OPCC File No. 2016-11766

IN THE MATTER OF THE POLICE ACT

IN THE MATTER OF CONSTABLE VIET HOANG
AND
CONTABLE MARK LOBEL

SUBMISSIONS OF THE RESPONDENT MEMBERS

Contents

1. INTRODUCTION

1. Paragraph 19 of the Notice of Public Hearing alleges as follows:

> 19. It is therefore alleged that Constable Mark Lobel and Constable Viet Hoang committed the following disciplinary default, pursuant to section 77 of the *Police Act*:
>
> > (i) That on March 25, 2016, Constable Mark Lobel and Constable Viet Hoang, committed *Abuse of Authority* pursuant to section 77(3)(a)(ii)(B) of the *Police Act* when they intentionally or recklessly detained and searched Mr. McDonald without good and sufficient cause.

2. This raises the following questions: (1) did the respondents commit misconduct by detaining Mr. McDonald from the outset; and (2) if the detention was not culpable *ab initio*, did Cst. Hoang commit misconduct by searching Mr. McDonald to ensure officer safety and for identification.

3. It will be argued that Cst. Hoang and Cst. Lobel did have grounds to detain Mr. McDonald for investigative detention.

4. It is acknowledged that during investigative detention, police officers do not have the power to compel a person to identify himself or to search him for ID. It is also acknowledged that while police officers have the power upon investigative detention to search for weapons to ensure officer safety, the police officers must have objective evidence that gives rise to a reasonable suspicion that the suspect has weapons. This test was not met in the present case.

5. The acknowledgment that the search was not authorized does not amount to an admission of misconduct. Not every unlawful detention or search constitutes misconduct. Good faith errors of law by police officers are not punishable as misconduct.

6. In criminal law, ignorance of the law is not a defence. Under the ***Police Act***, ignorance of the law can be a defence. The Court of Appeal has recognized that the ***Police Act*** is in the nature of specialized labour law: ***Florkow v. Police Complaint Commissioner*** **2013 BCCA 92 at**

para. 2. In employment law, good faith errors of judgment are not penalized. Thus, if a police officer is generally aware of the legal rules on a particular subject but makes a good faith error in applying the law, that is not misconduct. *A fortiori*, if a police officer has not been trained in the relevant area of law, a good faith error of law cannot be considered culpable.

7. The law does not presume that police officers are knowledgeable in all areas of the law that govern their conduct. If a police officer has not been *adequately* trained in the law that governs a particular police power, the police officer cannot be found to have committed misconduct merely because he or she makes an error in the application of a law that the police officer was properly taught. Even if a police officer was taught a particular point of law, and even if the training was adequate, a police officer does not commit misconduct if he or she makes a good faith error.

8. It must be remembered that police officers are not like members of self-governing professions in one crucial respect. Lawyer, doctors, engineers and others are responsible for obtaining the training necessary for the tasks they under take These professionals can choose their training, and can choose the kind of work they perform within their professions. Thus, it is reasonable to say to these professionals that ignorance of the professional standards is no excuse: if you have not received the training in how to approve a stock prospectus (as one example), then do not approve stock prospectus; if you do not know criminal procedure (as another example), then do not do criminal trials. By contrast, police officers do not choose their training, and they do not choose their assignments.

9. Two elements of the definition of abuse of authority as set out in the *Police Act* and the Form 2, bring one to this conclusion. First, a wrongful search or detention is not culpable unless the police officers committed the error "intentionally or recklessly;" that is, that the police officer knew he lacked lawful powers but exercised them anyway ("intentionally"), or the police officer simply did not care whether he had the lawful powers ("recklessly"). A good faith error is neither intentional or reckless (see *Lowe and Diebolt, Scott*, *infra*). Second, the wrongful search or detention must have been made "without good of sufficient cause". As the cases cited below show, "good or sufficient cause" is not synonymous with full legal authority. An officer may have "good or sufficient cause" to conduct a detention or search, even though it is later

determined that he lacked full legal grounds. At the risk of over-simplification, if a police officer is acting on the good faith belief that he has the requisite grounds to search and detain in furtherance of a bona fide police purpose, it can be said that the officer has "good and sufficient cause" even if he does not have full lawful authority.

10. There was evidence from Cst. Lobel and Cst. Hoang, both in direct and on cross-examination, about whether they could have, should have, or actually did review certain written materials. This evidence is largely moot, however. This submission contains every word in Vancouver Police Department and JI handouts on investigative detention. The fact is that ***there is not one single word in the written materials that (may have) been made available to them, that states that there is a difference between arrest and investigative detention with respect to the powers of police officers to demand (as opposed to request) the suspect's identity, or to search for weapons to ensure officer safety.***

11. This is not a special rule for police officers allowing them to "get off" where others would be found guilty of misconduct. Judges can make errors of law with very serious consequences including sending someone to prison who should not be there. Such errors of law are not punished. They are corrected by an appellate court. Even though lawyers are responsible for their own training, lawyers can violate the rules that govern the legal profession, yet not face disciplinary consequences. Normally when a lawyer violates the rules of the profession but in good faith, they are directed to attend a conduct review where they are educated and corrected by benchers; they are not formally disciplined. In this very case, the Police Complaint Commissioner has disagreed with the discipline authority, the Honourable Mr. Oppal. The Police Complaint Commissioner alleges in the Notice of Public Hearing that Mr. Oppal's findings below were "incorrect." The Adjudicator will decide whether Mr. Oppal or the Commissioner was correct. The one who was incorrect will not be disciplined.

2. FACTS

2.1 INADEQUATE TRAINING IN THE LAW OF INVESTIGATIVE DETENTION

12. The powers associated with investigative detention were summarized by Schultes J. in *R. v. MacQuarrie* 2009 BCSC 1832:

24 The standard to be met to justify an investigative detention was set out by the Supreme Court of Canada in Mann. At paragraph 45 of the majority judgment, Mr. Justice Iacobucci summarized this authority as:

> **[1]**... [P]olice 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. **[2]** 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 **[3]** 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 ...

It was noted in *R. v. Brown*, 2008 SCC 18 (S.C.C.), that:

> A "reasonable" suspicion means something more than a mere suspicion and something less than a belief based upon reasonable and probable grounds.
>
> [Bracketed numbers in bold added]

13. In the present case, three points of law are of particular importance:

(1) The test for detaining a person for investigation;

(2) Whether in investigation detention, the police may demand (as opposed to request) the person to identify himself; and

(3) Whether the police may search a person who is lawfully detained for identification if the person does not provide it voluntarily.

2.2 GROUNDS FOR INVESTIGATIVE DETENTION

14. The members acknowledge that they received adequate training on (1). Police officers may detain for investigation only if they are investigating a *specific offence,* and *there must be reasonable grounds to suspect* that the person was involved in the offence (**Ex. 2, tab 1, p. 7, first two red bullet points; *R. v. Mann* [2004] SCC 52 at para. 27).** As noted, the members will argue that they had grounds for an investigative detention. In the alternative if they lacked grounds, they committed a good faith error. The facts in support of investigative detention are

not so lacking that one could conclude that the members must have known they lacked grounds, or simply did not care.

2.3 THE MEMBERS' TRAINING RE: SEARCH POWERS DURING INVESTIGATIVE DETENTION

15. The case law does not state clearly what police officers may do by way of investigation during investigative detention, but there are some clear statements about they may *not* do. Unlike during an arrest, police officers may not automatically search a suspect. They may search for weapons to ensure officer safety, but only if there is objective evidence giving rise to a reasonable suspicion that the suspect has weapons. Similarly, during an arrest a suspect is obliged to identify himself or herself but there is no similar obligation on a person subject to investigative detention.

16. The steps Cst. Lobel and Cst. Hoang took during the investigative detention would all have been lawful if there were grounds to arrest Mr. McDonald. In other words, the powers they exercised were not ones that police officers can never exercise, so that no officer could ever believe that he or she could exercise the powers.

17. This then raises the question of what training the members actually had on their powers to search during investigative detention, as opposed to during arrest: is there evidence that these officers were adequately trained that the powers to determine the subjects identity, and the powers of search, are fundamentally different between a search and an investigative detention.

18. The member's training on their powers during investigative detention was very weak, old, and poorly delivered.

19. Lawyers and judges are not experts in education, but they may be experts on the narrower question of what it takes to learn legal principles. The most basic point is that one cannot learn the law by oral lectures alone. Once certainly cannot learn an important legal point by an oral statement seventeen seconds in length, in the midst of half hour video, itself in the midst of an eight-hour training day. One must be given reading material that includes the points to be learned. That is why law students read text books and casebooks. That is why lawyers read cases. That is why judges receive and read facts and written submissions.

20. Further, effective training requires repetition to cement the main points and testing to ensure that instructors are being effective, that the students fully understand what they are taught, and to ensure the students are qualified for the tasks they must perform.

21. In this case, the members received formal training on the general principles of arrest and detention, and search and seizure, only twice in their careers: once at the very beginning of their careers in Block 1 at the police academy at the Justice Institute, and once during a busy cycle training day by the Vancouver Police Department.

2.3.1 The Justice Institute

22. Training at the Justice Institute (JI) is divided into three blocks. Block one – when the police officers are rank beginners in the policing world – includes the only module on arrest and detention, and search and seizure. Greg Neufeld testified that he taught those subjects when the members were at the Justice Institute. Cst. Hoang testified that Mr. Neufeld taught him the subjects of arrest and detention, and search and seizure. Stewart Wyatt taught a part of the legal studies course to Cst. Hoang, but did not teach Cst. Lobel at all. Mr. Wyatt taught Cst. Hoang about the court process and how to testify, but did not teach the module on search and seizure.

