

**REPORT OF THE CIVILIAN MONITOR
INTO THE SEPTEMBER 10, 2012 DEATH OF
MR. GREGORY MATTERS**

PURSUANT TO TERMS OF REFERENCE DATED 14 JUNE 2014

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28 OCTOBER 2014

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FINAL REPORT OF CIVILIAN MONITOR

I. INTRODUCTION

On 14 June 2014 Richard Rosenthal, the Chief Civilian Director (“CCD”) of the Independent Investigations Office (“IIO”) appointed me to the post of Civilian Monitor with a mandate to review the investigation of a RCMP officer involved shooting which resulted in the death of Gregory Matters in rural Prince George on September, 2012. The statutory authority for this appointment can be found at section 38.08 of the *Police Act*.

38.08 (1) *The chief civilian director may appoint a person who is not a current or former member of a police force in British Columbia or the Royal Canadian Mounted Police to review and assess the integrity of a specific investigation in accordance with this section and the terms of reference, if any, established by the chief civilian director in the appointment.*

(2) *Before beginning to exercise powers and perform duties, a civilian monitor appointed under subsection (1) must take an oath before the chief civilian director*

(a) *to faithfully and impartially review and assess the integrity of the independent investigations office investigation in accordance with this section and the terms of reference, if any, established by the chief civilian director in the appointment, and*

(b) *not to divulge any information obtained as civilian monitor, except in accordance with this section.*

(3) *For the purposes of subsection (2), the chief civilian director is a commissioner for taking affidavits in British Columbia.*

(4) *A civilian monitor is not entitled to participate in, attend or conduct an independent investigations office investigation under this Part, but the civilian monitor*

(a) *is entitled access at reasonable times to any record of the independent investigations office that is directly related to the investigation in respect of which the civilian monitor is appointed and the duty of the civilian monitor described in subsection (2) (a) in respect of that investigation, and*

(b) *may request an interview with or statement from a staff member of the independent investigations office or an IIO investigator in order to assist the civilian monitor in the performance of that duty.*

(5) *A person to whom a request is made under subsection (4) (b) must comply with that request.*

(6) *Staff members of the independent investigations office and IIO investigators*

(a) have a duty to cooperate with a civilian monitor in the exercise of powers or performance of duties under this Act, and

(b) must comply with regulations, if any, made under section 74 (2) (t.3).

(7) Within 30 days after the conclusion of the investigation in respect of which the civilian monitor is appointed, the civilian monitor must provide a written report to the chief civilian director respecting the civilian monitor's assessment of the integrity of the investigation.

(8) If a civilian monitor considers it necessary or advisable at any time before the conclusion of the investigation in respect of which the civilian monitor is appointed, the civilian monitor may provide an interim report to the chief civilian director respecting the civilian monitor's assessment of the integrity of the investigation.

On 21 July 2014 I took an oath before the CCD as is required by section 38.08 (2) of the *Police Act* and subsequently commenced my investigation.

II. QUESTIONS TO BE CONSIDERED

My appointment as civilian monitor for the Matters case arose from a written complaint made by Mr. Robin Stutt, a former IIO investigator and the primary investigator for Matters. The complaint was forwarded to the Deputy Attorney General on 27 May 2014, and then to the CCD on 13 June 2014. In this document, Mr. Stutt alleges that the IIO investigation of the Matters case was compromised by actions taken by the CCD and others.

In his notice of appointment, the CCD set out the following questions to be considered in my review:

1. *Review the Stutt complaint of May 27, 2014 and identify any allegations that, if true, would support a conclusion that the investigation or the investigative procedures followed lacked integrity.*
 - a. *Assess the evidence and determine whether the integrity of the investigation was impacted; and*
2. *Review the questions raised about the initial public report by the Independent Investigations Office, as noted above, and consider the*

findings of the Chief Civilian Director addressing these issues in the supplementary report, to determine the integrity of the public reporting process.

I pause here to note that I have not been directed to provide any opinion regarding the correctness of the CCD's decision not to forward the case to Crown, nor have I been asked to comment on the reasoning set out in the CCD's two public reports. While I have been asked to conduct an administrative review related to the conduct of the investigation, my terms of reference do not extend to a re-opening of the investigation.

The notice of appointment directs that I review the investigative file of the IIO into the death of Mr. Matters, interview any staff members from that office who I felt should be interviewed in order to inform that review, and retain any expert I felt might be necessary. The notice of appointment requires that I provide a report in writing within 30 days of the completion of my review of the investigation, and in particular that I notify the CCD in the event that I am not able to complete my report on or before 30 September 2014.

On 17 September 2014 I advised the CCD that I would require an extension of my reporting deadline to 30 October 2014; this request was approved.

III. MATERIALS REVIEWED

In conducting my investigation, I have reviewed the following materials:

1. The final investigation report ("FIR") which includes the narrative report drafted primarily by Mr. Stutt, and the primary investigative materials which were assembled by IIO staff during the course of that investigation (referred to by Mr. Stutt as the disclosure package);
2. The initial public report of the CCD dated 29 April 2013;

3. The supplemental public report of the CCD dated 26 May 2014;
4. Archived emails and hand written notes stored at the IIO which deal with the Matters case but which were not included as part of the final investigation report;
5. Mr. Stutt's written complaint dated 27 May 2014. Although there are three parts to that complaint, I understand that my mandate is restricted to the issues raised by Stutt which are specific to the Matters investigation.
6. Transcripts of portions of the testimony at the coroner's inquest into the death of Mr. Matters held in October 2013 and continued in January 2014.

I have also interviewed the following former or current IIO personnel, either in person or over the telephone:

1. Robin Stutt on 28 August 2014
2. [REDACTED] on 2 September 2014 and 3 October 2014;
3. [REDACTED] on 3 September 2014
4. Henry Waldock on 5 September 2014;
5. Roy Fitzpatrick on 9 September 2014;
6. [REDACTED] on 16 September 2014;
7. [REDACTED] on 16 September 2014 and 2 October 2014;
8. [REDACTED] on 16 September 2014;
9. [REDACTED] on 18 September 2014;
10. [REDACTED] on 23 September 2014
11. Pat Kennedy on 29 September 2014;
12. Richard Rosenthal on 9 and 10 October 2014

IV. THE STUTT COMPLAINT

Robin Stutt was the primary investigator on Matters, a key position in the command triangle employed in the major crime management model. As primary investigator, Mr. Stutt played a central role in the investigation from its earliest stages through to release of the CCD's two public reports.

