Office of the
Police Complaint Commissioner

British Columbia, Canada

RR: 2026-01
OPCC File: 2020-17317

NOTICE OF REVIEW ON THE RECORD
Pursuant to section 139 *Police Act*, R.S.B.C. 1996, c.367

In the matter of the Review on the Record into the Conduct of Constable Mitchel Tong and Constable Canon Wong of the Vancouver Police Department

To: Constable Mitchel Tong (#3029) (Members)
Constable Canon Wong (#3003)
c/o Ms. Claire Hatcher, Counsel

And to: Mr. Maxwell Johnson (Complainants)
Ms. Torianne Tweedie
c/o Lisa Fong, K.C. and Ruben Tillman, Counsel

And to: Mr. Brian Neal, K.C. (Discipline Authority)
Retired Provincial Court Judge

And to: Chief Constable Steve Rai
Vancouver Police Department
c/o Professional Standards Section

OVERVIEW

1. This is an application for reconsideration based on new evidence pursuant to s. 139 of the *Police Act* in a matter involving Constable Canon Wong and Constable Mitchel Tong of the Vancouver Police Department ("Members").

2. On January 28, 2022, the Discipline Authority, retired judge Brian Neal, K.C., determined the Members committed misconduct by recklessly arresting and handcuffing an Indigenous child and her grandfather ("Applicants") without good and sufficient cause. The incident occurred on December 20, 2019, outside a Bank of

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Montreal in downtown Vancouver. The Applicants, who are members of the Heiltsuk Nation, were visiting Vancouver from their home community of Bella Bella. The Discipline Authority found the incident exposed the Applicants to unnecessary trauma and fear, and left them with a serious perception of unfairness in their treatment by police.

3. In determining the appropriate disciplinary or corrective measures, the Discipline Authority sought to repair the relationship between the parties and restore the Applicants' confidence in police. He observed that "bridging the gap between the Members and the Complainants is a critical component in establishing confidence in policing interactions with indigenous persons." Among other measures, the Discipline Authority ordered the Members to offer to meet with the Applicants to (a) listen to their concerns and (b) convey oral apologies to them "at a time and in a manner agreeable to the parties" ("Apology Order").

4. The former Police Complaint Commissioner ("Former Commissioner") did not order a public hearing or review on the record in respect of the decision, and a Conclusion of Proceedings was issued on May 27, 2022.

5. Since then, the Members have not met with the Applicants and have not provided oral apologies as contemplated by the Apology Order. The parties do not agree on the manner and setting in which the apologies ought to be conveyed. The Applicants submit the Members' oral apologies must be provided at an Apology Ceremony in Bella Bella in accordance with Heiltsuk Law. The Members have not accepted the Applicants' invitation to attend this ceremony. They say the Apology Order does not require them to attend a Heiltsuk Apology Ceremony whether in Bella Bella or elsewhere. They also submit that s. 126(1)(h) of the *Police Act* does not permit an order *requiring* a member to provide an apology when the member does not wish to do so voluntarily.

6. The Applicants state the absence of an Apology Ceremony has left this matter unresolved under Heiltsuk Law, and an Apology Ceremony is necessary for the Applicants and their community to heal and move forward. The Applicants perceive the Members' refusal to attend an Apology Ceremony as an attack on their culture. The relational repair sought to be achieved through the Apology Order has not occurred. The Applicants assert that the Members' refusal to attend the Apology Ceremony has resulted in a continuation of the harms caused by the misconduct, including continuing emotional and psychological impacts, and violations of their dignity and rights as Indigenous persons under the *United Nations Declaration on the Rights of Indigenous Peoples* ("*UNDRIP*").

7. As the statutory authority responsible for overseeing complaints and the administration of police discipline under the *Police Act*, I am deeply concerned with this outcome.

8. The question before me is whether new evidence has become available or been discovered that is substantial and material to the case or the prior determination not to order a public hearing or review on the record. I am satisfied the Applicants have adduced evidence which meets this threshold, and a review on the record is now necessary in the public interest.

9. The new evidence demonstrates the Apology Order, while well-intentioned, was made without relevant information which was not available at the time, and has not achieved its remedial objectives. This new evidence raises important questions regarding the appropriateness and adequacy of the Apology Order. A review on the record will provide an opportunity for an adjudicator to determine, with the benefit of the new evidence, including evidence about applicable Heiltsuk Law, whether the Members ought to be required to provide oral apologies to the Applicants, and if so, on what terms.

10. Reconciliation requires us to take seriously our obligation to learn about and act on Indigenous laws, and to work diligently within the bounds of the *Police Act* to ensure Indigenous perspectives are not excluded from the system of police oversight.

11. For the reasons that follow, I order a review on the record on the sole issue in dispute between the parties, that is, whether an order ought to be made requiring the Members to provide oral apologies to the Applicants, and if so, on what terms.

BACKGROUND

OPCC Order for Investigation

12. On January 10, 2020, the Office of the Police Complaint Commissioner ("OPCC") reviewed information reported in the media in relation to an incident on December 20, 2019, involving the Members and the Applicants. On January 14, 2020, the Former Commissioner ordered an investigation with respect to the conduct of Cst. Wong during the incident. The order was amended on March 18, 2020 to add Cst. Tong as a respondent member.

13. On March 24, 2020, Mr. Maxwell Johnson was added as a complainant to the investigation after he filed an admissible complaint with the OPCC regarding the incident.

14. On May 7, 2021, the investigating officer completed an investigation and submitted the Final Investigation Report to the former discipline authority.

