

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 PUBLIC HEARING COUNSEL

1. It is 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.
2. The Public Hearing commenced on September 18, 2018 and continued for the dates of September 19, 24, 25, 26, 2018 and November 13, 2018 and was adjourned over for final submissions to February 1, 2019.
3. Public Hearing counsel presented the following witnesses:
 - (i) Cameron McDonald, the complainant;
 - (ii) Gregory Neufeld, instructor from the BC Justice Institute;
 - (iii) Stuart Wyatt, past instructor for the BC Justice Institute;
 - (iv) Sergeant Christopher Burnham, a training officer from the Vancouver Police Department;
 - (v) Sergeant Patrick Kelly, the investigating officer who completed the Final Investigation Report.
4. In addition, both Constables Lobel and Hoang testified.

5. The following Exhibits were entered:

- (i) Notice of Public Hearing;
- (ii) Post-Academy Training Binder with Tabs 1-28;
- (iii) One page from the Vancouver Police Department Regulations and Procedure Manual;
- (iv) Final Investigation Report;
- (v) Book of investigative materials for the Public Hearing;
- (vi) Post-Academy Training Video on arrest and detention.

6. The facts which this matter is based upon which cannot reasonably be disputed are as follows:

- (a) That on March 25, 2016 at 00:48 hours a 911 call was received by VPD with respect to a theft in progress, being perpetrated by a male was stealing from mailboxes.¹
- (b) The offence was occurring in the 4700 block of Moss Street, Vancouver, BC.²
- (c) The offender was described as a male wearing a grey hoodie, hood pulled up, dark jeans, and carrying an Adidas sack.³
- (d) The male was on foot and alone.⁴
- (e) The male was no longer in view and last seen walking north on Moss Street.⁵
- (f) A number of police units were dispatched to the area including Constables Lobel and Hoang who were working together in a marked police car. Constable Lobel was the driver and Constable Hoang was the passenger.

¹ Exhibit 5, the CAD

² Exhibit 5, the CAD

³ Exhibit 5, the CAD

⁴ Exhibit 5, the CAD

⁵ Exhibit 5, the CAD

- (g) At approximately 01:15 Constables Lobel and Hoang, having conducted a grid search of the area, observed a male walking west in the 2800 block of Kingsway.
- (h) The officers drove by the male, who turned out to be Mr. McDonald, in the opposite direction at a speed well below the posted speed limit of 50 km/h.
- (i) As they drove by Mr. McDonald they observed him to conduct two shoulder checks where he turned and looked back at the police car over his shoulder.
- (j) The officers turned the police vehicle around and came up alongside Mr. McDonald, traveling at a crawl speed.
- (k) Constable Hoang said "Hi" to Mr. McDonald. Mr. McDonald did not respond.
- (l) Constable Hoang then raised his voice and said "Hey!" loudly to Mr. McDonald and Mr. McDonald responded, saying, "What? I don't talk to the police."
- (m) Constable Hoang told Mr. McDonald that there had been a report of theft from mailboxes from the area and provided the description that had been received by dispatch to Mr. McDonald which included the fact that the suspect was reported to be wearing a grey hoodie. Mr. McDonald stopped and turned towards Constable Hoang.
- (n) Mr. McDonald was wearing a black leather jacket with the hood up, he had a toque on, and was wearing dark blue jeans. He was not carrying an Adidas sack.
- (o) Mr. McDonald replied to Constable Hoang, saying, "Grey hoodie, see ya later." And he then continued to walk in the same path and direction as before.

- (p) Constable Lobel sped the police car up, traveling ahead of Mr. McDonald and turned the police car perpendicular to Mr. McDonald's path of travel to impede his direction of travel.
- (q) Mr. McDonald did stop at the police car and hit both his hands on the hood of the police car and raised his arms in frustration.
- (r) Constable Hoang exited the police vehicle and told Mr. McDonald that he was being detained for investigation of mail theft and placed him in handcuffs. Constable Lobel also exited the police vehicle at this time as the cover officer for Constable Hoang.
- (s) Mr. McDonald was agitated, very vocal, and was arguing with and swearing at both police officers. He was, however, compliant and did not resist their detention of him or threaten them in any way.
- (t) The officers both told Mr. McDonald that he was legally obliged to identify himself. Mr. McDonald initially refused.
- (u) Constable Hoang searched Mr. McDonald and did not find any identification on him nor did he find any mail or any other contraband to indicate that Mr. McDonald was involved in the commission of any offence.
- (v) Mr. McDonald then provided his name and date of birth. The officers checked him on CPIC and PRIME and found nothing that would connect him to the offences and, therefore, removed the handcuffs and released him.
- (w) Mr. McDonald demanded to know the identity of the officers. The officers pointed to their Pin numbers that were displayed on the outside of their uniforms but did not accede to Mr. McDonald's request to write their pin numbers down and provide them to him.

