

## **PART 7— THE PROFESSIONAL STANDARDS INVESTIGATION OF POLICE-RELATED DEATHS**

### **G. Recent Calls for Reform in British Columbia**

Since Part 9 of the *Police Act* came into force in 1998, it has been the subject of several reviews, leading to proposals for reform, to which I now turn.

#### **1. The Legislative Assembly’s special committee**

Section 51.2 of the *Police Act* requires that a special committee of the Legislative Assembly begin a comprehensive review of Part 9, and the work of the PCC, within three years of Part 9 coming into force.

The special committee was established in August 2001. In its August 2002 report,<sup>1</sup> the committee reported that it had heard from 68 witnesses, had received 28 additional written submissions, and had sent (through the PCC) a questionnaire to 1,043 individual complainants, of whom 268 responded.

The special committee reported that:

A general consensus exists that the police complaint process, as established, is a good one—held out as a model for other jurisdictions around the world. The Committee recognizes that many of the issues identified by witnesses in fact concerned the implementation and application of the Act, rather than the legislation itself (pp. 5–6).

Four main themes emerged from the committee’s public consultations:

- the need to improve public confidence in the complaint process,
- the need to improve the informal resolution process and to use that process more frequently,
- the need for procedural improvements to enhance the fairness of the complaint process for complainants and respondents, and

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<sup>1</sup> *Special Committee to Review the Police Complaint Process, Second Report*, August 2002. See <http://www.leg.bc.ca/cmt/37thparl/session-3/pcp/reports/aug2002.htm>.

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- the need to clarify the role of the PCC.

The special committee made 20 recommendations for amendments to Part 9, and 22 other recommendations. The recommendations that are most relevant to this analysis include the following:

- 5: that a special committee review Part 9, and the work of the Police Complaint Commission, not less than every four years.
- 8: the special committee concluded that s. 55(3) was intended “to allow the Commissioner to intervene in exceptional circumstances that may occur, such as a police ‘cover up’ of a significant public interest matter.” It agreed that the police complaint commissioner “should function primarily as an oversight agent, but that he or she should have adequate discretionary powers to ensure that the police complaint process satisfies the objective of providing police accountability to the public” (pp. 14–15). The special committee recommended that s. 55(3) should be amended as follows:

Despite any other provision of this Act, the Police Complaint Commissioner may inquire into the conduct of a municipal constable, chief constable or deputy chief constable, and may order an investigation whether or not a record of complaint has been lodged.

- 25: that the provisions already contained in s. 54.1 to consider informal resolution processes for public trust complaints be used more frequently.
- 27: that the Police Complaint Commissioner be mandated to encourage informal resolution and mediation.

The Legislative Assembly has not yet acted on any of those proposed amendments.

### **2. The Police Complaint Commissioner’s White Paper**

In his *2003 Annual Report*, Commissioner Ryneveld called for urgent reform of the *Police Act*. He renewed that call in his subsequent report on the RCMP’s external investigation of complaints brought forward by the Pivot Legal Society against members of the VPD. He was particularly concerned that the legislation should impose a duty on police officers to cooperate with investigations, if the civilian oversight process is to retain its legitimacy and credibility.

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He formalized those proposals in his June 2005 White Paper,<sup>2</sup> in which he suggested reforms to the *Police Act*, and appended a draft *Police Complaint Act* which would replace Part 9 as a freestanding statute, to emphasize the separation between his office and other aspects of provincial regulation of municipal policing.

He set out the four fundamental principles that underlay his proposed reforms:

**Civilian oversight**

Free and democratic societies must have effective civilian oversight processes for addressing allegations of individual or systemic breaches of proper police conduct.

**Legislative foundation**

The police complaint commissioner needs a sound legislative foundation that enables the civilian overseer to effectively carry out his or her functions.

**Structural independence of the police complaint commissioner**

After affirming the vital need for the commissioner to be structurally independent from the Executive Branch, he added:

Second, as necessarily implicit in Justice Oppal's recommendations, a Commissioner perceived to be subject to political influence in the method of his appointment, dismissal and resource allocation would lose legitimacy and credibility in the eyes of reasonable members of the public. This would undermine the entire statute. British Columbia would otherwise have to seriously consider turning to the Ontario model of a Special Investigation Unit. This is why, for Justice Oppal, the Commissioner's independence as an officer of the legislature was the *quid pro quo* for even allowing police to investigate themselves (p. 6).

**Regulatory process**

The police complaint process is not a criminal or quasi-judicial process in which an officer is charged, on trial and subject to a criminal proceeding. Rather, it is a regulatory disciplinary process, from which it follows that Part 9 should properly reflect the structures and features of modern regulatory statutes. This includes a duty on respondent officers to cooperate fully with investigating officers.

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<sup>2</sup> See <http://www.opcc.bc.ca/Reports/2005/White%20Paper%20Final%20Draft.pdf>.

