



April 14, 2008

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Paul Kennedy, Chair
Commission for Public Complaints Against the RCMP
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BY FAX: 1-613-952-8045

Dear Mr. Kennedy:

**RE: BCCLA Submission Regarding CPC Public Interest
Investigation Regarding in-Custody Deaths**

Please find attached the submission and attachments of the B.C. Civil Liberties Association in relation to your public interest investigation into the method for investigation of RCMP in-custody deaths or serious injuries.

Yours sincerely,

Murray Mollard,
Executive Director

Encl.

Submission of the B.C. Civil Liberties Association to
The Commission for Public Complaints Against the RCMP
Regarding the CPC's Public Interest Investigation: Police Investigating the Police
In In-Custody Death and Serious Injury Cases

April 14, 2008

Introduction

The British Columbia Civil Liberties Association (the "BCCLA" or "Association") is Canada's leading and most active civil liberties organization, founded in 1962. The Association's work focuses on a full range of civil liberties issues including fundamental freedoms (speech, religion, association, assembly), equality, due process, privacy, democratic rights, etc. The BCCLA's work encompasses four program areas: public education, complaint assistance, law/policy reform and litigation. The Association is led by a volunteer Board of Directors and supplemented by professional staff. For more information about the Association, visit bccla.org.

Since our beginnings in 1962, police accountability has been a major focus for the BCCLA's work. The BCCLA's police accountability work touches on all four core programming areas including public education, assisting individuals who wish to file complaints about police conduct, filing complaints in our own name, law and policy reform via submissions to various agencies and litigation.¹

Police possess extraordinary power including the authority to detain, arrest, search and seize property and use force, including lethal force, in the lawful execution of their duties. A hallmark of a western liberal democracy like Canada is the rule of law. As the legitimacy of police authority is dependent upon the confidence of the public and civil society, consistent with the rule of law, the police in turn must always remain fully accountable to civilian authority. This is the principle that underlies all of the BCCLA's police accountability work.

¹ For a sampling of the BCCLA's police accountability work, please see submissions of the BCCLA to the Oppal Inquiry into Policing in 1993 (http://www.bccla.org/othercontent/1993_Municipal_Policing.pdf and http://www.bccla.org/othercontent/1993_Supplementary_Brief.pdf), to the Special Committee to Review the Police Complaints Process in 2001 (<http://www.bccla.org/othercontent/2001LegReview.pdf>), to Dirk Ryneveld, Q.C., B.C. Police Complaint Commissioner in 2006 (<http://www.bccla.org/othercontent/06OPCCRRecommendations.pdf>) and to Josiah Wood, Q.C., Chair, Police Act Review in 2006 (<http://www.bccla.org/othercontent/06WoodReviewSubmission.pdf>).

The following submission relies upon concrete examples of the BCCLA's police accountability work. It is through this direct experience in working on police accountability that the Association brings specific expertise to bear on the topic.

Via a letter received by the BCCLA on March 4, 2008, the Commission for Public Complaints Against the RCMP (CPC), the civilian agency responsible for oversight of the RCMP and public complaints under the *Royal Canadian Mounted Police Act* (the "*RCMP Act*"), invited the BCCLA to make submissions on the CPC's public interest investigation into the issue of police investigating police when there is a serious injury or death of a civilian either in custody or while being pursued by the RCMP.

To summarize the BCCLA's position, the BCCLA submits that the RCMP should no longer have authority to undertake criminal or professional conduct investigations of its own members when there is a serious injury or death of a civilian either in custody or while being pursued by the RCMP. The CPC should be dissolved and a new civilian oversight agency should be established that would have jurisdiction to, among other responsibilities, investigate the RCMP when there is a police involved death or serious injury or when there is a matter of great public concern.

Theoretical Justifications for Civilian Investigative and Decision Making Authority

The issue of who should investigate the police after a police involved death has been and will likely continue to be a controversial policy debate. Policing authorities argue that only the police have the knowledge and experience to undertake these complex investigations. Furthermore, with respect to professional standards, policing authorities, as primary managers of the rank and file police officers within a police force, must have the ability to manage their personnel's conduct similar to any other manager of a work force.

In contrast, advocates for reform, including the BCCLA, argue that though the police traditionally have the skills and experience to undertake investigations, this is as a result of police being afforded the opportunity to acquire these skills and experience. There is otherwise no impediment to civilians acquiring these skills and experience regarding investigative competency if they were afforded the opportunity. Indeed, there are other jurisdictions where civilians undertake investigations in police involved deaths or serious injury in Ontario – the Special Investigation Unit of the Ministry of the Attorney General, in Britain – the Independent Police Complaint Commission and in Northern Ireland – the Police Ombudsman for Northern Ireland. Every investigator, whether police or civilian, must acquire these skills through training and experience.

With respect to the argument that policing authorities must investigate to maintain proper management of police officers, there is no reason to believe why a policing authority could not otherwise properly manage their police officers if they did not possess the authority to investigate and make discipline decisions regarding police involved deaths. Indeed, it has been the experience of the BCCLA that police management exhibit a

tendency to prejudge cases and defend their officers before an investigation is complete, thus compromising police management's ability and responsibility to impartially decide whether to recommend criminal or disciplinary charges. When a police union is particularly strong, there are internal management-union tensions that can exert subtle influence on police management decisions.

Most persuasively, the public must maintain confidence in the police generally and more specifically in systems for police accountability when there is a police involved death or serious injury. The current system of police investigating police raises strong perceptions of bias – if not real bias – in cases of police involved death and serious injury. High profile and controversial cases involving recent deaths of Ian Bush, Kevin St. Arnaud and Robert Dziekanski, among others, involving the RCMP highlight the problems of lack of public confidence that the RCMP is able to thoroughly and impartially investigate its own members when there is a civilian death or serious injury.

Indeed, even if the RCMP objectively conducted thorough and impartial investigations, if there is a lack of public confidence in the system, the system cannot be sustained.²

Empirical Research/Judicial Inquiry Regarding Adequacy of Police Investigating Police

Though it is important to consider principled and practical arguments for and against police investigating police in police involved deaths and serious injury, it is just as important, if not more important, to examine empirical research or other evidence regarding the thoroughness and impartiality of investigations led by police.

In an effort to obtain reliable empirical information regarding the adequacy of police investigations of public complaints, the BCCLA advocated for an independent audit of police complaint investigations involving municipal police forces in British Columbia beginning in 2005. In 2006, the Police Services Division of the Ministry of Public Safety retained Josiah Wood, Q.C. to undertake a review of the complaint process under the B.C. *Police Act*. Originally, Mr. Wood had planned to use the services of an RCMP officer to conduct the audit. However, due to the intervention of the BCCLA and other stakeholders, Mr. Wood included an experienced Crown Counsel lawyer to jointly conduct the audit of police files. The BCCLA believes that it was important to ensure that there was significant civilian participation in the actual audit work of the review given the issue of police investigating police. Mr. Wood's report can be found at <http://www.bccla.org/pressreleases/police%20misconduct/Report.pdf>

Regrettably, Mr. Wood and his auditors failed to audit any investigations regarding police involved deaths. However, Mr. Wood's findings in his final report are significant in that

² For a thorough review of the principled and practical justifications for independent civilian investigations of deaths-in-custody or serious injuries, please see the report by Liberty (UK), *An Independent Police Complaints Commission* (2000), especially chapter 1: <http://www.liberty-human-rights.org.uk/publications/6-reports/police.pdf>

he found material defects in 33 excessive force complaints, which represents one-third of excess force complaints that were audited and two-thirds of all materially deficient investigations that were identified by the auditors.

These findings provide a reasonable basis to conclude that more serious allegations of misconduct (e.g. excessive force) will produce greater deficiencies in police internal investigations.

In February 2008, a Commission of Inquiry into the death of Frank Joseph Paul (the “Paul Inquiry”³) heard testimony regarding the circumstances of Mr. Paul’s death and the investigation of his death by the Vancouver Police Department (VPD) and other agencies. Evidence led by Retired Detective Robert Staunton of the VPD at the Paul Inquiry indicates that VPD homicide investigations where the subject of the investigation is a police officer are conducted differently than regular homicide investigations where there is a civilian suspect. According to Mr. Staunton, the VPD engages in a “neutral” form of investigation by not making judgments about the police officers involved, nor testing or probing the evidence where there are inconsistencies. Generally speaking, Mr. Staunton’s testimony indicates that VPD internal investigations of police involved deaths are different than VPD homicide investigations involving civilian suspects.⁴ Given that Mr. Staunton was a part of police-involved death investigations up until his recent retirement, it does not appear that the B.C. Office of the Police Complaint Commissioner, the civilian authority charged with overseeing complaint investigations involving municipal police forces in B.C., has taken action to address this apparent problem.

