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

SUBMISSIONS OF COMMISSION COUNSEL

The allegation that is the subject of this proceeding is:

> 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.

Part 1 – Facts and Issues for Determination

1. Much of the evidence in this case is likely not in dispute. Officers Hoang and Lobel were on duty. They received and responded to a dispatch about a possible theft from mail boxes. They saw Mr. McDonald and they concluded that he might have been the person responsible for the theft of mail. On that basis they approached Mr. McDonald, they directed certain remarks to Mr. McDonald and, they detained, handcuffed and searched Mr. McDonald. They also demanded that he identify himself. Upon realizing that there was nothing to connect Mr. McDonald to the alleged thefts, Mr. McDonald was released.

2. Some issues are also likely not be in dispute. These are:
    a. That officers Hoang and Lobel received training and that training included at least something on the legal authority to detain, and the consequential powers to search and to demand identification.[1]
    b. That officers Hoag and Lobel acted lawfully and within their duty when they responded to the call and began to search for the person who might have been responsible for the alleged theft.
    c. That Mr. McDonald was at liberty to walk, as he had been doing, without interference from the police, unless specific legal criteria with respect to arrest or detention had been satisfied.
    d. That officers Hoang and Lobel did not, and did not have grounds to arrest Mr. McDonald.
    e. That under carefully circumscribed circumstances, police may briefly detain an individual for investigative purposes and, where that detention is lawful, that a limited search and questioning may be conducted for safety purposes.
    f. Finally, on the evidence of this case, it appears that it is agreed that the officers did not have lawful authority to require that Mr. McDonald identify himself and that when they issued this demand to Mr. McDonald, they were acting contrary to law.
3. Commission Counsel agrees with and adopts paragraphs 2-6 of the submissions of Hearing Counsel.

[1] September 25 – pp.43-44; p.59; pp.61-62; September 26 – p.14; September 19 – pp.41-45; November 13 – p.70

4. Commission Counsel also agrees with and adopts the framing of the issues to be decided as set out at paragragh 7 of the submissions of Hearing Counsel.
5. In addition, Commission Counsel submits the following evidence is of particular importance. Officer Lobel was driving the police car. He testified that they were travelling at 25-35 kilometers per hour and, from "halfway across the street [or] a few lanes of traffic", Mr. McDonald looked "similar" to the person they were looking for.[2]
6. Further, from his side view or rear view mirror, he saw Mr. McDonald do what he Sehe could only say it was more than one.[3]
7. Officer Lobel testified that he had grounds for investigative detention after Mr. McDonald said "see ya" to officer Hoang. He testified that he believed Mr. McDonald was going to flee at that time.[4][5]
8. Officer Hoang testified that there were grounds to detain based upon description alone. [6] He explained why inconsistences between Mr. McDonald the dispatch description did not concern him.[7]
9. After a CPIC query was conducted, the grounds to detain no longer existed.[8]
10. Officer Lobel agreed that it was important for his job that he understand safety searches.[9]

[2] September 25 – p.26 (13-18)
[3] September 25 – p.26 (38-44)
[4] September 25 – p.32 (5-21)
[5] September 26 – p.24-25
[6] November 13 – pp.72-73
[7] November 13 – pp.73-76
[8] September 25 – pp.36-37
[9] September 25 – p.58 (40-46)

11. Officer Lobel also agreed that the detention of Mr. McDonald was done jointly with officer Hoang.[10]

12. The descriptors of the suspect provided to the officers was brief. It consisted of "wearing a grey hoodie; hood pulled up; black Adidas sack; dark jeans; on foot."[11] The reliability of the caller was unknown.[12]

13. There was no reference to age, height, weight, skin colour, hair colour, hair length, the presence or absence of facial hair.[13]

14. Mr. McDonald did not have an adidas bag.[14] Further, he was wearing a leather black jacket. [15]

15. Officer Lobel understood that Mr. McDonald was under no obligation to communicate back to Officer Hoang. [16]

Part 2 – Argument

16. The following provisions of the Canadian Charter of Rights and Freedoms are relevant to the determination of these issues:

Search or seizure	**8.**	Everyone has the right to be secure against unreasonable search or seizure.
Detention or imprisonment	**9.**	Everyone has the right not to be arbitrarily detained or imprisoned.