15. On May 25, 2021, the former discipline authority, Chief Constable Del Manak of the Victoria Police Department, issued his decision pursuant to s. 112 of the *Police Act*. He determined the Members' conduct did not constitute misconduct.

16. On June 22, 2021, the Former Commissioner appointed Mr. Neal to review the matter pursuant to s. 117(1) of the *Police Act* because he considered there was a reasonable basis to believe the decision of the former discipline authority was incorrect.

17. On July 8, 2021, upon review of the report and the evidence and records referenced in it, Mr. Neal determined the Members' conduct appeared to constitute misconduct. Pursuant to s. 117(9), Mr. Neal became the Discipline Authority in respect of the matter.

Section 113 Submissions

18. On September 30, 2021, prior to the start of the discipline proceeding, the Applicants filed written submissions pursuant to s. 113 of the *Police Act*. Section 113 of the *Police Act* permits complainants to make submissions to a discipline authority at least 10 business days before a discipline proceeding begins. Those submissions may address the complaint, the adequacy of the investigation, and the appropriate disciplinary or corrective measures. They are filed without knowledge of what, if any, evidence will be led by the member or members at the discipline proceeding, and before the discipline authority has made any findings of misconduct.

19. The Applicants' submissions under s. 113 addressed disciplinary or corrective measures. They noted, among other submissions, that special concerns arise in addressing improper conduct affecting Indigenous peoples, and the measures imposed under the *Police Act* must be consistent with *UNDRIP*. In addition to other measures, the Applicants submitted that the Members should be required to engage directly with the Applicants and the Heiltsuk Nation, which may "include the members participating in a Heiltsuk gathering to address healing and the impacts of the specific conduct on the complainants and the community."

20. The Applicants also wrote to counsel for the Discipline Authority on November 16, 2021, to address information in the Final Investigation Report about the numbers that appeared on the Certificate of Indian Status of one of the Applicants, an issue which is not relevant to this application.

Discipline Proceeding

21. On November 29, 2021, the discipline proceeding commenced before the Discipline Authority and continued on December 13, 2021, January 12, 2022, and January 24, 2022.

22. At the discipline proceeding, the Discipline Authority heard evidence from the investigating officer and the Members. Under the *Police Act*, members have the sole ability to call witnesses at a discipline proceeding; in this case, the Members chose not to call the Applicants. While the Applicants had previously filed written submissions under s. 113 of the *Police Act,* they did not have standing to attend the hearing: *Police Act,* s. 123(9).

23. On January 28, 2022, the Discipline Authority issued findings on the allegations of misconduct pursuant to s. 125 of the *Police Act.* The following allegations were substantiated against each of the Members:

> 1. *Abuse of Authority* by oppressive conduct pursuant to sections 77(3)(a) and (a)(i) of the *Police Act* as a result of removing the Complainants from a Bank to a public street without reasonable cause and recklessly arresting the Complainants without good and sufficient cause.
>
> 2. *Abuse of Authority* by oppressive conduct pursuant to section 77(3)(a)(ii)(A) of the *Police Act* by recklessly using unnecessary force on the Complainants through the application of handcuffs without good and sufficient cause.

24. At the conclusion of the decision, the Discipline Authority provided preliminary guidance respecting the issues to be addressed at the next stage of the proceeding, which would determine the appropriate disciplinary or corrective measures. The Discipline Authority stated in part:

> (315) Included in submissions of Counsel for the Complainants is a suggestion that such education might take place as part a Heiltsuk community gathering to address healing, and the impacts of the specific conduct of the Members on both the Complainants and their broader community.
>
> (316) Clearly, with the advent of current COVID restrictions, certain courses of action may be challenging for some time. However, my goal in the next stage of these proceedings is to emphasize the need for disciplinary and corrective measures that address, and if possible

> restore, trust and confidence in policing for both Complainants, while ensuring that the Members' misconduct is appropriately addressed.

25. The Members subsequently filed written submissions respecting disciplinary or corrective measures and appeared before the Discipline Authority for a continuation of the discipline proceeding on March 10, 2022. Again, the Applicants did not have standing to receive or respond to the Members' submissions or attend this hearing. They were not provided with an opportunity to make additional submissions beyond what they had previously submitted prior to the start of the discipline proceeding under s. 113 of the *Police Act*.

26. In the Members' submissions on disciplinary or corrective measures, filed March 7, 2022, the Members stated they were willing to provide the Applicants with written or in-person apologies, and attend a gathering with the Applicants and representatives of the Heiltsuk Nation. The Members noted, however, that any gathering or apology should be deferred until after a related proceeding before the B.C. Human Rights Tribunal was resolved. The Members also indicated that deferring the gathering until Covid-19 health orders were lifted could make the gathering more effective for facilitating healing. The Members stated:

> 36. [The complainants' counsel] emphasises the principles of sentence and suggests that the members should participate in "face-to-face, interactive training", including a Heiltsuk Nation gathering […]. That may also include the members participating in a Heiltsuk gathering to address healing and the impacts of the specific conduct on the complainants and the community." (paragraphs 35-39).
>
> 37. In our respectful submission, the training being coordinated by Mr. Leech through the Vancouver Aboriginal Community Policing Centre satisfies this interactive, immersive element.
>
> 38. The members are not opposed to meeting with the complainants and representatives of the Heiltsuk nation, as suggested by [the complainants' counsel]. The members are also willing to issue a written or in-person apology to the Complainants and Mr. Morgan Johnson. However, in our respectful submission, such a gathering, as well as a further formal apology involving the parties and witnesses in the HRT matter should be <u>deferred until after the HRT matter is resolved.</u> The HRT hearing is now set hearing in **November 2022**.