In sum, there is adequate empirical and other evidence to indicate that there are significant problems with the way police investigate police involving serious incidents regarding the use of force and police involved deaths. This evidence undermines, rather than bolsters, public confidence in a system of police accountability that relies upon police investigating police.

The BCCLA notes that this research and evidence involves municipal police forces in British Columbia rather than the RCMP. However, we believe that that this information is relevant to and should inform the discussion about whether it is appropriate for the RCMP to undertake criminal and professional standard/complaint investigations regarding their own members when a death-in-custody or serious injury of a civilian occurs. Indeed, given the BCCLA’s own experience, we have reason to believe that the same problems arise in RCMP investigations. Please see our submissions below.

³ <http://www.frankpaulinquiry.ca/>

⁴ See testimony of Robert Staunton, February 14, 2008 at pages 9-18, 71-75, 89-91, 102-118 and 129 and following: <http://www.frankpaulinquiry.ca/transcripts/2008-02-14.pdf#RobertStaunton>

BCCLA Death-in-Custody Complaints

As a result of growing concerns about police involved deaths generally and as a result of media reports of the shooting death of Kevin St. Arnaud, the BCCLA filed a complaint regarding his death to the CPC on January 4, 2005. Since that time, the BCCLA has filed an additional 14 death-in-custody complaints involving the RCMP. There are several purposes for BCCLA death-in-custody complaints. First, we wish to ensure that the process for police accountability via a complaints mechanism is invoked in these most critical incidents. Second, we wish to ensure that the RCMP's and CPC's treatment of our complaint is appropriate. Third, we seek to identify the gaps and problems with the current process for police accountability involving RCMP members to highlight the need for law reform.

The BCCLA has filed the following death-in-custody complaints with the CPC (with date filed and RCMP detachment in brackets):

1. Kevin St. Arnaud (Filed: January 4, 2005, Vanderhoof)
2. Gurmit Sundhu (Filed: July 3, 2005, Surrey)
3. Ian Bush (Filed: November 7, 2005, Houston)
4. Ryan Snopek (Filed: May 16, 2006, Cranbrook)
5. Donald Lewis (Filed: August 28, 2006, Williams Lake)
6. Christopher Jickels (Filed: October 10, 2006, Fort St. John)
7. Daniel King (Filed: December 15, 2006, Burnaby/Coquitlam)
8. Steve Qualtier (Filed: September 11, 2007, Penticton)
9. Larry McPherson (Filed: September 11, 2007, Fort St. John)
10. Christopher Tom (Filed: September 11, 2007, Tofino)
11. Duane Gordon Nelson (Filed: October 24, 2007, Port Hardy)
12. Robert Dziekanski (Filed: October 24, 2007, Richmond)
13. Cecil Edward McKenna (Filed: November 1, 2007, Surrey)
14. Robert Knipstrom (Filed: November 11, 2007, Chilliwack)
15. Laura Eileen Coward (Filed: February 27, 2008, Chilliwack)

Other than the Ian Bush complaint, all of the BCCLA files remain active and are subject to an investigation by the RCMP, a review by Paul Kennedy, Chair of the CPC after the RCMP has summarily terminated our complaint or Mr. Kennedy has self-initiated an active complaint under the *RCMP Act*.

Kevin St. Arnaud Complaint

The BCCLA filed a complaint under the *RCMP Act* regarding Mr. St. Arnaud's death on January 4, 2005. Our complaint was summarily dismissed by the RCMP, a decision that was upheld by Brooke McNabb, Vice-Chair of the CPC in January of 2006. We wrote to the Chair, Paul Kennedy, in February of 2006 urging him to initiate his own investigation or call a public hearing into the death of Mr. St. Arnaud pursuant to section 45.43(1) of the *RCMP Act* in order to ensure appropriate public accountability in this and other police involved deaths or serious injuries involving civilians. Instead, in March of 2006, Mr.

Kennedy filed a self-initiated complaint under the *RCMP Act*. As with public complaints generally, Chair-initiated complaints rely upon an internal investigation by the RCMP. In April of 2007, Mr. Kennedy expanded his complaint to include the failure of RCMP members to conduct an adequate criminal investigation into Mr. St. Arnaud's death. As of this date, in March 2008, there is still no public information regarding Mr. Kennedy's self-initiated complaint.

In January of 2008, it was publicly revealed in the media that Constable Ryan Sherematta, the officer who shot Mr. St. Arnaud, was suspended for pay for making "false, misleading or inaccurate statements" at a coroner's inquest into Mr. St. Arnaud's death. Furthermore, the RCMP announced that the Toronto Police Service would review the RCMP's internal investigation. Cst. Sherematta's statement was inconsistent with ballistics and forensic evidence and the evidence of another RCMP officer who witnessed the shooting. In our view, this inconsistency should have come to light if a proper criminal investigation was undertaken.

In the submission of the BCCLA, given that the RCMP's competence with respect to its own initial investigation is in serious question, the CPC's reliance on the RCMP to investigate the RCMP's own investigation combined with the considerable delay in this process (39 months since the BCCLA first launched its complaint) seriously undermines rather than bolsters public confidence in the RCMP and the CPC.

Ian Bush Complaint

The BCCLA initially filed a complaint on November 7, 2005 into the death of Mr. Bush. The RCMP decided to hold our complaint in abeyance pending a criminal investigation and coroner's inquest. The BCCLA asked Mr. Kennedy to review this decision. Mr. Kennedy decided that the RCMP could not hold our complaint in abeyance. The RCMP instead terminated our complaint. The BCCLA asked the CPC to review this decision. The CPC found the RCMP's decision to summarily terminate our complaint to be reasonable in a decision that was received by the BCCLA on September 28, 2006. On or about September 28, 2006, Mr. Kennedy self-initiated his own complaint into the death of Mr. Bush. The BCCLA wrote to Mr. Kennedy on September 29, 2006 to launch a fresh complaint. On October 30, 2007, the BCCLA filed a judicial review in the Federal Court of Canada to challenge Mr. Kennedy's decision to uphold the RCMP's decision to terminate our complaint. The Attorney General of Canada sought to strike our notice of application for mootness on the basis of Mr. Kennedy's complaint. On September 13, 2007, O'Keefe J. ruled that:

"If the initiation of a complaint by the Chair [Mr. Kennedy] automatically justified the ending of an earlier public complaint, this would lead to the consequence that the Chair could quash or end a public complaint thereby denying the complainant the procedural entitlements set out in the Act. The Act does not rule out the possibility of parallel complaints."
[2007 FC 901 at para. 24]

On November 29, 2007, Mr. Kennedy released his Final and Interim Reports into the death of Mr. Bush.⁵ These reports seek to provide a thorough review of the investigation of Mr. Bush's death. However, rather than being an independent investigation of the death of Mr. Bush, these reports appear to rely on RCMP internal investigations and evidence adduced at the coroner's inquest. In fact, Mr. Kennedy's reports do not cite the source for the facts that he relies upon to make findings and recommendations. At the CPC's press conference to release Mr. Kennedy's Final Report, journalists inquired as to what sources of information Mr. Kennedy relied upon to establish the facts for his reports and to undertake his analysis. At the press conference, Mr. Kennedy indicated that he relied upon information gleaned from his discussions with a current or former Crown Counsel, a former Deputy Chief of a police department and a former Assistant Commissioner of the RCMP to prepare his reports.⁶ These individuals are not identified in Mr. Kennedy's final or interim reports nor were they identified by name by Mr. Kennedy during the press conference.

The BCCLA submits that the self-initiated complaint by Mr. Kennedy in the death of Ian Bush, his reliance upon the RCMP to provide evidence to establish the facts he relies upon and reference to unnamed individuals who assisted Mr. Kennedy in consideration of the issues do not constitute a process that will promote public confidence in police accountability regarding deaths-in-custody. The BCCLA also notes that several important recommendations made by Mr. Kennedy have been rejected by RCMP Commissioner Elliott.

