

September 29, 2021

IN THE MATTER OF THE *POLICE ACT*, R.S.B.C. 1996 C. 367

AND

IN THE MATTER OF A REVIEW OF ALLEGATIONS OF MISCONDUCT AGAINST

██████████ AND ██████████

NOTICE OF ADJUDICATOR'S DECISION

TO: ██████████ Member
c/o New Westminster Police Department

AND TO: ██████████ Member
c/o New Westminster Police Department

AND TO: ██████████ Investigating officer
c/o Abbotsford Police Department
Professional Standards Section

AND TO: Mr. Clayton Pecknold Police Complaint Commissioner

Introduction

1. On November 16, 2020 the Office of the Police Complaint Commission received a complaint from ██████████. In ██████████ complaint, ██████████ described being stopped by two officers of the New Westminster Police Department (NWPD) after leaving ██████████ residence on ██████████. The police officers were ██████████ and ██████████

██████████. The members were in the area attempting to locate and arrest ██████████ who was facing domestic violence charges. ██████████ was described as a Middle Eastern ██████████ approximately 6 feet tall, with a slim build. The members had a photograph of the suspect and ██████████ had had previous dealings with ██████████ ██████████ was walking to ██████████ when the members called out to ██████████ because ██████████ resembled the suspect they were looking for. ██████████ stopped and spoke to the officers. Their interaction was captured on C.C.T.V. (no audio) and lasted approximately 26 seconds. In ██████████ complaint to the Commissioner, ██████████ alleged ██████████ was racially profiled and further, that the members failed to follow NWPD policy with respect to street checks.

2. On January 8, 2021, the Commissioner ordered an investigation into the conduct of ██████████ and ██████████ after concluding that the conduct of the members would, if substantiated, constitute misconduct pursuant to section 77(3)(a)(ii)(B) of the Police Act (abuse of authority). The Commissioner also ordered that the matter be externally investigated by the Abbotsford Police Department. ██████████ of the Abbotsford Police Department was assigned to conduct the investigation.
3. ██████████ considered the evidence and delivered ██████████ Final Investigation Report dated July 8, 2021 to the Discipline Authority, ██████████ ██████████ identified a second allegation of misconduct arising from a potential breach of the NWPD policy regarding street checks. ██████████ characterized this allegation as Neglect of Duty pursuant to section 77(3)(m)(ii) of the Police Act. ██████████ concluded that the evidence did not prove the allegations of misconduct against ██████████ and ██████████ ██████████ recommended the allegations be deemed unsubstantiated.

4. On July 22, 2021, [REDACTED] issued [REDACTED] decision pursuant to section 112 of the Police Act. [REDACTED] considered two allegations of misconduct and determined that the evidence in the Final Investigation Report did not appear to substantiate the allegations. The allegations considered by [REDACTED] were:

1. *Abuse of Authority* pursuant to section 77(3)(a)(ii)(B) of the Police Act by intentionally or recklessly detaining a person without good and sufficient cause.
2. *Neglect of Duty* pursuant to section 77(3)(m)(ii) of the *Police Act*, for neglecting without good or sufficient cause, to promptly and diligently do anything that it is one's duty as a member to do.

5. The Police Complaint Commissioner reviewed the Discipline Authority's decision and considered that there was a reasonable basis to believe that the decision was incorrect.
6. On August 20, 2021 the Police Complaint Commissioner appointed me to review the investigating officer's report, the evidence and the records pursuant to section 117 of the Police Act.

Section 117

7. The statutory authority governing this review is set out in Section 117 of the Police Act. If, on review of a discipline authority's decision under section 112(4) or 116(4) that conduct of a member or former member does not constitute misconduct, the Police Complaint Commissioner considers that there is a reasonable basis to believe that the decision is incorrect, the Police

Complaint Commissioner may appoint a retired judge recommended under subsection (4) of this section to do the following:

- (a) review the investigating officer's report referred to in section 112 or 116, as the case may be, and the evidence and records referenced in that report;
 - (b) make her or his own decision on the matter;
 - (c) if subsection (9) of this section applies, exercise the powers and perform the duties of discipline authority in respect of the matter for the purposes of this Division.
- (6) The Police Complaint Commissioner must provide the appointed retired judge with copies of all reports under sections 98, 115 and 132 that may have been filed with the Police Complaint Commissioner before the appointment.
- (7) Within 10 business days after receiving the reports under subsection (6), the retired judge appointed must conduct the review described in subsection (1)(a) and notify the complainant, if any, the member or former member, the police complaint commissioner and the investigating officer of the next applicable steps to be taken in accordance with this section.
- (8) Notification under subsection (7) must include:
- (a) a description of the complaint, if any, and any conduct of concern,
 - (b) a statement of a complainant's right to make submissions under section 113,
 - (c) a list or description of each allegation of misconduct considered by the retired judge,
 - (d) if subsection (9) applies, the retired judge's determination as to

the following:

- (i) whether or not, in relation to each allegation of misconduct considered by the retired judge, the evidence referenced in the report appears sufficient to substantiate the allegation and requires the taking of disciplinary or corrective measures;
 - (ii) whether or not a prehearing conference will be offered to the member or former member under section 120;
 - (iii) the range of disciplinary or corrective measures being considered by the retired judge in the case, and
 - (e) if subsection (10) applies, a statement that includes the effect of subsection (11).
- (9) If, on review of the investigating officer's report and the evidence and records referenced in them, the appointed retired judge considers that the conduct of the member or former member appears to constitute misconduct, the retired judge becomes the discipline authority in respect of the matter and must convene a discipline proceeding, unless section 120 (16) applies.
- (10) If, on review of the report and the evidence and records referenced in it, the retired judge decides that the conduct of the member or former member does not constitute misconduct, the retired judge must include that decision, with reasons, in the notification under subsection (7).
8. A review of the Section 117 case law and the case cited as 2016 BCSC 1970 defines my role as the adjudicator. I must review the material delivered under subsection 117(6) and determine whether or not the conduct of the member appears to constitute misconduct. The law is clear that, because the

adjudicator may become the discipline authority in relation to discipline proceedings, my job is not to reach conclusions about the conduct of the member; rather, it is to assess only whether it appears to constitute misconduct.

9. The review is a paper-based process of the record provided by the Commissioner. There are no witnesses or submissions. Section 117(1)(b) directs the adjudicator to make “her or his own decision on the matter.”

Reports and Material Considered

10. Pursuant to sec. 117 (6) the Commissioner provided the following materials for my review.

- (a) Final Investigation Report of [REDACTED] and attachments described as: OPCC orders and notices, registered complaint, progress reports, members’ statements, [REDACTED] statement, legislation/police policy, media material and CCTV video footage.

- (b) Additionally, I have considered the Notice of Appointment of Retired Judge dated August 20, 2021, and the relevant case law and statutory authority.

Section 117(8)(a) Description of the Conduct of Concern

11. The conduct of concern relating to [REDACTED] and [REDACTED] arose out of their interaction with [REDACTED] on [REDACTED]. On that day, the members were in [REDACTED] neighbourhood attempting to locate and arrest [REDACTED]. The members saw an unknown [REDACTED] [REDACTED].

██████████ whom they believed resembled or fit the description of ██████████ ██████████ in terms of age, height, build and ethnicity. The members called out to ██████████ who stopped and turned to face the officers as they approached ██████████ on foot. After some brief conversation the members realized ██████████ was not the person they were looking for. The CCTV video footage shows the three parties standing in the street facing each other before the officers leave and ██████████ walks away. The alleged conduct of concern as described by the Commissioner in his letter of appointment is:

“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 ██████████. The Complainant was walking with ██████████ back to the officers and, upon hearing the officers, stopped ██████████ 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 NWPDP 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".

Section 117(8)(c) - Allegations of Misconduct Considered

12. Having reviewed the evidence referenced in the Final Investigation Report, I identify the following allegations of misconduct against [REDACTED] and [REDACTED] that could appear to be substantiated:

1. *Abuse of Authority* pursuant to section 77(3)(a)(ii)(B) of the Police Act by intentionally or recklessly detaining a person without good and sufficient cause.
2. *Neglect of Duty* pursuant to section 77(3)(m)(ii) of the *Police Act*, for neglecting without good or sufficient cause, to promptly and diligently do anything that it is one's duty as a member to do.

13. I am mindful of the limitation to the definitions of misconduct found in Section 77(4):

Section 77(4) It is not a disciplinary breach of public trust for a member to engage in conduct that is necessary in the proper performance of authorized police work.

