RR: 2015-02
OPCC File: 2014-9611

**IN THE MATTER OF THE REVIEW ON THE RECORD INTO THE CONDUCT OF CONSTABLE BATIUK
OF THE SOUTH COAST BRITISH COLUMBIA TRANSPORTATION AUTHORITY POLICE SERVICE**

CONTENTS

1. INTRODUCTION

1. It is submitted that the decision of the discipline authority was wrong for the following reasons

I: The discipline authority found that Cst. Batiuk committed misconduct by failing to prepare a report. However, the discipline authority had already dismissed that allegation in his Notice of Discipline Authority Decision under s. 112 of the *Police Act*. Accordingly, it was not open to him to substantiate that allegation at the conclusion of the discipline proceeding.

II: (a) Cst. Batiuk did not refuse or neglect to provide a statement to the RCMP investigator. Rather, she said (through counsel) that she would provide a statement after she had been given an opportunity to view a closed circuit television video of the scene. This request was reasonable, consistent with Transit Police policy and practice, and did not violate any duty.

(b) The discipline authority erred by misinterpreting the Transit Police policies he relied on. The written policies that the discipline authority relied on his Form 3 do not in fact create any duty upon an officer to provide a report in the circumstances of this case.

(c)**:** In the alternative to the foregoing, a police officer cannot be found guilty of neglecting to comply with a policy when the department is aware that she is not complying, and takes no steps to direct or order her to comply. In the present case, the Transit Police knew Cst. Batiuk had not provided a statement to the RCMP, but did not direct her to do so, or otherwise bring the supposed duty to her attention.

(d) In the further alternative, if Transit Police policy did impose on Cst. Batiuk a duty to provide a statement to the Surrey RCMP without first viewing the video, she did so in good faith reliance on legal advice. This constituted “good and sufficient cause” for neglecting such a duty.

2. FACTS

2.1 Background

2. On 27 April 2014 Cst. Batiuk and her partner saw a male acting suspiciously. They approached the male and asked him his name. They did so on their own initiative. There was no "request for attendance." Upon querying the man's name on police databases Cst. Batiuk and her partner were advised that the man had committed a very serious assault on a police officer, and had many bail conditions.

3. As Cst. Batiuk and her partner were completing their check, the man ran away to escape. He then backed his car at a high rate of speed towards Cst. Batiuk. Cst. Batiuk feared for her life. She fired a number of shots from her service firearm at the vehicle to protect herself. This was, obviously, a very stressful occurrence.

4. The incident was captured on surveillance video.

5. The IIO initially took an interest in the case, but soon decided not to assert jurisdiction because the fleeing suspect was not injured. (The jurisdiction of the IIO is limited to cases where a person suffers serious injury or death as a result of a police incident.)

6. However, the fact that the IIO did not assume jurisdiction (because the man was not injured) did not mean that Cst. Batiuk faced no criminal or *Police Act* jeopardy. It was evident that because Cst. Batiuk had fired shots, an investigation would be made as to whether she had grounds to do so. That investigation could lead to criminal charges (eg., careless use of a firearm), *Police Act* proceedings, or both. There was in fact a *Police Act* investigation, which has led her to this point.

2.2 Cst. Batiuk Did Not Refuse to Provide a Statement

7. The Surrey RCMP was the "jurisdictional police force"; that is, the police force with primary jurisdiction in the area where incident occurred. (The concept of "jurisdictional police" in connection with the Transit Police will be discussed below). Cst. Mizrahi was given the task of investigating whether the male whom the police officers were dealing with had committed any offence (for example, attempted assault with his vehicle). Cst. Mizrahi asked Cst. Batiuk to provide a statement.

8. Cst. Batiuk sought the advice of her union. Her union recommended that she receive legal advice. In fact, Cst. Batiuk received advice from two lawyers, David Butcher QC, and her present counsel.

9. On Cst. Batiuk's behalf, Mr. Butcher dealt with the RCMP. Mr. Butcher said that Cst. Batiuk would provide a statement, but she wanted to view the surveillance video first to refresh her memory. ***See statement of Cst. Ali Mizrahi, FIR p. 389 (electronic version).***

10. Cst. Batiuk later changed counsel. Her new counsel (her present counsel) also advised the RCMP investigator that Cst. Batiuk would provide a statement, but only after she had had an opportunity to review the surveillance video. ‘

11. *At no time did Cst. Batiuk refuse to provide evidence to the Surrey RCMP.*

12. The Transit Police were aware of the issue between Cst. Batiuk, her lawyers, and Surrey RCMP. Indeed, Cst. Batiuk was not permitted to return to her regular duties while the issue between Cst. Batiuk, her lawyers, and the RCMP remained unresolved.

