COURT FILE NO. 12-1027
VICTORIA REGISTRY

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA
CIVIL DIVISION
HELD AT VICTORIA

BETWEEN:

BRIAN EDWARD JULL

CLAIMANT

AND:

THE CORPORATION OF THE CITY OF VICTORIA
and SUE McLEOD

DEFENDANTS

Reasons for Judgment of the Honourable Judge Anthony J. Palmer

Counsel for the Claimant: Jeremy Maddock, Articled Student
Counsel for the Defendants: Lindsay Nilsson
Date of Trial: July 28, 2014.

[1] The Claimant claims against the Defendants for damages for various alleged breaches of his guaranteed rights under the *Canadian Charter of Rights and Freedoms* ("the *Charter*"), specifically sections 8, 9 and 10(b). He seeks a remedy in damages pursuant to section 24(1) to the maximum jurisdiction of this Court, namely, $25,000 including $5,000 as aggravated damages for mental and emotional distress and a further $5,000 as aggravated damages against Victoria City Police Constable Sue McLeod for "malicious dishonesty" in the course of the police complaint process.

[2] The Claim arises out of the brief detention of Mr. Jull on a city street by Cnst. McLeod during an investigation of a reported break and enter into a derelict motel, during which a witness had described the appearance and movements of a possible suspect wearing clothing similar to that worn by Mr. Jull.

[3] The Defendant, vicariously liable for the actions of its Police Officers, vigorously defends this Claim and asserts that, at all times, Cnst. Mcleod acted professionally and respectfully and, most importantly, upon reasonable grounds. Ms. Nilsson also argues that Mr. Jull has failed to provide any evidence of mental or emotional distress or any other damage arising out of the actions of Cnst. Mcleod. She urges this Court to dismiss the action.

Background

[4] The incident giving rise to this Claim took place on August 6, 2012, following a 9-1-1 call from a witness reporting intruders in a closed and unoccupied motel (the Holiday Court, then slated for demolition) and a suspicion that they were stealing copper wiring from inside. The witness, Mr. Ray Crouch, from his vantage point across the street from the motel, told the operator that he saw one person inside wearing white overalls and that he witnessed a second individual running from the building westbound on Hillside Avenue towards Douglas Street. The description he gave was of a male wearing a green coat, green shirt and dark pants.

[5] At 8:52 pm, Cnst. McLeod, a member of the canine unit travelling with her dog in an unmarked police car, received a 'rapid response' dispatch and drove to the area. She was provided with the descriptive information of the second male suspect as well as information that he was running west on Hillside Avenue. She then received information from Cnst. Keleher that he thought the second suspect was heading east, rather than west, in the direction of Blanshard Street, some two blocks away. He asked that other Officers in the vicinity approach this individual who was said to be wearing a green sweater and possibly light blue jeans, at the

corner of Hillside Avenue and Blanshard Street. Cnst. McLeod advised that she would take the call.

[6] At 8:56 pm she pulled into the crosswalk at that corner and intercepted a lone male, now identified as Mr. Jull, who was wearing a long sleeve green shirt and light blue jeans. He was the only male in the vicinity and appeared to match the clothing description supplied to her from Cnst. Keleher and the dispatch operator. No other description such as height, weight, apparent age or skin colour had been provided.

[7] With her police car in the crosswalk, blocking the southbound curb lane on Blanshard Street, she activated the flashing lights and approached Mr. Jull on foot, advising him that he was under investigation for a break and enter at the Holiday Court. Mr. Jull immediately denied breaking into any place, whereupon Cnst. McLeod advised that a witness had seen him leaving the motel. Mr. Jull stated that he'd walked by the motel and heard noises inside, but had not been inside the building.

[8] At this point, the Officer queried over her radio whether she "had the right guy", and received a response that the suspect was wearing a light green sweater and light blue jeans. The description matched the clothing of Mr. Jull and Cnst. McLeod's belief that she had the correct suspect was implicitly confirmed.

[9] She asked Mr. Jull if he had been running, and, according to her, he said that he had been running, but repeated that he had not been inside the motel.