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[10] September 25 – p.72 (36-39)
[11] September 25 – p.79 (34-42)
[12] September 26 – p.20 (12-36)
[13] September 26 – pp.16-17
[14] September 26 – p.17 (27-29)
[15] September 26 – p.18 (23-31)
[16] September 26 – p.23 (18-24); pp.30-31

17. The following is an overview of the position of Commission Counsel:

a. Officers Hoang and Lobel were working together and they acted jointly in relation to their actions against Mr. McDonald. More particularly, though each officer played a slightly different role in relation to their actions, the actions and beliefs of each officer were part of a common enterprise or purpose and at no time did officer Hoang attempt to separate himself from, or disavow the actions or beliefs of officer Lobel nor did officer Lobel attempt to do this in relation to officer Hoang. Officers Hoang and Lobel were indeed, partners in their actions against Mr. McDonald.

b. The officers did not, either individually or together, have anything more than a bare suspicion or hunch with respect to whether Mr. McDonald was connected to a particular crime.

c. Further, the officers were willing to overlook or explain away facts which inconsistent with and which detracted from a reasonable suspicion upon which to detain.

d. However, if the requisite subjective element had been present, the requisite objective element did not exist on the facts of the case.

e. Officers Hoang and Lobel did not have grounds in law upon which to detain Mr. McDonald.

f. On that basis, officers Hoang and Lobel did not have grounds in law upon which to place Mr.McDonald into handcuffs or to search him.

g. Even if the detention of Mr. McDonald had been lawful, officers Hoang and Lobel had no grounds in law upon which to require Mr. McDonald to produce identification or identify himself.

h. The actions of the officers resulted in a violation of Mr. McDonald's right to be secure against arbitrary detention, as guaranteed by s.9 of the Canadian Charter of Rights and Freedoms (the "Charter") and his right to be secure against unreasonable search and seizure as guaranteed by s.8 of the Charter.

i. The failure to comply with the law or, if there were acts which violated Mr. McDonald's rights as guaranteed by the Charter is relevant to but not determinative of whether there has been an abuse of authority.

j. However, on the facts of this case, it is submitted that officers Hoang and Lobel acted in a manner that was contrary to law, contrary to the protection of Mr. McDonald's rights as guaranteed by s.9 of the Charter, and contrary to the legal principles which they had been taught. Moreover, it is submitted that officers Hoang and Lobel intentionally or recklessly detained and searched Mr. McDonald without good and sufficient cause.

18. The adjudication of this case requires a clear understanding of "abuse of authority" as that phrase is used in the section in question.

19. The case of Scott v. British Columbia (The Police Complaint Commissioner), 2016 BCSC 1970 (CanLII) is instructive. In Scott, the Court considered held:

> [36] The petitioner does not seek to challenge in subsequent administrative proceedings the acquittal of the complainant. The question

before Rounthwaite P.C.J. was whether the complainant was guilty beyond a reasonable doubt of assaulting a police constable in the execution of his duty and of resisting arrest. The issue of the complainant's guilt or innocence is not the same as the issue of whether the petitioner was guilty of misconduct by abusing his authority. Provincial Court Judge Rounthwaite decided the petitioner did not have authority to enter the house of the complainant and arrest her, but made no decision that the petitioner had abused his authority within the meaning of s. 77(3) of the *Police Act*, which is reproduced at para. 7 of these reasons. "Abuse of authority" is defined for the purpose of the complaint against the petitioner as the intentional or reckless arrest of the complainant without good and sufficient cause. I do not read the phrase "without limitation", as the retired judge apparently did, to mean that intention or recklessness can be ignored when considering the petitioner's conduct. In my view, the section should be read to apply to conduct which has a serious blameworthy element and not simply a mistake of legal authority alone. (Emphasis added)

[37] In my opinion, the retired judge improperly conflated the issue of whether the petitioner was in the course of his lawful duties when he entered the complainant's home and arrested her, with the other issue of whether the petitioner was guilty of misconduct by abusing his authority as defined in the *Police Act*.

20. The following passages from Lowe v. Diebolt, 2013 BCSC 1092 (CanLII) are also of assistance:

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

[46] I do not agree with this position. The question of misconduct is different from whether a *Charter* breach occurred, and also from whether evidence obtained from an illegal search should be excluded. That is clear from the definition of the charged misconduct, which requires recklessness or intent. The "intent" cannot refer to the physical act of the search, because it is virtually impossible to conduct a physical search non-intentionally. It must refer to the *mens rea*, or state of mind of the officer. Recklessness must be interpreted in the same manner. The fact that an officer is ignorant of the law related to searches does not, by itself,

> indicate intent or recklessness. It is more in line with negligence, or, for that matter, poor training. (I address actual knowledge below at para. 52.)
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> [52] In this case, the difficulties with the Adjudicator's approach to the validity of the search were apparent, and therefore not a "treasure hunt". However, as I have stated, that is only the starting point. On several occasions, I invited the petitioner's counsel to point me to anything in the record indicating either intentional or reckless misconduct by Cst. Burridge other than the search itself. He could not do so other than to point out her acknowledgment that she did not have grounds to arrest. But that factor merely circles back to the validity of the search. There was nothing in the evidence to show that Cst. Burridge knew that the lack of grounds for arrest meant she could not do the search, something which might amount to intention. While there might be cases in which the misconduct bespeaks intention or recklessness, this is not one of them. (Emphasis added)

21. As will be elaborated upon below, it is submitted that the actions of officers Hoang and Lobel were not premised upon an ignorance of law or poor training. At best, they were reckless with respect to the scope of their authority.