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His recommendations that are most relevant to this inquiry include the following:

- S. 9: binding directives would address matters ranging from the duties of persons receiving complaints to the protocols, practices and procedures to be followed by investigating officers in conjunction with the collection of evidence or the taking of statements of witness officers and respondent officers. He added a telling footnote:

For example, on this issue most members of the public would likely assume that when a serious incident takes place in which a police officer causes death or serious injury to a civilian, protocols are in place akin to those in regular investigations, whereby the officer is questioned promptly, and steps are taken to avoid advertent or inadvertent collaboration between officers present at the scene. However, the experience of this office has been that on too many occasions, protocols on such basic investigative matters are either lacking or not followed.

- S. 9: like the existing power that the police complaint commissioner has to order an external investigation, he recommended that there be a similar power to replace the disciplinary authority (i.e., at the adjudicative stage) with an external disciplinary authority, in exceptional circumstances. This power is designed “to be exercised with restraint, and to address situations where a disciplinary authority, by his or her actions, statements or connections with an individual, is reasonably perceived as being incapable of making a fair and impartial decision” (p. 12).
- S. 25: he recommended continuation of the current provisions respecting external investigations, but added the following commentary:

A significant question arising during my deliberations has been whether to recommend that this Office receive the power in exceptional circumstances to conduct independent investigations. Such a power was recommended in the Oppal Commission Report, reinforced in Justice Oppal’s testimony before the Special Committee, acknowledged as a legitimate option by at least one municipal police chief [Victoria] before the Special Committee and proposed by me in my last Annual Report.

I have over the past year had further opportunity to reflect on this question, and in this context I have considered the responsiveness and the quality of the external investigations I have ordered under s. 55.1 of the Act. I can state without hesitation that I have been extremely satisfied with the responsiveness, expertise and quality of the external investigations conducted to date. This informs my present view that,

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on balance, my Office does not need an independent power to investigate if the legislation is amended to:

- create a formal duty in police officers to cooperate with internal and external investigators, and
- reinforce the duty of police departments and the provincial police force [i.e., the RCMP] to conduct external investigations when ordered.

**3. The Police Complaint Commissioner's Green Paper**

In August 2006, in response to reaction to his White Paper, the PCC published a Green Paper entitled *Reform of the Police Complaint Process: Supplementary Report of the Police Complaint Commissioner*.<sup>3</sup> While he affirmed most of his earlier recommendations, he reconsidered his position respecting whether the commissioner should be granted an independent power to investigate complaints. He noted that Justice Oppal had recommended such a power in 1994, but it had been excluded when the *Police Act* was enacted in 1998, in favour of the PCC's powers to order external investigations and to order new investigations.

The PCC summarized the opposing views on the issue:

- The police chiefs stated that such a power would damage the public's confidence in the police, and that "the legislature should be wary of the inadvertent creation of a quasi-investigational body in the Office of the PCC.... Such a shift in philosophy, it is submitted, requires a much broader public policy debate."
- The BC Civil Liberties Association stated that a home police force should never be allowed to investigate police misconduct, particularly in cases involving deaths or critical injuries involving a member of that force. In the case of a death or serious injury of a civilian in police custody, there should always be an independent civilian-led investigation. The PCC should have the discretion to independently investigate a matter where he or she considers there is good reason to do so. An independent investigation power would:
  - Increase public confidence in the complaint process,
  - Act as an incentive for the police to be thorough in their internal investigations,

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<sup>3</sup> See <http://www.opcc.bc.ca/Reports/2006/GreenPaper4.pdf>.

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- Act as a safeguard where both an internal and external investigation are unsatisfactory,
- Increase the confidence of complainants in making complaints, and
- Provide a power that is not dependent on the personalities of the particular individuals who happen to run internal investigation departments.

The PCC concluded that the time had come for the professional standards investigations of death and serious injury cases to be conducted by an agency other than the home police force. The options included:

- An external police force,
- A specialized unit of police officers drawn from municipal police departments and the RCMP, dedicated to independent *Police Act* investigations, or
- The Office of the Police Complaint Commissioner.

While he expressed satisfaction with the quality of past external investigations, he recognized that they sometimes result in financial and personnel hardships for some police departments.

On the other hand, a specialized and integrated unit of police officers, involving specially trained officers acting at arm's length from any particular police department, with a measure of financial contribution from the province, had much to commend it in both principle and practice. He was satisfied that the legislation could easily be crafted to make such a unit automatically responsible for death and critical injury investigations. It could also be activated in other cases, at the instance of the PCC.