> 39. There is also a concern about holding such a gathering when Covid-19 is still a going concern. As it stands, all participants would have to show proof of vaccination and wear masks. The masking of participants will reduce the benefit of the gathering in which facial and verbal expression will be crucial to promote healing. There may also be a sweat lodge. If the gathering is deferred until after the HRT proceeding, it is likely the Public Health Orders will be less restrictive.
>
> [emphasis in original]

27. On March 17, 2022, the Discipline Authority issued his decision on disciplinary or corrective measures pursuant to s. 128 of the *Police Act* ("*DA Decision*"). This decision is addressed further below. The Discipline Authority imposed the following measures in respect of the Members:

    1) An unpaid suspension of three days for Cst. Wong and two days for Cst. Tong;

    2) Completion by the Members of the following training or education programs:

        (a) "Cultural Perspectives" training offered by the Indigenous Perspectives Society (commenced March 7, 2022 by the Members);

        (b) Intensive immersive training (11-12 sessions) through the Vancouver Aboriginal Vancouver Aboriginal Community Policing Centre coordinated by Executive Director, Mr. Norm Leech;

        (c) Training or retraining in de-escalation skills and risk assessment;

        (d) Retraining on the power of arrest;

    3) A requirement for both Members to work under close and direct supervision of a senior VPD officer, or officers, for six months; and

    4) A requirement for both Members to prepare and deliver a written apology to the Applicants within 60 days in a form and content approved by the Discipline Authority, which:

        (a) Reflects the general findings of the Discipline Authority's decision on the issues of misconduct;

        (b) Conveys the tenor of the apologies provided by the Members in their

submissions and testimony during the proceedings; and

(c) **"Conveys the Members' offer to meet with the [Applicants] to listen to their concerns and hear the oral apologies of the Members in relation to the Complaint, at a time and in a manner agreeable to the parties"**: *DA Decision,* para. 86 [emphasis added]

Conclusion of Proceedings

28. On March 18, 2022, counsel for the Applicants and the Members were provided with a copy of the Discipline Authority's findings in relation to each allegation of misconduct and determinations on appropriate disciplinary or corrective measures. They were informed that, if they were aggrieved by either the findings or determinations, they could file a written request with the Commissioner to arrange a public hearing or review on the record.

29. Neither the Applicants nor the Members filed a request for a review on the record or public hearing under s. 133(5) of the *Police Act*.

30. The Former Commissioner did not order a review on the record or public hearing. On May 27, 2022, the OPCC issued a Conclusion of Proceedings.

Events after the Conclusion of Proceedings

31. In September 2022, the Vancouver Police Board and the Applicants executed a settlement agreement with respect to a human rights complaint related to this matter. It is uncontroversial that the settlement agreement included a requirement that a healing feast and ceremony be held in Bella Bella. The Members were not parties to the human rights proceeding or to the resulting settlement agreement. The settlement agreement required the Vancouver Police Board to exercise best efforts to ensure the Members attended the ceremony to make oral apologies.

32. An Apology Ceremony was subsequently scheduled for October 24, 2022. Representatives of the Vancouver Police Board and the Vancouver Police Department attended Bella Bella for the ceremony on that date. The Members were invited to attend the Apology Ceremony, but they did not attend. The Applicants state that, without the presence of the Members, the scheduled Apology Ceremony could not proceed in accordance with Heiltsuk Law. Consequently, even though representatives of the Vancouver Police Board and the Vancouver Police Department were in Bella Bella, the planned Apology Ceremony did not proceed.

33. Prior to the scheduled ceremony, on October 21, 2022, the Members' counsel wrote to

the Applicants' counsel. The letter stated the Members' position that the *DA Decision* did not require the Members to "participate in an 'apology ceremony', whether in Bella Bella or elsewhere". The letter also stated the Members "look[ed] forward to working with [the Applicants] to arrange an in person meeting as set out [in the *DA Decision*]" after the Members completed their training. The Members now state they were both on medical leave in October 2022, although they did not advise the Applicants or the Heiltsuk Nation of that at the time.

34. Counsel for the Applicants sought to address the Members' decision not to attend the Apology Ceremony with the Vancouver Police Board. On January 25, 2023, a representative of the Vancouver Police Board wrote to the Applicants' counsel stating the Board's position that the terms of the Discipline Authority's order were already met. The Board also stated, "I believe all parties are open to an oral apology but clearly that has to be done in a manner agreeable to the parties, which includes the officers."

35. On March 27, 2023, the Board advised counsel for the Applicants and the Nation that the Board and the Mayor's office had reached out to the Members' lawyer in an attempt to identify a forum for an oral apology but were unable to make progress on the issue, noting that one of the Members was away from work. The Board stated it would "pursue this effort again once both officers are available." I am not aware of what, if any, further efforts were made by the Board after this email.

36. The Members returned to work in 2023. Since their return to work, the Members have not met with the Applicants to hear their concerns and provide oral apologies.

Application for Reconsideration Based on New Evidence

37. On December 13, 2023, the Applicants applied for reconsideration based on new evidence under s. 139 of the *Police Act.* The Applicants filed written submissions and two affidavits on that date.

38. On February 9, 2024, the Applicants filed supplemental submissions.

39. On March 19, 2024, the Members filed submissions in which they requested that the Commissioner place the application in abeyance to allow the parties to attempt to resolve the matter cooperatively. The Commissioner deferred the application to permit resolution efforts to proceed.

