



Office of the  
Police Complaint Commissioner

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British Columbia, Canada

**NOTICE OF APPOINTMENT OF RETIRED JUDGE**  
Pursuant to section 117(4) of the *Police Act*

OPCC File 2020-18960  
August 20, 2021

To: [REDACTED] (Complainant)

And to: [REDACTED] (Members)  
[REDACTED]  
c/o New Westminster Police Department  
Professional Standards Section

And to: [REDACTED]  
c/o Abbotsford Police Department  
Professional Standards Section

And to: The Honourable Judge David Pendleton, (ret'd) (Retired Judge)  
Retired Judge of the Provincial Court of British Columbia

And to: His Worship Mayor Jonathan Coté  
Chair, c/o New Westminster Police Board

On November 16, 2020, our office received a complaint from [REDACTED] ("Complainant") describing [REDACTED] concerns with members of the New Westminster Police Department (NYPD). I determined the complaint to be admissible pursuant to Division 3 of the *Police Act* and directed that the matter be externally investigated by the Abbotsford Police Department. An additional allegation of misconduct was identified against the respondent members pursuant to section 108 of the *Police Act*.

On July 8, 2021, [REDACTED] ("Investigator") completed [REDACTED] investigation and submitted the Final Investigation Report to the Discipline Authority.

On July 22, 2021, [REDACTED] ("Discipline Authority") issued [REDACTED] decision pursuant to section 112 in this matter. Specifically, [REDACTED] identified two allegations of misconduct against the respondent members. The Discipline Authority determined that the allegations of *Abuse of Authority* and *Neglect of Duty*, pursuant to sections 77(3)(a)(ii)(B) and 77(3)(m)(ii) of the *Police Act*, against the respondent members did not appear to be substantiated.

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Clayton Pecknold  
Police Complaint Commissioner

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On August 9, 2021, the Complainant advised the OPCC that [REDACTED] disagreed with the Discipline Authority's decision and requested that I exercise my authority to appoint a retired judge to review the matter.

Pursuant to section 117(1) of the *Police Act*, having reviewed the allegations and the alleged conduct in its entirety, I consider that there is a reasonable basis to believe that the decision of the Discipline Authority is incorrect.

### **Background**

On the morning of [REDACTED] the Complainant left [REDACTED] residence to [REDACTED]. While walking on the street near [REDACTED] residence, [REDACTED] heard the respondent members calling out in [REDACTED] direction. According to the respondent members, the Complainant from a distance appeared to resemble an arrestable person whom they were seeking in the area. The Complainant stopped and turned back towards the approaching respondent members who were quickly closing the distance in order to speak with the Complainant.

During the interaction in which the Complainant stopped to speak with the respondent members (captured on CCTV video), the Complainant alleged that the officers asked [REDACTED] whether [REDACTED] was "[REDACTED]" and if [REDACTED] had [REDACTED] identification on [REDACTED] and remarked that [REDACTED] appeared to resemble "[REDACTED]". After the Complainant responded that [REDACTED] was not [REDACTED] and that [REDACTED] did not have any identification on [REDACTED] the respondent members departed without apologizing. The Complainant alleged that [REDACTED] was stopped and racially profiled because [REDACTED] fit the description of a generic "middle eastern [REDACTED]".

### **DA Decision**

With respect to the allegation of *Abuse of Authority* related to the detention of the Complainant, the Discipline Authority found that the Complainant was briefly delayed but not detained in a manner to trigger the obligations concomitant with an investigative detention. In support of [REDACTED] findings, [REDACTED] cited that the respondent members had reasonable suspicion to believe that the Complainant matched the description of an individual wanted on domestic violence related charges and that the interaction between the parties lasted for a short duration from a distance of 15 to 20 feet. The Discipline Authority also noted that the CCTV video supported that the respondent members quickly determined the Complainant was not the suspect they were seeking and disengaged accordingly. The Discipline Authority agreed with the analysis of the Investigator, who noted that the Complainant was not detained in the "legal sense." The Discipline Authority also agreed with the Investigator's assessment that "even if the brief interaction had resulted in a detention, that the [respondent members] satisfied their section 10(a) Charter obligations and were not required to provide [the Complainant] [REDACTED] section 10(b) rights."

