

PART 10

POSTSCRIPT— POLICE INVESTIGATING THEMSELVES

PART 10: POSTSCRIPT – POLICE INVESTIGATING THEMSELVES

**PART 10: POSTSCRIPT –
POLICE INVESTIGATING THEMSELVES**

| | | |
|----|---|-----|
| A. | INTRODUCTION | 411 |
| B. | RECENT CALLS FOR REFORM..... | 412 |
| C. | PROPOSALS FOR A CIVILIAN-BASED INVESTIGATIVE BODY | 413 |
| 1. | The Davies model | 413 |
| 2. | Proposed enhancements to the Davies model..... | 414 |
| a. | Applicability to all of British Columbia | 415 |
| b. | Mandate | 415 |
| c. | Competence of investigators | 418 |
| d. | Charge assessment..... | 420 |
| D. | RECOMMENDATION | 422 |

PART 10: POSTSCRIPT – POLICE INVESTIGATING THEMSELVES

A. INTRODUCTION

In Part 8, I discussed the RCMP's release of inaccurate information to the public about the Dziekanski incident soon after it happened and the decision that was made a few days later not to immediately correct the public record. I concluded that the intense public reaction against the RCMP's handling of its media response arose because the RCMP's Integrated Homicide Investigation Team was conducting the investigation to determine whether any RCMP officers should be charged criminally, and there were suspicions that inaccurate information was released deliberately in order to cast the officers' conduct in a more favourable light.

It was a case of the police investigating themselves, which gives rise to legitimate concerns about conflict of interest. Many members of the public perceive that the investigators may allow loyalty to fellow officers to interfere with the impartial investigative process. This perception, even if not justified in a given case, can lead to public distrust and an undermining of public confidence in the police.

When testifying during our evidentiary hearings, Supt. Rideout, who was at the time of Mr. Dziekanski's death the officer in charge of IHIT, was asked for his opinion about whether the RCMP should have been investigating its own officers in the Dziekanski matter. He stated:

And I think they were asked to do a very difficult job and [it] was very difficult. You know, we're not good at this. Let's be, let's just cut to the, like, we shouldn't be doing this. My, that's my opinion. I make no bones about it to the management. Time for an SIU in this province. We can't win this one. It's only going to get worse. We cannot market the RCMP and do an independent investigation at the same time, it can't be done.³⁰⁶

Supt. Rideout's reference to "SIU" was a reference to Ontario's Special Investigations Unit, an independent, civilian-led investigation agency established in 1989 to investigate police-related deaths and serious injuries. A similar civilian-led

³⁰⁶ Transcript, September 22, 2009, pp. 88-89.

investigative body was recently established in Alberta (the Alberta Serious Incident Response Team), and one has been recommended in Manitoba and Nova Scotia.

In British Columbia, my former judicial colleague William Davies, Q.C., undertook a detailed review of this issue during the Frank Paul Inquiry, and he recommended that British Columbia establish a civilian-based investigative agency modelled on Ontario's SIU.³⁰⁷ Because of Mr. Davies' limited mandate, his recommendation extended only to the 12 BC municipalities policed by 11 municipal police departments.

It should be emphasized that what is under consideration here is *criminal investigations* to determine whether a police officer should be charged with a criminal offence that would be prosecuted through the criminal courts. That process is to be contrasted to *professional standards investigations* that, if substantiated, would lead to internal disciplinary measures, such as suspension. Professional standards investigations are overseen by the provincial Office of the Police Complaint Commissioner (for municipal police officers) and by the federal Commission for Public Complaints Against the RCMP (for RCMP officers).

B. RECENT CALLS FOR REFORM

Since Mr. Davies' February 2009 recommendation for a civilian-based investigative body, three significant events have dramatically altered the landscape:

- In August 2009 the Commission for Public Complaints Against the RCMP recommended that the investigation of all police-related deaths should be referred to an external police service or to a provincial criminal investigative body, and that such a procedure also be considered in police-related serious injuries and sexual assaults.
- In September 2009 the British Columbia Association of Chiefs of Police (which includes the RCMP) recommended a new, independent, provincially established unit to investigate deaths or serious injuries involving police officers, which would be led by a civilian, with police

³⁰⁷ See the report of the Davies Commission of Inquiry into the Death of Frank Paul, *Alone and Cold*, Part 6, pp. 199-242.

officers seconded from police departments conducting the investigations.

- In February 2010 RCMP Commissioner Elliott announced a new policy applicable to police-related serious injuries and deaths, and other criminal matters that are of a serious or sensitive nature. In these circumstances, the RCMP will refer the investigation to a provincially or federally established regime. Where no such regime has been established, the RCMP will request that an external law enforcement agency or other duly authorized investigative agency conduct the investigation.

