

# IN THE SUPREME COURT OF BRITISH COLUMBIA

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

Date: 20181018  
Docket: S172705  
Registry: Vancouver

In the Matter of the *Judicial Review Procedure Act*, R.S.B.C. 1996, C. 241

Between:

**Interim Chief Civilian Director Albert Phipps  
Independent Investigations Office of British Columbia**

Petitioner

And

**Chief Constable Adam Palmer of the Vancouver Police Department,  
Cst. Mike Bains, Cst. Spencer Green, Cst. Scott Plummer,  
Sgt. Pat Gormley, Cst. Beau Spencer, Cst. Dave Gooderham and  
Cst. Thomas Dobranowski**

Respondents

Before: The Honourable Madam Justice Gropper

## Reasons for Judgment

Counsel for the Petitioner:

M. Sandford, Q.C.  
A. Tolliday

Counsel for the Respondents Cst. Mike  
Bains, Cst. Spencer Green, Cst. Scott  
Plummer, Sgt. Pat Gormley, Cst. Beau  
Spencer, Cst. Dave Gooderham and Cst.  
Thomas Dobranowski:

M.K. Woodall

Place and Date of Trial/Hearing:

Vancouver, B.C.  
February 6 to 8, 2018

Place and Date of Judgment:

Vancouver, B.C.  
October 18, 2018

## **Introduction**

[1] On November 10, 2016, members of the Vancouver Police Department (VPD) attended an incident at the Canadian Tire Store located at 2830 Bentall Street, Vancouver, BC. During that incident, Daniel Peter Rintoul was shot by a member or members of the VPD. Mr. Rintoul died at the scene.

[2] The Independent Investigations Office of British Columbia (IIO) assumed jurisdiction over the investigation into Mr. Rintoul's death under s. 38.09 of the *Police Act*, R.S.B.C. 1996, c. 367 [*Police Act*]. The IIO identified and designated a number of VPD officers as witness officers including Constables Michael Bains, Derek Cain, Matthew Conroy, Thomas Dobranowski, Dave Gooderham, Pat Gormley, Spencer Green, Scott Plummer and Beau Spencer (the witness officers or the respondents).

[3] Two VPD officers, while designated by the IIO as witness officers, are not the subject of this application. Cst. Derek Cain advised the IIO through counsel on January 16, 2017, that he was on medical leave and could not attend for an IIO interview. This application does not relate to this officer. On February 14, 2017, Cst. Matthew Conroy attended for an IIO interview with his counsel, David Crossin, QC. He did not view pre-interview video of the incident. This application does not relate to Cst. Conroy.

[4] The IIO has sought to interview the witness officers related to this application since the incident, but none have appeared for an interview.

[5] The essence of the dispute is aptly described by the respondents: as between the IIO and the respondents, who defines what "cooperate fully" under s. 38.101 of the *Police Act* means?

## **The Petition**

[6] Albert Phipps, the Interim Chief Civilian Director (CCD) of the IIO, seeks orders in the nature of *mandamus* under s. 2(2)(a) of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 [*JRPA*].

[7] The petitioner seeks an order compelling the witness officers to attend for interviews with the petitioner as and when scheduled by the petitioner and respond in good faith to questions put to each of them by the IIO investigators at the interviews.

[8] The petitioner also seeks declarations under s. 2(2)(a) of the *JRPA*, that:

- (i) the duty on witness officers to fully co-operate with the Petitioner under s. 38.101 of the *Police Act* includes the duty to attend interviews related to IIO investigations as and when the Petitioner directs;
- (ii) attendance of witness officers' counsel and union representatives at IIO interviews is at the discretion of the Petitioner;
- (iii) the providing of pre-interview disclosure to witness officers is at the discretion of the Petitioner; and
- (iv) the witness officers Cst. Beau Spencer, Cst. David Gooderham, Cst. Thomas Dobranowski, Cst. Spencer Green, Cst. Scott Plummer, Cst. Michael Bains, and Cst. Patrick Gormley have failed or refused to comply with their statutory duty under s. 38.101 of the *Police Act* to co-operate fully with the Petitioner.

[9] The petitioner also sought relief against Chief Constable Palmer. The relief is set out in the petition as:

- (i) That Chief Constable Palmer has a legal duty to compel [the witness officers] to comply with their duty to co-operate with the Independent Investigations Office by ordering them to attend for interviews with the IIO as and when directed and without the imposition of terms, and to respond in good faith to questions put to them by Independent Investigations Office investigators at those interviews;
- (ii) That Chief Constable Palmer has failed to comply with his legal duty to compel [the witness officers] to comply with their duty to co-operate with the IIO by ordering them to attend for interviews with the Independent Investigations Office as and when directed and without the imposition of terms, and to respond in good faith to questions put to them by Independent Investigations Office investigators at those interviews.

[10] On April 26, 2017, Chief Constable Palmer issued an order to each of the witness officers to “cooperate fully with an [IIO] investigator in the IIO investigator’s exercise of powers and performance of duties under the *Police Act*, per s. 38.101 of the *Police Act*.”

[11] The petitioner discontinued the claim for relief against Chief Constable Palmer on that basis.

**Independent Investigations Office of British Columbia**

[12] The IIO was established following two public inquiries in British Columbia conducted by two retired British Columbia justices regarding deaths involving police officers.

[13] The Honourable William Davies conducted an inquiry into the 1998 death of Frank Paul. In the 2009 report of the Davies Commission Inquiry into that death, the Davies Commission recommended that the government establish an independent investigation office to conduct criminal investigations of all police related deaths in the 12 jurisdictions policed by the 11 municipal police departments in British Columbia.

[14] In 2010, the Honourable Thomas Braidwood issued a report from the Braidwood Inquiry into the death of Robert Dziekanski. That report also recommended that British Columbia develop a civilian-based criminal investigative body. He suggested the name “Independent Investigation Office”, mandated to investigate all police-related incidents where persons died or suffered serious harm. The Braidwood Inquiry recommended that the civilian investigative body be the lead investigative agency in cases under its jurisdiction and that the home police department or RCMP in the jurisdiction have no investigative responsibility or authority, except as granted by the IIO. In addition, the Braidwood Inquiry recommended that the witness officers in such investigations “must promptly make themselves available for the IIO interviews.”

[15] In 2011, the legislature established a civilian-led independent investigations office by amendments to the *Police Act*. The IIO commenced operations in 2012.

[16] The amendments to the *Police Act* set out the mandate of the IIO in part 7.1, to investigate incidents where death or serious harm to members of the public occurs during interactions with British Columbia police officers. The petitioner, Mr. Phipps, was, at the relevant times, interim CCD of the IIO.

[17] Part 7.1, and ss. 101 and 117 of the *Police Act* are attached as Appendix A to these reasons.

[18] The statutory duty of the police officers is contained within s. 38.101 of the *Police Act*.

**Officers to cooperate with independent investigations office**

38.101 An officer must cooperate fully with

- (a) the chief civilian director in the chief civilian director's exercise of powers or performance of duties under this *Act*, and
- (b) an IIO investigator in the IIO investigator's exercise of powers or performance of duties under this *Act*.

[19] The *Police Act* provisions are supplemented by a memorandum of understanding (MOU) respecting investigations entered into in January 2012 by the IIO and all of the police agencies in British Columbia. It was executed in 2012 by the then Chief Constable of the VPD in accordance with his powers under the *Police Act*.

[20] Where the IIO assumes jurisdiction over an investigation, it designates the police officers involved in the incident as either witness officers or subject officers. The terminology is defined in the MOU. A witness officer is an officer involved or present during the incident under investigation, but whose actions are not believed to have caused or contributed to the death or serious harm being investigated. Subject officers are those who are reasonably believed to have contributed to the death or injury.

[21] The MOU requires that participant police forces “implement its terms by adopting them into their policies and by training officers about the terms of this MOU”, at s. 23.3.

[22] The Vancouver Police Department's *Regulations and Procedures Manual* confirms that witness officers have the duty to cooperate, at chapter 4.2, ss. 1(a), 1(g), 37-40. The *Manual* addresses the responsibility of the VPD's IIO Liaison Officer in IIO matters. It is through the Liaison Officer that matters related to the IIO are forwarded up the chain of command, ultimately to the Chief Constable.

[23] The *Manual* also confirms the duty of witness officers to attend IIO interviews: “[a] member who has been identified as a Witness Officer has an obligation under the B.C. *Police Act* to fully cooperate with the IIO investigation.” Further,

If the IIO Investigator requests an interview with a Witness Officer, that Witness Officer shall participate in an interview on the date, time and location set by the IIO Investigator. The Liaison Officer shall consult with the [Vancouver Police Union] or [Vancouver Police Officers' Association] and the IIO Investigator to resolve any hardships that result from the interview date, time, and location.

[24] The IIO forwards its investigative file on to Crown Counsel for charge approval assessment in cases where the CCD concludes that an officer may have committed an offence.

### **Background**

[25] The petition outlines the exchanges between the IIO and the respondents, their counsel and others. I have included, with some editing, those paragraphs from the petition to explain what has occurred since November 10, 2016.

[26] The IIO assumed jurisdiction of the investigation of the Canadian Tire incident (Canadian Tire Investigation) immediately after the incident occurred. It designated a number of the VPD members who were involved as witness officers. Among the VPD members involved in the Canadian Tire Investigation and designated as

witness officers are: Constables Beau Spencer, Dave Gooderham, Thomas Dobranowski, Spencer Green, Scott Plummer, Mike Bains, and Pat Gormley.

[27] In the months since their designation, the respondents have refused and/or failed to attend interviews requested by the IIO related to the Canadian Tire Investigation. They have demanded, through their counsel or union representative, pre-interview disclosure of certain investigative file materials in the IIO's possession as a precondition of any IIO interviews. The petitioner is not prepared to provide the witness officers with the requested pre-interview disclosure, although it is prepared to provide some limited materials on the day of the interview, before the interview commences.

### **The IIO's Efforts to Interview Witness Officers Involved in the Canadian Tire Investigation**

#### ***(a) Early Communications Regarding Interviews***

[28] The VPD Liaison Officer for the Canadian Tire Investigation is Staff Sergeant Dale Weidman.