With respect to the *Neglect of Duty* allegation, the Discipline Authority found that the interaction did not amount to a "street check" as defined by NWPD Policy OB235 Street Checks (and Police Stops), and agreed with the Investigator's analysis that "the interaction falls under the category of a police stop, not a Street Check." The Discipline Authority concluded that therefore the obligations of the respondent members stemming from the NWPD policy were not triggered.

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### **OPCC Decision, Section 117 of the *Police Act***

While it was open to the Discipline Authority, in consideration of all the evidence, to conclude that the conduct of the officers did not rise to the level of misconduct, I am of the view that the Discipline Authority's decision is incorrect as it relates to the application of the facts to the relevant NWPD policy, law, and jurisprudence surrounding police investigative detention. There is sufficient evidence to support a conclusion that, while brief, this matter did include a detention of the Complainant. During this incident the respondent members were in uniform, approaching the Complainant directly, and calling out to [REDACTED]. The Complainant was walking with [REDACTED] back to the officers and, upon hearing the officers, stopped [REDACTED] travel and turned. The respondent members were looking for a person they had lawful authority to arrest and, upon interaction with the Complainant, were operating on the subjective belief that the Complainant may have been the arrestable person and investigated that possibility. A reasonable person in the circumstances of the Complainant would have believed they were required to comply with the respondent members.

I also have a reasonable basis to believe that the decision is incorrect in the application of the applicable NWPD Policy OB235. That policy and the Provincial Policing Standards with respect to the Promotion of Unbiased Policing Policy (Police Stops) mandating the NWPD Policy, clearly provides obligations with respect to psychological detention and detention based upon identity factors such as race, color, ancestry, and other enumerated factors. The Discipline Authority's analysis does not sufficiently consider the available evidence against the applicable obligations governing the respondent members' interaction with the Complainant under the relevant policies and legal authorities.

Therefore, pursuant to section 117(4) of the *Police Act* and based on a recommendation from the Associate Chief Justice of the Supreme Court of British Columbia, I am appointing David Pendleton, retired Provincial Court Judge, to review this matter and arrive at his own decision based on the evidence.

Pursuant to section 117(9), if the appointed retired judge considers that the conduct of the member appears to constitute misconduct, the retired judge assumes the powers and performs the duties of the discipline authority in respect of the matter and must convene a discipline proceeding, unless a prehearing conference is arranged. The allegations of misconduct set out in this notice reflect the allegations listed and/or described by the Discipline Authority in their decision pursuant to section 112 of the *Police Act*. It is the responsibility of the retired judge to list and/or describe each allegation of misconduct considered in their decision of the matter pursuant to section 117(8)(c) of the Act. As such, the retired judge is not constrained by the list and/or description of the allegation as articulated by the Discipline Authority.

The Office of the Police Complaint Commissioner will provide any existing service records of discipline to the Discipline Authority to assist him or her in proposing an appropriate range of disciplinary or corrective measures should a pre-hearing conference be offered or a disciplinary proceeding convened. If the retired judge determines that the conduct in question does not constitute misconduct, they must provide reasons and the decision is final and conclusive.

Finally, the *Police Act* requires that a retired judge arrive at a decision **within 10 business days after receipt of the materials** for review from our office. This is a relatively short timeline, so our office will not forward any materials to the retired judge until they are prepared to receive the materials. I anticipate this will be within the next 10 business days.

A handwritten signature in blue ink, appearing to read 'Clayton Pecknold', is positioned above the printed name.

Clayton Pecknold  
Police Complaint Commissioner

cc: [REDACTED], Registrar