The BCCLA submits that CPC Chair initiated complaints will continue to raise concerns that the process for investigating police-involved shootings under the *RCMP Act* does not ensure a thorough, competent, independent, transparent and impartial investigation, not to mention a binding decision, all crucial for public confidence.

The BCCLA submits that Mr. Kennedy had other alternatives available to him under the *RCMP Act* to independently investigate and inquire into in-custody deaths and serious injuries. The BCCLA submits that utilizing these alternatives would have considerably enhance public confidence in the system in the case of Mr. Bush's death.

Under subsections 45.42(3) and 45.43(1) of the *RCMP Act*, the Chair of the Commission for Public Complaints Against the RCMP may investigate a matter himself or institute a public hearing into a matter. Given the considerable public controversy and concerns about public confidence over the RCMP internal investigation of the death of Mr. Bush – controversy and concern that continues to this day, there was a strong public interest argument for instituting a public hearing into Mr. Bush's death. A public hearing would provide a completely open forum for the public and media to attend. The presiding member has the power to subpoena and consider evidence from all relevant witnesses and documents. A public hearing permits interested parties to be represented by legal counsel.

⁵ http://www.cpc-cpp.gc.ca/DefaultSite/Reppub/index_e.aspx?articleid=1583

⁶ Murray Mollard, Executive Director of the BCCLA, attended the press conference.

The presiding member at a public hearing would have the benefit of full legal argument by counsel with respect to any legal issue that arises in the course of a public hearing.

Given the underlying objective of the public complaints process under the *RCMP Act* – to enhance and maintain public confidence in the RCMP – the BCCLA submits that a public hearing into the complaint by the BCCLA into the death of Mr. Bush would have been a much preferable option than proceeding with the process Mr. Kennedy chose.

Ryan Snopek

The BCCLA filed its complaint into Mr. Snopek's death on May 16, 2006. The RCMP summarily terminated our complaint without an investigation on August 16, 2006. The BCCLA filed a request for review of the RCMP's decision with the CPC on August 28, 2006. On December 5, 2006, the CPC informed us that they had sent an interim report to the RCMP. This report was dated November 24, 2006. On June 18, 2007, the BCCLA received a letter from then RCMP Commissioner Bev Busson that invited us to relate our concerns for further investigation if we had any. On July 13, 2007, the BCCLA received the CPC's final report determining that the RCMP's decision to terminate our complaint was unreasonable and directing the RCMP to investigate our complaint. Having not heard from the RCMP, on November 27, 2007, the BCCLA sent the RCMP a letter further outlining in detail our concerns. On February 6, 2008, RCMP Commissioner Elliott wrote to the BCCLA indicating that he would "honour the commitment" of Ms. Busson and investigate our complaint – apparently ignoring or unaware of the CPC's directive of July 13, 2007.

The BCCLA received a letter from the RCMP on March 18, 2008 confirming the appointment of an RCMP investigator to lead an internal investigation into our complaint 22 months after our complaint was originally filed.

2007 BCCLA Complaints

The BCCLA filed 7 deaths-in-custody complaints in 2007. All seven complaints have been summarily terminated by the RCMP pursuant to subsection 45.3(5) of the *RCMP Act*. The RCMP have continued to cite the existence of an on-going criminal investigation and coroners' inquests as justification for summarily terminating our complaints *without* an investigation. As explained below, the BCCLA submits that these are not valid reasons for summarily terminating a professional conduct complaint under the *RCMP Act*.

Summary of Concerns Regarding RCMP Act Complaint Process

The BCCLA has the following concerns regarding the RCMP and CPC's investigation and review of BCCLA death-in-custody complaints.

1. RCMP Termination of Complaints Citing Criminal Investigations and Coroners' Inquests

To the date of this submission, it continues to be customary practice for the RCMP to terminate BCCLA death-in-custody complaints citing the existence of a criminal investigation and coroners' inquests as procedures that will adequately address the issue of police accountability. We have written to Mr. Kennedy several times to object to this practice as exhibiting a disregard for the letter and spirit of the *RCMP Act*. Suffice it to say for the purposes of this submission, neither a criminal investigation nor a coroner's inquest are adequate substitutes for an investigation and assessment with respect to a complaint under the *RCMP Act*. The objectives and standards of review in the criminal process and coroners' inquests are significantly different than for investigations of police officer conduct with respect to professional standards – which is the purpose of a complaint under the *RCMP Act*.

It is the submission of the BCCLA that the RCMP is not complying with the *RCMP Act*. It is a practice that the CPC has a responsibility to end. In our letter of November 22, 2007 to the CPC (attached) requesting a review of the RCMP's decision to termination of our Tom, McPherson and Qualtier complaints, the BCCLA asked Mr. Kennedy to rule definitively against the RCMP's practice of invoking subsection 45.36(5) and to direct the RCMP to not rely on these procedures as a justification for terminating BCCLA complaints. Regrettably, Mr. Kennedy declined to do so in his response of December 13, 2007 (attached). We also attach our letter of April 11, 2008 raising the same issue in the Knipstrom, Nelson and McKenna complaints.

2. RCMP Delays in Investigation Until a Coroners Inquest is Complete

In more recent BCCLA complaints, even though the RCMP has not summarily terminated our complaint, the RCMP has indicated to the BCCLA that it will not complete its investigation of our complaint until a coroner's inquest is complete. This has been explicitly communicated to us by the RCMP in the King, Lewis and Jickels complaints.

In our submission, this delay in investigation is inappropriate and is yet another example of the RCMP's general approach to a lack of timely investigations of in-custody death complaints. As in point 1 above, professional standards investigations involving an allegation of misconduct have a different purpose and standard of review than coroner's inquests. While there may be overlap between the kinds of evidence that may be relevant in both procedures, there will likely be other kinds of evidence that must be considered by a professional standards investigation that will not be adduced or considered as part of a coroner's inquest. In addition, inquests can take months if not years to schedule and complete in death-in-custody cases, adding to an already considerable delay in the process. Finally, caution should be taken when relying upon the Verdict after completion of an inquest. The Verdict may not provide an adequate summary of all the relevant evidence adduced at an inquest. It is important to recall that most coroners in British Columbia and likely elsewhere are not lawyers (nor doctors), nor do they necessarily have any legal training.

3. General Delay

Other than the Ian Bush complaint, none of the BCCLA complaints have reached finality in the process. In addition to the principle that a complaints system should be timely – for both the complainant and the subject officer as well as the general public in public interest matters such as deaths-in-custody, there are practical difficulties including the fact that delay makes it difficult to maintain or obtain relevant evidence to assess professional conduct.

The problem with delay is one that is an important contributing factor in deteriorating public confidence in the system for police accountability under the *RCMP Act*. As can be seen by the date of the filing of our complaints, the process takes many months if not years before it is complete without adequate explanation. Though this may not be an intentional effort by the RCMP to undermine the efficiency of the process, then it is at least a damning indictment of the inadequacy of the process, an inadequacy that the CPC is either unwilling or unable to address sufficiently to reassure the BCCLA's and public's confidence in the process.

The BCCLA notes that delay is not a problem unique to its complaints involving deaths-in-custody.⁷

4. BCCLA Complaints Sidelined by CPC Complaints

The BCCLA submits that it is not appropriate for the Commission for Public Complaints Against the RCMP to sideline the BCCLA's death-in-custody complaints via Chair-initiated complaints. This practice has effectively occurred in three very high profile complaints including Kevin St. Arnaud, Ian Bush and Robert Dziekanski. We note that the Chair's practice of self-initiating complaints to supplant a BCCLA complaint has also occurred in the Income Trust matter.⁸

⁷ For example, the BCCLA made a complaint on March 10, 2005 against the RCMP relating to its "Operation Pipeline Convoy" program which involved an operation that sought to detect and interdict the transportation of drugs on highways near Hope, B.C. This operation included the use of uniformed Texas State Troopers to enforce Canadian laws in B.C. The RCMP terminated the BCCLA complaint on April 25, 2005. The BCCLA sought a review of the termination by the CPC on June 21, 2005. The BCCLA later learned that the CPC posted the Interim Report (dated December 29, 2006) on their website as part of the release of their Annual Report 2006-2007 in June 2007: http://www.cpc-cpp.gc.ca/DefaultSite/Reppub/index_e.aspx?ArticleID=1383. As of November 7, 2007, the CPC informed the BCCLA that they continue to await the response of the RCMP after which the CPC will prepare a Final Report. Assuming the CPC has not yet received the response of the RCMP Commissioner, there has been a 15.5 month delay since the CPC's Interim Report and over three years since our complaint was lodged. This is unacceptable.

