



British Columbia's
Office of the Human Rights
Commissioner

Interim review:


Settlement Agreement between Maxwell Johnson Sr. and A.B. and the Vancouver Police Board

Interim report | 2024

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INTERIM REPORT | MARCH 2024

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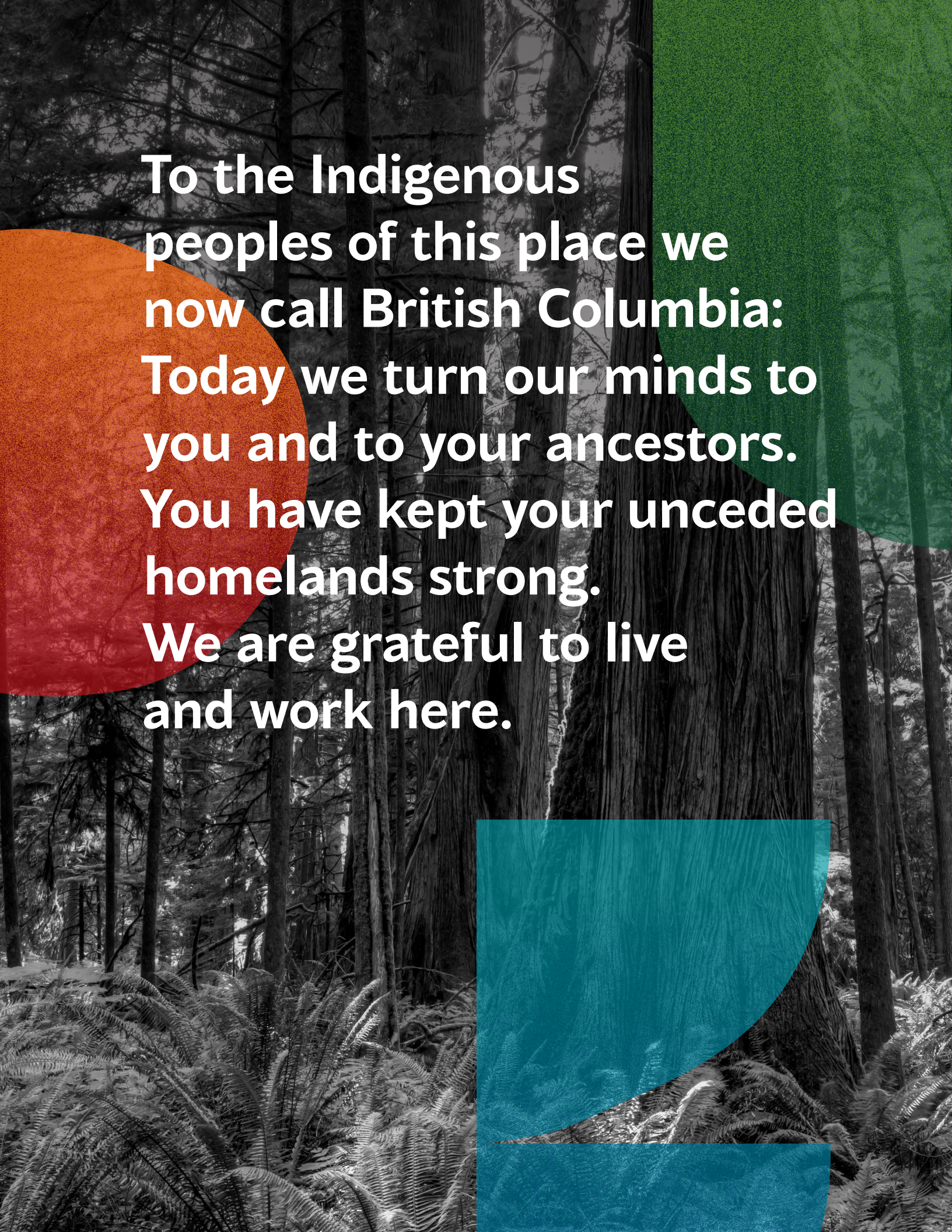
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ISBN: 978-1-990626-07-4

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536 - 999 Canada Place
Vancouver, BC V6C 3E1
1-844-922-6472 | info@bchumanrights.ca





**To the Indigenous
peoples of this place we
now call British Columbia:
Today we turn our minds to
you and to your ancestors.
You have kept your unceded
homelands strong.
We are grateful to live
and work here.**

Table of Contents

Acronyms and glossary	5
Introduction	6
The Settlement Agreement	7
Commissioner's role	9
Procedural fairness.....	9
Allegations of bias.....	10
Process for this review	10
Analysis	12

Acronyms and glossary

The following abbreviations and acronyms are used in this report.