23. The legal training at the JI is part of a very broad and comprehensive curriculum. The module on arrest and detention is only one part of the legal training. The sub-module on investigative detention is a sub-topic of this module.

24. There is no evidence that the members were given any written handouts on the law of investigative detention. The members do not recall receiving any such hand-outs, and there is no evidence that they did receive any.

25. Mr. Neufeld testified that recruits (ie. students) are taught that the law is very clear, that upon arrest they may demand that the suspect identify himself. He said it is much less clear whether and when police officers may demand that the suspect identify himself in an investigative detention. He pointed out that the power of arrest is specified in the criminal code, which also provides the power to demand identification. The criminal code does not set out the law of investigative detention.

26. Significantly, Mr. Neufeld testified that he taught that whether the suspect's identity may be demanded during investigative detention is more nuanced. In some cases, it is permissible to demand the suspect's identity; in other cases it is not.[1] Mr. Neufeld did not cite any authority that would allow a police officer to determine whether, in a specific investigation, it is permissible to demand ID. This is not surprising because there is no caselaw that provides that guidance. In short, Mr. Neufeld testified that recruits were taught that in some cases they may demand a detainee's identity, but he did not cite any legal authority to assist a police officer to determine whether a case he was involved in was one where they may demand (as opposed to request) the suspect to identify himself, or whether the police officer could only request identification.

27. In default of legal authority that sets out a test when it would be permissible to demand the suspect's identity, Mr. Neufeld used two examples. One example was a case where it was clearly permissible: when executing an arrest warrant. The other example was a case where it was clearly not permissible, where a man is found in the general vicinity of a call about a fight. Mr. Neufeld acknowledge that these two examples are at opposite poles of the spectrum, but that most actual cases would fall somewhere in between. Recruits were provided with no guidance on how to decide a case between the two poles.

28. Mr. Neufeld was certain that the recruits had been told that on an investigative detention, they may not search for contraband. Identification is not contraband. There is no evidence they were told specifically that they may not search for ID during investigative detention, or that investigative detention was expressly contrasted with arrest in this regard.

29. A recruit may be forgiven for believing that since the Supreme Court of Canada has authorized *investigative* detentions, they must have the power to investigate during a detention. Every investigation includes obtaining statements and gathering evidence. It is not very helpful to tell recruits that they may investigate during an investigative detention, but not tell them what investigation entails. Mr. Neufeld acknowledged that there is no case authority that sets out clearly what steps may be taken during an investigative detention. Indeed, in *Mann* the Supreme

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[1] One may question whether Mr. Neufeld's understanding of the law is correct, given the statement in *Mann* that suspects have no obligation to answer questions. Right or wrong, that is what the recruits were taught.

Court of Canada observed that there was not even a consensus among the courts and academics whether there was a power to detain for investigative purposes at all ***Mann*, para. 16**. Since *Mann,* the courts have not filled in that gap**.** There is some legal authority that specifies things that a police officer may not do during an investigative detention, but there is no case that specifies that a police officer may do. There is no judicial check list that a police officer could look at, and say, "I may do this, I may not do that."

30. Mr. Neufeld testified that recruits are taught that they may handcuff during an arrest or detention, but that there is no obligation to do so. He did not testify that the recruits are taught that when they have the authority to detain for investigation, they must meet some additional legal test or threshold before they have the authority to handcuff. That is not surprising because there is no legal authority for the proposition that a police officer who has the power to detain or arrest, must meet some additional threshold to obtain the power to handcuff.

31. Both Mr. Neufeld and Mr. Wyatt cited only one case that recruits are referred to specifically on the topic of investigative detention: *Mann*. In that case, the powers of police officers to demand or obtain the identity of a suspect subject to investigative detention simply did not arise. In *Mann*, the police asked the suspect for his name and birthdate which he gave voluntarily. The court did not comment adversely on the request for ID, and the question of whether they could demand ID did not come up in that case. Therefore, one may infer that recruits were not given any legal authority about whether they could, or could not demand (as opposed to request) identification, or what they could do if such a demand was refused.

32. At the JI, recruits are not tested on any aspect of the legal training as the training is ongoing. There is no evidence that Cst. Lobel or Cst. Hoang were tested at the end of the sub-module on search and seizure, and arrest and detention. They are not quizzed on investigative detention during, or at the end of that part of the training. Thus, there is no means for the instructor or the recruit to find out whether the recruit understands what he has been taught. There is a test on the entire legal training component at the end of the entire Block 1. There is no evidence about what aspects of investigative detention were tested. There is no follow up to assist recruits who may have misunderstood some aspect of the training. At the end of Block 1 the recruits head straight out onto the road. Upon return to the JI from the road, there was a re-

entry exam but there is no evidence about what questions (if any) about investigative detention were on the test. There was no follow up to assist recruits who did not understand aspects of legal training. There were no legal studies in Block 2 (the road practicum) or Block 3.

33. The JI training emphasized the differences between situations when police officers could arrest, and those when they could only detain, but there is no evidence that they were given clear direction about the powers There is no evidence that the recruits were given clear instruction that the powers upon arrest are different from the powers upon detention.

34. At the JI recruits are taught that when they arrest they may search and they may demand identification. It would not be surprising if recruits mixed up to some extent the powers available on arrest, and the more limited powers available on detention.

35. To summarize, at the JI the legal studies modcule was taught orally, vut recruits were not given handouts that they could then study on their own. They were taught that they may demand (as opposed to request) ID during some investigative detentions, but they were not taught a test that would determine in a given case whether they could or could not demand that the suspect identify himself. They were taught that they may not search for contraband, but they were not taught specifically that they may not search for ID, for the simple reason that no court has ever said directly that they may not search for identification (including *Mann*). Recruits were not taught that when they have the power to detain for investigation, they must not apply handcuffs unless some additional threshold has been met.

36. At the JI, the recruits were not tested on the powers of investigative detention while they were taking the course. There might possibly have been some questions on investigative detention in the final exam for Block 1, but there was no follow up to assist recruits who may not have understood parts of what they were taught.

37. Finally, it must not be overlooked that when Cst. Lobel and Cst. Hoang attended the JI, they were being bombarded with masses of information necessary to turn civilians into police officers. Cst. Lobel left the JI in 2007, nine years before the incident of March 2016. Cst. Hoang had left the JI in 2012, four years before the incident in March 2016.

38. Even if Cst. Lobel and Cst. Hoang had received complete and accurate information about their powers upon investigative detention and even if the information had been communicated in a format that was conducive to long-term memory (ie., in handouts that they could study from time to time, with testing), they could be forgiven for not remembering some of the things they had been taught when they were on the road in the early morning hours of March 25, 2016.

39. Therefore based on the members' JI training, it cannot be said that there is clear and convincing evidence that they must have known and understood the principles of investigative detention; such that if they failed to comply with those principles they must have done so with full knowledge that they were not in compliance.

2.3.2 Training at the Vancouver Police Department

Search Warrant Course Does Not Include Lesson on Investigative Detention

40. Hearing counsel has presented evidence of two training sessions in which it is claimed the members were taught the principles of investigative detention relevant to this case.

41. Both Cst. Lobel and Cst. Hoang took the VPD search warrant course. Sgt. Burnham confirmed that the materials at Ex. 2, tabs 12, 13, and 14 were not taught during the search warrant course. These materials deal with searches *without* warrant. Those materials were not part of recommended reading for the search warrant course. Much less were these materials required reading. Ex. 2 does not include the materials that the students were responsible for learning during that course. The required material was "robust", and was more than enough to occupy the students time fully. There was no time or opportunity for students to delve into other topics that were not covered in the course, investigative searches without warrant.

Cycle Training Day

42. Cst. Lobel and Cst. Hoang also participated in VPD training on December 3, 2013. The syllabus for this course is found in Ex. 2, tab 1.

43. The first point of emphasis is that in all the years of service of both Cst. Lobel and Cst. Hoang, the only training day that touched on search and seizure, and arrest and detention, was

this one, single cycle training day. Even then, only part , and then only during a small part of this training day touched on these topics.

44. The course was an eight-hour day that included a one-hour lunch break, coffee breaks, and many legal topics besides arrest and detention (see p. 1). It appears that about an hour and a half was devoted to the entire topic of arrest and detention. It is not clear how much of that time was devoted to the powers of investigative detention in particular.

45. The main teaching tool was a video. The title of the video and its principal topic was psychological detention. The issue of psychological detention has no bearing here as it is common ground that Mr. McDonald was physically detained, not just psychologically.

46. Within the video there is a *seventeen-second* oral passage in which the narrator states that during an investigative detention, it is permissible to search for weapons but only if the officer has an objective basis to suspect that the suspect has weapons.

47. Therefore, since Cst. Lobel and Cst. Hoang left the JI, the only training time devoted to the powers of search to ensure officer safety during investigative detention was this seventeen second passage, within a half-hour video, within an eight-hour day training day.

48. Important points in the video are emphasized by PowerPoint-like written-word slides with the key points listed in bullet points. The video had many such slides. Many slides have double emphasis where the key words are circled or underlined. There is no written-word slide emphasizing the limits on the power to search for officer safety during investigative detention.

49. The video does not address at all the differences between the powers on arrest as contrasted with the powers on investigative detention to demand, as opposed to request, the suspect's identity. The video does not contradict or correct the information (taught by Mr. Neufeld) that police officers may demand (as opposed to request) identification from suspects in investigative detention, in some cases. The video does not say directly that police officers may never demand identification, or search for identification if it is not provided upon demand.