⁸ See http://www.cpc-cpp.gc.ca/DefaultSite/Reppub/index_e.aspx?articleid=1735

It is arguable that the CPC would not have launched a self-initiated complaint in this matter without the BCCLA's two complaints. Note also that the BCCLA sought judicial review of a decision of the CPC to place our second income trust complaint in abeyance, a complaint that had legal jurisdiction over former RCMP Commissioner Guiliano Zaccardelli whereas Mr. Kennedy's self-initiated complaint did not given that it was made after Mr. Zaccardelli resigned. The Federal Court of Canada did not grant the BCCLA relief due to the fact that an investigative report was due shortly from the RCMP, a report that Mr. Kennedy

The effect of such an approach is to undermine the rights that the BCCLA has as a complainant pursuant to the *RCMP Act* including the right to an investigative report by the RCMP, the right to request a review by the Chair of a dismissal of our complaint, and the right to participate in a public hearing if one is instituted by the Chair, among other procedural rights. In our view, this practice undermines the objectives of the *RCMP Act* and diminishes the legitimate role of the BCCLA as a complainant and watchdog of police accountability generally, and more specifically as a watchdog for the accountability system for the RCMP including the CPC. We reprise the comments of Justice O’Keefe in the Bush Federal Court hearing:

“If the initiation of a complaint by the Chair automatically justified the ending of an earlier public complaint, this would lead to the consequence that the Chair could quash or end a public complaint thereby denying the complainant the procedural entitlements set out in the Act. The Act does not rule out the possibility of parallel complaints.”

There is no justification for this practice given that BCCLA complaints could have run concurrently with those of CPC Chair Paul Kennedy.

CPC/RCMP Independent Observer Pilot Project

On March 21, 2007, Paul Kennedy announced the creation of the CPC/RCMP Independent Observer Pilot Project (the “Observer Project”).⁹ In addition to information provided on the CPC’s website, the BCCLA asked for and received a copy of a draft of a document entitled: “CPC/RCMP E Division Independent Observer Pilot Project – A Guide (the “Guide”) for the CPC Observer” dated November 1, 2007. A copy of Mr. Kennedy’s response and the Guide is attached as an Appendix to this submission.

The Observer Project appears to be a response to rising public interest and concern regarding the independence, impartiality and competence of RCMP internal investigations involving critical incidents such as death-in-custody investigations. Aside from the general information available on the CPC website and the document noted above, the BCCLA has no other information about the Observer Project nor have we spoken to anyone at the CPC regarding the Observer Project. The CPC provides news releases about the engagement of the CPC observer as well as the “Final Status Report” in particular incidents.¹⁰ The actual reports however are not publicly available on the CPC website.

The following outlines the concerns of the BCCLA with respect to the Observer Project.

declined to provide to the BCCLA upon request. Complainants have an automatic right to the RCMP’s investigative report.

⁹ http://www.cpc-cpp.gc.ca/DefaultSite/Reppub/index_e.aspx?ArticleID=1625#iopp

¹⁰ For example, a typical news release regarding Final Status Report can be found at: http://www.cpc-cpp.gc.ca/DefaultSite/Whatsnew/index_e.aspx?ArticleID=1714

1. No Mandate To Assess Adequacy or Quality of an Investigation

The Observer's Project's mandate is specifically limited to assessing the "impartiality" of the RCMP's investigation. In assessing impartiality, the CPC observer will use criteria relating to line management, appropriate level of response, timeliness of the response and conduct.¹¹ The focus of the Observer Project is thus to make an assessment of the choice of staff the RCMP deploys to investigate a critical incident, to determine whether RCMP staff are appropriate in relation to qualifications and accreditation, and whether they have any pre-existing relationships with subject officers that might undermine their impartiality. It is also to assess whether there has been a timely response.

These are important considerations in evaluating an investigation. However, taken alone, the BCCLA submits that they are not sufficient to bolster sagging public confidence in internal RCMP investigations.

The Observer Project is clearly not designed to assess or determine the thoroughness, competency or adequacy of any particular internal investigation. On the contrary, the CPC observer is in fact explicitly prohibited from assessing the "quality or adequacy of the investigation".¹² The CPC observer will not "be present during any witness or suspect interviews".¹³ Furthermore, attendance at the actual scene of the incident is "not necessary" and is in fact discouraged in the Guide.¹⁴ The observer is directed to not take notes in respect of any investigative details other than those relating to impartiality.¹⁵

2. Questionable Independence from the RCMP

It is clear to the BCCLA that the Observer Project is not an independent project of the CPC but rather a *joint* project of the CPC and the RCMP. The title alone ("CPC/RCMP ...") reinforces this message. The RCMP must notify the CPC. The CPC Communications Manager must notify the RCMP Communications person and together "they" will determine an appropriate communication strategy.¹⁶ The CPC observer is permitted to travel with RCMP Office of Investigative Standards and Practices personnel to the incident "to discuss incident details and develop a strategy".¹⁷ Though, given the design of the Observer Project, there must be cooperation between the RCMP and CPC, the BCCLA has a serious concern that the project structure permits too close cooperation to be considered truly "independent". Furthermore, the fact that a high degree of cooperation is required points to a lack of independence.

¹¹ See "Program Outline" in the general description of the Observer Project available on the CPC website.

¹² See #3 "CPC Observer Attendance at the Scene" and following in the Guide.

¹³ See "Roles and Responsibilities, RCMP" in the general description of the Observer Project available on the CPC website.

¹⁴ See #3.

¹⁵ See the end of #3.

¹⁶ See #1 "Notification" in the Guide.

¹⁷ See #2 "CPC Observer Travel to Location of Incident" in the Guide.

3. Timeliness of CPC Response

Though there appears to be consideration that the CPC observer should be on location of the investigation (as opposed to attendance at the actual scene) in a timely manner, it is not clear that the CPC observer will be on the scene as soon as possible.¹⁸

The engagement of a CPC observer requires first notification from the RCMP, prior approval of the Chair, Vice-Chair or Executive Director of the CPC and contact with the CPC observer him/herself. After working hours, this may take time to obtain RCMP notice and CPC approval. Furthermore, it is not clear that the CPC has staff available to ensure travel distances throughout B.C. (and Canada if the Observer Project expands to the entire country). Given that critical incident response requires immediate response by both investigators and observers, there may be delay that undermines the limited objective of the Observer Program.

4. Actual Practice

The BCCLA's analysis is limited to a paper review of the Observer Project. As such, we can provide only a limited evaluation of the project. How the system works in actual practice would require an in-depth analysis of documentation and interviews with observers as well as direct observation of how the project actually works in practice. The CPC and RCMP have indicated that the Observer Project will be subject¹⁹ to an evaluation after its first year of operation which ended on March 31, 2008.

Summary of Concerns

In the submission of the BCCLA, the CPC's Observer Project must be seen as, at best, a very tentative step towards actual independent investigation of deaths-in-custody or, at worst, a program that will provide the illusion of independence without actually ensuring investigations are thorough, competent, impartial and *independent*. As such, the BCCLA submits that the CPC Observer Project is detrimental to police accountability in that it will only forestall true progressive reform to ensure full police accountability in deaths-in-custody. The only certain way to actually achieve independence – and thus optimally promote public confidence – is to have civilian investigators without ties to the RCMP undertake these investigations as exists in other jurisdictions as will be reviewed below.

RCMP Report on Deaths in Custody

As a result of freedom of information requests, the media released the RCMP's own 2006 Annual Report of RCMP In-Custody Deaths (the "Report"). The Report is a compendium of statistics related to in-custody deaths involving the RCMP including statistics related to year and RCMP Division, causes, age and gender of deceased, past criminal record and reporting of alcohol/drug use by deceased at the time of apprehension.

¹⁸ See the end of #1.