[10] While standing outside her police car, she asked Mr. Jull if he "had anything on him", possibly dope, and then asked him to empty his pockets and place the contents on the hood of her car. He complied, whereupon she proceeded to give him a pat down search that lasted about ten seconds, according to her evidence, and checked his waistband area for weapons or other dangerous objects. Finding

nothing to cause concern or arouse suspicion, she advised him to put the items back in his pockets, and at that moment received a radio call advising that Mr. Jull could be released and that she could 'clear' the scene. She advised Mr. Jull of this, apologized to him for the inconvenience, stated that she was doing her duty and following the description given and that he was free to go.

[11] She said that, while he seemed agitated at first, he calmed down and remained relatively relaxed throughout. The entire encounter, she recalled, lasted about five minutes.

[12] At no time during this brief episode did Cnst. McLeod advise Mr. Jull of his right to contact and instruct counsel pursuant to s. 10(b) of the *Charter*.

[13] Mr. Jull testified that he was walking eastbound on Hillside Avenue en route to his home and, as he was about to step into the crosswalk, an unmarked car pulled in front of him and Cnst. McLeod got out and approached him "in an aggressive manner" and took hold of his arm. The Officer demanded to know what he was doing in that building, gesturing toward the Holiday Court. He stated that he denied being inside the building and that he did not tell her he had been running.

[14] He said that she received a radio message and then adopted a much more relaxed demeanour, but asked for identification and "ordered" him to empty his pockets on the hood of her car. According to him, she then patted him down without warning and asked if he was carrying anything of concern to her, to which he answered no. She asked if he was carrying any dope, and he denied that as well. She then received another radio message and advised, without apologizing, that he was free to go. She did not advise him of his right to counsel.

[15] According to Mr. Jull, he has Autism Spectrum Disorder, and suffers from depression and anxiety. He becomes "over-stimulated" as a result of sudden

unexpected events and has a fear of being quickly approached or touched. He avoids contact and all forms of confrontation and leads a solitary social life as a result. After his encounter with Cnst. McLeod on August 6, 2012, he felt shocked and "absolutely humiliated". He said that the incident increased his anxiety and stress and that even now, some two years after the incident, his insomnia is worse than it had been prior to the incident.

The Arguments

[16] Mr. Maddock submits that Cnst. McLeod lacked reasonable grounds to stop and detain Mr. Jull and that she had no reasonable basis for the pat down search and the examination of the personal items contained in his pockets. He also argues that she ought to have advised him of his right to counsel and that the *Charter* breaches entitle him to an award of damages pursuant to s. 24(1). Because of Mr. Jull's pre-existing emotional disabilities an award of aggravated damages is claimed.

[17] Ms. Nilsson submits that the Officer did have reasonable grounds for the brief stop and detention, that she had every right to conduct a non-intrusive search for her own safety and that there is no basis to argue any *Charter* breaches. The circumstances, she says, did not warrant any advice of his right to contact counsel.

[18] Ms. Nilsson also submits that, in any event, Mr. Jull has not proved any loss or damage resulting from this encounter.

Discussion: Did Constable McLeod have reasonable grounds for detention?

[19] The main issue is the reasonableness of the Officer's actions, including the initial detention and the search.

[20] Ms. Nilsson points to section 25(1)(b) of the *Criminal Code* as a complete defence. It states:

> **Protection of persons acting under authority**
>
> 25. (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law...
>
> (b) as a peace officer or public officer
>
> is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

[21] She submits that, at all times, Cnst. McLeod's actions were justified based upon reasonable grounds and in accordance with the Victoria Police Department's own policies and procedures. A complaint under the *Police Act* was filed, considered and dismissed by Chief Constable Graham on March 12, 2013. That followed a full and thorough investigation by Sgt. Lance Philip who concluded his report with this statement:

> "It is unfortunate for Mr. Jull that he was identified as a suspect, but the evidence gathered in this investigation does not appear to support any of the allegations made by Mr. Jull."

[22] Chief Constable Graham found that Cnst. McLeod acted reasonably in the circumstances. He went further. He also concluded that if Cnst. McLeod had *not* detained Mr. Jull and queried him, she would have been professionally negligent and derelict in her duty. He also dismissed the complaint that she failed to advise him of his right to counsel in a timely manner, citing her legitimate personal safety concerns as a reason for the delay in doing so.