50. At the conclusion of the training day, students are not tested on any of the material they have been taught to ensure that they understood what they are expected to understand.

2.3.3 Written Materials.

51. Cst. Lobel and Cst. Hoang have not receive *any* written materials on the difference between arrest and investigative detention with respect to the powers to demand (as opposed to request) that the person identify himself, or the power to search to ensure officer safety by searching for weapons.

52. It would be not be illogical or unreasonable for police officers to believe that the powers to protect themselves would be the same during an arrest as during an investigative detention. The treat of dealing at close quarters, with an unknown person, is exactly the same whether the person is under arrest, or under investigative detention.

53. There was evidence from Cst. Lobel and Cst. Hoang, both in direct and on cross-examination, about whether they could have, should have, or actually did review certain written materials. This evidence is largely moot, however. The fact is that ***there is not one single word in the written materials provided by the Vancouver Police Department that may have been made available to them, that states that there is a difference between arrest and investigative detention with respect to the powers of police officers to demand (as opposed to request) the suspect's identity, or to search for weapons to ensure officer safety.***

54. The syllabus of the single relevant cycle training course states that the instructor is expected to hand out the "Arrest Release Detention Workbook." **Tab 2 of Ex. 2** has the "Arrest, Release, and Continued Detention Workbook." Sgt. Burnham testified that this would be made available to the students, but it is not required reading. It hardly matters whether it was or was not required reading, because it has almost no information in it. The first page has the heading, "Arrest and Detention Authorities", but it is otherwise blank. The fifth page into the Workbook (with the number 1 in the lower right hand corner) has the "SOKP" (summary of key points) that the instructor is expected to refer to. The sole key points listed relevant to investigative detention are these:

- Can arrest to investigate to gather evidence to charge

- "difference between detention (reasonable suspicion) and arrest (reasonable grounds)"

Ex. 2, Tab 2, fifth page (numbered 1)

The bullets points imply that there are different standards for arrest and for investigative detention, but there is no statement about what police officers may do during an arrest of investigation. The "Key Points" does not include the point that on arrest police officers may demand identification while they may not demand identification on investigative detention. The Key Points does not state that police officers may search for weapons to ensure their own safety during an arrest, but they are forbidden from taking the same safety precaution during an investigative detention.

55. Tabs 3, 4, and 5 of Ex. 2 contain documents prepared by the VPD Education and Training Unit. As noted earlier, Sgt. Burnham testified that even if these documents were available, they were not required reading. However, even if the police officers could have, should have, or actually did read these documents, they provide *no information* about the powers of a police officer on investigative detention to demand identification or search to ensure officer safety.

56. The document at Ex. 2, tabs 3 and 4 provide information about the grounds for commencing an investigative detention, but they provide *no information* about the powers of a police officer on investigative detention to demand identification or search to ensure officer safety. The information in both tabs 3 and 4 are identical, although the information in Tab 3 is broken down into numbered paragraphs, while tab 4 is not broken down in that way. The entire section on investigative detention in both tabs 3 and 4 is as follows:

> **Understanding the Different Threshold for Investigative Detention versus Arrest**
>
> Where there may not be reasonable and probable grounds to make an arrest, the police may still detain a person for investigative purposes, under the common law. The articulable cause required for an investigative detention is stated in *Doherty J.A. in R. v. Simpson* (1993) (Ont.C.A.) as, "… 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." The facts objectively observed would, "give rise to a reasonable suspicion of the existence of potentially illegal activity which would justify intervention"

> The Supreme Court of Canada in *R v. Mann* 2004 SCC 52 specifically examined the issue of the police power to effect an investigative detention where the police did not have reasonable and probable grounds to arrest someone.
>
> The Court in *Mann* held that although there is no general power of detention for investigative purposes, police officers may detain an individual if there are reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that the detention is reasonably necessary on an objective view of the circumstances. ***However, evidence learned by the police as a consequence of the detention, or based upon further information obtained by the police during the detention may lead to the officer forming the necessary reasonable and probable grounds to then arrest the suspect.***
>
> **Ex. 2, tab 4, p. 5/14**

57. This sets out the test for entering upon an investigative detention, but it says nothing whatever about the differences between arrest and investigative detention, aside from the test for entering upon an investigative detention.

58. The final sentence above refers to police officers using information learned during an investigative detention to bolster grounds that may lead to an arrest. Again, a police officer may be forgiven for believing that there is some investigative purpose to an investigative detention. This document does not specify any limitations on what evidence the officer may "learn", or how they may "learn" it. The document does not state that the power to confirm identification that accompanies an arrest does not apply to an investigative detention. The document does not state any limitations on what a police officer may search for during an investigative detention.

59. Tab 5 of Ex. 2 is entitled, "Welcome to Cycle 4 Training". This was prepared for the teachers of the cycle training. This was not given to students to take home and study. It would not have assisted if it had been handed out. This document has twenty-four pages. The portion on Arrest and Detention is confined to one out of the twenty-four pages. This gives some measure of how much of the eight-hour day was devoted to arrest and detention. Recall that the module on investigative detention was only a portion of the module on arrest and detention. The totality of the information on arrest and detention, and search and seizure, in this document is as follows:

Arrest and Detention Group Work

Groups 1 & 2: Arrest and Detention Authorities

Groups 3 & 4: Release Options

Groups 5 & 6: Conditions (Peace Officer, OIC, and Judges)

Groups 7 & 8: Hearings, Remands, and Justice Releases

- Identify the Key Learning Points for your section
- You'll have 10 minutes
- One member will be required to present your findings to the class

60. Even if the police officers could have, should have, or actually did read this document, it provides *no information* about the powers of a police officer on investigative detention to demand identification or search to ensure officer safety.

61. Vancouver Police Department members take "increment exams" to be promoted, or to receive a pay rise within a given rank. Two examples of increment exams are included **(Ex. 2, tabs 19 and 20)**. There are no questions in either exam relevant to the powers that a police officer may exercise during investigative detention.

2.3.4 Parades and Bulletins

62. The VPD has submitted four "Bulletins" that hearing counsel, commission counsel, and the Vancouver Police Department argue are relevant to the training the members receive. Bulletins are distributed by e-mail and include a wide variety of kinds of information. Sgt. Burnham and Cst. Lobel testified that members typically receive several such e-mails each day. Cst. Lobel and Cst. Hoang testified that the department does not provide patrol members with either the time or the facilities to go through all the informational e-mails that are circulated, on or off work. They are not given time at the beginning of shift, during shift, or at the end of shift, to read all these materials.

63. At Ex. 2, tab 15 is a bulletin dated April 2009. Approximately 11 pages into tab 15 is a bulletin concerning the VPD Search Policy. Sgt. Burnham highlighted it in yellow although the original would not have been highlighted.

RPM Section 1.12.1(v) *Search Policy*

> Amendments have been made to RPM Section 1.12.1(v) to address issues relating to inconsistent terminology between the RPM and the Jail Manual of Operations (JMO). Several amendments have been made to the RPM's terminology to reflect the best choice of terms to assist police members and jail guards in carrying out their duties. Operational Items - Year 2009 200904.htm [2018/08/21 1:00:30 PM] First, the definition of "Body Search" in the RPM has been amended to prevent the term from being improperly interpreted. Second, the Vancouver Police Department (VPD) 602 Arrest Report has been amended to reflect the RPM and replace "Security Search" with the term "Strip Search". Third, information pertaining to body cavity searches was outdated and in need of updating. Amendments include changing the term "Internal Search" to "Body Cavity Search" as well as requiring body cavity searches be conducted at a hospital rather than at the Jail. Finally, the RPM only identified three types of person-related searches, when there are in fact four. The Supreme Court of Canada authorizes protective searches where a member may pat down a person under investigative detention for possession of weapons. This fourth category of search has been added to the RPM.

64. This bulletin says nothing about limitations on the power of police officers to search during investigative detention. Even if the police officers could have, should have, or actually did read this document, it provides *no information* about the powers of a police officer on investigative detention to demand identification or search to ensure officer safety.

65. At Ex. 2, tab 16 is a bulletin from April 2014. On p. 1 is a passage about *R. v. Macdonald* 2014 SCC 3.

66. The totality of the information provided to members in the bulletin at tab 16 is as follows:

> April 24, 2014 SAFETY SEARCHES - R V. MACDONALD, 2014 SCC 3
>
> On January 17, 2014 the Supreme Court of Canada released its decision in R. v. MACDONALD; ***expanding the limitations upon Safety Searches beyond the circumstances of Investigative Detentions***, and the scope of the search beyond protective Pat-Down searches of people.
>
> Simply put, the test for a valid Safety Search is whether the officer had reasonable grounds to believe that officer or public safety was at stake based upon an imminent threat such that it was necessary to conduct a search to the threat.

Operational Impact:

- ***Safety Searches can be conducted in situations other than Investigative Detentions***
- Safety Searches are not limited to a Pat-down search of a person and may include the area surrounding the person
- The search will be authorized by law only if the police officer believes on reasonable grounds that officer or public safety is at stake and that, as a result, it is necessary to conduct the search to eliminate the threat.
- The search cannot be justified on the basis of vague concerns for safety. For the search to be lawful, the officer must act on reasonable and specific inferences drawn from the known facts of the situation
- There must be an objectively verifiable necessity to conduct the search
- The manner in which a safety search is conducted must be reasonable
- Restraints upon safety searches are particularly important in homes

For more details refer to the R v MacDONALD Bulletin; or

Access the complete R v MacDONALD Supreme Court Decision

67. This information deals with searching for officer safety in cases *other than* investigative detention. The document does not purport to describe the powers of police officers during officer safety.