7. It is submitted that the issues of determining whether there was a lawful detention and a lawful search of Mr. McDonald turn on the above referenced facts. A determination of those issues requires consideration of the other evidence surrounding and reflecting on those

enumerated facts. Ultimately, the evidence heard at the Public Hearing requires a determination of the following issues:

- (i) Was the investigative detention of Mr. McDonald lawful? In other words, did Mr. McDonald's detention meet the threshold requirement that the officers need have a reasonable suspicion that is not only based on their subjective belief but supported on an objective basis.
- (ii) Even if the investigative detention of Mr. McDonald was lawful, was the further act of handcuffing him and conducting a search of him, lawful?
- (iii) If the investigative detention was not lawful and the search was not lawful, were the officers' actions intentional or reckless or were their actions based on a lack of knowledge of the law resulting from a lack of training being provided to them.

8. It is my submission that it is clear on the evidence, the officers were acting jointly in that both of them made the decision to detain Mr. McDonald and to search him. This is apparent as a result of the evidence given by each of the officers.

9. Turning to the first issue of whether Mr. McDonald's detention was an investigative detention supportable in law, I reference the oft quoted phrase from *R. v. Simpson*⁶ which sets out the articulable cause required for a valid investigative detention,

A constellation of objectively discernable facts which gives the detaining officer reasonable cause to suspect that the detainee is criminally implicated in the activity under investigation.

10. The law in that regard is clear and the Supreme Court of Canada confirmed in *R. v. Mann*⁷ that the police have a limited power to detain for investigation and such a detention must be viewed as reasonably necessary on an objective view on the totality of the circumstances. There must be a clear nexus between the person to be detained and a recent or ongoing criminal offence.

⁶ *R. v. Simpson* (1993) 79 C.C.C. (3d) 482 (ONCA)

⁷ *R. v. Mann* [2004] 3 S.C.R. 59

11. While both officers testified that they first saw Mr. McDonald walking westbound on Kingsway and that his clothing was similar to that provided by the dispatch, it is my submission that their evidence in that regard cannot be objectively supported. The only actual factual component of Mr. McDonald's dress that directly was on point, that he was wearing a jacket with a hood on it and the hood was up. The caller described the jacket as a grey hoodie with the hood up. Very clearly, Mr. McDonald was wearing a black leather jacket with the hood up. Both officers tried to justify their conclusion of similar dress by saying that witnesses often get colours confused and that grey is close to black.
12. From an objective perspective that conclusion raises concern as it requires a filling in of a gap in the evidence which, as Constable Lobel stated in his testimony, should not be done.⁸
13. At the very least, even accepting the jacket as having a hoodie and the hood being up, it is necessary to consider the balance of the evidence provided by the caller to dispatch in comparison with Mr. McDonald's attire. More particularly, the only other descriptors that were provided were that the male was wearing dark jeans and was carrying an Adidas sack. Mr. McDonald was wearing dark blue jeans and was not carrying an Adidas sack and he was also wearing a toque.
14. It is significant to note that Constable Lobel testified that the dress, as presented by Mr. McDonald, was very common for that area of the City of Vancouver where Mr. McDonald was seen to be walking.
15. From an objective perspective, it is also important to note that there were no descriptors of age, height, weight, skin colour, facial hair or lack thereof, colour of hair, or length of hair.
16. In my submission, without at least some of those other factors, a reasonable suspicion that Mr. McDonald was the perpetrator cannot be realistically supported from an objective perspective.
17. The officers further testified that his location, proximity and timing also supported their belief that Mr. McDonald was a legitimate suspect. It is important to note that the stopping of Mr. McDonald occurred some 20 minutes after the caller had stated the male who had

⁸ Transcript: September 26, 2018, p. 26, l. 15 - p. 29, l. 1-23

been stealing from the mailboxes was walking out of view northbound on Moss Street which, on all of the evidence, was the opposite direction in which Mr. McDonald was walking. The officers tried to explain this as a situation where suspects often change direction when fleeing or leaving the scene of the crime by jumping fences and cutting through yards. Once again, this is clearly an exercise of filling in gaps where there is no evidentiary support of an objective nature to come to that conclusion.