40. Approximately one year later, the parties' settlement discussions ended without reaching an agreement. On March 26, 2025, counsel for the Commissioner wrote to the parties confirming that the Commissioner would accordingly proceed with deciding the

application. Due to the passage of about one year since the first round of submissions, the Commissioner requested updated submissions from the parties.

41. On April 16, 2025, the Applicants provided further submissions. On May 9, 2025, the Members provided further submissions in response. On May 23, 2025, the Applicants provided submissions in reply. On May 25, 2025, the Members provided further submissions in sur-reply.

42. In December of 2025, the Applicants and Members were given opportunities to make further submissions about the BC Court of Appeal's recent decision in *Gitxaala v. British Columbia (Chief Gold Commissioner)*, 2025 BCCA 430, which, among other things, addressed the role of *UNDRIP* in the interpretation of provincial statutes. The Applicants provided a submission on this decision on December 17 and the Members in turn provided a further submission on December 28, 2025.

PRELIMINARY ISSUES

43. Before addressing the Applicants' application under s. 139, it is necessary to address two preliminary issues raised in the parties' submissions.

Settlement Privilege

44. The first preliminary issue is whether I should review the parties' settlement communications in deciding this application.

45. The Members submit that I should review the records related to the parties' efforts to resolve this matter through settlement. The Members acknowledge settlement communications are presumptively protected by settlement privilege. However, they state an exception to settlement privilege applies because the public interest in the disclosure of these records outweighs the interest in keeping them confidential. The Applicants disagree. They submit that no exception to settlement privilege applies. Among other things, the Applicants state they may not have entered into settlement discussions with the Members had they not been assured the protection of settlement privilege.

46. I find the parties' settlement communications are protected by settlement privilege, and the Members have not established an applicable exception to the privilege.

47. I will first address the Members' concern that there is already some information about the parties' settlement negotiations before me. This concern is misplaced. It is common ground, as the parties' submissions acknowledge, that the parties made efforts to settle this matter and that no agreement was reached. There is no other information before me

about any settlement efforts. For example, there is no information before me about any communications between the parties for the purposes of settlement, or positions taken, if any, by the parties with respect to any attempt at settlement.

48. Settlement negotiations are subject to a class privilege that applies whether or not a settlement is reached. While there are exceptions to this privilege, they are narrow. To come within an exception to the privilege, a party must establish that "on balance, 'a competing public interest outweighs the public interest in encouraging settlement'": *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, para. 19. The Court of Appeal has explained that "an exception should only be found where the documents sought are both relevant and necessary in the circumstances of the case to achieve either the agreement of the parties to the settlement, or another compelling or overriding interest of justice": *Dos Santos v. Sun Life Assurance Co. Of Canada*, 2005 BCCA 4, at para. 20.

49. As the Applicants point out, recognized exceptions to settlement privilege have included allegations of misrepresentation, fraud or undue influence, or preventing a plaintiff from being overcompensated, none of which apply here. I accept the Members' submission that the courts have not necessarily precluded decision-makers from recognizing other interests of justice capable of displacing settlement privilege outside the foregoing situations. However, I find that the Members have not established any such interest in this case.

50. The Members submit, "[t]he public interest in procedural fairness to *both* parties and the administration of police discipline supports a limited exception to settlement privilege" [emphasis in original]. They do not elaborate on this submission. I find that a general assertion of procedural unfairness or the administration of police discipline does not provide me with a basis to displace settlement privilege in respect of the parties' settlement communications.

51. The Members also submit in sur-reply that, "ensuring that a decision maker is not deciding a matter without all relevant facts before them" is a public interest capable of displacing settlement privilege. I disagree. Relevance is too low a threshold to ground an exception to settlement privilege.

Rights of a Complainant to Make Submissions in a Discipline Proceeding

52. The second preliminary issue raised by the parties is the scope of a complainant's right to make submissions in a discipline proceeding. As set out above, the Applicants in this case filed written submissions pursuant to s. 113 of the *Police Act* before the start of the discipline proceeding. However, they did not have an opportunity to make further

submissions after the evidence was heard and the Discipline Authority made findings substantiating misconduct against the Members. The parties disagree on whether the Discipline Authority *could* have invited further submissions from the Applicants under the *Police Act*.

53. Section 113 of the *Police Act* permits complainants to make submissions to a discipline authority on matters including "the disciplinary or corrective measures that would be appropriate". However, the provision requires these submissions to be filed "at least 10 business days before the date of the discipline proceeding" and, consequently, in the absence of evidence and submissions heard at the hearing, and before findings of misconduct are made. The Applicants point to s. 124(3) of the *Police Act*, which permits a discipline authority to consider "any other relevant written records, including, without limitation, a complainant's submissions and transcripts made under section 113". They submit this provision allows additional submissions from a complainant outside of s. 113. Further, they state the discretion to receive additional submissions under s. 124(3) must be exercised consistently with *UNDRIP*, which required the Discipline Authority to provide the Applicants with an additional opportunity to make submissions in this case.

54. The Members submit that, as a creature of statute, a discipline authority has no jurisdiction to permit a complainant to make submissions besides those provided for in s. 113. They state that "[t]he shortcomings *vis-à-vis* the application of *UNDRIP* that the Applicants identify under the *Act* in this case are matters for the Legislature to grapple with and possibly ameliorate; not the Commissioner on this application, and certainly not an Adjudicator appointed under the current *Act*." In later submissions, the Members submit that s. 113 of the *Police Act* achieved "general harmony" with *UNDRIP* in this case.