Section 117(8)(d)(i) Whether the Evidence Appears Sufficient to Substantiate the Allegations

14. ██████████ reviewed the January 28, 2021 statement of ██████████. ██████████ also considered the ██████████ General Occurrence reports of ██████████ and ██████████. On June 30, 2021 ██████████ interviewed the members prior to submitting ██████████ Final Investigation Report.
15. Upon a review of the Record I am satisfied the following circumstances are not in dispute:
- a) On ██████████ at approximately 10:00 ██████████ and ██████████ attended a residence at ██████████ ██████████ Suite ██████████ was the last known address of ██████████ ██████████ ██████████ had orders to locate and arrest ██████████ ██████████ ██████████, who had had prior dealings with ██████████ ██████████ agreed to accompany ██████████ to assist in identifying and apprehending the suspect.
- b) The Members had looked at a photograph of ██████████ before encountering ██████████ ██████████ observed that ██████████ ██████████ appeared to be “a Middle Eastern ██████████ slim build, short hair, approximately early to mid-thirties”.
- c) At approximately the same time as the members were patrolling in the area looking for ██████████, ██████████ left ██████████ residence at ██████████ ██████████ was walking to ██████████. In a November 16, 2020 email ██████████ described ██████████ as ██████████ ██████████.

- d) [REDACTED] and [REDACTED] observed an unknown [REDACTED] [REDACTED] walking away from this residence. [REDACTED] relayed to [REDACTED] that [REDACTED] believed the [REDACTED] was [REDACTED] because the [REDACTED] resembled [REDACTED] appearance, who [REDACTED] described as "Middle Eastern, slim build with dark, short hair".
- e) The members followed [REDACTED] calling out to [REDACTED]
- f) The CCTV video shows [REDACTED] walking in the street. The time-stamped footage starts at 9:09:30 and ends at 9:10:07. [REDACTED] [REDACTED] said [REDACTED] heard a voice calling out to [REDACTED] but [REDACTED] ignored it at first. [REDACTED] turned toward the voices at 9:09:35 and saw two uniformed police officers approaching [REDACTED] [REDACTED] is seen pointing at [REDACTED] and in two different directions before the members appear on the video at 09:09:50.
- g) The members walked towards [REDACTED] and stopped approximately 10-15 feet from [REDACTED]. The members turned and walked away at 9:09:57. They are out of the video at 9:10:00.
- h) At 9:10:02 [REDACTED] gestured with [REDACTED] raised hands, turned, and walked away.
- i) There is conversation occurring between the members and [REDACTED] [REDACTED] although there is no audio recording of that conversation. The conversation would have occurred from the time [REDACTED] faced them until they walked away, a period of approximately 21-22 seconds. [REDACTED] recalled being asked if [REDACTED] was [REDACTED]

and if [REDACTED] had any identification. The members say they did not ask for identification.

16. [REDACTED] reviewed the members General Occurrence reports that they prepared on [REDACTED]. [REDACTED] in [REDACTED] report, wrote:

On [REDACTED] at 0600 hours, [REDACTED] was tasked with continuing efforts to locate accused [REDACTED] [REDACTED] who was arrestable without warrant for two (2) counts of Failure to Comply with Probation Order and two (2) counts of Utter Threats to Cause Death or Bodily Harm.

At 0957 hours, [REDACTED] spoke with [REDACTED] who advised that [REDACTED] had dealt with [REDACTED] on a prior file earlier this year, and would be able to accompany [REDACTED] [REDACTED] to identify [REDACTED] should police observe [REDACTED] during patrols. [REDACTED] noted that [REDACTED] had been recently living at [REDACTED] [REDACTED] until recently, and asked [REDACTED] to accompany [REDACTED] as [REDACTED] may have returned to the area, as well as the possibility of further information coming to light regarding [REDACTED] whereabouts from the building management or residents of the building. [REDACTED] observed [REDACTED] mugshot on PRIME prior to arriving at the residence. At 1003 hours, [REDACTED] and [REDACTED]

arrived at [REDACTED] whereupon police observed a [REDACTED] who appeared to be Middle Eastern with a slim build and short hair walk away from the front door to [REDACTED]. [REDACTED] immediately advised [REDACTED] that the [REDACTED] appeared to be [REDACTED] as the [REDACTED] began to walk west on [REDACTED] [REDACTED] and [REDACTED] called out to the [REDACTED] several times as they attempted to catch up to the [REDACTED] who continued to walk away with [REDACTED] back to officers. Upon approaching the [REDACTED] and closing the distance, the unknown [REDACTED] turned around upon noticing members approach behind [REDACTED]. As soon as the [REDACTED] turned around, [REDACTED] and [REDACTED] immediately could see that the [REDACTED] was not [REDACTED]. [REDACTED] advised the unknown [REDACTED] that police were looking for another [REDACTED] and that the unknown [REDACTED] looked like another individual we were looking for. [REDACTED] immediately apologized for troubling the unknown [REDACTED] and turned around to get back to the building. At no point did police ask this unknown [REDACTED] for identification, physically make contact with [REDACTED] or ask [REDACTED] for any information.

[REDACTED], in [REDACTED] report, wrote:

On [REDACTED] at approximately 1000 hrs, [REDACTED] assisted

██████████ in an arrest attempt of ██████████ whose last address on PRIME was ██████████, ██████████, B.C.

