

A Call to Modernize Police Accountability: An Evaluation of the Law's Response to Excess Use
of Force by Police in British Columbia

by

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Bachelor of Arts, University of Victoria, 2009

Juris Doctor, University of Victoria, 2017

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Supervisory Committee

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Abstract

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When a police officer exercises their statutory authority to use force against a member of society, and that force results in death, the public must have confidence that the police acted legitimately. The inquiry this thesis facilitates examines current police oversight law that purports to hold police accountable in circumstances of police-involved death in British Columbia. The research is motivated by two assertions:

1. The government's response to reform the investigatory and legal processes for the determination of allegations of police-involved death is inadequate; the resulting police oversight regime is too complex, and fails to act in the public interest.
2. Oversight and law enforcement agencies limit access to the information required for families and the public to understand the circumstances of, and to fairly assess, alleged police-involved death.

While this research does not anticipate a singular resolution to the complex and longstanding questions of police accountability in BC, it draws attention to an unresolved history of police unaccountability as a matter of public interest. Due to the complex nature of the legal framework, this research does not identify an exhaustive list of issues within policing law.

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I would like to acknowledge the Coast Salish peoples for welcoming me onto their unceded territory to complete this important work.

Although under very tragic circumstances, I am grateful to have met many families who have lost loved ones in the hands of the police. I am also grateful for the legal experts who have advocated for strengthened police accountability well before my involvement. Thank you for working with me and supporting my family.

Dedication

I wholeheartedly regret the circumstances for which this work is based upon. This journey has forever changed me, my outlook on life, and my faith in the justice system.

I dedicate this thesis to my brother, Jeremy, who died in the hands of the police. He will never be forgotten. I also dedicate this thesis to my mother, father, sister and husband who supported and encouraged me during the writing of this work.

Introduction

“Civilian oversight of the police is a critical topic in any democracy. A democracy that does not hold its police accountable can become a police state in which those entrusted with the state’s most coercive powers can defy the rule of law with impunity.”

Kent Roach¹

In 2015, 20-year-old Hudson Brooks was shot nine times by a police officer in the parkade of the District 5 RCMP detachment on 152nd Street in Surrey.² The media statement from the British Columbia Prosecution Services (BCPS) summarized the process that followed:

The death was investigated by the Independent Investigations Office (IIO). A Report to Crown Counsel (RCC) was first submitted to BCPS by the IIO in October 28, 2016. After an initial review, the BCPS requested further information from the IIO. A further expert opinion was obtained by the IIO and was forwarded to the BCPS in March 2017. Further investigation was requested and the RCC was completed in November 2017. After reviewing the evidence that was available in December 2017, senior Crown Counsel were satisfied that the standard for charge approval under the BCPS Charge Assessment Guidelines was met.³

The Crown initially proceeded with charges of aggravated assault and assault with a weapon against Constable Cucheran of Surrey RCMP. The preliminary hearing began in September 2019.

A number of witnesses were called on behalf of the defense counsel (for the police). According to some of these witnesses, Mr. Brooks was likely suffering from “excited delirium”, and therefore there was a heightened risk to the officer which justified the use of force according

¹ Roach, K. (no date) *Models of Civilian Police Review: Objectives and Mechanisms of Legal and Political Regulation of the Police* at 29 [Roach, *Models of Civilian Overview*]. See: <

https://www.law.utoronto.ca/utfl_file/count/users/cox/clq61-1_models_of_civilian_police_review.pdf>.

² Lazaruk, S. “Vancouver Sun” (September 19, 2019). *Devastated mom, police watchdog disagree with withdrawal of charges against officer in surrey killing*. See:

<<http://www.google.ca/amp/s/vancouver.sun.com/news/local-news/charges-stayed-in-officer-involved-fatal-shooting-of-hudson-brooks-in-surrey/amp>>.

³ British Columbia Prosecution Service, Media Statement, “Stay of Proceedings Directed in Prosecution of Surrey RCMP Officer”, September 18, 2019, at p. 2. See: <<https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/media-statements/2019/19-16-stay-prosecution-surrey-rcmp-officer.pdf>>.

to s. 25 (1)(b) of the *Criminal Code*. It should be noted that in Canada, there appears to be a lack of medical evidence supporting the conclusion that those suffering from excited delirium pose a risk to others that justifies lethal use of force.⁴ However, the charges were stayed following expert witness testimony during the preliminary hearing in September 2019. According to Brooks' mother Jennifer Brooks, at the time of the shooting, her son was wearing shorts and flip-flops and was walking around in distress. He was unarmed.⁵

When a police officer uses force that results in death, like in the Brooks case, it is imperative that instead of acting with impunity, as Roach puts it, the police provide families and the public with an accurate and forthcoming account of the events leading to the incident. Regrettably, it would appear that under the current legal framework, this is often not the case.

The Brooks case is just one of many police-involved killings in BC. Such cases raise questions about potential abuse of police power, and also about what police oversight looks like. These questions have attracted considerable public attention in BC, leading to a number of Commissions of Inquiry and expert legal reports on police accountability. These reports have produced some moves to incremental reform. However, as I will show in this thesis, this history of incremental law reforms has resulted in a complex and arguably ineffective civilian police oversight regime, one where investigatory agencies and legal processes are embedded within a maze of multi-jurisdictional laws and police infrastructure. The outcome in the Brooks case suggests that Commission recommendations and government law reforms have not gone far enough to ensure adequate police accountability following police-involved death.

⁴ "Peace Arch News". (September 27, 2019). *Letter: Lack of Charges an 'Appalling' Call*. See: <<https://www.peacearchnews.com/opinion/letter-lack-of-charges-an-appalling-call/>>.

⁵ Larson, Karin. "CBC News". (December 19, 2017). *Surrey RCMP officer charged in shooting death of Hudson Brooks*. See: <<https://www.cbc.ca/news/canada/british-columbia/surrey-rcmp-officer-charged-in-shooting-death-of-hudson-brooks-1.4456244>>.

The legal framework that governs BC's police oversight regime is so complex that it can be a real challenge to even describe and understand the regime, let alone focus on the various legal issues and theoretical questions that emerge. It is therefore, also challenging to articulate the ways in which a lack of police accountability constitutes a justice issue, and how the current accountability mechanisms and legal processes contribute to ongoing failures of justice. With that being said, the Brooks case demonstrates the seriousness of police use of force as it threatens the fundamental *Charter* value of the right to life. This inquiry into the legal framework that is in place to hold police accountable when a death occurs is therefore warranted.

In Chapter 1, I will introduce the reader to six pieces of legislation and eight administrative bodies that a family may encounter when dealing with a police-involved death. This chapter will help make visible the maze of trajectories and pathways that confront the average citizen.

In Chapter 2, I will step back to the *Criminal Code of Canada* provisions dealing with police officers following a police-involved killing to provide insight as to how exactly lethal use of force is justified, and what constitutes a crime. Section 25, for example, provides the police with the statutory authority to use as much force as they believe necessary when enforcing the law.⁶ I will also identify inadequacies of the legal framework and police accountability law, discussed throughout the paper, that are especially prominent and problematic in police-involved deaths.

Chapter 3 deals with the context of policing in BC as it relates to the Provincial Police Service Agreement (PPSA). I will outline the issues that come into play when the province is bound by provincial laws that impact how accountability is carried forward.

⁶ *Criminal Code* (R.S.C., 1985, c. C-46) at s. 25(b).

In Chapter 4, I step back to place the discussion of law into context. I will do this by providing a snap shot of 11 high profile inquiries into police-involved deaths. From these, I draw up four themes central to questions of police accountability, including inadequate police response to persons in crisis, a lack of de-escalation strategies, inequitable access to life, liberty and security of the person in crisis, and discrepancies in officer accounts following a police-involved death.

In Chapter 5, I look to 15 past calls for police accountability in the province. Themes that emerged were independence, civilianization, harmonization of federal and provincial complaint processes, access to justice, transparency of investigations and public confidence. I conclude that, despite great efforts on behalf of police accountability experts to address problematic laws, specifically around civilianization and information disclosure, government law reform to date appears not to have gone far enough to reform investigatory and legal processes to reflect these themes.

In Chapter 6, I return to Table 1 from the introduction and focus on the current legal framework for police accountability, with a focus on the institutions that deal with public/family access to information about a police-involved death. I will describe the Independent Investigations Office (IIO), the provincial Office of the Police Complaint Commission (OPCC), the federal Civilian Review and Complaints Commissioner for the RCMP (CRCC), the BC Coroner Service, and provincial and federal access to information agencies, and then discuss barriers to access to justice that are present in each.

In Chapter 7, I take up the challenges of publicly available police data in general. Through freedom of information requests, it becomes evident that data related to police-involved

death is not well documented by government agencies, and this information, if it exists, is not easily accessible.

Finally, I will conclude by offering some thoughts on where we are, and the structural challenges to creating more just institutional structures for accountability. In this dissertation, I conclude that there is a disconnect between law, justice and police accountability, particularly as it affects citizens who are vulnerable in their relationship with law enforcement by way of mental health. The research demonstrates how a singular interaction of citizen and state can produce an unaccountability that, although rationalized in law and permitted in our legal system, is arbitrary, incoherent, and at times even cruel in its effect.

Based on the research, I make recommendations for the different institutional structures that are implicated in police oversight. I also consider issues of evidence law, including the question of how prosecutions and civil proceedings might reasonably proceed when material evidence is not available. It is my hope that this research provides a platform for discussion of the basis on which law makers might consider the important public interest question of how police accountability may be strengthened to prevent police-involved deaths and to improve public confidence in law enforcement.

Chapter 1: Problematizing Police Accountability

How is it that public concern with police accountability remains unabated? One challenge is that currently in BC, where there is alleged police misconduct it is police officers who investigate police officers. This is referred to as *civilian oversight*, because these investigations of police officers by police officers are overseen by the Commissioner responsible for misconduct complaints, and the Chief Civilian Director (CCD) responsible for criminal investigations.⁷ In other words, the police oversight regime is not fully civilian staffed or investigated. It is civilian led through the involvement of the Commissioner or CCD.

Civilianization on the other hand refers to a fully civilian staffed agency, where investigators of misconduct or criminal conduct have no prior police experience. In England and Wales, serious police complaints involving death are investigated by the Independent Police Complaint Commission using a fully civilian model.⁸ When a police involved death occurs in BC, investigators can be ex-police officers so long as they have not served as police officers in the previous five years. There are no fully civilian complaint or independent investigations models in Canada.

What follows in this chapter is an explanation of the complex challenges an individual encounters when seeking information after they learn that there has been a police-involved death.

When the police notify the next of kin about a loved one's police-involved death, those notified may naturally have questions about the circumstances of the death. And as they ask these questions, and seek information, those kin can expect to encounter a set of complex

⁷ *Police Act* [RSBC 1996] Chapter 367 s. 38.06(3) [*Police Act*].

⁸ BC Civil Liberties Association. (2012). *Police Involved Deaths: The Need for Reform* at 81. Research by David MacAlister [BCCLA 2012]. See: <https://bccla.org/our_work/police-involved-deaths-the-need-for-reform/>.

challenges. The legal framework that governs police oversight in BC opens a maze-like structure of possible avenues, rules, policies and regulations. If family seek information beyond what the police agency provides to them, they must navigate through eight government agencies or independent offices of the legislature and six provincial and federal laws. The agencies are responsible for investigating police-involved misconduct and death, and for the disclosure of related information. In the dissertation that follows, I will explore each of these in more detail. But to provide a brief sketch of the problem, consider Table 1 below.

Table 1 lays out the complicated police oversight regime in BC. Across the top are the seven pieces of legislation that are implicated in a police-involved death. Along the side are the eight government agencies or institutions that affected individuals might be expected to engage with when seeking information about a police-involved death, with each X marking a place where a member of the public needs to have a sense of the legal regimes that apply to the specific institution they might encounter. The picture is chaotic.

Government Agency ↓	Law →	<i>BC Coroner Services Act</i>	<i>Provincial Police Act</i>	<i>Federal RCMP Act</i>	<i>Federal ATIP Act</i>	<i>Provincial FOI Act</i>	<i>Criminal Code of Canada</i>
Office of the Police Complaint Commissioner (OPCC)			X			X	X
Civilian Review and Complaints Commission for the RCMP (CRCC)				X	X		X
Freedom of Information for municipal police (FOIPPA)						X	
Information and Privacy Commissioner of BC (FOIPPA appeals)						X	
Access to Information for RCMP (ATIP)					X		
Privacy Commissioner of Canada (ATIP appeals)					X		
BC Coroner Services		X			X	X	

IIO		X		X		X
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Table 2: Government agencies and enabling legislation

Currently, there is no coordinated, independent process available to assist affected families, or the public, to navigate the complicated legal network of agencies and laws in their attempt to find information and answers following a police-involved death. There is a complexity to understanding how to attain information. This is problematic, especially for those closely impacted by the death. An individual seeing information must research where to access information outside of the police institution, and identify the appropriate government agency and legislation that governs disclosure of information.

However, individuals may not initially know what information they are looking for, and this is particularly so if they suspect they have not been provided with all of the facts or accurate information by the police. After an inquiry through the police department, independent research, and their own investigation, they may start to identify what type of information they are looking for. There are numerous sources to locate information, however, it is unlikely that individuals outside of the police services are aware that such sources exist. Sources include RCMP general occurrence reports, police cruiser GPS data, and PRIME data (Police Records Information Management Environment). PRIME-BC, the holder of PRIME data, is a multi-jurisdictional data management system that facilitates the access of data between almost 10,000 police officers in BC.⁹ Another source of information is the Canadian Police Information Centre (CPIC). CPIC is controlled by the RCMP and is used by approximately 80,000 law enforcement officers within over 3000 police departments, RCMP detachments, and federal and provincial agencies such as

⁹ PRIMECorp: About PRIMEBC. See: <<https://primecorpbc.ca>>.

Canada Border Service Agency. Multi-jurisdictional data, such as PRIME-BC data is available nationally through CPIC.¹⁰

Information held by the police is not easily accessible. In order to successfully request access to information from the appropriate agency, individuals are required to recognize that different police services are governed by different Acts, understand which Acts govern which services, interpret how the relevant Act applies in their case, and (potentially) advocate for their interpretation within the relevant agency. For example, the *Police Act* governs the provincial police complaints process for municipal police, and criminal investigations by the IIO related to municipal police and RCMP. The *RCMP Act* governs the complaint process for RCMP. The *Coroners Act* governs coroner processes for municipal police and the RCMP. While the provincial *Freedom of Information Act* governs information and appeal process related to municipal police, the federal *Access to Information Act* governs information and appeal process related to the RCMP.

Once an individual understands what information they are looking for and where and how to access that information, they must then understand the relevant facts of their case and align those facts with the disclosure rules in the legislation when applying for information. They must also understand how the facts of their case will be treated in the processing of their application for information. When an individual's request is not compatible with what the legislation allows for, and they are denied information, they have to determine whether there is an appeal process and how the rules of any appeals process relate to their case.

Failing sufficient disclosure through any appeal, an individual may submit a complaint against the officer(s) involved in an attempt to be provided information from the police

¹⁰ BC Civil Liberties Association: Privacy Handbook. See: <<https://bccla.org/privacy-handbook/main-menu/privacy7contents/privacy7-14.html>>.

department. Individuals may also attempt to find answers through the final reports following the coroner or criminal investigation processes; however, families are not provided these investigation reports. As a last resort, information may be sought through civil litigation, where the court has the authority to order disclosure. Information is not easy to come by through the court as the police can argue that information should be withheld due to arguments of relevance to the claim, public interest immunity, or the protection of confidential police information under s. 37 of the *Canada Evidence Act*.¹¹

The means of engaging with the justice system on matters of disclosure and police accountability are so complex, one might ask how citizenry could be expected to have confidence in a system that is likely incoherent. Navigating policing law requires a level of legal expertise regarding the various processes and legal frameworks in order to compel a response for information. For example, without formal legal training, an individual seeking information will likely not understand that the police are privy to special disclosure rules that prevent the sharing of information with the public.¹² They may not understand the implications on access to information when inquest evidence is led by the Coroner, and not a legal representative acting on behalf of the deceased.

The police also have the ability, albeit unlawfully, to withhold information from the external investigating agency, which would likely impact the Crown's ability to properly assess criminal charges. The absence of full investigatory information could also impact the outcome of what information is available to the public. It takes a high level of legal expertise to be confident that a response for information is complete, and in good faith on behalf of the police. They

¹¹ Public Prosecution Service of Canada. See: <<https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p4/ch01.html>>.

¹² *Freedom of information and Protection of Privacy Act* [RSB.C. 1996] Chapter 165 at s.3(1)(c) [*FOIPPA*]. See: <http://www.B.C.laws.ca/Recon/document/ID/freeside/96165_00>.

encounter an extremely complex legal process around information gathering. Public confidence in the police and accountability may understandably be questioned.

Chapter 2: Legal framework for police use of force in British Columbia

This chapter looks at the legal justification behind police-involved death through the legal framework in the *Criminal Code of Canada*. Use of force standards, which govern officer training and the model used to implement use of force, and their deficiencies are discussed, as well as the ideology around using minimal use of force.

1. *Criminal Code of Canada*

The question of accountability arises when considering the nature of the modern state and its assumptions about who can legitimately use lethal force, in what circumstances, and under what authority. In his final report, Justice Braidwood provides a concise analysis of the use of force legal framework. Section 25(1)(b) states:

“Every person who is required or authorized by law to do anything in the administration or enforcement of the law...as a peace officer...is, if he acts on reasonable grounds, justified...in using such force as necessary...”¹³

If use of force is used, then s. 26 applies, “everyone who is authorized by law to use force is criminally responsible for any excess.” Limits to the application of s. 26 are set forth in s. 25(3), “officers may use force that is intended or is likely to cause death or grievous bodily harm only if the officer *believes on reasonable grounds* it is *necessary* for the self-preservation of the person from death or grievous bodily harm.” In *R. v. Canada (Royal Canadian Mounted Police)* (1981), the Court defined “grievous bodily harm” as “serious hurt or pain”.¹⁴ The subjective belief in the determination of what constitutes *excess* use of force, and in what circumstances officers are permitted to use *lethal* force, remains problematic. For example, when being

¹³ *Criminal Code*, *supra* note 6 at s. 25(1)(b).

¹⁴ *R. v. Canada (Royal Canadian Mounted Police)* (1981), 60 C.C.C. (2d) 211. The court authorities relied upon were *Director of Public Prosecutions v. Smith* (1960), 44 Cr. App. R. 261 and *The Queen v. Archibald* (1898), 4 C.C.C. 159.

criminally investigated or prosecuted, police officers can defer to s. 25(3) or to their use of force training to justify their decisions to use lethal force.

Society entrusts police with discretion to use force in only necessary circumstances. Causing death is not supposed to be the intention behind the authority to use force – it is only supposed to be incidental: in the preservation of life of the police or the public. However, in the absence of video or independent civilian evidence following a police-involved death, it can be difficult to properly assess the actual circumstances around the use of force, and whether the death is properly justified by s. 25.

Notwithstanding evidentiary issues that arise following a police-involved death, use of force justification appears unreasonable, for instance, when the victim is unarmed, suffering mental illness, and is likely no threat to the police or public. In 2014, Tony Du was holding a piece of wood while experiencing a mental health crisis. According to a Vancouver lawyer and evidence at the coroner inquest, the IIO found that Du was shot and killed within 18-25 seconds of the arrival of law enforcement.¹⁵ The Criminal Justice Branch that approves criminal charges following an investigation cleared the officer of any charges.¹⁶ It could therefore be inferred that in accordance with the use of force legal framework which officers in BC are subject to, the officer was justified in his decision to use lethal force only seconds after arriving.

According to a Freedom of Information request submitted to the IIO, 1164 IIO criminal investigations against police officers have taken place since 2012; 17 charges have been

¹⁵ Simon Little. “Global News” *Im sorry for your loss: officer in fatal Toy Du shooting addresses inquest* (February 6, 2018). See: <<https://globalnews.ca/news/4010600/im-sorry-for-your-loss-officer-involved-in-fatal-tony-du-shooting-addresses-inquest/>>.

¹⁶ Criminal Justice Branch Media Release: No Charges Approved in Vancouver Shooting (February 9, 2017). See: <https://iiobc.ca/app/uploads/sites/472/2019/03/17-02-nocharges_approved-vpdshooting.pdf>.

approved (1.46%).¹⁷ There is no public data produced by the IIO or Criminal Justice Branch to indicate the dispositions of the cases approved. The low number of approved charges, and the *Criminal Code* s. 25 special defenses sends the police a message of impunity.

