

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

I. Developing a New Approach to the Investigation of Police-Related Deaths

1. Conclusions drawn from this analysis

Based on my review of this issue, as discussed above, I have reached several conclusions.

First, I have not conducted the wide-ranging inquiry into professional standards investigations that Mr. Wood did, and it would consequently be inappropriate for me to comment on the overall architecture of Part 9 of the *Police Act*. I will limit my analysis to professional standards investigations arising out of police-related deaths, such as occurred after Frank Paul's death.

Second, it is timely that I should contribute to the public discussion on this issue, given this inquiry's examination of how the professional standards investigation was carried out in the Frank Paul case (including pleas from several participants for reforms), and given the provincial government's stated intention to introduce amendments to Part 9 of the *Police Act*. In the February 12, 2008, Speech from the Throne,¹ the government's intention was articulated as follows:

Amendments to the *Police Act* will aim to implement Josiah Wood's recommendations to improve transparency, accountability and public confidence in the police complaints process.

Third, if my recommendations respecting criminal investigations of police-related deaths (see Part 6 of this report) are implemented, then that may well have an impact on how professional standards investigations of such cases should be conducted. Let me explain what I mean.

As I discussed in Part 6, conflict of interest and divided loyalties are the Achilles heel of the police (and especially the home police department) conducting

¹ See <http://www.leg.bc.ca/hansard/38th4th/H80212p.htm>, p. 9627.

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criminal investigations of police-related deaths. In my view, the same problem permeates professional standards investigations.

Earlier in this part, I summarized several British Columbia reports that have recommended reforms to the police complaints system. My reading of those reports satisfies me that everyone acknowledges that conflict of interest pervades the current regime, and that the development of our civilian oversight system has been a reaction to that reality. Although it has not been articulated in quite this way, British Columbia's approach to police complaints has been to say: "We recognize that there is a conflict of interest in the police conducting professional standards investigations of themselves but, rather than eliminate the conflict, we will put in place a civilian oversight system to act as a watchdog."

Having confronted the conflict of interest issue in Part 6 of this report, I feel compelled to do so again in this part, at least to the extent that it applies to professional standards investigations of police-related deaths.

How, then, should professional standards investigations of police-related deaths be conducted? To answer that question, we need to go back to the criminal investigation of those same deaths. If they are conducted in a competent manner that eliminates any risk of conflict of interest, then they should result in thorough and impartial reports, and in equally competent, thorough and impartial decisions about whether criminal charges will be laid. If that happens, then the focus of subsequent professional standards investigations should be significantly narrower than at present. Before turning to that issue, I will comment on "the duty to cooperate."

2. The duty to cooperate

A central issue in the ongoing debate about the investigation of police complaints relates to a police officer's duty to cooperate. Mr. Wood summarized the history surrounding this issue at paragraphs 154–172 of his report.

As discussed in Part 6 of this report, my review of the practice within the VPD leads me to conclude that an accommodation has been reached between the union and management respecting the extent to which a respondent police officer

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must cooperate in a criminal investigation and in a subsequent professional standards investigation arising out of a police-related death.

A single policy appears to apply to both types of investigations—the respondent officer *may* (but is not required to) agree to be interviewed by the investigating officer, but *must* complete a written duty report which sets out the officer’s involvement in the incident. The respondent officer normally has up to five business days to complete the duty report, which is often completed with the assistance of a union representative and legal counsel.

This policy and practice is, in my view, problematic. On the one hand, it imposes a duty on the respondent officer to give a written statement to the investigating officer in the criminal investigation, when no such duty is imposed generally on a person who is the subject of a criminal investigation. On the other hand, it does not require the respondent officer to cooperate fully in the professional standards investigation (for example, by being interviewed or by being required to produce all relevant documents under the officer’s control), contrary to the standard that exists in most self-governing professions.²

In the context of professional standards investigations, I agree with the PCC’s view, set out at page 24 of his White Paper:

It is in my view inappropriate for respondent officers to be protected from the usual obligation to provide evidence in a regulatory discipline process. As made clear in the preamble to this White Paper, the police complaint process is not properly understood to be a quasi-criminal proceeding. It is an error to assume that respondents have, or that the process requires the respondent to have, the right to remain silent. The discipline process is a civil regulatory proceeding. As with other civil proceedings and modern regulatory statutes dealing with professional conduct, the obligation to respond promptly, fully and truthfully to allegations of misconduct is a