18. Another piece of evidence to consider is that the caller stated that the suspect was carrying an Adidas sack. Clearly Mr. McDonald was not carrying an Adidas sack and, in his evidence, was carrying a white Chevron grocery bag. While neither officer remembered the white Chevron grocery bag, they did not deny that he may have been carrying the same. The evidence did establish that he was walking from the direction of a Chevron gas station which was located several blocks behind him.
19. Once again, the officers tried to justify the absence of the Adidas bag based on their evidence that perpetrators often ditch the contraband and then return later to retrieve it. This is, yet again, an exercise of filling in a significant gap in the evidence that cannot be justified from an objective perspective.
20. Simply put, there was nothing in any of the evidence to support even a suspicion that Mr. McDonald had changed direction, cut through yards, jumped fences or ditched an Adidas sack.
21. While both officers stated in their evidence that the test for reasonable suspicion required not only subjective grounds but also objective grounds, it is my submission that they were clearly reckless in their application of the task in describing the manner in which they detained Mr. McDonald. Both testified that they understood that a street check would not permit such a detention nor any search, and that a person in a street check scenario could simply refuse to accede to the request to answer their questions and simply walk away.
22. In my submission, on any reasonable interpretation of the evidence, it is apparent that the stopping of Mr. McDonald was nothing more than a street check and, as such, the officers did not have any lawful basis to detain him or demand that he identify himself.

23. It is interesting to note that the police form authored by Constable Hoang describing the stop and detention of Mr. McDonald is entitled "Street Check" and not entitled "General Occurrence Report". Constable Lobel tried to explain this in his evidence as being something that is entered under that title because it allowed easier access of the information. In my submission, his evidence in that regard is not believable.⁹
24. Constable Hoang testified that it was not a street check. He denied that at the point of his loudly saying, "Hey!" to Mr. McDonald, that it was his understanding of the law at the time that Mr. McDonald was free to continue on his way. The cross-examination of Constable Hoang on that point is very telling. He was referred to his evidence at the Discipline Hearing where he stated the exact opposite. In this Public Hearing, he was at a loss to explain why his evidence at the Discipline Hearing had changed to the evidence that he was now providing.¹⁰
25. The obvious answer to the reason there was a change in his evidence is that he now knows that at the time of the giving of his evidence at the Public Hearing he knew that if he provided the same answer that he did at the Discipline Hearing, his current position that the officers had the appropriate grounds for a lawful investigative detention could no longer be supported.
26. The law with respect to what is required to support lawful investigative detention is not new law or something that is as a result of a recent change in the law. The law in that regard has been known since 1993 and applied in numerous cases that have been currently reported. As the Supreme Court of Canada has stated, if there is a recent change in the law then it is reasonable to allow a timeframe for the police to become educated and aware of those changes and apply them to their operational duties. This clearly is not that kind of situation as the law with respect to what is required for a valid investigative detention is well established.¹¹
27. Even more so, both officers were able to articulate in their testimony an understanding of what the law requires for a lawful investigative detention. They both referenced the requirement for, not only their subjective belief, but the requirement of an objective

⁹ Exhibit 5, Tab 4 CAD & PRIME Material; Tab Street Check VPD

¹⁰ Transcript: November 13, 2018, p. 30, l. 1 – p. 33, l. 42

¹¹ *R. v. Simpson* (1993) 79 C.C.C. (3d) 482 (ONCA); *R. v. Mann* [2004] 3 S.C.R. 59; *R. v. Silveira* [1994] 2 S.C.R. 297

standard that could be reasonably supported. In my submission, they were clearly reckless in their application of those legal requirements in detaining Mr. McDonald in the manner which they did.