[29] On November 10, 2016, Constables Conroy, Gormley and Spencer were formally designated by the IIO as witness officers. These officers were to be interviewed on November 11, 2016. The arrangement was made in the presence of Mr. Tom Stamatakis of the Vancouver Police Union (VPU).

[30] On November 11, 2016, Constables Conroy, Gormley and Spencer failed to attend for the IIO interviews. They did not contact the IIO to make alternate arrangements regarding the interviews.

[31] That same day IIO Investigator Pina Altwasser emailed Liaison Officer Weidman a number of inquiries, including a request that he advise what arrangements had been made to have the witness officers attend for interviews. On the evening of November 11, 2016, the IIO emailed Liaison Officer Weidman to ask that he confirm the VPU wished to delay the witness officer interviews of Constables Conroy, Gormley and Spencer to November 14, 2016. Liaison Officer Weidman

replied to the IIO's email that same evening and confirmed that the VPU did not want the witness officers interviewed until Monday, November 14, so as to allow these witness officers time to collect their thoughts.

[32] On November 12, 2016, Kevin Woodall, counsel for the Vancouver Police Union, emailed Martin Allen, counsel for the IIO. Mr. Woodall inquired whether the IIO objected to the VPU obtaining the Computer Aided Dispatch (CAD) printout, transcripts of dispatch audio, and all available incident video related to the Canadian Tire Investigation from the Vancouver Police Department and providing the same to the involved officers.

[33] Mr. Woodall stated that his advice to the VPU would be that witness members were entitled to this requested pre-interview disclosure and were justified in law in deferring IIO interviews until they had received the requested disclosure. Mr. Woodall also requested that the IIO consent to his representing more than one of the VPD members involved in the Canadian Tire Investigation. He advised that in the absence of pre-interview disclosure and IIO consent to the joint retainer request, there would be delay arising from the officers retaining multiple counsel to represent them.

[34] On November 13, 2016, Martin Allen of the IIO replied via email to Mr. Woodall's email of the previous day. Mr. Allen advised that the IIO would provide pre-interview disclosure only if the disclosed materials did not, in the IIO's view, have the potential to "augment or influence the officer's recollections," and that it was unlikely that any video would be released to officers prior to their initial interviews. He stated that the IIO did not accept that witness officers had the right to delay or refuse to attend IIO interviews on the basis that they were entitled to pre-interview disclosure, nor did the IIO agree that they were entitled to have counsel attend at the interviews. Mr. Allen also advised that representation of multiple police officers was contrary to an opinion of the Law Society's Existing Ethics Committee and was potentially a conflict of interest. Mr. Allen stated that the IIO was not in a position to advise Mr. Woodall on his ethical obligations.

[35] On November 13, 2016, IIO Investigator Gorrod emailed Liaison Officer Weidman regarding the witness officers attending for interviews, and advised that interviews of Constables Spencer, Gormley, Conroy and Bains were IIO priorities.

[36] On November 14, 2016, Mr. Woodall replied via email to Mr. Allen's email of the previous day. He forwarded the decision "In the Matter of Constable B", dated January 26, 2016, and authored by C. Baird Ellan (Baird Ellan Decision), who was sitting as a delegate of the Police Complaints Commissioner. The decision arose from a review on the record under s. 117 of the *Police Act*. Mr. Woodall contended that any delay in the investigation was caused by the IIO, as it refused to provide reasonable pre-interview disclosure and refused to consent to Mr. Woodall representing multiple officers.

[37] The witness officers, Constables Conroy, Gormley, Spencer, Bains, Gooderham and Dobranowski, did not make contact with the IIO on November 14, 2016, or attend for interviews, despite the fact that this was the date to which the VPU had requested the interviews be deferred.

[38] In the afternoon of November 14, 2016, Liaison Officer Weidman replied to IIO Investigator Altwasser's November 11, 2016 email inquiring what arrangements had been made to have witness officers attend for interviews on that date. Liaison Officer Weidman advised the request was "under discussion," as IIO investigator Gorrod, IIO counsel, VPD counsel, the VPU, and VPD members' counsel were aware.

[39] On November 14, 2016, Mr. Stamatakis of the VPU emailed CCD Bert Phipps (the petitioner) and Chief Constable Palmer of the VPD regarding pre-interview disclosure. He attached the described email exchanges between Mr. Allen and Mr. Woodall between November 12 and 14, 2016. Mr. Stamatakis expressed his views on the IIO's position regarding pre-interview disclosure, and advised that he was bringing this to the Chief Constable's attention in an effort to find a way to "reasonably address" the issue.

[40] On November 15, 2016, Constables Cain, Green and Plummer were re-designated by the IIO from “subject officers” to “witness officers.” As officers are officially re-designated by the IIO in person, the IIO emailed Liaison Officer Weidman on November 18, 2016, with the request that Constables Cain, Green and Plummer attend on November 22, 2016, for re-designation as witness officers, with IIO interviews to be scheduled at a later date. The IIO also requested that Constables Spencer, Gormley and Conroy attend for interviews on November 23, 2016. The IIO noted that Constables Dobranowski, Gooderham and Bains were to be designated as witness officers and interviewed on November 24, 2016. The IIO noted that if the indicated interview times conflicted with pre-existing commitments they could be rescheduled to mutually convenient dates.

[41] On November 18, 2016, Liaison Officer Weidman replied to the IIO’s email of that date. He advised that he would look into the matter of the requested interviews, but as the union was involved he was “just in the middle.”

[42] Later on November 18, 2016, Chris Campbell, a representative of the VPU, emailed Liaison Officer Weidman in response to the IIO’s email scheduling interviews for the witness officers. He stated that the IIO should contact the VPU’s counsel, Kevin Woodall, directly to determine the status of witness officer interviews, as Mr. Woodall was providing general legal information to them and assisting in identifying counsel who could act for the officers. Mr. Campbell advised that if the IIO was not prepared to provide the disclosure requested by Mr. Woodall, the officers would each need to consult with independent legal counsel.

[43] Mr. Woodall emailed Mr. Allen on November 18, 2016, regarding the status of the witness officers’ retaining counsel. He advised that he had met with most of the designated witness officers and subject officers but had not obtained any information from them about their respective personal involvements in the incident. He also advised that as the IIO and VPD had not provided the requested pre-interview disclosure, Constables Bains, Conroy, Gormley, Plummer, Green and Cain were seeking independent legal advice.

[44] On November 20, 2016, Mr. Allen of the IIO and Mr. Woodall exchanged a series of emails regarding the witness officers.

- (a) At 10:49 am Mr. Allen wrote to Mr. Woodall and suggested they meet to discuss the conduct of the investigation by the IIO. He advised that in his view, the Baird Ellan decision was not binding on the IIO's authority to determine how it conducted its investigations, nor did it reflect the statutory duty of police officers to cooperate fully with the IIO.
- (b) At 10:52 am Mr. Allen emailed Mr. Woodall in reply to his November 18, 2016 email and advised he would pass on the witness officer update to the IIO investigators. Mr. Allen asked Mr. Woodall to confirm that all witness officers were aware of their duty to comply with requests and directions from IIO investigators.
- (c) At 11:32 am Mr. Woodall replied to Mr. Allen. He advised he had not provided the officers with advice, but only general information about the legal issues in order to allow them to determine if they required independent legal advice. In response, a number had asked him to arrange for independent counsel. Mr. Woodall advised that he had exhausted the lawyers in the Lower Mainland who customarily provide this kind of advice, and that were the IIO not "insisting on the full rigour of the Ethics Committee opinion" he would have been able to provide advice himself to the witness officers.
- (d) At 12:04 pm Mr. Woodall replied by email to Mr. Allen's 10:49 am email. He advised that as their views on pre-interview disclosure of investigative file materials were at odds and unlikely to change, it was his view the matter would have to be litigated. He stated that as long as the IIO continued to refuse to provide justification for its position on pre-interview disclosure, there was nothing for him and Mr. Allen to discuss.
- (e) At 12:08 pm Mr. Allen replied to Mr. Woodall's 11:32 a.m. and 12:04 pm emails. He advised that the IIO did not agree with Mr. Woodall's interpretation

- of “cooperation”, and that under the *Police Act* the officers had a duty to cooperate fully with directions of the IIO to attend interviews. Mr. Allen also stated that no provision in the *Police Act* or the MOU permitted witness officers to defer interview requests for the purpose of obtaining independent legal advice. He also indicated that the IIO policy on pre-interview disclosure was mirrored across Canada in other civilian oversight agencies, and the IIO would not alter its policy to conform with police views on appropriate IIO interview procedures.
- (f) At 12:34 pm on November 20, 2016, Mr. Woodall replied to Mr. Allen’s most recent email. He asserted that the IIO had altered its policy on pre-interview disclosure, and that he had been involved in previous files in which disclosure had been handled differently.
- (g) On November 23, 2016, Mr. Woodall emailed Mr. Allen of the IIO and advised that Cst. Spencer Green would be consulting counsel, Ravi Hira, QC. He also advised that as the IIO refused to cooperate on the “multiple retainer issue,” the timing of witness officers obtaining legal advice would be further delayed.
- (h) Constables Spencer, Gormley and Conroy did not attend for IIO interviews on November 23, 2016, as had been requested in the IIO’s email of November 18, 2016.
- (i) Constables Dobranowski, Gooderham and Bains did not attend for IIO interviews on November 24, 2016, as had been requested in the IIO’s email of November 18, 2016.
- (j) On November 23, 2016, IIO Investigator Altwasser emailed Liaison Officer Weidman and advised that the IIO required the attendance of Constables Green, Plummer and Cain on November 28, 2016, for re-designation as witness officers and for IIO interviews, and also required Constables Spencer, Gormley and Conroy to attend for IIO interviews on November 29, 2016. She advised that interviews of Constables Dobranowski, Gooderham and Bains

were to occur on November 30, 2016. None of the witness officers attended for the interviews scheduled by Investigator Altwasser in her November 23, 2016 email.

(k) Between December 9, 2016 and December 14, 2016, IIO Investigator Hemmings-Cook and IIO Investigator Gorrod exchanged a series of emails with Mr. Stamatakis of the VPU in an attempt to negotiate an agreement for the interview process related to the VPD witness officers involved in the Canadian Tire Investigation. They met on December 12, 2016, in an attempt to resolve the issue. No agreement was reached.

