



July 17, 2018

Via Email: Patti.Marfleet@vancouverpoliceboard.ca

His Worship Mayor Gregor Robertson
Chair, Vancouver Police Board
3rd Floor, City Hall
453 West 12th Avenue
Vancouver, BC V5Y 1V4

Your Worship:

Re: Methodology for investigation of Service or Policy Complaint #2018-133 (Street Checks); OPCC #2018-14863

The Union of BC Indian Chiefs ("UBCIC") and the BC Civil Liberties Association ("BCCLA") write in respect of the Service or Policy complaint ("the Complaint") we filed with the Office of the Police Complaint Commissioner ("OPCC") on June 14, 2018, against the Vancouver Police Department ("VPD") on the practice of "street checks" or "police stops" (OPCC File No. 2018-14863).

On June 14, 2018, Andrea Spindler, Acting Deputy Commissioner for the OPCC, forwarded you a copy of the Complaint. In that letter, Ms. Spindler cited the Vancouver Police Board's (the "Board") obligations pursuant to s. 171(1) of the *Police Act*, RSBC 1996, c. 367 (the "*Police Act*") as follows:

Upon receiving a copy of the complaint, pursuant to section 171(1) of the *Police Act*, the board of the municipal police department to which the complaint relates, must promptly do one or more of the following [Emphasis added]:

- (a) request a chief constable of that municipal police department to investigate and report on the complaint;
- (b) initiate a study concerning the complaint;
- (c) initiate an investigation into the complaint;

- (d) dismiss the complaint with reasons;
- (e) take any other course of action the board considers necessary to respond adequately

Ms. Spindler also stated that, pursuant to s. 171(3) of the *Police Act*, the Board must notify, within twenty (20) business days of doing any of the actions described in subsection (1)(a) to (e) the Complainant, the Director of Police Services, and the Police Complaint Commissioner as to the course of action the Board will take in respect to the Complaint.

On June 19, 2018, we received a letter from Patti Marfleet, Executive Director for the Board, acknowledging receipt of our Complaint, and confirming that the Complaint will be formally considered at the meeting of the Board's Service and Policy Complaints Review Committee on September 20, 2018. In respect of the Board's obligations under s. 171(1) of the *Police Act*, Ms. Marfleet states that, "I will advise you in writing of the actions taken by the Committee with respect to this complaint."

In an email correspondence with Ms. Marfleet, dated July 3, 2018, we were informed that the VPD would be conducting the investigation into the Complaint. In her email, Ms. Marfleet stated that, "As a matter of course the Department investigates all Service and Policy complaints."

On July 12, 2018, we filed an amendment to the Complaint with the OPCC that included additional data released under a Freedom of Information request on both race and gender of street checks conducted by the VPD.

As we will set out below, we have concerns about the VPD being the only body to conduct an investigation and study into the Complaint. Therefore, we recommend that the Board exercise its authority under s. 171(1)(e) to do, at least, the following:

- 1) initiate a study to be conducted at an academic institution or institutions by experts in criminal justice science and sociolegal studies to independently analyze and interpret the VPD's data on police stops / street checks, the VPD's practice and policy, procedures and/or guidance on street checks, and the use of street checks as a policing tool;
- 2) initiate a study to be conducted by an academic institution or institutions by experts in discrimination, stereotyping and equality rights, including Indigenous academics and experts, to independently investigate and make conclusions on the impacts of police stops / street checks on Indigenous and racialized people;

- 3) following the lead of the Toronto Police Services Board, commission a community-based research assessment of police contacts to determine the satisfaction of particularly affected racialized or geographic communities (urban Indigenous people, people in the Downtown Eastside, black people) with policing with particular focus on police stops / street checks, to measure the impact of police stops and street checks and to make recommendations in relation to police stops and street checks in Vancouver. This assessment must include consultation with all Indigenous organizations working on justice, poverty, and youth issues located in Vancouver; and
- 4) work with the Office of the Information and Privacy Commissioner for British Columbia, and interested Indigenous organizations, to develop and draft policies on data collection, protection, and retention that protect the personal information of persons subject to police stops and street checks. Any new policy should provide for annual release of police stop/street check statistics, as well as for routine compliance audits to ensure that VPD practice aligns with policy.