2.3 CST. BATIUK NOT COMPELLED TO PROVIDE A STATEMENT

13. At no time did any of Cst. Batiuk's supervisors, including the Chief Constable, order her to provide a statement to Cst. Mizrahi.

3. LAW AND ARGUMENT

3.1 ALLEGATION OF FAILING TO PREPARE A REPORT HAD BEEN DISMISSED

14. The discipline authority dismissed the allegation of "failure to write a police report" in the Notice of Disciplinary Authority's Decision ("NDAD") (23 April 2015) (attachment "A"). It was not open to him to substantiate this allegation after the discipline proceeding.

15. The investigator considered four allegations against Cst. Batiuk: (1) failing to use care in the discharge of a firearm; (2) failure to make notes about the incident; (3) ***failure to write a police report***; and (4) failure to provide a statement to the Surrey RCMP**.** The discipline authority considered the same potential misconduct.

16. Allegation (3) in the discipline authority's NDAD, was the following:

> **Allegation Three**
> Neglect of Duty, pursuant to section 77(3) (m)(ii) of the Police Act, which is neglecting, without good or sufficient cause, to do any of the following: promptly and diligently do anything that it is one's duty as a member to do; **in relation to Constable Batiuk failing to write, in a timely manner, a police report in regards to the shooting incident of April 27, 2014.**

17. As noted, in the NDAD the discipline authority found this allegation was not substantiated.

18. Following the discipline proceeding the discipline authority renumbered Allegation 2 from the NDAD as Allegation 1 in the Form 3. Allegation 4 from the NDAD was renumbered as Allegation 2 in the Form 3.

19. The discipline authority purported to substantiate Allegation 2 in his Form 3 on the basis that Cst. Batiuk had failed to write a police report in a timely manner:

(a) The heading to his analysis of Allegation 2 on p. 9 of Form 3 is: *Is there a Duty for Cst. Batiuk to complete a report*?

(b) The discipline authority then cited two sections from the Transit Police Patrol Responsibilities Policy that set out duties with respect to writing reports.

(c) The discipline authority concluded (p. 11):

> I find that there was a breach of Constable Batiuk's duty ***to provide a report*** to assist the Jurisdictional Police Department, in this case, the Surrey RCMP, who were investigating the assault of Constable Leaver and the discharge of Constable Batiuk's firearm.

20. Therefore, while the wording of Allegation 2 in the Form 3 is not identical to the wording of Allegation 3 in the NADD (which was dismissed), the substance of the misconduct that the discipline authority found in the Form 3 is the same as the allegation he had already dismissed: that is, the failure to provide a report.

3.2 CST. BATIUK DID NOT COMMIT NEGLECT OF DUTY

3.2.1 Note On Statements by Police Officers in Various Investigatory Regimes

21. As noted earlier, Cst. Batiuk did not refuse to provide a statement to the Surrey RCMP. Rather, through counsel she said that she would provide a statement, after she had watched the CCTV video of the incident.

22. The incident was obviously highly stressful. Cst. Batiuk shot several shots at a car that was reversing towards her in a manner that made her fear for her life. It is well recognized that people who have been involved in critical incidents often have difficulty recalling the timing and sequence of the incident correctly, and may in fact recall the incident very differently from the way it unfolded. Viewing video will assist involved officers to providing an accurate account of what occurred. Further, a police officer who was personally involved as a participant in a dynamic, dangerous incident is in a different position from an officer who is merely investigating an event that involved others. In the former case, the police officer cannot make notes as the incident is unfolding (as, for example, an officer investigating an impaired driving case might), and instead relies on automated contemporaneous recordings to assist in giving evidence.

3.2.1.1 A Statement May Have Multiple Uses

23. A statement that a members is compelled to give under s. 101 of the *Police Act* should be used only in *Police Act* proceedings. By contrast, statements given to criminal investigators almost always become part of a *Police Act* investigation into the same incident. Common sense and fairness dictate that a member should have the same rights when preparing a statement that may indirectly become part of the investigation against her that she would have had when preparing a statement expressly for a *Police Act* investigation.

24. In the present case, that means that any statement that Cst. Batiuk might have given to the RCMP investigators would likely become part of the *Police Act* investigation into her own conduct. Since Transit Police policy and practice allow her access to the video before preparing a duty report and interview, there is no reason why she should have been denied the same access before providing a statement to the RCMP, that would indirectly become part of the *Police Act* file.

3.2.1.2 Pre-Statement Disclosure

25. The object of any police statement is to assist investigators to get to the truth of what happened in an incident, directly and quickly. If *aides memoires* are available that will assist the member to recall what occurred accurately, without distort recollections or providing an opportunity to collude in falsehoods, providing those to the member will help the investigation get to the right outcome.