¹⁹ To see the report in its entirety, visit: <http://www.cbc.ca/bc/news/bc-080214-rcmp-2006-report.pdf>

The BCCLA acknowledges that the Report is useful for statistical purposes and likely for adjusting RCMP policies and procedures. However, the Report does not provide an in-depth, comprehensive and critical analysis of the phenomenon of RCMP in-custody deaths or their cause. A quote from the Executive Summary provides an example of the limits of this type of RCMP self-reporting:

“This report is good news for the RCMP. While in-custody deaths are still occurring, and always will, the strategies adopted by the RCMP to reduce the number and to effectively address any shortcomings in its equipment, facilities, training, or policies, are proving to be effective. The report shows that the deaths reported in 2006 could not have been prevented by improved RCMP intervention. The subjects lived, for the most part, high-risk lifestyles. Their decisions resulted in their death.” [Emphasis added]

Though no doubt drugs and alcohol consumption can play a role in in-custody deaths, the RCMP’s assertion that this is the cause for in-custody deaths is irresponsible and self-serving. The Report demonstrates the lack of willingness by the RCMP to engage in any truly comprehensive and thoroughgoing analysis of the role its own policies, procedures and actions played in deaths of civilians.

Of interest, the Report indicates that 56% of RCMP in-custody deaths occur in British Columbia despite 33% of RCMP members serving in B.C. Notwithstanding information provided by ‘E’ Division of the RCMP (which provides police services to the B.C. and Yukon regions) to contest this statistic, alternative statistics also suggest that B.C. does in fact have a higher RCMP in-custody death rate than the national average.²⁰

Trends in Other Jurisdictions

The BCCLA believes that there is a growing trend towards enhancing public confidence in the police and the process for police accountability by providing for civilian investigations of death-in-custody and serious injury incidents. We review in brief some of the jurisdictions both in Canada and internationally that have moved to this system.

Ontario Special Investigations Unit

The Ontario Special Investigations Unit (SIU) is a branch of the Attorney General of Ontario, an arms length agency independent of any policing service in Ontario.²¹ The SIU was established in 1990 and is managed by a civilian Director who relies on civilian investigators to conduct all aspects (including forensics) of death and serious injury investigations. The Director is responsible for determining whether any criminal charge should be laid against a police officer relating to a death-in-custody or serious injury.

²⁰ Chad Skelton, “B.C. Mounties dispute report on deaths”, *The Vancouver Sun*, (26 February 2008), B5.

²¹ For a variety of information about the SIU, visit its website at: <http://www.siu.on.ca/home.html>

Alberta Serious Incident Response Team

Pursuant to section 46.1 of the Alberta *Police Act*, the province has recently created the Alberta Serious Incident Response Team (ASIRT). ASIRT has a mandate to investigate serious injuries or deaths via a criminal investigation and allegations of a serious or sensitive nature via a professional standards investigation. Clifton Purvis, a lawyer and Crown prosecutor, is the Executive Director of ASIRT. Reporting to Mr. Purvis are:

- A civilian assistant director,
- Two civilian criminal analysts,
- Four civilian investigators, and
- Ten sworn police officers (seconded from the Calgary Police Service, Edmonton Police Service, and the RCMP).

Independent Police Complaints Commission (England and Wales)

The Independent Police Complaints Commission (IPCC) was established in 2004 as a result of public inquiries, civilian watchdog demands for reform of police accountability and the government's own consultations. In February 1999, the report of the Stephen Lawrence Inquiry (an inquiry into a racially motivated murder of a black man and botched police investigation) recommended to England's Parliament the creation of an independent, civilian police complaints authority.²² In 2000, an organization similar in mandate to the BCCLA called *Liberty* authored a report recommending the creation of the Independent Police Complaint Commission.²³ As a result of these reports and subsequent consultations by the government, the Independent Police Complaint Commission was established under the terms of the *Police Reform Act 2002*. Both of these reports figure prominently in the Independent Police Complaint Commission's (<http://www.ipcc.gov.uk/index.htm>) own description of their origins.²⁴

Investigations of police complaints regarding police forces throughout England and Wales may be undertaken by an appropriate policing authority on its own behalf, by a policing authority supervised by the IPCC, by a policing authority under the management of the IPCC and an independent investigation by the IPCC. The seriousness of the complaint and the degree of public interest and need for public confidence will what kind of investigation will occur.

All deaths in custody and serious injuries involving civilians will be investigated and managed by the IPCC, and most will likely be investigated by the IPCC due the seriousness of the case, the high degree of public interest and concern.²⁵

²² <http://www.archive.official-documents.co.uk/document/cm42/4262/4262.htm>

²³ <http://www.liberty-human-rights.org.uk/publications/6-reports/police.pdf>

²⁴ http://www.ipcc.gov.uk/index/about_ipcc/came_from.htm

²⁵ See the IPCC's Criteria for Investigations: http://www.ipcc.gov.uk/investigations_criteria.pdf

Police Ombudsman for Northern Ireland

The Police Ombudsman for Northern Ireland was created in 2000 under the terms of the *Police (Northern Ireland) Act 1998*. The Police Ombudsman has a responsibility for investigating all aspects of any allegations of criminal conduct or professional misconduct by police in Northern Ireland. The Police Ombudsman is responsible for making recommendations for prosecution and discipline. *All* police investigations are conducted by the Police Ombudsman's own staff. Investigators have a mix of backgrounds including policing and non-policing. Despite the very challenging policing and political environment in Northern Ireland, the Office of the Police Ombudsman for Northern Ireland has won a high degree of confidence in its work both from the public and from police officers.²⁶ It has been recognized internationally as a model for an advanced system of police accountability.

Queensland Crime and Misconduct Commission (Australia)

Created in 2002, the Queensland Crime and Misconduct Commission (CMC) has a broad mandate that includes the referral and monitoring of police complaints to police agencies for investigation. Though most police complaints will be referred to a police agency for investigation, the CMC also has the power to investigate the most serious complaints. In making a decision to refer a matter or investigate itself, the CMC will consider the capacity of the agency to deal with the matter, the nature and seriousness of the alleged misconduct, and whether it will increase public confidence in the agency if the CMC conducts the investigation.²⁷

Recommendations and Conclusion

The B.C. Civil Liberties Association has been calling for a major review and overhaul of the *RCMP Act* and the Commission for Public Complaints Against the RCMP for years.

More recently, in 2005, the BCCLA made submissions to the Arar Inquiry recommending that the RCMP no longer be responsible for investigating complaints involving national security activities and that a new independent, civilian agency be established that would have investigative and audit responsibility for the RCMP's national security activities.²⁸

²⁶ See, *The Police Complaints System in Northern Ireland*, a publication of the Office of the Police Ombudsman's Office (2007):

<http://www.policeombudsman.org/Publicationsuploads/Complaints%20System.pdf>

²⁷ <http://www.cmc.qld.gov.au/asp/index.asp?pgid=10764>

²⁸ See: <http://www.bccla.org/othercontent/05ararpolicy.htm> and http://www.bccla.org/othercontent/05Arar_Policy_Review_Supplementary_Submission.pdf

In December 2006, Commissioner Dennis O'Connor recommended a new, independent agency to review the RCMP's national security activities.²⁹ The Government of Canada has not yet implemented those recommendations despite promises to do so.

In December 2007, the Task Force on Governance and Cultural Change in the RCMP, led by Chair David Brown, Q.C., recommended the creation of the Independent Commission for Complaints and Oversight for the RCMP (ICCOR). This agency would have jurisdiction and oversight of all RCMP complaints and would have the authority to make binding recommendations.³⁰ The ICCOR would have the discretion to refer an investigation to the RCMP, another police force or undertake the investigation itself.³¹

In contrast to these strong and progressive measures for reform, Paul Kennedy, Chair of the Commission for Public Complaints Against the RCMP, has recommended only an enhanced ombudsman model for review and oversight of the RCMP.³² The BCCLA submits that an ombudsman role for ensuring accountability of the RCMP is no longer appropriate and would not maintain and enhance public confidence in the RCMP.

Given the BCCLA's own experience, recent recommendations made by eminent panelists regarding review and oversight of the RCMP and progressive trends in foreign jurisdictions, the BCCLA recommends that the Commission for Public Complaints Against the RCMP be abolished and that a new independent, civilian led agency be created to ensure RCMP accountability in matters dealing with deaths-in-custody and serious injury.