We discuss each of these in more detail below. Note that this list is not exhaustive, and other community stakeholders, and the Police Complaints Commissioner, may have additional ideas that could inform the Board's approach to this matter.

VPD self-investigation in relation to street checks is problematic

We understand that it is customary for the VPD to investigate and report back to the Board on policy complaints that have been accepted for investigation by the Board, and that in this case, Chief Constable Palmer has indicated that the VPD will conduct such an investigation and report to the Board without waiting to be instructed by the Board to do so. While we appreciate the speed of the Chief's decision to engage in this work, we are highly troubled by the lack of independence, and the lack of the appearance of independence, of the VPD's investigation and reporting on its own practices in this case. Given the public interest in a review of this matter that appears independent and is independent in fact, it is clear to us that the VPD must not be the only body to conduct an investigation in relation to this Complaint.

Our concerns about VPD self-investigation of this complaint are heightened by recent public statements by Chief Constable Adam Palmer, which create an appearance that the VPD has already formed conclusions on the Complaint prior to an investigation. For example, in a media release, dated June 14, 2018, Chief Constable Palmer commented on the practice of street checks as follows:

"The VPD's street checks are not based on ethnicity. If our officers see potential criminal activity or a threat to public safety, they are bound by law, including the

Police Act, to address it. [...] A person's race does not factor into an officer's decision to take action to prevent a crime."

Whether the race of individuals plays a role, consciously or unconsciously, in the conduct of street checks is a question at issue in this complaint. Chief Constable Palmer's statement appears to predetermine a key question that must be considered.

Chief Constable Palmer went on to state that:

"There is a strong association between street checks and criminal charges. The numbers show that the percentage of street checks by ethnicity is comparable to percentages by ethnicity for charges and recommended charges.

The VPD does not control where crime falls along racial and gender lines. It is unrealistic to expect population and crime ratios to be aligned."¹

In a June 18, 2018 interview with CBC Radio's *The Early Edition*, Chief Constable Palmer stated that:

"The arrest statistics that we have in the city, they match the demographics that we have for street checks as well. [...] It reinforces the fact that those are the people who are committing crimes in our city."²

Again, these statements create an appearance that the VPD have formed a preliminary conclusion to a question that is at issue in this complaint as to the reason for the overrepresentation of certain racialized groups in street check statistics, prior to any investigative steps having been taken.

Our concern with the statements of Chief Constable Palmer is that the investigation into the Complaint be free from a reasonable apprehension of bias. Based on the VPD's public response from the outset, a reasonable-minded observer of this issue would have firm grounds to be concerned that the VPD's investigation of the Complaint are affected by an appearance of bias. As an administrative decision-maker, the Board is bound by the tenets of administrative law, which include procedural fairness and natural justice. Procedural fairness "requires that decisions be made free from a reasonable apprehension of bias, by an impartial decision-maker."³ While Chief Constable Palmer

¹ "Statement on Street Checks from Chief Constable Adam Palmer", Vancouver Police Department, June 14, 2018: <https://mediareleases.vpd.ca/2018/06/14/statement-on-street-checks-from-chief-constable-adam-palmer/> (accessed June 27, 2018)

² "VPD chief defends police checks after allegations of racial bias", *The Early Edition*, CBC, June 18, 2018: <https://www.cbc.ca/news/canada/british-columbia/vpd-chief-defends-police-checks-1.4711020> (accessed on June 27, 2018)

³ *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817, [1999] F.C.J. No. 39, at para 45.

is not the administrative decision-maker in this complaint, those who are tasked with investigating this complaint at VPD ultimately report to the Chief Constable. Even if those officers do their job as impartially as they can, the appearance of bias has already set in. In our view, the Board has an obligation to ensure that its investigation and/or study into the Complaint be free from a reasonable apprehension of bias. It must therefore make sure that it bases its decisions in this complaint on a broader range of information than that provided by the VPD.

In addition, in order for the Board to understand the impact of the VPD's practice of street checks on individuals and communities, the investigation should hear from the affected communities about their experiences and concerns. Many of the affected individuals and communities that will have valuable information for the Board's deliberations are very unlikely to feel comfortable sharing that information with a VPD-led investigation. The position of the UBCIC and BCCLA is that an investigation into the Complaint should be in-depth, independent, informed by Indigenous academics, experts, community members and organizations, and, most importantly, impartial.