That portion of the Stutt complaint which pertains to the Matters investigation runs for nine and a half pages with footnotes. This document is best described as a wide ranging indictment of the CCD's handling of the Matters investigation from its inception, with the added proviso that he nevertheless agreed with the CCD's decision not to refer the case to Crown. His chief complaints can be summarized as follows:

1. Directing Roy Fitzpatrick and Patrick Kennedy to be involved in the investigation contrary to section 38.06 (3) of the *Police Act*;
2. Directing that material be removed from the disclosure package;
3. Coaching evidence (in preparation for the coroner's inquest);
4. Attempting to have him excluded as a witness at the coroner's inquest;
5. Inappropriate involvement with Mr. Cameron Ward, who was counsel for the Matters family at the coroner's inquest;
6. Inaccuracies in the CCD's first of two public reports on the Matters case;
7. Comments by the CCD reflecting bias against him and the RCMP; and
8. Bullying and harassment directed at him personally.

To assist my understanding of Mr. Stutt's complaint, I met with him for some six hours on 28 August 2014. This interview was a first important step toward focussing my review on those issues which clearly fall within my mandate. This interview also greatly assisted my preparation for the many interviews which would follow.

In responding to the “questions to be considered” set out in the notice of appointment, I will focus primarily on the concerns raised in items 1 and 2 from Mr. Stutt’s complaint, in particular item 1, which alleges that Mr. Fitzpatrick and Mr. Kennedy were involved in the Matters investigation contrary to s. 38.06 of the *Act*.

I have concluded that items 3 through 8 on that list, even if true, have not impacted the integrity of the investigation or the integrity of the public reporting process. I will in due course provide brief comments on the substance of those complaints and why it is that I have arrived at this conclusion.

V. QUESTION ONE: STUTT ITEMS 1 - 2

1. THE INVOLVEMENT OF KENNEDY AND FITZPATRICK

a. IIO – Legislative Intent

The IIO model was created to resolve the public perception of bias which may and often does arise when “police investigate police.” The *Act* specifically sets out two scenarios which attract the jurisdiction of the IIO, (1) where it appears that “a person may have died or suffered serious harm as a result of the actions of an officer...”: section 38.09(1)(a); or more generally, (2) where police may have committed a criminal or quasi-criminal offence: section 38.09(1)(b).

The name for this organization and the statutory framework which would follow emerged from the recommendations made by Justice Thomas Braidwood in his report on the police involved death of Robert Dziekanski at the Vancouver International Airport. These were in turn derived in part from the Davies report in to the death of Frank Paul. In Part 10 of his report, under the title “Police Investigating Themselves”, Justice Braidwood prefaced recommendations for establishing the IIO model in BC with the following commentary on the public perception problem which will arise in cases like these:

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

Braidwood report at page 411

Justice Braidwood considered other police oversight models, including the Alberta Serious Incident Response Team (“ASIRT”), which employs as investigators both current and former police officers, and Ontario’s Special Investigations Unit (“SIU”), which employs only former police officers in that role. His comments here on the SIU experience underscored his determination that BC should steer a new course:

In Ontario, the director of the Special Investigations Unit cannot be a current or former police officer, and investigators cannot be currently serving police officers. Former police officers may be hired as investigators, but they cannot investigate officers from their former police force. At the time Mr. Davies wrote his report, all three full-time investigative supervisors were former police officers, as were just under half of the full-time investigators. *In 2008, the Ontario Ombudsman found that these former officers were steeped in police culture*, and he stated that it was critical that SIU move swiftly away from the police ties that continue to hold it back from being a truly civilian oversight body. (Emphasis added)

Braidwood Report at page 419

A core element of this model is the mandate to “civilianize” the operational side of the IIO, from the CCD on down. The *Act* mandates that a current or former member of a police force may not be appointed as CCD: section 38.03(2). The CCD may in turn appoint investigators with policing experience, but there are limits to that authority imposed by the *Act*:

38.03(3) The chief civilian director may not appoint a person under subsection (2) if the person

(a) is currently a member of a police or law enforcement agency outside of British Columbia,

(b) is currently a member of the Royal Canadian Mounted Police, or

(c) was a member of a police force in British Columbia at any time during the 5-year period immediately preceding the appointment.

In the result, a person who is currently a member of a police or law enforcement agency is barred from employment as an IIO investigator. A former police officer may serve in that role, but there is a temporal restriction on the hiring of investigators who were formerly employed as police officers in British Columbia (the “five year rule”).

The temporal restriction is derived directly from recommendations made by Justice Braidwood in his report (see at pages 419-423), and was proposed there as a compromise necessary to ensure that the IIO had the necessary experience to conduct a competent investigation immediately upon becoming operational, and as part of a transition to full civilianization. Indeed, Justice Braidwood went so far as to recommend that the “five year rule” for investigators exist only as an interim measure, that their employment would expire at the end of a five year transitional period, and that they “take no part in any investigation relating to a law enforcement agency in which they were employed.”(Pages 419-420)

It is apparent that the intention behind these provisions was to reassure the public that investigations of police officers would in fact be as fair and unbiased as possible, and would create public confidence that this was so, a reflection of the well known maxim, “not only must justice be done, it must also be seen to be done.”

The “five year rule” was perceived to be adequate, at least for the time being, to balance the need for both competence and civilian oversight. When Bill 12, the *Police (Independent Investigations Office) Amendment Act* was called for second reading, then Attorney General Shirley Bond commented on this tension before describing the government’s decision to include the “five year rule” for the appointment of investigators:

“...we need to make sure that we strike the right balance between appropriate expertise and civilian oversight when it comes to the investigations themselves. We want to make sure that the civilian perspective is there, but we also must ensure that where an officer is not charged, the reason is not due to a lack of investigative experience or expertise.”