[45] Constables Dobranowski, Gooderham, and Bains have never been officially designated as witness officers by the IIO, due to their non-attendance for formal designation and interviews.

[46] Constables Green, Plummer, and Cain were initially designated as subject officers, and are required to meet with the IIO for re-designation as witness officers. However, this process has not been formally completed due to their refusal to attend interviews.

[47] The IIO drafted letters dated December 15, 2016, to the witness officers to confirm their designations and to arrange their attendance for interviews. The IIO emailed Liaison Officer Weidman and advised it would forward copies of these letters to Liaison Officer Weidman, the VPU, and any counsel known to represent the witness officers. Liaison Officer Weidman agreed to serve the December 15, 2016 letters on the witness officers himself in a telephone conversation with the IIO. This agreement was confirmed by the IIO on December 22, 2016, by email. Liaison Officer Weidman replied by email the same day and confirmed he would send the IIO's letters out to the witness officers on December 27, 2016, after his return from holidays.

[48] On December 28, 2016, the IIO emailed Liaison Officer Weidman and confirmed that the IIO's December 15, 2016 letters had been sent by him via email to the witness officers.

[49] On January 12, 2017, IIO Investigator Gorrod wrote to Liaison Officer Weidman to request that he forward letters dated that same date, addressed to each of the witness officers, on behalf of the IIO.

**(b) Subsequent Communications Related to IIO Interview of Cst. Bains**

[50] The IIO's letter to Cst. Bains dated December 15, 2016, was forwarded to Liaison Officer Weidman on December 22, 2016, by the IIO. This letter was forwarded via email by the Liaison Officer to Cst. Bains on December 28, 2016. The IIO letter sought that he attend for an IIO interview on January 9, 2017.

[51] On January 2, 2017, Cst. Bains emailed Liaison Officer Weidman and advised he would not attend the requested interview as he was on weekly leave on the scheduled date, and that he would require the attendance of his counsel at any IIO interview.

[52] The IIO wrote to Cst. Bains on January 12, 2017, and requested that he contact the IIO prior to January 18, 2017, to re-schedule the interview for a date no later than January 27, 2017.

[53] On January 16, 2017, Claire Hatcher, counsel for Cst. Bains, replied to the IIO's letter of January 12, 2017. She sought confirmation of her client's designation as a witness officer, assurances that any statement would not be utilized in any criminal or civil proceedings against him, and pre-interview disclosure of CAD entries, dispatch audio and video of the incident. She also advised that she was unavailable to attend for an interview prior to the January 27, 2017 deadline, and that her first availability was the week of February 6, 2017.

[54] The IIO responded to Ms. Hatcher's correspondence in a letter dated January 24, 2017. The IIO confirmed her client's designation as a witness officer and agreed to extend the interview deadline to accommodate Ms. Hatcher's schedule. The interview would occur, the IIO advised, on February 6, 2017. The IIO also advised that disclosure of investigative file materials to a witness was at the discretion of investigators. In this case, the IIO would agree to provide Cst. Bains with certain relevant CAD print-outs and dispatch audio to review just prior to the commencement of the interview, but no incident video would be provided prior to the interview. The IIO also advised that it was anticipated that Cst. Bains would be given the opportunity to view incident video after his initial interview.

[55] In a letter dated February 1, 2017, the IIO advised Ms. Hatcher that Cst. Bains' interview was now scheduled by the IIO for 9:30 a.m. on February 6, 2017, at the IIO office in Surrey. It noted that no response had been received to its January 24, 2017 letter.

[56] On February 2, 2017, Ms. Hatcher replied to the IIO's correspondence. She indicated that Cst. Bains was not available on February 6, 2017, as he was on leave from February 6 to 9, 2017. She suggested that the IIO meet with her concerning pre-interview disclosure.

[57] The IIO responded to Ms. Hatcher's February 2, 2017 letter on February 3, 2017, and agreed to reschedule Cst. Bains' February 6, 2017 interview to February 10, 2017, to accommodate her client's leave. The IIO advised that a number of discussions regarding pre-interview disclosure had already occurred with counsel, and the IIO would not alter its position on the issue. The IIO asked Ms. Hatcher to confirm by close of business on February 6, 2017, whether her client was prepared to attend the re-scheduled interview on the terms set out in its correspondence of January 24, 2017.

[58] On February 6, 2017, Ms. Hatcher replied to the IIO's February 3, 2017 correspondence. Ms. Hatcher again requested that the IIO agree to a meeting with

her to discuss pre-interview disclosure. She also advised that Cst. Bains understood he had a statutory obligation to cooperate with the IIO investigation, but would not attend for an interview.

[59] Cst. Bains has not attended for an interview by the IIO concerning the Canadian Tire Investigation.

**(c) Subsequent Communications Related to IIO Interview of Cst. Spencer Green**

[60] A letter from the IIO to Cst. Spencer Green dated December 15, 2016, was forwarded to Liaison Officer Weidman on December 22, 2016. On December 28, 2016, the letter was forwarded via email by Liaison Officer Weidman to Cst. Green. The letter confirmed the officer's status as a witness officer and sought his attendance for an IIO interview on January 11, 2017.

[61] On December 28, 2016, Cst. Green advised via email to Liaison Officer Weidman that he would not attend the scheduled interview, as he was off duty on the requested date. Cst. Green also advised that he wished to consult with counsel Ravi Hira and to have him present at the interview.

[62] Mr. Hira wrote to the IIO on January 9, 2017. He requested confirmation of Cst. Green's designation as a witness officer, confirmation that any statement provided by him would not be used against him "in any manner whatsoever," and requested certain pre-interview disclosure. Mr. Hira also stated that he was available to accompany his client for an interview on January 27, 2017, and they would attend on the condition that he received the requested pre-interview disclosure plus assurances that the interview was compelled and that Cst. Green's statement would not be used in any other proceedings.

[63] On January 12, 2017, the IIO wrote to Cst. Green by letter forwarded by Liaison Officer Weidman to request that he contact the IIO prior to January 18, 2017, to schedule an interview, which was to occur no later than January 27, 2017.

[64] Mr. Hira wrote to the IIO on January 16, 2017, and confirmed that he and his client were available to be interviewed on January 27, 2017, if the pre-conditions set out in his January 9, 2017 letter were met. He requested a response to that correspondence.

[65] The IIO wrote to Mr. Hira on January 24, 2017. The IIO confirmed Cst. Green was designated as a witness officer. Regarding the request for pre-interview disclosure, the IIO advised that disclosure of investigative file materials to a witness was at the discretion of investigators. In this case the IIO would agree to provide Cst. Green with certain relevant CAD print-outs and dispatch audio just prior to his interview. The IIO advised that no incident video would be provided prior to the interview, but that it was anticipated that Cst. Green would be given the opportunity to view incident video after his initial interview. The IIO requested that Mr. Hira advise promptly whether his client was prepared to attend on the terms outlined.

[66] On January 26, 2017, Mr. Hira wrote to the IIO. He sought assurances that his client would not be subject to any future obstruction of justice charges that might arise from his compelled statement. Mr. Hira advised that the issue of pre-interview disclosure needed to be resolved before Cst. Green would attend for an interview, and suggested a meeting be scheduled.

[67] The IIO responded to Mr. Hira's January 26, 2017 letter on February 1, 2017. The IIO advised that debates among counsel and IIO were not consistent with full cooperation with the IIO's investigation. The IIO requested that Mr. Hira reconsider his position regarding his client's attendance, and asked that he or Cst. Green contact the IIO immediately to schedule the interview.

[68] Mr. Hira wrote to the IIO on February 2, 2017. He requested that the IIO provide a rationale for its position regarding pre-interview disclosure. He confirmed that his client would not attend the interview unless he was given full opportunity to first refresh his memory with video recordings of the incident, and was given use immunity regarding his statement to the IIO, including immunity from obstruction of

justice charges. Mr. Hira suggested a meeting with counsel and the IIO regarding pre-interview disclosure. He advised he would be out of the country from February 11 to 26, 2017.

[69] On February 8, 2017, the IIO wrote to Mr. Hira in response to his letter of February 2, 2017. The IIO advised that its position was that witness viewing of pre-interview video had the potential to distort officers' memories of the subject incident. The IIO also stated that as it was interested in determining not only what actually occurred, but also the officer's perception of the event, any risk that outside information could alter or affect the officer's memory needed to be closely guarded against. The IIO advised that it was not open to officers to refuse to participate in IIO interviews due to a disagreement as to interview best practices. The IIO confirmed that Mr. Hira had refused on his client's behalf to attend an interview on the IIO's terms. The IIO requested that he reconsider that refusal, and contact the IIO immediately to arrange for an interview to occur prior to his departure from the country.

[70] Cst. Green has not attended for an interview by the IIO concerning the Canadian Tire Investigation.

**(d) Subsequent Communications Related to IIO Interview of Cst. Pat Gormley**

[71] On November 21, 2016, David Butcher, QC informed Martin Allen of the IIO via email that he represented Officer Gormley. Mr. Butcher requested a copy of all cell phone and security camera footage depicting the incident, and the audio of the radio transmissions. Mr. Allen replied to Mr. Butcher via email on November 22, 2016, and advised that pre-interview disclosure of video would not be provided to Cst. Gormley.

[72] The IIO's letter to Cst. Gormley dated December 15, 2016, was forwarded to Liaison Officer Weidman on December 22, 2016. On December 28, 2016, the letter was forwarded via email by Liaison Officer Weidman to Cst. Gormley. The letter

confirmed the officer's status as a witness officer and requested that he attend for an IIO interview on January 12, 2017.

[73] On January 6, 2017, Cst. Gormley emailed Liaison Officer Weidman to advise he would not attend the scheduled interview date as it fell during his weekly leave. He also advised that he wished to have his lawyer and his union representative present at the interview and that the interview date would be contingent on their availability.

[74] On January 10, 2017, Anila Srivastava of Mr. Butcher's office wrote to the IIO. She advised that Mr. Butcher represented Cst. Gormley and that their client was on weekly leave on the proposed interview date of January 12, 2017, and that Mr. Butcher was out of the country until February 6, 2017. Ms. Srivastava reiterated Mr. Butcher's November 2016 demand for pre-interview disclosure.