For all of these reasons, we urge the Board to exercise its authority under the *Police Act* to respond to the Complaint by commissioning independent reports in order to provide the Board with a sound basis on which to consider the practice of police stops and street checks. Whether or not the Board agrees with the UBCIC and BCCLA that there is a potential appearance of bias in the VPD's investigation of itself, the recommendations below nevertheless offer, in our view, a promising avenue to ensure a proper, independent investigation of this complaint and a more complete picture of the situation on which to base the Board's decisions.

1. Interpretation of the Data on Street Checks and Their Use as a Policing Tool

We recommend that the investigation into the Complaint include a review of, and report on, the VPD's policies and practices on street checks. The investigation into the VPD's policies on street checks would include a review of the current policies and procedures on street checks developed by the VPD. Moreover, the investigation would include a review of the current practice of street checks conducted by VPD officers. Such a review must consider any identified costs to policing effectiveness alongside identified benefits, such as the potential loss of cooperation from affected communities and the impact on policing of damage to police-community relations. Following this review, we would ask that the investigator issue recommendations for revised policies and procedures on the practice of street checks that address the concerns raised in the Complaint.

Police services, including the VPD, cite the usefulness of street checks as a tool to solve and prevent crime. However, there is significant academic debate over the costs and benefits of street checks as a policing tool.

In the Toronto context, the Toronto Police Services Board commissioned an academic study by two criminology professors at the University of Toronto.⁴ The professors analyzed data on policing and crime rates from across North America and concluded that

“the evidence that it is useful to stop, question, identify, and/or search people and to record and store this information... appears to us to be substantially outweighed by convincing evidence of the harm of such practices both to the person subject to them and to the long term and overall relationship of the police to the community.” (pg A22)

The Board is well-placed to contribute to this debate and to the understanding of the use of street checks in the Vancouver context by initiating a study of the VPD’s street check data and practices.

The VPD’s own review of its practices, in our view, is not adequate for the reasons outlined above in this letter. While VPD has strongly suggested that it finds street checks useful, the Board needs objective information to draw a conclusion. We also note that even to the extent street checks prove useful, that utility must be judged against any possible disadvantages, social costs or costs to policing effectiveness in other ways that may be identified.

With respect to the interpretation of the data on VPD street checks and the evaluation of the use of street checks as a practice, we recommend that the Board exercise its authority under the *Police Act* to respond to the Complaint by:

- initiating a study to be conducted at an academic institution or institutions by experts in criminal justice science and sociolegal studies to independently analyze and interpret the VPD’s data on police stops / street checks, the VPD’s practice and policy, procedures and/or guidance on street checks, and the use of street checks as a policing tool.

2. The Impact of Street Checks on Indigenous and Racialized People

Given the statements made by Chief Constable Palmer quoted above, we have concerns that the VPD lacks the institutional knowledge to understand the unique impacts that

⁴ Anthony N. Doob and Rosemary Gartner, “Understanding the Impact of Police Stops” *Report prepared for the Toronto Police Services Board* (17 January 2017).

street checks could have on Indigenous and racialized people who are overrepresented in the criminal justice system.

There is evidence that police stops – even those that do not lead to criminal justice consequences – can have negative impacts on people by leading to political alienation, distrust and civic disengagement.⁵ Given the disproportionate number of Indigenous and racialized people subject to street checks as revealed in the VPD street check data, it is possible that Indigenous and racialized people are disproportionately affected by such negative consequences in Vancouver. We note that whether or not the VPD intends to discriminate, whether they target Indigenous and racialized individuals, and whether street checks are based on ethnicity or race – is not relevant to the question of whether Indigenous and racialized minorities experience a disproportionate and discriminatory impact. Discriminatory intent is not necessary to establish the existence of systemic or individualized discrimination under Canadian law – what matters is the effect of the policy or actions.