Hansard, Thursday 26 May 2011, p. 7439.

At the end of the day, it was hoped that complainants, affected family members and friends, and the public at large would feel confident that decisions taken by the CCD would be based on an investigation cleansed of a common belief that the “thin blue line” will somehow protect one of its own. This level of confidence in the transparency and fairness of the investigation would also be in the best interests of the officer subject to investigation, and of policing overall in BC. It was deemed that the “five year rule”, at least for now, struck the appropriate balance between the need for investigative experience on the one hand, and civilian oversight on the other.

b. Lead up to Matters Call Out

The Matters call out was the first major investigation for the newly operational IIO. Mr. Stutt and others I have interviewed acknowledge that the IIO, while officially open for business when this call was received on 10 September 2012, was not yet fully prepared for a challenging investigation located hundreds of kilometres from their home base. Several of the people I interviewed commented that they were quite frankly hoping things would remain relatively quiet while the IIO continued to organize itself for this kind of work. Fate would not be so kind.

The responsibilities of the CCD are set in section 38.04 of the *Act*:

38.04 (1) *The chief civilian director is responsible for the following:*

(a) the management, administration and operation of the independent investigations office;

(b) overseeing investigations conducted by the independent investigations office under this Part.

(2) The chief civilian director must

(a) exercise powers and perform duties assigned to the chief civilian director under and in accordance with this Act and any other enactment, and

(b) ensure compliance with the director's standards as they relate to the independent investigations office.

Several IIO staffers and the CCD himself commented in particular on the challenges presented by the policy of “civilianization”, which as discussed is a core mandate of the IIO. Section 38.04(2) of the Act requires that the CCD implement that mandate. As noted, the CCD’s authority to hire investigators is circumscribed as set out in section 38.06(3) of the Act.

The Act establishes that the CCD and IIO investigators have all of the powers, duties and immunities of a peace officer, as well as jurisdiction to carry out their duties throughout British Columbia: section 38.07.

There is another aspect of the CCD’s power of appointment which is not caught by the restrictions in section 38.06 (3):

38.06 (5) *The chief civilian director may retain consultants, experts, specialists and other persons the chief civilian director considers necessary to enable or assist the chief civilian director in exercising powers or performing duties of the chief civilian director under this Act.*

In the result, a person appointed under section 38.06(5) is not an investigator, and is not clothed with the powers, duties and immunities of a peace officer in British Columbia.

During a clause by clause review of Bill 12 by a committee of the whole house, the Attorney General offered this insight on the intent behind the CCD's authority in section 38.06(05):

"I think the point of this section is to give flexibility for the chief civilian director to ensure that, as necessary, the appropriate experts may be retained for a particular case, a particular period of time. There certainly may not need to be experts of, for example, traffic reconstruction on staff full-time. This allows the chief civilian director to have that discretion."

"This bill lays out the road map. It basically says that in British Columbia, we're going to have an independent investigations office with a chief civilian director who has the authority to hire and make decisions about the experts that are required."

Hansard, 31 May 2011 at page 7688.

When it became operational on 10 September 2012, the investigations branch of the IIO was organized into four teams, with a fifth "specialized" team, made up of investigators with backgrounds in forensic identification and collision analysis. Each team is headed by a director. The intention as I understand it was that a director would also be an investigator.

The CCD reports, and others have confirmed, that the prohibition on hiring investigators who had been active in policing in BC over the previous five years presented a difficult challenge. Their goal had been to hire, where possible, qualified major crime and critical incident investigators. It turned out that qualified and willing candidates with relevant policing experience were hard to come by; some of the most qualified had settled into other post-policing careers and were not prepared to take on this role, while it was thought that others possessed major crime experience which had become outdated with the passage of time.

In testimony before the House Special Committee to Review the IIO on 11 September 2014, Police Complaints Commissioner Stan Lowe and the RCMP's Assistant Commissioner Rideout each recommended either a relaxation or complete abolition of the "five year" rule, citing the need for a merit based approach to hiring investigators with major crime or critical incident experience. Representatives from the organization

Justice for Girls and from PIVOT argued very strongly against this proposal, and submitted that immediate 100% civilianization was the only way to conduct police oversight. While the “tension” between “appropriate expertise and civilian oversight” continues as part of the debate now that we are part way into this CCD’s mandate, the legislation itself has not changed.

c. Fitzpatrick and Kennedy

Roy Fitzpatrick was brought in to the IIO on secondment from his work as the Assistant Director at ASIRT. Before ASIRT, Mr. Fitzpatrick was with the Calgary Police Department for 26 years. His last assignment prior to ASIRT was with the RCMP major crime unit in Kelowna; he left that post in 2008, which brought him within the five year prohibition set out in section 38.06(3) of the *Act*. Although he could not be appointed as an investigator, he was employed as the special advisor to the CCD. Mr. Fitzpatrick’s unofficial role was to oversee the investigative teams. He was made the acting Executive Director of Investigations (“EDI”) in November 2012, tasked with supervising the investigations branch of the IIO. I have concluded that Mr. Fitzpatrick was in a supervisory role on the investigations side of the IIO at the time of the Matters call out, and that he performed as the CCD’s eyes and ears on the ground in Prince George.

The CCD and Mr. Fitzpatrick began to look for suitable director and investigator candidates in Alberta, which is where they found Patrick Kennedy. Mr. Kennedy was a twenty five year RCMP veteran and most recently a major crime investigator for the force in Edmonton when he was hired in late July 2012. Mr. Kennedy had never been employed as a peace officer in British Columbia, so he was not caught by the five year rule in section 38.06(3)(c). However, due to circumstances surrounding his departure from the RCMP in Alberta, he was caught by section 38.06(a). That part of the *Act* prohibits appointing as an investigator anyone “who is currently a member of a police or law enforcement agency outside of British Columbia.” Mr. Kennedy’s last operational day with the RCMP in Alberta was on 21 July 2012, and he started with the IIO on 23

July. He was caught by the prohibition in section 38.06(3)(a) because he added a period of unclaimed leave to the end of his tenure with the RCMP, which extended his time on their payroll to 19 September 2012. In the result, although Mr. Kennedy was to be employed on the operational side of the IIO, he was not sworn in as an investigator until 20 September 2012.