[75] The IIO wrote to Cst. Gormley on January 12, 2017, and confirmed he had not attended the scheduled January 12, 2017 interview. The IIO requested he contact the IIO prior to January 18, 2017, to co-ordinate a new interview date, to occur no later than January 27, 2017.

[76] On January 16, 2017, Mr. Butcher wrote to IIO to advise he represented Cst. Gormley and that he, Mr. Butcher, left the country on December 27, 2016, and was not scheduled to return until February 6, 2017. Mr. Butcher advised that Cst. Gormley would not attend for any interview until the matter of pre-trial disclosure was resolved and he returned to the country.

[77] On January 18, 2017, Ms. Srivastava wrote to the IIO and noted that they had not been provided with the requested pre-interview disclosure. She confirmed that Mr. Butcher was out of the country, and could be available for an interview the week of February 20 to 24, 2017.

[78] The IIO wrote to Mr. Butcher on January 24, 2017, to advise that it would agree to defer Cst. Gormley's interview to the first week after Mr. Butcher returned to

Canada, and asked that the interview occur on February 7 or 8, 2017. Regarding his request for pre-interview disclosure, the IIO advised that disclosure of investigative file materials to a witness was at the discretion of investigators. In this case they would agree to provide Cst. Gormley with certain relevant CAD print-outs and dispatch audio just prior to his interview. There would not be pre-interview disclosure of video. The IIO advised that it was anticipated that Cst. Gormley would be given the opportunity to view incident video after his initial interview.

[79] The IIO wrote to Mr. Butcher on February 1, 2017, in follow-up to its letter of January 24, 2017. The IIO advised that in the circumstances it would agree to defer the interview of Cst. Gormley until Mr. Butcher's return to the country, and scheduled that interview for February 8, 2017, at 9:30 a.m.

[80] Mr. Butcher replied to the IIO's letter by email on February 2, 2017. He advised that he was not available to attend for an interview until the week of February 22, 2017. He also advised, for the first time, that Cst. Gormley was working night shift on February 8, 2017, and was unable to be interviewed on that date as a result. He suggested the IIO take steps to determine his client's schedule before scheduling an interview. Mr. Butcher also requested that IIO counsel contact him to discuss the disputed pre-interview disclosure issue.

[81] On February 2, 2017, the IIO responded to Mr. Butcher's email of the same day. The IIO agreed to delay Cst. Gormley's interview until Mr. Butcher's first available date, February 22, 2017, and advised that his attendance would be in accordance with the terms set out in the IIO's January 24, 2017 letter.

[82] Ms. Srivastava wrote to the IIO on February 10, 2017. She advised that Cst. Gormley would be in a training course February 20 to 24, 2017, and that this commitment had been overlooked when they had communicated earlier regarding scheduling. Ms. Srivastava also requested a response regarding the expressed concerns regarding the potential jeopardy faced by their client if he were to participate in an interview.

[83] On February 14, 2017, the IIO wrote to Liaison Officer Weidman via email to request Cst. Gormley's duty roster for February 20 to 24, 2017.

[84] On February 15, 2017, Liaison Officer Weidman replied to the IIO's email and provided Cst. Gormley's schedule for February 15, 2017, and for the week of February 20 to 24, 2017. That same day Mr. Butcher emailed the IIO and requested that the IIO not contact Cst. Gormley to determine his work schedule, although the communication in question had been with the Liaison Officer and not with the officer directly. Mr. Butcher commented that he was of the view that the IIO was unwilling to meet with counsel to "resolve the controversy about pre-interview disclosure" and expressed the hope this would be resolved prior to his next availability on March 3 or 13, 2017.

[85] Cst. Gormley has not attended for interview by the IIO concerning the Canadian Tire Investigation.

***(e) Subsequent Communications Related to IIO Interview of Cst. Scott Plummer***

[86] The IIO wrote a letter to Cst. Plummer dated December 15, 2016, which was forwarded by the IIO on December 22, 2016, to Liaison Officer Weidman. On December 28, 2016, the letter was forwarded via email by Liaison Officer Weidman to Cst. Plummer. The letter confirmed the officer's status as a witness officer and requested that he attend for an IIO interview on January 11, 2017.

[87] Cst. Plummer emailed Liaison Officer Weidman on December 28, 2016, confirmed he had received the letter regarding the interview, and advised he would not attend as he was on weekly leave on the proposed date. He said that he had not yet consulted with counsel, and as he wished his counsel and his union representative to attend with him at the interview, their availability would need to be accommodated.

[88] The IIO wrote to Cst. Plummer on January 12, 2017; that letter was forwarded to him by Liaison Officer Weidman. The IIO confirmed the officer had not attended

the scheduled interview, and advised that the interview would need to occur no later than January 27, 2017.

[89] On January 13, 2017, Cst. Plummer advised Liaison Officer Weidman, who in turn advised the IIO, that he was attempting to co-ordinate interview times with his counsel, Michael Shirreff, and that Cst. Plummer was on annual leave from January 17 to February 5, 2017.

[90] In a letter dated January 16, 2017, Mr. Shirreff advised the IIO he now represented Cst. Plummer. Mr. Shirreff noted that he was aware of communications among various witness officers' counsel and the IIO concerning pre-interview disclosure. He suggested that once the IIO provided pre-interview disclosure, an interview could be quickly scheduled.

[91] The IIO wrote to Mr. Shirreff on January 24, 2017, in response to his letter of January 16, 2017. The IIO advised that disclosure of investigative file materials to a witness was at the discretion of investigators and that the IIO would agree to provide Cst. Plummer with certain relevant CAD print-outs and dispatch audio just prior to his interview. The IIO also advised that no incident video would be provided to Cst. Plummer prior to the interview, but that it was anticipated that Cst. Plummer would be provided with an opportunity to view incident video after having been initially interviewed. The IIO also noted that as it had been advised Cst. Plummer was on leave until February 5, 2017, the interview should be scheduled to occur immediately upon his return.

[92] On February 1, 2017, Mr. Shirreff wrote to the IIO and advised that he and his client were available to attend an interview on February 14, 2017. Mr. Sherriff also requested that the IIO reconsider its position on pre-interview disclosure.

[93] On February 1, 2017 the IIO replied to Mr. Shirreff's correspondence of that same date and advised it agreed to interview Cst. Plummer on February 14, 2017, but it would not reconsider its position regarding pre-interview disclosure. The IIO

asked that Mr. Shirreff confirm that his client would attend on February 14, 2017, for his interview.

[94] Mr. Shirreff wrote on February 14, 2017, in reply to the IIO's letter of February 1, 2017. He advised that in light of the IIO's position regarding pre-interview disclosure of video footage, Cst. Plummer would not attend for an interview. He advised that it was his view that there was an obligation on the IIO to provide officers with full and complete disclosure prior to interviews.

[95] Cst. Plummer has not attended for interview by the IIO concerning the Canadian Tire Investigation.

***(f) Subsequent Communications Related to IIO Interviews of Cst. Thomas Dobranowski, Cst. Beau Spencer & Cst. Dave Gooderham***

[96] On December 22, 2016, letters from the IIO to Constables Dobranowski, Gooderham and Spencer dated December 15, 2016, were forwarded to Liaison Officer Weidman. On December 28, 2016, these letters were forwarded via email by Liaison Officer Weidman to those officers. The IIO letters confirmed the officers' status as witness officers. Constables Dobranowski and Gooderham were advised they were required to attend IIO interviews on January 10, 2017. Cst. Spencer was advised that he was required to do so on January 9, 2017.

[97] Cst. Spencer emailed Liaison Officer Weidman on December 28, 2016, and advised that he would not attend the January 9, 2017 interview as he was on weekly leave on the scheduled date. He also advised that he wished to have his lawyer and his union representative present at the interview, and the interview date would need to accommodate their availability.

[98] On December 28, 2016 Cst. Gooderham emailed Liaison Officer Weidman. He advised that he would not attend the January 10, 2017 interview as he was on annual leave on that date. He also advised that as he wished to attend the interview with his lawyer, Kevin Woodall, and his union representative, the interview date would need to accommodate their availability.

[99] Cst. Dobranowski emailed Liaison Officer Weidman on December 29, 2016, and advised that he would not attend the scheduled interview as he would be on weekly leave on the scheduled date. He also advised that he wished to have his lawyer and his union representative present at the interview and that the interview date would need to accommodate their availability.

[100] The IIO wrote to Constables Spencer, Gooderham and Dobranowski on January 12, 2017. The IIO requested that the officers contact the IIO prior to January 18, 2017, to schedule interviews that were to occur no later than January 27, 2017.

[101] Cst. Dobranowski emailed Liaison Officer Weidman on January 14, 2017, and advised he was consulting with legal counsel and his union, and would attend the IIO interview on a date to be arranged, which would be prior to January 28, 2017. The Liaison Officer forwarded this email to the IIO.

[102] On January 16, 2017, VPU President Mr. Stamatakis wrote to the IIO on behalf of Constables Spencer, Gooderham and Dobranowski. He acknowledged the IIO letters requesting interviews, and advised that these officers were represented by agents of the Vancouver Police Union. Mr. Stamatakis advised that recent IIO correspondence failed to address VPU and IIO discussions regarding pre-interview disclosure. He advised that the VPU would provide availability for interviews within one week from the date that the requested pre-interview disclosure had been provided.

[103] The IIO wrote to Mr. Stamatakis on January 24, 2017, in response to his January 16, 2017 correspondence. The IIO advised that disclosure of investigative file materials to witnesses was at the discretion of investigators. In this case the IIO agreed to provide the witness officers with certain relevant CAD print-outs and dispatch audio just prior to their interviews. The IIO advised that no incident video footage would be provided to the officers prior to their interviews. It was anticipated that the officers would be provided an opportunity to view incident video after their initial interviews. The IIO also advised that it required the officers to attend for

interviews within the time frame set out in its January 12, 2017 letter. The letter advised that the officers were under a statutory duty to fully cooperate with the IIO, the relevant terms of the MOU, and ss. 34, 36, and 38 of the VPD's *Regulations and Procedures Manual*.

[104] Mr. Stamatakis did not reply to the IIO's letter of January 24, 2017.

[105] Constables Dobranowski, Spencer and Gooderham have not attended for IIO interviews concerning the Canadian Tire Investigation.