[23] Of course, Chief Constable Graham's Decision is not binding upon me, but it appears to be a thorough and reasoned one based upon an exhaustive investigation. In *Fortey v Canada* (1999), 63 B.C.L.R. (3d) 185, at 193, the British Columbia Court of Appeal confirmed that "Police policy may be evidence of the standard of care."

[24] And the policy itself, together with evidence of compliance with it, "is a very important factor in determining whether the standard of care has been met": *Anderson v Port Moody (City) Police Department* (2000), BCJ No. 1628 (BCSC), at paragraph [54] citing *Priestman v Colangelo*, [1959] S.C.R. 615. This statement has been approved by the British Columbia Court of Appeal in *Doern v Phillips Estate* (1997), 43 B.C.L.R. (3d) 53.

[25] All of the pertinent case law refers to the reasonableness of the Officer's actions based upon the totality of circumstances that existed at the time of detention. See, for example, *R v Simpson*, [1993] O.J. No. 308 (Ont. C.A.) at page 14, paragraph [55], where five inclusive elements comprising the totality of circumstances are set out. These include a consideration of "the duty being performed, the extent to which some interference with individual liberty is necessitated to perform that duty, the importance of performance of that duty to the public good, the liberty interfered with and the nature and extent of the interference".

[26] In *Anderson*, the Claim was for damages for assault, negligence and misconduct resulting from an arrest that was ultimately found to be justifiable. After reciting s. 25(1) of the *Criminal Code*, Dillon, J, stated at paragraph [51]:

> "Consideration must be given to the circumstances as they existed at the time. Allowance must be made for the exigencies of the moment, keeping in mind that the police officer cannot be expected to measure the force with exactitude."

[27] In *R v Mann*, [2004] 3 S.C. R. 59, the Court referred to an "objective view of the totality of the circumstances" and to the reasonableness of the detention being assessed "against all of the circumstances" (para [34]).

[28] So long as an appropriate assessment is made of the totality of circumstances as they existed at the time, with a focus on what the arresting officer knew, suspected or reasonably assumed, then the detention may be found

to be reasonable even where it was in error, as it was in this case. If the objective standard was met, the Officer cannot be faulted, provided her actions fell within existing police policies and procedures. Put another way, an erroneous detention is not necessarily an unlawful one. The law does not require the investigating Officer to be satisfied beyond any doubt that the suspect is guilty of a crime. Such a requirement would surely lead to paralysis of police investigations that are often carried out in hazardous situations where there is little time for reflection and where decisions must be made quickly in the heat of the moment.

[29] So, investigative detention within a "limited sphere" is permissible and "constitutional rights recognized by ss. 9 and 10 of the *Charter* are not engaged by delays that involve no significant physical or psychological restraint": *Mann, supra*, at paragraphs [18] and [19].

[30] Citizens rely on law enforcement officials to protect them and to investigate crime effectively and, in doing so, only to adhere to standards of conduct that respect dignity and individual rights. Police are trained to take charge of a situation when approaching, detaining, questioning and arresting suspects. In most cases, the Officer has no real advance knowledge of the situation or state of mind of the individual he or she is facing. The pace and elements of such an encounter are not to be dictated by the suspect, and so the situation must necessarily be under the control of the Officer.

[31] Further, in carrying out their duties, Police Officers are not expected to forgo any concerns about personal safety, and they are entitled to take all reasonable precautions to protect themselves from harm when the apprehension of risk presents itself. The suspect may be armed and harboring violent intentions. This is why the standard is only reasonableness, not perfection.

[32] In order to determine the reasonableness of Cnst. McLeod's actions, it is necessary to consider it in two parts: the detention and the search. The s.10 *Charter* complaint is dealt with separately.

[33] With respect to the detention, the only relevant factors are those within the knowledge of Cnst. McLeod. She was not an eyewitness. Case law pertaining to the weakness of eyewitness identification is not pertinent to this case. She proceeded to intercept Mr. Jull upon direction and only in possession of limited information. She was not at the scene of the break and enter and she never spoke to Mr. Crouch. All information within her knowledge was transmitted through her Dispatcher who was herself receiving information that was fluid in nature.