The CCD, and, as far as I can determine, the Public Service were aware at the time of their hiring that Mr. Fitzpatrick and Mr. Kennedy were not eligible to be appointed as investigators for the reasons set out here. As will be discussed later in this report, the CCD points to his authority under section 39.06(5) for these hirings.

d. The Matters Investigation

When the IIO became operational, Patrick Kennedy was the director in charge of charge of Team 1, which was on call when the IIO received notification of the Matters shooting in Prince George. He received the initial call from the RCMP liaison officer at E Division in Vancouver, and he completed the notification report. Kennedy gave instructions to the liaison officer and to the critical incident commander in Prince George regarding initial steps which were to be taken prior to the arrival of IIO investigators. This included directions to document the appearance of the involved “witness” officers by taking photographs of them, their weapons and other use of force options, that those members stand down and complete their notes before being released to go home, an instruction that they were not to discuss the incident with anyone else, and a direction to re-attend to the ERT room the following morning to meet with IIO investigators. In addition, a local major crime unit officer was to be dispatched to meet with the Subject Officer (██████████) to carry out a similar regimen with him.

The next step taken by Mr. Kennedy was to deploy the IIO investigative team to Prince George. This included Team 1, made up of Robin Stutt, ██████████, ██████████, ██████████, ██████████, and ██████████. Also deployed were ██████████, who was the

director in charge of Team 2, [REDACTED] from the specialized team, Kennedy himself, and Mr. Fitzpatrick.

A group made up of Fitzpatrick, Kennedy, [REDACTED] and [REDACTED] made the last flight out of Vancouver. The remainder of the team could not get on a flight until the following morning.

Mr. Kennedy reported that while on the plane en route to Prince George, he was told by Mr. Fitzpatrick that due to his personal situation (that he remained on the RCMP payroll in Alberta), he could not take an active role in the investigation, and that he would serve in a monitoring role. [REDACTED] was told that he would step in as the acting head of Team 1.

Mr. Fitzpatrick was of course aware of Mr. Kennedy's problem. He said that he was quite surprised when Mr. Kennedy met the team at the airport. Once on the plane, he told Mr. Kennedy that he (Mr. Fitzpatrick) was "in the same boat" (referring to his own statutory disability), and that they were to sit back, observe, offer suggestions, not give directions or participate in the investigation.

[REDACTED] confirms that mid-flight to Prince George, he was told by Mr. Fitzpatrick that he would be stepping in as leader of Team 1 because Mr. Kennedy was still officially a member of the RCMP. Mr. Kennedy has reported that, upon arrival in Prince George, he told [REDACTED] that he was to assume the role of team commander in the command triangle. Mr. Kennedy also reports that the decision to make [REDACTED] team commander was made by Mr. Fitzpatrick, but he was given the task of communicating this to [REDACTED].

[REDACTED] very clearly states that Mr. Fitzpatrick was his supervisor, that he played an operational role which was not merely advisory while in Prince George, and later when the investigation shifted back to the IIO offices in Surrey. Mr. Fitzpatrick rejects this characterization of his role on the ground in Prince George or later; he states that his

role was to watch, sit back and note how the file was evolving, and that he was not actively involved in investigations. He did concede that he gave advice when needed, but he insists that this was consistent with his advisory role.

When questioned about this, Mr. Kennedy offered the view that Mr. Fitzpatrick was more involved in operational decision making than he will probably let on.

██████████, who was later assigned the task of file coordinator in the command triangle, offered the view that Mr. Fitzpatrick was directing team members or making strong suggestions as to what should be done during the course of the investigation in Prince George, including which persons should be interviewed and when. Given his status in the IIO, ██████████ took anything coming from Mr. Fitzpatrick as a direction.

What is apparent from the materials I have reviewed is that Mr. Kennedy and Mr. Fitzpatrick attended the first impromptu briefing given by RCMP after first landing in Prince George. According to the RCMP critical incident log, Mr. Kennedy explained at this briefing that there were three main concerns which should be the initial focus of the investigation: “members, family, scene.” (FIR p. 838) Mr. Kennedy has told me that this was his reminder to RCMP that they were to determine whether the members were alright, that they cannot forget about the family, and that the scene where the event happened is of critical importance.

Both Kennedy and Fitzpatrick also attended a second briefing with RCMP which was arranged for 11 September at 0800 hours, before the balance of the IIO team could get to Prince George. Only ██████████ and ██████████ (from the specialized unit) held appointments as investigators for this briefing. The briefing note indicates that Fitzpatrick was introduced as “assisting the IIO”. (FIR pp.392-393) Kennedy is identified in that note as someone who “will monitor and provide oversight.” A Task Report was generated for this briefing; in that report both Kennedy and Fitzpatrick were described as having “advisor capacity” (FIR page 388). Another Task Report states that Kennedy “oversaw the deployment of a team of IIO investigators”, including the selection of Robin

Stutt as the Primary Investigator, and [REDACTED] as the File Coordinator, and that while in Prince George he “provided oversight to the established Command Triangle for the investigation.” (FIR p. 1057)

[REDACTED] made notes with respect to the IIO/RCMP briefing on 11 September. He noted that there were discussions as to whether to designate one of the RCMP in Prince George as a witness officer. He wrote that Kennedy and Fitzpatrick were consulted about this, and that it was finally determined that this person was to be designated a witness officer (FIR page p. 887).