² For example, in *McPherson v. Institute of Chartered Accountants of British Columbia* (1988), 55 B.C.L.R. (2d) 286 (B.C.C.A.) the Court upheld the institute’s practice review and licencing rules, including the rule empowering the practice review officer to examine and take copies of documents including client files. The rules violated neither sections 7 nor 8 of the Charter. See also *Greene v. Law Society of British Columbia* (2005), 40 B.C.L.R. (4th) 125 (B.C.S.C) and *College of Physicians and Surgeons of British Columbia v. Bishop* (1989), 56 D.L.R. (4th) 164 (B.C.S.C.). In *James v. Law Society of British Columbia* (1982), 143 D.L.R. (3d) 379 (B.C.S.C.), the court ruled that disciplinary proceedings were civil in nature and consequently the member was a compellable witness. This constituted neither a breach of natural justice, nor a contravention of s. 11 of the Charter (which applied only to criminal matters). See also *British Columbia (Securities Commission) v. Branch* (1992), 123 D.L.R. (4th) 462 (S.C.C.).

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legal and ethical duty properly attached to the privilege of being a professional.

To the PCC, the duty to cooperate has several dimensions. It encompasses a duty to cooperate during the professional standards investigation itself and, as well, during the commissioner's oversight of that investigation. It includes an obligation to make and preserve records about an incident in accordance with directives issued by the PCC, a duty to promptly produce documents when requested by the PCC, and a duty to attend before the PCC's counsel for an interview prior to a public hearing (unless the officer is the respondent officer). Failure to comply with these requirements would constitute the disciplinary default of neglect of duty.³

In his 2007 report, Mr. Wood endorsed the commissioner's analysis, and made several recommendations including proposed amendments to the *Police Act* respecting the duty to cooperate:

29. Part 9 be amended to provide that every municipal constable, chief constable and deputy chief constable has a duty to cooperate fully with any investigation conducted under Part 9 of the Act.
30. Part 9 be further amended to provide that every municipal constable, chief constable and deputy chief constable has a duty to cooperate with the police complaint commissioner, and his properly delegated staff, in the exercise of the powers and duties of that office under Part 9 of the Act.
31. Division 4 of Part 9 be amended by adding a section containing an express duty on the part of respondent or witness officers to provide a statement, and to submit to an interview, within 5 days of being called upon to do so by an officer conducting an investigation into a public trust complaint, such deadline to be subject only to a discretion on the part of the discipline authority, in special circumstances, to grant an extension.
32. Division 4 of Part 9 be further amended to provide that any statement so provided shall be admissible in any proceedings under the *Police Act*, but cannot, under any circumstances, excepting a prosecution for perjury, be admitted into evidence in any civil or criminal proceeding.

³ See White Paper, p. 14, and section 14 of the PCC's draft *Police Complaint Act*.

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33. Section 5 of the *Code of Professional Conduct Regulation* be amended to provide an additional category of discreditable conduct in the form of a failure to cooperate with any investigation or a failure to provide a statement or to submit to an interview when called upon to do so by an investigating officer.
34. Part 9 of the Act be amended by adding thereto a section which provides that a justice of the peace, who is satisfied by information on oath that there are reasonable grounds to believe that there is in a building, receptacle or place anything that there are reasonable grounds to believe will afford evidence with respect to the commission of a disciplinary default under the *Code of Professional Conduct Regulation* may, at any time, issue a warrant authorizing a discipline authority or a municipal constable, chief constable or deputy chief constable conducting any investigation under Part 9 to search the building, receptacle or place for any such thing and to seize it. Such a provision should be accompanied by the usual safeguards relating to the custody, preservation and ultimate disposal of such evidence following conclusion of the investigation in question.

I agree with these recommendations.

Recommendation 34, above, recommends an administrative search warrant provision, as the PCC had proposed in his White Paper. While I do not question the appropriateness of such a provision, consideration might also be given to imposing a duty on a police officer to produce to an investigator, when demanded, all notes, reports or other documents, or information in any other form, either created by or in the possession or control of the officer that are relevant to the incident.

3. The nature of the professional standards investigation

If every police-related death becomes the subject of a criminal investigation, *and* if every such investigation is conducted independently by an entity such as the IIO proposed in Part 6 of this report, *and* if witness officers are required to cooperate fully in the investigation, then the criminal investigation report should set out all the relevant facts, including statements from civilian and police officer witnesses. In that case, the subsequent professional standards investigation would, in most cases, focus on three matters:

- obtaining information from the respondent officer about the incident,

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- making a determination whether a disciplinary default has occurred, and
- if a disciplinary default has occurred, deciding on an appropriate disciplinary measure.