It is gratifying indeed that within a year of Mr. Davies' bold call for reform, all of British Columbia's municipal police departments, and the RCMP nationally, have committed themselves to this profoundly important reform. The debate is no longer whether British Columbians should have a civilian-based investigative body, but what it should look like.

C. PROPOSAL FOR A CIVILIAN-BASED INVESTIGATIVE BODY

1. The Davies model

I have carefully reviewed Mr. Davies' recommendations for a civilian-based investigative body, and the reasons for them. I agree with him that British Columbia should establish such an investigative body, and that it ought to be modelled on Ontario's Special Investigations Unit.

Mr. Davies' proposed model is described in his recommendations, which I reproduce below:

4. I recommend that British Columbia develop a civilian-based criminal investigation model for the investigation of police-related deaths occurring in the municipalities policed by the 11 municipal police departments.
5. I recommend that the initial mandate of this organization (which I suggest be named the Independent Investigation Office (IIO)) include a wide variety of factual circumstances including (but not limited to) a death in a police department jail cell, a death resulting from an officer's use of force or a motor vehicle, or a death arising from some other form of police interaction with the deceased.

PART 10: POSTSCRIPT – POLICE INVESTIGATING THEMSELVES

6. I recommend that the IIO be accountable to the Ministry of Attorney General.
7. I recommend that the IIO be led by a director appointed by Order-in-Council for a fixed term of five or six years.
8. To ensure the IIO's unquestioned authority to act, I recommend that its essential powers be entrenched in legislation, such as:
 - the IIO director and investigators have the status of peace officers,
 - the chief constable of the jurisdiction in which a police-related death occurs must immediately advise the IIO of the incident,
 - pending arrival of the IIO at the incident scene, the chief constable must ensure that the scene is secured and that officers involved in the incident are segregated from each other,
 - officers involved in the incident must not communicate with each other about the incident, except as authorized by the IIO,
 - the IIO becomes the lead investigative agency, and the home police department has no investigative responsibility or authority, except as granted by IIO,
 - a witness officer must promptly make himself or herself available for an interview with the IIO investigator, and must promptly deliver to the IIO all notes, reports and other investigative materials relevant to the incident, and
 - a respondent officer may be – but is not compelled to be – interviewed by the IIO, and must in all cases promptly deliver to the IIO all notes, reports and other investigative materials relevant to the incident.
9. I recommend that the director recommends to the Criminal Justice Branch whether criminal charges should be laid, and if so, which charges, involving which officer or officers.
10. I recommend that the provincial Ombudsman have jurisdiction over the IIO.

2. Proposed enhancements to the Davies model

As I noted earlier, the landscape has changed significantly since Mr. Davies made his recommendations, and for that reason I have concluded that there is a need for several enhancements to his proposals.

a. Applicability to all of British Columbia

In light of the RCMP's new national policy to refer all serious police-related incidents to a provincially established investigative regime (where there is one), the civilian-based investigative body proposed for British Columbia must have province-wide jurisdiction; that is, in the 12 municipalities policed by the 11 municipal police departments, as well as in all the other municipalities and in all unorganized areas of the province that are policed by the RCMP under contract to the province.

b. Mandate

Mr. Davies explained (at p. 217) his rationale for limiting his recommendations to police-related deaths:

Throughout this report I have limited my discussion to police-related *deaths*. I appreciate that it is sometimes only good fortune that separates serious injury from death, and that the conflict of interest that jeopardizes the integrity of police-related death investigations applies with equal force to investigations of police-related serious injuries. I note that in Ontario the mandate of the Special Investigations Unit extends to serious injuries and deaths involving municipal police (as well as the Ontario Provincial Police), and this mandate has been interpreted to include firearms injuries and deaths, custody injuries and deaths, motor vehicle injuries and deaths, and sexual assault.

I have decided not to include the investigation of police-related serious injuries in my recommendations for several reasons. First, the fact pattern that was before me involved a police-related death. I concluded that conflict of interest probably contributed to what I find to be an unsatisfactory criminal investigation in that case, and I am willing to extrapolate from that incident the existence of a risk that conflict of interest could taint other police-related death investigations. However, without a firmer evidentiary basis, it would be imprudent for me to extrapolate any farther, to cases of serious injuries.

Second, while I am confident that a new system is required and should be established for all municipal police departments without delay, there is merit in proceeding incrementally when it comes to defining the mandate of this new system. Prudence suggests that we begin with the most serious category of cases first. Then, after developing policies and practices, and gaining valuable on-the-ground experience, the decision can be made whether the mandate should be broadened and, if so, how much.