[REDACTED] then made notes of a second briefing on 11 September after the arrival of the balance of the IIO team. Only IIO staff, including Kennedy and Fitzpatrick, were present for this briefing. The command triangle was set, as were the roles of all of the other IIO members on scene. [REDACTED] wrote in his notebook that Fitzpatrick and Kennedy were there as “advisors to [REDACTED]”. The investigative plan was discussed, including times and places for witness interviews, and interviewer roles (FIR pp. 888-9).

The IIO team departed Prince George in stages on 13 and 14 September 2012. Team briefings followed back at the IIO offices in Surrey on 17, 18, 20 and 25 September 2012. Mr. Kennedy attended all of these briefings; Mr. Fitzpatrick attended all but the briefing held on 20 September.

[REDACTED] was relieved of his duties as the team commander for the Matters case in early November 2012 ([REDACTED]). Mr. Kennedy was sworn in as an investigator on 20 September 2012, and installed as the team commander on 2 November 2012.

e. **The Position of the CCD**

When I interviewed Mr. Rosenthal on 9 October he told me that he understood why Mr. Kennedy could not be appointed as an investigator when he was hired on at the IIO. He also knew that Mr. Kennedy remained ineligible for that appointment at the time of the Matters call out. He told me that it was his view Mr. Kennedy had been taken on at the IIO pursuant to his authority in section 38.06(5) to retain “consultants, experts, specialists and other persons...” When asked why this was necessary, Mr. Rosenthal pointed to the difficulties they had experienced recruiting experienced critical incident investigators.

This was also Mr. Rosenthal’s explanation for bringing Mr. Fitzpatrick into his role, which included supervision of the investigative teams. Once again, Mr. Rosenthal knew that the *Police Act* blocked Mr. Fitzpatrick’s appointment as an investigator, and that he had not been appointed to that role at the time of the Matters call out. Mr. Rosenthal believed (and believes today) that Kennedy and Fitzpatrick were the only IIO staffers (other than himself) with the requisite experience to carry out a competent investigation of this kind. Given his view that it would not be practical or appropriate to take on this role himself, he chose to rely on Kennedy and Fitzpatrick despite the limitations imposed by the *Act*.

Mr. Rosenthal was fully aware that Kennedy and Fitzpatrick had been deployed to Prince George after the IIO was notified of the Matters shooting. He told me he reminded them that they were not investigators, and he gave instructions that they refrain from doing the following: (1) interviewing witnesses; (2) collecting evidence; and (3) operating emergency equipment on IIO vehicles.

I asked Mr. Rosenthal again about his decision to deploy these two into the midst of an active investigation given the *raison d’etre* of the IIO, which I identified as gaining the public’s trust that police are no longer investigating police in situations like this one, and that the decisions made at the end of the day will be accepted as having been based on

a fair and objective inquiry conducted by an impartial agency. Mr. Rosenthal replied that this was an example of “optics vs. competency”, and in this case he elected to proceed with the option he believed would ensure that the IIO conducted a competent investigation. Put simply, he believed he needed Kennedy and Fitzpatrick on the ground and close to the action if this first major IIO case was to be successful, and he concomitantly lacked that confidence in the abilities and experience of Stutt, [REDACTED] and [REDACTED]. Mr. Rosenthal made it very clear in our first meeting, and in a second brief telephone conversation on the following day, that his goal of gaining the trust of the public and the family of the deceased would best be met if Kennedy and Fitzpatrick were involved as consultants. In short, he said that “the competence of the investigation had to be my number one priority.”

The Matters shooting became the subject of a coroner’s inquest which ran over several days in October 2013 and completed in January 2014. Mr. Stutt was the last witness to testify at the inquest. There were discussions at the IIO prior to the inquest regarding issues which might be raised by Cameron Ward, counsel for the Matters family, in his cross-examination of Mr. Stutt. One of the anticipated issues was the presence of Fitzpatrick and Kennedy in Prince George and their participation in the Matters investigation. These discussions were held on 4 September 2013. The CCD directed [REDACTED], who was employed on the public accountability side of the IIO, to review the FIR to identify any areas of risk or issues that might arise at the inquest.

[REDACTED] prepared a memorandum dated 17 September 2013 which outlined three areas of potential concern. One of the headings was “Police Act Conflicts.” In [REDACTED] memo [REDACTED] described the reasons why Kennedy and Fitzpatrick could not be investigators (the prohibitions in the *Act* which have been reviewed elsewhere in this report). Then [REDACTED] expressed the view that Kennedy, regardless of his title, played an investigative and supervisory role in Prince George beyond that of a mere observer, and that Roy Fitzpatrick’s presence at the scene may have influenced the investigation. [REDACTED] recommended that these facts be disclosed to the Matters family prior to the inquest. [REDACTED] also argued that if this issue should somehow arise without having made disclosure,

“the integrity of the IIO investigation and the credibility of the IIO could be publicly challenged.”

I showed that memo to Mr. Rosenthal at our interview on 9 October 2014. He told me that he disagreed (then and now) with ████████ view of the conflict issue. He also disagreed with the recommendation that the Kennedy and Fitzpatrick ineligibility issue should be disclosed to the Matters family. He explained that, in his view, there was nothing wrong with his decision to send the two of them to Prince George to act as advisers, so there was no reason to make this disclosure. In support of this position he once again pointed to his section 38.06(5).

On the day following our interview Mr. Rosenthal phoned me to add some comments regarding the ████████ memo and his decision to withhold this information from the Matters family. He sought to re-emphasize his conclusion that there was nothing wrong with sending Kennedy and Fitzpatrick to Prince George, but he also said once again that he needed them there to ensure that this would be a competent investigation. He said that he would have preferred not to have done it, but that as balanced against the “optics”, he came down in favour of competence.

In the result, the Matters family was not told of this, and the issue was not raised at the inquest by Mr. Ward. The FIR was disclosed to the coroner prior to the inquest, and to Mr. Ward. I find that from the materials contained in the FIR, it would not have been possible to discern that Kennedy and Fitzpatrick were ineligible for appointment as investigators.