4. Alternative organizational approaches

Having thus identified the principal responsibilities of the investigator in a professional standards investigation of a police-related death, I turn now to a consideration of the various organizational alternatives for the conduct of such investigations. Professional standards investigations could be conducted:

- by the home police department, subject to much more real-time oversight and direction by the PCC,
- by another police department, the RCMP or some other external agency,
- by a specialized unit of police officers drawn from municipal police departments and the RCMP, or
- by the PCC.

a. Police-based professional standards investigations

All three police-based alternatives noted above (the home department, another police department, or a specialized unit of police officers drawn from municipal police departments) give rise to a common concern—they are instances of the police investigating themselves.

Given this concern, the risk of divided loyalties tainting a professional standards investigation is reduced if the underlying *criminal* investigation is done by a civilian entity (such as my proposed Independent Investigation Office) and if there is a duty on the respondent officer to cooperate fully in the professional standards investigation. If the officer conducting the professional standards investigation is required to prepare a thorough report summarizing all investigative measures taken and giving detailed reasons for the investigator's decisions, then the process is transparent and thus susceptible to effective oversight by the PCC.

I am not persuaded, however, that even in these circumstances, there would be general public acceptance of the police investigating themselves.

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As noted in Part 6, that concern would be highest if the home police department conducted the investigation, and would become less so, if the investigation was assigned to another police department or to a specialized unit of police officers.

In my view, it is absolutely necessary for the public to have confidence in professional standards investigations of police-related deaths. I note that a public awareness survey conducted as part of Mr. Wood's study found that only 55 percent of those responding were confident (42 percent) or very confident (13 percent) with the existing process for handling complaints against the police.⁴ I am reluctant to recommend any regime that would perpetuate the current practice of the police investigating themselves in the most sensitive of such cases—police-related deaths.⁵

b. Civilian-based professional standards investigations

The alternative to a police-based professional standards investigation of police-related deaths is for the PCC to conduct such investigations. On balance, I favour this approach. It eliminates all concerns about conflict of interest, and it should not place an inordinate load on the commissioner, if my estimate of the number of police-related deaths per year (see Part 6) is accurate.⁶

In advocating this approach, I recognize that it necessitates a qualitative change to the role of the PCC—the overseer now becomes the investigator. The commissioner would assume, in such cases, many of the powers and responsibilities of the “discipline authority” (currently the chief constable

⁴ See Wood Report, Appendix E: *Report on the Public Awareness Survey Conducted for the Review of the Police Complaint Process in British Columbia*, p. 8. Of the remaining 45 percent of respondents, 5 percent were not confident at all, 13 percent were not very confident, and 27 percent were neutral. According to the study, the sample of 1,024 yielded a margin of error of ± 3 percentage points 19 times out of 20.

⁵ However, if it is ultimately decided that a police-based entity should conduct professional standards investigations of police-related deaths, then I endorse Mr. Wood's suggestion that the PCC's oversight needs to occur during, not after, such investigations, and that it must be based on full access to the investigation as it occurs. For such oversight to occur, all complaint files would need to be stored electronically, and the PCC's staff would need to have ongoing electronic access to them.

⁶ While I do not wish to downplay the amount of time and resources that the PCC will need to devote to such professional standards investigations, they will be offset by the PCC no longer having to oversee a police department's professional standards investigation of such cases including, in some instances, a public hearing.

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or his or her designate), including the responsibility to determine whether a disciplinary default has occurred and, if so, an appropriate disciplinary measure (perhaps after consultation with the chief constable, as in Manitoba).

It also raises the question of the extent to which those affected by the PCC's decisions in cases of police-related deaths (i.e., the respondent officer, the home police department and any third-party complainant) should have an avenue to review those decisions.

I do not think it would be appropriate for me to engage in a detailed examination of this issue, given Mr. Wood's exhaustive study of all aspects of the Part 9 scheme and his detailed recommendations for reform, including creation of a new streamlined "public review" process as an alternative to a full public hearing. I will say that I am satisfied that the PCC and his staff would bring competence and impartiality to bear when conducting professional standards investigations arising from police-related deaths. That confidence extends to the PCC's decisions about whether a disciplinary default has occurred and, if so, an appropriate disciplinary measure. If the PCC and his staff have been given the legislative mandate to oversee such investigations, surely they have the necessary competence to conduct them in the first instance.

However, given my recommendation that this small subset of professional standards investigations should be conducted by the PCC (and not by an external police department as proposed by Mr. Wood), it may be necessary to refine Mr. Wood's recommendations insofar as they apply to police-related deaths. For example, there may be circumstances in which a third-party complainant should have an opportunity to review the PCC's decision about the disciplinary measures imposed on an officer arising out of a police-related death.