[34] According to the Affidavit of Jodi Mclaren, the Dispatcher, Cnst. McLeod was advised of the following at about 8:53 pm:

(a) there was a break and enter in progress at 740 Hillside, and that "some people leaving now";

(b) a second male was seen exiting, wearing a green coat, green shirt, dark pants, on foot, running on Hillside westbound towards Douglas Street;

(c) a male wearing a green shirt and light coloured blue jeans was eastbound on Hillside;

(d) "That could have been him";

(e) "kind of like a lighter green like a khaki'ish green";

(f) "...that would be him"

(g) now towards Boston Pizza [at the corner of Hillside and Blanshard];

(h) "he's right at the southwest corner of Hillside and Blanshard...";

(i) [following a query about whether she had 'the right guy'] "In a light green sweater and faded blue jeans".

[35] In addition, Mr. Jull was the only male at that location and was wearing the clothing described to Cnst. McLeod, and admitted walking from the direction of

the Holiday Court. According to her, he also admitted running in that direction, although this was denied by Mr. Jull.

[36] This was the sum total of information within her knowledge immediately prior to, and at the initial stage of the detention.

[37] Cnst. McLeod was convinced that she had the right person described to her. She was not given any more descriptive information and made her decision to stop and investigate this male based only upon the information within her knowledge. She had not attended the scene of the break and enter, having travelled directly from her previous location to the Hillside and Blanshard corner.

[38] When asked about the first information received that the male was heading west towards Douglas Street, she stated that in her experience suspects leaving crime scenes often change direction, and she was not surprised that the description and direction changed. She is an experienced Officer with almost eighteen years policing experience, eleven as a canine handler. In my respectful view, some deference must be shown to the judgment she employed in carrying out this brief detention. Armed only with the information referred to, it cannot be said that, from an objective standpoint, she acted unreasonably in the circumstances. The totality of the evidence surrounding this brief interaction satisfies me that she acted at all times within the scope of her duties and with minimal intrusion upon the liberty of Mr. Jull.

[39] The detention was based upon information within her knowledge at the time and was neither random nor arbitrary, and was not a violation of his s.9 *Charter* rights (See: *Mann*, paragraph [20]).

Discussion: Was the Search Lawful?

[40] With respect to the second part of this analysis, namely, the search, I am satisfied that it was minimally intrusive and was legitimately carried out in

order to protect the Officer's personal safety (See: *Mann*, paragraphs [43] and [45]). She was alone at the scene and had no knowledge of whether Mr. Jull was potentially dangerous or hiding weapons or other contraband on his person. The waistband search was entirely appropriate in my opinion for the same reason. This was a brief and lawful search of his person for safety reasons and, as such, not a violation of his s.8 *Charter* rights. Nothing incriminating was found and there is no issue about admissibility of items found, unlike in the case of *Mann, supra.*

[41] In my view, all of the elements set out in *R v Simpson, supra* at paragraph [25] of these Reasons, have been met in this case.

Discussion: Section 10 Charter

[42] With respect to his s. 10 *Charter* rights, Mr. Jull was immediately informed of the reason for the detention and no section 10(a) violation occurred.

[43] Section 10(b) of the *Charter* prescribes that:

> 10. Everyone has the right on arrest or detention
> (b) to retain and instruct counsel without delay and to be informed of that right;

[44] It is not disputed that Mr. Jull was not informed of his right to retain and instruct counsel during his detention for investigative purposes. It is also beyond dispute that the total detention lasted no more than seven minutes, according to the transcript of radio transmissions. During that time, Cnst. McLeod and Mr. Jull were conversing and she was conducting the pat down search and the examination of the contents of his pockets.

[45] The issue of what constitutes "without delay" has been the subject of considerable jurisprudence almost since the advent of the *Charter*.

[46] In *R v Suberu*, (2009) 2 S.C.R. 460, the Court dealt with the appeal of a decision regarding a brief period of "preliminary investigative questioning" that preceded an actual arrest for fraud. The suspect was advised of his right to counsel immediately following the brief detention at a point in time, the Court concluded, that "coincided with his arrest".

[47] But the Court did wrestle with the issue of when such rights are triggered in the course of an investigative detention, whether followed by actual arrest or not. McLachlin, CJ, and Charron, J, for the majority, said at paragraph [42] that the "concept of immediacy" is preferable, leaving "little room for misunderstanding". Otherwise, "a delay between the outset of detention and the engagement of the police duties under s. 10(b) creates an ill-defined and unworkable test of the application of the s. 10(b) right".