There is in my view a distinction to be made between the notion of preferring a competent investigation over the optics of keeping Kennedy and Fitzpatrick away from the front lines of this case, and later saying “there was nothing wrong with it”. The first explanation captures the essence of the public perception problem which attaches itself to this decision, and at least acknowledges the risk posed by proceeding on this basis. The second explanation denies that there was anything wrong with the decision in the

first place. In his follow up telephone call, Mr. Rosenthal seemed once again to recognize that a public perception issue might arise from his decision to send Kennedy and Fitzpatrick to Prince George, thus his concern for optics as he balanced the pros and the cons while at the same time saying he would have preferred not to have done so.

f. **Did the investigation or the investigative procedures followed lack integrity?**

Did the decision to deploy Kennedy and Fitzpatrick impact the integrity of the investigation?

During our interview I raised with Mr. Rosenthal concerns expressed by David Eby of the BCCLA regarding the independence of the IIO from the RCMP while operating in Prince George. In an email to Mr. Rosenthal dated 14 September, Mr. Eby reported that the IIO may have been relying on RCMP cars and interview rooms and perhaps other resources while operating in Prince George. He noted that external police agencies investigating the RCMP had in the past rented hotel rooms for interviews, and rented their own cars. He added the following general concern:

The reality and perception of independence can be preserved, but only if the IIO is overly sensitive to the issue and errs on the side of “too much” independence rather than “should be ok” independence.”

In his response later that day, Mr. Rosenthal told Mr. Eby that their investigators “are very aware of the importance of not just maintaining actual independence from the police agencies we will be investigating, *but the need to avoid the perception of dependence as well.*” (emphasis added). He then thanked Mr. Eby for his concerns, and offered his agreement that “they are important in maintaining public confidence in the integrity of the IIO investigations.”

This exchange, where Mr. Eby was raising relatively mild criticisms of IIO procedures employed during the early stages of the Matters case, demonstrates the extent to which involved and concerned community members are and will be watching to ensure that

the IIO remain diligent in its mission to remain fully independent of police during a critical incident investigation. Mr. Rosenthal's response acknowledged those concerns, and reflected the signal importance of this aspect of the IIO's mandate.

The CCD's first public report was issued on 29 April 2013, and the coroner's inquest ran for several days in October 2013 before completing in January 2014. On 11 March 2014 Cameron Ward wrote a letter to the CCD which raised a series of concerns founded upon his view of the evidence led at the inquest. Mr. Ward asserted that the IIO's investigation and public report were "deeply flawed", and he asked that the CCD order an independent review of the case. In that letter, Mr. Ward argued in part that there was "a real question as to whether Mr. Matters...had a hatchet in one of his hands when he was killed." He then pointed to "an inexplicable and unexplained six minute gap in the radio transmission records". While not stated explicitly, implicit in the structure of his letter is that he was pointing to this gap as support for a theory that police may have re-organized that evidence in order to establish that the words "Greg, drop the hatchet" would seem to have been spoken at a time which corroborated the police justification for employing lethal force.

To this day it is apparent that the Matters family does not accept that justice was done when the CCD determined that the case would not be forwarded for Crown for a charge approval assessment. The Ward letter is an example of how family members or others in the community might lose confidence in an investigation like this one even where, to their knowledge, it had been conducted in accordance with the strictures of the *Act*.

In his email response to Mr. Eby, Mr. Rosenthal placed emphasis on avoiding the "perception of dependence". This of course is precisely what the IIO was designed to avoid. The decision to deploy these two IIO staffers with the label "adviser" or "consultant" created a situation where a reasonable observer might conclude that the "perception of dependence" had inserted itself into this investigation.

Public confidence that the IIO will scrupulously follow its mandate to provide fully independent investigations of critical incidents involving police requires that the office respect both the letter and the spirit of the law as set out in the *Police Act*. It is my view that deploying Mr. Fitzpatrick and Mr. Kennedy to Prince George by invoking section 38.06(5) of the *Act*, while consistent with the letter of the law (neither was appointed as an investigator), was a work around designed to place de facto investigators on the ground and involved at the very onset of this important investigation. I find that section 38.06(5) was not intended for this purpose. I also find that this was a decision taken by the CCD as a lesser of two evils, having concluded in his own mind that optics would need to give way to competence; in other words, this was a risk Mr. Rosenthal was prepared to take.

I find that Mr. Fitzpatrick and Mr. Kennedy were to some extent involved in operational decision making while working in Prince George as “advisers” to ██████████ and the other members of Team 1. I find as well that these were duties reserved by statute to someone who had been appointed as an investigator; as discussed, neither of these individuals was eligible for that appointment.

I have carefully reviewed the contents of the FIR, including the materials generated by the IIO investigation in those early days. I have also considered the IIO investigation which continued later when the bulk of the team returned to the IIO offices in Surrey. During that latter time, Mr. Kennedy was appointed as an investigator, resumed his role as leader of Team 1, and took over the role of team commander in the command triangle. Mr. Fitzpatrick was not sworn in as an investigator until March 6, 2014.

I have been unable to identify any action, decision or direction by either Mr. Kennedy or Mr. Fitzpatrick which undermined the integrity of the investigation. I have not identified any overt instances of either pro or anti-police bias arising from their involvement in the case. With respect to Mr. Kennedy in particular, I have heard repeatedly from those I interviewed that he is personally and professionally held in high regard, and that his work on the Matters case was invaluable. In that respect, the decision to deploy Mr.

Kennedy to Prince George assisted Mr. Rosenthal in his determination to favour competence over optics.

In the result, I cannot find that the investigation or the investigative procedures which were followed in this case lacked integrity.

The problem as I see it is this: while I can conclude that there was nothing overtly dishonest, biased or corrupt about the conduct of either Kennedy or Fitzpatrick, the mere fact of their participation is inconsistent with the principles which underlie the creation of the IIO. Here the concern that an oversight agency not be “steeped in police culture” was subordinated to a perceived need for a higher level of expertise. If widely known, these facts may to some extent damage the public’s confidence that the investigation was conducted in a fair and unbiased manner, which in turn might cause the public to lose confidence in the CCD’s decision not to refer the case to Crown.