2. Use of force standards in BC

According to s. 39 of the *Police Act*, the Director of Police Services (the provincial Ministry of Public Safety and Solicitor General) establishes standards for use of force and training, which then each police department develops a use of force model approved by the Director.¹⁸ According to Justice Braidwood in his report on the death of Robert Dziekanski, while the Regulation requires that the director approve each police force's use of force model, it establishes no criteria to standardize use of force, and creates the possibility of wide variations in models among the police departments. Of all police powers, use of force is the most extraordinary. In the interest of a constitutionally protected right to life, and the idea that all citizens should have an equal right to life, should citizenry be subject to the same use of force standards by police officers across the country?

In Justice Braidwood's view, the Regulation expressly states that the Lieutenant Governor in Council could set province-wide standards respecting all aspects of the use of force by police officers.¹⁹ The question should then be raised as to whether use of force standards should be established with the direction of civilian authority.

¹⁷ Independent Investigations Office of BC request to access records. File No.:FOI-2018-02 (August 1, 2018) [IIO FOI].

¹⁸ *Police Act*, *supra* note 7 at s. 39(1).

¹⁹ Braidwood, T. (2010). *Why? The Robert Dziekanski tragedy*. Vancouver: Braidwood Commission on the Death of Robert Dziekanski at 69-72 [Braidwood, *Why?*]; *Police Act*, *supra* note 7 at s. 184, B.C. Reg. 203/98. See <http://www.qp.gov.bc.ca/statreg/reg/P/Police/203_98.htm>.

3. Using minimal use of force

Using the analogy of proportionality in the criminal context, Justice Braidwood explained the limited circumstance under which the deployment of conducted energy weapons should take place. The same circumstances could be applied to police use of force in general.

Justice Braidwood's views on what he described as "subject behavior" suggests crime prevention should be conducted using the mildest means possible.²⁰ In short, a high subject behavior threshold should be set for criminal offences only because behaviors caught in the definition of "active resistance" are not egregious enough to warrant use of force. He stated, "...proportionality concerns, and my sense of Canadian values—it would embarrass me as a Canadian to watch a police officer deploy a conducted energy weapon against a subject, even one under investigation for a criminal offence, for merely walking or running away from the officer." He disputes the current use of force justification of "threat to officer or public safety" absent of a criminal offence being committed. Instead, the subject behavior threshold is met when the subject is causing bodily harm, or the officer is satisfied, on reasonable grounds, that the subject's behavior will imminently cause bodily harm. Even then, an officer should not deploy use of force unless satisfied, on reasonable grounds, that no lesser force option would be effective, and de-escalation or crisis intervention techniques would not be effective.²¹

In 2009, Justice Braidwood headed a commission that considered use of force by way of conducted energy weapon. In his report, it was suggested that such use of force against non-compliant individuals who do not pose a probable threat of serious injury to themselves or

²⁰ *Braidwood, Why?*, *supra* note 19 at 11.

²¹ *Ibid* at 17.

others, is excessive use of force that may constitute torture.²² Article 2(2) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment states that the duty to prevent torture is absolute.²³ In Canada, there is currently no duty on behalf of the police to avoid lethal force when possible. Nor is there a duty to minimize force as a condition for police being empowered to deploy force. If there were such a duty, it may act as a police accountability mechanism for any breaches of the duty. Accountability may provide the general public with confidence that police respect the conditions under which they are authorized to use force; and with confidence that any failure to respect the conditions for using force is acknowledged, disciplined and remedied.

²² *Ibid* at 64.

²³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 U.N.T.S. p. 85 (entered into force 26 June 1987). See: <http://www.unhchr.ch/html/menu3/b/h_cat39.htm>.

Chapter 3: Construction of Policing in BC

In order to articulate and understand the legal framework as it relates to police accountability, this chapter begins by describing the current policing model in BC. With both federal and provincial jurisdiction at play, I discuss two of the dominant issues that structure current challenges. First, the agreements cost-share model provides incentive for the province to contract RCMP, which enables the federal government to maintain control over the administration of the RCMP. Second, the federal control over the RCMP and the provincial control of municipal police creates inconsistent policing standards within once policing jurisdiction. In section six of this chapter, I will identify issues that arise as a result of federal jurisdiction over police services in the province.

1. Constitutional jurisdiction over policing

The *Constitution Act* provides the province and municipalities with constitutional jurisdiction over law enforcement; the provincial government therefore establishes the policing model in BC.²⁴ It is within this model that both federal and provincial police legislation enables the RCMP to enter into the PPSA. The structure of federal, provincial and municipal police services under the agreement is significant to the issue of police accountability because disclosure rules and criminal findings of the RCMP are federal jurisdiction under the agreement.

It was not always the case that the federal government maintained control over the majority of policing in the province. In *Attorney General of Alberta et al. v. Putnam et al* (1981), the Supreme Court of Canada found that the Attorney General historically not only had the responsibility for the enforcement of criminal law, but maintained control of provincial policing in general. The Court stated that the original conception of local control of policing within the

²⁴ *Constitution Act, 1867*. 1867-1982, s. 92 ss. 14.

provinces “has been largely replaced by a federal police enclave completely insulated...from provincial control.”²⁵

In the 1994 Commission of Inquiry into Policing in BC, Justice Oppal shared a similar view, reporting that the first contract entered into between the Province and the federal government in 1950 stated that the commanding officer of the RCMP “shall act under the direction of the Attorney General without reference to the senior officers of the force at Ottawa...” In this statement, Justice Oppal inferred that in 1994 the Attorney General had less control over the RCMP than was agreed upon in 1950.²⁶

2. Provincial Police Service Agreement

In 2012, the Minister of Justice and Attorney General signed three 20-year intergovernmental agreements that authorize the RCMP to act as a provincial and municipal police force. The agreements expire on March 31, 2032.²⁷

- a. The *Provincial Police Service Agreement* is between the federal and provincial governments for the use of the RCMP as a provincial police service.
- b. The *Municipal Police Service Agreement* is between the federal and provincial governments for the use of the RCMP as a municipal police service.
- c. The *Municipal Police Unit Agreement* is between the provincial and municipal governments for the use of RCMP as a municipal police service.

²⁵ *Attorney General of Alberta et al. v. Putnam et al* (1981) at 297 [*Attorney General of Alberta*].

²⁶ Commissioner the Honourable (Retired) Mr. Wallace Oppal. (1994). *Closing the Gap: Policing and the Community*. Vol 1 at 21 [Oppal, *Policing and the Community*].

²⁷ British Columbia: Provincial Police Service Agreements [*PPSA*]. See: <<https://www2.gov.bc.ca/gov/content/justice/criminal-justice/policing-in-bc/publications-statistics-legislation/publications/policing-agreements>>; Municipal Police Service Agreement (2012). See: <<https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/police/publications/agreements/2012-municipal.pdf>>; Municipal Police Unit Agreement (2012). See: <<https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/police/publications/agreements/2012-municipal-police-unit.pdf>>.

3. Federal, provincial and municipal policing

Under the federal Minister of Public Safety, the RCMP commissioner is responsible for the control and management of the RCMP as a federal organization. Within federal policing, the RCMP enforce federal laws, and handles border integrity, national security, drug, financial and organized crime, and international policing.²⁸

The RCMP operate as a provincial police force, assisting the province with the administration of justice and the implementation of provincial policing goals, priorities, and objectives.²⁹ The RCMP in BC (E-Division) is responsible for detachment policing and the provincial police infrastructure for 135 RCMP detachments. Detachments are responsible for municipalities under 5,000 population and in unincorporated areas throughout the province. They provide uniformed patrols, response-to-call duties, investigative services, community-based policing, traffic enforcement, and administrative support to provincial detachments.

Municipalities with populations of 5000 or more population must provide their own law enforcement or use contract policing.³⁰ There are 11 non-RCMP municipal police departments in BC: Abbotsford, Central Saanich, Delta, Nelson, New Westminster, Oak Bay, Port Moody, Saanich, Vancouver, Victoria and West Vancouver. The remaining 163 municipalities use contract policing, and therefore the RCMP maintain approximately 70% of the policing jurisdiction in the province.³¹

²⁸ Government of BC: Federal Policing. See: <<https://www2.gov.bc.ca/gov/content/justice/criminal-justice/policing-in-bc/the-structure-of-police-services-in-bc/federal>>.

²⁹ *Police Act*, *supra note 7* at s. 14(1); *PPSA*, *supra note 27* at 4. See: <<https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/police/publications/agreements/police-agreement-provincial-2012.pdf>>.

³⁰ *Police Act*, *supra note 7* at s. 15.1; *PPSA*, *supra note 27* at Article 10.0, 10.2.

³¹ Ministry of Public Safety and Solicitor General Police Services Division: Police Resources in British Columbia (2016) at 4. See: <<https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/police/publications/statistics/police-resources-2016.pdf>>; Oppal, *Policing and the Community*, *supra note 26* at 20; Government of British Columbia Municipal Policing: See:

4. Cost-share model

The PPSA is based on a cost-share model; the federal government provides funding to the province for policing services by the RCMP. Municipalities under 5,000 population are policed by the provincial force and do not pay any policing costs. Municipalities between 5,000 to 14,999 population pay 70% of the policing costs and the federal government pays 30%. Municipalities with 15,000+ population pay 90% of the policing costs, and the federal government pays 10%. Communities that have their own police force pay 100% of the policing costs.³²

The current provincial cost-share model departs from agreements seen in other provinces during the early development of the police. Alberta and Saskatchewan, for example, paid an annual cost for the federal government to administer the criminal law. To this end, the contractual relationship was summarized by the commissioner in the 1920 Annual Report. The Dominion government agreed to maintain the police force under the authority of the Attorney General and the exercise of their rights, powers and authority.³³ The province, therefore was responsible for the costs of RCMP services, and maintained authority over the RCMP.

Cost-share is important to the question of police accountability because it appears to be financially advantageous for the province to contract policing services, regardless of the potential for loss of provincial autonomy over conduct matters of the RCMP as set forth in the PSSA.

<https://www2.gov.bc.ca/gov/content/justice/criminal-justice/policing-in-bc/the-structure-of-police-services-in-bc/municipal>.

³² RCMP: Contract Policing: Police. See: <http://www.rcmp-grc.gc.ca/ccaps-spcca/contract-eng.htm>.

³³ *Attorney General of Alberta, supra note 25* at 295.

5. Termination of the PPSA

The agreements may be terminated on March 31st in any year by either party to the agreement.³⁴ In the alternative, the provincial Solicitor General may give notice in writing to the federal government to exclude any geographic area from the police contract.³⁵ The Solicitor General must be satisfied that the municipality has a sound policing model in place before the agreement is terminated.

For some, there is a question as to whether the RCMP contract should be terminated in order to better meet diverse community needs. The Mayor of Surrey created a policing transition plan, which has been approved by the Minister of Public Safety and Solicitor General.³⁶ The transition plan is the first step in switching from RCMP to municipal police services. An ex-RCMP officer who spent over 25 years with the force has voted on the proposal to end the Surrey RCMP contract.³⁷ Rather than having the RCMP report to the Mayor via the RCMP headquarters in Ottawa, municipal policing would have a greater layer of accountability when reporting to a municipal police board, civilian bodies, the mayor, and council. This means that changes to policing can be made on a local level rather than requiring approval from headquarters.³⁸

6. Issues within the current policing model in BC

³⁴ Municipal Police Service Agreement (2012) Article 3, 3.3(a); Article 3 (3.3)(a). See: <<https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/police/publications/agreements/2012-municipal.pdf>>.

³⁵ PPSA, *supra* note 27 at Article 4, 4.1.

³⁶ Saltman, J. (August 23, 2019). Vancouver Sun. Solicitor General give Surrey municipal police force green light. See: <<https://www.google.ca/amp/s/vancouvrsun.com/news/local-news/solicitor-general-gives-surrey-municipal-police-force-green-light/amp>>.

³⁷ City of Surrey- Police Transition. See: <<https://www.surrey.ca/city-government/25021.aspx>>.

³⁸ Ferreras, J. (January 6, 2019). Global News. Surrey is getting ready to ditch the RCMP. See: <<https://globalnews.ca/news/4859076/rcmp-surrey-local-police-force/>>.

a. Federal control of the RCMP

Notwithstanding the complicated legislative framework that governs policing, the federal control over the RCMP in BC creates difficulties in the application of provincial police oversight law. The *Police Act* states that under the direction of the Attorney General, the commanding officer of the RCMP has general supervision over the police force. The *RCMP Act*, however, removes provincial authority by placing RCMP officers under the direction of the federal Minister of Public Safety.³⁹ The PPSA confirms this federal jurisdiction by prescribing the limits to which the Commissioner can take direction from the Attorney General over the control, management and administration of the RCMP. These matters remain in the exclusive jurisdiction of the federal government.⁴⁰ The conflicting regime raises the question as to whether the province therefore maintains democratic control of policing across the province.

Federalism, and the extent to which the RCMP maintain control over conduct matters, has an enormous impact on how police accountability is currently administered. Looking to Canada's early police commission system, discipline and dismissal were considered functions independent of the police. In 1981, the debate over the administration of police officer discipline was raised at the Supreme Court of Canada. The Court dealt with the impugned conduct of an officer; they held that it should be within the power of the province to impose discipline upon RCMP officers following circumstances that bring policing and the administration of justice in the province into disrepute. The Court wrote that discipline does not "strike at the heart of the RCMP as an institution or intrude on the internal management or methods of the force."⁴¹ In dissent, Justice Dickson wrote,

³⁹ *Police Act*, *supra* note 7 at s. 14(1)(d) and s. 7(1)(a); *RCMP Act* R.S.C., 1985, c. R-10 at s. 2(1) [*RCMP Act*].

⁴⁰ Oppal, *Policing in the Community*, *supra* note 26 at 20; PPSA, *supra* note 28 at Article 6.0, 6.2; 4, D (ii)(iii).

⁴¹ *Attorney General of Alberta*, *supra* note 25 at 269.

“the province has constitutional authority to discipline all police officers engaged in administering justice within the province, and does not interfere with the “internal management” of the RCMP.”⁴² The Attorney General of British Columbia was an intervenor in the case, and submitted that it was as fully open to the province to provide discipline under its legislation as it was to investigate.⁴³

In his evaluation of policing in BC, Justice Oppal had difficulty accepting that public complaints are properly classified as internal to the RCMP. His view is that if the RCMP are subject to other provincial statutes, they should be subject to provincial police statute. In his 2009 inquiry into the police-involved death of Robert Dziekasnski, Justice Braidwood concluded that the provincial minister ought to require the RCMP to contractually agree to comply with the rules, policies, and procedures respecting conducted energy weapons.⁴⁴ It makes sense that the same principle would apply to disciplinary procedures of the RCMP.

To this end, the PPSA provides that the province has the authority to accommodate amendments to the police complaint system in the province. However, of the two municipal police and RCMP complaint processes in the province, the PPSA provision does not apply to the RCMP.⁴⁵ In other words, amendments can only be considered for the complaint process that governs municipal police, or 30% of the police in the province.

b. Inconsistent police oversight standards

The current legislative scheme creates procedurally different processes for individuals submitting complaints against RCMP, then those submitting complaints against municipal police officers. Individuals may face longer time limits throughout the CRCC complaint process as there is no statutory time limit for processing complaints. The OPCC on the other hand is

⁴² *Ibid* at 305.

⁴³ *Ibid* at 272.

⁴⁴ *Braidwood, Why?*, *supra* note 7 at 18.

⁴⁵ *PPSA*, *supra* note 27 at Article 5J(ii).

statutorily required to respond to the claimant within 30 days of receiving a complaint, and must complete the misconduct investigation within 6 months.⁴⁶

Putting the number of complaints into perspective between the respective complaint processes, according to access to information results, the CRCC receives a greater volume of complaints annually than the OPCC. In a request submitted to the RCMP, 1046 complaints were received by the CRCC against the RCMP in BC in 2016/2017.⁴⁷ According to the 2016/2017 Annual Report of the OPCC, 445 complaints were received in relation to conduct of municipal police officers in BC.⁴⁸

Another procedural difference is that municipal police and the RCMP are subject to different internal code of conduct and disciplinary standards. There are no formal statutory definitions of misconduct or disciplinary standards in the *Royal Canadian Mounted Police Regulations*, 2014 (SOR/2014-281). Whereas municipal police are governed by a code of conduct in their municipality, and by statutory definitions of misconduct set forth in s. 77(3) of the *Police Act*. The different standards of conduct and discipline raises questions of whether RCMP officers are statutory held to a lesser standard of conduct than municipal police, and if so, how does it impact fairness amongst complainants?

In his 2007 inquiry into the police complaint process in BC, former Justice Wood reported that such a scheme “raise the spectre of inequality affecting all stakeholders.”⁴⁹ Similarly, Justice Oppal reported that it is unacceptable that citizens are subject to two different

⁴⁶ *Police Act*, *supra* note 7 at s. 99(1).

⁴⁷ Royal Canadian Mounted Police. Access to Information File Number A-2018-05623 (February 8, 2019).

⁴⁸ Office of the Police Complaint Commission- 2016/2017 Annual Report. See: <<https://opcc.bc.ca/wp-content/uploads/2017/11/2016-2017-OPCC-Annual-Report.pdf>>.

⁴⁹ Wood, J. (2007). Report on the review of the police complaint process in British Columbia at 6 [Wood, *Review of the Police*]. Victoria: Public Safety and Solicitor General for British Columbia. See: <www.pssg.gov.bc.ca/police_services/publications/complaint_process/Report_PoliceComplaintProcess.pdf>.

legislative standards of police accountability, and recommended that there should be one complaint process for all police in the province.⁵⁰ To date, government reform has not harmonized the two complaint process as recommended by Justice Oppal.

⁵⁰ Oppal, *Policing in the Community*, *supra* note 26 at 20.

Chapter 4: Abridged summaries of police-involved death in British Columbia

The stories of the victims, like Hudson Brooks, are at the heart of the police accountability issue. What follows is an abridged summary of 11 police-involved deaths, and three themes that arose from these stories: inadequate police response to persons in crisis, a lack of de-escalation strategies among officers, and a general unaccountability when discrepancies arise from officer accounts following a police-involved death.

1. Abridged summary of police-involved death

"I do not have any faith in the system at the moment, and I'm hoping that I'm wrong, that there will be someone who is going to be reviewing every little detail."

Lorraine Matters, mother of Greg Matters (deceased)⁵¹

There appears to be a relatively long and sadly repeating history of professional misconduct and police-involved deaths in BC. Police involvement in the subsequent investigation and prosecutorial process has often times strained public trust. The abridged summaries of 11 past cases below will provide an account of what appears to be inadequate police responses to persons in crisis, and failure to treat those with mental illness equal under the law.⁵²

a. Frank Paul (1998)

The deceased hypothermic body of Frank Paul was discovered in a Downtown Eastside alley. Vancouver police officers initially told the Paul family that he had been the victim of a hit-and-run. An internal jailhouse video was later released showing that the evening prior, Paul was

⁵¹ The Canadian Press *CBC News* "Greg Matters shooting investigation gets third-party review" (June 14, 2014) [CBC, *Matters*]. See: < <https://www.cbc.ca/news/canada/british-columbia/greg-matters-rcmp-shooting-investigation-gets-third-party-review-1.2677587>>.

⁵² Factual backgrounds a, d, e, f and g cited from B.C. Civil Liberties Association. *Police-involved deaths: The failure of self- investigation* (2010). Vancouver: B.C. Civil Liberties Association at 5 [BCCLA 2010].

in police custody and had been dragged out of an elevator and placed in a police wagon while unconscious. He was transported to an alley and abandoned. After being detained for public intoxication, a Sergeant refused to allow Paul to recover in the city sobering cell.⁵³

b. Jeffery Berg (2000)

Berg was apprehended in an alley by a Vancouver police officer. The jury at the Coroner Inquest heard evidence that Berg was surrendering to police when he was knocked to the ground and kicked repeatedly by police as he lay motionless.⁵⁴ Two police officers then handcuffed him, dragged his body across the pavement and left him prone for 10 minutes. Following the incident, he remained on life support for two days until he passed away in hospital. An autopsy concluded that the cause of death was an aneurysm resulting from a blow to the neck.⁵⁵ The Vancouver Police Department maintained that Berg collapsed as a result of an altercation with the officer.

c. Kevin St. Arnaud (2004)

An officer attended a break-in at a pharmacy in Vanderhoof, BC; St Arnaud was witnessed running away from the scene. A police officer pursued and confronted him before shooting him three times. The officer claimed that during the incident he slipped and fell onto his back and fired up at St. Arnaud whom he said was advancing on him. His partner, however, testified that he fired at St. Arnaud while standing up with his feet apart in a police combat stance.