██████████ was familiar with ██████████ as ██████████ acted as a cover officer when ██████████ was arrested in New Westminster Police Department File ██████████. ██████████ was aware from that file that ██████████ ran away from Police and had previously hidden in bushes from members. ██████████ viewed a mugshot of ██████████ to familiarize ██████████ with ██████████ appearance and noted again that ██████████ was described as Middle Eastern, with dark short hair, slim build and approximately 6'0 feet tall.

While talking to ██████████ outside of ██████████, ██████████ B.C., ██████████ observed a ██████████ walk out of the patio area of the ground floor units and onto the sidewalk. ██████████ was aware that ██████████ was on the ground floor and they had access to the units from the street. The ██████████ was approximately 20 feet away from ██████████ and from that distance resembled ██████████ appearance of Middle Eastern, slim build with dark short hair. The ██████████ half looked back toward members (just showing the profile of ██████████ face) multiple times and walked away briskly. ██████████ called toward the ██████████ ██████████ multiple times, to which the ██████████ did not stop. Due to the information known that ██████████ sometimes ran from Police, ██████████ and ██████████ caught up to the ██████████ and just asked ██████████ to hold on.

The ██████████ turned around, and when ██████████ looked at ██████████ from up close, immediately noticed that it was not ██████████. The facial features did not match and the ██████████ in front of members

had a salt and pepper short trimmed beard. Members explained that they were looking for someone who resembled the [REDACTED] but that [REDACTED] was not the [REDACTED] they were looking for and apologized for the mistake. At NO TIME, did either [REDACTED] nor [REDACTED] ask for the [REDACTED] ID as [REDACTED] immediately recognized that the [REDACTED] was in fact not [REDACTED]

17. [REDACTED] interviewed [REDACTED] on January 21, 2021. The complainant was asked to describe what happened. [REDACTED] said:

I hear a voice say hey you and I ignored it the first time because I was just minding my own business, somebody could be having a conversation with their friend, shouting at them who knows, right. So then I heard the voice again you know a couple of seconds later say hey you, this time slightly sterner, and, ah, you know I've had this kind of thing happen to me before so I turned around to see if somebody was there, half expecting the police to be there, ah, and indeed it was two police officers who were there, uhm, [REDACTED] and [REDACTED] partner. And, ah, they, ah, you know were walking towards me down the hill and I stopped at that point and pointed at myself and said the words who me and then [REDACTED] said yeah you, and you know I know the drill you know I don't want to get my ass kicked by a cop so I stopped and I waited for [REDACTED] and [REDACTED] partner to come and encounter me. And, ah, as they were getting closer to encounter me, the [REDACTED] ah, asked me, ah, if I was [REDACTED] and I said no, and, ah, [REDACTED] asked me a second time if I was [REDACTED] the [REDACTED] meaning [REDACTED] specifically. Ah, [REDACTED] asked me a second time, in fact just to clarify, [REDACTED] is the only one who spoke to me during this encounter the other [REDACTED] did not actually speak to me at any point.

█ Okay.

█ Uhm, so that's just so if I'm talking about a police interacting with me it's only that one █ this whole time. And so, ah, █ asked me a second time, are you █ and I kind of giggled a little bit because I have been racially profiled before so I kind of experienced this and found it absurd so I started giggling and I said again no I'm not. And then █ asked me for ID and I said to █ that I didn't have any 'cause I was just out for a walk and I pointed at that moment 'cause I just wanted to, I didn't want to give the █ my ID I know how carding works in Canada in terms of my name and everything going in a database which it shouldn't go into given that I'm not a criminal and there should be no information being kept on me. So I didn't want to give █ my ID, uhm, and I, ah, you know pointed at my building I said that's my building over there 'cause I was still within eyeshot of my building and then I pointed at my friend █ who was sitting in the church courtyard who was oblivious to this █ didn't really even see what was going on, uhm, even though █ was probably only about fifty feet away during this time. Uhm, and so basically, ah, you know I pointed at my friend I said I'm meeting my friend that's where I live, █ and at that point I was asked for ID again and I said look I don't know what to tell you. And, ah, at that point █ partner turned to █ and said come on, █ it's not █ and they started to turn to go walk back up the hill towards where they came from, like back towards basically the front side of the building that would be my apartment building, uhm, and then at that point I stood there and I waited for them to leave 'cause I felt kind of threatened by what just happened and I didn't feel like I was ready to just comply and turn around and pretend like this is business like usual, that I