55. The Members are correct that the *Police Act* does not expressly set out a discipline authority's ability to invite and consider further submissions from complainants beyond those permitted under s. 113. However, in my view this does not necessarily prohibit a discipline authority from doing so. There may be an implied authority to receive additional submissions where doing so would respect principles of fairness and further the purposes of the *Police Act*. Regardless, I do not believe this issue needs to be resolved for purposes of the current application. I agree with the Applicants that this potential gap in the *Police Act* is not determinative of my decision under s. 139. The question on this application is whether there is new evidence that has become available or been discovered that is substantial and material to the case or to the prior determination not to order a public hearing or review on the record. I turn to that question below.

APPLICATION BASED ON NEW EVIDENCE

The Role of UNDRIP

56. Before addressing s. 139 of the *Police Act*, it is necessary to consider the role of *UNDRIP*. *UNDRIP* is an international declaration of the individual and collective rights of Indigenous peoples: *Gitxaala v. British Columbia (Chief Gold Commissioner),* 2025 BCCA 430, paras. 2 and 64. The rights recognized in *UNDRIP* "constitute the minimum standards for the survival, dignity and well-being of indigenous peoples of the world": *UNDRIP,* art. 43.

57. In 2019, British Columbia passed the *Declaration on the Rights of Indigenous Peoples Act,* S.B.C. 2019, c. 44 ("*DRIPA*"). The purposes of *DRIPA* set out in s. 2 include to affirm the application of *UNDRIP* to the laws of British Columbia and contribute to its implementation. The Court of Appeal has confirmed that *DRIPA* "incorporates *UNDRIP* into the positive law of British Columbia with immediate legal effect": *Gitxaala,* para. 7. *DRIPA* "affirms the interpretive lens through which British Columbia laws must be viewed and the minimum standards against which they are to be measured": *Gitxaala,* para. 7. *UNDRIP* ought to be treated as "a weighty source for the interpretation of Canadian law in accordance with the presumption of conformity, with due regard to the extent to which the relevant articles express binding international legal rights, obligations, or general principles, minimum standards, or aspirations": *Gitxaala,* para. 78.

58. Section 8.1(3) of the *Interpretation Act,* enacted in 2021, confirms the requirement to construe provincial statutes consistently with *UNDRIP*. Section 8.1 "applies generally and infuses the entire interpretive process, regardless of whether multiple reasonable interpretations of a statutory provision are possible": *Gitxaala,* para. 91. The approach to s. 8.1(3) is set out in *Gitxaala* as follows:

> [92] Considered in the light of its text, context, and purpose, in my view s. 8.1(3) requires that British Columbia's laws be interpreted to conform with the binding international rights, obligations and principles recognized in *UNDRIP* and to generally harmonize with the international standards and extended rules that it articulates, wherever possible. In other words, from a functional perspective, s. 8.1(3) imposes a rebuttable presumption of consistency between British Columbia statutes and *UNDRIP*, akin to the common law presumption of conformity.

59. The rights of Indigenous peoples affirmed in *UNDRIP* include, among others, the rights of Indigenous peoples to maintain and strengthen their legal and cultural institutions;

practise and revitalize Indigenous cultural traditions and customs; and promote, develop and maintain distinctive customs, procedures, practices, and juridical systems or customs (Arts. 5, 11, 34). *UNDRIP* also affirms the rights of Indigenous peoples to determine the responsibilities of individuals to their communities, as well as rights to effective remedies for infringements of individual and collective rights with due consideration to the customs, traditions, rules and legal systems of the Indigenous peoples involved (Arts. 35 and 40).

60. I accept the Applicants' submission that in determining this application, *UNDRIP* ought to infuse the entirety of the interpretive process. Where possible, I should interpret and apply the provisions of the *Police Act* in a manner that, at minimum, achieves general harmony with the rights affirmed in *UNDRIP*: *Gitxaala,* para. 98.

Section 139 of the *Police Act*

61. Section 139 of the *Police Act* allows me to reconsider a prior determination that a public hearing or review on the record is not necessary in the public interest if I am satisfied that new evidence has become available or been discovered that is substantial and material to the case or to the prior determination.

62. Section 139 of the *Police Act* states in part:

> **Reconsideration on new evidence**
>
> **139** (1)Despite section 138 (3) and (6), at any time after the police complaint commissioner has determined that a public hearing or review on the record is not necessary in the public interest, the police complaint commissioner may reconsider the determination if satisfied, on application by any person or on the police complaint commissioner's own initiative, that new evidence has become available or been discovered that is substantial and material to the case or that determination.
>
> (2) In reconsidering whether a public hearing or review on the record is necessary in the public interest, the police complaint commissioner must consider all relevant factors, including, without limitation, the factors described in section 138 (2).
>
> […]

63. On an application under s. 139, there are three questions:

    1) Has new evidence become available or been discovered?

2) If so, is the new evidence substantial and material to the case or to the prior determination not to order a public hearing or review on the record?

3) If so, is a public hearing or review on the record necessary in the public interest?