The Agreement – Settlement Agreement and Release between the Complainants and the VPB

The Commissioner – B.C.’s Human Rights Commissioner

Complainants – Maxwell Johnson and Mr. Johnson on behalf of his granddaughter, A.B.

Complainant Parties – The Complainants, the Heiltsuk Nation and the Heiltsuk Tribal Council

HTC – Heiltsuk Tribal Council

OPCC – Office of the Police Complaint Commissioner

UBCIC – Union of BC Indian Chiefs

VPB – Vancouver Police Board

VPD – Vancouver Police Department

Introduction

I am releasing this report pursuant to the Settlement Agreement and Release (the “Agreement”) between Maxwell Johnson Sr. and A.B. (the “Complainants”) and the Vancouver Police Board (“VPB”).

The Agreement resolved a human rights complaint arising from an incident that took place on Dec. 20, 2019, at a Vancouver branch of the Bank of Montreal. The Complainants had visited the bank, where Maxwell Johnson Sr. had an account, to open an account for his granddaughter, A.B. After presenting their Indian status cards, bank staff stated they suspected the Complainants of using invalid identification. The bank manager called 9-1-1 and said that the Complainants were using a fraudulent Indian status card. Two constables of the Vancouver Police Board responded to the call. After speaking to the bank manager for approximately one minute, the constables removed the Complainants to a public sidewalk where they were arrested, detained and handcuffed. The constables did not speak to them or otherwise investigate the bank staff’s suspicions before doing so.

The Agreement outlines several independent and collaborative actions for the parties to take within anticipated timelines. I initiated this interim review in August 2023 planning for a November publication, approximately halfway through the specified term, but encountered multiple delays through the evidence gathering and administrative fairness review periods.

The Settlement Agreement

This section summarizes the portions of the Settlement Agreement and Release between Maxwell Johnson Sr. and A.B. and the Vancouver Police Board that are most relevant to my review. The redacted Agreement is attached to this report as Appendix A. As noted by the Supreme Court of Canada in relation to contractual interpretation, “the words of one provision must not be read in isolation but should be considered in harmony with the rest of the contract and in light of its purposes.”¹

The Agreement contains 24 paragraphs and the following four parts:

- A. Compensation and expenses
- B. Community engagement
- C. Steps to address systemic issues
- D. Other provisions

Part A

Within the Agreement, the VPB “admits that the Conduct by the Board’s Constables contravened the Code [B.C.’s *Human Rights Code*] by discriminating against the Complainants because of their Indigenous identity, race, and ancestry.”

Part B

Paragraphs 6 through 8 of Part B state that a healing feast and ceremony will be held in Bella Bella and paid for by the Board. Paragraph 8 specifies, “The Board shall exercise best efforts to ensure that Constables Wong and Tong attend at the Ceremony as part of the Board’s delegation, to make an in-person apology at the Ceremony.”

Part C

Part C outlines “steps to address systemic issues,” including that “the Board shall work with UBCIC [the Union of BC Indian Chiefs] and HTC [Heiltsuk Tribal Council]” on several initiatives to review, develop and plan changes to Vancouver police policies. The parties committed to working together to improve:

¹ *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 9 at para. 64

- training relating to anti-Indigenous racism, cultural competency and humility, including education and training about Indian status cards and anti-racist responses related to status cards (paragraph 10)
- investigation protocols when constables respond to calls from service providers, risk-identification protocols and handcuffing procedures applicable to Indigenous people, especially Elders and youth (paragraph 11)
- the Board's complaint process, with a view to making the process more accessible to Indigenous people (paragraph 12)

The Board also committed to establishing a committee to oversee the Agreement's implementation. The committee must include a member appointed by UBCIC and a member appointed by HTC (paragraph 16).