28. If the detention of Mr. McDonald was conducted without having met the appropriate legal standard, it follows that the demand for identification and the search of his person were also unlawful.
29. In my submission, it would be difficult for either officer to raise as a defence to the allegation of the detention of Mr. McDonald as being unlawful based on their lack of knowledge due to inadequate or poor training. As stated earlier, they were both able to articulate the required test for an investigative detention and the difference between what is required for investigative detention as opposed to what is required for an arrest.
30. However, even if the detention of Mr. McDonald was determined to have met the legal standard, there must be further consideration of the demand for identification and the search of his person once he was detained.
31. With respect to the issue of searching Mr. McDonald, both officers testified that they believed that once they had made a valid investigative detention, they were entitled to demand identification from Mr. McDonald and that if that information was not provided then they were entitled to search him for identification.
32. Furthermore, both officers stated that as a result of having to go through the process of these allegations and hearings, they now have a clear understanding of that issue. Both testified that they now know that pursuant to an investigative detention, the law does not provide them with the authority to demand any information, including information about identification. They also testified that they now know they are not allowed to search a person under investigative detention for identification or contraband.
33. The law is clear that investigative detention must be of short duration and that while an officer is entitled to ask questions, answers cannot be compelled. This includes answers related to identification.¹² (double check site...SCC or SCR?)

¹² *R. v. Mann* [2004] 3 S.C.R. 59

34. In addition, the law is equally clear that the only search authorized during the course of investigative detention is a search for weapons. That search can only be conducted where there are legitimate concerns for officer safety. Any search based on a safety concern must be objectively reasonable. Such a search will not be justified on a vague or non-existent concern for safety or premised upon hunches or mere intuition.¹³
35. In my respectful submission, based on an application of the law to the facts of this case there can be no other conclusion other than the search of Mr. MacDonald was unlawful and not justified on the basis of any safety concerns. On all of the evidence, Mr. MacDonald was detained, handcuffed and immobilized prior to the search being conducted.
36. Furthermore, neither officer testified that Mr. MacDonald was threatening them in any way or was in possession of any weapons. While they both testified that he was handcuffed because he was agitated and waving his arms around and that they were concerned he might flee, there was not any evidence articulated with respect to concerns that he might be in the possession of a weapon.
37. The final issue to be determined is whether the officers have available to them, the defence of the lack of training being the reason for their unlawful conduct as opposed to their conduct being of an intentional or reckless nature. The law in that regard is set out in *Lowe v. Diebolt*¹⁴ and *Scott v. British Columbia (The Police Complaint Commissioner)*¹⁵. If the officers can establish that the fault in their actions which constitute the misconduct in question is as a result of their lack of knowledge due to improper, inadequate or incorrect training then they are not to be held accountable for those actions under the *Police Act*.
38. As it was apparent that this issue was at the forefront of both officers' defence of their actions, there was a significant amount of evidence led in that regard. The Vancouver Police Department sought permission and were granted leave to participate in the Public Hearing and had Ms. McNeil as counsel on their behalf.
39. The legal test as to whether the allegations of misconduct as set out in the Notice of Public Hearing have been proven is, of course, on the balance of probabilities.

¹³ *R. v. Crocker* 2009 BCCA 388; *R. v. MacDonald* 2014 SCC 3

¹⁴ *Lowe v. Diebolt* 2013 BCSC 1092 at para. 46 & 52

¹⁵ *Scott v. British Columbia (The Police Complaint Commissioner)* 2016 BCSC 1970 at para. 36

40. There was a significant amount of evidence led in these proceedings outlining the officers' training, particularly with respect to the issues of arrest, detention and search and police powers that are derived from those processes.
41. An overview of the evidence with respect to the officers' training is as follows. Once an individual is hired by the police department they are sent to the BC Justice Institute for training. Part of that training process is legal studies which includes the topics of arrest, detention and searches. The education process begins with Block 1 which is set for a period of 14 weeks where the new officers are in a classroom being taught legal studies for that period of time. In Block 2 the candidates are placed with a fully-trained police officer and are out on the job in an operational capacity for another 14 week period where they have the opportunity to apply their knowledge of the law and their police powers that they had learned in Block 1. They are also required to write and pass an exam to test their knowledge prior to ascending from Block 1 to Block 2. Upon their return they are required to write another exam testing their knowledge before beginning Block 3 which is further training that is more focused on sections and applications of enumerated offences in the *Criminal Code*. Upon completion of Block 3 there is a final exam testing the officer's knowledge on all subjects and upon graduation from the BC Justice Institute they become 3rd Class Constables and return to the police department to carry on operational duties.
42. The Vancouver Police Department posts regular bulletins and updates which include legal updates. These bulletins are available for all members of the Vancouver Police Department to access and read.
43. There is also the progression from 3rd Class Constable to 1st Class Constable with each stage taking approximately one year. At the completion of each year, the Constable's supervisor makes a recommendation for the advancement and the Constable writes an increment exam and upon passing that, moves to the next level of Constable, being from 3rd Class, to 2nd Class and, ultimately, to 1st Class.
44. In addition, there is cycle training provided. Some of which is mandatory and some of which is optional. More particularly, there is what has been referred to as Cycle 4 Training which is mandatory and teaches a number of topics and updates including arrest, detention and searches.