64. Each of these questions is addressed in turn.

New Evidence Has Become Available or Been Discovered

65. The proposed new evidence is contained in two affidavits. One affidavit is affirmed by Mr. Maxwell Johnson, who is one of the Applicants in this matter. The other is affirmed by the Chief Councillor of the Heiltsuk Tribal Council, Marilyn Slett. The affidavits document unsuccessful attempts to have the Members attend an Apology Ceremony in Bella Bella, which was planned to take place on October 24, 2022. They also address Mr. Johnson's experiences as an Indigenous complainant in the *Police Act* process, the impacts on Mr. Johnson and the Heiltsuk community flowing from the Members' refusal to attend the Apology Ceremony, and the significance of an Apology Ceremony in Heiltsuk Law and culture. It is clear from the evidence and submissions before me that the parties have been unable to agree on the appropriate manner and setting in which to meet with one another and hear the Members' oral apologies. The Members have not agreed to provide these apologies in the manner that the Applicants assert is culturally meaningful to them and accords with Heiltsuk Law.

66. The threshold question under s. 139(1) is whether the evidence adduced on this application is new evidence that has become available or been discovered.

67. First, the evidence of the Members' refusal to attend an Apology Ceremony and the related impacts on the Applicants is new evidence which post-dates the discipline proceeding and the Former Commissioner's prior decision to conclude the proceedings without arranging an adjudication. This is clearly new evidence which was not available at those earlier times.

68. Second, the evidence respecting applicable Heiltsuk Law and culture adduced by the Applicants was also not before the Discipline Authority or the Former Commissioner. However, information about Heiltsuk Law and culture presumably *existed* at the time of the discipline proceeding. I have thus considered whether the Applicants ought to be barred from raising evidence of their laws and culture now, having not included such information in their s. 113 submissions prior to the discipline proceeding.

69. Section 113 of the *Police Act* permits a complainant to make *submissions* but it does not expressly provide an ability for a complainant to file *evidence* with those submissions. In

my view, the *Police Act* is unclear as to whether the evidence could simply be included in, or appended to, a submission under s. 113. I note further that, while s. 124(3) of the *Police Act* permits "other written records…including…a complainant's submissions…under section 113" to be considered at a disciplinary proceeding, it does not expressly allow a complainant to submit *evidence*. Given the absence of an express mechanism for a complainant to adduce evidence in a discipline proceeding, I find that the Applicants' failure to do so in this case should not be a barrier to them raising the evidence now. Further, the relevance of evidence regarding Indigenous law and culture did not crystalize until the dispute arose between the parties regarding the manner in which the apologies should be provided. This did not occur until after the discipline proceeding concluded and the Conclusion of Proceedings was issued.

70. This case certainly brings into focus the procedural difficulties involved in ensuring relevant evidence of Indigenous laws and culture is brought to bear on decision-making under the *Police Act.* To be clear, the above comments acknowledging the uncertainty and challenges with respect to how complainants may adduce evidence in discipline proceedings should not be interpreted as a direction to discipline authorities against inviting or considering such evidence in future discipline proceedings. Discipline authorities may be required to, for example, consider this issue in light of the developing law respecting the role of *UNDRIP* in the interpretation of provincial statues.

New Evidence is Substantial and Material

71. The second question under s. 139(1) of the *Police Act* is whether the new evidence is substantial and material to either the case or to the prior determination not to order a public hearing or review on the record. I am satisfied that it is. The new evidence bears directly on the determination of appropriate corrective measures in this case. In particular, the new evidence appears to undermine the appropriateness or adequacy of the Apology Order. I will begin by briefly reviewing the context in which the Apology Order was made.

72. The Discipline Authority observed that the factors contributing to the seriousness of the misconduct in this case included the fact that, "[n]either Member gave any consideration to the indigenous status of either complainant prior to their arrest, nor to the unique cultural safety needs and circumstances of such persons": *DA Decision,* para. 31. The Discipline Authority found the Members' conduct exposed the Applicants to trauma and fear, and that "bridging the gap between the Members and the [Applicants] is a critical component in establishing confidence in policing interactions with indigenous persons": *DA Decision,* para. 75. He observed that written words alone would be unlikely to address the Applicants' concerns: *DA Decision,* para. 81.

73. Against that backdrop, the Discipline Authority concluded it was "important for the Members to hear from the [Applicants] themselves as to how the arrests and handcuffing that took place have impacted their wellbeing and confidence in the administration of justice" and, in turn, for the Members to convey to the Applicants "their newfound understanding of the unique issues confronting indigenous persons, and the regret for the actions that took place": *DA Decision,* paras. 82-83.

74. In reaching his determination, the Discipline Authority indicated that, while the specific implementation of the principles in *UNDRIP* would take time, "the goal is clear: The unique needs and issues of indigenous persons must be considered in all decision making to address historic injustices and to promote equity, understanding and tolerance": *DA Decision,* para. 76.

75. It is clear from the Discipline Authority's reasons that the Apology Order was intended to assist the Members to better understand the impacts of their conduct, facilitate repair between the parties, and help restore the Applicants' trust in police. These are worthwhile objectives, which, in my view, are consistent with the purposes of the *Police Act* to protect public confidence in police and police oversight. However, the new evidence calls into question the appropriateness and adequacy of the Apology Order as drafted for the following reasons.

76. First, the Apology Order, which requires the Members to meet with and apologize to the Applicants on terms agreeable to the parties, appears to have been based on the premise that if the Applicants wished to meet with the Members, the parties would be capable of agreeing on the terms of that meeting. There was no evidence before the Discipline Authority of any disagreement between the parties regarding the manner or setting of an oral apology. The Members stated before the Discipline Authority that they were not opposed to attending a Heiltsuk gathering as proposed by the Applicants. The new evidence now demonstrates that the parties are unable to agree on the terms of a meeting and oral apology as contemplated by the Apology Order. The Members have declined to provide apologies in the manner that the Applicants assert is culturally meaningful to them and consistent with Heiltsuk Law. The fact that the Members do not agree to provide apologies to the Applicants in the manner that the Applicants wish to receive those apologies is not contemplated by the Apology Order and bears directly on the appropriateness or adequacy of that Order. In my view, this is sufficient to order a review on the record. The other evidence adduced on this application, discussed below, reinforces this conclusion.