22. The issue of investigative detention, and whether there is a corresponding authority that permits an officer to conduct a search or ask a detained person any questions in the course of an investigative detention was addressed in R. v. Patrick, 2017 BCCA 57. "The question of law that lies at the heart of this Crown appeal reduces to this: Does a police officer have the power to ask a detainee questions preliminary to or in the course of conducting a permissible pat-down search incident to a lawful investigative detention? If so, what can properly be asked of a detainee at the investigative detention stage?" (para.10)

23. In Patrick, the Court held that limited questions that relate to officer safety are permissible. "...I would hold that any questions asked by a police officer of a detainee in the course of a protective pat-down search must be limited to the narrow purposes for which the power exists." (para.12)

24. In its reasons in Patrick, the Court elaborated upon the purpose and scope of a search pursuant to an investigative detention:

> [58] *Mann* at para. 40 also recognized that the general duty of officers to protect life may, in certain situations, give rise to the power to conduct a pat-down search incident to an investigative detention. To lawfully exercise this authority, the officer must believe on reasonable grounds that his or her own safety, or the safety of others, is at risk. The decision to search must also be reasonably necessary in light of the totality of the circumstances. It cannot be justified upon mere intuition or on the basis of vague or non-existent concerns for safety. In addition, the search must be conducted in a reasonable manner and the Crown bears the burden of demonstrating this on a balance of probabilities: *Mann* at paras. 36, 40.
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> [59] I pause here to note that the language used in *Mann* gives rise to interpretive challenges. In *R. v. MacDonald*, 2014 SCC 3 (CanLII), the court split on the issue of whether an officer can search incident to an investigative detention when he or she has reasonable grounds to believe that a threat or risk exists, or whether the power to search arises when the officer has reasonable grounds to suspect that a threat or risk exists. The parties made submissions on how *Mann* should be interpreted and whether the majority judgment in *MacDonald* has effectively changed the test for a lawful search incident to an investigative detention. I do not consider that it is necessary for this Court to address the point to resolve this appeal.
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> [60] The power to search incident to an investigative detention is circumscribed by its underlying rationale – the protection of police officers and others from harm that could have been avoided through a minimally intrusive search. It is not a license to search for evidence and must, in this respect, be distinguished from the power to search incidental to a lawful arrest: *Mann* at para. 37, 45. As noted in *Mann*:
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>> [45] ...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...
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>> [Emphasis added.]
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> [61] The power to conduct a protective search incidental to a lawful investigative detention where the test in *Mann* is met recognizes the unpredictable, dynamic and sometimes dangerous context in which the

police are obliged to discharge their public duties. The point was emphasized in *Mann*:

> [43] ...Police officers face any number of risks everyday in the carrying out of their policing function, and are entitled to go about their work secure in the knowledge that risks are minimized to the greatest extent possible. As noted by L'Heureux-Dubé J. in *Cloutier, supra*, at p. 185, a frisk search is a "relatively non-intrusive procedure", the duration of which is "only a few seconds". 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 to prevent "fishing expeditions" on the basis of irrelevant or discriminatory factors.

[62] As this Court noted in *Crocker*, the risks are heightened when the police approach an occupied vehicle in which weapons may be concealed:

> [63] ...the potentially dangerous or even lethal risk to police officers in approaching a stationary, occupied vehicle, even when that risk is not readily observable, is well-established: *R. v. Miller and Cockreill* (1975), 1975 CanLII 927 (BC CA), 24 C.C.C. (2d) 401 (B.C.C.A.); *R. v. Romeo* (1989), 1989 CanLII 7122 (NB CA), 47 C.C.C. (3d) 113 (N.B.C.A.).

Those risks are magnified even further when, as in this case, a roadside stop occurs in darkness and the vehicle is occupied by a group of men, some of whom are known to have connections to the drug trade and a propensity for violence.

25. Within the context of a s.24(2) analysis, in R. v. Reddy, 2010 BCCA 11, Frankel J.A. addressed the issue of the requirement that police officers know, understand and comply with the law.