In his 2010 report on police-involved deaths, David MacAlister reported that CTV News W5 investigated the St. Arnaud death and concluded that the finding of the Complaint

⁵³ Pivot. *Towards More Effective Police Oversight* (2004) at 11 [Pivot, *More Effective Police Oversight*]. Eby, D, Metcalf, J, Richardson, J, Singhal, D. See: <<http://capg.ca/wp-content/uploads/2013/05/Effective-Police-Oversight.pdf>>.

⁵⁴ Legal Counsel Cameron Ward: *Berg death a homicide, jury rules* (August 13, 2004) [Ward]. See: <<http://www.cameronward.com/2004/08/berg-death-a-homicide-jury-rules/>>.

⁵⁵ *Ward, supra note 54* at 11.

Commission failed to account for the inconsistencies between both constable accounts of the event and the facts arising from the forensic evidence.⁵⁶

d. Ian Bush (2005)

Bush was detained for drinking alcohol outside a hockey arena in Houston, BC, and placed in custody at the RCMP detachment. While being processed, the rookie arresting officer shot Bush in the back of the head. The RCMP told the Bush family that Bush attacked the officer and that he was shot in self-defence. There was no witness evidence, and the RCMP video recording equipment in the detachment had not been turned on that evening.⁵⁷

e. Paul Boyd (2007)

Boyd who suffered bipolar disorder, reportedly swung a heavy chain at an officer during an attempt to arrest and was subsequently shot eight times in self-defence. Civilian video evidence emerged five years after the incident showing Boyd was in fact crawling on his hands and knees, and posed little danger to the surrounding officers at the time he was shot. Special prosecutor Mark Jette took the view that the new civilian evidence was incomplete because although the evidence showed what appeared to be an officer removing the chain from Boyd, “a number of civilian witnesses failed to observe a police officer remove the chain prior to the fatal shots.”⁵⁸

⁵⁶ *BCCLA 2010, supra note 52* at 5.

⁵⁷ *Journal of the British Columbia Civil Liberties Association* (2007) at 5. Vol 41. Article by Linda Bush [*BCCLA Journal*]. See: <https://B.C.cla.org/wp-content/uploads/2012/08/2007_Fall_Newsletter_Democratic_Commitment.pdf>.

⁵⁸ The Canadian Press, “No Charges in Fatal Vancouver Police Shooting Prosecutor Rules” (2013). See: <<http://www.theglobeandmail.com/news/british-columbia/no-charges-in-fatal-vancouver-police-shooting-prosecutor-rules/article15126522/>>; B.C. Government Criminal Justice Branch Media Statement, *No Criminal Charges Approved in the Death of Paul Boyd*. (October 28, 2013) at 7. See: <<https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/media-statements/2013/13-29-p-boyd-death-no-charge-clear-stmt.pdf>>.

f. Robert Dziekanski (2007)

Dziekanski, suffering a schizophrenic crisis upon arriving from Poland at the Vancouver International Airport, was killed by Cst. Millington by use of conducted energy weapon. He and Cst. Robinson were convicted of perjury for testimony they gave at the Commission of Inquiry into Dziekanski's death.⁵⁹ A BC Supreme Court Judge told the court that the perjury strikes at the heart of the justice system.⁶⁰ In October 2017, the Supreme Court of Canada dismissed the constables appeals.⁶¹ A civil suit launched by Dziekanski's mother was settled for a non-disclosed amount.

g. Orion Hutchinson (2008)

Shortly after the Dziekanski death, Cst. Robinson was allegedly driving under the influence of alcohol with his children in the vehicle when he struck and killed 21-year-old Orion Hutchinson. The Court heard that Robinson immediately proceeded to his home and consumed two shots of vodka in order to thwart the subsequent police investigation.⁶² He was sentenced to a one-year conditional sentence, and was suspended with pay for four-years before he voluntarily left the RCMP in 2012.⁶³

⁵⁹ No author, "Robert Dziekanski Taser Death: Kwesi Millington Sentenced to 30 Months for Perjury", *CBC News* (June 22, 2015). See: <<http://www.cB.C.ca/news/canada/british-columbia/robert-dziekanski-taser-death-kwesi-millington-sentenced-to-30-months-for-perjury-1.3122941>>.

⁶⁰ No author, "Monty Robinson to Appeal Conviction in Robert Dziekanski Perjury Case", *CBC News* (June 24, 2015). See: <<http://www.cB.C.ca/news/canada/british-columbia/monty-robinson-to-appeal-conviction-in-robert-dziekanski-perjury-case-1.3166318>>.

⁶¹ The Canadian Press, "Supreme Court of Canada dismisses appeals in Dziekanski case", *CBC News* (October 30, 2017). See: <<http://www.cbc.ca/news/canada/british-columbia/kwesi-millington-monty-robinson-appeals-dismissed-1.4378565>>.

⁶² *R v. Robinson* 2015 BCSC 1535 at 23.

⁶³ Vivian Luk, "No Jail Time for Former R.C.M.P. officer Monty Robinson Convicted of Obstruction", *The Vancouver Sun* (July 27, 2012). See: <<http://www.vancouver.sun.com/news/jail+time+former+R.C.M.P.+officer+Monty+Robinson+convicted+obstruction/6999826/story.html>>.

h. Greg Matters (2012)

Matters, a retired soldier from Prince George, suffered from post-traumatic stress disorder. Surrounded by heavily armed police officers, he was shot and killed following a thirty-hour stand-off while he wait unarmed, with his dog, in a shed on his property. Moments before he was killed, his psychiatrist was on the telephone to his mother, and his mother asked the authorities if she could talk to her son. The Matters death was the first investigation conducted by the IIO on the day they became operational.

The subject officer's account of the incident was that Matters advanced towards him. The IIO report stated that he was shot in the chest, however, a pathologist testified at the coroner inquest that Matters was shot in the back. Due to the investigative issues, a civilian monitor was assigned to review the death, and cleared the officers of criminal wrongdoing.⁶⁴

i. Peter de Groot (2014)

Following a request from a distant neighbor purporting to evict de Groot from the property where he lived, a manhunt proceeded that ended in his death. An independent witness observed the confrontation between de Groot and the RCMP, whose evidence was that an RCMP officer fired upon de Groot first. Contrary to what the family was told by the RCMP, the pathologist's report concluded that an officer had contact with de Groot while he was alive, and the police dog did not have contact with him until he was deceased.⁶⁵ According to the de Groot family legal counsel, the IIO failed to report the witness's evidence in the final report, and ignored conflicting evidence between the RCMP, a civilian witness, and pathologist's report.

⁶⁴ Civilian Monitor Report by Mark Jette IIO file #2012-0002 (November 17, 2014).

⁶⁵ No author, "Family of Peter de Groot Release Statement Regarding Shooting by RCMP Officer Near Slocan, B.C.," *BCTC Kootenays* (April 5, 2018) Statement released by Donald J. Sorochan, QC; Independent Investigations Office of BC File number 2014-182 (October 13, 2014). See; <<http://iio.bc.ca/wp-content/uploads/2018/03/09-13-2014-Slocan-Death-2014-182-Signed2.pdf>>.

j. Tony Du (2014)

Du was shot and killed by a Vancouver Police officer while suffering from a schizophrenic crisis, while walking down Knight Street hitting a fence with a wooden board. The IIO hired a retired Vancouver police officer as a use of force expert to provide an opinion on whether or not the force was excessive. The use of an ex-police officer in a criminal investigation of a police officer raises the question of whether the public could perceive a conflict of interest that undermines the independence of the investigation. No criminal charges were laid. Pivot Legal Society launched civil action on behalf of the Du family against the Vancouver Police Department.⁶⁶

k. Miles Grey (2015)

Like each of the deaths presented, Grey had no criminal record or history of violence. Grey died in an altercation with several Vancouver police officers who arrived at an address in Burnaby to investigate reports that a man was spraying a woman with a garden hose.⁶⁷ An autopsy showed that Gray suffered multiple injuries in the struggle to the extent that the coroner was not able to determine an exact cause of death, and forensic experts from other provinces were called upon to assist in the investigation.

There were no civilian witnesses, and the investigation was stalled due to a dispute between the Vancouver Police Department and the IIO over the duty to co-operate with

⁶⁶ No author. "Pivot Legal Society launches civil lawsuit against Vancouver Police in fatally shooting" (February 9, 2017). Tony Du. See: <http://www.pivotlegal.org/media_advisory_pivot_legal_society_launches_civil_lawsuit_against_the_vancouver_police_for_the_fatal_shooting_of_tony_du>.

⁶⁷ Bethany Lindsay, "Watchdog wraps investigation into Myles Gray's fatal encounter with police, family says", *CBC News* (January 15, 2019). See: <<https://www.cbc.ca/news/canada/british-columbia/myles-gray-investigation-closes-crown-1.4979638>>; Independent Investigations Office of BC File number 2015-116, *IIO Files Report to Crown Counsel for Consideration of Charges* (January 16, 2019). See: <<http://iio.bc.ca/2019/01/16/iio-files-report-to-crown-counsel-for-consideration-of-charges-iio-2015-116/>>.

investigators. It was only after the IIO filed a petition with BC Supreme Court that an officer who witnessed Gray's death agreed to provide evidence.⁶⁸ The petition alleged that none of the officers at the scene made any notes about the incident contrary to department policy, and that seven officers waited five months to submit evidence to the RCMP database. The IIO referred the file to Crown counsel for the consideration of charges.

2. Summary of themes

Themes that emerged from the abridged summaries include the inadequate police response to a person in crisis, a lack of de-escalation strategies leading to frequent fatal incidents and discrepancies in police officer accounts of events leading to death.

a. Inadequate police response to persons in crisis

Police-involved deaths continue to occur against society's most vulnerable people. Notable, CBC recently reported that in BC, the majority of police-involved deaths involved shootings of unarmed males, average age 36-years old, with mental health and substance use issues. Indigenous and black victims were also over-represented.⁶⁹ The Georgia Straight analyzed public BC Coroner data dating back to 2007, and found that 90% of police-involved death involved mental illness, substance use or both.⁷⁰

The summaries appear to reflect the demographics that CBC sets forth, men over 30 years of age, suffering from mental illness or substance use issues. Dziekanski, Matters and Du all experienced either a bi-polar, schizophrenic or PTSD crisis during their interaction with the

⁶⁸ *Independent Investigations Office of British Columbia v. Vancouver (City) Police Department* 2018 BCSC 1804.

⁶⁹ Data analysis and research by Marcoux, J. (April 5, 2018) "CBC Radio Canada" *BC has country's highest rate of police-involved death ground-breaking CBC data reveals* [Marcoux, CBC].

⁷⁰ Lupick, T. "Georgia Straight" (December 23, 2015). *BC RCMP officers at centre of sharp rise in fatal police shootings* [Lupick, CBC]. See: < <https://www.straight.com/news/602376/bc-rcmp-officers-centre-sharp-rise-fatal-police-shootings>>.

police moments before their death. Paul suffered from alcoholism and homelessness, and was intoxicated at the time of his death.

b. Lack of de-escalation strategies

The scenario of an officer responding to a person in crisis and using lethal force that ends in fatality, similar to Boyd, Dziekanski, Matters and Du, unfortunately occurs far too often. Police officers should instead use first words to understand a victim and de-escalate a non-threatening situation or use less lethal measures. CBC's documentary, *Hold Your Fire*, demonstrates how jurisdictions such as the United Kingdom use a police training model that focuses on de-escalation training.⁷¹ Unarmed officers use containment strategies and communication techniques that result in understanding the person in crisis and taking the time to control the situation. The documentary also revealed that verbal and non-verbal communication techniques can de-escalate a situation in order to work with the person in crisis, while distinguishing symptoms of mental health and criminal behavior.⁷² Even when an individual is armed, and the officer is unarmed, de-escalation techniques were found to be effective and result in the preservation of life.

Iacobucci's view on police encounters with persons in crisis aligns with the outcomes of de-escalation as shown in *Hold Your Fire*. He believes that policing system, policies and procedures should be designed and implemented with zero deaths, while maintaining safety of the subject, the police and the public.⁷³

⁷¹ Canadian Broadcast Corporation: *Hold Your Fire* (2016). See: <<https://www.cbc.ca/firsthand/episodes/hold-your-fire>> [CBC, *Hold Your Fire*].

⁷² *Hold Your Fire*, *supra* note 71 at 26.

⁷³ Police encounters with people in crisis. An independent review conducted by Honourable Frank Iacobucci (2014) at 8 [Iacobucci, *Independent review*].

Unfortunately, the abridged summaries do not reflect efforts on behalf of police officers to use de-escalation strategies, instead they applied physical force, a firearm, or a conducted energy weapon. In the Berg case, forensic evidence established that the police applied a blow to the neck. Boyd, Arnaud and Du were excessively shot 3-8 times each. While crawling on his hands and knees, the police shot Boyd, the eighth shot was in his head. Upon arrival on scene of Arnaud, DeGroot, and Du, the police shot the victims within seconds of arriving on scene, likely failing to take sufficient time to assess the situation and use de-escalation tactics.

c. Inequitable access to life, liberty and security of the person in crisis

In his 2014 report, Former Supreme Court Justice Iacobucci puts forth a level of consideration to the human dignity that all people deserve when discussing the topics of policing and persons in crisis.⁷⁴ He suggests that people in crisis who have frequent contact with law enforcement require community mental health support.⁷⁵ Through the summaries, it would appear that government reform has not taken into account the special requirement recommended by Justice Iacobucci, that the police carry out their duty differently when interacting with persons in crisis.

In a study from the Arizona State University, the police–citizen encounter is defined as a “transactional event.” A transactional event involves multiple stages where the police officer and the citizen make decisions and respond to the decisions of the other participant. A lack of verbal communication or response on behalf of the person in crisis, and a police officer’s subsequent decision to use deadly force, raises the questions of whether a person in crisis has equal access to

⁷⁴ Iacobucci, *Independent review*, *supra* note 73 at 37.

⁷⁵ *Ibid* at 85.

life, liberty or security of the person if they lack the ability to communicate with law enforcement effectively.⁷⁶

d. Discrepancies in officer accounts following a police-involved death

Following incidents of lethal use of force, the summaries made evident that the police, more often than not, failed to disclose facts. The Vancouver Police Department did not disclose that Paul was unconscious, as well as the facts relating to the actions of the officers that led to his death. In the Berg case, the police reported that the death was caused by a collapse due to an altercation, instead of reporting that an officer used force by way of a blow to the neck. The subject and witness officers in the Arnaud case had a different account of events altogether; the subject officer testified that he fell and shot up, while the partner officer testified that the subject officer was standing in the combat position before he shot. The officer in the Bush and Matters cases provided evidence that they shot the victims in the front torso region, while forensic evidence provided that they were both shot while facing away from the officer; Bush was shot in the back of the head. All of the officers involved in the deaths of, Bush, Boyd, Matters, DeGroot and Du provided evidence that the victims were advancing on them and that they shot in self-defense. However, it is difficult to imagine that an individual is advancing on an officer if they are on their hands and knees or facing away from the officer.

The inadequacies in the police investigation in the Dziekanski and Paul death led to the Braidwood and Davies Commissions of Inquiry, where the recommendations were made to create an Independent Investigations Office. Following the Braidwood inquiry, two officers were charged, convicted and imprisoned for perjury for providing false testimony.

⁷⁶ Transactional Encounters, Crisis-Driven Reform, and the Potential for a National Police Deadly Force Database. White, M.D. American Society of Criminology, *Criminology and Public Policy*. Vol 15, issue 1.

Such strong discrepancies in police accounts not only impact affected families and the public, but impact the final investigative reporting of the Coroner Service, the IIO, and the media, which reports on IIO and coroner investigations. Bush's initial coroner report, based on information provided to the coroner by the police, was contrary to what an expert later found at the inquest with regard to the location of the inflicted wounds on his body.

It is equally problematic that the investigatory agencies show discrepancies in their reporting. The IIO failed to account for witness information in the final report of the DeGroot case, nor did they report on the coroner findings in the final report. In light of inaccurate facts and reporting, it is difficult to imagine that those affected would be satisfied that they have been provided with the accurate circumstances leading to the death.

Chapter 5: Independent reviews and past calls for police accountability in BC

“The public is demanding accountability of the police...The public has conferred upon the police powers, which are not conferred upon ordinary citizens. In any democratic society based on the rule of law and responsible government, it is fundamental that police independence be balanced with accountability.”

Former Justice Wally Oppal
Commissioner of Inquiry on Policing in BC⁷⁷

In this chapter, police accountability will be defined, and six themes that emerged from the 15 past calls for police accountability in BC will be discussed, including: independence, civilianization, harmonization of federal and provincial complaint processes, access to justice, transparency of investigations and public confidence. Considering the recommendations from these past calls along with the resulting legal framework, this chapter supports the conclusion that government has not gone far enough to reform investigatory and legal processes to enhance police accountability.

1. Defining police accountability

Police accountability in its subjective form can hold many meanings. Justice Braidwood suggests that “pro-active accountability” is achieved through the legislative and executive branches of government, for example by setting conduct standards. Conduct standards are currently set by police departments themselves. Both Justice Braidwood and Justice Oppal reported that there is a civilian authority duty to set such standards, and in a system of responsible government, delegating the duty to the police would be an “abdication of a fundamental element of democracy.”⁷⁸ These views support the idea that misconduct and criminal investigations involving police officers should be conducted by non-police officers.

⁷⁷ The idea to use this quote is derived from a report by Pivot Legal Society. Pivot, *More Effective Police Oversight*, *supra* note 53 at 10. Original source: Oppal, *Policing in the Community*, *supra* note 26 at 17.

⁷⁸ Braidwood, *Why?*, *supra* note 19 at 61.

“After-the-fact accountability” as Braidwood suggests, is the accountability citizenry seeks when police conduct is in question, and an individual police officer faces internal disciplinary, civil or criminal proceedings.⁷⁹ To this end, Black’s Law Dictionary defines accountability as one party reporting its activities and taking responsibility for them. It is done to keep the party honest and responsible. In the context of policing, accountability may take the form of reporting wrongful activities and taking responsibility for them, institutional transparency, dismissal or prosecution.

The benchmark of accountability may not be to ground a conviction. Robert Prisk-Write, who was left with severe life-altering brain damage as a result of excess use of force, received a financial settlement for an undisclosed amount. His wife sought justice as a form of accountability, *“I don’t feel there is any justice - justice would be [the officer] losing his job.”*⁸⁰

In a lecture he gave at the University of Victoria in 2016, Justice Iacobucci stated that a goal of the criminal justice system is the proper prosecution of an alleged crime, while being sensitive to the means by which we pursue justice.⁸¹ It is acceptable that police officers enjoy *Charter* protections against self-incrimination, however there must be a fair balance between the unique statutory powers to use lethal force and accountability for the execution of those powers by way of subject officer compellability.

2. Past calls for police accountability in BC

“The danger in not knowing one’s past is not being doomed to repeat it but, more simply, in losing any ability to recognize repetition.”

⁷⁹ *Ibid* at 61.

⁸⁰ Eric Rankin “R.C.M.P. Settles with Permanently Brain Injured Man, Robert Wright”, *CBC News* (March 10, 2016). See: <<http://www.cbc.ca/news/canada/british-columbia/robert-wright-terrace-first-nations-brain-injury-1.3485547>>.

⁸¹ University of Victoria: Criminal Law Term Guest Lecture by the Honourable (Retired) Mr. Justice Frank Iacobucci (March 9, 2016).

Over the past three decades, numerous calls for police accountability have emerged in the form of multiple commissions of inquiries and independent reviews of policing in the province. Despite these efforts, it remains unclear if police accountability has been strengthened in such a way that enhances transparency and legitimacy. For example, in 1982, the McDonald inquiry established that public confidence in the police force was directly related to the actions of the RCMP, and the laws that govern the ideas around independence and civilianization.

Civilianization, fifteen years after the McDonald inquiry, was an issue raised by Justice Oppal as it related to bias in police oversight of public complaints and disciplinary processes. Questions of bias emerge today when considering the appointment of an ex-police officer as Commissioner of the Police Complaint Commission. BC Civil Liberties Association, Justice Davies and Justice Braidwood sustained that public confidence is not enhanced when the police investigate police on misconduct and criminal matters.