77. I pause here to note that the Applicants have asked me to draw an inference from the new evidence that the Members *misrepresented* their willingness to meet with the Applicants before the Discipline Authority. I have not made that finding on this

application. It is open to an adjudicator to consider that issue in the ordered review on the record.

78. Second, the new evidence about the impacts on the Applicants of the unsuccessful attempts to hold an Apology Ceremony is also substantial and material. The new evidence indicates that the difficulties in implementing the Apology Order may have resulted in further harm to the Applicants and exacerbated their distrust in policing and the administration of police discipline under the *Police Act.* Mr. Johnson states in his affidavit that the Members' refusal to attend an Apology Ceremony has left him feeling disrespected, and has exacerbated the psychological impacts of the December 20, 2019 incident. He "experience[s] the Constables' failure and refusal to attend an Apology Ceremony in Bella Bella as an attack on Heiltsuk culture." The evidence that the Apology Order has not addressed the relational damage and impact on public trust caused by the misconduct and instead may have contributed to further harm is also substantial and material to the appropriateness of the Order.

79. Finally, when the Discipline Authority made the Apology Order, he did not have relevant evidence before him about Heiltsuk Law and culture. I agree with the Applicants that the perspectives and needs of Indigenous complainants and their communities are necessary considerations in an assessment of the adequacy of disciplinary or corrective measures. It is important that this evidence be considered in determining the disciplinary or corrective measures in this case in light of the rights affirmed in *UNDRIP*, including those in articles 5, 11, 34, 35 and 40. The Apology Order may be inappropriate or inadequate insofar as it does not require the Members to meet with the Applicants and deliver oral apologies in a manner that is culturally meaningful to the Applicants and accords with Heiltsuk Law.

80. In summary, I am satisfied that the new evidence is substantial and material to the determination of disciplinary and corrective measures in this case and to the prior determination that a review on the record is not required. Specifically, the new evidence appears to undermine the adequacy or appropriateness of the Apology Order, which was aimed at important remedial objectives that to-date remain unfulfilled. I will therefore go on to consider whether a public hearing or review on the record is required in the public interest in accordance with s. 139(2) of the *Police Act*.

A REVIEW ON THE RECORD IS NECESSARY

81. In reconsidering whether a public hearing or review on the record is necessary in the public interest, I must consider all relevant factors including those in s. 138(2) of the *Police Act.* I have determined a review on the record is necessary in the public interest for the following reasons.

82. First, the misconduct is serious in nature, involving the unjustified arrest and handcuffing of an Indigenous child and her grandfather, in circumstances which the Discipline Authority described as "objectively humiliating". The misconduct resulted in significant psychological harm to the Applicants, and violations to their dignity. The Applicants have provided new evidence stating the harms caused by the misconduct are ongoing and exacerbated by the Members' refusal to attend an Apology Ceremony. Given the seriousness of the underlying misconduct, the lingering unresolved issues regarding the Apology Order are likely to undermine public confidence in police, particularly for the Applicants and the Heiltsuk community specifically, and Indigenous persons generally. They are also likely to undermine public confidence in the effective administration of police discipline.

83. Second, there is an arguable case that the Apology Order imposed by the Discipline Authority is inappropriate or inadequate considering the new evidence. I have found above that the Apology Order was crafted without the benefit of substantial and material evidence which has since become available. As I have explained, the new evidence bears directly on the Apology Order and may undermine the adequacy or appropriateness of that Order. The Order has created unfulfilled expectations and has not achieved its remedial objectives.

84. Further, ordering a review on the record in which evidence of Heiltsuk Law and culture can be considered by an adjudicator is consistent with my responsibility to exercise my discretion in a manner that, at minimum, achieves harmony with the rights of Indigenous persons under *UNDRIP,* including Indigenous peoples' rights to obtain effective remedies for infringements of their rights with due consideration to their customs, traditions, rules and legal systems: *UNDRIP,* Art. 40.

85. This case also raises important legal questions respecting the determination of disciplinary or corrective measures under the *Police Act.* Discipline authorities will benefit from adjudicative guidance on these questions, including:

    a) The application of *UNDRIP* and Indigenous laws to the exercise of remedial discretion under the *Police Act*; and

    b) Whether s. 126 of the *Police Act* confers jurisdiction on a discipline authority or adjudicator to make an order requiring a member to provide an apology to a complainant if the member does not wish to do so voluntarily, and, if so, what the terms of such an order can be.

86. I have considered the Members' submission that this application ought to be dismissed

because the Applicants did not apply for a review on the record or public hearing under s. 133(5) within the time limit applicable to that section. The Members argue that "[s]ome of the key concerns now expressed in [the present] application roughly (3) years later were known to the Applicants immediately upon receipt of the [Discipline Authority's] reasons in the spring of 2022." I disagree with this submission.

87. The Members' position at the discipline proceeding was that they were willing to meet with the Applicants and members of the Heiltsuk Nation. The Applicants did not know that the Members were unwilling to attend an Apology Ceremony until October 2022 when the Members advised them of their position. By that time, the deadline to bring an application under s. 133(5) had passed and the Conclusion of Proceedings had already been issued. While the Applicants would have known within time that the Apology Order required mutual agreement respecting the manner in which the Members would meet with the Applicants and deliver oral apologies, they had no reason until later to believe that such agreement could not be reached.