68. *R. v. MacDonald* was not a case of investigative detention. In that case the police officers were investigating a noise complaint. They did not have the power to arrest or detain. Yet, they had the power to conduct a limited search in a dwelling house for officer safety.

69. Given that these two bulletins have been identified by the VPD training section as the most relevant and given that they say nothing about the scope of the powers to search during investigative detention, it may be inferred that the VPD has not sent out a bulletin on that topic.

70. In summary, after the members attended the JI, the Vancouver Police Department provided very limited training on arrest and detention, and search and seizure. This training that was confined to a small portion of a single training day. The principle training tool in investigative detention was a half hour video of which 17 seconds were devoted to the powers of

a police officer during investigative detention. The words spoken during those 17 seconds were not emphasized by a written-word slide that would indicate that those were key points. The students were given access to a Workbook, but it was not required reading. Even if the students had read the Workbook, it provided no information whatsoever about the powers of a police officer during investigative detention. There was no test at the conclusion of the cycle training to ensure that the students understood what they were expected to understand. VPD members must pass a test to be promoted or get a pay raise, but the test does not ask any questions about the powers of police officers during investigative detention. The VPD has the ability to circulate bulletins on legal matters, but it has not circulated any legal update bulletin on the powers of search during investigative detention.

71. In summary, it is submitted that there is no clear and cogent evidence from which the Adjudicator could conclude that the members had prior knowledge of the differences between their powers on arrest and on detention, but chose to ignore those limitations. Thus, there is no evidence that the members had actual knowledge that they were violating the rights of Mr. McDonald, but did so anyway.

72. We are not aware of a case under the *Police Act* that defines what is meant by being reckless about one's legal powers. One can imagine points of law that are so obvious that anyone must know them whether trained or not. For example, everyone knows that police officers cannot enter a private residence without a search warrant (setting aside unusual exceptions like the doctrine of fresh pursuit). A police officer who says he was not trained in the purpose of search warrants may not be believed, or it may be concluded that he was reckless, willfully blind.

73. The difference between the powers of a police officer on arrest and on detention, are not so obvious that one could conclude that a police officer should know the difference whether or not he has received adequate training. That is, there is room for good faith error. It will be argued in this case that Cst. Hoang made a good faith error.

2.4 THE DETENTION

74. The facts surrounding the detention and search are not highly controversial. There are differences between the recollections of Mr. McDonald and those of Cst. Hoang and Cst. Lobel, but the differences are no wider than one might expect in such a case.

75. The police officers received the following information:

- At approximately 0052 hours I was dispatched to a report of a theft in progress in the 4700 block of Moss Street. While driving into the area, I was provided with the following information by police dispatch;
- The complainant was watching a male (suspect) walking northbound on the west side of the street;
- The suspect was seen going into mailboxes and taking items out of the mailboxes;
- The suspect was last seen walking northbound on the west side of Moss Street;
- The suspect was wearing [1] a grey hoody [2] with the hood pulled up, [3] dark jeans and [4] carrying a black Adidas backpack, and [5] travelling on foot.

76. A short while later, they observed Mr. McDonald walking west in the 2800 Block of Kingsway. The police officers were driving in the opposite direction (that is, east).

77. A number of other police units had been dispatched on the same call. Cst. Lobel and Cst. Hoang believed they were also searching the neighborhood, and may have been seen by the suspect.

78. As their marked police car passed Mr. McDonald, he looked over his shoulder several times at the receding police car. They were not doing anything remarkable that would have caused an ordinary person to look over their shoulder to see what was going on. Cst. Hoang and Cst. Lobel interpreted this as “heat checking”; that is, looking out to make sure the police in the police car were not focusing on him. This was not unreasonable. This was not simply a pedestrian watching a police car as it approached. Rather, Mr. McDonald continued to look over his shoulder several times, as the police car was going to opposite direction. In other words, he had fastened intently on the police car as distinct from casually watching it in the street.

79. Mr. McDonald was (1) a white male, (2) wearing a black leather jacket with a hoody, (3) with the hood up; (4) a dark coloured toque, (5) a black leather jacket; (6) dark blue jeans, and (7) black shoes.

(1) Item (1) was consistent between the description and the suspect.

(2) Item (2) was neither wholly consistent nor completely inconsistent with the suspect. The witness described the hoody as "grey" while Mr. McDonald's jacket and hoody were dark or black. Grey and black can be similar colours especially when viewed by a witness from a distance at night.

(3) Item (3) was consistent between the description and the suspect. The witness described the hoody as being up.

(4) Item (4) was neutral. The witness did not see a toque but since the hoody was up, it would not have been visible to the witness at any distance or from the side or behind.

(5) Item (5) was somewhat inconsistent. The witness did not describe the suspect as wearing a black leather jacket. However, a witness who sees a person briefly in the dark could easily fail to distinguish between a dark or black jacket, and a grey hoody.

(6) Item (6) was consistent between the description and the suspect.

(7) Item (7) was neutral. The witness did not say what colour the suspect's shoes were.

80. Mr. McDonald was observed late at night, with no other people on the street. This was consistent with the suspect. He was on foot. This was also consistent with the suspect. He was on a different street walking in a different direction from the suspect. However, the crime was ongoing, the suspect was walking about, and some time had passed. It was eminently possible that while the police officers were getting to the scene, the suspect had changed direction.

81. It will be argued below that when weighing the consistent and inconsistent facts, the police officers had grounds to detain Mr. McDonald for investigation under the test in *R. v. Mann, infra.* It must be emphasized, however, that if the Adjudicator concludes that the police

officers did not have grounds to conduct an investigative detention, that does not automatically mean they committed misconduct. Whether there existed a "constellation of objectively discernable facts", sufficient to support a "reasonable suspicions" is almost always open to debate. There are very few cases involving investigative detention where the grounds are not open to debate. If the police officers erred, in good faith, by applying the *Mann* test incorrectly, that does not amount to misconduct.

2.5 THE SEARCH

82. Cst. Hoang asked Mr. McDonald to identify himself. Mr. McDonald refused, as was his right. Cst. Lobel told Mr. McDonald that his refusal to identify himself could amount to the offence of obstruction of a police officer in the execution of his duties. Cst. Lobel was wrong on this point, but no harm was done because Mr. McDonald was not actually arrested for obstruction.

83. Cst. Hoang believed that he had the power to search Mr. McDonald for officer safety and for identification. If Mr. McDonald had been under arrest, Cst. Hoang could have searched him for officer safety and ID. Cst. Hoang's error was in not realizing that the powers of search upon investigative detention are different from the powers upon arrest.

84. Cst. Hoang put Mr. McDonald in handcuffs prior to searching him. There is no law that states that when a person is subject to detention or arrest, a police officer may not apply handcuffs unless some additional test or threshold has been met.

85. The entire episode with Mr. McDonald was very brief. He estimated the detention took between four and six minutes. He told Sgt. Kelly that initially he had thought it took longer but immediately after he got home he checked his clock, and realized that the estimate of four to six minutes was more accurate.

3. LAW AND ARGUMENT

86. "Abuse of authority" is defined in s. 77(3)(a) of the *Police Act* as follows:

> (a) "**abuse of authority**", which is ***oppressive conduct*** towards a member of the public, including, without limitation,
>
> (i) ***intentionally or recklessly*** making an arrest without good and sufficient cause,
>
> (ii) in the performance, or purported performance, of duties, ***intentionally or recklessly***
>
> (A) using unnecessary force on any person, or
>
> (B) detaining or searching any person without good and sufficient cause …

87. The phrase *oppressive conduct* is significant. The law has long recognized that mere errors of law or judgment are not necessarily blameworthy. An element of oppressiveness must be found before an officer will be held liable for alleged misconduct. Second, not all unlawful arrests, detentions, or searches are oppressive. In order to find an unlawful act is oppressive, the Adjudicator must find either that the officer acted intentionally or recklessly.

88. Finally, the section does not define misconduct as arresting or searching with "reasonable and probable grounds." A search or arrest constitutes misconduct only if it is conducted "without good and sufficient cause." "Good or sufficient cause" is not the same as "reasonable and probable grounds." If the legislature had intended the tests to be the same, it would have used the same language. The question then arises whether "good or sufficient cause" is a more exacting standard, or a less exacting standard. Clearly, "good of sufficient cause" could not be a more exacting standard than "reasonable and probable grounds", because officers who failed to meet the higher standard, but nevertheless met the standard imposed by the *Charter* and the Criminal Code would be guilty of misconduct. That cannot be the case. Therefore, "good or sufficient cause" must be a more relaxed standard than "reasonable and probable grounds." That in turn, means that a search that cannot be justified on the *Charter* and *Criminal Code* standard of "reasonable and probable grounds", may nevertheless satisfy the "good or sufficient cause" standard and not constitute misconduct.

89. Simply establishing that the police officer did not have good and sufficient cause to make the arrest does not establish misconduct. The evidence must also establish the mental element; that is, that the police officer knew he or she did not have grounds to make the arrest, or was reckless. If an officer makes an arrest that is unlawful or that violates a person's *Charter* rights, but acted in good faith in the belief that the arrest was lawful and did not violate the person's *Charter* rights, the officer commits no misconduct notwithstanding the unlawfulness or unconstitutionality of the arrest or search. Put another way, a police officer who, in good faith, believes that he has the power to conduct a search or arrest may have "good or sufficient cause" to carry out the arrest or search, even if he or she does not have "reasonable and probable grounds" on the *Charter* standard.