As is sometimes said in our courts when inadmissible evidence leaks into a trial, “you cannot unring that bell”. In the Matters case, it is impossible now to make things completely right. The investigation is what is it is, and the CCD has made his decision based on the information which was placed before him in the FIR. Although I have found that there is nothing obviously biased or unfair about the investigation which followed, it can never be known how if at all the active participation of Fitzpatrick and Kennedy may have influenced the overall direction of the investigation. What the public will see now is that Kennedy, a senior NCO serving with the RCMP in Alberta who was still receiving a paycheque from that force, and Fitzpatrick, a career police officer who as recently as 2008 was employed by the RCMP in British Columbia, were each engaged on the front lines of the Matters case in its critical early phase, and in a circumstance where the RCMP were the central focus of their investigation.

No investigation is perfect, and it is impossible completely to eradicate bias, no matter the context; that standard is impossibly high. What is expected of the IIO and the CCD in particular is decision making which is consistent with and respectful of the

foundational principles of this agency. Central to all of that is the requirement that there be a specified degree of separation between police and those who investigate police. While one could argue that the five year rule is arbitrary, and it may be, it is the dividing line which the legislature chose to demarcate those who can from those who cannot perform these tasks.

It is unlikely that anything will satisfy the Matters family that the investigation was fair and objective, and this will only add fuel to that fire. As far as the community at large is concerned, the participation of Fitzpatrick and Kennedy may leave a nagging unease that all was not right, which is the very thing that the IIO was designed to avoid. This flows as a natural consequence of Mr. Rosenthal's decision to settle for (using Mr. Eby's turn of phrase), "should be ok" independence.

I find that the decision to deploy Fitzpatrick and Kennedy in this way had the effect of undermining the civilianization scheme in the *Act*, which in and of itself has had an impact on the integrity of the investigation. It is an impact which is impossible to quantify. While this was not the intended consequence, it was something that was well within the contemplation of the CCD when he made his decision to deploy these two as "advisers" or "consultants."

2. DIRECTING THAT MATERIAL BE REMOVED FROM THE DISCLOSURE PACKAGE

Mr. Stutt as the primary investigator had the task of drafting the FIR and organizing the accompanying disclosure package. The drafting of this particular FIR morphed into a contentious affair involving primarily Mr. Stutt on the one hand, and the CCD and Mr. Fitzpatrick on the other.

Mr. Stutt was of the opinion that it was his job to draft the FIR, and the CCD's job to read it. The CCD took a much different view, and his suggested edits both for style and

for substance was reduced to a battle of wills, with Mr. Fitzpatrick acting on many occasions as the CCD's agent and intermediary.

I have been advised by several sources that when the IIO opened for business no template existed for the drafting of a FIR; this one was at best a work in progress. Mr. Stutt, relying on his police training, mapped out his idea for how this should be done. As it turned out, the CCD disagreed with the way in which Mr. Stutt pieced together his narrative summary of the case. The CCD was of the view that this report as first drafted was biased in favour of police, and that in many places Mr. Stutt had incorporated into his summary evidence which was unhelpful or simply irrelevant.

The first public report was issued on 29 April 2013 while this back and forth with Mr. Stutt was ongoing. A meeting on 17 June 2013 attended by Stutt, Fitzpatrick and [REDACTED] brought all of that to a head. I am advised that this was a tense and unpleasant meeting where Stutt was criticized for failing to incorporate into the FIR some of the many changes which had been directed by the CCD.

I find that the suggested changes were with respect to the FIR itself, with some cross-referencing to the original documents assembled in the supporting disclosure package. I do not find that there was any substantive change made to the documents included in the disclosure package.

In the result, the final draft of the FIR was not the same as that which the CCD relied upon in drafting his first of two public reports. As I appreciate it, Mr. Stutt believes that this may have impacted on the integrity of the investigation. I disagree. All of the original investigative materials were reviewed by the CCD prior to issuing that first public report. While this may not have been a best practice, a change in the summary did not affect the integrity of the investigation or undermine the validity of the opinion expressed by the CCD in his public report.

VI. QUESTION ONE: STUTT ITEMS 3 – 8

- 3. COACHING EVIDENCE (IN PREPARATION FOR THE CORONER'S INQUEST; and**
- 4. ATTEMPTING TO HAVE STUTT EXCLUDED AS A WITNESS AT THE INQUEST**

I will deal with these together. Having discussed these allegations with Mr. Rosenthal, Henry Waldock (the IIO's former legal officer) and Mr. Stutt, I am satisfied that there was no improper coaching of Mr. Stutt as part of his preparation to testify at the inquest. There were meetings which included a mock examination exercise; in my experience, this is a typical part of witness preparation. Mr. Waldock assures me that Mr. Stutt was advised to answer the questions posed and not head off into long rambling and non-responsive answers, and to answer truthfully any question asked. I would expect nothing less.

It does appear that relations between Mr. Stutt and the CCD had hit at or near rock bottom when it was time to prepare for the inquest. I find that Mr. Stutt's near visceral disregard for Mr. Rosenthal by this point likely coloured his view of what was happening and why. I have been told and accept that there was real concern that Mr. Stutt might "go off" on Mr. Rosenthal at the hearing. There was no effort however to keep Mr. Stutt out of the inquest. It was the coroner's decision to issue a subpoena to Mr. Stutt, and I am unaware of any application or threatened application to block his testimony.

Mr. Stutt did eventually testify on 28 and 29 January 2014. I have reviewed that transcript and conclude that there was nothing relevant to this complaint that happened while he was on the stand. Mr. Waldock appeared as counsel for the IIO, and he objected to several lines of questioning which were advanced by Mr. Ward for the Matters family. Those objections were upheld on each occasion by the coroner, and were in my view quite proper.