45. Both Constables Lobel and Hoang were provided all of the aforementioned training and went through all of the described processes and, in fact, completed Cycle 4 training in December of 2013.
46. The lesson plan and training materials for the Cycle 4 training are contained in Exhibit 2, the Book of Post-Academy Training Material, Tabs 1-28. Those materials were reviewed at length by Sergeant Burnham of the Vancouver Police Department. He is the officer in charge of training and, as such, was a well-informed witness who provided a very detailed overview of the training that is provided to operational police officers both through Cycle Training and legal updates which are posted and available for all members to access in order to keep their knowledge current with respect to legal issues.
47. A noteworthy piece of evidence that was entered through Sergeant Burnham is Exhibit 6 which is a 30 minute video and deals with the issues of arrest, detention, searches and police powers or limitations thereof which arise in the course of those processes. This video was shown to both Constable Lobel and Constable Hoang in their Cycle 4 Training in December 2013. Both officers agreed that they had been shown the video in that Cycle 4 Training but stated they had no memory of having watched it at that time and that their recall of it came when their counsel had shown it to them a short time ago.
48. Mr. Woodall, on behalf of Constables Lobel and Hoang, has quibbled with the amount of time the video specifically focused on the issue of searching for identification in the course of an investigative detention. In my respectful submission any commonsense consideration of the contents of the 30 minute video, once having watched it, make it absolutely clear that it is an intense overall focus on the issues of arrest, detention and the powers and limitation on powers that derive from them. This specifically included the issues of arbitrary detention, street checks and when you can and when you cannot search an individual. More particularly, it was extremely clear that the only search that was authorized by law was where there was legitimate concerns for officer safety in the course of an investigative detention.
49. In my respectful submission, anybody watching that video and paying attention to it would be left with a clear understanding of the differences between when you can detain someone for an investigative detention and when you cannot. The video also clearly illustrated the differences between what a police officer's powers are in the course of a street check as

opposed to an investigative detention. Most significantly, the video was clear that there is not any authority to search somebody for identification or contraband. It clearly set out the only law authorizing searches on investigative detention is where there exists a legitimate concern for officer safety and a search for weapons is permitted.

50. In addition, a review of the evidence of Mr. Neufeld, Mr. Wyatt and Sergeant Burnham and the Post-Academy Training Materials contained in Exhibit 2, clearly demonstrates that both officers had an abundance of training on the topics at issue and any defence that they raise claiming a lack of training, cannot be borne out. In fact, both officers agreed under cross-examination that all of the evidence of training that was testified to by Mr. Neufeld, Mr. Wyatt and Sergeant Burnham, was not evidence that they took exception to, and agreed that what must have occurred was that they had been taught the material as set out by those witnesses and had simply forgotten parts of it.
51. It is not as if the topics of arrest, detention and search were given a cursory overview throughout all of the aspects of the officers' training. Indeed, as admitted by them, those very issues and the powers that arise from them, with respect to continued detention and searches are matters that they deal with on a daily basis in the course of executing their operational duties as police officers. The evidence of training as provided by Mr. Neufeld, Mr. Wyatt and Sergeant Burnham was very thorough and a review of some of those points is worthwhile.
52. Mr. Neufeld was an instructor at the BC Justice Institute from 2005 to 2017 and prior to that was a member of the Vancouver Police Department for 28 years. He testified that the powers of arrest, detention and search and seizure were major components in the 14 week Block 1 studies at the BC Justice Institute.¹⁶
53. He also testified that *R. v. Mann* was a case that would have been referred to by name and the principles coming out of that case were core materials that were taught at the Justice Institute. Specifically, he testified as to the standard required for an investigative detention and the fact that pursuant to an investigative detention, police officers were not entitled to search for identification or contraband but could only search for legitimate safety reasons.¹⁷