90. This does not mean that a police officer could escape liability simply by stating that he believed he had grounds. The totality of the information and evidence available to the police officer would have to be assessed. If a police officer conducted a search or arrest on grounds so manifestly deficient that no reasonable police officer could believe them to be sufficient, then it would be open to the discipline authority to conclude that the police officer was not in good faith or was reckless as to his grounds. In either case that would be sufficient to substantiate an allegation of abuse of authority.

3.1 Intention, Recklessness, and Blameworthiness

91. These principles were established in *Lowe v. Diebolt* 2013 BCSC 1092, in which the police complaint commissioner sought judicial review of a decision of a retired judge under s. 117 of the *Police Act*. In that case, a police officer conducted an unlawful strip search incident to arrest mistakenly believing she had legal authority to do so. The discipline authority dismissed the allegation on the following grounds:

> [9] On November 4, 2011, Abbotsford Chief Constable Bob Rich, acting as a discipline authority (the "Discipline Authority"), issued a Notice of Discipline Authority's Decision pursuant to s. 112 of the *Act*. The Discipline Authority held that:
>
> > a) reasonable and probable grounds existed to stop and conduct a drug search of Ms. Gowland and her vehicle;

> b) after the initial search of Ms. Gowland's vehicle and person, there were not enough grounds to continue the detention or arrest or to perform a strip search. The strip search was therefore a violation of the *Charter*;
>
> c) nevertheless, Cst. Burridge "did not commit an abuse of process" and "she was acting in good faith and was not acting in an arbitrary or abusive fashion".
>
> [10] Although the Discipline Authority did not find misconduct, he directed that Cst. Burridge receive an update on the law surrounding strip searches.

92. The police complaint commissioner ordered a review of that decision under s. 117 of the *Police Act*. The retired judge (called "the Adjudicator" in the *Lowe v. Diebolt* reasons for judgment) upheld the decision of the discipline authority. The police complaint commissioner then sought judicial review of the decision of the Adjudicator. The Supreme Court defined the question under judicial review as follows:

> [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). A decision in the negative (ss. 10) is subject to the privative clause; an affirmative decision is not.

93. The Court then considered whether misconduct could be established solely by establishing that the strip search was in fact and law unconstitutional. The Court held as follows:

> **VI. THE SUBSTANTIVE ISSUE**
>
> [42] Although the petitioner argued that he was not saying that a *Charter* breach automatically constituted misconduct, substantively that was very close to his position.
>
> [43] The petitioner hinged his argument on the fact that the search could not be valid under the *Charter*: Cst. Burridge acknowledged she did not think she had the grounds to arrest Ms. Gowland, and she did not, in fact, make an arrest. Since a strip search could only be conducted incidental to a lawful arrest, the search could not be justified. In his written argument, the petitioner stated:
>
> > The fact of the strip search itself was not in dispute. Once a determination was made that the officer lacked grounds for arrest and thus had no justification for the strip search, there could be no doubt that the conduct at issue appeared to constitute misconduct. Based on the Respondent's

> own statements, she conducted a highly invasive search procedure knowing that she lacked grounds for arrest, but rather based only on suspicion. That conduct can only be intentional or reckless as those terms are understood in Canadian law.

[Emphasis added.]

[44] The reason why the petitioner says that Cst. Burridge's conduct could only be reckless or intentional is, quoting again from his written argument:

> Put another way, either the Respondent knew that her conduct was unlawful or she ought to have known. By the time of the events in issue, the *Golden* decision had been the law in Canada for approximately seven and half years. It was well known to all in the law enforcement and general legal community.

[45] The petitioner's conflating the legality of the search and misconduct under s. 77(3)(a)(ii)(B) is shown starkly in his argument with respect to the standard of review, with respect to which he identified one issue:

> The question at issue in this appeal (*sic*) is clearly one of law; it is the application of a legal test, as defined by the Supreme Court of Canada in *R. v. Golden*, for the circumstances in which police may lawfully conduct a strip search of an individual.

[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.)

[47] Turning to the Adjudicator's decision, as I said above (para. 18), at page 8 of his decision, he concluded that Cst. Burridge had reasonable and probable grounds to perform a strip search. If he meant by that that the strip search was justified, he would be incorrect because of the lack of an arrest or the subjective grounds for that arrest. Cst. Burridge concedes as much. That finding might even be unreasonable. But as the foregoing demonstrates, that is not the end of the matter for a misconduct charge under the *Act*. (In fact, it would not be the end of a matter in a criminal trial, since a s. 24(2) analysis must be done in order to determine whether evidence obtained pursuant to a *Charter* breach is admissible.)

> [48] The Adjudicator found that there were objective grounds for the arrest, and I do not think the petitioner takes issue with that. The Adjudicator also appears to have concluded that there were objective grounds for a strip search because Ms. Gowland wiggled around. The adjudicator concluded that Cst. Burridge acted in good faith in conducting the search in the gas station. Those are not unreasonable conclusions. (Again, this is separate from whether the search was valid.)
>
> …
>
> [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 might amount to intention.*** While there might be cases in which the misconduct bespeaks intention or recklessness, this is not one of them.

94. In summary, in order to substantiate an allegation of abuse of authority it is not sufficient to establish that a search or arrest was unlawful. There must also be evidence that the police officer arrested or searched knowing he lacked the grounds, or being reckless as to whether he or she had the grounds. Recklessness in this context means that the officer did not even turn his mind to whether he had grounds in circumstances where the officer knew he should turn his mind to that question.

95. In *Scott v. Police Complaint Commissioner* 2016 BCSC 1970 **(Book of Authorities tab 2),** the Supreme Court of British Columbia came to a similar result on a slightly different basis. In that case, a woman was charged with resisting arrest and assault of a police officer. Police officers had tried to enter her house to apprehend a child under the *Child, Family and Community Services Act.* The judge ruled that the police officers lacked grounds to enter the house, and acquitted the woman.

96. The woman then brought a complaint under the *Police Act* that the police officers had committed abuse of authority. Her complaint was eventually heard by a retired judge on a review on the record under s. 117. The retired judge held in effect that since the provincial court judge

had found the police officers lacked grounds to enter the house, therefore they had committed abuse of authority.

97. The decision of the retired judge was then considered on judicial review in the British Columbia Supreme Court. The Supreme Court judge held that the retired s. 117 judge had erred. A finding that an officer entered a house unlawfully does not without more, amount to abuse of authority:

> The question before Rounthwaite P.C.J. [the provincial court judge who heard the assault trial of the woman] 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.***

98. A "blameworthy element" would be some form of bad faith that is, where a police officer conducts a search or detention for some ulterior purposes (perhaps in the opportunistic hope of getting evidence for another investigation, or to put pressure on the detainee, or out of malice for the detainee). In the present case, there is no evidence whatever of bad faith, ulterior purpose, or malice.

99. The law in British Columbia is consistent with the law of other western provinces. In *Allen v Alberta (Law Enforcement Review Board)* 2013 ABCA 187 **(Book of Authorities tab 4),** a police officer conducted an unlawful strip search. As in *Lowe v. Diebolt*, *supra* the Supreme Court of Canada had provided the test for lawful strip searches many years prior to the case at bar. The Alberta Court of Appeal ruled that a search that violates the detainee's *Charter* rights *ipso facto* constitutes misconduct:

[32] The third question on which leave to appeal was granted is: Is an officer's conducting any search outside the *Charter* parameters set by prevailing court decisions, *ipso facto* an offence under Count 1?

[33] It cannot be the case that a *Charter* breach is *ipso facto* a disciplinary offence, because it would mean that mere errors in judgment or carelessness would inevitably rise to the level of discreditable conduct. While police discipline may not require a full level of *mens rea*, and negligence may in some instances amount to a disciplinary offence, there must be some meaningful level of moral culpability in order to warrant disciplinary penalties. As noted in *Rampersaud v Ford*, January 26, 1994 (Board of Inquiry under the *Ontario Police Act*) police work would become impossible if police officers were, regardless of the circumstances, subjected to disciplinary proceedings every time a judge found a *Charter* breach.

[34] At one level, this is a question of statutory interpretation. The *Police Service Regulation* Alta Reg 356/90, lists a lot of things that are discreditable conduct. Breaching *Charter* rights is not listed, but that is not conclusive, because some conduct that is caught by the *Regulation* undoubtedly also involves a *Charter* breach. That being said, there is generally not much to be gained by bifurcating the analysis of the officer's conduct. For example, it is generally not helpful to decide if there was an "unauthorized exercise of authority" during a search, and then to go on and analyze if there was a *Charter* breach, and *vice versa*. These are, generally, two sides of the same coin. The officer's conduct must be analyzed as a whole, in context, having regard to all the sources defining acceptable police conduct. Those sources include the *Charter*, the *Criminal Code*, parameters set by prevailing court and Board decisions, the standards set in the *Regulation*, the internal policies of the police service, the expertise of police officers, and any other relevant source.

…

[36] One must also be sensitive to the fact that police officers often have to make quick decisions without the ability to resort to legal advice or legal research: ***R. v Golub*** (1997), 34 OR (3d) 743 at p. 750, 117 CCC (3d) 193 (CA). A police officer in an alley behind a hotel, dealing with a defiant suspect, cannot be expected to hold a hearing, or sit down and do a careful analysis of the case law after consulting his law reports. It is not helpful to say that just because, with hindsight and after the careful argument of counsel, a court or tribunal is able to determine that there was a *Charter* breach based on "parameters set by prevailing court decisions", that the arresting officer has engaged in disciplinary misconduct: ***Golden*** at para. 63, citing ***United States v Robinson***, 414 US 218 (1973) at p. 235; ***Tomie-Gallant*** at para. 58.