[48] But the Court went on to state that the requirement for immediacy is "[S]ubject to concerns for officer or public safety and such limitations as prescribed by law and justified under s. 1 of the *Charter*" although the Court also said that it was not necessary to invoke s. 1 of the *Charter* due to the expansive definition of 'detention' in *R v Grant*, [2009] 2 S.C.R. 353. In citing *Grant*, the Court stated that "in a situation where the police believe a crime has recently been committed, the police may engage in preliminary questioning of bystanders without giving rise to a detention under ss. 9 and 10 of the *Charter*." [paragraph [28]] The Supreme Court went on to confirm that such a 'bystander' is under no legal obligation to comply.

[49] In the case at Bar, any suggestion that Mr. Jull would not likely have understood that he was under no legal obligation to comply with the questions or demands of Cnst. McLeod is not supported by any evidence. No mention of Mr. Jull's feelings related to compulsion to cooperate was made in his testimony. While the absence of such testimony will not necessarily be fatal to this

Application, any contention that Cnst. McLeod effected a "significant deprivation of his liberty must find support in the evidence" (*Suberu*, paragraph [28]).

[50] And, as already stated, the encounter was very brief, almost momentary, and the Officer was clearly of the belief that a crime had recently been committed and that Mr. Jull may have been involved. The questioning was sparse and Mr. Jull said nothing to inculpate himself. The majority of the time was spent by the Officer conducting the search which I have already concluded was legitimately carried out for personal safety reasons. Therefore, despite any compulsion that Mr. Jull may have felt, in all the circumstances he has not persuaded me that a breach of his s. 10(b) *Charter* rights was committed. As the Court concluded in *Suberu* at paragraph [31]: "There was no right to counsel because there was no detention".

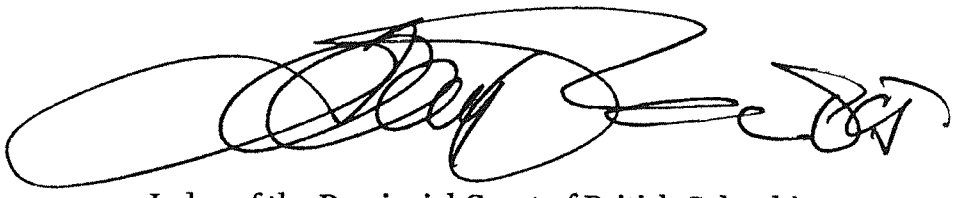
[51] Further, as Ms. Nilsson argued, in those circumstances there would have been no point in advising him of those rights in any event. He was allowed to proceed on his way within minutes of being stopped. According to Cnst. McLeod, Mr. Jull acknowledged her professionalism and explanation with courtesy and acceptance. She said that their parting was "amicable", although in hindsight Mr. Jull clearly does not agree.

[52] Finally, Mr. Jull has presented no cogent evidence of damage or loss that would entitle him to an award of aggravated damages even if *Charter* breaches had been found. The first time he attended a physician with respect to this matter was eighteen months after his encounter with Cnst. McLeod, and then only after a suggestion by Judge Wood at the Settlement Conference. That physician, Dr. Murray, offered no diagnostic or treatment services, but advised that Mr. Jull could say in Court that he had attended a doctor regarding this incident. In my opinion, that was a rather disingenuous effort to suggest that he had sought medical treatment. There is no other evidence beyond Mr. Jull's claim that he was humiliated and suffered insomnia.

[53] It was pleaded that aggravated damages ought to be awarded for Cnst. McLeod's "malicious dishonesty" in the police complaint process. Not a shred of evidence was presented to support this serious allegation.

[54] It is, as Chief Constable Graham said, unfortunate that Mr. Jull was stopped while lawfully walking on a public sidewalk. Despite this misfortune, the actions of the investigating Officer in my view were reasonable in all the circumstances and above reproach.

[55] For all of the foregoing reasons the Claim is dismissed with Costs to the Defendants. Any dispute over *quantum* of Costs is hereby referred to the Registrar for assessment.



Judge of the Provincial Court of British Columbia

September 23, 2014.