The following past calls for police accountability summarizes themes of independence, civilianization, harmonization of federal and provincial complaint processes, access to justice, transparency of investigations and public confidence.

a. McDonald Commission into certain activities of the RCMP (1981)

The former Trudeau government initiated an inquiry to investigate the extent of investigative practices and alleged illegal activities of the RCMP Security Service. The inquiry demonstrates that an inherent abuse of power was present within the police institution, and that it can countenance only police and security service activities which are lawful, and that the rule of

⁸² DeLloyd J. Guth. *Police Powers in Canada: The Evolution and Practice of Authority, Part I: The Traditional Common Law Constable, 1235-1829: From Bracton to the Fielding to Canada*. University of Toronto Press (1994) at 4.

law must prevail.⁸³ The McDonald inquiry provides a base line for early themes in police accountability, all of which have been central to subsequent inquiries, and continue to manifest in policing today.

Public confidence

The inquiry report found that actions by both the Security Service and the Criminal Investigations Unit had significantly diminished the public confidence in the RCMP.⁸⁴ The public support of the RCMP is dependent on confidence in the policies and procedures governing its activities, and that confidence required a full inquiry into the laws.

Independence and civilianization

The RCMP have vigorously resisted proposed operational changes running counter to deeply held traditions, beliefs, and ingrained attitudes. Therefore, the Commissioner found that independence from the police to be absolutely crucial to the effective and lawful operation of a security intelligence agency.⁸⁵ Independence would create a new philosophy, based on respect for the law and for other liberal democratic principles.⁸⁶

The commissioner's principal recommendation was to create an agency civilian in character, its members would not have the usual peace officer powers, nor would they necessarily be recruited primarily from the national police force.⁸⁷ The Canadian Security Intelligence Service (CSIS) was established in 1984.

Transparency

⁸³ Commission of Inquiry Concerning Certain Activities of the RCMP: Second report. *Freedom and Security Under the Law*. Volume 2 (1982) at 1194 [*McDonald Inquiry*].

⁸⁴ *McDonald Inquiry*, *supra* note 83 at 758.

⁸⁵ *Ibid* at 757.

⁸⁶ *Ibid* at 752.

⁸⁷ *Ibid* at 753.

The principal of publicity was relied upon by the commission to provide the transparency required to gain public confidence in the investigatory processes.

“Unless these inquiries are held in public they are unlikely to achieve their main purpose namely, that of restoring the confidence of the public...And without this confidence no democracy can long survive.”⁸⁸

The Commissioner’s view on transparency is sensible and quite relevant to oversight investigations today. When there is a crisis of public confidence about alleged misconduct or criminality of the police, the public would naturally distrust any investigation being conducted privately.

b. Commission of Inquiry into Policing in British Columbia (1994)

Public confidence

Historically, little attention was given to police oversight. Civilians largely relied on internal investigations of the police investigating themselves, with little public authority to verify the adequacy of the investigations and findings. The BC Police Commission was established in 1974, close in time to the McDonald inquiry, with the objective to act as a civilian body to oversee accountability and enhance public confidence in the police. The complaint Commissioner was the Deputy Chair of the Police Commission, and therefore the Commission performed the appellate function in the public-complaints process and in the discipline of police officers.⁸⁹

In 1994, Justice Oppal was appointed by Order in Council to conduct the Commission of Inquiry Into Policing in British Columbia. In his letter of committal, he set forth the issue with police oversight and public confidence as he saw it at the time. In short, the public complaints and discipline process appeared biased and lacked fairness and objectivity. For example,

⁸⁸ *Ibid* at 1185.

⁸⁹ Oppal, *Policing in the Community*, *supra* note 26 at 6.

complainants were required to bring forward a complaint to the department of the officer in question which was intimidating, and in many cases, the police discouraged complaints.⁹⁰

Independence and civilianization

Justice Oppal found the complaint process to be in conflict with independence of the Police Commission, and therefore he recommended that it become independent from the police. His view was that the function of police complaints was within the constitutional and statutory authority of the Attorney General. His primary recommendation was that the province establish an independent civilian complaint commission to supervise misconduct investigations of all police in the province. The BC Police Commission was disband and its functions allocated to the Office of the Police Complaint Commissioner in 1998.⁹¹

The issues of independence and civilianization are extremely complex. Justice Oppal's interpretation of these principles and how they should be applied to police oversight has had a profound and lasting impact on the establishment of the police accountability model. The government created the oversight model based strongly on the opinions and recommendations of the inquiry. Justice Oppal's view was that accountability could be achieved through a model that provided civilian authority to *oversee* all investigations, vested with *complete independence* and the authority to conduct independent investigations *if necessary*.⁹² As such, the powers of the commissioner are generally restricted to receiving complaints and ordering a public inquiry in appropriate cases.⁹³ Notably, the office does not oversee all investigation, rather only those of municipal police. None the less, what his view established was that so long as the office assumed

⁹⁰ *Ibid* at 18.

⁹¹ *Ibid* at 45. Recommendation 259(a).

⁹² *Ibid* at 19.

⁹³ *Police Act, supra note 7* at s. 50.

a quasi-judicial role, independent of the police under the auspice of the Attorney General, with the cooperation of police investigators, the office was deemed to be independent and civilian.

c. Legislative Assembly Special Committee to Review the Police Complaint Process (2001)
Independence and Civilianization

The debate on independence and civilianization of police oversight arose during the first Legislative Special Committee statutory review of the OPCC. Stenning, an expert in police oversight, submitted to the special committee that there should be restrictions on hiring former police officers, not because they are not capable of independence, but because they are not perceived to be independent. To the contrary, a representative of the Vancouver Police Officers Association submitted that the police complaint commissioner is to oversee the handling of complaints, and that first and foremost, it is an oversight role.⁹⁴

Transparency

The Organized Crime Agency, a specialized policing and law enforcement unit in BC, shared with the special committee their concerns with premature access to information of intelligence systems and information on the identity of confidential sources that can harm law enforcement.⁹⁵ The special committee therefore recommended that the *Police Act* be amended for the protection of sensitive law enforcement information during the complaint process. The “blanket” amendment of s. 182 removes a layer of transparency and accountability, and moves away from the principle of publicity as seen in the McDonald inquiry.

Public data

⁹⁴ British Columbia, Legislative Assembly, Special Committee to Review the Police Complaint Process. (August 2002) *Special Committee to Review the Police Complaint Process*, Second Report at 17. [OPCC, *Special Committee*]. See: <

http://www.llbc.leg.bc.ca/public/PubDocs/bcdocs/355655/37_3_2ndRpt_Police.pdf>.

⁹⁵ OPCC, *Special Committee*, *supra note 94* at 21.

Notwithstanding loss of life, a significant issue with police oversight is the lack of data related to the use of lethal force and encounters with people in crisis. Unfortunately, access to information provisions protect police disclosure interests, and there is no single source data base that tracks strong aggregate information of this kind.

The committee reported that a strong complaint process can be a management tool for the police whereby they can track trends, pick up systemic problems and respond to them.⁹⁶ It was recommended that the commissioner explore the feasibility of implementing a management information and recording system to maintain systemic complaint information.⁹⁷

Access to justice

The committee found that there was a need to improve public confidence and procedural fairness in the complaint process. They reiterated Justice Oppal's view that it is improper for the public to be expected to attend the police department to submit a complaint regarding fellow police officers to the chief of police.⁹⁸ Such a demand on the public hinders access to justice. Access to justice means that affected family members are provided with the information they need to understand the law, and are supported in resolving their own disputes without having to go to court.⁹⁹

Stenning, an expert in police oversight, established criteria for fair oversight and access to justice. He submitted that police oversight ought to be procedurally fair in order for complainants to access the process. Procedural fairness considers: (a) whether parties receive adequate notice of the various stages and developments in the process and the requirements of

⁹⁶ *Ibid* at 11.

⁹⁷ *Ibid* at 11.

⁹⁸ 2001 Legislative Session: 2nd Session, 37th Parliament Special Committee to Review the Police Complaint Process Minutes and Hansard (August 29, 2001) at 1130.

⁹⁹ Access to Justice BC: What is Access to Justice? See: <<https://accesstojusticebc.ca/about/what-is-access-to-justice/>>.

them; (b) whether they have sufficient opportunity to present their side of the story to decision-makers; (c) whether they have adequate opportunity for legal or other representation in the process; (d) whether they have adequate opportunity to be heard before any sanctions are determined, any dispositions are determined or are either imposed on them or imposed on people they've complained against; (e) the adequacy of their access to review and appeal of decisions; and (f) whether the process gives complainants, respondents and the public more generally access to procedural and substantive justice.¹⁰⁰

Harmonization

Harmonization means that individuals could submit a complaint against a municipal police officer or RCMP to the same complaint process in BC. However, the current division of policing responsibilities in the province between municipal police forces and the RCMP is confusing and inhibits access to justice as it relates to an inaccessibility of the complaint process. As such, the committee recommended that the provincial government harmonize complaint processes between municipal police and the RCMP.¹⁰¹

Stenning also called to harmonize provincial police complaint process. His view is that it is not correct to have completely different principles governing or determining the complaint process between municipal police and RCMP.¹⁰²

Justice Wood and Justice Oppal made similar comments in their final reports, and showed strong support for harmonization. Justice Oppal wrote:

“There is no good reason for them, as a part of our provincial police force, not to obey our provincial laws....Incidentally, the RCMP polices 70 percent of this province, both in terms of geography and in terms of population. It's totally unfair that the people in Burnaby be subject to a complaint process

¹⁰⁰ 2001 Legislative Session: 2nd Session, 37th Parliament Special Committee to Review the Police Complaint Process Minutes and Hansard (November 19, 2001) at 1255.

¹⁰¹ OPCC, *Special Committee*, *supra note 94* at 23.

¹⁰² OPCC, *Special Committee*, *supra note 94* at 22.

which is different from the people in Vancouver. There's no rational reason for the distinction.”¹⁰³

Service record of discipline

Several police representatives discussed the need to amend the *Police Act* to remove permanent corrective and disciplinary measures from the police officer service record of discipline. The committee recommendations led to amendment to expunge service records, however, removing such dispositions arguably undermines the principle of deterrence and accountability.¹⁰⁴

- d. Police Complaint Commissioner Annual Report (2003) and White Paper: *Police Act Reform* (2005)

Civilianization

In 2003, almost a decade after Justice Oppal's inquiry, Police Complaint Commissioner Dirk Ryneveld, Q.C., called for urgent reform of the *Police Act* to reflect independent investigations into allegations of police misconduct. He stated that the restriction of the OPCC to make decisions based solely on the investigation provided by the police severely compromises the concept of civilian oversight.¹⁰⁵

In 2005, Ryneveld conducted a review of the legislation and provided a draft *Police Compliant Act*, outlining a series of proposed reforms. He reiterated the link between democracy, the rule of law and police accountability. Namely, a reasonable persons will not perceive police to be legitimate without effective civilian oversight of any system where police are allowed to investigate police.¹⁰⁶ Ryneveld maintained that democratic societies must have effective civilian

¹⁰³ Oppal, *Policing in the Community*, *supra note 26* at 20.

¹⁰⁴ *Ibid* at 20.

¹⁰⁵ Dirk Ryneveld. Police Complaints Commissioner 2003 Annual Report at 5 (Victoria 2003). See: <https://opcc.bc.ca/wp-content/uploads/2017/04/2003_Annual_Report.pdf>.

¹⁰⁶ *Police Act Reform*. White paper and Draft *Police Complaint Act* by Ryneveld, D., Q.C. (March 2005) at 3.

oversight that finds the truth when misconduct is alleged because police accountability is a “precondition to the grant of police powers.”

e. Pivot Legal Society: Toward more effective police oversight (2004)

Independence

Pivot Legal Society released a report that reiterated the 2003 Police Compliant Commissioner’s call for independent investigations. Pivot called for the province to expand the budget and powers of the OPCC in order to conduct timely, thorough independent civilian investigations of public complaints. Pivot took independence and civilianization a step further, to recommend that if an investigation determines that a police officer has engaged in professional misconduct, the findings of the investigation should be referred directly to a police complaints tribunal for disciplinary action.¹⁰⁷

The report articulated that the administrative and investigatory structure of the police complaint process conflict a fundamental principle of our legal system, judicial independence. The separation of the Executive and the Judiciary has been characterized as perhaps the most essential characteristic of a free society and as such, the dual role in conducting investigations and determining the discipline conflict.¹⁰⁸

f. Report on the review of the police complaint process in BC (2007)

The Minister of Public Safety and Solicitor General instructed the Director of Police Services to conduct a review of the Police Complaint Process. Former Justice Josiah Wood, Q.C. was appointed to assist in the review and prepare a report.

¹⁰⁷ Eby, D., Metcalfe, J., Richardson, J., & Singhal, D., for Pivot Legal Society. *Towards More Effective Police Oversight (2004)* at 17 [*Pivot 2004*]. See: < <http://capg.ca/wp-content/uploads/2013/05/Effective-Police-Oversight.pdf>>.

¹⁰⁸ *Pivot 2004*, *supra note* 107 at 8. Original source, Sam J. Ervin, Jr., *Separation of Powers: Judicial Independence*, 35 *Law & Contemp Probs* (1970).

Civilianization

Wood refrained from recommending independent investigations by suggesting that “enhanced civilian oversight” at the OPCC would improve the complaint processes. What was particularly interesting about the Wood report was that among the past inquiries into policing, Wood made the first distinction between *enhanced* and *full* civilian oversight. He suggested that if enhanced civilian oversight proved inadequate after the three-year review, that a completely civilian-run complaint system would be required. In his view, a model could be legislated to remove the process from the police by placing the responsibility for investigations, adjudication and discipline in the hands of a completely independent civilian agency.¹⁰⁹

Harmonization

Justice Wood reiterated past calls for harmonizing complaints processes between all police officers in the province. He held that the *Police Act* only applies to just over one quarter of the total number of police officers in the province, and therefore the current situation creates a perception that complaints are treated differently in municipal and RCMP jurisdictions.¹¹⁰

Insufficient police misconduct investigations

Wood reviewed 283 OPCC investigation files, from which 52 excess use of force, abuse of authority, search and seizure and detention files showed investigatory deficiencies.¹¹¹ A number of use of force cases revealed police violating the law, as well as a great degree of inconsistencies across the 11 municipal police departments as to how and when complaints

¹⁰⁹ Wood, *Review of the Police*, *supra* note 49 at 89.

¹¹⁰ *Ibid* at 6.

¹¹¹ *Ibid* at 43.

should be dismissed.¹¹² He concluded that there was an unacceptably high risk that the more serious the public trust complaint, the higher risk of a less thorough investigation.¹¹³

g. Police-involved death forum, Vancouver (2007)

Independence

BC Civil Liberties Association, former Chair of the Commission for Public Complaints against the RCMP, and a number of civil liberties lawyers explained how the current system of police investigating police does not enhance public confidence. The panel stated that the investigatory system was in urgent need of reform, and that police should no longer be allowed to investigate police-involved deaths. The BCCLA called for an independent agency to impartially conduct criminal and professional conduct investigations of police-involved deaths.¹¹⁴ This call for independent investigations came two years before the inquiries of Frank Paul and Robert Dziekanski took place, where similar recommendations were considered.

h. Inquiry into the death of Frank Paul (2009)

Independence and civilianization

The Davis and Braidwood inquiries were amongst the first in the province to review police accountability and law reform as it related to police-involved death. Former Justice William Davies conducted an inquiry into death of Frank Paul to review how police-involved deaths were investigated. The report dealt extensively with the failed criminal investigation as a result of conflicts of interests related to police investigating police, and the subsequent issues with the disciplinary function of the Vancouver Police Department following the incident. In his

¹¹² *Ibid* at 29.

¹¹³ *Ibid* at 44.

¹¹⁴ *BCCLA Journal*, *supra* note 57 at 1.

interim report, Justice Davies criticized the notion that a police department conducts investigations of a death connected to the same department.

He reported that Paul's death occurred within a system that failed to hold individuals accountable for the discharge of their public duties.¹¹⁵ It was therefore, recommended that police-involved deaths be investigated by a "civilian-based criminal investigation model".¹¹⁶ The IIO should recommend whether criminal charges should be laid, and what charges against whom.¹¹⁷

i. Braidwood (2009)

Independence and civilianization

Following the death of Robert Dziekanski, Provincial Crown prosecutor Stan Lowe decided no charges should be filed against the police officers involved in the incident. The provincial government established a commission of inquiry headed by former Justice Tomas Braidwood to investigate the use of conducted energy weapons and the circumstances of Dziekanski's death.

The two-part report expanded on Justice Davies's recommendation to implement a civilian based criminal investigation model. Justice Braidwood's recommendation of civilianization went further than the previous inquiry, to suggest that the IIO be composed of a civilian director and non-police investigators who have no prior police experience.¹¹⁸ His

¹¹⁵ Davies, W.H. (2009) *Alone and cold: Interim report*. Vancouver: The Davies Commission Inquiry into the Death of Frank Paul at 21 and 287 [*Davies Inquiry*].

¹¹⁵ *Davies Inquiry*, *supra* note 115 at 5.

¹¹⁶ *Ibid* at 187.

¹¹⁷ *Ibid* at 192.

¹¹⁸ Braidwood, *Why?*, *supra* note 19 at 412.

recommendation reiterates Justice Oppal's notion that the police ought to be subject to civilian authority.¹¹⁹

- j. Commission for Public Complaints Against the RCMP: Police Investigating Police Final Report (2009)

Independence

Similar to the municipal police complaint model, the RCMP investigate its own members for statutory offences. Prior to the development of the IIO, the RCMP also conducted criminal investigations of its own members in cases where individuals were affected by serious injury or death. The commission asked whether or not an organization whose members' actions have resulted in such outcomes should be the very same organization then charged with the responsibility to investigate the incident with the prospect of laying criminal charges. In considering whether their process could engender public confidence in the transparency, impartiality and integrity of the criminal investigation and its outcome, it was recommended that all police-involved deaths, serious injury and sexual assaults should be investigated by a provincial criminal body.¹²⁰

- k. BC Civil Liberties Association (2010 and 2012)

Independence and Civilianization

BC Civil Liberties Association produced two reports that explained the failure of self-police investigations. The organization sought to provide specific recommendations to address how to prevent police-involved deaths, and the independent and civilian model of investigation and oversight that could ensure sufficient police accountability.¹²¹ The BCCLA recommended

¹¹⁹ *Ibid* at 16.

¹²⁰ Kennedy, P. (2009). *Police investigating police: Final public report*. Ottawa: Commission for Public Complaints Against the Royal Canadian Mounted Police at 92.

¹²¹ *BCCLA 2012, supra note 8* at 2.

that an independent prosecutor be used in criminal cases involving the police, an aspect of accountability overlooked by previous inquiries.¹²²

1. Human Rights Watch: Abusive Policing in Northern BC (2012)

Independence

Human Rights Watch is an international non-government organization based in New York. They conducted evidence-based research that canvassed the failure of law enforcement to deal with investigations into missing and murdered Indigenous women in Northern BC. The five-week field research project spanned Highway 16 from Prince George to Prince Rupert, and Highway 97 between Prince George and Williams Lake.

Researchers found an inadequate police response in general to disappearances, murders, domestic violence and sexual assaults. In the course of their research, they spoke to several women whose experience of police abuse dates back decades. They found accounts of excessive use of force against girls under the age of 18, rape, sexual and physical assault, cross-gender searches, abuse during arrest and in custody, and poor condition of city cells.

Evidence was provided by a RCMP officer who had experience investigating complaints against members of other detachments, stating that the process was “hardly impartial.” Affected civilian participants expressed a fear of law enforcement; high levels of fear which the Human Rights Watch researchers found in post-conflict countries. The research results showed an overwhelming number of participants who felt that the police complaints processes dismissed their experiences.

¹²² *Ibid* at 164.

The report called for an expanded mandate of the IIO to investigate sexual assault by police officer. They also called to collect and maintain publicly available disaggregated data on the ethnicity of Indigenous women and girls.

m. BC Legislature Special Committee to Review the Independent Investigation Office (2015)

In 2015, the BC Legislature undertook a statutory review of the IIO. The final report recommended that the provincial government support the continued civilianization of the IIO, and the use of officer worn body cameras.¹²³

n. Pivot Legal Society: Project Inclusion (2018)

Pivot Legal Society conducted research to inquire into the law and policy barriers to overdose deaths and other health epidemics among individuals in BC who struggle with poverty and homelessness. The report called for evidence-based solutions that simultaneously address stigma that endangers the lives of those who use substances.

The research team interviewed 76 participants and 100 service providers. The research revealed an overwhelming amount of data with regard to current policing practices that lead to negative health outcomes, opioid-related harms, and safety issues for study participants. Across the province, participants shared their experiences of harassment, displacement, threats, racism, and violence by the police. Overall, participants explained how police disrupt harm reduction activities and basic survival activities in ways that undermine their health and safety.