We further point out to the Board that the fact that Indigenous and racialized individuals are overrepresented in other parts of the criminal justice system provides no satisfactory justification at all as to why they should be overrepresented in street checks. The Report of the Aboriginal Justice Inquiry of Manitoba, nearly two decades ago, commented on the potential reasons for the overrepresentation of Indigenous people in the criminal justice system:

“Differences in crime statistics between Aboriginal and non-Aboriginal people result, at least in part, from the manner in which the behaviour of Aboriginal people becomes categorized and stigmatized. This may happen because, to a certain extent, police tend to view the world in terms of "respectable" people and "criminal" types. Criminal types are thought to exhibit certain characteristics which provide cues to the officer to initiate action. Thus, the police may tend to stop a higher proportion of people who are visibly different from the dominant society, including Aboriginal people, for minor offences, simply because they believe that such people may tend to commit more serious crimes.”⁶

With respect to arrests and charges of Indigenous people, the Report referred to testimony of witnesses who appeared before the Inquiry:

⁵ Doob and Gartner, *supra* note 8 at pg B36.

⁶ Report of the Aboriginal Justice Inquiry of Manitoba, Vol 1: The Justice System and Aboriginal People, Chapter 4: ABORIGINAL OVER-REPRESENTATION (“Aboriginal Justice Inquiry”): <http://www.ajic.mb.ca/volumel/chapter4.html#15> (accessed on June 27, 2018)

“Many who appeared before us complained about being stopped on the street or on a country road and questioned about their activities. We heard complaints that Aboriginal people are charged with offences more often than their non-Aboriginal counterparts. They may also be charged with a multiplicity of offences arising out of the same incident. Many charges are never proceeded with and appear to have *been unnecessary. We believe that many Aboriginal people are arrested and held in custody, where a non-Aboriginal person in the same circumstances either might not be arrested at all or might not be held.*”⁷

The overrepresentation of Indigenous people in the criminal justice system is well documented. In the *Gladue* case,⁸ the Supreme Court of Canada commented that the overrepresentation of Indigenous people in Canadian prisons is, in part, the result of a broader societal bias:

“[The excessive imprisonment of aboriginal people is only the tip of the iceberg insofar as the estrangement of the aboriginal peoples from the Canadian criminal justice system is concerned. Aboriginal people are overrepresented in virtually all aspects of the system. [T]here is widespread bias against aboriginal people within Canada, and “[t]here is evidence that this widespread racism has translated into systemic discrimination in the criminal justice system.”⁹

We suggest that the Board should not be satisfied by the analysis quickly suggested by the VPD in its public statements – which seems to point to a conclusion that we should not be concerned about the overrepresentation of Indigenous and racialized people in street checks because it is consistent with the rest of the criminal justice system. Instead, in our view the Board must critically consider the long-established evidence of overrepresentation in other aspects of the system and its relationship, if any, to the overrepresentation of Indigenous and Black people in the rates of street checks.

We wish to note, additionally, that while our letters to the Police Complaints Commissioner highlight the dramatic overrepresentation of Indigenous people generally, and Black men and Indigenous women in particular, our complaint includes all the VPD-released street check statistics for other racialized groups intersecting with gender, and the incidence of overrepresentation, where statistically significant, of other groups is an issue raised in this complaint.

⁷ Aboriginal Justice Inquiry, *ibid.*

⁸ *R. v. Gladue*, [1999] 1 SCR 688, 1999 CanLII 679 (SCC) (“Gladue”).

⁹ *Gladue*, *ibid.*, at para 61.

The Board is well-placed to ensure an investigation that contributes to our understanding of the impacts of street checks on Indigenous and racialized people by commissioning a study or studies on the issue in the Vancouver context. We recommend that the Board exercise its authority under the *Police Act* to respond to the Complaint by:

- initiating a study to be conducted by an academic institution or institutions by experts in discrimination, stereotyping and equality rights, including Indigenous academics and experts, to independently investigate and make conclusions on the impacts of street checks on Indigenous and racialized people.