In addition, Part C commits the Board to several independent actions to:

- create a new or modified position to act as the anti-Indigenous racism office or officer (paragraph 14)
- publish an annual report on its website starting at the end of 2022, detailing the numbers and nature of complaints by or relating to treatment of Indigenous persons, including how they were addressed (paragraph 15)
- provide financial contributions to HTC to support the work of Part C (paragraphs 17 and 18)

With respect to the role of B.C.'s Human Rights Commissioner, paragraph 19 provides:

The Board agrees to the Commissioner performing third-party reviews of initiatives identified under this Part, both on an interim basis and two years after November 1, 2022, and to the Commissioner making interim and final review reports open to the public. For clarity, the Board is not responsible for funding any review by the Commissioner. The scope of the review may include the Commissioner assessing

19.1 how the board has implemented the terms of Part C of the Agreement;

19.2 the impact of systemic changes made by the Board;

For clarity, the Board and the members of the oversight committee shall cooperate with any interim or final reviews by the Commissioner, which may include participating in interviews by the Commissioner. All Parties acknowledge that the Commissioner is an independent officer and therefore determines the scope and method of such reviews.

The Agreement does not contain any explicit prerequisites to the implementation of Part C. The VPB takes issue with my jurisdiction and has alleged a lack of procedural fairness and bias in the process given, in part, my consideration of factors that may have been impeding the implementation of Part C, including those related to Part B of the Agreement.

Commissioner's role

Procedural fairness

The VPB has challenged my jurisdiction to interpret any aspect of Part B of the Agreement.

Under paragraph 19 of the Settlement Agreement, the Board agreed to me “performing third-party reviews of initiatives identified under this Part (Part C)” and agreed that “the scope of the review may include the Commissioner assessing how the board has implemented the terms of Part C of the Agreement.” They agreed that I am an independent officer (of the Legislature) and that I determine the scope and method of the review. In determining the scope of my review, I decided that it was necessary to assess both the progress made in implementing the initiatives in Part C and also any impediments to that progress, regardless of whether this required me to look at the Agreement as a whole or to consider provisions outside of Part C.

In their Dec. 18, 2023 administrative fairness response, the VPB suggests that it is improper for me to “report on matters that are now before the retired judge pursuant to the *Police Act*.” While I acknowledge that a reconsideration by the Office of the Police Complaint Commissioner (OPCC) and my review under the Settlement Agreement involve some of the same circumstances and facts, in my view, these are distinct legal processes.²

The role of the OPCC is to oversee complaints of misconduct by municipal police in B.C. and to administer discipline proceedings under the *Police Act*. On Dec. 13, 2023, the Complainants requested reconsideration of the Police Complaints Commissioner’s decision to not conduct an additional review or public hearing after adjudicator and retired judge Neal issued his Mar. 17, 2022 disciplinary decision. The Complainants are requesting reconsideration on the basis of new information and are seeking additional disciplinary measures to be imposed on the constables, specifically that the constables be required to attend an Apology Ceremony in Bella Bella.

While an adjudicator appointed under the *Police Act* is concerned with determining complaints of police misconduct and ordering disciplinary or corrective measures if misconduct is found, my role under the Settlement Agreement is specific to reviewing the VPB’s progress in implementing the systemic initiatives in Part C of the Settlement Agreement — two very distinct processes. In addition, as an independent reviewer under the Agreement, my powers are limited to issuing public reports. Unlike an adjudicator appointed under the *Police Act*, I do not have authority to order parties to take specific actions — again these are distinct processes, with distinct powers.

² At the time of writing of this report, the Police Complaints Commissioner had not yet issued a public decision on the Complainants’ request for reconsideration.

Allegations of bias

I will not address the VPB's allegations of bias in detail here, for three reasons. First, I responded to their specific concerns about bias during the administrative review periods. Second, they have not sought a remedy as a result of their allegations. Third, at this time, I have decided not to address the factual issues over which the VPB allege bias, so those allegations are not relevant to this report.

Speaking generally however, it should be clear that a Human Rights Commissioner acknowledging the impact of systemic racism or respecting Heiltsuk law are not indicators of bias. Nor am I biased for bearing witness to the expressions of trauma (both intergenerational and direct) caused by systemic discrimination, particularly in the context of reviewing a settlement agreement explicitly seeking to address systemic issues. In my view, I was asked to be an independent reviewer under this Agreement because of my role as B.C.'s first independent Human Rights Commissioner and recognized expertise in understanding the context in which systemic discrimination and inequality persist in this province.