It is beyond the scope of this submission to provide an exhaustive list of recommendations regarding enhancing the system for RCMP accountability. However, the BCCLA recommends the following key characteristics as necessary conditions to achieve public confidence in the RCMP in the context of deaths-in-custody and serious injuries to civilians.

1. Independent and Civilian Led

The new agency must be led by a civilian who has a reputation for fairness yet independence from the RCMP. To ensure independence, the leader of the agency should be an Officer of Parliament and should report to Parliament as a whole rather than through the Minister for Public Safety.

²⁹ See Chapter XI, A New Review Mechanism for the RCMP's National Security Activities: http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/EnglishReportDec122006.pdf

³⁰ See page 14 of the report: http://www.publicsafety.gc.ca/rcmp-grc/fl/Task_Force_Report-English.pdf

³¹ At page 15 and 16.

³² http://www.cpc-cpp.gc.ca/DefaultSite/Whatsnew/index_e.aspx?articleid=1266

2. Civilian Investigations and Determinations

Serious injuries involving civilians and deaths-in-custody must be investigated by civilian investigators within the agency rather than permitting the RCMP to investigate the RCMP. This is a necessary condition to ensure public confidence in the system for RCMP accountability.

3. Adequate Funding and Resources to Achieve its Mandate

The Commission for Public Complaints Against the RCMP has long been under-funded by the federal government. A lack of adequate resources has hampered its ability to fully carry out its limited mandate as an ombudsman for the RCMP. A new agency must have adequate funding and resources to achieve its mandate and work to restore public confidence in the RCMP.

In conclusion, the BCCLA submits that public confidence in the RCMP and in the system for accountability for the RCMP can only be achieved by the creation of a new agency responsible for RCMP accountability responsible for, among other issues, investigations of RCMP in-custody deaths and serious injuries involving individuals.

The RCMP is at a pivotal crossroads. Given the number of continuing public controversies regarding the RCMP, public confidence in the police force is likely at an all time low. Bold and decisive action is required immediately to reverse this trend and restore Canadians confidence in the iconic status of the RCMP.

Submitted By:

Murray Mollard, Executive Director
B.C. Civil Liberties Association (bccla.org)
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murray@bccla.org
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FILE COPY

November 22, 2007

HONOURARY DIRECTORS

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Thomas Berger, Q.C., O.C.

Robin Blaser

The Right Honourable
Kim Campbell, P.C., Q.C.

Andrew Coyne

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Rafe Mair

Stephen Owen P.C., Q.C., M.P.

Svend Robinson

David Suzuki

Milton Wong

Paul Kennedy, Chair
Commission for Public Complaints Against the RCMP
PO Box 3423, Station D
Ottawa, Ontario
K1P 6L4

Dear Mr. Kennedy:

RE: Request for Review

Further to Chief Superintendent Dick Bent's letter of November 10, 2007 (attached), the BCCLA is requesting that, pursuant to section 45.42 of the *Royal Canadian Mounted Police Act*, you review the termination of the BCCLA's complaints into deaths-in-custody that occurred in the Fort Saint John, Tofino and Keremeos/Penticton Detachments.

As we have explained on various other occasions, neither a criminal investigation nor a Coroner's Inquest into these deaths can replace a proper professional conduct investigation into the relevant subject RCMP officers. As should be evident by now, given that the potential offences and standard of proof in a criminal investigation differ than a professional conduct investigation and given that a Coroner's Inquest is legally prohibited from making findings of responsibility, neither of these procedures are adequate to assess professional responsibility.

In addition to these points, we understand that the RCMP is undertaking an internal conduct review. Furthermore, we understand that you have initiated a complaint under the RCMP Act in the Dziekanski matter that includes a focus on professional conduct while the RCMP continues their criminal investigation. The RCMP have not terminated your complaint for the reasons that have been outlined in the attached letter. It is inappropriate that they terminate the BCCLA's complaints while they investigate yours.

The RCMP's continued response in this vein is becomingly increasingly frustrating and is clearly a barrier to civilian oversight of RCMP conduct in the most serious of incidents.

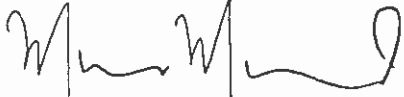
.../2

To: Paul Kennedy
From: Murray Mollard
Date: November 22, 2007
Page: 2

The BCCLA requests that you provide a definitive ruling that will ensure that complaints from the BCCLA or any member of the public in the future will be investigated rather than terminated in similar circumstances.

We also ask that you reconsider our standing request for your office to conduct the professional conduct investigations in these matters.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Murray Mollard', with a stylized flourish at the end.

Murray Mollard,
Executive Director

Encl.



Office of the Chair

Cabinet du Président

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DEC 19 2007

December 13, 2007

Mr. Murray Mollard
Executive Director
British Columbia Civil Liberties Association
Suite 550 – 1188 West Georgia Street
Vancouver, BC V6E 4A2

Dear Mr. Mollard:

I am in receipt of your letter dated November 22, 2007 in which you request that the Commission undertake a review of the RCMP decisions to terminate British Columbia Civil Liberties Association (BCCLA) complaints in respect of Mr. Christopher Tom, Mr. Larry McPherson and Mr. Steven Qualtier.

I wish to confirm that the Commission will be assessing the reasonableness of the RCMP decision to terminate the BCCLA public complaints in respect of the above three incidents. As per the statutory provisions contained in the *RCMP Act*, the Commission has written the RCMP requesting that all materials relevant to the RCMP decisions to terminate be forwarded so that an assessment of the reasonableness of the decisions can be made. If the RCMP decision in any of the cases is found not to have been reasonable, the Commission may make findings and recommendations, including recommending that the RCMP conduct the public complaint investigation in respect of the alleged misconduct. From time to time, in cases where the Commission finds the RCMP termination unreasonable, the Commission will assess the adequacy of the materials made available and may go forward with a review of the conduct complained of. In all of the foregoing situations the Commission is required to provide you, the complainant, with a written report.

I have no doubt that it is frustrating for the BCCLA to receive RCMP letters terminating, pursuant to the provisions of section 45.36 of the *RCMP Act*, its complaints. When the Commission receives a request from a complainant to review an RCMP decision to terminate, it must judge the reasonableness of the decision at the time it was taken in relation to the particular section relied upon and the circumstances of the complaint at hand. It is not simply a matter of the RCMP invoking this section of the Act; the RCMP must demonstrate the reasonableness of the decision and provide compelling justification.

For example, there have been instances where the RCMP has invoked paragraph 45.36(5)(a) claiming that the potential for a Coroner's Inquest is a sufficient and reasonable justification for terminating a complaint. The Commission is clear in this regard; a Coroner's Inquest is not "[...] a procedure provided under any other Act of Parliament" and thus we would find the termination not to have been reasonable. In other cases, the RCMP has relied upon an upcoming criminal trial as justification for the reasonableness of its decision to terminate a complaint. Upon careful review the Commission has determined, on a number of occasions, that it was not reasonable for the RCMP to assume that the conduct complained of would be addressed at a criminal trial. The RCMP has also terminated complaints pursuant to paragraph 45.36(5)(c) and the Commission has found, upon review of the file materials, that there was adequate investigative documentation on the file that would have permitted a full and complete response to the complaint. In such cases the Commission has found it not reasonable to terminate and gone forward with a review of the conduct complained of. I hope the foregoing examples serve to demonstrate to you the rigorous assessment undertaken by the Commission when the RCMP applies this section of the Act.

Finally, I would like to take this opportunity to reiterate the Commission's position in respect of RCMP in-custody deaths and other high profile cases of public interest. For the vast majority of such incidents, I, as the Commission Chair, will initiate a complaint pursuant to the provisions of the *RCMP Act*. I do so because the RCMP is compelled by the legislation to respond to my complaint. It has no authority to terminate a Chair-initiated complaint. In the absence of a complaint from the public, a Chair-initiated complaint assures the citizenry that an appropriate level of independent, impartial and unbiased scrutiny is given to such tragic and important events.

It may be the case that where I have initiated a complaint the RCMP will decide to terminate your complaint. The RCMP may rely on the paragraph 45.36(5)(a) of the Act and find such action as reasonable based on the fact that there is an ongoing criminal investigation. The RCMP may, pursuant to paragraph 45.36(5)(c) of the Act, determine that it is not necessary or reasonably practicable to investigate the complaint because the Commission complaint is sufficiently broad to encompass concerns raised in the complaint of your organization. Again, it is the responsibility of the Commission to assess the reasonableness and justification for such decisions taken by the RCMP. I appreciate that the termination of complaints by the RCMP continues to be a source of frustration for the BCCLA.