was just gonna go about my business and go back to my day. I was entitled I believe to an emotional reaction of just standing there processing my feeling, and at that point, ah, [REDACTED] turned around and looked at me and he threw up [REDACTED] arms in like an arm like a goalie kind of gesture, goalpost kind of gesture, and [REDACTED] said what, in kind of like a throwing down kind of gesture. And so I threw my arms up in a similar gesture and I said what, and of course this [REDACTED] gonna kick my ass because [REDACTED] [REDACTED] and [REDACTED] a trained police officer, [REDACTED] said what again, so then I backed down and I said look [REDACTED] I'm just in shock what happened over here. And then at that point [REDACTED] side partner made some verbal or facial gestures at [REDACTED] if it was verbal I couldn't hear what [REDACTED] said but [REDACTED] made some facial expressions at [REDACTED] and kind of corralled [REDACTED] with [REDACTED] arm and the two of them walked, ah, back up a way from the encounter. And I was still a bit shaken I went met my friend [REDACTED] and told [REDACTED] what happened and, [REDACTED] and I are old friends we had many things to talk about and my initial instinct when I got back home [REDACTED] with [REDACTED] was to actually not pursue anything, but as I was sitting there, ah, two months to the day after what happened in Minneapolis and what happened also of course in Nashville, uhm, or Mem, Memphis or Nashville, I forget where Breonna Taylor is from. I just thought you know like this was a very dangerous situation and this [REDACTED] was determine to tar me with some sort of brush of criminality and when it didn't work out that I wasn't the [REDACTED] [REDACTED] was looking for [REDACTED] was taking it out on me like it's my fault that I'm not [REDACTED] target, and [REDACTED] was acting very emotional and unsteady frankly throughout the entire encounter and thank god for [REDACTED] side partner to calm [REDACTED] down, frankly, you know. So, anyway that's kind of what happened on that day, uhm, if you have any questions about like

that or about any of the aftermath or anything I'm, I'm, I'm an open book.

18. [REDACTED] asked [REDACTED] to describe where the members were when they were questioning [REDACTED] [REDACTED] said:

[REDACTED] Right. Yeah, just so like I'm trying to picture it here so when they say hey you the second time is when you stop and you turn around they're and they're walking towards you still and then and, and that's when they ask twice if you're [REDACTED] correct?

[REDACTED] Yeah.

[REDACTED] And, and are they still walking or they have they stopped at this point?

[REDACTED] Oh no, no, when I turned around and said who me and then they said yeah you and then I was waiting for them, they started the questioning about the [REDACTED] two times and ID and all that, they were like in the encounter with me at that point, they weren't still walking towards me while they asked me if I was [REDACTED] that was like a, a, a static encounter at that point.

[REDACTED] Okay, so they were, they were static standing talking and, and how many like if you, if you go by car lengths how many car lengths or feet or whatever kind of unit you'd like to, that, that would be obvious to us, how far away would--

[REDACTED] Like half a car length at the most.

[REDACTED] They're half a car length when they ask you if you are [REDACTED] twice?

[REDACTED] That's right.

■ So like ten feet you'd think type of thing or is it--

■ Less. Probably like five to six feet.

■ Okay, five to six feet away, and so and, and so after they hey you the ■ is the second thing that they start asking, right, are you ■

■ Are you ■ and then a second time, are you ■ after I say no.

■ Okay. And then and at that point there they're already like five, six feet away from you?

■ Yeah.

Later ■ said:

■ At some point in the interaction it was either right before ■ asked me for ID or right at this point that you're asking me about right now, or I'm sorry, right after ■ asked me for ID and I said I didn't have any,--

■ Yeah.

■ --that ■ even said come on, ■ you look exactly like ■ And in fact that was before, uhm, ■ asked me for ID, ■ asked me if I was ■ twice and I said no and then the second time ■ responded to my saying no by saying come on, ■ you look exactly like ■ And then ■ asked me for ID after that to which I told you what I responded and then at that point ■ side partner said hey, it's not ■ let's just go. And then that's when the other part of the interaction happened. But yeah basically, uhm, that's

extremely important and it also explains part of why I was hiding in my intension because it seemed like ■ wanted to believe that I was this individual that I definitely am not. And, ah, was determined to believe that and that, that made me feel like okay I don't know what this ■ doing here. So that's important I just want to make sure that that's in the record.

■ Okay. So then the side partner says it's not ■ and what do the two police do at that point?

■ Ah, at that point they turn to walk away, ah, and go back up kind in that same diagonal direction, up the corner that they had turned around from before.