88. I have also considered the Members' submission that it would be unfair to reopen this matter years after the conclusion of the discipline proceeding when, in their view, they have already complied with the disciplinary and corrective measures imposed on them and have suffered negative impacts on their mental health and professional lives. I acknowledge that these proceedings must have had a stressful impact on the Members. I also recognize that leaving this matter as it stands, with important evidence demonstrating that intended corrective measures are effectively incomplete, will continue to cause stress to the Applicants initially created by the Members' misconduct.

89. Therefore, I find that despite the passage of time in this case, a review on the record is necessary in the public interest. I note that the review on the record will be limited to the single issue in dispute between the parties; that is, the question of whether an oral apology ought to be ordered, and if so, on what terms. This is not a broad reopening of the misconduct proceeding in its entirety. The passage of time since the incident will not result in any prejudice to the Members' ability to respond to this review on the record, and the Members have not alleged any such prejudice. While I understand the Members' desire to avoid a further proceeding in respect of this matter, I must also consider the ongoing impacts on the Applicants, which are asserted to be exacerbated by the events since the discipline proceeding. I am satisfied it is necessary for this issue to be resolved through an adjudication to attempt to permit all parties to move forward.

A Public Hearing is Not Required

90. In making my decision to arrange a review on the record, I considered whether a

public hearing is required. I am satisfied that it is not.

91. The Applicants have indicated a *preference* for a public hearing to permit the hearing of oral evidence respecting Heiltsuk Law and culture. The Members submit that this evidence is already part of the record and that in any event, the *Police Act* allows oral evidence to be heard at a review on the record if the adjudicator permits.

92. I am cognizant that s. 143(1)(a) requires me to order a public hearing instead of a review on the record if it is likely that evidence other than the record described in that provision will be *necessary* for the adjudication. That record includes any record relating to the new evidence adduced on this application. Based on the information and submissions before me, I am not satisfied that additional evidence will likely be necessary in an adjudication of this matter. However, if a party disagrees with that assessment, they may apply to the adjudicator to adduce additional evidence under s. 141(4). My assessment under s. 143(1)(a) does not bind the adjudicator in deciding any application under s. 141(4).

93. The review on the record will be open to the public and the resulting decision will be posted to the OPCC website, subject to any orders the adjudicator may make under s. 150 of the Act. In the circumstances, a public hearing is not required to preserve or restore public confidence in the investigation of misconduct and the administration of police discipline.

Review on the Record – Procedures and Parties

94. The review on the record will be limited to the single issue in dispute between the parties: whether an order requiring the Members to provide oral apologies to the Applicants ought to be made, and if so, on what terms.

95. The record will consist of the materials described in s. 141(3) of the Act, which will include any record relating to the new evidence adduced on this application. Further, the adjudicator will have discretion to receive additional evidence under s. 141(4) of the Act.

96. The adjudicator at the review on the record will be able to receive oral or written submissions from the following persons about the matters under review:

    c) Pursuant to s. 141(5), the Members or their agents or legal counsel may make submissions.

    d) Pursuant to s. 141(6), the Commissioner or his commission counsel

may make submissions.

e) Pursuant to s. 141(7), the adjudicator may permit the Applicants or their agent or legal counsel to make submissions.

f) Pursuant to s. 141(7)(b), the adjudicator may permit the Discipline Authority to make submissions.

APPOINTMENT OF RETIRED JUDGE

97. Section 142(1) of the Act requires the Commissioner to appoint an adjudicator for a review on the record. An appointment under s. 142(1) of the Act must be made pursuant to s. 177.2 of the Act.

98. Section 177.2 of the Act, in turn, requires the Commissioner to request the Associate Chief Justice of the Supreme Court of British Columbia to consult with retired judges of the Provincial Court, Supreme Court, and Court of Appeal and recommend retired judges who the Commissioner may include on a list of potential adjudicators. Appointments under the Act are to be made in accordance with published procedures established under s. 177.2(3).

99. I have published on the OPCC website the appointment procedures established under s. 177.2(3) of the Act (the "Appointment Procedures") and the list of retired judges who may be appointed for the purposes of, among other things, s. 142 of the Act.

100. In accordance with the Appointment Procedures, I have appointed the Honourable Wally Oppal, K.C., to preside as Adjudicator in this review on the record pursuant to ss. 142(1) and (2) of the Act. I have considered the factors as set out in the Appointment Procedures, namely:

(a) the provision under which the appointment is being made;

(b) the current workloads of the various retired judges;

(c) the complexity of the matter and any prior experience with the Act; and

(d) any specific expertise or experience of a retired judge with respect to a particular issue or sensitivity associated with the matter.

101. The Honourable Wally Oppal, K.C., has confirmed their availability to

preside over this matter and reported no conflicts. They have significant experience and expertise with the provisions of Part 11 of the *Police Act,* including as an adjudicator appointed for the purposes of reviews on the record.

Inquiries with respect to this matter may be directed to the Office of the Police Complaint Commissioner:

200 - 947 Fort Street, PO Box 9895 Stn Prov Govt, Victoria, BC V8W 9T8
Telephone: 250-356-7458 • Toll Free: 1-877-999-8707 • Facsimile: 250-356-6503

DATED at the City of Victoria, in the Province of British Columbia, this 22nd day of January 22, 2026.

Prabhu Rajan
Police Complaint Commissioner