¹⁶ Transcript: September 18, 2018, p. 3, l. 3-7

¹⁷ Transcript: September 18, 2018, p. 5, 13-47- p. 7, l. 1-22

54. Mr. Neufeld testified that as an instructor he would provide examples to his students as to when a police officer could demand identification and when they could not. He testified that students at the police academy are specifically warned to be careful about demanding identification of individuals who have been detained as opposed to arrested as there is not any authority to do so. He also testified that the students were specifically tested on the powers of arrest and detention.¹⁸
55. Stuart Wyatt also testified as a current Special Constable who teaches at the BC Justice Institute. Mr. Wyatt had an impressive work history which involved 30 years of policing and teaching with periods of being an instructor at the BC Justice Institute on three different occasions, concluding with his current position as an instructor at the time of the Public Hearing. Indeed, he testified that he had taught both Constables Lobel and Hoang Cycle 4 Training.
56. Mr. Wyatt told this Tribunal that there is a magazine called 10-8 which has replaced the legal bulletin update that the Justice Institute used to issue. He testified that while this is not required reading, it is available to all police officers to access and keep themselves current on legal issues. It is significant to note that he told this tribunal that it is a publication that is written by a member who has a Masters in law and is intended to keep operational police officers updated on current case law.¹⁹
57. Mr. Wyatt is a current instructor at the Justice Institute and had worked with Mr. Neufeld in the past in the same capacity. He testified and provided a detailed breakdown of the components, principles and differences in search power with respect to the topics of arrest and detention. He testified that those same topics were taught in the past and are still taught throughout Block 1 at the BC Justice Institute.²⁰
58. There can be no question that Constable Wyatt's evidence was comprehensive and reliable. There can also be no doubt that the legal requirements and the differences in those requirements for arrest and detention and the limitation on the powers that come with each of them were thoroughly taught to the officers at the BC Justice Institute.

¹⁸ Transcript: September 18, 2018, p. 8-10, l. 1-42

¹⁹ Transcript: September 18, 2018, p. 36, l. 46-47, p. 37, l. 1-35

²⁰ Transcript: September 18, 2018, p. 42, l. 25 – p. 48, l. 1-31

59. Sergeant Burnham of the Vancouver Police Department testified and told this tribunal that he had been a member of the Department for 22 years and is currently the Sergeant in charge of education and training within the Department. He described what that role entailed including the organization of legal studies and providing written bulletins, which are made available to the officers to keep them apprised of changes or developments in the law that would affect their day to day jobs.²¹
60. Exhibit 2, the Post-Academy Training Materials was prepared by Sergeant Burnham. Tabs 1-28 are materials that set out the lesson plans, training processes and bulletins that Constables Lobel and Hoang would have been taught and had access to in their Cycle 4 Training at the Vancouver Police Department and throughout their operational work days. The materials do not include all of the bulletins that were posted but contain some that illustrate how information is posted and made available to police officers through computers that are located at three different Vancouver Police Department locations.
61. Included in Exhibit 2 were the training materials from the Cycle 4 Training of December 2013 which both Constables Lobel and Hoang completed in December of 2013. Tab 1 of Exhibit 2 contains the lesson plan for Cycle 4 Legal Studies which includes the subjects of arrest, release and detention. Attached to that is the 30 minute video which was marked as Exhibit 6 in these proceedings.
62. Sergeant Burnham took this Tribunal through Exhibit 2, Tabs 1-28 and explained their content and purpose. A review of his evidence demonstrates that the officers were taught the differences between what is required for arrest and detention and the search powers that came along with each of those processes.²²
63. Sergeant Burnham referenced all of the materials in Tabs 1-28 in Exhibit 2 and, without going through each of those tabs in this argument, it is my submission that it is very clear that the evidence demonstrates a clear and comprehensive training program that was provided to both Constable Lobel and Constable Hoang in December 2013 that informed them of the differences between what is required for an arrest as opposed to an investigative detention and the limitation on their powers of search in an investigative detention. The material was a reiteration of the principles taught at the Justice Institute and

²¹ Transcript: September 19, 2018, p. 2, l. 12 – p. 3, l. 1-12

²² Transcript: September 19, 2018, p. 6, l. 21 – p. 14, l. 32

contained in the police bulletins and clearly informs the students that under an investigative detention the only power of search is where there is a legitimate concern for officer safety that must be objectively satisfied. It also informed the officers and warned them about arbitrary detentions that are not authorized by law. The training materials provided clear examples of arbitrary detentions that have been authorized by the law, such as roadblocks for impaired drivers and drew the distinction that all other arbitrary detentions are not lawful.