3. Community-based research assessment of police contacts

In order to better understand the impact of carding in Toronto, the Toronto Police Services Board commissioned independent researchers to conduct a Community-Based Assessment of Police Contact Carding in 2014.¹⁰ The Assessment involved over 400 community interviews with residents, included two community forums – first to provide feedback on the proposed research activities and later on the findings emerging from the research – and employed 23 youth research assistants to help with the evidence-gathering. The study’s objectives were to “(1) determine community satisfaction with policing during the June to August, 2014 time period; (2) measure the impact of the Board’s Community Contacts policy; and, (3) make recommendations for changes or improvements to the Board’s Community Contacts policy.”¹¹ The community-based research approach used by the assessment involved community members in deciding what to research, how to conduct the research, and what to do with the findings.¹²

Community-based research is “[a] research approach that involves active participation of stakeholders, those whose lives are affected by the issue being studied, in all phases of research for the purpose of producing useful results to make positive changes.”¹³

We think that such a project along the lines of what was conducted in Toronto will fill a critical gap in the public’s and the Board’s knowledge as to the lived experience of individuals from communities that experience a disproportionate rate of police contact. We therefore recommend that the Board use its authority to:

¹⁰ Price, Neil, “*The Issue Has Been With Us For Ages*” – A Community-Based Assessment of Police Contact Carding in 31 Division – Final Report, November 2014. Accessed at <https://www.publicsafety.gc.ca/lbr/archives/cnmcs-plcng/cn000043559042-eng.pdf>

¹¹ *Ibid.* at p. 16.

¹² *Ibid.* at p. 21.

¹³ Community Based Research Canada, “Introduction to CBR”, accessed at <https://communityresearchcanada.ca/intro-to-cbr/>.

- following the lead of the Toronto Police Services Board, commission a community-based research assessment of police contacts to determine the satisfaction of particularly affected racialized or geographic communities (urban Indigenous people, people in the Downtown Eastside, black people) with policing with particular focus on police stops / street checks, to measure the impact of police stops and street checks and to make recommendations in relation to police stops and street checks in Vancouver. This assessment must include consultation with all Indigenous organizations working on justice, poverty, and youth issues located in Vancouver.

4. Collection, Protection, and Retention of the Data on Street Checks

A related concern to the interpretation of the data on street checks is whether the VPD's policies and practices on the collection, protection, and retention of personal information on law enforcement databases, such as PRIME-BC, is in compliance with provincial privacy legislation.¹⁴ Specifically, we are concerned that non-conviction information, such as personal information collected in a street check, may be disclosed to public and private bodies other than law enforcement agencies, and may be retained in law enforcement databases for an indefinite period of time. Moreover, we are concerned that there is no process for a person to have non-conviction records expunged from these databases.

In addition, in order to understand the impact of street checks over time, under any new policy that may be adopted, it is necessary to ensure that reliable aggregate data is regularly produced. Without this, neither the VPD, oversight bodies such as the Board and the OPCC, nor the public will have any way of understanding how the tool is being used.

With respect to the VPD's policies and practices on the collection, protection, and retention of personal information related to street checks, we recommend that the Board exercise its authority under the *Police Act* to respond to the Complaint by:

- Working with the Office of the Information and Privacy Commissioner for British Columbia, and interested Indigenous organizations, and independent privacy and database experts familiar with best practices for privacy protection in law enforcement, to develop and draft policies on data collection, protection, and retention that protect the personal information of persons subject to street checks.

¹⁴ See *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165, Part 3, Division 1 ("FOIPPA").

- Ensuring that any new policy provides for annual release of police stop/street check statistics, as well as for routine compliance audits to ensure that VPD practice aligns with policy.

Please note that the recommendations that we make above represent our initial thinking on how the Board might address this complaint. As evidence emerges, it could give rise to additional questions not addressed by the methods above. Furthermore, it is important that the Board receive input from other stakeholder groups, particularly those representing people with lived experience, on what might be required to address the questions raised in this complaint. While the community-based research proposal aims to fulfil this function, there may be additional ideas from others that could guide the Board in its consideration of this matter.

Thank you for your attention to our concerns about the methodology to be used in considering this Complaint.

Sincerely,

On behalf of the UNION OF BC INDIAN CHIEFS



Grand Chief Stewart Phillip
President



Chief Robert Chamberlin
Vice-President



Kukpi7 Judy Wilson
Secretary-Treasurer

On behalf of the BC Civil Liberties Association



Josh Paterson
Executive Director

cc: Hon. Mike Farnworth, Minister of Public Safety and Solicitor General
Stan Lowe, Police Complaints Commissioner
Adam Palmer, Chief Constable, Vancouver Police Department