Justice Oppal previously recommended that the province make abuse, threats, harassment or intimidation of complainants in relation to the complaint process a discipline code offence.¹²⁴ Although the *Police Act* has been reformed to capture retribution against complainants, Project

¹²³ Special Committee to Review the Independent Investigations Office Final Report. Legislative Assembly, 40th Parl, 4th Sess [*Special Committee Report 2015*].

¹²⁴ Oppal, *Policing and the Community*, *supra note* 26 at 44.

Inclusion researchers found that participants continue to experience an extreme distrust of police, and are reluctant to submit complaints against police in fear of retaliation.¹²⁵

o. Office of the Police Complaint Commissioner review (2019)

Special Committee to Review the Police Complaint Process

The Legislative Assembly agreed that a Special Committee be appointed to conduct an audit respecting the outcome or resolution of randomly selected OPCC complaints and investigations. The audit results and final report deadline is November 2019. A number of recommendations were made that would improve access to justice. For example, amend the *Police Act* to allow complainants to appeal inadmissible complaints, and amend the *Police Act* to require mandatory documentation and reporting of all complaints in order to collect statistical information.¹²⁶

*Commissioner appointment*¹²⁷

A Legislative Assembly Special Committee was appointed to select and recommend the OPCC Commissioner for a six-year non-renewable term. The composition of the committee included a number of ex-police officers. In December 2018, the committee recommended to the Legislature that Clayton Pecknold, and former RCMP officer, be appointed as Commissioner. He is the current Chair of the Police Records Information Management Environment board of directors.¹²⁸ The question remains then, does appointing an individual with past ties to the RCMP

¹²⁵ Bennett, D & Larkin, D.J. Pivot Legal Society. Project Inclusion: Confronting Anti-Homelessness and Anti-substance user stigma in BC (2018) at 5 and 44.

¹²⁶ Special Committee to Review the Police Complaint Process (2019). Third Session of the 41st Parliament; *Special Committee to Review the Police Complaint Process Report* (November 2019) at 31 and 32.

¹²⁷ Special Committee to Appoint a Police Complaint Commissioner (December 2018). Third Session of the 41st Parliament.

¹²⁸ Charlie Smith *The Georgia Straight* (December 14, 2018). “Should three ex-cops be on five-member committee recommending new police complaint commissioner?”. See: <

act to enhance or diminish the public's perception of independence and fairness in the complaints process?

Former Deputy Police Complaint Commissioner and former police officer, Rollie Woods, recently stepped down from his 11-year career with the OPCC. In a media interview, he reported that, "it's natural that former police officers will be biased in favour of police". Woods view is that it is important for the OPCC to have the ability to investigate misconduct rather than the police department, because there is resistance when police departments are asked to investigate wrongdoing. He also believes that there is a public perception of bias that can lead to mistrust in the police, and in order to enhance trust there needs to be an independent civilian body ensuring that the outcome is the right one.¹²⁹

3. What do previous independent reviews reveal?

Experts in the field of police accountability have long been concerned with the principles of fairness in complaint processes, and of independent, civilian investigations. When comparing the previous reviews and recommendations with the current legal framework, the PPSA, *Police Act* and *RCMP Act* appear to still fall short of providing a legal framework that reflects such principles.

Stenning, Justices Wood and Justice O'Pal called to harmonize provincial and federal police complaint process, because as Justice Wood suggested, the current process creates a perception that complaints are treated differently in municipal and RCMP jurisdictions.

However, harmonization has never occurred.

<https://www.straight.com/news/1177766/should-three-ex-cops-should-form-majority-committee-recommending-new-police-complaint>>.

¹²⁹ Katie Derosa. *Times Colonist*. Police watchdog leaves with independence call (June 2019).

The McDonald inquiry demonstrates that a body independent from the police, composed of civilian staff could operate to conduct effective and lawful operations of CSIS. This independent civilian investigatory model does not reflect police oversight today.

Justice Oppal brought forth issues of police oversight as it relates to lack of public confidence because the public complaints and discipline process that was established in 1974 appeared biased and lacked fairness and objectivity. However, his 1997 recommendations did not go far enough to suggest what could be required to achieve true police accountability; instead he recommended that the Police Commission become independent from the police. In other words, he suggested that misconduct complaints be civilian led, not civilian investigated. Justice Wood called for “enhanced civilian oversight”, which also does not go far enough to expressly call for civilian investigations. These recommendations fall short of what other experts in the field recommend in terms of full civilianization.

Police Complaint Commissioner Dirk Ryneveld, Q.C. recommended that police investigations should be independent from the police. Pivot recommended that findings of misconduct be referred to a disciplinary tribunal, however, this did not occur. Twenty-five years after Justice Oppal’s recommendations for independent oversight, and after only partial civilianization has been implemented, the issues are not abated. In fact, the current Commissioner is an ex-police officer.

Justice Davies, Stenning and lawyers from BC Civil Liberties Association similarly suggested that the public does not perceive investigations into criminal conduct following police-involved death to be independent when police investigate police. Justices Davies and Braidwood suggested an independent investigations office; Justice Davies recommended a “civilian-based criminal investigation model”. What has resulted is a civilian based agency independent of the

police department, where former police continue to investigate police. Further, despite recommendations by lawyers for the IIO to have the statutory authority to recommend charges against police officers, they currently do not have such authority.

Chapter 6: Current legal framework for police accountability

This chapter will revisit Table 1, which lays out the complex legal framework that governs the IIO, the BC Coroner Services, the OPCC, the CRCC, and the federal and provincial Access to Information Commissions. The chapter will describe in detail each of the agencies and their legal framework, as well as specific shortcomings as they relate to the lack of legislative and regulatory authority to carry forward independent and civilian investigations. Civil litigation is also discussed as a last resort for gaining information disclosure. First, principles of independent investigations and civilianization will be defined.

1. Principles of independent investigations and civilianization

In addition to asking whether the legal framework reflects the past calls for police accountability, it is important to ask whether the legal framework reflects principles that produce a positive and practical impact on citizenry. Principles of independent investigations and civilianization are central to the law's response to police accountability, and to the two key assertions made in this paper.

Civilian led and civilian run agencies were distinguished in Chapter 1; what follows is a more detailed look at the legal framework as it places limits on how independent investigations and civilianization are defined. As well as what that means for the public as police continue to investigate police.

Take for example, a family who has lost a loved one as a result of police use of force. It is understandable that a family's trust in police would be strained. It is not always easy to ascertain whether an officer has acted within the confines of the law, and deciding on this matter likely requires some form of interpretation of the *Police Act* and *RCMP Act*. Adding to this strain is the unfortunate reality that, reports have repeatedly indicated that families cannot rely on police to

provide them with accurate information about the circumstances leading up to the death. Families may be left for days without knowing the particulars of the incident. They may resort to calling hospitals to find out something as simple as the location of the body of their loved one. They may meet with police officers, only to learn subsequently through media reports that they were possibly misinformed. They may be left on their own to combat misinformation and defamatory comments circulating in the press about their loved one. It would not strain the imagination to think that families in these circumstances might distrust even the external agencies once they learn that former police are involved in the investigation.

If BC has an independent oversight regime, why are police authorized to investigate police for misconduct, and ex-police officers for serious harm or death? Currently, the legal framework provides that investigations into police-involved misconduct and death is overseen by an independent agency, the OPCC, CRCC or IIO. The agencies are independent insofar as they operate under the auspice of an Independent Office of the Legislature (OPCC), the federal government (CRCC, and the Attorney General (IIO). However, they are not independent of police involvement or influence. Although the *Police Act* requires the CCD to be civilian, the OPCC and CRCC have no such requirement. In fact, the current OPCC Commissioner is a former RCMP officer. The legal framework also allows former police officers to act as investigators in both agencies (neither are civilian-run).

The *Police Act* used to prohibit current police officers and those who have been in the force within five years from being hired as IIO investigators. However, in 2019, the five-year rule was removed from the legislation on a temporary basis in order to open the hiring pool of investigators.¹³⁰

¹³⁰ *Police Act*, *supra* note 7 at s. 38.06(3).

Although in practice the principles of independence and civilianization may not guarantee higher substantiation or conviction rates, there no doubt remains the question as to whether former police officers have sufficient distance from the assumptions about what policing consists of and what the necessary practices and modes of engagement are to be able to assess whether an officer has deviated from professional standards, and/or whether the professional standards themselves might be the problem. These principles are so important, they reoccurred multiples times as experts reviewed the legal framework as it relates to investigations being treated objectively and impartially.

For example, enhancing public confidence is central to police oversight, and as Justice Oppal stated, public confidence is fundamentally important for the survival of democracy. As such, when considering the principles of independence and civilianization as they are defined by the legal framework, there is a danger in having former police-involved; there may be a strong public perception of bias in how investigations are handled. Prior to the development of the IIO, both Stenning and Justice Braidwood suggested that when police investigate police, the public is provided the perception that they are not independent and that they may allow loyalty to fellow officers to interfere with impartial criminal investigations.¹³¹

During Justice Oppal's inquiry, he found that some citizens recommended that there only be external, independent investigations, because that was the only way unbiased investigations could take place.¹³² According to Caldero who specializes in police ethics and raises questions of

¹³¹ Why? The Robert Dziekanski Tragedy, Phase 2 Report (May 20, 2010) at 411, at 5. See: http://www.braidwoodinquiry.ca/report/P2_html/00-TitlePage.php4.

¹³² 2001 Legislative Session: 2nd Session, 37th Parliament Special Committee to Review the Police Complaint Process Minutes and Hansard (September 12, 2001) at 1055. See: <<https://www.leg.bc.ca/Pages/BCLASS-Legacy.aspx#%2Fcontent%2Flegacy%2Fweb%2Fcmnt%2F37thparl%2Fsession-2%2Fpcp%2Fhansard%2F120010912a.htm>

police bias, the role of police oversight is to provide strong, fair, transparent and independent decisions to effect deterrents on police misconduct.¹³³ The same could be said for criminal investigations of police-involved death.

As Roach pointed out, the CRCC preamble states that, “civilian review is vital to promoting transparency and public accountability of law enforcement”.¹³⁴ Roach argues that much of the debate on civilian oversight discounts the importance of *ex ante* political and policy direction to the police and oversight’s preventative measures.¹³⁵

The official debates of the Legislative Assembly provide clarity as to the legislative intent behind the *Police Amendments Act* 2011 when the IIO was developed.¹³⁶ From the record, the legislation would be guided by Justice Braidwood’s recommendations to implement a civilian-led investigations office for police-involved serious injury and death. The CCD was to build a team of civilians as they create the independent investigations office.¹³⁷ Justice Braidwood also proposed that within five years, the IIO be fully civilianized. The recent IIO Strategic Plan, which sets organizational objectives between 2018-2022 did not consider the Attorney General’s said objective of civilianization.¹³⁸ At the very least, the IIO may consider

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¹³³ Submission by Morrison, D. 2001 Legislative Session: 2nd Session, 37th Parliament Special Committee to Review the Police Complaint Process Minutes and Hansard (November 5, 2001) at 1030. Original source: *Police Ethics: The Corruption of Noble Cause*. See: <<https://www.leg.bc.ca/Pages/BCLASS-Legacy.aspx#%2Fcontent%2Flegacy%2Fweb%2Fcmnt%2F37thparl%2Fsession-2%2Fpcp%2Fhansard%2F120011105a.htm>>.

¹³⁴ *Enhancing RCMP Accountability Act*, S.C. 2013, c. 18. See: <https://laws-lois.justice.gc.ca/eng/annualstatutes/2013_18/FullText.html>.

¹³⁵ Roach, *Modes of Civilian Overview*, *supra* note 1 at 30.

¹³⁶ British Columbia, Legislative Assembly, *Hansard*, Third Session, 39th Parl, Vol 24 No 2, (31 May 2011) [*Hansard 2011*]. See: <<https://www.leg.bc.ca/documents-data/debate-transcripts/39th-parliament/3rd-session/20110531pm-Hansard-v24n2#7682>>.

¹³⁷ *Hansard 2011*, *supra* note 136 at 1620.

¹³⁸ IIO Strategic Plan 2018/22. See: <http://iiobc.ca/wp-content/uploads/2013/03/IIO-STRATEGIC-PLAN_Website-Version_Dec13-2018.pdf>.

developing a civilianization plan to ensure the public that civilianization continues to be a legislative priority.

Savage wrote that civilian control is “not established at a stroke by statute...the notion of not being ‘of’ the police is complicated by the fact that many independent, civilian, oversight bodies operate on the basis of a ‘mix’ of investigators with both nonpolice and police backgrounds, including most of those holding the most senior investigative roles.”¹³⁹ This holds true to how Justice Braidwood’s recommendations were implemented and how the IIO currently operates.

Much of the concern brought forward from the past inquires arose from the police investigating police. What developed was a regime that consists of police still investigating police with some degree of civilian oversight.

The following is an overview of the government’s response to the past calls for police law reform, and the resulting agencies that aggrieved citizens might pursue in their attempts to understand incidents of police-involved misconduct and death.

2. Legal framework for police accountability in BC

As described in Chapter 1 of this paper, Table 1 lays out the complicated police oversight regime in BC. The table visualizes what affected individuals are up against when attempting to engage with the justice system and police accountability following the traumatic experience of a police-involved death. The specific institutions and governing law, as seen in the Table, are described in detail below.

¹³⁹ *Roach, supra note 1* at 45. Original source: Stephen Savage, “Seeking Civilianess” (2013), 53 *British J. of Criminology* 886, at 889.

Government Agency ↓	Law →	<i>BC Coroner Services Act</i>	<i>Provincial Police Act</i>	<i>Federal RCMP Act</i>	<i>Federal ATIP Act</i>	<i>Provincial FOI Act</i>	<i>Criminal Code of Canada</i>
Office of the Police Complaint Commission (OPCC)			X			X	X
Civilian Review and Complaints Commission for the RCMP (CRCC)				X	X		X
Freedom of Information for municipal police (FOIPPA)						X	
Information and Privacy Commissioner of BC (FOIPPA appeals)						X	
Access to Information for RCMP (ATIP)					X		
Privacy Commissioner of Canada (ATIP appeals)					X		
BC Coroner Services		X			X	X	
IIO			X		X		X

Table 2: Government agencies and enabling legislation

3. BC Coroner Services

As concluded by the Supreme Court of Canada in *Faber v. the Queen*, “The traditional role of the coroner...was replaced by a duly Canadianized function, one which was not primarily of a criminal nature, but came to have a social context.”¹⁴⁰ In 2007, thirty years after that decision, the BC government repealed and replaced the *Coroners Act*. The Act now aims to enhance public safety through the prevention of future deaths.¹⁴¹ When a police-involved death occurs, the coroner is dispatched to the scene of the incident to retain jurisdiction of the deceased’s body. They conduct a coroner investigation to determine the cause of death, and in

¹⁴⁰ *Faber v. the Queen*, [1976] 2 SCR 9 at 30.

¹⁴¹ British Columbia, Legislative Assembly, *Hansard*, Third Session, 38th Parl, 3rd Sess, Vol 16 No 2, (8 March 2007) at 1340 [*Hansard*]; *Coroners Act* (SBC. 2007) Ch.15 [*Coroners Act*]; *Coroners Act* B.C. Reg. 298 (2007).

some cases, they conduct a coroner inquest to determine facts and circumstances of the death. The coroner investigation and inquest are distinguished below.

4. Coroner Investigation

A peace officer must immediately report to a coroner the facts and circumstances relating to the death of a person who dies while in the custody of the police.¹⁴² A subsequent investigation must take place to determine the cause of death; an autopsy of the body may or may not occur. When a death is reported to the coroner, they have the authority to secure the scene, collect information, conduct interviews, and seize documents. Upon conclusion, a report is released, setting out the coroner's findings and cause of death.

What should be noted is that although the coroner is provided the powers of a peace officer to investigate the death, they rely on evidence that has been secured by the police prior to retaining jurisdiction. Therefore, absent of civilian witness evidence, the coroner relies solely on any evidence provided by witness or subject police officers. To distinguish between the two officers, a witness officer has witnessed the incident, whereas a subject officer is the officer that caused the police-involved death, is subject to criminal investigation. The nature of any investigation where the police are the guardians of evidence prior to any investigatory agency arriving, provides an opportunity for evidence to be tampered with or withheld, or for officers to discuss the occurrence with one another prior to providing an account of the incident to any investigatory agency.

Because the coroner investigation is not a means to criticize the quality of the evidence provided by the police, naturally, the investigation may or may not provide the family of the deceased, or the public, with sufficient answers regarding the circumstances of the death.

¹⁴² *Coroners Act*, *supra* note 141 at s. 3(2).

If new evidence arises, the chief coroner may re-open an investigation upon application.¹⁴³

5. Coroner Inquest

The purposes of an inquest are to identify the deceased and to understand how, when, where and by what means the death arose. An inquest can provide public confidence that the death is not being ignored, concealed or overlooked.¹⁴⁴

Inquests are formal fact-finding court proceedings decided by a five-person jury. The deceased's family may retain legal counsel to represent their interest in the inquest. Unlike a coroner investigation, the inquest jury hears evidence from civilian, police or expert witnesses. Upon conclusion, the jury prepares a verdict stating the classification of the death and recommendations on how to prevent similar deaths. Once an inquest is complete, the family of the deceased may gain access to the investigation file.

6. Issues with the legal framework

The coroner process is problematic as an accountability mechanism for a variety of reasons. Inquests are no longer mandatory as they once were following a police-involved death. The deceased, or family is not provided access to legal counsel for the inquest, inquest evidence is coroner led, and jury recommendations are not binding on the police department.

a. Inquests are no longer mandatory

All police-involved deaths used to be subject to a coroner inquest. The *Coroners Act* previously stated that the chief coroner *must* direct a coroner to hold an inquest if the deceased person died while in the custody of the police.¹⁴⁵ In 2010, this requirement was removed, now

¹⁴³ *Ibid* at s. 17(1).

¹⁴⁴ *Ibid* at s. 38; Ministry of Public Safety and Solicitor General (2011). Media Information Guide to a Coroner's Inquest. See: <www.pssg.gov.bc.ca/coroners/investigation/docs/mediaguide.pdf>.

¹⁴⁵ *Coroners Act*, *supra* note 141 at s. 18(2).

the coroner *may* direct a coroner to hold an inquest. The discretion is dependent on whether the coroner believes a death is due to natural causes and was not preventable, or that there was no meaningful connection between the death and the nature of the care or supervision received by the person while in custody. McDonald's principle of publicity says that inquiries should be held in public in order to advance public accountability in the inquiry process.¹⁴⁶ Removing mandatory coroner inquests, out of the public view decreases police accountability by placing police accountability processes behind closed doors.

b. Inequitable access to legal counsel at a coroner inquest

At their own expense, the family of the deceased may retain legal counsel to represent their interests in the inquest. Access to justice in the inquest process is heavily impinged for those who cannot afford a lawyer. The police, however, have government funded legal counsel provided for them. The Bush case demonstrates the importance of access to legal representation. In the Bush inquiry, the RCMP, the subject officer, and the Attorney General had legal representation. The Bush family retained counsel, and hired an investigator, pathologist, and blood spatter expert, without whom, Bush's mother stated, "the coroner would rubber stamp the police investigation through the inquest."¹⁴⁷ Contrary to the results of the coroner investigation which stated Bush was shot in the torso, the forensic expert provided evidence in the inquest that revealed Bush was shot in the back of the head. Without participating in the inquest, the Bush family would not know the circumstances leading to Bush's death.

The Ontario Ministry of Community Safety and Correctional Services offers the *Family Reimbursement Program*. Families participating in coroner inquests can recover costs of legal representation if the deceased was involved in a police related incident that resulted or

¹⁴⁶ *Ibid* at 1185.

¹⁴⁷ *BCCLA Journal*, *supra* note 57 at 5.

contributed to their death.¹⁴⁸ With no public funding provided to families for coroner inquest legal counsel in BC, the interests of victims are not equally represented in an accountability process that provides the police with government funded legal representation. As shown in the Bush case, a lack of funding for legal counsel is problematic because without such representation, important facts that explain the true circumstances leading to the death may not come to light for those affected.

c. Coroner led evidence

With respect to the examination of witnesses at a coroner inquest, the *Coroners Act* limits which parties can lead evidence, specifically public interest counsel or counsel representing the family of the deceased.¹⁴⁹ Outside counsel, with permission, may examine a witness but the coroner can limit the questioning if they are satisfied previous questioning was sufficient in disclosing facts in relation to which the witness has given evidence. Therefore, it is possible that questions, important to the family in gaining closure, may not be heard during the inquest.