64. The materials contained clear warnings about the need to understand what is necessary for an investigative detention not only from the perspective of having a subjective belief but of the absolute need for objective standards to be met for the detention to be valid. It was also abundantly clear that the only search that could be legally undertaken on investigative detention was one for legitimate safety concerns.
65. In my submission, a review of the evidence of training provided to both Constable Lobel and Constable Hoang clearly demonstrates that from their inception of becoming police officers at the Justice Institute and throughout all levels of training and in all the materials made available to them through bulletins and other processes, the principles in law around arrest and investigative detention and searches arising from them, has been thorough, consistent and without change. It has always been abundantly clear that an investigative detention requires a constellation of objectively discernable facts which gives the detaining officer reasonable cause to suspect that the detainee is criminally implicated in the activity under investigation. Equally, it has been made abundantly clear that the investigative detention must be brief in nature and that the only search permitted would be a search for legitimate safety concerns.
66. For either officer to now say that their defence is "I didn't know" truly rings hollow in the face of the evidence led at this Public Hearing.
67. The last topic I wish to address is the evidence provided by each of the officers.
68. Constable Lobel testified on September 25, 2018 and September 26, 2018. While I do not intend to make lengthy references to his evidence, it is in my submission, clear that he did not disagree with any of the evidence that was provided by Mr. Neufeld or Mr. Wyatt about the training he received at the Justice Institute. He did not disagree with any of the evidence

of Sergeant Burnham regarding bulletins or material that was contained and taught in the Cycle 4 Training. He did say that as his job was so busy he didn't have time to access the police computers and read all of the bulletins. He also indicated that he did not recall seeing Sergeant Burnham attend to the parade prior to shifts and provide legal updates to himself or other officers.

69. It is significant to note that Constable Lobel, in not disagreeing with the evidence of the three persons who testified as to his training, made it clear that he was not laying any fault against them in that respect.²³
70. In submission, an important aspect of the evidence provided by Constable Lobel was the questioning that took place under cross-examination with respect to the video that is contained in Exhibit 6. Under cross-examination Constable Lobel was taken through the contents of the video and questioned with respect to the topics that were taught and covered throughout the presentation of it. Constable Lobel agreed that he had seen that video in Cycle 4 Training and that in accepting that he had seen it, agreed that he had simply forgot the information. A review of his evidence with respect to the contents of that video and the lesson plan attached to it are confirmatory evidence of the detailed training that was provided in December 2013 when Constable Lobel attended to Cycle 4 Training.²⁴
71. Constable Hoang testified on November 13, 2018 and, like Constable Lobel, did not disagree with the evidence regarding the training he received at the Justice Institute or the Cycle 4 Training he received in December 2013.
72. Constable Hoang also agreed that he had been shown the video contained in Exhibit 6 in the course of his Cycle 4 Training and, when taken through the contents of the video, did not disagree with the fact that had been taught the information contained within it. In fact, he ultimately agreed that there was no question that he was trained in the area of arrest, investigative detention and search as set out in that video and that he had simply forgotten it.²⁵

²³ Transcript: September 25, 2018, p. 47, l. 26-46

²⁴ Transcript: September 25, 2018, p. 61, l. 2 – p. 69, l. 22

²⁵ Transcript: November 13, 2018, p. 34, l. 9 – p. 39, l. 18

73. I have not done an exhaustive review of the evidence of Constables Lobel and Hoang but, in my submission, any review of their evidence does not reveal that there was any lack of training, gaps in training or inadequate training provided to them with respect to the principles of arrest, detention and searches arising in either of those circumstances. They were properly trained and responsible for their intentional and reckless actions in dealing with Mr. McDonald on March 25, 2016.
74. Both officers testified that they now know what the law is with respect to those topics as a result of having gone through the process of having the matter dealt with pursuant to the *Police Act*. As Public Hearing counsel, I do not take exception to their evidence that they are now very certain in their training. In my respectful submission that is something which goes to the issue of what corrective or disciplinary measures are necessary in the circumstances and does not address the issue of whether the allegations of misconduct as set out in the Notice of Public Hearing have been proven on a balance of probabilities.
75. In conclusion, the evidence has clearly established that both Constables Lobel and Hoang were properly trained with respect to the legal requirements necessary for them to execute a valid investigative detention and on the limitations that were placed upon them with respect to their powers of search. This Tribunal should have no hesitation concluding that the allegations of misconduct should be substantiated.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated this 11th day of January, 2019.


Bradley L. Fickford
Public Hearing Counsel