It is my position that reports flowing from Chair-initiated complaints should be made public. Since my tenure I have posted reports related to Chair-initiated complaints on the Commission website. I have also made a point of providing directly to the BCCLA copies of reports related to Chair-initiated complaints where the Association has engaged the public complaint process. You can be assured that I will continue both these practices. In situations where I have initiated a complaint I encourage the BCCLA to communicate

areas of concern in respect of RCMP in-custody deaths and other high profile cases of public interest to my office prior to taking a decision to initiate a public complaint. I suggest this because you may find that our respective organizations have a convergence of interests that will be reflected in the specifics of my complaint and the final report I prepare.

I thank you for your continued interest and voice in the public debate as it relates to the civilian oversight and review of Canada's national police force.

Yours truly,


Paul E. Kennedy



April 11, 2008

HONOURARY DIRECTORS

David Barrett
Neil Boyd
Thomas Berger, Q.C., O.C.
Robin Blaser
The Right Honourable
Kim Campbell, P.C., Q.C.
Andrew Coyne
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Gordon Gibson
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Rev. Phillip Hewett
Michael Ignatieff
Art Lee
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Rafe Mair
Stephen Owen P.C., Q.C., M.P.
Svend Robinson
David Suzuki
Milton Wong

Paul Kennedy, Chair
Commission for Public Complaints Against the RCMP
PO Box 3423, Station 'D'
Ottawa, Ontario
K1P 6L4

BY FAX: 613-952-8045

Dear Mr. Kennedy:

RE: Request for a Review

Pursuant to section 45.41 of the *Royal Canadian Mounted Police Act* (the "*RCMP Act*"), I am writing to request a review of the RCMP's decisions to terminate our complaints in the RCMP in-custody deaths involving Robert Knipstrom (Chilliwack, BC), Cecil Edward McKenna (Surrey, BC), and Duane Gordon Nelson (Port Hardy, BC). I attach the letters of P. Derbyshire outlining the reasons for termination. These letters notify us that the RCMP has terminated our complaints to avoid "unnecessary multiplicity of proceedings", noting the existence of criminal investigations and coroners' inquests. I should note that the BCCLA did not receive the McKenna and Nelson letters until March 28, 2008 after we made telephone enquiries regarding the status of our complaints. The letters were then faxed to us.

The stated grounds for terminating our complaints are cited under subsections 45.36(5) (a) and (c) of the *Royal Canadian Mounted Police Act*:

(5) Notwithstanding any other provision of this Part, the Commissioner may direct that no investigation of a complaint under subsection 45.35(1) be commenced or that an investigation of such a complaint be terminated if, in the Commissioner's opinion,

- (a) the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided under any other Act of Parliament;
- (b) the complaint is trivial, frivolous, vexatious or made in bad faith; or
- (c) having regard to all the circumstances, investigation or further investigation is not necessary or reasonably practicable.

.../2

To: Paul Kennedy
From: Murray Mollard
Date: April 11, 2008
Page: 2

Last year the BCCLA requested that your office review three complaints terminated according to section 45.36. These complaints involved the deaths-in-custody of Christopher Tom, Larry McPherson and Steven Qualtier. In a letter dated December 13, 2007, you indicated that you would undertake the requested review. In that letter you state your office's position that "a Coroner's Inquest is not '[...] a procedure provided under any Act of Parliament'". You also note that your office must assess, on a case-by-case basis, whether a criminal investigation or trial will address the conduct concerns raised in a complaint.

A criminal investigation is not an adequate substitute for complaint investigation because it assesses RCMP conduct based on a different standard and for a different purpose than what is appropriate for a complaint under the *RCMP Act*. The standard is a criminal standard (proof beyond a reasonable doubt) rather than a civilian standard (balance of probabilities) that is used for complaints. The purpose of a criminal investigation is to assess whether criminal charges will be laid rather than whether discipline proceedings will be commenced. The public has no right of access to reports to Crown Counsel. Furthermore, an RCMP initiated internal review is not subject to any review or appeal by a civilian review agency like the CPC in the case of a complaint. Nor does the public have a right to receive status reports or a final report with respect to the internal investigation. Under sections 45.39 and 45.4 of the *RCMP Act*, a complainant does have a right to receive a response to his or her complaint.

We believe that the RCMP's decision is not appropriate given that none of the alternative procedures noted by P. Derbyshire are an adequate substitute for independent civilian review and oversight of RCMP conduct involving an in-custody or in-pursuit civilian death. Given that these alternative procedures are not an adequate substitute for civilian review and oversight of the professional conduct of the RCMP under the *RCMP Act* we are requesting that you initiate an investigation into the relevant deaths-in-custody or that you direct the RCMP to investigate our complaint so that we can receive a report of the investigation and request a review of their findings if we are dissatisfied with their conclusions.

The BCCLA made 7 complaints regarding deaths-in-custody in 2007. All 7 of these complaints have been terminated, 6 for the reasons outlined in this letter. As you noted in your aforementioned letter, it is indeed a source of frustration that our deaths-in-custody complaints are consistently dismissed under S. 45.36 of the *RCMP Act*.

To: Paul Kennedy
From: Murray Mollard
Date: April 11, 2008
Page: 3

The form letter provided to the BCCLA lists a coroner's inquest as a reason for dismissal, a reason known to be invalid. The BCCLA is faced with an institutional response that necessitates constant intervention by your office. Our efforts to maintain accountability and oversight in lethal police action have been effectively stymied for an entire year. We again ask you to explicitly direct the RCMP to cease this practice which we consider to be an abuse of the *RCMP Act*.

We look forward to your review to ensure that there is civilian review/oversight into the deaths of Robert Knipstrom, Cecil Edward McKenna, Duane Gordon Nelson, Christopher Tom, Larry McPherson and Steven Qualtier.

We also look forward to explicit direction from you to the RCMP to cease and desist their practice of summarily terminating our deaths-in-custody complaints.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Murray Mollard', with a stylized flourish at the end.

Murray Mollard,
Executive Director

Encl.



Office of the Chair

Cabinet du Président

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November 5, 2007

File No.: 24-10-8

NOV 14 2007

Mr. Murray Mollard
Executive Director
British Columbia Civil Liberties Association
Suite 550 – 1188 West Georgia Street
Vancouver, BC V6E 4A2

Dear Mr. Mollard:

I am in receipt of your letter dated October 19, 2007 in which you request information related to the *CPC/RCMP "E" Division Independent Observer Pilot Project* launched jointly by this Commission and the RCMP on March 21, 2007. In responding to the specifics of your request I can tell you that there was no memorandum signed by the CPC and RCMP in respect of this pilot project and there have been no related policies developed.

This is in every sense a pilot initiative that is guided by the *CPC/RCMP "E" Division Independent Observer Pilot Project* outline posted on the CPC website March 21, 2007 and the ongoing experiences of the CPC and RCMP project team members. I have attached a copy of this project outline for your ease of reference. You will note that the outline covers a range of topics including, but not limited to, the project objectives, roles and responsibilities, and a commitment to evaluate the initiative at the end of the fiscal year. With respect to the project evaluation, it is intended that the CPC and RCMP "E" Division project team conduct a joint evaluation with a view to presenting recommendations to the RCMP Commissioner and me. By way of follow-up a report will be posted on the CPC website to outline the results of the evaluation and next steps as might be directed by the RCMP Commissioner and me.

You have also asked that I provide to you any informal or formal protocols related to this pilot project. By way of guidance, the CPC project team has developed and shared with the RCMP a draft guide for the CPC Observer (attached). As you can appreciate, this document is constantly being refined as the CPC and RCMP move through this fiscal year.

.../2

However, it may be of some assistance to you in understanding how the pilot project is operating.

Thank you for your ongoing interest in the *CPC/RCMP "E" Division Independent Observer Pilot Project*.

Yours truly,


Paul E. Kennedy

Enclosures

DRAFT
November 1, 2007

**CPC/RCMP E Division Independent Observer Pilot Project
- A Guide for the CPC Observer -**

This guide is prepared to provide a general guideline for Observers who participate in the CPC Observer Pilot Project.