### **Memorandum of Understanding**

[106] I have referred briefly to the MOU. The parties disagree on the effect of the MOU in the context of this investigation, particularly whether and how it informs the term "cooperate fully" in s. 38.101 of the *Police Act*. Because it figures prominently in the respondents' argument, I will address its application to the matters in issue first.

### **Terms of the MOU**

[107] The MOU describes as its purposes:

#### **PURPOSES:**

- A. This Memorandum of Understanding Respecting Investigations replaces in its entirety the Memorandum of Understanding Respecting Investigations among the same participants dated for reference July 16, 2012.
- B. The IIO has been established pursuant to the *Police Act* section 38.02 for the purpose of investigating incidents where a person may have died or suffered serious harm as a result of the actions of an officer, or for other investigations referred to in the *Police Act*.
- C. The IIO, the RCMP, and other police services in British Columbia all conduct investigations pursuant to the *Criminal Code* and other statutes.
- D. The *Police Act* sections 38.09 (1) and (2) require police to notify the IIO of an incident that may fall within the jurisdiction of the IIO, and further require police to secure the scene of the incident until an IIO investigator arrives on the scene.
- E. The *Police Act* section 38.101 requires officers to cooperate fully with the CCD and IIO investigators in respect of the exercise of the powers or performance of duties under the *Police Act* by the CCD and IIO investigators.

- F. The RCMP Independent External Investigations Policy directs the RCMP to refer to established independent investigation regimes, like the IIO, certain matters including those where there is death or serious harm involving an RCMP employee.
- G. The *Police Act* section 38.11 requires the CCD, after an investigation is conducted, to make a report to Crown Counsel if the CCD considers that an officer may have committed an offence under any federal or provincial statute.
- H. The IIO, the RCMP, and all other police services in British Columbia wish to cooperate with one another in order to facilitate efficient, effective and timely investigations, and to that end they enter into this Memorandum of Understanding.

[108] The MOU sets out expectations between the IIO and various police agencies; designates liaison officers within the police department and the IIO to manage investigations, including ordinary disagreements that may arise from time to time; and provides a dispute settlement mechanism. The IIO is represented in the MOU by the CCD.

[109] The MOU states that it was created under ss. 4.1, 4.2, 26, and 34 of the *Police Act*.

[110] The police officers and their respective unions are not parties to the MOU; the only parties are the policing organizations and the IIO. Members of the various police departments are included under the terms of the MOU through the powers of their respective Chief Constables.

[111] Section 14 provides:

**14. Designation of subject officers and witness officers**

14.1 As soon as practicable after an incident which falls within IIO jurisdiction, the IIO investigator shall designate all the officers involved in or present during the incident as either subject officers or witness officers, and shall notify those officers and the police service liaison officer of the designations, and shall subsequently confirm those designations in writing.

14.2 “Subject officer” means:

- (a) an on-duty officer whose presence, action, or decision is reasonably believed
  - (i) to have been a contributing factor in the death of any person (including in-custody deaths);

- (ii) to have been a contributing factor in a life-threatening injury to any person;
  - (iii) to have caused disfigurement (permanent change in appearance), if there were no medical intervention;
  - (iv) to have caused permanent loss or impairment of any function or mobility of the body, if there were no medical intervention;
- (b) an on-duty officer who has discharged a firearm, where there is a reasonable belief that any person (including an officer) may have been injured by that discharge;
- (c) an off-duty officer whose action is reasonably believed
- (i) to have been a contributing factor in the death of any person;
  - (ii) to have been a contributing factor in a life-threatening injury to any person;
  - (iii) to have caused disfigurement (permanent change in appearance), if there were no medical intervention;
  - (iv) to have caused permanent loss or impairment of any function or mobility of the body, if there were no medical intervention.

[112] Section 18 provides:

**18. IIO interviews with witness officers**

18.1 When requesting to interview an officer, and at the beginning of every interview, an IIO investigator shall advise the officer whether he or she is designated as a witness officer or a subject officer. The IIO shall immediately advise the officer, and shall subsequently advise the officer and the police service in writing, if the officer's designation has changed from witness officer to subject officer, or has changed from subject officer to witness officer.

18.2 Unless otherwise determined by an IIO investigator in consultation with the police service liaison officer, a witness officer shall participate in an interview with an IIO investigator:

- (a) before the end of the witness officers' shift; or
- (b) if the IIO investigator agrees, within 24 hours of the officer being contacted by an IIO investigator; or
- (c) at any other time as agreed by the IIO investigator; and
- (d) on any additional occasions as determined by the IIO investigator.

18.3 During IIO interviews, witness officers shall answer the questions of IIO investigators.

18.4 IIO investigators shall determine the location of interviews with witness officers.

18.5 An IIO investigator may request video-recording of an interview with a witness officer, and if the officer declines to be video-recorded, the officer's

interview shall be audio-recorded. If the interview is only audio-recorded, the witness officer shall assist the IIO investigator in video-recording any places or things that are relevant to the investigation, but the officer himself or herself shall not be video-recorded (unless he or she consents), except that any physical demonstrations by the officer shall be video-recorded.

[113] Section 19 of the MOU provides:

**19. IIO interviews with subject officers**

19.1 When requesting to interview a subject officer and at the beginning of every interview, an IIO investigator shall advise the officer that he or she is designated as a subject officer.

19.2 The IIO shall immediately advise the officer, and shall subsequently advise the officer and the police service in writing, if the officer's designation has changed from witness officer to subject officer, or has changed from subject officer to witness officer.

19.3 IIO investigators shall seek to conduct video-recorded voluntary interviews with subject officers. Subject officers have the same rights and freedoms as every person in Canada and the benefit of all applicable law, including but not limited to the right to silence and the rights under section 10 of the *Canadian Charter of Rights and Freedoms*.

19.4 IIO investigators shall provide the "Official Warning" at the beginning of every interview with a subject officer and shall provide the "Written Statement Caution" before accepting any written statement from a subject officer. It is understood that the purpose of the Warning and Caution are:

- (a) to make clear that subject officers, unlike witness officers, are not compelled to say anything to IIO investigators; and
- (b) to make clear that subject officers' statements and interviews may be used in evidence because they are not compelled.

[114] If a disagreement arises between the IIO investigator and a police officer, the MOU provides a dispute settlement provision at s. 22:

**22. Dispute resolution and compliance**

22.1 Disagreements regarding the conduct of an investigation may be resolved by the designated liaison position for the police service and the IIO investigator, or if a dispute is not resolved at that level, it may be referred to the CCD or his/her designate and to the chief of the police service or his/her designate.

22.2 If the CCD or the chief of a police service believes that any employee of a participant may have intentionally failed to comply with any term of this MOU, the CCD may make a formal complaint to the chief of a police service or the chief of a police service may make a formal complaint to the CCD.

[115] The dispute resolution clause does not provide an ultimate mechanism by which the resolution to an agreement may be imposed from one party by the other.

[116] Section 24 provides:

**24. Non-derogation terms**

24.1 Nothing in this MOU shall replace or amend any obligation imposed upon a participant by operation of law, including the *Criminal Code* and the *Canadian Charter of Rights and Freedoms*.

24.2 Nothing in this MOU shall be interpreted to conflict with or derogate from the *Royal Canadian Mounted Police Act* or regulations under that Act (Canada), the *Police Act* or regulations or Standards under that Act (British Columbia), the *South Coast British Columbia Transportation Authority Act* or regulations under that Act (British Columbia), the *Coroners Act* (British Columbia), the *Access to Information Act* (Canada), the *Privacy Act* (Canada), or the *Freedom of Information and Protection of Privacy Act* (British Columbia), but shall be interpreted in all respects as subject to those statutes. Should any provision of this MOU conflict with or derogate from any of those statutes, such provision shall be null and void.

24.3 Nothing in this MOU shall be interpreted as in any way derogating from the responsibilities and obligations of the RCMP pursuant to the Provision of Police Services Agreement between Canada and the Province of British Columbia dated April 1, 2012.

**Positions of the Parties**

***Respondents***

[117] The respondents argue the obligations of witness officers to “cooperate fully” are informed by the provisions of the MOU. They argue there is no specific duty imposed by law to submit to unilateral demands imposed by the IIO, including demands to attend interviews on conditions that the IIO imposes.

[118] The essence of the respondents’ position is that the legislature has not set out the powers and the duties of the IIO in criminal matters in a prescriptive manner. The respondents say it is necessary to compare the procedure in place for handling discipline complaints provided in Part 11, particularly s. 101, of the *Police Act*, as well as the precise prescriptive powers of the Special Investigations Unit (SIU) in Ontario to investigate police officers for criminal offences. The respondents assert that because the legislature did not provide precise and prescriptive powers to the

IIO regarding the conduct of interviewing witness officers, the legislature did not intend to give them such powers. These include summary powers jurisdiction in criminal matters or greater powers than investigators have on less serious matters of professional discipline under Part 11, such as the summary power to order police officers to attend interviews and to do so within five days.

[119] The fact that such provisions are not contained within the *Police Act*, according to the respondents, means that the legislature intended that the MOU is to serve the purpose of regulations or statutory provisions. The terms of the MOU are “in essence” regulations for the IIO in respect of its investigations. The respondents say that the MOU does not create a duty to cooperate on the part of the witness officers enforceable through *mandamus*. Because the MOU contains a dispute resolution clause, the intent of the signatories to it was to remove disputes from the jurisdiction of the court.

[120] The respondents assert that the MOU characterizes a “spirit of cooperation” and in accordance with its terms, the IIO and the police officers must together determine what the process ought to be for IIO investigations including the meaning of “cooperate fully,”

***Petitioner***

[121] The petitioner asserts that the MOU is not legislation and does not provide any statutory framework for the IIO. The legislature is not a party to the MOU.

[122] The petitioner points out that s. 24.1 of the MOU provides that nothing in the MOU replaces or amends any obligation imposed by operation of law. Section 24.2 specifies that it shall not be interpreted to conflict with or derogate from the *Police Act* and that it shall be “interpreted in all respects as subject to the *Police Act* and should any provision in the MOU conflict or derogate from that *Act*, such provision shall be null and void.”