Coroner led evidence is particularly problematic as a matter of perceived bias, in cases where the coroner is a former police officer. It should therefore be noted that the *Coroners Act* does not preclude police officers from being hired to conduct coroner investigations or inquests. The very fact that an individual investigating the cause of a police-involved death, and who may have been a former member of the same police department, raises the question of whether affected families or the public can have confidence in the inquest process is a non-biased and impartial fact finding process.

¹⁴⁸ Ontario Ministry of Community Safety and Correctional Services: Coroner's Inquest Legal Fees. See: <https://www.mcscs.jus.gov.on.ca/english/DeathInvestigations/Inquests/LegalFeeReimbursement/OCC_reimbursement.html>.

¹⁴⁹ *Coroners Act*, *supra* note 141 at s. 33(3).

d. Non-binding jury recommendations

Once an inquest jury has maintained a verdict, non-binding recommendations are provided. The *Coroner Act* only requires the Chief Coroner to bring the recommendations to the attention of the appropriate persons, public authority or public.¹⁵⁰ Until 2010, the BC Coroner Services included statistics on recommendation implementation in their annual public report. Now, there is no certain method or single source database to capture which jury recommendations are implemented. Further, there is no statutory requirement for police departments to implement jury recommendations.

The statutory structure of the coroner processes in general is highly problematic because it removes functions that act to hold police accountable; it may be difficult for affected families or the public to know or trust that the police agencies are adopting jury recommendations in an effort to reduce police-involved death or improve use of force training.

7. Federal and provincial professional misconduct investigations

If substantiated, professional conduct investigations may lead to internal disciplinary measures that are corrective and educational in nature. The complaint process is in theory, a mechanism for affected families and the public to seek information with regard to involved officers following a police-involved death. This section will review the federal and provincial professional standards investigations processes, as well as issues within the OPCC and CRCC that support the idea that Justice Oppal's inquiry recommendations did not go far enough to suggest a fully civilian model of investigations.

First, there are two complaint processes in BC. Justice Oppal called for the OPCC to investigate all provincial police misconduct complaints, however, the RCMP remained outside

¹⁵⁰ *Coroners Act*, *supra note* 141 at s. 53(2)(c).

provincial jurisdiction as set forth by the PPSA. The agreement removes authority for the province to deal with RCMP conduct and disciplinary matters, and as such, misconduct against the RCMP are managed in Ottawa by the CRCC in accordance with the RCMP Act. The *Enhancing Royal Canadian Mounted Police Accountability Act* was enacted in 2014, yet public reporting requirement and “serious harm” provisions were removed from the legislation. Notwithstanding the authority to review the police investigations, the OPCC and CRCC processes remain under the control and direction of the police, not the commissioners overseeing the agencies. The OPCC and CRCC, and the accountability issues are summarized below.

8. Office of the Police Complaint Commission for municipal police

As a response to the recommendations provided in Justice Oppal’s report, a new statutory scheme was created in 1997 for dealing with police misconduct.¹⁵¹ When a municipal police officer is alleged to have contravened the code of conduct as set forth in the Code of Professional Conduct Regulation,¹⁵² a complainant can submit a formal complaint to the OPCC.

In order for a conduct complaint to be considered, the complaint must contain allegations of police misconduct as defined in the *Police Act*. They must not be frivolous or vexatious, and the incident must have occurred within 12 months of the filing of the complaint. If the complaint is admitted into the complaint process and substantiated by the police department, all parties may sign a Complaint Resolution Agreement. If an agreement cannot be made, an investigation must proceed and a Chief Constable, Deputy Chief Constable or senior officer at the police department will decide if disciplinary or corrective measures are imposed. If no disciplinary agreement is reached between the department and the officer in question, the Discipline Authority at the police department makes a finding as to whether the allegation of misconduct is

¹⁵¹ *Police Amendment Act* [S.B.C. 1997], c.37.

¹⁵² *Police Act Reg.* 205/98.

proven and any disciplinary or corrective measures to be imposed.

If misconduct is not found, and the OPCC has a reasonable basis to believe that the Discipline Authority's decision of no misconduct is incorrect, or if a complainant requests a review of the decision, the OPCC may order an external investigation if it is in the public interest to do so.¹⁵³ A retired judge may be appointed to review the matter and their decision on misconduct and whether discipline and corrective measures are to be taken is final. In the alternative, if they disagree with the Discipline Authority's decision, the police officer in question or the complainant can request that a retired judge call a Review on the Record or Public Hearing. The decision of the retired judge is final.

9. Civilian Review and Complaints Commission for the RCMP

Similar to the OPCC, when a RCMP officer is alleged to have contravened the Code of Conduct as set forth in the *RCMP Act*, a complainant can submit a formal complaint to the CRCC. Upon conclusion of the investigation, the RCMP provide their decision to the CRCC. If the complainant is not satisfied with the RCMP final report, they may request a review by the CRCC. If the CRCC is not satisfied with the RCMP findings, the chairperson sends an interim report and recommendations to the RCMP. Although the legislation provides that the Commissioner's findings are conclusive, their recommendations are not binding on the RCMP.¹⁵⁴

10. Issues within the provincial and federal legal framework

There are a number of inadequacies within the complaint process, notably around investigatory independence and civilianization because the police investigate police misconduct. Other issues include a narrow definition of misconduct, and different investigation standards

¹⁵³ *Police Act*, *supra* note 7 at s. 117(1)).

¹⁵⁴ *Ibid* at s. 45.77.

among municipal police and RCMP. It is unclear whether mediation by a third party, although recommended by Justice Wood and later added to the *Police Act*, is offered to complainants as an alternative to a fully police led investigation. Misconduct is rarely recorded on the member service record of discipline, which can be seen as a missing layer of accountability. Finally, issues that are especially prominent for marginalized individuals include the complaint process being inaccessible, and a recorded fear of retaliation by police towards those who experience systemic police misconduct and face daily interactions with police.

a. Investigatory independence and civilianization: police investigate police misconduct

The OPCC and CRCC provide a public perception that police misconduct complaints are independent from the police, however, police continue to investigate police. Complaint procedures are left largely in the hands of the police, they determine admissibility and substantiation, they conduct investigations, and they make disciplinary decisions.¹⁵⁵

The Berg case points out fundamental flaws within the complaint process, leaving little confidence for families who ought to be provided with an accurate account of the incident. Following a 26-month investigation, the Vancouver Police Department determined there was no evidence to support allegations of officer misconduct in Berg's death. The internal investigation, overseen by the OPCC, relied solely upon the statement of the officer involved. Berg's sister hired a private investigator to canvass the neighborhood for independent witnesses. The private investigator found independent witnesses who disputed the police version of events, stating that they saw the subject officer repeatedly kick Berg in the neck and head as he lay unresisting on the ground.¹⁵⁶

¹⁵⁵ *RCMP Act*, *supra note 39* at s. 45.6(1).

¹⁵⁶ *Pivot 2004*, *supra note 107* at 10.

Justice Davies found that complete interviews for the two subject officers involved in Paul's death were not conducted, and the determination of discipline was therefore hampered. He stated that the disciplinary punishment system unduly limited the penalties and excluded important remedial training of the officers involved.¹⁵⁷

Justice Wood reported that over a third of complaints were not properly investigated by the police. He found that the commissioner had few effective powers to ensure that all complaints were thoroughly investigated and properly concluded.¹⁵⁸ Although his report led to changes to the OPCC in their ability to appoint a retired judge to review dispositions on behalf of the police, it remains unknown whether the police oversight mechanisms function to achieve adequate accountability.

b. Narrow definition of misconduct

The *Police Act* defines misconduct as a breach of public trust that constitute a conviction, deem a member unfit to perform duties or discredit the police department. Misconduct includes: harassment, coercion, intimidation, obstruction of investigation, abuse of authority, accessory to misconduct, corrupt practice, damaging property, deceit, discourtesy, discreditable conduct, improper disclosure of information, misuse of intoxicants, and neglect of duty.¹⁵⁹ The admissibility of misconduct are subjective and remain in the discretion of the police department.

The RCMP Code of Conduct defines misconduct in broader terms, requiring members to behave in a manner that is not likely to discredit the Force.¹⁶⁰ The complainants must have suffered loss, damage, or stress, but the threshold for the determination of what may constitute

¹⁵⁷ *Davies Inquiry*, *supra* note 115 at 12.

¹⁵⁸ Wood, *Review of the Police*, *supra* note 49 at 9.

¹⁵⁹ *Police Act*, *supra* note 7 at s. 77(1).

¹⁶⁰ Schedule 18 *Code of Conduct of the Royal Canadian Mounted Police* (2014) at s.18 and ss. 23(1) See: <<http://laws.justice.gc.ca/eng/regulations/SOR-2014-281/page-6.html#h-29>>.

misconduct is not publicly available.¹⁶¹ Admissibility of misconduct complaints are subjective and remain in the discretion of the RCMP.

c. Different complaint standards for British Columbians

A call for complaint process harmonization was a prevalent theme in many of the past calls for police law reform. There was a strong view that having different complaint processes for municipal police and RCMP potentially leads to a different standard of complaint outcomes for British Columbians.¹⁶² There was also the view that different complaint processes lead to a perception that complaints are treated differently between jurisdictions. For example, a complaint will be automatically initiated for an individual who is killed by a municipal police officer. A citizen who is killed by the RCMP, which is the majority of policing in the province, will not because RCMP chair initiated complaints are discretionary.¹⁶³

d. Systemic police misconduct and fear of retaliation

For marginalized individuals who face daily interactions with law enforcement, fear of authority and retaliation may prevent individuals from bringing forward a complaint. In 2003, Pivot Legal Society brought forward 50 affidavits, outlining alleged police misconduct in the Downtown Eastside. The group complaint demonstrated a systemic problem of police misconduct among marginalized residents. The commissioner granted that the complaints be conducted by an external investigation by a different police agency. The RCMP assisted with “Project E-Pivot” which took 14 months to complete.¹⁶⁴

¹⁶¹ *RCMP Act*, *supra* note 39 at s. 45.53(2).

¹⁶² Oppal, *Policing and the Community*, *supra* note 25 at 43.

¹⁶³ *Police Act*, *supra* note 7 at s. 89.

¹⁶⁴ Office of the Police Complaint Commissioner: Report of the Police Complaint Commissioner Pivot Complaints Against VPD (2003) at 2.

Of the 50 complaints, 11 were substantiated by the Vancouver Police Department and referred to the Chief Constable for discipline. The extent of the misconduct that Pivot submitted on behalf of the public included: beating, torture, unlawful detention and confinement, illegal strip searches, illegal entry into homes and abusive language. After reviewing the Disciplinary Authority's disposition, the Commissioner found no systemic abuse.

The finding brings forth the idea that individual and structural understandings of police wrongdoing differ. The commissioner of Project E-Pivot may accept the facts and evidence as the police presented them, and measure the alleged wrongdoing in accordance with the statutory definitions of misconduct. Where no misconduct is found, the victim would likely disagree. It is not unreasonable to imagine that a victim would think that the harms against them are wrong and that there should be redress. This may be especially true for marginalized individuals who face homelessness or substance use, many of whom distrust the police and have negative daily interactions with them.¹⁶⁵

Following the Pivot report *To Serve and Protect*, which documents the misconduct affidavit evidence, police Chief Jamie Graham reported, "I've never heard anything so preposterous in my life...I can't fight it when there are no names attached to it".¹⁶⁶ Pivot took the position that the police complaint system was flawed due to its reliance on internal investigations and the reasonable apprehension by informed observers that bias influences the outcomes of those investigations.¹⁶⁷ The test is articulated in *Committee for Justice and Liberty v. National Energy Board* [1978] 1 SCR 369, "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think

¹⁶⁵ *Pivot 2004, supra note 107* at 9.

¹⁶⁶ *Ibid* at 8; Original source CKNW News interview with Bill Good. February 13, 2002.

¹⁶⁷ *Ibid* at 10.

that it is more likely than not that the decision maker whether consciously or unconsciously, would not decide fairly.”

Pivot reported that complainants were afraid to submit their names in fear of retaliation. Pivot provided the names of the victims, and the Commissioner agreed with Pivot’s submission that the Chief was biased, ordering an external RCMP investigation into the affidavits.¹⁶⁸ To this end, a fair and non-bias structure of the complaint process in BC is lacking when a police officer is involved in an investigation of another officer, and investigative objectivity may be in question.

Pivot submitted a similar group complaint in 2018, fifteen years after Project E-Pivot. Pivot found that a number of marginalized individuals did not feel safe bringing forward complaints against two Vancouver Police Department officers who remained un-named to the public.¹⁶⁹ The two police officers refused to disclose their names, and are known as officer #3066 and officer #3108. Pivot conducted a police complaint drafting rally, where over 22 individuals came forward as complainants against the two officers. They felt unsafe making a formal individual complaint to the OPCC in fear of retaliation, with concern for their personal safety. A number of potential complainants felt unsafe drafting a complaint at the rally due to the police taking photos from across the street. Alleged misconduct ranged from intimidation and harassment to use of force.

e. Inaccessible complaint process

If a complaint process is inaccessible, it is likely not effective. The current legal framework requires complainants to be able to distinguish between the OPCC and CRCC, and

¹⁶⁸ *Ibid* at 10.

¹⁶⁹ Pivot Legal Society. Cooper, A. *Why a public group complaint against two Vancouver police officers was necessary* (September 14, 2018). See: < http://www.pivotlegal.org/vpd_group_complaint>.

undertake statutory interpretation of either provincial or federal legislation to fully understand the intricacies of each process. For example, limitation periods and appeal time limits are confusing. Both the OPCC and CRCC have a 1-year limitation period for submitting a complaint.¹⁷⁰ They both have a 10-day limitation period from date of decision to request a non-substantiated complaint review. The CRCC has a 20-day limitation period to request a public hearing or review on the record, and a 60-day limitation period to request a review of outcome to the CRCC.¹⁷¹

The OPCC has a time limit of 30 days to process and complete the complaint disposition. The CRCC shall establish, and make public, service standards respecting the time limits within which it is to deal with complaints.¹⁷²

Individuals who do not have access to a computer and internet or the ability to go to the OPCC (Victoria) or CRCC (Ottawa) in person, including marginalized individuals most at risk of coming into contact with law enforcement, must submit the complaint in person to the department of the officer in question. This was raised as a concern over a decade ago during the first legislative review of the OPCC, and remains a barrier to accessing justice through the complaint process.

f. Mediation is not a common option for the complainant

The Wood report led to an expansive mediation provision in the *Police Act*, providing that an independent third party can mediate misconduct complaints.¹⁷³ However, because the police department decides on how the claim proceeds, it is unclear if claimants are provided the option to mediate, or if they are generally required to proceed through a complaint resolution

¹⁷⁰ *Police Act*, *supra* note 7 at s. 79.

¹⁷¹ *Ibid* at s. 117(2) and s. 136(1).

¹⁷² *Ibid* at s. 45.37.

¹⁷³ *Ibid* at s. 158(1).

agreement process. According to the OPPC 2016/2017 Annual Report, no files proceeded to mediation. A deterrent for the police to proceed through mediation is that discipline is recorded on the member service record of discipline, whereas, following the complaint resolution agreement process, discipline is not recorded on the record. The CRCC does not offer mediation.

g. Member Service Record of Discipline

Currently, when discipline or corrective measures are taken, the misconduct and discipline are recorded on the police member's service record of discipline. The record is expunged after 2, 3 and 5 years.¹⁷⁴ Where misconduct is alleged, and no discipline or corrective measures are taken, the misconduct *may* be entered on that member's personnel file. Due to strict service record disclosure rules, it is unclear as how many officers and under which circumstances, have misconduct recorded.¹⁷⁵

11. Independent Investigations Office BC

The IIO was formed following the Davies and Braidwood Commissions of Inquiry for the purpose of restoring public confidence in all police in BC following police-involved serious injury and death. It was recommended that the provincial government establish a civilian-led investigative body modeled on Ontario's Special Investigation Unit. In response to the inquiry recommendations, the government introduced amendments to the *Police Act* in 2011, giving effect to Part 7.1 and the accompanying Memorandum of Understanding (MOU).¹⁷⁶ The IIO became operational in September 2012. Justice Braidwood recommended that the reporting out

¹⁷⁴ *Ibid* at s. 180(8).

¹⁷⁵ *Ibid* at s. 180(3) and s. 167(2).

¹⁷⁶ Bill 12: *Police (Independent Investigations Office) Amendment Act* (2011). See: <https://www.leg.B.C..ca/Pages/B.C.LASSLegacy.aspx#%2Fcontent%2Flegacy%2Fweb%2F39th3rd%2F3rd_read%2Fgov12-3.htm>; IIO MOU (February 12, 2013). Officers include the RCMP, Municipal Police Departments of B.C., and the Organized Crime Agency of B.C.

be separated from the Solicitor General who is responsible for policy and governance of policing in BC.¹⁷⁷ As such the IIO operates under the Attorney General.

The IIO holds a valuable role in ensuring that police officers are held criminally responsible within s. 25 of the *Criminal Code*. However, in doing so their role is limited. The CCD is mandated to conduct investigations into police-involved serious harm or death, and to determine whether an officer *may* have committed a criminal offence. If evidence supports such a finding, the Crown retains jurisdiction over the prosecutorial process.¹⁷⁸ Prior to the appointment of the new CCD in 2018, the IIO aimed to carry forward the conduct of competent, thorough and unbiased investigations, the completion of these investigations in a timely manner, and transparency through public reporting.¹⁷⁹ It appears that this mission and vision has been removed from the public purview, and not publicly available as it once was.

12. Issues within the legal framework

The IIO poses a lengthy set of issues that support the idea that law reform has not gone far enough to create a strong and effective independent criminal investigative process. From the lack of civilianization, and the narrow investigations mandate that excludes sexual harms by police officer, to lengthy and delayed investigations, the IIO has seen criticism from affected families and public interest legal counsel. From a prosecutorial standpoint, the list of evidentiary issues discussed below perhaps provides the greatest insight as to why IIO investigations lack the ability to compel potentially exculpatory evidence from subject police officers.

a. Investigatory independence and civilianization: police investigate police-involved death

Public confidence in the police is a foundational principle which the IIO was developed

¹⁷⁷ Braidwood, *Why?*, *supra* note 19, recommendation 8(c) at 421.

¹⁷⁸ *Ibid* at 412.

¹⁷⁹ Independent Investigations Office of BC: Mandate. No longer available online: <<http://iioB.C..ca/mandate/>>.

upon following the Davies and Braidwood inquiries. How investigations are conducted, including the independent and civilian investigation nature of investigations has an impact on that public confidence. Justice Braidwood explained that historically police have investigated themselves, which gives legitimate concerns about conflict of interest. The perception can lead to public distrust and an undermining of public confidence in the police.¹⁸⁰

The legislative intent of civilianization was limited in that the *Police Act* enabled former police officers to become investigators; however, this was thought to be a necessary short term limitation in order for the IIO to have major case handling abilities upon becoming operational. It is worth mentioning that although a phased approach is sensible, there is no good reason that the IIO could not become fully civilian. A police-centric view may be that only the police have the skills to carry forward IIO investigations, however, there is little uniqueness about the recruitment and training of a civilian becoming a police officer. Therefore, civilians can surely become competently trained investigators.

The 2015 Legislative Assembly Special Committee Review of the IIO recommended that they continue progress toward civilianization. Seven years after the IIO became operational, the agency continues to be civilian-led, with no formal civilianization plan in place. The Attorney General has jurisdiction to decide on the administration and general operations of the IIO, and therefore, has the authority to ensure civilianization. The IIO has however initiated an investigative training program at the Justice Institute of BC, and project having a pool of civilian trained investigators in 2021.¹⁸¹

The CCD recently stated that the public acknowledges there are police who are

¹⁸⁰ Braidwood, *Why?*, *supra* note 19 at 412.

¹⁸¹ Justice Institute of British Columbia: Investigation and Enforcement Skills Certificate. See: <<http://www.jibc.ca/programs-courses/schools-departments/school-criminal-justice-security/justice-public-safety-division/professional-development/investigation-enforcement-skills-certificate>>.

successfully able to investigate other police officers.¹⁸² Although this may or may not be the case, so long as former police investigate police, the public perception is at stake. The CCD's statement also brings attention to the question of how the IIO is canvassing such information from the public, including the public's needs and how public confidence is evaluated.