1. Notification

During regular working hours, off-hours and on weekends the manager of the Review and Investigations Unit is available to receive information from the RCMP Deputy Criminal Operations Officer in respect of emerging incidents that the CPC might consider appropriate for engaging the CPC Observer Pilot.

Having received such a communication the unit manager contacts the CPC Chair, Vice-Chair, or Executive Director to review the information available. The CPC Chair, Vice-Chair, or Executive Director then provides instructions to the unit manager as to whether the CPC Observer Pilot is to be engaged. A discussion is also held to determine availability of CPC Observers and any media strategy over and above that outlined below.

If it is determined that the CPC Observer Pilot **will not be engaged** the unit manager:

- contacts the Deputy Criminal Operations Officer and indicates that at the this time the program, will not be engaged and requests that updates continue to be provided in the event that circumstances change and the CPC Chair, Vice-Chair, or Executive Director determine that increased CPC involvement is required. The unit manager stays current on emerging issues and informs/seeks direction from the Chair or Vice Chair as required.

If it is determined that the CPC Observer Pilot **will be engaged** the unit manager:

- confirms with the CPC Observer his/her availability and sends by e-mail the incident information.
- informs the CPC Communications Manager that the program is being engaged and forwards the incident information. The CPC Communications Manager will then contact the RCMP Communications person and they will determine the appropriate communications strategy. Given that the Team Commander assigned to lead the investigation has a communications responsibility it will be his/her decision on incident specific information to be released to the media outlets. The CPC will post an information release on the CPC website indicating that the CPC Observer has been engaged in respect of a particular incident;

- conveys to the Deputy Criminal Operations Officer the CPC's intention to engage the program and the name of the CPC Observer assigned. Both will confirm next steps (e.g. notification of the Office of Investigative Standards and Practices [OISP] and linkage to respective communications personnel).
- contacts by telephone and/or e-mail the OISP to inform it that the CPC Observer is being engaged. The unit manager also will indicate the name of the CPC Observer and make the hand-off to the CPC Observer who will, by this time, contacting the OISP to make arrangements to meet and travel to the location of the incident.

All CPC Observers (with the exception of contract personnel) have standing travel authorities and have been assigned a TAN should they be called out.

2. CPC Observer Travel to Location of Incident

Once the call-out is received the CPC Observer should arrange travel to the location of incident by the quickest method possible. This will depend on where the incident occurred. It is important to consider all methods of travel. Travel with OISP is permissible as this will provide an opportunity to discuss incident details and develop a strategy (e.g. what to do upon arrival). Travel with non-OISP RCMP personnel should be assessed on a case by case basis. It may be advantageous to do so where the Team Commander is in the travel party as the CPC Observer can begin to ask questions of the Team Commander as they relate to the composition of the investigative team. If unsure of the possible implications the unit Manager is available to provide and/or seek direction from the Chair or Vice Chair.

3. CPC Observer Attendance at the Scene

When speaking of the "scene", this refers to location (e.g. town, city, detachment) of the incident not the actual scene where the incident took place. Normally the investigative team works out of the local detachment. With few exceptions, attending the actual scene where the incident occurred is not necessary. It is recommended that the CPC Observer not request to view the actual scene of the incident.

After arriving at the scene/location of incident the CPC Observer will:

- meet with the Team Commander as soon as practicable for a briefing. OISP will likely have already spoken to the Team Commander and he/she will be expecting the arrival of the CPC Observer;
- explain that the role of the RCMP/CPC Observer is to assess impartiality only and not the quality or adequacy of the investigation;
- explain that the CPC Observer helps assess the impartiality of the investigative team by utilizing the impartiality questionnaire (see attached form jointly developed by the CPC and RCMP OISP). OISP should already

- have advised the Team Commander of the questionnaire and will provide it to the Team Commander;
- explain that most issues involving impartiality are guided by common sense. Use examples to illustrate points if appropriate (e.g. if the Team Commander was a Depot roommate with the subject member this would be a problem or that someone who is a traffic analyst should not be the Team Commander because they may not be qualified);
 - explain that in addition to assessing the impartiality of the investigative team, the CPC Observer will also look at certain aspects of the investigation itself, again with a view to assessing only matters of impartiality;
 - review witness statements, investigators' notes and daily briefs. Consider asking the Team Commander if there are any statements available for review. Explain that the statements will be reviewed for a limited purpose (e.g. to determine whether or not leading questions were asked) and that they will not be kept;
 - consider whether or not to meet with the investigative team and/or to participate in a daily briefing. Although not strictly required, CPC Observer presence will reinforce the important role of the CPC Observer Program. It may be that you only need to attend the first daily briefing. If the CPC Observer attends a daily briefing, consider providing another overview of the CPC Observer's role if given an opportunity. If there are any concerns about impartiality, it will likely be better to take any opportunity to appear in front of the investigative team.
 - assess how long to stay at the location of the incident. The majority of the investigation will be completed in the first couple of days so it is likely not necessary to remain or more than 1-2 days. The circumstances regarding the incident will also influence how long to stay on scene.

Once the initial briefing and foregoing has been completed the CPC Observer can report in to the unit manager and barring direction to the contrary travel home. Prior to leaving the CPC Observer should make tentative arrangements with the Team Commander for follow-up briefing and / or review of investigative materials.

Take notes related to assessing impartiality, but do not take notes in respect of any other investigative details. Your notes will be provided to the Team Commander for disclosure purposes. You should bring with you a copy of your resume in the event the Team Commander has an interest in your background.

4. Preparation of Initial Report Detailing Observations

After returning from a scene, prepare a report for submission to the CPC unit Manager, Chair and Vice Chair. The report should provide information:

Current Status

Initial scene attendance – [normally this will be completed].

Next Steps – [e.g. wait for statements, ask for production of other documents, attend Major Crime Unit office to review].

Outstanding Actions [e.g. return to view documents, provide any notes to Team Commander for disclosure purposes]

Issues for Consideration – [e.g. list any issues that warrant further discussion].

Communication Issues – [e.g. how is the Team Commander handling this aspect]

Summary regarding Impartiality

List Observations specific to the four criteria the CPC Observer Pilot Project is mandated to assess.

1. Line Management

- Do the investigators have any prior association (business or personal) with the potential subjects of the investigation?
- If so, what is the nature of that association?
- Is the investigative team far enough removed from the members and the internal administrative structures, whose involvement may be under scrutiny? (i.e. Are the investigators from outside the detachment, district, division, etc. as the circumstances of the investigation demand?)

2. Appropriate Level of Response

- Determine the scope of the investigation (this may change over time and the Observer should be apprised of any subsequent modifications to that scope).
- Verify Major Case Management accreditation for investigative team members.
- Where *curriculum vitae* are available for members of the investigative team, is the designated experience level appropriate given the nature of the investigation?

3. Timeliness of the Response

- Prepare a timeline which should include the time the subject matter of the investigation came to the attention of the RCMP, the times of the intermediary steps prior to the designation of the original Major Case Management team member(s).
- Assess the timeliness of appointments to the investigative team.
- Assess the timeliness of the investigative response to the investigation proper – this will likely call for an assessment of the diary dates for various investigative steps and should be dealt with during RCMP/CPC briefings. (Consideration should be given to travel constraints and requirements for specialized investigative skills.)

4. Conduct

- The above areas of review overlap with this issue, which amounts to a catchall. This issue should be assessed based upon the standards set forth in s. 37 of the *RCMP Act* and will be an ongoing consideration throughout the course of the investigation.

Timeline

Prepare a brief timeline noting the following:

Incident: date/time

CPC Notification: date/time

CPC en route to scene: date/time

CPC arrival at scene: date/time

- note any issues regarding delay in attendance by the CPC Observer.
- prepare a detailed timeline showing all actions of the CPC Observer including travel date/time details (that will help explain any delay in arrival on scene) and date/time details for interaction with the RCMP.

Overview of Incident

Prepare an overview of the incident based on information learned from the Team Commander's briefing and from attendance. The information learned will likely be more detailed than the initial briefing note prepared by the RCMP as this is prepared very early when information is still being gathered.

CPC Interaction with the Investigative Team

List in detail all interactions with the RCMP's investigative team including any formal and informal discussions.