> [101] The critical factor in situating Constable Todd's conduct along that fault line is that at the time of his encounter with Mr. Reddy he either knew, or ought to have known, that he did not have the power (a) to detain someone for investigation on a bare suspicion that that person might be in breach of a condition of a probation order, or (b) to conduct a search incidental to an investigative detention that is unconnected to any safety concerns. Whatever uncertainly may have existed with respect to those aspects of investigative detention had been swept away by *Mann*. Although, as discussed by Mr. Justice Sopinka in *Kokesch*, instant knowledge of court decisions is not to be attributed to the police, they are

> expected to comply with those decisions within a reasonable time: at 33. What occurred in *R. v. Brydges*, 1990 CanLII 123 (SCC), [1990] 1 S.C.R. 190, is instructive. In that case, the Supreme Court held that, by reason of s. 10(b) of the *Charter*, the police have a duty to advise a detainee of the existence and availability of legal aid plans and duty counsel. However, to give the police time to take the steps necessary to implement that decision the Court provided a 30-day transitional period: at 217.
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> [102] I am not suggesting that 30 days is the outside limit with respect to the time within which the police are expected to bring their practices into conformity with pronouncements by the Supreme Court of Canada. In *Brydges*, the Court was of the view that 30 days was "sufficient time for the police forces to react, and to prepare new cautions". Other decisions may well take longer to implement such as, for example, where it is necessary for police forces to update their operations manuals, and provide training. However, in my view, 11 months was ample time for police officers to bring their investigative-detention practices into conformity with the dictates of *Mann*. Accordingly, I consider the violation of Mr. Reddy's rights to lie at the serious end of the breach-spectrum.

26. It might be concluded that the actions of officers Hoang and Lobel were motivated by a desire to investigate the complaint of mail theft. However, while an improper motivation might operate negatively against an officer in a hearing such as this, the absence of an improper motive or even the presence of a laudable motive is not determinative of the legal issues in question.

27. It is submitted that the actions of the officer did not take place in a circumstance of urgency and did not take place in a circumstance that engaged the safety of the public. The actions of the officer in relation to Mr. McDonald were also highly intentional in that, after Mr. McDonald refused to engage with the officers (as he was entitled in law to do), the officers chose to detain Mr. McDonald rather than allow him to continue without any further interaction.

28. It is likely that the officers' actions arose out of frustration with Mr. McDonald more than anything else.
29. On this basis, the only issue is whether the officers intentionally acted without good and sufficient cause to detain Mr. McDonald or whether they were reckless in their actions. Commission Counsel submits that, at best, the officers were reckless in deciding to detain, handcuff, search and demand identification from Mr. McDonald.
30. It may readily be concluded that the authority to detain for investigative purposes, and search is fundamental to a street officer's job, on a day to day basis.
31. This is plainly recognized by the VPD in the initial and ongoing education and training they provide in relation to these police powers.
32. Commission Counsel submits that any argument that officers Hoang and Lobel might advance that their actions were premised upon ignorance of law should be rejected. Instead, the officers chose to ignore their training, their education and the law or, at the very least, the officers were reckless with respect to whether the interference with Mr. McDonald's constitutionally protected interests were justified in law.
33. A police officer's job might be busy and demanding however, a police officer must be guided by and act within the law. Officers Hoang and Lobel were trained in the law governing investigative detention and they were well aware that the governing law imposed limits upon their authority.
34. This case does not involve the understanding or application of a new or novel legal principle, However, even if it did, knowing that the law might evolve, an

officer who is too busy to read legal updates that his or her employer provides, will be reckless with respect to the scope of his or her authority if he or she has acted contrary to law.

35. It does not appear that the officers dispute that the legal education and training with respect to the authority to conduct an investigative detention was clear. The point of dispute seems to be in relation to the authority (or lack of authority) to require that Mr. McDonald identify himself.

36. Commission counsel submits that there was no basis in law to conduct an investigative detention of Mr. McDonald. The descriptors did not match and inconsistences cannot be swept aside with explanations such as the adidas bag might have been ditched.

37. Therefore, it is unnecessary to consider the scope of the authority to use handcuffs against a person under investigative detention or against Mr. McDonald and, it is unnecessary to consider the adequacy of the training in relation to demanding identification.

38. The position of Commission Counsel is that the training and education that the officers received was comprehensive, however, if there was no authority to conduct an investigative detention, then there was no authority to handcuff and, even a mistaken belief with respect to the authority to demand identification would not be engaged.

39. The conduct of officers Hoang and Lobel were serious and blameworthy and they committed Abuse of Authority pursuant to section 77(3)(a)(ii)(B) of the Police Act.

All of Which is Respectfully Submitted.

Dated this 19th day of January, 2019 at Vancouver, BC

Greg DelBigio, QC

Commission Counsel