PART 10: POSTSCRIPT – POLICE INVESTIGATING THEMSELVES

Persuasive as those reasons were at that time, the RCMP's new policy requires a reconsideration of what the proposed new investigative body's mandate should be. According to the RCMP, it will request an independent external investigation whenever:

- there is a serious injury or death of an individual involving an RCMP employee, or
- when it appears that an employee of the RCMP may have contravened a provision of the *Criminal Code* or other statute and the matter is of a serious or sensitive nature.

Logic dictates that the breadth of the mandate of the proposed new investigative body ought to be at least as extensive as the categories of offences that the RCMP wishes to refer to that body.

The RCMP's new policy is acknowledged to be an interim measure, and there will be ongoing consultation with provincial partners to provide for independent investigation and to support new legislative initiatives to enhance this important aspect of police accountability. With that in mind, in my view, there are several aspects of the RCMP's new policy that ought to be given greater specificity for a very practical reason. When a police-related incident occurs, the chief constable or commanding officer of the RCMP must be able to make an immediate determination whether it is the type of incident that must be referred to the independent investigative body; in other words, the circumstances in which discretion must be exercised should be eliminated as much as possible.

Consequently, in my view, the legislation establishing the proposed new investigative body should address the following matters.

i. Police-related incidents – this is descriptive, but not particularly precise. Mr. Davies (speaking only of deaths) fleshed it out to encompass a wide variety of factual circumstances including (but not limited to) incidents in a police department jail cell, an incident resulting from an officer's use of force or a motor vehicle, or an incident arising from some other form of police interaction with the subject. I am attracted to recent amendments to the

*Police Act*³⁰⁸ that have taken a different approach in articulating the types of matters that must (in most cases) be referred to an external police force for professional standards investigations:

- (a) a person dies or suffers serious harm
 - (i) while in the custody or care of a member of the municipal police department, or
 - (ii) as a result of the operations of that municipal police department, or
- (b) a person dies or suffers serious harm and the death or serious harm could be seen to be the result of
 - (i) the conduct of any member of the municipal police department, or
 - (ii) the operations of that municipal police department.

ii. Serious injury – The RCMP policy does not define this term. I am again attracted to the *Police Act*'s definition of "serious harm:"

"serious harm" means injury that

- (a) creates a substantial risk of death,
- (b) causes serious disfigurement, or
- (c) causes substantial loss or impairment of mobility of the body as a whole or of the function of any limb or organ.

iii. Other serious matters – the RCMP policy includes incidents in which an RCMP officer may have contravened a provision of the *Criminal Code* or other statute and the matter is of a serious or sensitive nature. This general language leaves much discretion to the commanding officer to decide whether the incident must be referred to the provincial investigative body – for example, what about an off-duty officer stopped for impaired operation of a motor vehicle, found in possession of marijuana, or accused of threatening a spouse? I appreciate that it is not possible to specify all the types of incidents that should be referred to the investigative body. Inevitably, it will be necessary to be as precise as possible, recognizing that discretion will have to be exercised to some extent. It seems to me that what is at stake here is public confidence in the police – if the decision of a home police department to conduct the criminal investigation may, in the minds of reasonable, informed members of the public, undermine confidence in the police, then the investigation ought to be referred to the independent investigative body.

³⁰⁸ *Police (Misconduct, Complaints, Investigations, Discipline and Proceedings) Amendment Act, 2009* (Bill 7 - 2009), s. 89(1).

c. Competence of investigators

Mr. Davies was alive to this concern, stating (at pp. 219-220 and 234-235):

One of the arguments that has been advanced historically to justify keeping the investigation of police-related deaths in-house (or at least within a neighbouring police department) is that they can be complex, requiring the special training and skills that only experienced police officers possess. For example, evidence must be collected and preserved, and statements from suspects must be taken, in a manner that will render them admissible at trial.

While I agree that competence is crucial and that using currently serving experienced homicide investigators would promote competency, other jurisdictions have found other ways to address this concern, such as through specialized training programs and the employment of former or retired police officers for some purposes....

I am satisfied that a civilian-based investigation team model eliminates concerns about conflict of interest and, with adequate resourcing, can conduct competent criminal investigations. Although the situation in British Columbia is significantly different from that in Ontario, we can learn much from SIU's growing pains. I am impressed with Mr. Adams' conclusion in his 2003 report, quoted earlier, that "all police and community representatives framed their proposals as intended to improve the SIU, not to replace it."

This is probably the most controversial aspect of the proposed new approach. Many in the policing community contend that only experienced police officers have the special training and skills required to competently conduct these sensitive criminal investigations. Others argue that these investigative skills can be taught or can be found in other investigative bodies, such as the military, government enforcement agencies, or self-governing professions.