19. ■ asked ■ what ■ impression was after ■ realized it was the police who were calling out. ■ said, "I knew I was going to be racially profiled". ■ was asked when ■ was alerted to the presence of the police whether ■ felt free to leave and whether ■ felt ■ had to stop for them. ■ said:

■ ■ yeah. Let me, let me, ah, just go back to this, so like when, when they when you were alerted to their presence with the hey you, did you think you were free to leave or did you think you had to stop for them?

■ I thought I had to stop because I didn't know, all the stuff I've learned about the differences between street checks and investigative detentions that's after the fact from all of this as I've been fighting my case, right. Uhm, when this actually originally happened I just thought this is a cop and ■ can kick my ass if ■ wants like that's just what my socialization about police is so of

course I was gonna stop 'cause and, and, and interpret that I'm not free to leave. I wasn't aware of the U/I) and one, they didn't inform about any them. They didn't follow the procedure about informing me about any of the either street check procedures or investigative detention procedures

20. In the Final Investigation Report, [REDACTED] carefully analyzed two issues. Firstly, whether the members' abused their authority by intentionally or recklessly detaining [REDACTED]. Secondly, whether the members neglected their duty to follow NWPD policy regarding street checks. [REDACTED] assessed whether the members' conduct amounted to an investigative detention and concluded that it did not. [REDACTED] also concluded that the members' interaction with [REDACTED] was not a street check and therefore they did not breach any NWPD policy.
21. Section 117(1)(a) and (b) of the Police Act requires me to review [REDACTED] [REDACTED] report and the evidence and records and then make my own decision on the matter. I agree with the comments of the Adjudicator Baird Ellan in OPCC 2016-11867 where she said:

"While my task is not to review his decision, rather to consider the issues and reach my own conclusion, I find it instructive to consider the matter from the perspective of a trained officer, particularly in assessing the reasonableness of the member's response from a policing perspective. In doing so I nonetheless bear in mind that the test has an objective component"

22. The issue to be determined is whether the evidence appears to be sufficient to substantiate the allegations against [REDACTED] and [REDACTED]. This necessarily involves a consideration of whether [REDACTED] was

detained for investigation and whether the members' conducted a street check of [REDACTED]

23. The NWPD policy regarding street checks, referred to in the Final Investigation Report, is intended to promote a policing model free of bias or the perception of bias during any interactions with persons of the community (paragraph 5). The policy recognizes that in addition to their lawful duties, members are expected to interact with the public. A street check is defined as any voluntary interaction between a police officer and a person that is more than a casual conversation and which impedes the person's movement (paragraph 6). The policy obliges an officer when conducting a street check to:

15. Members must take steps to ensure that the interaction with the person is voluntary, including but not limited to advising the person they are:

- a) Not required to provide any identifying information;
- b) Not required to answer any questions; and
- c) Free to walk away at any time.

16. In fulfilling their obligations under 15 (above), members should be mindful of the possibility that the person may feel psychologically detained due to factors such as:

- a) The circumstances that gave rise to the interaction;
- b) The nature of the member's conduct; and
- c) The particular characteristics of the person, included but not limited to:
 - (i) Indigenous;
 - (ii) Homelessness;
 - (iii) Racialized;

- (iv) Age;
- (v) Physical stature;
- (vi) Minority status; and
- (vii) Level of sophistication.

24. The policy makes it clear that a street check is not appropriate when members are operating with lawful authority to detain (paragraph 1). If a detention is appropriate, a street check should not be conducted (paragraph 14).
25. I have reviewed the case law dealing with investigative detentions including the Supreme Court of Canada decisions in *R. v. Mann* (2004), *R. v. Grant* (2009) and *R. v. Suberu* (2009). As well, I have considered the decisions in *R. v. R (J.)* and *R. v. Hendrickson* referred to in the Final Investigation Report. In *R v. Mann* 2004 SCC 52, the Court held that there is no general power of detention for investigative purposes. The police may stop and detain an individual without arresting him if there are reasonable grounds to suspect in all the circumstances that the person is connected to a particular crime and that the detention is reasonably necessary. The Mann decision held that the officer could detain a person provided there was “articulable cause”. The decision holds that while the officer’s subjective opinion regarding reasonable grounds to suspect is relevant, the court must consider all of the circumstances to assess objectively whether what the officer believed and did was reasonable.
26. The NWPDP Policy regarding investigative detentions (OD65 Investigative Detention) states:
- 4. Detention in a legal context refers to a significant suspension of an individual’s liberty, generally involving physical or psychological

restraint from leaving.

