, nor have I found any, that would support the power to demand identification upon an investigative detention. Given the careful limitations imposed on police powers incident to investigative detentions as set out in *Mann*, I find there is no authority to compel persons subject to investigative detention to identify themselves.

42. However, I have also not been directed to any case law, nor found any, that explicitly states the police cannot demand identification from a person who is lawfully detained for investigative purposes. This is not to suggest that the absence of jurisprudence stating the police do not have a particular power may

be taken to imply the existence of such a power as a matter of law. Rather, I make this observation because in my view it is relevant to the question of whether the Members intentionally or recklessly acted without lawful authority. In the absence of explicit legal authority on point, the law may be considered less than perfectly clear with respect to the extent of police officers' authority in seeking information about the identity of suspects under investigative detention.

43. The lack of clarity on this point is apparent from the training the Members received. As noted, Mr. Neufeld taught that identification could be demanded pursuant to some types of investigative detention but not others, and that a detainee's refusal to provide identification could afford an officer with reasonable grounds to make an arrest for obstruction of justice. I wish to be clear that in raising this point I am not endorsing the Members' complaints that they received inadequate training in the law relating to investigative detentions. Mr. Neufeld and Cst. Wyatt were both clear that they taught trainees that the only search power incident to an investigative detention is to address legitimate safety concerns. I am satisfied on the evidence that the Members received sufficient training to alert them to the state of the law with respect to the requisite grounds for an investigative detention and the limited incidental search power. There is ample evidence in support of that conclusion. There was no suggestion that Mr. Neufeld or Cst. Wyatt were mistaken in the evidence they gave about officers' training in this regard, and indeed Cst. Hoang allowed in his testimony that he may have forgotten the training he received. Rather, I raise this point because in my view it illustrates the relative uncertainty as to the state of the law regarding acceptable police conduct in attempting to identify persons subject to investigative detention, which in turn bears upon whether the Members engaged in misconduct or were simply mistaken about their legal authority.

44. In view of the legal principles discussed earlier, I have little difficulty finding the Members searched Mr. McDonald without good and sufficient cause. Cst. Hoang testified that he searched Mr. McDonald for safety reasons and in order to find identification. There does not appear to have been any reason to

believe Mr. McDonald had any weapons or other items that might pose a threat to officer safety on him, and in any event the search went further than a protective pat-down search to a search of Mr. McDonald's pockets for identification documents. I find there was no lawful authority for either search; there were no grounds to search him for officer safety reasons and no lawful authority exists to search for identification pursuant to an investigative detention.

45. However, this conclusion does not the end of the matter. I must consider whether the Members acted in an intentional or reckless manner, in the sense that they knew or did not care they had no grounds for their actions, such that their conduct was seriously blameworthy and not simply the result of a mistake of legal authority. In my view the evidence does not support such a finding. I accept Cst. Hoang's evidence that the Members honestly believed they were lawfully authorized to demand Mr. McDonald's identification, and to search him if he refused. They were incorrect in this belief, but that mistake alone is insufficient to establish an abuse of authority.

46. I also accept that the Members mistakenly thought they had the authority to search Mr. McDonald for safety reasons in the circumstances, despite the lack of any specific reason to believe he had a weapon or any other items that might pose a safety threat. Cst. Hoang testified that he had safety concerns based on Mr. McDonald's aggressive presentation. While that was not sufficient to support grounds to believe Mr. McDonald had any items in his possession that would pose a threat, I consider it relevant to the Members' actions. Once again, my finding that the Members were mistaken about their legal authority does not on its own equate to misconduct. Further, I wish to be clear that I do not find this mistake resulted from any inadequacy in the training the Members received, although it appears the Members' practical experience may have contributed to their error.

47. Turning to the issue of blameworthiness, I do not find that the Members' conduct in the circumstances was so egregious that it would be capable, on its own, of supporting a finding of intention or recklessness. This conclusion applies to both aspects of the search, namely the officer safety component and the search for identification. While there were insufficient grounds for both aspects, the evidence does not satisfy me that either search was knowingly or recklessly done without lawful authority. Rather I accept, based on the Members' experience and the somewhat unusual circumstance of having detained but not identified a suspect in an investigation, that the Members were simply mistaken as to their lawful authority.

48. I have already referred to the relative uncertainty surrounding the power to demand identification from persons subject to investigative detention. I acknowledge, in light of that uncertainty, that an officer could well be confused as to what is permissible in attempting to identify a detainee who refuses to provide identification voluntarily. That appears to be what happened here in terms of the Members' belief that they could search Mr. McDonald for identification documents. With respect to the officer safety search, I find that while the Members did not have any grounds to believe Mr. McDonald had a weapon or other items raising safety concerns, they did have some grounds to be concerned about their safety in general based on his behaviour, which is the reason they handcuffed him. Ultimately I do not find that the evidence supports the conclusion that they knowingly or recklessly exceeded their authority in patting him down.

49. I find that the Members' state of mind in searching Mr. McDonald was more akin to negligence than intent or recklessness. As stated in *Lowe*, at para. 46, "ignorance of the law related to searches does not, by itself, indicate intent or recklessness." That comment is appropriate here; the Members were ignorant of the law related to searches incident to investigative detentions, but on the

evidence I do not find they intentionally or recklessly acted outside their legal authority.

VI. Conclusion and Recommendations

50. I find that the allegation of misconduct against Cst. Lobel and Cst. Hoang has not been proven. While they searched Mr. McDonald without good and sufficient cause, they did not do so intentionally or recklessly.

51. Pursuant to section 143(9)(c) of the *Act*, I recommend to the Chief Constable of the VPD that members need to be reminded of the state of the law in respect to "pat-down" searches for officer safety. It appears from the evidence of Cst. Hoang, set out at para. 17 of these reasons, that some members have, as a matter of routine, ignored the need to have a reasonable belief that upon detention there is an actual concern for officer safety before conducting any search. I further recommend that members be instructed that they are permitted to ask for identification pursuant to an investigative detention, but they cannot search for identification if the person declines to answer, without other lawful authority.

Dated at Vancouver, British Columbia this 26 day of June, 2019

Ronald McKinnon, Adjudicator