“...it should be clear that a Human Rights Commissioner acknowledging the impact of systemic racism or respecting Heiltsuk law are not indicators of bias.”

Process for this review

Initiating the review

- Aug. 14, 2023 – I wrote to counsel for the Complainant parties and the VPB outlining my intention, consistent with the Agreement, to produce an interim report reviewing progress to-date.
- Aug. 30 – I initiated the review by sending a letter explaining the focus of my review and requesting written responses from both parties. The letter indicated that, pursuant to paragraph 19, my review would focus solely on the implementation of Part C of the agreement and would seek to answer:
 - »What progress has been made to date on implementation of Part C of the Agreement? What, if anything, has impeded implementation?
 - »To the extent that Part C has been implemented, what is the impact to date on addressing the complainants' concerns about systemic discrimination?

Written responses

- Sept. 22 – Written responses and any relevant documents were due to be submitted to my Office. The parties requested and were granted a one-week extension.
- Sept. 28 – A written response was received from VPB Executive Director.
- Sept. 29 – A written response was received from counsel for the Complainant parties.

Interviews

- Oct. 6 – My Office requested interviews with Chief Councillor Marilyn Slett of the Heiltsuk Tribal Council, Vancouver Police Chief Adam Palmer and Vancouver Police Board Executive Director Jason Kuzminski.
- Oct. 12 – My Office confirmed the interview with Chief Slett for Oct. 16th.
- Oct. 12 – VPB Executive Director Jason Kuzminski confirmed that he and VPB legal counsel were both available for an interview Oct. 23, 24, 25 or 26th.
- Oct. 13 – My Office confirmed the interview with ED Kuzminski for Oct. 23rd.
- Oct. 16 – An interview was conducted with Chief Marilyn Slett.
- Oct. 16 – Legal counsel for the VPB responded to my Office requesting a rationale for my decision to proceed with the interviews under sworn oath or affirmation.
- Oct. 17 – My Office wrote back to explain that, pursuant to paragraph 19, I would be relying on the information provided in interviews to inform my interim report.
- Oct. 20 – Counsel for the Vancouver Police Department wrote to my Office challenging my jurisdiction to determine the scope of my review, explaining that Chief Palmer and the Board were declining to participate in interviews.
- Nov. 2 – I wrote to both parties to provide an update on the status of interviews and further explain the scope of my interim review.
- Nov. 8 – Counsel for the VPB wrote to my Office further explaining their view that I do not have jurisdiction to consider anything outside of Part C, including anything that may be impeding progress on Part C.
- Nov. 14 – Counsel for the Complainants wrote to my Office explaining their view that my jurisdiction necessarily includes consideration of what may be impeding progress on Part C, including provisions included in Part B.

Administrative fairness reviews

- Nov. 27 – I sent a draft report to counsel for the VPB and the Complainants to provide the parties with an opportunity to review and comment on the factual accuracy of the draft report prior to it being released by my Office.

- Dec. 18 – Counsel for the Complainants responded, indicating, in part, that “Mr. Johnson and Heiltsuk appreciate the draft and hope that the finalized interim report will spur progress on holding a Heiltsuk Apology Ceremony in Bella Bella, with the constables in attendance.”
- Dec. 18 – Counsel for the VPB responded, indicating, in part, that the VPB does not accept my jurisdiction to interpret Part B of the Agreement. The VPB provided my Office with a significant amount of new information to ensure the report “accurately reflects the truth of the situation.”
- Jan. 24, 2024 – I sent a revised report to the parties for a second administrative fairness review following significant revisions to incorporate the new information and records provided by the VPB.
- Jan. 31 – Comments were due following the second administrative fairness review. A one-week extension was later requested and granted to both parties.
- Feb. 7 – Counsel for the Complainants submitted a response and provided new video evidence. Their response indicated, in part, concern that the report, amended to include new evidence from the VPB, now presented an incomplete understanding of Ǿviłás, Heiltsuk law.
- Feb. 7 – Counsel for the VPB submitted a response reiterating their disagreement with many of the findings and the scope of my role in conducting this review.
- Feb. 14 – Counsel for the VPB submitted an additional letter responding to the position presented in the Feb. 7th letter from counsel for the Complainants and the new visual information, reiterating their concerns about jurisdiction.
- Feb. 16 – Counsel for the Complainants submitted a response to the VBP’s Feb. 14 letter. In it, they disagree with arguments presented by the VPB.