5. An investigative detention occurs the moment a member decides that a person with whom they are interacting is not free to leave.
6. An investigative detention may also occur when the person feels they are not free to leave.
7. In order to be valid, an investigative detention must satisfy the following criteria:
 - a) The detention must be based on articulable cause (also known as reasonable suspicion):
 - i. A sincerely held belief that the person being detained may be involved in specific unlawful activity
 - ii. Based on articulable objective fact which would convince a reasonable person that the person being detained may be involved in the specific unlawful activity.
 - b) It must be reasonably justified:
 - i. It must take place during, soon before or soon after the suspect unlawful activity (reasonable proximity).
 - ii. It must only continue for a reasonable length of time before the person is arrested (if reasonable grounds for arrest exist) or they are released.
 - iii. It must be conducted using not more force, coercion or restraint than reasonably necessary in the circumstance.
8. Physical detention occurs when a members actions physically

constrain or impede a person's freedom to leave.

9. Psychological detention occurs when a member makes a demand or direction and a person is not free to choose whether or not to comply if either:

a) They are under a legal obligation to comply

b) They believe on reasonable grounds they have no choice but to comply.

27. In *R. v. Mann* the court stated at paragraph 19:

"Detention" has been held to cover, in Canada, a broad range of encounters between police officers and members of the public. Even so, the police cannot be said to "detain", within the meaning of ss. 9 and 10 of the *Charter*, every suspect they stop for purposes of identification, or even interview. The person who is stopped will in all cases be "detained" in the sense of "delayed", or "kept waiting". But the constitutional rights recognized by ss. 9 and 10 of the *Charter* are not engaged by delays that involve no significant physical or psychological restraint. [Appendix 21]

28. Having considered the Final Investigation Report and the evidence and records as well as the NWPD policies on street checks and investigative detentions and the case law, I am satisfied, on a balance of probabilities, that the evidence does not substantiate the allegations. I find that the conduct of [REDACTED] and [REDACTED] does not constitute misconduct for the following reasons:

- a) The members were involved in an investigation of a wanted suspect. They attended a specific location where the suspect last resided. They were in possession of the details of [REDACTED] crime, had a description of [REDACTED] as to [REDACTED] age, build and ethnicity and they had a photograph. When they saw an unknown [REDACTED] [REDACTED]) leave that residence they were reasonably suspicious that the [REDACTED] was [REDACTED]. When viewed objectively, I am satisfied that what the members believed and did was reasonable. This reasonable suspicion or articulable cause gave them the lawful authority to pursue their investigation and to detain and arrest the suspect if [REDACTED] was [REDACTED].
- b) To further their investigation they followed this [REDACTED] and asked [REDACTED] to stop. This was not a voluntary interaction or a random encounter. The members were investigating an offence and attempting to locate and arrest a suspect. This was not, in my opinion, a street check. It does not engage a consideration of whether the NWPD street check policy applies and whether the members failed to or neglected their duty to comply with the obligations set out in that policy.
- c) During the course of an investigation, the police make decisions, often quickly, whether to pursue the investigation or abandon it depending on the circumstances and available evidence. The court in R. v. Mann made it clear that the police cannot be said to detain every suspect they stop for purposes of identification or even interview. A suspect who is stopped will be delayed or kept waiting but such a delay that does not involve significant physical or psychological restraint does not amount to a detention.

- d) [REDACTED] was stopped and delayed or kept waiting but [REDACTED] was not physically restrained.
- e) [REDACTED] said [REDACTED] was being racially profiled. [REDACTED] said [REDACTED] felt threatened by the members and was not free to go. In *R. v. Grant*, the court considered whether Mr. Grant was detained and at what point the detention occurred. At paragraph 44 the court stated:

In summary, we conclude as follows:

1. Detention under ss. 9 and 10 of the *Charter* refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint. Psychological detention is established either where the individual has a legal obligation to comply with the restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply.
2. In cases where there is no physical restraint or legal obligation, it may not be clear whether a person has been detained. To determine whether the reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of the liberty of choice, the court may consider, *inter alia*, the following factors:
 - a) The circumstances giving rise to the encounter as they would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular

occurrence; or, singling out the individual for focussed investigation.