100. In a Manitoba case, RM v. CB (12 October 2017) **(Book of Authorities tab 5),** police officers conducted a search of an apartment. The review board found that the search was unlawful (**see para. 83 and 87-88)**, but it did not amount to misconduct.

> [98] The evidence suggests the Respondents were courteous and professional throughout their contact with the Complainant.
>
> [99] There is no basis to find that the conduct of the Respondents was abusive.
>
> [100] I have found that the general search of the suite and the search of the papers were unlawful due to there being no informed consent obtained before the search. The searches, as being "unlawful exaction" of duty, must fall within the definition of "oppressive" conduct.
>
> *4. Was the search of the suite and/or the search of the papers an abuse by the Respondents of their authority so as to constitute the commission of a disciplinary default?*
>
> [101] I have found the searches to be technically unlawful and therefore "oppressive" conduct.
>
> [102] Does this oppressive conduct by the Respondents necessarily constitute an abuse of their authority?
>
> [103] Whether conduct found to constitute "oppressive" conduct, is in fact an "abuse of authority" within section 29 of the *Act* depends on the facts of a particular case. The mere fact that the searches in this case were technically unlawful, and thereby oppressive, does not necessarily mean that they were abuses of authority by the Respondents.
>
> [104] I agree with the comments of Judge Joyal (as he then was) in *A.C. v. Constable G.S*. (LERA Complaint #6100), February 20, 2007 that, reading the *Act* in context and having regard to its purpose, one may conclude that an "abuse of authority" connotes police conduct that is exploitative. Judge Joyal states, at paragraph 52:
>
> > "The exploitative potential flows from an officer's position of authority which permits the impugned conduct to have an inappropriately and unjustifiably controlling, intimidating or inhibiting effect on a given complainant in the context of a particular fact situation. Police conduct which can be properly found as an "abuse of authority" is that exploitative conduct which, even after an examination of the factual context of a given case, cannot be viewed as consistent with a reasonable police officer's good faith intention to lawfully perform his duties and uphold the public trust".

> [105] Even the fact that the searches done may have amounted to a breach of *Charter* rights does not necessarily mean they were an "abuse of authority" within section 29 of the *Act.* Other decisions of this court have held that even Charter breaches are not necessarily disciplinary defaults under the *Act* (decision of Judge Chartier (as he then was) in *J.W.P. v. Cst. R.L.* (November 15, 2004); decision of Judge Swail in *F.D., and Cst. E.D. and Cst. M.C.* of December 12, 2005). Even Judge Smith, who found conduct she concluded was a breach of a section 10 *Charter* right to be a disciplinary default under the *Act* in *W.H. v. Det. Sgt. R.H. et al* (August 18, 2006) states that "…a Charter breach, in itself, does not automatically constitute a disciplinary default". Rather, Judge Smith says, disregard for fundamental rights guaranteed by the *Charter* can constitute an abuse of authority in certain circumstances and she suggests conduct constituting *Charter* breaches should be carefully scrutinized, in the circumstances of a particular case, to determine whether, in that case, a disciplinary default has been committed.
>
> [106] It is important that every police action that does or might constitute a breach of a *Charter* right and/or might fall within one of the enumerated grounds under section 29(a) of the *Act,* not be automatically deemed to be an abuse of authority. To do so will disturb the balance that must exist between the police being accountable to the public for their conduct and being able to do their jobs effectively in order to protect the public. Judge Swail, in *F.D. v. Constable E.D. and Constable M.C.,* December 12, 2005, paragraphs 83 to 85, accepts comments in the January 26, 1994 decision of *Rampersaud v. Ford*, Board of Inquiry (Ontario Police Services Act) of January 26, 1994, referring to the fact police officers would operate under a "disciplinary chill" if police were subject to disciplinary proceedings every time it was found that an officer had committed a breach of an accused's *Charter* rights.

101. This case makes an important point about the relationship between conduct that is "oppressive" and that which constitutes misconduct. It is understandable that a person whose apartment was unlawfully searched (*RM v CB)* or who was detained even though he was innocent (this case), may feel that the police conduct was oppressive. However, that is not sufficient to constitute misconduct on the part of the police who conducted the search or the detention.

3.2 GOOD AND SUFFICIENT CAUSE

102. A similar result may be reached by examining the concept of "good and sufficient cause." The definition of "abuse of authority" includes detaining or searching a person "without good and sufficient cause."

103. "Good and sufficient cause" is not synonymous with lawful authority. An arrest may be unlawful, yet be made on good and sufficient cause. In *Complaint of Catherine Crockwell* (May 26, 1998), Nfld. Adj., **(Book of Authorities tab 8)** an Adjudicator heard a discipline hearing under the *Royal Newfoundland Constabulary Act* concerning the unlawful arrest pursuant to the Newfoundland *Mental Health Act*.

> Having found, therefore, that Mr. Crockwell was unlawfully detained by Constable Moss, does this mean that Constable Moss is strictly liable in the disciplinary context of this public complaint or does the concept of good faith apply in considering whether an officer has acted in a manner unbecoming a police officer as charged? …
>
> …
>
> Having considered this matter, I am not satisfied that a police officer is to be strictly liable for an offence under Section 3 for an arrest or detention that is subsequently established to be an unlawful arrest or unlawful detention. If the *Regulations* intended this result, different wording would have been used and that wording would simply have provided the offence to be established on the basis of unlawful arrest or detention and nothing more.
>
> ***Conduct necessary to establish an offence under Section 3(1)(a), however, is qualified by the words "without good or sufficient cause". An officer not guilty of this offence simply on the basis that his arrest or detention is established to be unlawful. Additionally it must be established that the officer acted without good or sufficient cause.***
>
> Case law establishes that the words "good or sufficient cause" is descriptive of behavior which is done in good faith, behavior which is not arbitrary, irrational, unreasonable or irrelevant to the duties which rests upon police officers. The phrase, in my view, is broad enough to include an officer acting in good faith but acting under mistake of fact as well as mistake of law. Mistake of law is not a defence to an offence but I have already concluded that Mr. Crockwell's arrest was unlawful in the first instance. In considering good faith conduct, it makes no difference if the reasons for an officer's mistaken belief, is prompted by a mistake of fact or by a mistake of law. I therefore do not conclude an officer is guilty of acting "without good or sufficient cause" simply because an arrest or detention is determined to be unlawful.

104. In *A.C. and G.S.* (20 February 2007), LERA Complaint #6100**, (Book of Authorities tab 7)** a Manitoba provincial court judge sat on a case under the *Law Enforcement Review Act.* The allegation was abuse of authority by being discourteous. In British Columbia *Police Act*, discourtesy is a separate charge from Abuse of Authority but in both British Columbia and

Manitoba, Abuse of Authority is defined as oppressive conduct. The facts in *A.C.* are not similar to those in the case at bar, but the discussion of abuse of authority is helpful and is frequently cited in Manitoba decisions:

> [51] Read contextually in the entirety of the Act, it would seem that the legislators have, with section 29(a), recognized a police officer's "abuse of authority" as one category of behaviour which, along with the other sorts of behaviour and conduct set out in section 29(b)-(i), is deserving of a disciplinary default. It is only the cases where a police officer's behaviour or conduct can be concluded to be abusive of his authority that are sanctionable pursuant to section 29(a). Default is not to be found for absolutely any and all manifestations of the impunable behaviour set out in section 29(a)(i)-(vii). Each case will depend upon its own facts.
>
> [52] On a contextual reading of the Act and the consideration of its purposes, one can conclude that an " abuse of authority" connotes conduct of an ***exploitative character***. The exploitative potential flows from an officer's position of authority which permits the impugned conduct to have an inappropriately and unjustifiably controlling, intimidating or inhibiting effect on a given complainant in the context of a particular fact situation. Police conduct which can be properly found as an "abuse of authority" is that ***exploitative conduct*** which, even after an examination of the factual context of a given case, cannot be viewed as consistent with a reasonable police officer's good faith intention to lawfully perform his duties and uphold the public trust. Judicial decisions such as the one in the case at bar, continue to develop a set of reference points and criteria by which an alleged abuse of authority can be evaluated. The development of those reference points and criteria must find a way to balance the need to hold police officers to account, while not defining "abuse of authority" too broadly or vaguely.
>
> [53] In continuing to confirm the expectation of appropriate and justifiable police conduct and in giving more clear meaning to the idea of police "abuse of authority", this Court's future decisions (while not foreclosing the possibility in appropriate cases -- see LERA Complaint #6180, August 18, 2006) must take care to not encourage hearings pursuant to section 29(a) for <u>every</u> example of sub-par police behaviour. The developing definition of an "abuse of authority" must ensure, for example, that the LERA forum not become a means for attacking all police conduct which may have been the subject of earlier judicial determination respecting such matters as Charter breaches and the consequent exclusion of evidence. (see for example, Swail P.J.'s warning about the potential for "disciplinary chill" in F.D. v. Cst E.D. and Cst. M.C., December 12, 2005, paras. 83-85)

105. In *Rabah v. Austin* (November 23, 1995), Ont. Board of Inquiry No. PC007/97 **(Book of Authorities tab 9)**, members of a drug squad entered an apartment without a warrant to prevent

the destruction of drug evidence. They entered the wrong apartment. Upon entry, they arrested the two occupants and searched the apartment, finding no drugs. The officers were charged with, *inter alia*, unlawful arrest and unlawful search. (Ontario does not have a charge of abuse of authority).