5. INAPPROPRIATE INVOLVEMENT WITH CAMERON WARD

Mr. Stutt wrote of a presentation made by Cameron Ward to IIO investigators in November 2013, which fell after the commencement of the inquest, but before its conclusion in January 2014. It was only after the inquest concluded that Mr. Ward raised a series of issues which he argued arose from the evidence led at the inquest, and which he claimed justified an independent review of the investigation conducted by the IIO (the letter of 11 March 2014 referred to earlier). Mr. Stutt is critical of the CCD for inviting Mr. Ward because he (Ward) had been critical of the CCD's public report, and because the Matters case was discussed to some extent during the course of his presentation.

I have no doubt that Mr. Ward attended the IIO offices and made a presentation, and that the Matters case was discussed to a limited extent. I see no reason to criticize the decision to involve Mr. Ward in this way, and I certainly do not find that this had any impact on the integrity of the investigation.

6. INACCURACIES IN THE CCD'S APRIL 2013 PUBLIC REPORT

I will make some brief comments towards the end of this report in response to the second of the two questions posed in my notice of appointment. That question asks whether the findings included in the second, supplementary public report impacted upon the integrity of the public reporting process; this issue is related to that one.

The only issue from the first report which might be characterized as a mistake is the CCD's description of the location of the gunshot wounds, which he described at page 8 of his report as "two gunshot wounds to the chest." Although this language had been pulled directly from the summary findings at the beginning of the pathologist's report, it did not adequately describe where the bullets had entered and exited Matters' body. I

have concluded that the language employed in this part of the initial public report was misleading in its effect, but also that this was not the CCD's intent.

Mr. Ward pointed out the discrepancy between the language in the public report as compared to the pathologist's report and his testimony at the inquest in his letter of 11 March 2014, where he asked that the CCD order an independent review of the case.

In his supplementary report the CCD explained more fully what the findings of the pathologist were, that he had read the report and was fully aware of those findings when he drafted his initial report, and why it was that his answer on the ultimate issue was unchanged. The CCD also noted that he had now taken into account the pathologist's inquest evidence.

I find that this mistake, which was really a failure fully to explain the evidence underlying the CCD's view of this aspect of this case, was corrected and adequately explained in the supplemental public report, and that this does not impact on the integrity of the case or of the reporting process.

- 7. COMMENTS BY THE CCD REFLECTING BIAS AGAINST STUTT AND AGAINST THE RCMP; and**
- 8. BULLYING AND HARASSMENT DIRECTED AT STUTT BY THE CCD**

I will also deal with these two points together.

I have already reviewed the dispute which emerged over the initial drafting and re-writing of the FIR. One aspect of the criticism emanating from the CCD was his view that the narrative in its original form presented a biased summary of the case which favoured the police. I have no doubt that allegations of bias were from time to time directed towards Mr. Stutt by the CCD and perhaps by others as well. This was but one aspect of what became a very dysfunctional relationship between the CCD and Mr. Stutt.

Mr. Stutt also complains of bullying and harassment, primarily by the CCD, although to some extent he includes Mr. Fitzpatrick in this allegation.

I heard from a number of sources that a broader culture problem exists at the IIO, and I am persuaded that this is so. These particular complaints of bullying and harassment are the way in which Mr. Stutt describes his own experience, and it is beyond my mandate to make any specific findings in this regard, unless of course it is my view that any of this impacted on the integrity of the Matters investigation. I do not make that finding.

VII. QUESTION TWO: THE INTEGRITY OF THE PUBLIC REPORTING PROCESS

I have carefully reviewed the initial and supplemental public reports issued by the CCD in this case. The supplemental report was issued after the completion of the coroner's inquest, and in response to issues raised separately by Cameron Ward and by counsel from PIVOT. Both parties were seeking a review of the case in light of evidence tendered at the inquest.

I have touched here upon a couple of these issues, for example the "six minute gap" in time between two police communications systems, and the CCD's statement in his first report that Matters died as a result of "two gunshot wounds to the chest." A number of other issues were raised and dealt with in the supplementary report.

I find that given the concerns raised by the Matters family and by PIVOT both during and following the inquest, it was appropriate and indeed important to respond with a supplemental report. That decision was fundamental to maintaining the integrity of the public reporting process. The report itself very thoroughly canvassed the issues raised, and it clearly explained why the CCD had left unchanged his decision not to refer the matter to Crown.

In answering the question posed in my terms of reference, I have determined that the supplemental report in this case was something which, if anything, buttressed the integrity of the public reporting process.

VIII. SUMMARY OF FINDINGS

1. *Review the Stutt complaint of May 27, 2014 and identify any allegations that, if true, would support a conclusion that the investigation or the investigative procedures followed lacked integrity.*
 - a. *Assess the evidence and determine whether the integrity of the investigation was impacted.*

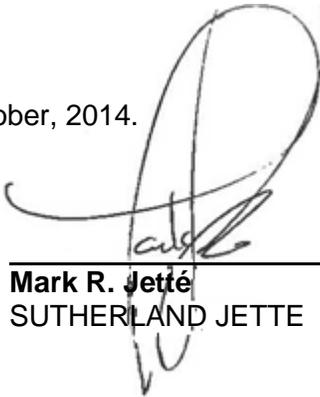
Having considered the Stutt complaint and information gathered in my own investigation of the issues raised in that complaint, I have not found evidence of any action, decision or direction by IIO staff, including Mr. Fitzpatrick and Mr. Kennedy, which betrayed a pro or anti-police bias, or anything else which might cause me to find that the investigation or the investigative procedures followed lacked integrity.

However, I have concluded that the integrity of the investigation was impacted by the CCD's decision to dispatch Roy Fitzpatrick and Patrick Kennedy to Prince George pursuant to his authority under section 38.06(5) of the *Act*, and as a result of their operational involvement in that investigation despite the fact that neither of them was eligible to be appointed as investigators due to the restrictions imposed in section 38.06(3).

2. *Review the questions raised about the initial public report by the Independent Investigations Office, as noted above, and consider the findings of the Chief Civilian Director addressing these issues in the supplementary report, to determine the integrity of the public reporting process.*

I have concluded that the integrity of the public reporting process was not undermined in this case.

Dated at Vancouver, British Columbia, this 28th day of October, 2014.



Mark R. Jette
SUTHERLAND JETTE