- b) The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.
- c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.
- f) [REDACTED] was not physically restrained nor subject to a legal obligation to comply; however, [REDACTED] liberty may have been infringed if [REDACTED] experienced a psychological detention.
- g) Applying the factors outlined in *R. v. Grant* in determining whether the reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of the liberty of choice, I am satisfied as follows:
 - i. The members were in [REDACTED] neighbourhood making general inquiries regarding an investigation they were pursuing. It would have been clear to [REDACTED] that the members were not investigating [REDACTED] rather they were looking for someone named [REDACTED]. [REDACTED] stopped, explained to the officers [REDACTED] was not [REDACTED] and told them [REDACTED] did not have any identification. [REDACTED] in [REDACTED] interview, stated [REDACTED] understood [REDACTED] did not have to provide [REDACTED] identification. [REDACTED]

felt free to say that [REDACTED] did not have it with [REDACTED]

- ii. The members called out to [REDACTED]. [REDACTED] stopped and they asked [REDACTED] if [REDACTED] was [REDACTED] and whether [REDACTED] had identification. This was not an interrogation. The members had a duty to investigate their reasonable suspicions; however, their questions amounted to no more than “preliminary questions to find out whether to proceed” (R.v. Suberu – paragraph 33).
- iii. The encounter with [REDACTED] lasted approximately 22 seconds from 09:09:35 until the members turned and walked away at 09:09:57. When [REDACTED] turned to face the officers [REDACTED] pointed to [REDACTED] chest at 09:09:37. I accept [REDACTED] was making the gesture “who me” in response to the members calling to [REDACTED]. At 09:09:43-:47 [REDACTED] is seen pointing towards, as [REDACTED] recalls, [REDACTED] building and the [REDACTED] where [REDACTED] friend is waiting. I accept the three [REDACTED] are conversing about whether [REDACTED] is [REDACTED] and whether [REDACTED] has identification. On the footage, the members walk into view at 09:09:50. At 09:09:54-:55 the officers stop. [REDACTED] leans toward [REDACTED] and then immediately turns away. [REDACTED] stops a few feet closer to [REDACTED] and then [REDACTED] turns away. In [REDACTED] interview, [REDACTED] recalled that the members had stopped and were “static” when the conversation about [REDACTED] and identification occurred. [REDACTED] said the officers were standing 5 to 6 feet away. The CCTV footage shows that [REDACTED] recollections are not accurate. The members were never that close to [REDACTED] nor were they stationary. From the time the members walk

into view until they turn and walk away 7 seconds elapse. The evidence proves that the encounter that [REDACTED] had with the members was very brief. There was some conversation and when the members realized [REDACTED] was not the suspect they were looking for they left. There was no physical contact and no suggestion that they were rude or verbally aggressive. There was nothing about the members' conduct that would cause a reasonable person to conclude that they were not free to go.

- iv. [REDACTED] personal circumstances are relevant. [REDACTED] is, I am satisfied, a sophisticated, highly educated [REDACTED] [REDACTED] is articulate and [REDACTED] explained that prior experiences with the police make [REDACTED] fearful and feel that [REDACTED] has no choice but to comply. There is no information or explanation regarding the nature, duration and outcomes of those prior experiences apart from a reference to an incident at the [REDACTED]. I accept that subjectively [REDACTED] is afraid of the police but it does not follow that every interaction [REDACTED] has with the police will amount to a detention (R. v. R. (J.) paragraph 38).
- v. Considering all of the circumstances surrounding what happened when [REDACTED] encountered the members on [REDACTED], I am satisfied, that [REDACTED] had no objectively valid reason to be fearful of the members or feel compelled to comply with their directions. At one point [REDACTED] said [REDACTED] "elected" to stop and [REDACTED] appears to voluntarily speak with the police officers. [REDACTED] realized the members were looking for someone else, knew [REDACTED] had done nothing wrong and

answered their questions. ■ was aware ■ did not have to comply with their request to provide identification. ■ described ■ as, “very emotional, unsteady throughout the whole encounter, intimidating and very aggressive”. The manner in which the questions were asked and the questions themselves would not suggest ■ acted in this way. Nor does the CCTV footage support ■ description of the member’s conduct. The members’ interaction was very brief. Within a few seconds of realizing ■ not their suspect they left the area.

- h) Having regard to all the circumstances, I am satisfied that it would be objectively unreasonable for ■ to conclude that the conduct of the members left ■ no choice but to comply. ■ was not psychologically detained. The members did not intentionally or recklessly detain ■.

Conclusion

29. On reviewing the Final Investigation Report and the evidence and the records, I am satisfied, with regard to each allegation of misconduct of the following:

- a) Abuse of Authority, which is intentionally or recklessly detaining any person without good and sufficient cause, I find the evidence does not constitute misconduct. Pursuant to section 117(11), this decision is not open to question or review by a court on any ground and is final and conclusive.

b) Neglect of Duty, which is neglecting without good and sufficient cause, to promptly and diligently do anything that is one's duty as a member to do, I find the evidence does not constitute misconduct. Pursuant to section 117(11), this decision is not open to question or review by a court on any ground and is final and conclusive.

Dated at Victoria British Columbia
September 29, 2021

David Pendleton
David Pendleton
Adjudicator