106. The search in *Rabah* followed the decision of the Supreme Court of Canada in *R. v. Silveira*, [1995] 2 S.C.R. 297. In *Silveira,* the court held that police may not enter a premises without a warrant even if it is to preserve evidence. The Board of Inquiry in *Rabah* had found that even if the officers had identified the correct apartment, they would not have had lawful authority to enter it to preserve evidence. The Board found that the officers could not be faulted for being unaware that the entry was unlawful. The Board then held:

> In *Rampersaud v. Officers Ford and Vammus* (Board of Inquiry, January 24, 1994), the Board observed that police officers should not face disciplinary action every time they may breach the Charter since these rights are constantly being refined by the courts, and police officers acting in good faith should not be held to a retroactive standard of conduct. In that case, the Board found that the subject officer did not act in good faith and findings of misconduct for unlawful arrest and unreasonable search were made.
>
> In the case before this Board, we have determined that the subject officers were acting in good faith and were not made aware of the change in the law as a result of the *Silveria* [sic] decision.
>
> *In Re P.C. Shockness* (Gillespie) (Board of Inquiry, September 27, 1994), the Board noted that not every violation of the Charter will result in a finding of misconduct against a police officer. The Board in that case stated that it was required to determine whether the Charter violation was likely to bring discredit upon the reputation of the police force. The Board stated that the test had both objective and subjective elements. The Board said that bad faith on the part of the police officers may not need to be proved in every case because recklessness or a high degree of negligence may be enough to establish misconduct.
>
> In the case before this Board, we find no bad faith, police officer negligence or recklessness.
>
> In the *Silveria* [sic] case, the majority found that there were factors which mitigated against the seriousness of the *Charter* violation. These factors included the exigent circumstances requiring the police officers to enter the premises in order to protect against the destruction of evidence and the lack of bad faith of the part of the police officers. In the matter before this Board, the police officers were not made aware by their police service of the decision of *Silveria*. [sic] In these

> circumstances, the Board finds that the officers are not guilty of misconduct by breaching the provisions of the *Charter* and the *Narcotic Control Act.*
>
> In the case before us, the police officers had an honest belief that they had the right to enter the apartment without a warrant in order to preserve evidence. This *Board* decision will make all officers on the force aware that such an entry is a violation to the right of privacy of an individual and a breach of s. 8 of the *Charter.*

107. In *R.M and C.B.* (October 12, 2007), LERB Complaint #2005/3 **(Book of Authorities tab 5)**, two officers extracted a "consent" from the complainant to search his suite and then searched it for drugs. It was alleged that the police conduct was oppressive in that the consent was not informed consent, so the search was unlawful and the manner of the search was oppressive. The Adjudicator agreed with the complainant that there was no true consent and therefore the search was unlawful, but did not agree that the search was excessive. The Adjudicator then considered whether the search being unlawful, was by definition oppressive:

> [101] I have found the searches to be technically unlawful and therefore "oppressive" conduct.
>
> 102] Does this oppressive conduct by the Respondents necessarily constitute an abuse of their authority?
>
> [103] Whether conduct found to constitute "oppressive" conduct, is in fact an "abuse of authority" within section 29 of the *Act* depends on the facts of a particular case. The mere fact that the searches in this case were technically unlawful, and thereby oppressive, does not necessarily mean that they were abuses of authority by the Respondents.
>
> [104] I agree with the comments of Judge Joyal (as he then was) in *A.C. v. Constable G.S.* (LERA Complaint #6100), February 20, 2007 that, reading the *Act* in context and having regard to its purpose, one may conclude that an "abuse of authority" connotes police conduct that is exploitative. Judge Joyal states, at paragraph 52:
>
> > "The exploitative potential flows from an officer's position of authority which permits the impugned conduct to have an inappropriately and unjustifiably controlling, intimidating or inhibiting effect on a given complainant in the context of a particular fact situation. Police conduct which can be properly found as an "abuse of authority" is that exploitative conduct which, even after an examination of the factual context of a given case, cannot be viewed as consistent with a reasonable police officer's

> good faith intention to lawfully perform his duties and uphold the public trust".

[105] Even the fact that the searches done may have amounted to a breach of *Charter* rights does not necessarily mean they were an "abuse of authority" within section 29 of the *Act.* Other decisions of this court have held that even Charter breaches are not necessarily disciplinary defaults under the *Act* (decision of Judge Chartier (as he then was) in *J.W.P. v. Cst. R.L.* (November 15, 2004); decision of Judge Swail in *F.D., and Cst. E.D. and Cst. M.C.* of December 12, 2005). Even Judge Smith, who found conduct she concluded was a breach of a section 10 *Charter* right to be a disciplinary default under the *Act* in *W.H. v. Det. Sgt. R.H. et al* (August 18, 2006) states that "…a Charter breach, in itself, does not automatically constitute a disciplinary default". Rather, Judge Smith says, disregard for fundamental rights guaranteed by the *Charter* can constitute an abuse of authority in certain circumstances and she suggests conduct constituting *Charter* breaches should be carefully scrutinized, in the circumstances of a particular case, to determine whether, in that case, a disciplinary default has been committed.

[106] It is important that every police action that does or might constitute a breach of a *Charter* right and/or might fall within one of the enumerated grounds under section 29(a) of the *Act,* not be automatically deemed to be an abuse of authority. To do so will disturb the balance that must exist between the police being accountable to the public for their conduct and being able to do their jobs effectively in order to protect the public. Judge Swail, in *F.D. v. Constable E.D. and Constable M.C.,* December 12, 2005, paragraphs 83 to 85, accepts comments in the January 26, 1994 decision of *Rampersaud v. Ford*, Board of Inquiry (Ontario Police Services Act) of January 26, 1994, referring to the fact police officers would operate under a "disciplinary chill" if police were subject to disciplinary proceedings every time it was found that an officer had committed a breach of an accused's *Charter* rights.

[107] In order to decide if the conduct of the Respondents in this case, in conducting the general search of the Complainant's suite and the search of his personal papers within the suite, amounts to "abuse of authority", it is necessary to look at the facts of this case. I consider the following facts:

> (i) the treatment by the Respondents of the Complainant;
>
> (ii) whether their conduct can be seen as consistent with a reasonable police officer's good faith intention to lawfully perform his duties;
>
> (iii) the extent and specifics of the search itself; and
>
> (iv) how the Respondents' conduct affected the Complainant.

> [112] The Respondents failed to obtain informed consent for the searches from the Complainant. This was an error which could have had significant legal consequences for exclusion of evidence, had this been a situation in which charges resulted from such a search (which of course was not the case here).

3.3 No "Recklessness" If Officer Not Trained in Appropriate Standard

108. As noted earlier, in *Lowe v. Diebolt, supra* a police officer conducted a strip search that was unlawful according to the standards of *R. v. Golden* 2001 SCC 83. The Police Complaint Commissioner argued that search constituted misconduct, and the subject officer could not rely on the fact that she had never received training in the law of strip searches. The Police Complaint Commissioner argued that the police officer's ignorance amounted to reckless because: "By the time of the events in issue, the *Golden* decision had been the law in Canada for approximately seven and half years." **(*Lowe v. Diebolt, supra*, Book of Authorities tab 1 at para. 44).** The Supreme Court rejected this argument. The fact that the subject officer *should* have been trained did not amount to reckless. In the absence of evidence that the police officer had received the necessary training, a discipline proceeding cannot find that the police officer was reckless.

109. The importance of the subject officers' training was discussed in Constable Tiwana, PH. File No. 2014-2; OPCC 2012-7819

> I do not see that Lowe v. Diebolt is inconsistent with that line of cases or establishes an entirely subjective test of good faith. Myers J. pointed repeatedly to the lack of evidence, and observed specifically that ignorance of the law might indicate a lack of training. Justice Myers appears to simply have been observing that the evidence in that case did not establish that the officer had training, or had been taught a standard, that fixed her with knowledge that she was searching unlawfully. *That is not the same as a purely subjective test; it means only that the adjudicator was not equipped to find that the officer knew her options and intentionally or recklessly acted outside her authority.*
>
> …
>
> The problem in *Lowe v. Diebolt* was that there was no evidence regarding the training within the officer's department and whether it was common or available knowledge for a trained officer in her department that a search could not be conducted without grounds for an arrest. A finding of "recklessness" on the part of the officer in relation to her search powers was not available.
>
> ***Tiwana, supra*, Book of Authorities tab 3 at p. 15-16**

110. Lack of training and an error of law was also at the center of *The Matter of Constable X* (December 22, 2010). The Honourable Carole Lazar sat as reviewing judge in the capacity as Discipline Authority on a complaint that two officers had committed abuse of authority by arresting a cyclist without authority, and using excessive force in the arrest. The cyclist's bicycle did not have brakes. One of the officers mistakenly believed that the police have the authority to seize unsafe bicycles. The Discipline Authority concluded that the police officer did not have authority to seize the bicycle, but that his erroneous belief was in good faith. She wrote:

> I conclude that Constable l arrested Mr. Y illegally. He did this because he thought he had the right to seize Mr. Y's bike so he viewed Mr. Y's resistance as obstruction. He was wrong. Still, his mistake is understandable if his background and training are taken into account. I find that Constable acted in good faith. Because of this, though Mr. Y was wrongly arrested, there was no punishable misconduct on the part of Constable Y.
>
> **Book of Authorities, tab 6, p. 10**

3.4 THE TEST FOR THE GROUNDS FOR INVESTIGATIVE DETENTION

111. The law of investigative detention is perhaps the most unclear and nuanced in the field of search and seizure. While the courts have enunciated the words of the formula to define the articulable cause that gives rise to the power to detain investigative purposes, the formula is vague and controversial in its practical application. Worse, while the case law provides some guidance on what police officers may *not* do during an investigative detention, it provides next to no guidance on what they may do.