[123] In respect of the dispute resolution mechanism addressed in ss. 22.1 and 22.2 of the MOU, the petitioner submits that these do not create any preconditions

for a petition to court. The language of the MOU is permissive. It does not suggest that there are no other means of resolution, including recourse to the court. These sections do not describe the process that must be undertaken; the fact that the parties at the top of the chain of command cannot resolve the issue does not mean the IIO cannot pursue its investigation. The petitioner says that if the MOU provides that the liaison officer should fill a dispute resolution role, which it does not admit, the facts demonstrate that the IIO attempted to do that but the liaison officer did not wish to assume that position, rather, the liaison officer operated as a “go-between” between the IIO and the VPD.

[124] In respect of the IIO’s powers to make demands directly on officers, the petitioner says that the MOU does not preclude the IIO from making demands directly on witness officers or directing witness officers as to what they are required to do in respect of the IIO investigation. Such an interpretation, the petitioner asserts, is contrary to the legislative scheme and is not supported by the plain language of the MOU. Under s. 38.07 of the *Police Act*, every IIO investigator has all the powers of a peace officer at common law or under legislation and they operate under the exclusive command and direction of the CCD. Under s. 38.09, IIO investigators “take over and conduct the investigation” of incidents under their jurisdiction. Under s. 38.101, witness police officers must fully cooperate with the IIO investigators. The *Police Act* provisions do not suggest that IIO officers may only make demands of witness officers or give directions to them through the liaison officer or the chief constable. Rather, the provisions contemplate direct demands or communications between the IIO investigators and the police officers.

### **Analysis**

[125] I am not persuaded that the MOU is intended to achieve legislative authority regarding the conduct of interviews by the IIO for the reasons referred to by the petitioner.

[126] There is no indication in the MOU that it is intended to have legislative authority.

[127] Section 24.1 clarifies that the MOU does not “replace or amend any obligation imposed upon a participant by operation of law, including the *Criminal Code* and the *Canadian Charter of Rights and Freedoms*”. Section 24.2 provides:

Nothing in this MOU shall be interpreted to conflict with or derogate from ...the *Police Act* or regulations or Standards under that *Act* (British Columbia)...but shall be interpreted in all respects as subject to those statutes. Should any provision of this MOU conflict with or derogate from any of those statutes, such provision shall be null and void.

[128] The MOU provides some direction about how the interviews of witness officers ought to take place. It requires witness officers to participate in interviews with the IIO investigator, and that witness officers answer questions of IIO investigators. The MOU does not purport to define what “cooperate fully” means.

[129] The role and obligations of witness officer are briefly stated in the MOU. In accordance with s. 18.2, the witness officer “shall participate in an interview with an IIO investigator.” The MOU does not provide that the witness officer must be provided with pre-interview disclosure or that he or she be accompanied by a lawyer and/or a union representative at the interview. It does not suggest that the interview take place at the convenience of the witness officer after accommodating the officer’s schedule. To the contrary, s. 18 requires that the interviews between the witness officers and the IIO take place with dispatch: before the end of the witness officer’s shift or at some later time provided that the IIO investigator agrees. It does not provide for the agreement of the witness officer to attend the interview or to determine if and when it will take place.

[130] Section 19, by contrast, explicitly sets out procedural safeguards that apply where the IIO interview is of a subject officer. This suggests that the MOU does not reflect an agreement that witness officers are entitled to the same or similar safeguards, including those that the witness officers have demanded here.

[131] The MOU’s dispute resolution provisions are permissive, not mandatory, and do not and cannot have the effect of ousting the court's jurisdiction to address the duties of witness officers under the provisions of s. 38 under Part 7.1 of the *Police*

Act. The MOU does not assist in interpreting the obligations on witness officers to “cooperate fully” with the IIO. Reference to the common law is required to define that legal duty.

[132] Finally, the MOU does not suggest in any of its terms that the witness officers, their union, or the liaison officer have a role in directing the terms upon which the interview with the IIO will take place.

### **Cooperate Fully**

[133] The petitioner refers to the common law duty of police officers to assist in law enforcement and investigation of potential offences and their duty as members of a self-governing profession to cooperate with their governing bodies.

[134] At common law, police officers have an obligation to assist in law enforcement and investigation of potential offences: *Wood v. Schaeffer*, 2013 SCC 71 [*Wood*].

[135] I agree with the petitioner that the language of s. 38.101 is clear. The duty is mandatory and the witness officers do not have any discretion in regard to this duty. It is not open to them to withhold cooperation based on assertions that the proposed interview timing inconveniences them or that the proposed IIO interviews will not be conducted in accordance with the terms of the witness officers demand for pre-interview disclosure or assurances as to potential derivative use of their accounts.

[136] An obligation to cooperate fully with the IIO must be an essential element of the functioning of a police oversight agency that exists to investigate police-related fatalities and incidents involving serious harm. If cooperation by the witness officers is discretionary, the goal of the IIO is diminished or extinguished. There will be no arm’s-length investigation of an incident if it is at the discretion of the witness officers.

[137] The jurisprudence with regard to the duty to cooperate is referred to in cases dealing with the duty of members of self-governing professions to cooperate with

their governing bodies. The duty is codified in legislation and in professional rules and regulations.

[138] Several authorities provided by the petitioner involve circumstances where a professional refuses to cooperate with his or her self-governing professional body and is disciplined for failing to cooperate. The professional then seeks judicial review of the findings by the professional organizations that their failure to cooperate amounts to professional misconduct.

[139] In *Wise v. Law Society of Upper Canada*, 2010 ONSC 1937 at para. 19 the court states: “[i]t is well recognized that to ensure the effective discharge of the responsibilities of professional regulators, every professional has an obligation to cooperate with the self-governing body...”

[140] The duty to cooperate is based on the obligations of professional governing bodies to protect the public interest and, in doing so, requires effective investigative powers. Powerful public policy reasons require members of self-governing professions to cooperate with investigations by a regulator. Professionals under investigation by their governing bodies are not entitled to disclosure as a precondition of their cooperation. The failure to cooperate can and does result in delay in investigations; frustration of the governing bodies’ fulfilment of its statutory mandate in the public interest; jeopardizing of the collection of evidence and the recollection of witnesses; and erosion of public confidence in the governing body. At the investigative stage, the targets of investigations have less administrative law protections than they do in an adjudicative process, as that would be contrary to public interest: *D’Mello v. Law Society of Upper Canada*, 2015 ONSC 5841; *Round v. Institute of Chartered Accountants of Ontario*, 2015 ONSC 7099; *Strauts v. College of Physicians and Surgeons (British Columbia)* (1997), 36 B.C.L.R. (3d) 106 (C.A.).

[141] In *Wood*, the Court considered whether the legislative scheme relating to the Ontario SIU allow for involved officers to refrain from making their notes related to a police shooting until they had spoken with counsel. At para. 32, the Court held:

32 This starting point requires that an officer's entitlement to counsel at the note-making stage be determined purposively, through the lens of the legislative scheme, thus ensuring the entitlement will be in harmony with the scheme and its overarching purpose. The first question, therefore, is whether s. 7(1) of the regulation, interpreted purposively, entitles officers to consult with counsel at the note-making stage. If such an entitlement is inconsistent with the regulation, then officers involved in SIU investigations are precluded from such consultations and we need not reach the question of what residual liberty officers may retain at common law. In short, 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.

[142] The Court determined that the Ontario Legislature intended to create an independent and transparent investigative body for the purpose of maintaining public confidence in the police and the justice system as a whole. The regulation in issue regarding note-taking was created to facilitate that purpose. The Court considered that the SIU was created because of the crisis in public confidence in policing. The scheme was designed to foster public confidence by combating the problem of “police investigating police”: *Wood*, at para. 36. The Court found that a reasonable member of the public would question whether counsel's assistance at the note-taking stage is sought by officers to help them fulfill their duties as police officers or in their own self-interest to protect themselves and their colleagues from an adverse SIU investigation: *Wood*, at para. 50.

[143] In *Kyle v. Stewart*, 2017 BCSC 522, Madam Justice MacNaughton held that the duty of fairness is minimal at the investigative stage, referring to *Nicholson v. Haldimand-Norfolk (Regional Municipality) Commissioners of Police*, [1979] 1 S.C.R. 311 at 324.

[144] The witness officers' statutory obligation mandates that they have a public legal duty to act, in particular to cooperate fully with the petitioner. This obligation requires them to cooperate fully in the context of a legislative scheme that was

intended to provide an independent and transparent investigative body for the purpose of maintaining public confidence in the police and the justice system along with the minimal procedural requirements expected at the investigation stage, particularly of witness officers rather than subject officers. The imposition of a requirement of pre-interview disclosure, the presence of counsel, the presence of a union representative, assurances that there will be no derivative use of their accounts and that the interview must be scheduled to accommodate annual leave, weekly leave, particular shifts or on some other basis, does not interfere with the obligation to cooperate fully.

[145] Whether or not the witness officers were acting in good faith or making up excuses about their non-attendance for interviews is not a consideration. The IIO has the obligation to investigate the Canadian Tire incident and the witness officers have an obligation to cooperate fully with that investigation. The witness officers do not have the discretion to determine the bounds of the interview process.

[146] To address the issue as described by counsel for the respondents: it is the IIO, not the witness officers, who determine what “cooperate fully” under s. 38.101 of the *Police Act* means.

### **Mandamus**

#### **The Apotex Test**

[147] The test for *mandamus* is set out in *Apotex Inc. v. Canada* (1993), [1994] 1 F.C. 742 (C.A.), *aff’d Apotex Inc. v. Canada (Attorney General)*, [1994] 3 S.C.R. 1100, in para. 55 of the Federal Court of Appeal decision:

55 Several principal requirements must be satisfied before *mandamus* will issue. ...

(1) There must be a public legal duty to act.

(2) The duty must be owed to the applicant.

(3) There is a clear right to performance of that duty, in particular:

(a) the applicant has satisfied all conditions precedent giving rise to the duty;

(b) there was (i) a prior demand for performance of the duty; (ii) a reasonable time to comply with the demand unless refused outright; and (iii) a subsequent refusal which can be either expressed or implied, e.g. unreasonable delay.