He concluded as follows:

If the creation of such a unit is not deemed practicable, the responsibility should fall upon my office, in a fashion akin to what has been proposed for Ontario under Bill 103<sup>4</sup> which was drafted as a result of the *LeSage Report* (April 2005). Consistent with that responsibility, provisions will have to be added to the statute ensuring that the Commissioner is in a

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<sup>4</sup> See *An Act to establish an Independent Police Review Director and create a new public complaints process by amending the Police Services Act*, Bill 103, 2006.

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position to retain a proper team of investigators, and is armed with necessary investigative powers.

**4. The 2007 Josiah Wood Report**

In July 2005, the director of the Police Services Division of the provincial Ministry of Public Safety and Solicitor General appointed former Justice Josiah Wood to address the shortcomings in Part 9 of the *Police Act*, and to make recommendations for improvement. In February 2007, he submitted his report entitled *Report on the Review of the Police Complaint Process in British Columbia*,<sup>5</sup> which included 91 recommendations.

I will now discuss the process Mr. Wood followed, as well as his findings, then summarize his consideration of alternatives to a home police department conducting professional standards investigations, particularly in cases of police-related deaths.

a. Process

His study included three surveys and two audits:

- A public awareness survey of 1,024 residents of the 11 municipalities served by municipal police departments,
- A core area awareness survey of residents of Vancouver, New Westminster and Victoria,
- A police awareness survey of all 2,245 sworn members of the 11 municipal police departments,
- An administrative audit on a randomly selected sample of 294 lodged complaint files that were closed between June 2003 and June 2005, and
- An investigative audit of those same 294 closed files.

Mr. Wood conducted 141 interviews with chief and deputy chief constables, other discipline authorities, professional standards officers, union representatives, the police complaint commissioner and his staff, and other interested parties. In addition, each of the respondents and complainants in the 294 randomly selected audit files were invited to participate in an interview, with an understanding that any information

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<sup>5</sup> See [http://www.pssg.gov.bc.ca/police\\_services/publications/](http://www.pssg.gov.bc.ca/police_services/publications/).

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provided would be treated confidentially. He also reviewed police complaint processes in other Canadian jurisdictions, the work of the 2002 Select Committee and the police complaint commissioner's 2006 White Paper.

### **b. Findings**

The investigative audit showed that 42 percent of the complaint files had investigative deficiencies. Although some of these were minor, 19 percent of the complaint files did not meet the reasonable and appropriate standard imposed by the investigative audit team. Since all but four of these files were serious abuse of authority complaints (e.g., excess force, wrongful search and wrongful arrest), he found these results to be unacceptable, and they became the driving force behind many of his recommendations.

Mr. Wood's analysis began with recognition that in 1998, the Legislative Assembly adopted a police complaint model that left the responsibility for investigating complaints and imposing discipline for proven misconduct with the police, and provided for a civilian authority, independent of government, to oversee the discharge of those responsibilities. In his view, "the results of this review have not persuaded me that it is necessary at this time to change the basic structure of that model" (para. 33). However, he added:

It became obvious early in this review, that the police complaint commissioner had few effective powers with which to ensure that all public complaints were thoroughly investigated and properly concluded. As will be discussed in greater detail later in the report, the power to order a further investigation by an external police department is a poor remedy for an initial investigation that is flawed, and the power to order a public hearing is an equally poor remedy for an erroneous disposition in the case of a complaint that does not raise issues that meet the high public interest standard required to justify engaging that seemingly complex, expensive and generally unsatisfactory process (para. 28).

Based on his analysis of these 294 files (none of which involved a police-related death), he concluded that: "there is an unacceptably high risk that

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the more serious public trust complaints will not either be investigated thoroughly or concluded appropriately” (para. 183).

c. Alternatives

Mr. Wood’s principal concern related to the handling of serious public trust complaints. He considered three different alternatives to the current system under which the home police department conducts the professional standards investigation: a “seconded” investigative unit, an independent investigative unit, and a more active role for the police complaint commissioner:

**A “seconded” investigative unit**

This would consist of police officers drawn from existing municipal police departments, who would conduct what would amount to external investigations of serious public trust complaints. It would be quartered separately, have its own chain of command, and operate independently from any individual municipal police force. If properly equipped and resourced, Mr. Wood felt that such an investigative unit would have the potential to conduct investigations that would be (and appear to be) impartial, with greater consistency in quality and faster disposition rates. However, he concluded that this option was not viable at present, because of cost. Each police force would have to contribute officers to the unit, but would still need to maintain an in-house capacity to investigate less serious complaints. The unit would incur additional costs for separate facilities, equipment and administrative support staff, and relocation costs for some officers. There would be significant travel costs in relation to complaints arising out of the Greater Victoria police forces or, alternatively, establishment of a second facility in Victoria.

**An independent investigation unit**

This would be a stand-alone *civilian* entity, and would require a staff of between six and eight investigators, plus administrative

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staff, premises costs, and other operating and capital costs. Mr. Wood was not attracted to this model, because of similar cost concerns.