The IIO offers a layer of accountability that encompasses some form of independence. The CCD may appoint a civilian monitor, who is not a former or current member of a police force, to review and assess the integrity of a specific investigation and provide a written report to the CCD.¹⁸³

b. Narrow investigations mandate

In Hansard debates leading to the implementation of the IIO, the former Attorney General stated that the IIO have “a mandate to investigate police-related incidents involving the death or serious harm of a person....”¹⁸⁴ The statutory definition is limited to “injury that may result in death, may cause serious disfigurement or may cause substantial loss or impairment of mobility of the body as a whole or of the function of any limb or organ.”¹⁸⁵

Sexual assault was not defined under the category of serious harm. Advocates have long been calling on the IIO to expand their investigatory mandate to include sexual assault, as investigated by Alberta, Nova Scotia, Quebec, Ontario and Newfoundland investigations agencies. The newly appointed CCD, former head of the Serious Incident Response Team in Nova Scotia, recently stated that he plans to examine the IIO's mandate to include “other types

¹⁸² Katie DeRosa, *Times Colonist* “New police watchdog might investigate domestic assaults by officers (September 14, 2017) [*DeRosa article*]. See: <<https://www.timescolonist.com/news/local/new-police-watchdog-might-investigate-domestic-assaults-by-officers-1.22725768>>.

¹⁸³ *Police Act*, *supra* note 7 at s. 38.08.

¹⁸⁴ *Hansard 2011*, *supra* note 136 at 1705.

¹⁸⁵ *Police Act*, *supra* note 7 at s. 38.01.

of cases.”¹⁸⁶

c. Charge assessment standard

Once the IIO has established that a criminal offence *may* have occurred, Crown Counsel retains jurisdiction over the file to determine whether there is a substantial likelihood of conviction on the available evidence and that public interest requires prosecution. Therefore, accountability is removed from the IIO and placed with a branch of government who work close with the police agencies when recommending charges on a day to day basis. Justice Braidwood highlighted that the relationship between the crown and police agencies leaves the potential for a perceived conflict of interest that could undermine public confidence in the justice system. He also cautioned against the CCD making the charge assessment decisions because of the historical practice of keeping the police investigatory and the charge assessment roles separate. He therefore, recommended that a special prosecutor be assigned to each police related incident, and make the charge assessment decision, as well as assume conduct of the prosecution.¹⁸⁷

d. Evidentiary issues

Although IIO investigators have statutory powers to gain access to information required to carry forth criminal investigations, there appears to be a high number of cases with insufficient evidence to determine whether a criminal act may have occurred.¹⁸⁸ Following an IIO investigation, and with the available evidence, the IIO either exonerates a police officer or gives jurisdiction to crown counsel. However, in circumstances where the IIO does not acquire sufficient evidence to make that determination, the file is closed, or crown counsel determines that there is no likelihood of conviction.

¹⁸⁶ *DeRosa, supra note 182.*

¹⁸⁷ Braidwood, *Why?*, *supra note 19*, at 422.

¹⁸⁸ *Police Act, supra note 7* at s. 38.06(1)(a); *Hansard 2011, supra note 136* at 1630.

There are three critical evidentiary issues regarding the quality and availability of potentially exculpatory evidence following a police-involved death. They include: subject officer non-compellability, witness officer refusal of the Duty to Cooperate, and the lack of police notes. These issues impact the ability of IIO investigators to be able to gather evidence during a criminal investigation, and whether subsequent charges are laid by the Crown. These issues are discussed below.

Subject officer non-compellability

Police notes and police interviews are key forms of evidence, and are essential for the IIO to conduct competent, thorough and timely investigations. However, subject officers are not compellable. In other words, they are constitutionally exempt from providing evidence by way of IIO interview or providing police notes. This question speaks to the constitution privilege against self-incrimination.¹⁸⁹

The public expects penal consequences for culpable homicide. In many cases, the subject officer is likely to be the only witness. Absent any civilian witness, witness officer or video evidence following a police-involved death, the subject officers may be the only holder of evidence related to the death. Consideration thus turns to the question of whether evidence in the possession of the police – which might be critical to understanding the circumstances of a death, but which also might be inculpatory of an officer – can be compelled by IIO investigators for the benefit of families and the pursuit of justice, notwithstanding the protections against self-incrimination enjoyed by citizenry generally?

What if police officers were granted immunity from such prosecution arising from statutory compellability? In *R v. Herbert*, the court stated that the *Charter* right to silence is not

¹⁸⁹ *Constitution Act*, 1982. Part 1 Canadian Charter of Rights and Freedoms s. 7.

absolute and the individual interest must be balanced with a legitimate public interest.¹⁹⁰ The Court held that an overriding public purpose in the testimony sought from a witness, evidence that could not have been otherwise obtained, can be balanced against the protections of the witness' right against self-incrimination by providing immunity from use of any evidence derived from a statement in future criminal proceedings against the witness.¹⁹¹

In *Schaeffer*, the Court found that public interest should be paramount, stating, "...so long as police officers choose to wear the badge, they must comply with their duties and responsibilities under the regulation, even if this means at times having to forego liberties they would otherwise enjoy as ordinary citizens."¹⁹²

Duty to Cooperate

In contrast to the Ontario Special Investigation Unit legislative and regulatory regime, the *Police Act* is accompanied by a memorandum of understanding (MOU) between the IIO and police agencies. However, the MOU provides arguably less legal authority to carry out the intent of the *Police Act* than a regulation. An issue on this point recently arose when witness police officers in two different IIO investigations refused to provide statements as required by their duty to cooperate under the MOU.

First, in relation to a fatal shooting by Vancouver police officers, several witness officers refused to attend IIO interviews as directed by the IIO investigators. Second, in the death of Miles Grey, witness officers refused to participate in a second interview with the IIO. The MOU includes words to the effect that officers' constitutional rights are to be respected and protected,

¹⁹⁰ *R v. Herbert* (1990), 57 C.C.C. (3d) 1 (S.C.C.) at 6 and 46.

¹⁹¹ *R v. S.(R.J.)* (1995), 96 C.C.C. (3d) 1 (S.C.C.) at 80.

¹⁹² *Wood v. Schaeffer* 2013 SCC 71 at 32 [*Wood v. Schaeffer*].

and therefore, subject officers are not compelled to provide evidence to the IIO.¹⁹³ The IIO submitted applications for relief before the BC Supreme Court in each of these cases, seeking a declaration to clarify the interpretation of witness “duty to cooperate”. The Court held that witness officers must cooperate with IIO investigations.¹⁹⁴

The petitioner, an Independent Office of the Legislature, had the financial and legal resources to challenge police power. Many individuals may not have sufficient resources to proceed with formal judicial proceedings against the police.

Right to counsel prior to completing police notes

In BC, only witness officers are compelled to submit incident notes to the IIO.¹⁹⁵ Unlike in Ontario, officers in BC do not have a duty to the Chief of Police to complete notes on the incident in accordance with his or her duty.

In *Wood v. Schaeffer*, the Supreme Court of Canada was called upon to determine whether the legislative scheme for police accountability in Ontario permitted witness and subject officers to consult with legal counsel before completing their notes. The Court held that lawyer-vetted refinements in the note-taking process would undermine the very purpose of an officer's notes, namely, to set out the officer's independent and contemporaneous record of the incident.¹⁹⁶ Notes were found to be the most immediate source of relevant evidence, and by allowing legal counsel to vet officer notes, the Director was unable to rely on them for the truth of their contents to determine what happened.¹⁹⁷ Further, the Court stated that permitting officers to consult with

¹⁹³ IIO Memorandum of Understanding 2012 at s. 17.2, s. 17.4, s. 18. 2, s.19.3, s. 20 [*IIO MOU*]. See. <https://iiobc.ca/app/uploads/sites/472/2019/02/MOU_OPCC_IIO_AMEND_NOV_20141.pdf>.

¹⁹⁴ *Independent Investigations Office of British Columbia v. Vancouver (City) Police Department* 2018 BCSC 1804.

¹⁹⁵ *IIO MOU*, *supra note* 193 at s. 17.

¹⁹⁶ *Wood v. Schaeffer*, *supra note* 192 at 71.

¹⁹⁷ *Ibid* at 66 and 81; s. 10(b) of the *Charter* was not addressed in *Schaeffer* because the main parties did not raise the issue.

counsel before their notes are prepared “is an anathema to the transparency that the legislative scheme aims to promote.”¹⁹⁸ However, officers were free to consult with counsel once the notes are submitted to the Chief of Police, and they are entitled to have legal counsel present during the IIO interview.¹⁹⁹

BC does not follow suit. Section 15(1)(d) of the MOU sets out that in order to avoid the contamination of evidence, officers are not permitted to discuss recollections of the incident directly to anyone other than the IIO investigator. They are, however, permitted to obtain advice from legal counsel or a police association representative.²⁰⁰ It bears note also that to prevent conflict of interest, lawyers have a professional obligation to disclose to each of their clients what the others have told them, which runs counterintuitive to s. 15(1)(d).

In a review of closed IIO reports since they began operations in 2012, there were cases where police officers consulted with legal counsel prior to participating in the IIO investigations.²⁰¹ A Freedom of Information request revealed that the IIO does not record data on such occurrences.²⁰²

e. Lengthy investigations

There are no set timelines for completed investigations. The average timeline to provide a report to crown counsel, or to provide a public report is 569-573 days in 2017/2018. The lengthy investigations can be taxing on affected families, and officers under investigation.

13. Body cameras as an evidentiary solution

¹⁹⁸ *Ibid* at 6.

¹⁹⁹ *Ibid* at 88.

²⁰⁰ *Police Act, supra note 7* at s. 15(1)(d).

²⁰¹ Independent Investigation Office Public Reports on Closed Investigations File numbers 2012-0002, 2013-000024 and 2014-000108. See: <http://iioB.C..ca/cases/>.

²⁰² Independent Investigations Office of BC: Request for Access to Records under the *Freedom of Information and Privacy Act*. File no.: FOI-2018-02 (August 1, 2018) [*File no.: FOI-2018-02*].

“To be perceived as legitimate, police use of force must be subject to open and transparent accountability.”

David MacAlister ²⁰³

Notwithstanding special powers and immunities of the police when use of force is used, the IIO must have access to quality evidence in order to carry out timely, competent and thorough investigation that fairly assesses use of force. In light of the multiple evidentiary issues faced by the IIO, the government or police agencies might consider requiring police officers to wear body cameras. Justice Iacobucci recommended the use of body cameras by police officers who may encounter people in crisis in order to ensure greater police accountability.²⁰⁴ It is imperative that independent police accountability experts be involved in the policy development around body cameras to ensure strict privacy rules to protect against misuse of evidence by the police.

14. Access to Information related to police-involved death

The processes for requesting information by municipal police are governed by the *Freedom of Information and Protection of Privacy Act*.²⁰⁵ The *Access to Information Act* governs information requests related to the RCMP.²⁰⁶ If an individual requests information and believes information was unreasonably withheld, they can submit a request for review to the Office of the Information and Privacy Commissioner (freedom of information appeals for information regarding municipal police) or the Information and Privacy Commissioner of Canada (access to information appeals for information regarding RCMP).

15. Issues within the legal framework

²⁰³ *BCCLA 2012*, *supra* note 8 at 7.

²⁰⁴ Iacobucci, *Independent review*, *supra* note 74 at recommendation 72.

²⁰⁵ *FOIPPA*, *supra* note 12.

²⁰⁶ *Access to Information Act* R.S.C., 1985, c. A-1. See: <<http://laws-lois.justice.gc.ca/eng/acts/a-1/FullText.html>>.

a. Exemptions to disclose information

It is reasonable to believe that disclosure may be provided through access to information laws, however, this is not generally the case. This lack of transparency can lead to the public believing they are not privy to the true version of the investigation. Even perceived bias that investigations are not impartially carried out can lead to a lack of public confidence in law enforcement.²⁰⁷

With the exception of the coroner services, generally, the public is not privy to the investigation file of the police, OPCC or IIO. While families should have a right to review the full police investigation file, no such right is provided at law. The *Police Act* exempts police agencies from disclosing information under freedom of information legislation as it relates to an officer's conduct or investigation file.²⁰⁸ The OPCC is exempt from disclosure provisions in their duties as Independent Offices of the Legislature.²⁰⁹ Justice Oppal requested RCMP data while conducting the inquiry into policing in BC, but he was refused disclosure.²¹⁰

In the event some information is provided by the police or investigation agency, the results are likely to be heavily, if not entirely, redacted. On appeal to the provincial or federal information and privacy commissioners, a review of the FOIPPA and ATIP legislation will likely find that a lack of disclosure was within legislative authority, and yield no further results.

b. Access to information fees

Search fees can be extraordinarily high; according to an information request, the search fee for a request for information from the IIO was estimated to be \$34,380.00.²¹¹ Regardless of

²⁰⁷ Civilian Review and Complaints Commission for the RCMP. *Police Investigating Police Final Public Report* (2009) at 22. See: < <https://www.crc-ccecp.gc.ca/en/police-investigating-police-final-public-report>>.

²⁰⁸ *Police Act*, *supra note 7* at s. 182.

²⁰⁹ *FOIPPA*, *supra note 12* at s. (3)(1)(c).

²¹⁰ Oppal, *Policing and the Community*, *supra note 26* at 19.

²¹¹ Request for Access to Records under the *Freedom of Information and Privacy Act*. File no.: FOI-2018-02.

the size and the scope of a request, fees provide barriers to the public accessing information that in many cases, should be publicly reported.

16. Civil Litigation

For individuals who had little success gaining information through the coroner, OPCC, CRCC, IIO or freedom of information processes, civil litigation may be pursued as a last resort. Unlike a criminal investigation, a police officer can be compelled to testify, and have their credibility examined. A benefit of litigation is that the plaintiff has discovery rights that allow them to examine the police officers in an examination for discovery under oath. However, *Lindgren (Guardian ad litem of) v. Parks* 2016 BCSC 907 provides that the federal government, including the RCMP, can choose the Crown deponent. This means that an officer in questions of a police-involved death or a subject officer is not required to be examined under oath. Municipal police are not bound by this case. Plaintiffs can also request document disclosure from the court if disclosure is relevant to the claim.

The mother of Greg Matters filed a civil suit for compensation related to the wrongful death of her son. She sought damages for battery, wrongful arrest, unlawful detention and malicious misconduct for his arrest which occurred during the standoff between her son and the police just prior to her son being shot.²¹² Matters mother reported, "[w]e believe it should have been investigated as a criminal case... We can now only pursue this as a civil case... We're hoping for truth and justice... We want everyone to know the facts."²¹³

²¹² Baker, P. *Global News* "Greg Matters' family launches civil suit against RCMP (September 9, 2014). See: <<https://globalnews.ca/news/1554795/greg-matters-family-launches-civil-suit-against-rcmp/>>.

²¹³ Dene Moore, "Greg Matters Mother Suing R.C.M.P. for Shooting Her Son", *CB.C. News* (September 9, 2013). See: <<http://www.cB.C.ca/news/canada/british-columbia/greg-matters-mother-suing-R.C.M.P.-for-shooting-her-son-1.2761312>>.

Besides obvious barriers to access to justice such as the emotional and financial cost of litigation, civil forms of redress are not a viable accountability mechanism.

There are two notable legal barriers in accessing justice and police accountability: legislation stating that punitive damages cannot be awarded to families affected by police-involved death, and legal precedence that finds municipalities, not police departments or officers, are liable when sued. The legal barriers are discussed below.

a. *Family Compensation Act*

Individuals can bring forward a civil claim in order to receive damages for wrongful death by police. In the civil process, compensation can be awarded for the death of a family member. However, provisions in the *FCA* prohibit punitive damages from being awarded to the deceased's estate.²¹⁴ Some damages may be awarded if there is a surviving dependent and are based on the deceased's income. Therefore, damages will only be substantial to dependents in instances where the deceased was a financially successful person. Siblings, who often manage legal matters in order to relieve their parents of stress, are excluded from receiving damages under the *FCA*.

Further, police legal counsel defend aggressively, and awards may not cover the full cost of legal fees. This provides a barrier to affected persons retaining pro-bono legal counsel. If the claimant is unsuccessful in a claim, they may have a cost award issued against them, which means they are required to pay the legal fees of the opposing party that were incurred defending the claim. Roach suggests that the absence of a principled framework departing from the "loser pay cost rule" is a barrier to litigation.²¹⁵

²¹⁴ *Family Compensation Act* [1979], Chapter 120 at s. 3(2).

²¹⁵ Kent Roach, *Constitutional Remedies in Canada*, 2nd ed. (Toronto: Canada Law Book, 2013) ch. 11.

b. *R v. Henry*²¹⁶

The Court held that that municipal police agencies are not required to provide evidence to the Court in proceedings against them. This is in part because the legislative scheme treats municipal police departments as third parties, and therefore, they are not a legal entity and cannot be sued. In other words, municipalities are named as defendants in claims against municipal police departments. The idea of deterrence is therefore placed on the municipality as the liable party, not the police department. There is no financial implication on the police department, and the municipality is not privy to disclosure on behalf of the police who are the holders of any evidence that could be crucial in establishing a civil claim against them. This requires affected individuals to seek disclosure through the court, resulting in possible expense to plaintiffs.

Further, the rules of court require that a plaintiff must have knowledge that a document exists in order to seek disclosure. This is a challenging task when one does not know the document exists unless it is disclosed. Disclosure must be relevant to the claim, and relevance can be difficult to demonstrate if the plaintiff's expectations of disclosure do not align with the particulars of the claim and with the rules of court. Further, the police can claim litigation or public interest immunity, where case law sets forth the Crown's ability to withhold disclosure based on their interests.

²¹⁶ *R v. Henry* 2014 BCSC 1018.

Chapter 7: Lack of police data and public reporting

It has become evident that the government's response to police accountability, following the multiple recommendations of legal expert reviews and inquiry recommendations, was not effective in establishing a strong legal framework and investigatory processes that promote police accountability. What role could public police data have in assisting in police law reform?

Transparent police data that captures location, age, race, mental health, and substance use as it pertains to police incidents could provide law makers with the necessary information to better understand police-involved deaths and inform stronger law reform. However, there is currently no statutory requirement for law enforcement agencies to capture data following a police-involved death. This chapter will explore why there is a lack of publicly available police data, as well as provide examples of the limited data available through access to information requests for the BC Coroner Services, OPCC, CRCC and IIO.

1. Lack of publicly available police data

There is no requirement on behalf of police, or standardized method for recording the number of police-involved misconduct claims, serious injuries, deaths, or subsequent disciplinary or prosecutor measures. The lack of data that captures location, age, race, mental health, and substance use, puts limits on the study of police accountability, and trends that may contribute to incidents cannot be monitored or evaluated.

Justice Braidwood concluded that in relation to use of force, data needs to be regularly reviewed for the purpose of informing and developing policy and training.²¹⁷ He also recommended that the Ministry of Public Safety and Solicitor General develop a province-wide conducted energy weapon incident report form that is completed whenever an officer deploys a

²¹⁷ Braidwood, *Why?*, *supra note* 19 at 18.

conducted energy weapon, followed by a province-wide electronic system for the reporting and analysis of incidents.²¹⁸ The lack of publicly available data does not lend to public confidence in the justice system, and without such data, use of force cannot fairly be assessed.

In an attempt to understand the general landscape of police-involved deaths in Canada, the media has taken the initiative to piece together and maintain data related to fatal interactions between the police and civilians. The Canadian Broadcast Corporation (CBC) has published a national police-involved death database, however, data does not capture in-custody death or motor vehicle incidents involving police. The CBC recently reported that in BC, the majority of deaths involved shootings of unarmed males, with an average age of 36-years old, with mental health and substance use issues. Indigenous and black victims were also over-represented.²¹⁹

The Georgia Straight, a Vancouver based newspaper, provides an online database of police-involved deaths in BC using data captured from online coroner investigation reports.²²⁰ They reported that 90% of police-involved death involved mental illness, substance use or both.²²¹

An attempt was made to piece together publicly available data from the oversight agencies in BC. Although not sufficient to undertake a thorough analysis related to the assessment of use of force, the data demonstrated that the public is not privy to how often and under what circumstances police use force against citizens.

2. BC Coroner Services Data

Historically, any time that somebody in BC died during an interaction with police, the

²¹⁸ *Ibid* at 23.

²¹⁹ Marcoux, *CBC*, *supra note* 69.

²²⁰ Georgia Straight database: Police-involved deaths. See: <
<https://docs.google.com/spreadsheets/d/1aLNSF4Hkk9XdVKeuVU6ZrRO6GtSxT4t8TiMiQ6ptLrY/edit#gid=0>>.