Analysis

As noted above, when I initiated this review, I anticipated gathering evidence from the parties to better understand and report back on the status of implementing Part C of the Agreement, with recommendations about how to move forward. However, after months of delays and considerable correspondence and disagreement among the parties, I am concerned that the parties seem to be far apart in their positions and the process did not appear to be bringing them closer together, despite their mutual stated intentions to work together on implementing Part C and their hopes that this process would move that implementation forward. Given concerns flagged by both parties about potentially incomplete disclosure of evidence and less than fulsome legal submissions, including submissions on Heiltsuk law, I am also concerned about drawing conclusions on the evidence and law before me.

“...the parties seem to be far apart in their positions and the process did not appear to be bringing them closer together...”

I understand my role in this Agreement, described as “performing third-party reviews”, as being an impartial auditor of the implementation of Part C of the Agreement. My role — both as Human Rights Commissioner and as third-party reviewer to this Agreement — is to be in service of Part C, which is aimed at systemic changes to address the human rights concerns identified. To this end, I am concerned that the process of a mid-term review should not itself become an obstacle to future implementation by inadvertently entrenching disagreement and division between the parties.

For these reasons, I have decided to leave a detailed review of the positions of the parties, the applicable legal principles and the facts to date until my final report (if they remain relevant) and focus on what could and should happen next to move forward the mutual goals of the parties.

I believe it is vital to ground my analysis in the objectives of this Agreement. It bears repeating that the Agreement represents the terms by which the parties settled the Complainants’ human rights complaint against the Vancouver Police Board for the actions of its constables in detaining and handcuffing Mr. Johnson and his 12-year-old granddaughter A.B., without investigation or speaking to either of them, and in the presence of Mr. Johnson’s son. The Board admits that this conduct was discriminatory based on the Complainants’ Indigenous identity, race and ancestry. The Agreement also notes the Complainants’ concerns “about systemic discrimination flowing from biases embedded within British Columbia’s and Canada’s institutions, including policing organizations.” It is well recognized that policing in Canada is rooted in colonial mandates to control Indigenous peoples and lands,³ and that ongoing systemic racism in policing in large part grows from these colonial roots.

The other key issue to highlight is the nature of the Agreement as an agreement. This important document represents the coming together of the parties towards potentially transformative change. The milestone of the Johnson family, the Heiltsuk Nation and the Vancouver Police Board working together to chart a path towards addressing racism in the service was and is something to celebrate.

At its heart, this Agreement — and Part C in particular — is aimed at promoting and protecting human rights and addressing systemic inequities in the relationship between Indigenous peoples and police institutions. The parties were once united in their goals to undertake this important work, but now find themselves divided again. The work ahead is to reunite and paddle together towards their once-shared vision. I hope this report serves as a call to action for both parties to come back to the table to renew the collaboration envisioned in Part C.

³ Canada, Parliament, House of Commons, Standing Committee on Public Safety and National Security, *Systemic Racism in Policing in Canada: Report of the Standing Committee on Public Safety and National Security*, 2nd sess., 43rd Parliament, 2021, Committee Report 6, 34-38, <https://www.ourcommons.ca/Content/Committee/432/SECU/Reports/RP11434998/securp06/securp06-e.pdf>. British Columbia, Legislature, Special Committee on Reforming the Police Act, Minutes of Proceeding, 1st sess., 42nd Parliament, Issue No. 12, 2021, 186 (Vancouver Aboriginal Community Policing Centre Society), <https://www.leg.bc.ca/content/HansardCommittee/42nd1st/rpa/20210226am-PoliceActReform-Virtual-n12.pdf>.

“The parties were once united in their goals to undertake this important work, but now find themselves divided again. The work ahead is to reunite and paddle together towards their once-shared vision.”

Over the course of the last several months, I have heard from both parties about the obstacles they saw as impediments to the implementation of the Agreement. Regardless of who said or did what when, or the legal arguments being made, certain facts are clear to me:

- To the Heiltsuk Nation and Johnson family, an apology ceremony conducted in accordance with Heiltsuk law is necessary before they can move forward with the collaboration envisioned in Part C. This has not occurred to date.
- While the VPB has implemented the provisions of Part C that require unilateral action (paras. 14, 17 and 18), many sections require a level of collaboration between the parties that has not occurred (paras. 10–13, 15 and 16). The latter provisions pertain to: police training; improvements to procedures on investigation protocols in response to service provider calls (including on status cards), risk identification protocols and handcuffing procedures; complaint processes and related data; and the establishment of an oversight committee.