### **A more active role for the police complaint commissioner**

Mr. Wood concluded that the results of the investigative audit did not justify removing from police departments the responsibility for *investigating* public trust complaints. A preferable approach would be to increase the *oversight* role of the Office of the Police Complaint Commissioner with respect to the investigation of public trust complaints, without going so far as to make the commissioner responsible for actual conduct of such investigations. In his view, oversight needs to occur during, not after, the investigation, and it must be based on full access to the investigation as it unfolds. Consequently, the role of the police complaint commissioner should be expanded to provide that, at any time after receipt of a record of complaint:

- ◆ The commissioner may review the conduct of an ongoing investigation,
- ◆ Upon consultation with the investigating officer and/or discipline authority, the commissioner may provide such advice and/or direction as necessary to ensure that a full and thorough investigation is conducted,
- ◆ The commissioner must, on an ongoing basis and on request, be afforded full access to the investigative file and any other documents or information in the possession of the police force which may be relevant to that investigation, and
- ◆ The commissioner must have a specific statutory power to order an external investigation in those instances where the advice and/or direction given with respect to an ongoing investigation is not accepted and complied with by the investigator, and to require that the full investigative file be turned over to the new external investigator.

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For these reforms to be effective, it would be necessary for all complaint files to be stored electronically, and for the OPCC to have ongoing electronic access to them. He recommended adoption of the Integrated Police Data Management Application (IPDMA) developed by the Saanich Police Department, with enhancements that would enable the Office of the Police Complaint Commissioner to access this database.

**d. The investigation of in-custody and police-related deaths**

Mr. Wood then directed his attention to circumstances in which a person dies in police custody or as a result of police-related actions (para. 219). There were no such cases among the 294 investigative audit files, so he resorted to BC Coroners Service statistics. Between 2002 and 2004, there were 26 in-custody or police-related deaths in the 11 municipal police department jurisdictions. The PCC received only seven complaints arising out of these deaths, which were cases of police shootings (4), use of the Taser (2) and use of force during arrest (1).

Mr. Wood acknowledged that such deaths are the natural breeding ground for suspicion and distrust, but he was not persuaded “that this category of complaint gives rise to a compelling argument for the establishment of either of those specialized investigative units, particularly if there exists an alternative means by which the requisite degree of accountability can be achieved in such cases” (para. 223).

He recommended that the Act be amended as follows:

- The police complaint commissioner must be given notice of any in-custody or police-related death,
- An external investigation must be conducted in all in-custody or police-related deaths, whether or not a complaint has been lodged in connection with the death,
- All such investigations must be subject to the same contemporaneous oversight powers given to the police complaint commissioner in the case of other public trust complaints, and
- The scope of available external agencies should not be limited to an existing municipal police department or the RCMP (para. 232).

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### **e. Concluding caution**

Mr. Wood was clearly troubled by the policing community's resistance to more robust civilian oversight. In his "Conclusion," he effectively gave the policing community one last chance, by observing that arguments in favour of the police investigating complaints

can prevail only so long as there exists a demonstrated willingness on the part of such management, and all who serve below, to fully accept the authority of civilian oversight. With that in mind and, if the recommendations contained in this report are implemented, I recommend that a further audit of a random sample of closed complaint files, similar to that which was conducted as part of this review, be undertaken three years following the date of such implementation, with a view to determining whether the Part 9 complaint process and civilian oversight model should be retained in this province (para. 353).

### **5. Summary of proposed reforms in British Columbia**

It might be useful to summarize how the issue of the professional standards investigations of police conduct has been considered in British Columbia since the early 1990s, in reports and in legislation:

- In 1994, then-Justice Oppal recommended that police departments continue to conduct professional standards investigations, subject to civilian oversight by a complaints commissioner, who would have the authority to conduct an investigation when the commissioner thought it appropriate.
- In 1998, the *Police Act* continued the practice of police departments conducting professional standards investigations, subject to civilian oversight by an independent police complaint commissioner. The commissioner's oversight would be principally an after-the-fact review, without any power to conduct investigations himself or herself, but with the authority to order that another police department conduct the investigation.
- In 2002, the Special Committee of the Legislative Assembly recommended that the current model of the home police department conducting professional standards investigations continue, but that the PCC's mandate be broadened to "inquire into" the conduct of a municipal police officer.

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- In 2006, the PCC recommended that professional standards investigations of death and serious injury cases should be removed from the home police department, and assigned to a specialized unit of police officers drawn from municipal police departments and the RCMP. If government deemed this alternative impractical, then such investigations should be assigned to the PCC.
- In 2007, former Justice Wood recommended that most professional standards investigations should remain with the home police department, subject to much more real-time oversight and direction by the PCC. However, professional standards investigations of in-custody and police-related deaths should always be conducted externally. Mr. Wood would not limit the scope of external agencies to another municipal police department or the RCMP.