²²¹ Lupick, *CBC*, *supra note* 70.

coroner service released a media statement including information such as the date of the incident, the police department involved, how the death occurred and the name of the deceased. However, in recent years they have limited media statements to only deaths requiring an inquest. The arbitrary shift in reporting undermines transparency of the circumstances leading to all police-involved deaths and how many police-involved deaths occur. According to the Georgia Straight, the coroners service stopped releasing information sometime in 2017 due to a review of their disclosure policies. According to a Vancouver police accountability lawyer at Pivot Legal Society, losing the coroners service as a source of information is problematic because “media attention and public outcry impacts how coroner inquests unfold”.²²²

Table 3 demonstrates public data from the BC Coroner website. The data does not reflect the total number of police-involved deaths because the 2010 *Coroners Act* amendments removed the requirement to hold an inquest for all police-involved deaths. Although not accurate in the number of police-involved deaths, the data demonstrates that 58.7% of victims suffered substance use or a mental health issue. 64% of victims died while in custody of the police, while 32% of people died from police use of force. Due to the lack of publicly available information since 2017, it may be difficult to understand how victims are dying in custody and what use of force victims might face.

Year	Number of deaths	Substance use or mental illness	In custody	Use of force	Pursuit	Other	Cells
2007	13		12	1			
2008	15	10	11	3	1		9
2009	7	5	7				5
2010	10	4	7	3			5
2011	12	9	7	5			2
2012	12	8	6	6			1

²²² Travis Lupick *The Georgia Straight*. B.C. Coroner Service information blackout on police-involved death raises red flags for accountability (June 19, 2017). See: < <https://www.straight.com/news/926101/bc-coroners-service-information-blackout-police-involved-deaths-raises-red-flags>>.

2013	10	4	3	3		4	1
2014	7	6	3	3		1	
2015	5	5	4	5			
2016	6	4		4		2	
2017	5	4	3	2			
2018	7	5	7				
Total	109	64	70	35	1	7	23

Table 3: BC Coroner Service: Publicly available number of police-involved death inquests 2007-2018²²³

3. OPCC Data

Oppal recommended that the province amend the *Police Act* to require that the complaint commissioner keep a public record briefly describing every complaint, including any disciplinary or other action imposed in respect of each allegation.²²⁴ He also recommended that the Attorney General work with the RCMP to establish a national police discipline digest.²²⁵ These recommendations were not implemented.

The OPCC publishes annual reports which capture partial data on the type of complaint, police department and discipline imposed, however, the data is limited. Between 2017-2018, the annual statistical report concluded that over half of the 1154 complaints were ordered investigations by the police department or OPCC, questions or concerns, internal discipline or service or police complaints.

Table 4 indicates that the majority of complaints were not substantiated, rather they were either informally resolved, withdrawn, abandoned or refused. There were 522 registered complaints on behalf of the public.²²⁶ 233 of the complaints were not admissible. No misconduct was found in 223 of the complaints in accordance with misconduct as defined in the *Police Act*.

²²³ BC Coroner Services: Inquests Archive. See: <<https://www2.gov.bc.ca/gov/content/life-events/death/coroners-service/inquest-schedule-jury-findings-verdicts#schedule>>. 2019 data not available.

²²⁴ Oppal, *Policing and the Community*, *supra* note 26 recommendation 258 (b) at 45.

²²⁵ *Ibid*, recommendation 292 at 48.

²²⁶ OPCC 2017-2018 Annual Report at 89 [*OPCC Annual Report*]. See: <<https://opcc.bc.ca/wp-content/uploads/2018/11/2017-2018-Annual-Report-Revised-on-2019-Mar-27.pdf>>.

Without data on the nature of misconduct alleged, it is difficult to determine if the definition of misconduct is too narrow. 39 complaints were made after the 12-month limitation period, perhaps indicating that the time limit is a barrier to accessing the complaint process. 11 of the complaints were deemed frivolous or vexatious.

Annual complaint disposition	Total
Total complaints 2017-2018	1154
Registered complaints received	522
Registered complaints withdrawn prior to admissibility assessment	16
Registered complaints inadmissible	273
Registered complaints admitted	233
Registered complaints substantiated	6

Table 4: OPCC total number of registered complaint dispositions 2017-2018²²⁷

A FOIPPA request for information was submitted in an attempt to understand the nature of complaints received by the OPCC. The request asked for the following data pertaining to complaints made between 2016-2017:²²⁸

- 1) All records and data related to questions and concerns made to any municipal police department and the OPCC, and actions taken to address them.
- 2) All records and data related to inadmissible registered/public trust complaints.
- 3) All records and data related to unsubstantiated registered/public trust complaints.
- 4) All records and data related to registered/public trust complaints that resulted in a Complaint Resolution Agreement or mediation.

²²⁷ Office of the Police Complaint Commissioner request for access to records under the *Freedom of Information and Protection of Privacy Act*. File.: F2018-006 (July 11, 2018) [OPCC FOI].

²²⁸ OPCC FOI, *supra* note 283.

No records or data was provided. The response stated that as an Independent Office of the Legislature, they are exempt from disclosing information pursuant to s. 182 of the *Police Act* and s. (3)(1)(c) of the *Freedom of Information and Protection of Privacy Act*.

4. CRCC Data (retrieved from the CRCC and the RCMP)

The CRCC Annual reporting is vague. An ATIP request was submitted for information in an attempt to understand the nature of complaints received by the CRCC. Table 5 demonstrates the lack of publicly available data that would assist in assessing the nature of complaints and discipline imposed, beyond the total number of complaints submitted and substantiated. In a one-year period, the CRCC received 1100-1500 complaints against the RCMP. Search results of this nature can be thousands of pages and take years to process and redact. The CRCC provided basic data between 2016-2017, taken from the Annual Provincial Report provided to the provincial government by the CRCC in accordance with s. 45.52(2) of the *RCMP Act*.²²⁹

Annual complaint disposition	Total
Number of complaints that were submitted to the CRCC and E-Division RCMP	1159 public complaints on-duty RCMP
Admitted complaints	984
Inadmissible complaints	175
Substantiated complaints	Incomplete data ²³⁰
Misconduct pursuant to the <i>RCMP Act</i>	Incomplete data ²³¹
Number of complaints that were not substantiated	Incomplete data ²³²

²²⁹ Civilian Review and Complaints Commission for the RCMP Access to Information Request File.: A2018-002 (September 13, 2018).

²³⁰ Data was combined for multiple years (years unknown), therefore, the data on substantiated complaints in 2016-2017 was not provided.

²³¹ Data was combined for multiple years (years unknown), therefore, the data on substantiated complaints in 2016-2017 was not provided.

²³² Data was combined for multiple years (years unknown), therefore, the data on substantiated complaints in 2016-2017 was not provided.

Number of submitted complaints per RCMP detachment in BC	Incomplete data ²³³
Disciplinary measures	No data available

Table 5: CRCC total number of registered complaint dispositions 2016-2017 ²³⁴ (Data does not include off-duty misconduct allegations)

Annual complaint disposition	Total
Number of complaints that were submitted to the RCMP	1046
Admitted complaints	989
Inadmissible complaints	57
Code of conduct investigation took place	3
Disposed of complaints	255
Informal resolution	391
Withdrawn	90
Not yet concluded	253
Total including admitted complaints	2038
Total excluding admitted complaints	1049

Table 6: RCMP total number of registered complaint dispositions 2016-2017²³⁵

The total number of complaints against the RCMP provided by the CRCC is 1159 (Table 5), whereas the total number of complaints against the RCMP provided by the RCMP is 1046 (Table 6). The total number of complaints by category provided by the RCMP equals 2038. A possible explanation for the discrepancy between the CRCC and RCMP in total number of submitted complaints is that the RCMP either reported an inaccurate number of submitted complaints, or the RCMP separated the total number of admitted complaints from the complaints

²³³ Data was combined for multiple years (years unknown), therefore, the data on substantiated complaints in 2016-2017 was not provided.

²³⁴ Royal Canadian Mounted Police Access to Information Request. File.: A-2018-05623 (February 8, 2018) [RCMP ATIP].

²³⁵ RCMP ATIP, *supra* note 291.

broken down into their complaint disposition. The total number of complaints does not equal the number of complaints by category, leaving discrepancies in the data.

Although misconduct is not defined in the *RCMP Act*, the RCMP provided the category of misconduct per complaint (Table 7). The CRCC did not provide the category of misconduct data. Use of force, improper attitude and neglect of duty were the most common complaints, however, there is no public information to describe the type of officer behavior in each category of misconduct.

Misconduct pursuant to the <i>RCMP Act</i>	Total number of allegations= 2477
Driving irregularity	28
Improper arrest	175
Improper attitude	680
Improper person/vehicle search	39
Improper search of premises	71
Improper use of firearm	11
Improper use of force	280
Irregularity of evidence	12
Irregularity in procedure	82
Mishandling of property	82
Neglect of duty	937
Oppressive conduct	52
Police	1
Service	10
Statutory office	17
Disciplinary measures imposed	No data available

Table 7: RCMP: total number of allegation and discipline imposed 2017²³⁶

5. IIO Data

The principle of publicity as described in the McDonald Inquiry would say that transparent reporting and publicly available data enables the public to see how an investigation is being carried out, and accordingly dispel suspicion. The IIO provides public information concerning police-involved serious injury or death on cases to which it dispatches an

²³⁶ *IIO FOI, supra note 17.*

investigation team, where the file has not proceeded to Crown counsel for charge assessment, and for which it deems there is a public interest to do so.

A FIOPPA request was submitted for information in order to understand how IIO investigations proceed.

Year	Total death and serious injury	Number of deaths investigated	Number of serious injuries investigated	Files closed by IIO with public report	Files closed by IIO with no public report	Files to Crown counsel	Officers Charged with criminal offence
2012-2013	233	8	1	8	No data	No data	No data
2013-2014	223	4	25	31	No data	No data	4
2014-2015	223	7	17	25	No data	No data	2
2015-2016	191	6	9	15	5	2	5
2016-2017	275	10	6	16	80	2	4
2017-2018	119	4	14	18	64	2	No data

Table 8: Independent Investigations Office Data 2012-2019²³⁷

Of the 52 police-involved and in-custody deaths reported by the BC Coroner Services between 2012-2018, since the IIO became operational, publicly available data shows only 39 were investigated by the IIO. Under s. 38.09 of the *Police Act*, all police-involved deaths are to be investigated by the IIO. There is no public explanation for the discrepancy; it is possible that the 13 cases not investigated by the IIO were not reported by the police to the IIO. There is also little data to suggest the dispositions of approved charges, and information that remains with BCPS. The following information was sought but few records were disclosed.²³⁸

1) The number of files where no subject or witness officer submitted notes or participated in interviews.

No data available.

2) The number of files where subject and/or witness officers consulted with legal counsel prior to submitting notes to the IIO and participating in interviews with the IIO.

No data available.

²³⁷ IIO FOI, *supra* note 17.

²³⁸ IIO FOI, *supra* note 17.

3) The number of files involving insufficient evidence to consider whether an offence may have occurred, specifically files where subject officers exercised s. 19.3 of the MoU, and/or witness officers failed to cooperate with s. 18 or the MoU.

No data available.

4) All records and data related to the number and the nature of accounts where witness and/or subject officers contravened of the MoU, including actions taken by the IIO to correct such circumstances.

No data available.

5) All records and data related to officers and/or municipal police and RCMP departments withdrawing from the MoU pursuant to s. 23.5.

0 have withdrawn.

6) Estimated search fees for #4 and #5

Due to the size and scope of this request, an estimated search fee of \$34,380.00 was quoted. Section. 75(1) of the *Police Act* provides that the IIO may charge a fee for processing the information request.

6. What do the records and data results indicate?

Without a standardized method to collect and record police-involved death data, there lacks a solid benchmark to measure whether the number of police-involved deaths are decreasing, whether new policies are developed to prevent deaths by police, or whether training, or the state of police accountability in general, is improving.

What is evident is that the agencies disclose very limited data, and data as it pertains to specific evidentiary questions is largely unavailable. For example, insufficient data on behalf of the BC Coroner service makes it difficult to draw conclusions as to who is being killed by way of race or mental illness, under what circumstances, or why use of force appears to be prevalent among police-involved deaths.

Public coroner data indicated a significant decrease in the information available after the 2010 amendments to remove mandatory inquests following a police-involved death. Currently, there are gaps in the data that indicate how many people are killed as a result of police use of force, as well as the type of use of force. At the very least, the public should have access to accurate and transparent information on how public officers are causing death, under which circumstances and its justification or prosecutorial outcome.

Data gathered from the OPCC public annual report indicate the number of misconduct complaints, however, that information could not be corroborated by a freedom of information request due to legislative restrictions on what public information independent officers of the legislature are required to provide. Data was not available on why complaints were not admissible and not substantiated.

The CRCC shared less public information than the OPCC, and did not make public the types of misconduct complaints that were received. An information request to the RCMP revealed more data than the CRCC with regards to the annual complaint disposition, but there was no data available as to why complaints were not admitted or substantiated. Due to insufficient data, misconduct complaints among municipal police and RCMP across the province are difficult to assess.

Through a freedom of information request, the IIO provided annual data on the number of complaints received by death and serious injury, the number of files closed, the number of files forwarded to Crown counsel, and the number of officers charged with a criminal offence. This information is publicly available on their website. However, data as it relates to officer note taking, legal counsel consultation prior to submitting notes, and the nature of which files lack evidence to proceed to Crown was not available. As a result of a sizable amount of

information being absent from the information request, large search fees for compiling data from the public agency would be incurred if the information request were to proceed.

Chapter 8: Conclusion

Provided the unresolved history of police un-accountability in BC, this dissertation raised the question about potential abuse of power and what accountability looks like following a police-involved death. These questions have attracted considerable public attention in BC, leading to a number of Commissions of Inquiry and expert legal report recommendations on police accountability. Although these recommendations have led to some incremental reform, section 25 of the *Criminal Code*, the division of federal and provincial powers and inadequate civilian and independent oversight laws supports the assertion that the government's response to reform the investigatory and legal processes for the determination of allegations of police-involved death is inadequate.

Furthermore, following an analysis of disclosure laws and a review of information requests, it appears that oversight and law enforcement agencies limit access to the information required for families and the public to understand the circumstances of, and to fairly assess, alleged police-involved death.

When looking at the abridged summaries of police involved death, the ability for the police to use as much force as necessary when enforcing the law, enforcement which can be exercised with no independent civilian witness or video evidence, continues to be problematic. As described in chapter 1, the maze of laws, trajectories and pathways that confront the average citizen following a police-involved death may understandably raise a question of whether the legal structures are effective in achieving accountability. As Roach put it, civilian oversight of the police and accountability is critically important in any democracy.

Adding to the complexity of police law is the multi-jurisdiction of policing within the division of provincial and federal powers. As described in Chapter 3, the PPSA limits provincial

authority over administrative matters and conduct of the RCMP. Despite calls to create one complaint process for police in BC, the current police structure does not provide a standardized method for public complaints, information disclosure or data collection of police-involved deaths.

Chapter 4 described the sad history of police-involved death in BC; themes that emerged from the abridged summaries of past cases include the inadequate police response to persons in crisis, a lack of de-escalation strategies leading to frequent fatal incidents, discrepancies in police officer accounts of events leading to death, and a general unaccountability felt by families affected by police-involved death. It became clear that persons in crisis may not have an equal right to life when interacting with law enforcement.

Having summarized the key themes that were addressed throughout the first half of the thesis, I now proceed to discuss the various solutions that have been proposed, and where recommendations have fallen short. Chapter 5 highlighted multiple commissions of inquiry into policing and expert legal report recommendations. Although the CRCC, OPCC and IIO were implemented to provide independent and civilian police misconduct and criminal investigations, police continue to investigate police.

Justices Oppal and Wood opened the door for dialogue around independence and civilianization. However, they did not expressly recommend that misconduct complaints be free from police involvement. They called for partial civilianization. Their recommendations lacked what former Police Complaint Commissioner Dirk Ryneveld, Q.C. recommended; that police investigations should be independent from the police.

Justice Braidwood, Justice Davies, Stenning and lawyers from BC Civil Liberties Association suggested that the public does not perceive investigations into criminal conduct

following police-involved death to be independent when police investigate police. Following their inquiries, Justices Davies and Braidwood suggested an Independent Investigations Office. What resulted was a civilian based agency independent of the police department, where former police continue to investigate police.

What remains is the question as to whether former police officers, who investigate police misconduct and death, have sufficient distance from the assumptions about what policing consists of in order to conduct investigations objectively and impartially, and whether the public can perceive these investigations as such. Without such distance, the government runs the risk of enabling the police to act with impunity.

As set forth in Chapter 7, there is no requirement on behalf of the police to record the number of police-involved misconduct claims, serious injuries, deaths, or subsequent disciplinary or prosecutor measures. In addition to the lack of publicly available data, freedom of information laws limit disclosure. The lack of transparency undermines a fair assessment of excess use of force, and any potential dysfunctional effects on citizenry.

Despite the efforts of government commissioned inquiries, there remains a strong need to evaluate the landscape of police accountability in BC. Given the immense power the police hold through the statutory authority to use force, the civilian authority ought to be satisfied that all police are held equally accountable under a regime accessible to all British Columbians. So long as police continue to investigate police within the current model, the government's response to reform the investigatory and legal processes will continue to lack in its ability to hold police accountable. To this end, police accountability must be built on a strong legislative foundation and institutional structures fully staffed by civilians with no prior police experience.

Reform that remains to be completed is found through recommendations as set out below.

The recommendations could provide a robust framework of accountability that considers fully independent and civilian oversight to ensure accurate investigative findings, perceived by the public to be impartial in reaching those findings.

General Recommendations
<ol style="list-style-type: none">1. Create an Independent Officer of the Legislature for Police Accountability to oversee provincial policing and accountability law reform.2. Amend the PPSA to reflect provincial authority of RCMP administrative matters including complaint and disciplinary processes.3. Create a comprehensive single source database for all incidents of police-involved misconduct, serious injury and death in BC.

Coroner Recommendations
<ol style="list-style-type: none">1. Require mandatory inquests for police-involved deaths.2. Provide funding for independent legal counsel to represent families at coroner inquests.3. Allow independent legal counsel to lead evidence.4. Make recommendations binding on public agencies.5. Establish a database to track recommendation implementation and improvements to public safety.6. Develop a police-involved death review panel in cases where the deceased was a person in Crisis, to develop recommendations for improved police response. The panel should be composed of mental health and legal experts with no prior police experience.

OPCC and CRCC Recommendations
<ol style="list-style-type: none">1. Create a single source database to record data including:<ul style="list-style-type: none">• race and mental health data of complainants• admitted and non-admitted claims• substantiated and non-substantiated allegations• names of police officers who were disciplined or had corrective measures enforced (currently police officers are only on the public record if the matter is adjudicated)2. The <i>Police Act</i> and <i>RCMP Act</i> should be amended to introduce a public reporting requirement in the statistical and/or annual reports.3. Enhance the staffing to ensure that that the OPCC/CRCC can employ its own civilian investigators. Under no circumstances, should investigators have been a police officer.

4. Expand the commissioner's powers to determine and enforce discipline.

5. In order to address the issue of delay in complaints and the investigation process, the *Police Act* and *RCMP Act* should be amended to introduce reasonable time limitations for each stage of the complaint process.

IIO Recommendations

1. Develop a regulatory model and have the ability to refer matters directly to the OPCC and CRCC for regulatory proceedings.

2. Expand the IIO mandate to include sexual assault by police officer.

3. The IIO should sustain the "5-year rule". The CCD may not appoint a member of a police force in BC within a 5-year period preceding the appointment per section 38.06(3)(c) of the *Police Act*.

4. Create a formal civilianization plan.

5. Require a special prosecutor to take conduct of files from the IIO.

6. Require subject and witness officers to prepare thorough notes following an incident. The notes should be submitted by the end of the day to the CCD.

7. Officers should not be permitted to consult with legal counsel prior to submitting their notes to the CCD. The legislation/MoU should reflect the decision in *Wood v Schaeffer*.

- Note: The OPCC submitted to the government that the police should follow *Wood v. Schaeffer* following an investigation and for all purposes under the *Act*.²³⁹

8. The legislation/MoU should ensure all officers consult with separate legal counsel once their notes are submitted to the CCD in order to avoid conflicts of interest.

9. The provincial government should implement the police use of body-worn cameras, in consultation with non-police stakeholders.

10. Regulate time limits for investigations.

11. The reports of civilian monitors be made public.

²³⁹ See the OPCC 2014/2015 Annual Report (page 26). See: <https://opcc.bc.ca/wp-content/uploads/2017/03/2014_2015_Annual_Report.pdf#page=26>.

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