(4) Where the duty sought to be enforced is discretionary, the following rules apply:

(a) in exercising a discretion, the decision-maker must not act in a manner which can be characterized as "unfair", "oppressive" or demonstrate "flagrant impropriety" or "bad faith";

(b) *mandamus* is unavailable if the decision-maker's discretion is characterized as being "unqualified", "absolute", "permissive" or "unfettered";

(c) in the exercise of a "fettered" discretion, the decision-maker must act upon "relevant", as opposed to "irrelevant", considerations;

(d) *mandamus* is unavailable to compel the exercise of a "fettered discretion" in a particular way; and

(e) *mandamus* is only available when the decision-maker's discretion is "spent", i.e., the applicant has a vested right to the performance of the duty.

(5) No other adequate remedy is available to the applicant.

(6) The order sought will be of some practical value or effect.

(7) The Court in the exercise of its discretion finds no equitable bar to the relief sought.

(8) On a "balance of convenience" an order in the nature of *mandamus* should (or should not) issue.

[Citations omitted.]

**1) *There must be a public legal duty to act.***

[148] The parties agree that the respondents have a public legal duty to cooperate fully. The parties differ on the content of that duty.

[149] The IIO asserts that the witness officers have a mandatory public duty to act, to "cooperate fully" with the IIO in accordance with s. 38.101 of the *Police Act*. It asserts that the language of s. 38.101 is clear and unequivocal. The duty on the witness officers is mandatory and they have no discretion with regard to this duty. The witness officers cannot withhold cooperation based on assertions that the proposed interview timing inconveniences them, or that the proposed IIO interviews will not be conducted in accordance with the terms that the witness officers consider

appropriate for pre-interview disclosure, or that assurances as to the potential derivative use of their accounts is not satisfactory to them.

[150] The respondents say that their duty is to their Chief Constable in accordance with the terms of the MOU. I have rejected the respondents' argument regarding the application of the MOU.

[151] In the context of this first *Apotex* factor, I determine that the witness officers have a public duty to act and to cooperate fully with the IIO.

***2) The duty must be owed to the applicant.***

[152] The respondents' position in respect of where the duty is owed also relies on the application of the MOU and their position that it is intended to address all of the duties required of witness officers. On the basis that I have rejected the MOU as fulfilling the legislative function as argued by the respondents, I reject the suggestion that the duty the police officers owe is to their Chief Constable rather than to the IIO. The duty owed by the witness officers is to the IIO.

***3) There must be a clear right to the performance of that duty.***

[153] It is clear from the background provided that the petitioner made demands of the witness officers for the performance of their duties and that the witness officers have had more than a reasonable time to comply. The witness officers have refused to attend interviews with IIO investigators for the reasons outlined.

[154] There is a clear right to the performance of the witness officers' duty to the IIO.

***4) Is the duty discretionary?***

[155] The duty of these witness officer to attend interviews is not discretionary on the part of the witness officers.

**5) *Is there another remedy?***

[156] I do not consider that the dispute resolution mechanism provided in the MOU is to be exhausted before the court can order *mandamus*.

[157] The *Police Act* contains no enforcement provisions related to breach of the duty to cooperate fully under s. 38.101.

[158] An order for *mandamus* is the only remedy available to the petitioner.

**6) *The order sought will be of some practical value or effect.***

[159] The order sought will be of practical value and effect to the IIO's investigative process.

**7) *Is there an equitable bar to the remedy?***

[160] No equitable bar exists to the petitioner to obtain the remedy that is sought.

**8) *Application of the balance of convenience test.***

[161] The court retains the discretion to refuse to issue an order for *mandamus* where the public interest outweighs the interest of those who would otherwise be entitled to the order.

[162] As noted in *Wood*, the SIU in Ontario was created because of the crisis in public confidence in policing. The scheme was designed to foster public confidence by combating the problem of "police investigating police." The IIO in British Columbia was created for the same purpose. Thus, the balance of convenience test involves the weighing of the public interest and the terms that the witness officers seek to apply to their being interviewed. In fact, that is what the witness officers argue: the interview can proceed so long as the IIO meets the witness officers' demands.

[163] I have already noted that the duty of fairness is minimal at the investigation stage.

[164] In balancing the public interest and the minimal duty of fairness that is owed to the witness officers, the balance of convenience favours the issuance of an order for *mandamus*.

### **The Declarations Sought**

[165] I agree with the petitioner that the history of this matter reveals a misapprehension of the respondents' legal duties. In order that there be no further misapprehension, I make the following declarations under s. 2(2)(a) of the *JRPA*, that:

- (i) the duty on witness officers to fully co-operate with the petitioner under s. 38.101 of the *Police Act* includes the duty to attend interviews related to IIO investigations as and when the petitioner directs;
- (ii) attendance of witness officers' counsel and union representatives at IIO interviews is at the discretion of the petitioner;
- (iii) the providing of pre-interview disclosure to witness officers is at the discretion of the petitioner; and
- (iv) the witness officers Cst. Beau Spencer, Cst. David Gooderham, Cst. Thomas Dobranowski, Cst. Spencer Green, Cst. Scott Plummer, Cst. Michael Bains, and Cst. Pat Gormley have failed or refused to comply with their statutory duty under s. 38.101 of the *Police Act* to co-operate fully with the petitioner.

### **Best Practices**

[166] As part of their submissions, the parties provided expert and other evidence concerning best practices in respect of the interviews of witness officers following an incident such as the Canadian Tire incident. Because I have found that the IIO is entitled to the declarations sought, and that the IIO has the discretion to determine how the interviews will proceed, I did not address that evidence.

**Summary**

[167] I issue the order for *mandamus* and make the declarations sought by the petitioner.

“Gropper J.”

**APPENDIX A**

**Police Act, R.S.B.C. c. 367**

**Part 7.1 — Independent Investigations Office**

**Definitions**

**38.01** In this Part:

**"chief of the police service"** means as follows:

- (a) in relation to the provincial police force, the commissioner;
- (b) in relation to a municipal police department, a chief constable;
- (c) in relation to a police force described in section 1.1 (c), a chief officer;

**"civilian monitor"** means a person appointed by the chief civilian director under section 38.08 (1) to review and assess an investigation by the independent investigations office under this Part;

**"officer"** includes a person who is a member of the Royal Canadian Mounted Police;

**"police service"** means the Royal Canadian Mounted Police or a police force in British Columbia other than the independent investigations office;

**"serious harm"** has the same meaning as in Part 11.

**Independent investigations office established**

**38.02** (1) An independent investigations office is established in the Ministry of Attorney General, the purpose of which is to conduct

- (a) the investigation of an incident under section 38.09 (3) [*immediate reporting of critical incidents*],
- (b) the investigation of a matter under section 38.10 (2) [*immediate reporting of critical investigations*],
- (c) an investigation that may be directed to the independent investigations office under section 44 [*special investigations*], and
- (d) the investigation of a matter under section 177.1 [*duty of police complaint commissioner to notify IIO*] on receiving notice from the police complaint commissioner under that section.

(2) The independent investigations office consists of a chief civilian director, who is in charge of the independent investigations office, and IIO investigators selected by the chief civilian director.

**Appointment of chief civilian director**

**38.03** (1) The Lieutenant Governor in Council may appoint a person as chief civilian director.

(2) A person who is a current or former member of a police force or the Royal Canadian Mounted Police may not be appointed as chief civilian director.

(3) The chief civilian director holds office,

- (a) on being appointed to a first term, for 5 years, and
- (b) if appointed for a 2nd term, for a period of up to 5 years as specified in the reappointment.

(4) A person must not be appointed under subsection (1) for a 3rd or subsequent term.

**Responsibilities of chief civilian director**

**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.

**Remuneration, expenses and application of *Public Sector Pension Plans Act***

**38.05** (1) The chief civilian director is entitled

(a) to be paid a salary specified by the Lieutenant Governor in Council in the chief civilian director's appointment or reappointment, and

(b) to be reimbursed for reasonable travelling and out-of-pocket expenses personally incurred in exercising the powers and performing the duties of the chief civilian director under this Act.

(2) The public service plan as defined in section 1 (1) of the *Public Sector Pension Plans Act* applies to the chief civilian director.

**Independent investigations office staff and investigators**

**38.06** (1) The chief civilian director may appoint, in accordance with the *Public Service Act* and the regulations, if any, made under section 74 (2) (t.1) [*power to make regulations*] of this Act, the employees 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.

(2) Subject to subsections (2.1) and (3), the chief civilian director may appoint persons with investigative experience to serve as investigators with the independent investigations office.

(2.1) An appointment under subsection (2) must be made in accordance with

(a) the *Public Service Act*, and

(b) the regulations, if any, made under section 74 (2) (t.2) [*power to make regulations*] of this Act.

(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.

(4) For the purposes of the application of the *Public Service Act* to subsections (1) and (2) of this section, the chief civilian director is a deputy minister.

(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.

(6) The chief civilian director may establish the remuneration and other terms and conditions of a person retained under subsection (5).

(7) The *Public Service Act* does not apply in respect of a person retained under subsection (5).

**Jurisdiction of chief civilian director and IIO investigators**

- 38.07** (1) The chief civilian director and each IIO investigator have
- (a) all of the powers, duties and immunities of a peace officer and constable at common law or under any Act, and
  - (b) jurisdiction throughout British Columbia while carrying out those duties and exercising those powers.
- (2) An IIO investigator is under the exclusive command and direction of the chief civilian director while serving with the independent investigations office.

**Civilian monitors**

- 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.

**Immediate reporting of critical incidents and steps to be taken for takeover by independent investigations office**

- 38.09** (1) When an officer is at the scene of an incident where it appears that

- (a) a person may have died or suffered serious harm as a result of the actions of an officer, whether on or off duty, or
- (b) an officer, whether on or off duty, may have contravened a prescribed provision of the *Criminal Code* or a prescribed provision of another federal or provincial enactment,

the officer must immediately notify the independent investigations office in accordance with the guidelines established by the chief civilian director.

(2) Until IIO investigators arrive at the scene of the incident, the officers at the scene must take any lawful measures that appear to the officers to be necessary or expedient for the purposes of obtaining and preserving evidence relating to the matter.

(3) On arriving at the scene of the incident, one or more IIO investigators must take over and conduct the investigation of the incident under this Part.