In Ontario, the director of the Special Investigations Unit cannot be a current or former police officer, and investigators cannot be currently serving police officers. Former police officers may be hired as investigators, but they cannot investigate officers from their former police force. At the time Mr. Davies wrote his report, all three full-time investigative supervisors were former police officers, as were just under half of the full-time investigators. In 2008, the Ontario Ombudsman found that these former officers were steeped in police culture, and he stated that it was critical

that SIU move swiftly away from the police ties that continue to hold it back from being a truly civilian oversight body.

In Alberta, the Alberta Serious Incident Response Team is led by a civilian director who is a lawyer and Crown prosecutor. Reporting to the director are a civilian assistant director, two civilian criminal analysts, four civilian investigators, and ten sworn police officers seconded from the Calgary and Edmonton municipal police departments and from the RCMP.

While Mr. Davies called for a civilian director, he made no specific recommendations respecting the professional backgrounds of the investigators.

I share Mr. Davies' view that the proposed independent investigative body can, if properly resourced, perform competently without reliance on police officers to serve as investigators. In my view it must, if it is to address the public's distrust of the police investigating themselves.

My only concern centres around timing – how quickly can British Columbia realistically develop an independent investigatory body that is, through and through, civilian? This is a profoundly important reform that must be done right, and if that takes some time, so be it. At the end of the day, this investigative body should, in my view, be entirely civilian. By that I mean that none of its management, supervisory staff, or investigators should have served anywhere in Canada as a police officer. I suggest that five years be the time frame within which that goal is achieved.

Between now and then, two interim measures are necessary:

- **Staffing** – from the day this new investigative body opens its doors, it will be operational, and it will have to be capable of responding immediately as police-related incidents are referred to it. For that reason, it may not be possible to initially staff the body completely with civilians. If that happens, in my view it would be acceptable, as a transitional measure, to employ former police officers, provided that:
 - they have not served as a police officer in British Columbia within the preceding five years,
 - they take no part in any investigation relating to a law enforcement agency in which they were employed,

PART 10: POSTSCRIPT – POLICE INVESTIGATING THEMSELVES

- they constitute no more than a minority of the investigators who are assigned to a particular investigation, and
- their employment with the IIO expires by the end of the five-year transitional period.
- *Training* – depending on the skills and experience of candidates who apply for employment as investigators, it may be necessary to develop, through the Justice Institute, specialized training programs in matters such as investigative techniques, and scene of crime and other forensic analysis.

d. Charge assessment

In British Columbia, prosecutors in the Criminal Justice Branch of the Ministry of Attorney General decide whether criminal charges will be laid, based on the reports they receive from the investigating police officers. In normal circumstances, those charge assessment decisions are made at the local level. However, as Mr. Davies discussed in his report (at pp. 209-210), the practice is different in police-related incidents. The Branch policy states:

In order to ensure that there is no perception of a conflict of interest and to maintain public confidence in the administration of criminal justice, the charge assessment decision on an allegation against a peace officer must be made by either Regional Crown Counsel or the Director, Legal Services.

Regional Crown Counsel should make the charge assessment decision unless concerned that there could be an objectively reasonable perception of a conflict of interest or that the maintenance of public confidence in the administration of justice requires that the decision should be made at Headquarters. In either case, the matter should be referred to the Director, Legal Services for a charge assessment decision, pursuant to the procedure set out below.

Where there is an allegation that a peace officer's actions caused death, the policy requires that the Director, Legal Services provide a copy of the material to the Assistant Deputy Attorney General.

As noted earlier, Mr. Davies recommended that the director of the proposed new Independent Investigation Office would recommend to the Criminal Justice Branch whether criminal charges should be laid, and if so, which charges, involving which officer or officers. He added (at p. 240):

The question of whether the director should be the one to approve criminal charges – rather than Crown Counsel – is an important one. I understand this to be the practice in Ontario, although I appreciate that in Ontario (as in most provinces), the police determine who is charged criminally – while in BC that determination is left to Crown Counsel. Because I have not had input on this issue from the Criminal Justice Branch, I may reconsider this recommendation if, at the conclusion of the litigation involving the branch, further information persuades me that a different approach is necessary. I reserve the right to consider, for instance, whether the IIO director should approve criminal charges, and also to what extent special prosecutors should be employed in such cases.

As indicated, in Ontario the director of SIU decides whether criminal charges will be laid against a police officer. When the director approves charges, the prosecutions are conducted by a Crown attorney in the Justice Prosecutions section of the Ministry of the Attorney General, which is responsible for prosecuting those in the justice system who are charged by any authority.