The relationship between the parties is fundamental to the execution of the agreement, as proceeding with the enumerated changes to policing in isolation from the Nation risks perpetuating the very racism it seeks to address. However, the relationship between the parties seems to have broken down.

“The relationship between the parties is fundamental to the execution of the agreement, as proceeding with the enumerated changes to policing in isolation from the Nation risks perpetuating the very racism it seeks to address.”

The Truth and Reconciliation Commission of Canada (“TRC”) defined reconciliation as “an ongoing process of establishing and maintaining respectful relationships.”⁴ According to the TRC,

Establishing respectful relationships also requires the revitalization of Indigenous law and legal traditions. It is important that all Canadians understand how traditional First Nations, Inuit, and Métis approaches to resolving conflict, repairing harm, and restoring relationships can inform the reconciliation process.

Traditional Knowledge Keepers and Elders have long dealt with conflicts and harms using spiritual ceremonies and peacemaking practices, and by retelling oral history stories that reveal how their ancestors restored harmony to families and communities. These traditions and practices are the foundation of Indigenous law; they contain wisdom and practical guidance for

⁴ Truth and Reconciliation Commission of Canada. *Honouring the Truth, Reconciling for the Future – Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, 2015 at 6. www.trc.ca.

moving towards reconciliation across this land.⁵

I am hopeful that the parties will find a way to move forward to rebuild their relationship and implement Part C, given the profound human rights issues at stake and the importance of relationship to the larger goals of reconciliation. In doing so, I urge them to interpret the

Agreement in the context of the legal pluralism contained within it, including with respect to Indigenous laws and the authority of Indigenous peoples to self-govern. The Agreement between the Complainants and the Vancouver Police Board incorporates aspects of Heiltsuk law and B.C. law, an example of legal pluralism in a contract between a Nation and an agent of the Crown.⁶ The introductory statements to the Agreement include the recognition that:

Heiltsuk First Nation has, since before the time of Heiltsuk contact with Europeans and since before the Crown asserted sovereignty over what is now British Columbia in 1846, exclusively occupied, owned, governed, managed and harvested from their traditional land and marine areas along the central coast, under pre-existing Aboriginal sovereignty and pursuant to Heiltsuk laws...

“I am hopeful that the parties will find a way to move forward to rebuild their relationship”

Ultimately the spirit and intent of the Agreement was to move forward in cooperation to address “systemic issues” in the Vancouver Police Department’s interactions with Indigenous peoples. These are matters of vital importance to Indigenous peoples and to the fulfillment of human rights in this province.

To this end, and in the spirit of the Agreement and the direction of the Truth and Reconciliation Commission’s findings on reconciliation, I strongly urge the parties to refocus their efforts on building a respectful relationship by facilitating an Apology Ceremony that is agreeable to both parties and in accordance with Heiltsuk law so that the important work of Part C can proceed. To facilitate this, I recommend that the leadership of each of the parties involved, as well as personal representatives of the Johnson family, meet in person with an agreed-upon facilitator, within three months, to discuss how to move forward. While lawyers may certainly be present for this conversation, I hope that the parties themselves will engage in dialogue to rebuild their relationship.

I urge the parties to recommit to the purpose of this Agreement rather than getting caught up in legal wranglings. This Agreement represented an important step forward in the relationship between Indigenous peoples and police in this province, with a precedential impact that could stretch far beyond the parties involved. Every public institution and every level of government has committed itself in one way or another to decolonization, and it is time that those words become actions. If we are truly committed to reconciliation and decolonization, this is not an opportunity we can afford to waste.

⁵ Truth and Reconciliation Commission of Canada. *Honouring the Truth, Reconciling for the Future – Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, 2015 at 16-17. www.trc.ca

⁶ See British Columbia Law Institute *Legal Pluralism: Indigenous Legal Orders & Canadian State Law*, September 2023 for further explanation of the role of legal pluralism in B.C.



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536 – 999 Canada Place
Vancouver, BC V6C 3E1
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