### **Immediate reporting of critical investigations and takeover by independent investigations office**

**38.10** (1) When a police service is conducting an investigation into the conduct of an officer under Part 11 [*Misconduct, Complaints, Investigations, Discipline and Proceedings*] and there is evidence that the officer may have, whether on or off duty,

- (a) caused the death of a person,
- (b) caused a person serious harm, or
- (c) contravened a prescribed provision of the *Criminal Code* or a prescribed provision of another federal or provincial enactment,

the chief of the police service must immediately notify the independent investigations office in accordance with the guidelines of the chief civilian director.

(2) When the independent investigations office receives notice under this section, one or more of its members must initiate and conduct an investigation into the matter under this Part.

### **Officers to cooperate with independent investigations office**

**38.101** An officer must cooperate fully with

- (a) the chief civilian director in the chief civilian director's exercise of powers or performance of duties under this Act, and
- (b) an IIO investigator in the IIO investigator's exercise of powers or performance of duties under this Act.

### **Use of statements made by officers**

**38.102** (1) A statement provided or an answer given by an officer during an investigation under this Part is inadmissible in evidence in court in a civil proceeding for remedies against the officer in relation to the matter under investigation.

(2) Subsection (1) applies also in respect of evidence of the existence of a statement provided or answer given by an officer during an investigation under this Part.

### **Report to Crown counsel**

**38.11** If after an investigation by the independent investigations office is concluded the chief civilian director considers that an officer may have committed an offence under any enactment, including an enactment of Canada or another province, the chief civilian director must report the matter to Crown counsel.

### **Investigation records and annual reports**

**38.12** The chief civilian director must

- (a) establish and maintain a record of each investigation conducted by the independent investigations office under this Part, including all records related to each of those investigations,
- (b) compile statistical information in respect of records referred to in paragraph (a), including, without limitation,
  - (i) information respecting the number and frequency of investigations or of different types or classes of investigations, and the outcome or resolution of them, and
  - (ii) any trends in relation to information compiled under subparagraph (i), and
- (c) submit to the Attorney General an annual report of the information described in paragraph (b) and the operations of the independent investigations office.

**Chief civilian director may provide information to public**

**38.121** (1) In this section, "**personal information**" has the same meaning as in Schedule 1 of the *Freedom of Information and Protection of Privacy Act*.

(2) If the chief civilian director considers it in the public interest to do so, the chief civilian director may make the following information available to the public by posting the information on a publicly accessible website maintained by or on behalf of the chief civilian director:

- (a) a summary of a matter in respect of which the independent investigations office has been notified or ordered to conduct an investigation;
- (b) a description of the resources that the independent investigations office has assigned to an investigation;
- (c) a statement indicating whether the independent investigations office, after concluding an investigation, has reported the matter to Crown counsel;
- (d) a summary of the results of an investigation, if the matter has not been reported to Crown counsel.

(3) In providing information under subsection (2), the chief civilian director must not disclose personal information about an officer, a victim, a witness or another person who may have been involved in the matter, except as provided in subsection (4).

(4) The chief civilian director may disclose personal information about a person described in subsection (3) only if

- (a) the person consents to the disclosure, or
- (b) in the opinion of the chief civilian director, the public interest in disclosure outweighs the privacy interests of the person.

(5) Before disclosing information in accordance with subsection (4), the chief civilian director must, if practicable,

- (a) in the case of information to be disclosed under subsection (4) (a), notify the person to whom the information relates, and
- (b) in the case of information to be disclosed under subsection (4) (b),
  - (i) notify the person to whom the information relates, and
  - (ii) notify, and consider any comments provided by, the commissioner appointed under the *Freedom of Information and Protection of Privacy Act*.

**Special committee to review administration of independent investigations office**

**38.13** (1) In this section, "**special committee**" means a special committee of the Legislative Assembly that the Legislative Assembly appoints for the purposes of this section.

(2) Before January 1, 2015, the special committee must conduct a review of the following and submit a report under subsection (6):

- (a) the administration and general operations of the independent investigations office;
  - (b) the chief civilian director's progress towards a goal of having an independent investigations office that is staffed entirely with employees and IIO investigators who have never served as officers or members of a police or law enforcement agency.
- (3) As part of the review process contemplated by subsection (2), the special committee may
- (a) request the chief civilian director to provide copies of any relevant records, information or reports respecting a matter of administration or general operations of the independent investigations office,
  - (b) review and consider the copies of records, information and reports referred to in paragraph (a) that the chief civilian director provides, and
  - (c) solicit and consider written and oral submissions from any interested person or organization.
- (4) Subject to subsection (5), the chief civilian director must comply with a request of the special committee under subsection (3) (a).
- (5) Before providing copies of the records, information and reports referred to in subsection (3) (a), the chief civilian director may sever any portions that must or may be excepted from disclosure by the head of a public body under Division 2 of Part 2 of the *Freedom of Information and Protection of Privacy Act*.
- (6) Within one year after the date that the special committee is appointed, the special committee must submit a report respecting the results of the review under subsection (2) to the Legislative Assembly.
- (7) A report submitted under subsection (6) may include any recommendations that the special committee considers necessary or appropriate.

## **Part 11 – Misconduct, Complaints, Investigations, Discipline and Proceedings**

### **Division 3 – Process Respecting Alleged Misconduct**

#### **Members' duty to cooperate with investigating officer, answer questions and provide written statements**

- 101** (1) A member must cooperate fully with an investigating officer conducting an investigation under this Part.
- (2) Without limiting subsection (1), at any time during an investigation under this Part and as often as the investigating officer considers necessary, the investigating officer may request a member to do one or more of the following, and the member must fully comply with the request:
- (a) answer questions in respect of matters relevant to the investigation and attend at a place specified by the investigating officer to answer those questions;
  - (b) provide the investigating officer with a written statement in respect of matters relevant to the investigation;
  - (c) maintain confidentiality with respect to any aspect of an investigation, including the fact of being questioned under paragraph (a) or being asked to provide a written statement under paragraph (b).

(3) A member requested to attend before an investigating officer must, if so requested by the investigating officer, confirm in writing that all answers and written statements provided by the member under subsection (2) are true and complete.

(4) Unless the discipline authority grants an extension under subsection (5), the member must comply with any request under subsection (2) within 5 business days after it is made.

(5) If satisfied that special circumstances exist, the discipline authority may extend the period within which the member must comply with a request under subsection (2).

**Appointment of new discipline authority if conclusion of no misconduct is incorrect**

**117** (1) If, on review of a discipline authority's decision under section 112 (4) [*discipline authority to review final investigation report and give early notice of next steps*] or 116 (4) [*discipline authority to review supplementary report and give notice of next steps*] that conduct of a member or former member does not constitute misconduct, the police complaint commissioner considers that there is a reasonable basis to believe that the decision is incorrect, the police complaint commissioner may appoint a retired judge recommended under subsection (4) of this section to do the following:

- (a) review the investigating officer's report referred to in section 112 or 116, as the case may be, and the evidence and records referenced in that report;
- (b) make her or his own decision on the matter;
- (c) if subsection (9) of this section applies, exercise the powers and perform the duties of discipline authority in respect of the matter for the purposes of this Division.

(2) A complainant seeking an appointment under subsection (1) must file a written request with the police complaint commissioner within 10 business days after receiving the notification under section 112 (1) (c) [*discipline authority to review final investigation report and give early notice of next steps*] or 116 (1) (c) [*discipline authority to review supplementary report and give notice of next steps*].

(3) An appointment under subsection (1) must be made within 20 business days after receiving the notification under section 112 (1) (c) [*discipline authority to review final investigation report and give early notice of next steps*] or 116 (1) (c) [*discipline authority to review supplementary report and give notice of next steps*].

(4) The police complaint commissioner must request the Associate Chief Justice of the Supreme Court to

- (a) consult with retired judges of the Provincial Court, the Supreme Court and the Court of Appeal, and
- (b) recommend one or more retired judges for the purposes of this section.

(5) The police complaint commissioner must notify all of the following, as applicable, of an appointment under this section:

- (a) the complainant, if any;
- (b) the member or former member whose conduct is to be the subject of the review;
- (c) a chief constable of the municipal police department with which the member is employed or former member was employed at the time of the conduct of concern;
- (d) the board of the municipal police department referred to in paragraph (c);
- (e) the investigating officer;
- (f) the retired judge appointed.

(6) The police complaint commissioner must provide the retired judge appointed with copies of all reports under sections 98 [*investigating officer's duty to file reports*], 115 [*if member's or former member's request for further investigation is accepted*] and 132 [*adjournment of discipline proceeding for further investigation*] that may have been filed with the police complaint commissioner before the appointment.

(7) Within 10 business days after receiving the reports under subsection (6), the retired judge appointed must conduct the review described in subsection (1) (a) and notify the complainant, if any, the member or former member, the police complaint commissioner and the investigating officer of the next applicable steps to be taken in accordance with this section.

(8) Notification under subsection (7) must include

- (a) a description of the complaint, if any, and any conduct of concern,
- (b) a statement of a complainant's right to make submissions under section 113 [*complainant's right to make submissions*],
- (c) a list or description of each allegation of misconduct considered by the retired judge,
- (d) if subsection (9) applies, the retired judge's determination as to the following:
  - (i) whether or not, in relation to each allegation of misconduct considered by the retired judge, the evidence referenced in the report appears sufficient to substantiate the allegation and require the taking of disciplinary or corrective measures;
  - (ii) whether or not a prehearing conference will be offered to the member or former member under section 120 [*prehearing conference*];
  - (iii) the range of disciplinary or corrective measures being considered by the retired judge in the case, and
- (e) if subsection (10) applies, a statement that includes the effect of subsection (11).

(9) If, on review of the investigating officer's reports and the evidence and records referenced in them, the retired judge appointed considers that the conduct of the member or former member appears to constitute misconduct, the retired judge becomes the discipline authority in respect of the matter and

must convene a discipline proceeding, unless section 120 (16) [*prehearing conference*] applies.

(10) If, on review of the report and the evidence and records referenced in it, the retired judge decides that the conduct of the member or former member does not constitute misconduct, the retired judge must include that decision, with reasons, in the notification under subsection (7).

(11) The retired judge's decision under subsection (10)

(a) is not open to question or review by a court on any ground, and

(b) is final and conclusive.