In Alberta, the director of the Alberta Serious Incident Response Team reviews the results of each investigation to ensure completeness and fairness. A report is then forwarded to the office of the Crown prosecutor, requesting an opinion on charges. The director will, after reviewing that opinion, decide what charges, if any, will result from the investigation.

Two issues arise. Who should make the charge assessment decision? If charges are approved, who should prosecute the police officer? In considering these questions, I return again to the pivotal concerns about conflict of interest, public distrust, and an undermining of public confidence in the police and in our justice system. In light of the explicitly stated concerns about perceptions of conflict of interest in the Criminal Justice Branch's policy cited earlier, it would in my view be inappropriate for lawyers within that branch to make charge assessment decisions in police-related incidents. In such sensitive matters, it only takes a perception of conflict of interest to undermine public confidence. I am also uncomfortable with the director of the independent investigative body making charge assessment decisions. British Columbia has a long and respected tradition of keeping the police investigatory and the quasi-judicial

charge assessment roles separate. It would in my view be a regrettable blurring of those roles for the director of the independent investigatory body to make charge assessment decisions.

For these reasons, I have concluded that in every police-related incident that is assigned to the proposed independent investigatory body, a special prosecutor should be appointed in accordance with the *Crown Counsel Act*, R.S.B.C. 1996, c.87. The special prosecutor should make the charge assessment decisions and should, if charges are approved, assume conduct of the prosecution.

D. RECOMMENDATION

In preparing my recommendation, I have adopted Mr. Davies' framework and have made changes to it that I consider necessary in light of the changed landscape I discussed earlier.

Recommendation 8

I recommend that:

- a. British Columbia develop a civilian-based criminal investigative body, which I suggest be named the Independent Investigation Office (IIO).
- b. The IIO be mandated to investigate all police-related incidents occurring throughout the province, in which:
 - “police-related incidents” include, but are not necessarily limited to, incidents:
 - in which a person dies or suffers serious harm:
 - i. while in the custody or care of a municipal police officer or RCMP officer, or
 - ii. the death or serious harm could be seen to be the result of the conduct of any municipal police officer or RCMP officer, or
 - which involve possible contravention, by a municipal police officer or RCMP officer, of:
 - i. any provision of the *Criminal Code*, or

- ii. any other federal or provincial statute that, if the incident were investigated by a police officer, might in the minds of reasonable, informed members of the public undermine confidence in the police.
- “serious harm” means injury that:
 - creates a substantial risk of death,
 - causes serious disfigurement, or
 - causes substantial loss or impairment of mobility of the body as a whole or of the function of any limb or organ.
- c. The IIO be accountable to the Ministry of Attorney General.
- d. The IIO be led by a director who is neither a current nor former police officer, appointed by Order-in-Council for a fixed, renewable term of five or six years.
- e. No member of the IIO shall have served anywhere in Canada as a police officer.
- f. Notwithstanding para. (e), during the first five years of operations, the IIO may include as members former police officers, provided that:
 - they have not served as a police officer in British Columbia, within the preceding five years,
 - they take no part in any investigation relating to a law enforcement agency in which they were employed,
 - they constitute no more than a minority of the investigators who are assigned to a particular investigation, and
 - their employment with the IIO expires by the end of the five-year transitional period.
- g. To ensure the IIO’s unquestioned authority to act, its essential powers be entrenched in legislation, such as:
 - the IIO director and investigators have the status of peace officers,
 - the chief constable or commanding officer of the RCMP of the jurisdiction in which a police-related death occurs must immediately advise the IIO of the incident,
 - pending arrival of the IIO at the incident scene, the chief constable or commanding officer of the RCMP must ensure that

PART 10: POSTSCRIPT – POLICE INVESTIGATING THEMSELVES

- the scene is secured and that officers involved in the incident are segregated from each other,
- officers involved in the incident must not communicate with each other about the incident, except as authorized by the IIO,
 - the IIO becomes the lead investigative agency, and the home police department or RCMP has no investigative responsibility or authority, except as granted by IIO,
 - a witness officer must promptly make himself or herself available for an interview with the IIO investigator, and must promptly deliver to the IIO all notes, reports, and other investigative materials relevant to the incident, and
 - a respondent officer may be – but is not compelled to be – interviewed by the IIO, and must in all cases promptly deliver to the IIO all notes, reports, and other investigative materials relevant to the incident.
- h. In every police-related incident assigned to the IIO, a special prosecutor be appointed in accordance with the *Crown Counsel Act*.
- i. The provincial Ombudsman have jurisdiction over the IIO.