112. The test for articulable cause to detain for investigation was first enunciated in *R. v. Simpson* (1993), 17 OR 182, and was adopted by the Supreme Court of Canada in *R. v. Mann* 2004 SCC 52 **(Book of Authorities tab 10)** as follows:

> 27 The Court of Appeal for Ontario helpfully added a further gloss to this second stage of the *Waterfield* test in *R. v. Simpson* (1993), 12 O.R. (3d) 182, at p. 200, by holding that investigative detentions are only justified at common law "if the detaining officer has some 'articulable cause' for the detention", a concept borrowed from U.S. jurisprudence. Articulable cause was defined by Doherty J.A., at p. 202, as:
>
> > . . . 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. Articulable cause, while clearly a threshold somewhat lower than the reasonable and probable grounds required for lawful arrest (*Simpson*, *supra*, at p. 203), is likewise both an objective and subjective standard (*R. v. Storrey*, [1990] 1 S.C.R. 241, at p. 250; *R. v. Feeney*, [1997] 2 S.C.R. 13, at para. 29).

113. Lawyers and judges now know that when considering whether a police officer had articulable cause to detain a person, they must recite the "constellation of objectively discernable facts" test. What a "constellation of objectively discernable facts" that rise to "reasonable suspicions" actually means in practice is highly contentious, even for lawyers and judges. There are countless cases where a trial judge comes to one conclusion on the facts, and appellate lawyers (perhaps at several appellate levels) come to different conclusions. A "constellation of objectively discernable facts" test is of even less clarity for police officers in the field – if they have been trained in the test and its application.

114. In the present case, there can be no doubt that the members were investigating a specific offence (theft of mail).

115. "Reasonable suspicion" and "mere suspicion" are very flexible and ambiguous concepts. In a given case, reasonable persons may differ about whether it has been met. In *Mann*, for example, ten appellate judges considered the case: three Court of Appeal judges, and seven Supreme Court judges. Five judges concluded that the search was not lawful (five at the Supreme Court), and five concluded that it was lawful (three at the Court of Appeal and two the Supreme Court). If one were to treat errors of law as misconduct, one-half of the appellate judges committed misconduct in their application of the rules governing investigative detention.[2]

116. As noted earlier, in this very case the Police Complaint Commissioner and the Honourable Mr. Oppal disagree about whether the police officers had grounds for investigative detention. If there is disagreement between these to very senior, very experienced lawyers, it cannot be said that Cst. Hoang and Cst. Lobel were so obviously wrong that they must have been acting in bad faith.

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[2] Even if one were to "excuse" the dissenting Supreme Court judges on the ground that they were dissenting, not ruling, it remains that the three Court of Appeal judges committed errors of law.

4. APPLICATION TO THIS CASE.

117. The context of the detention in this case is of great importance. A witness had observed a crime being committed. Mail theft is a serious enough crime on its own and it often leads to identity theft, another serious crime.

118. The circumstances were exigent. If the suspect was not apprehended shortly after the witness' report, he would almost certainly get away.

119. There is no suggestion whatsoever that the police officers were not engaged in good faith in attempting to locate and if possible, apprehend the suspect. This was not a case where an arrest was made opportunistically with some ulterior purpose. There is not the slightest suggestion that the police officers had ill will towards Mr. McDonald, or had any other improper motive.

4.1 INVESTIGATIVE DETENTION

120. It is submitted that there were grounds for Cst. Hoang and Cst. Lobel to stop Mr. McDonald.

(1) A witness had seen a crime being committed: mail theft. This was an objectively discernable fact.

(2) The description of the suspect given over the air matched Cst. Lobel in a number of respects, as set out in paragraph 9, above. These were objectively discernable facts.

(3) Mr. McDonald was in the same neighbourhood as the suspect, albeit not on the same street. Some minutes had passed between the witness report and the detention, so it was reasonable to believe that the suspect could have come from the place where he was first seen to the location where he was detained by Cst. Lobel and Cst. Hoang.

(4) Mr. McDonald did not have a backpack, while the suspect did. On its face, this would suggest that Mr. McDonald was not the suspect. However, the police officers did have reasonable grounds based on objectively discernable facts, to account

> for the absence of the backpack. Several police units had responded to the same call. They were also patrolling through the neighborhood looking for the suspect. The police officers reasoned that it was likely that the suspect had noticed the increased police presence, understood that the police may be looking for him, and therefore took evasive action: stashing the backpack with the intention of coming back for it, and taking a different route out of the neighborhood.

121. Thus, the police had the report of a crime objectively discernable facts that were capable of connecting Mr. McDonald to the crime, and rational reasons to account for indicia that may have pointed away from Mr. McDonald as being the suspect. There was much more than a reasonable suspicion that a crime had been committed, and a fact-based reasonable suspicion that Mr. McDonald may be the suspect who committed the crime.

122. Therefore, it is submitted that the investigative detention met the *Mann* test.

123. In the alternative, if the discipline authority concludes that the police officers' grounds fell short of the *Mann* test, it remains that whether particular "constellation of facts" gave rise to "reasonable suspicion" is a judgment call upon which reasonable persons may differ.

124. It is beyond any doubt that the police officers were acting in good faith for a legitimate police purpose. The simple fact is that if the police officers did not honestly believe that Mr. McDonald might be the suspect, they would not have stopped him. They had no reason to stop him other than their belief that he was the suspect and if Mr. McDonald was not the suspect, the real suspect remained at large.

125. Therefore, even if the discipline authority concludes that the police officers erred in that they did not have grounds for the investigative detention, that error does not amount to disciplinary misconduct. They did not violate Mr. McDonald's rights knowing they lacked the grounds (intentional misconduct), nor were they so absolutely lacking in grounds that one could conclude that they did not care whether they had authority (reckless misconduct). If the discipline authority concludes that they lacked the grounds to form a reasonable suspicion, they still had "good and sufficient cause", as defined in the caselaw. If they committed an error of

law, there is no evidence of some other blameworthy element sufficient to constitute misconduct (*Scott, supra.*)

4.2 SEARCH OF MR. MCDONALD

126. There is no evidence that Cst. Hoang or Cst. Lobel received training to the effect that a police officer may not search a detainee to establish identity. Both Cst. Lobel and Cst. Hoang testified that they had received some training at the justice institute on investigative detention, but neither recalled receiving training on the specific question of the power to search.

127. Therefore, there is no evidence from which it could be concluded that Cst. Hoang searched Mr. McDonald knowing they had no power to do so (intentional misconduct), or that they just did not care whether they had the power (reckless misconduct).

128. The facts in this case are on point in every material respect with *Lowe v. Diebolt*. In that case, a police officer conducted a search contrary to the rules set out by the Supreme Court of Canada many years earlier. Here it is alleged that the police officers searched Mr. McDonald contrary to rules set out in *Mann*. In *Lowe v. Diebolt,* the Police Complaint Commissioner argued that length of time between the *Golden* decision setting the parameters for strip searches and the improper strip search at issue, allowed the conclusion that the police officers could be fixed with knowledge of the law whether she actually had that knowledge or not, and that in turn, allowed the finding that she had been reckless when she undertook the strip search. The court disagreed. The court noted that in the absence of evidence that the officer had received the requisite legal training, she could not be held to know the relevant law. Similarly, in our case it cannot be argued that the length of time between the *Mann* decision and the investigative detention at issue fixes Cst. Hoang and Cst. Lobel with knowledge of the law of investigative detention, whether or not they actually have received that training. There is no evidence that Cst. Hoang or Cst. Lobel received training about the limits of their ability to ascertain the identity of the detainee, so there is no basis to find either that they knew the law and ignored it (intentional misconduct) or that they just did not care what the law was. Both Cst. Lobel and Cst. Hoang testified that they had discussed the limits of their powers with colleagues and supervisors, but never received a clear answer about the limits of those powers. Perhaps that his not surprising,

since the scope of the powers of police officers to ascertain the identity of detainees has not been definitely settled.

129. Therefore, even if the discipline authority were to conclude that police officers do not have the power to search for identity documents when a person is under investigative detention, the error by Cst. Lobel and Cst. Hoang was a mere error of law not culpable misconduct.

4.3 A Concluding Note

130. Section 126 of the *Police Act* states what may be regarded as the central principle of the disciplinary regime: that education and correction take precedence over punishment. If the discipline authority concludes that Cst. Hoang or Cst. Lobel committed errors in the detention of Mr. McDonald but also concludes that the error does not constitute misconduct, such a finding does not mean that the have "gotten off." Being engaged in the disciplinary process is itself corrective and educational. In the course of these proceedings, Cst. Lobel and Cst. Hoang have been required to discuss and consider the law of investigative detention generally, and the powers of police officers during an investigative detention. They have been advised very clearly, that going forward they must assume that they do not have the power to search a detainee for identity documents. Mr. Oppal, who is very experienced in the ***Police Act***, concluded that the only disciplinary and corrective measures necessary for Cst. Hoang would be additional training. It is not clear that any training on offer by the JI or the VPD, would address the issues in this case as clearly as the lesson imparted by the proceeding before Mr. Oppal and this proceeding.

131. In short, even if they are found not to have committed disciplinary misconduct, they have already received the education and corrective measures that would likely have been ordered if they had been found liable.

16 November 2018.

M. Kevin Woodall

Counsel for the Respondent Members