26. Thus, in municipal police departments in British Columbia members are invariably given access limited disclosure before they are asked to give a statement about their own involvement in a critical incident. This includes, at a minimum, computer assisted dispatch transcripts, their own notes, dispatch audio, and police video before they are asked to give a statement about their own involvement in a critical incident. To repeat, this is the invariable practice in municipal police departments in British Columbia. I am not aware of any case involving a municipal police officer where he or she was not provided these statements before providing a statement to the IIO or a PSS investigator. The practice concerning third party video (as opposed to police video) is not 100% consistent, but generally speaking officers are given access to objective, neutral video (like pre-existing CCTV). There is certainly no principled reason for drawing a distinction between access to police CCTV and private security CCTV. Indeed, the Transit Police itself gave Cst. Batiuk access to the CCTV video before she provided her compulsory *Police Act* statement.

27. It is reasonable to provide this limited disclosure. Each of those items records events in real time, with a high degree of objectivity. Resort to those items is particularly important to obtain an accurate statement when the incident at issue was stressful, dynamic, with real or potential violence.

28. This is not, of course, full disclosure. Before providing statements police officers are not given disclosure of witness statements, forensic measurements, ballistic reports, other expert reports, police investigative logs, and so on.

29. As just noted, the practice of the Transit Police can be illustrated by this very case. Although the RCMP refused to allow Cst. Batiuk to view the video of the incident for her statement to them, the Transit Police followed ordinary practice, and allowed her to view the

video with her counsel before she was called upon to prepare a duty report or participate in an interview.

30. The RCMP investigator did not provide any reason why providing Cst. Batiuk with the video would have impaired his investigation of the suspect he was investigating. To the contrary, if the RCMP investigator had interviewed Cst. Batiuk without having her comment on what was shown in the video, he could rightly be criticized for carrying out an incomplete investigation. Further, even if the RCMP investigator believed for reasons known only to himself that an interview where Cst. Batiuk had not seen the video would be better than an interview where she had seen the video, surely it would have been better to have a less-than-perfect interview than no interview at all.

31. The discipline authority's reasons on this issue were patently unreasonable. He wrote:

> Constable Batiuk states that she would have provided a statement if the Surrey RCMP provided an opportunity for her to view the video prior to her statement. The Surrey RCMP refused to do so. The rationale rests with the Surrey RCMP and it is not open to me to test the validity of that decision. Surrey RCMP were in charge of this investigation and ***there is no evidence before me on whether disclosure of the video would have hampered their investigation. I must assume that there was a valid reason for them to do so***.

32. It is quite correct that the Surrey RCMP investigator did not provide any reason for believing that disclosure of the video would have impaired their investigation. But it was patently unreasonable for the discipline authority simply to assume that they had a valid reason. The fact is that the RCMP investigator was never interviewed, and the discipline authority never asked that the RCMP investigator be interviewed. The discipline authority was, after all, the investigators supervising officer. Neither the *Police Act* investigator nor the discipline authority ever bothered to ask the RCMP investigator why he thought it better to have no interview, rather than an interview after Cst. Batiuk had viewed the video. The discipline authority's bald assumption that the RCMP investigator had a valid reason for refusing to allow Cst. Batiuk to view the video, when he had the power at the investigative stage to ensure that Cst. Mizrahi was asked his reasons, is patently unreasonable.

3.2.1.3 Compelled vs. Voluntary Statements

33. Any officer who has discharged her firearm on duty faces potential criminal and *Police Act* jeopardy for the use of the firearm. In this case, Cst. Batiuk was investigated for misconduct in discharging her firearm. Even though the RCMP investigator said he was not interested in investigating Cst. Batiuk for the use of her firearm, that did not mean she had immunity from such charges. Other police officers, or the Police Complaint Commissioner,[1] could refer the matter to Crown counsel to consider charges.

34. In addition, if a member gives a statement that appears to be different from video evidence, the member may face further *Police Act* jeopardy for an allegation of deceit, and criminal charges for obstruction of a police officer, breach of trust, or fabricating evidence. (The latter is not a mere theoretical possibility. In the recent case of *R. v. Shipley and Wong* two Transit Police members were charged criminally with these offences because the investigator believed that their police reports were contradicted by a video. They were acquitted of these charges, but only after a long and very stressful trial).

35. In many areas of the law there is a tension between society's interest in obtaining information or evidence from a person, and that person's *Charter* and common law rights not to be compelled to give evidence against herself. Those conflicting interests are reconciled by providing that a person may be compelled to give a statement where societal interests require access to the person's information, coupled with the rule that compelled statements cannot be used against the person in subsequent criminal proceedings.[2]

36. The key to the balance is the concept of a compelled statement. Any *voluntary* statement that a member gives may become evidence against her in other proceedings. However, if a member is *compelled* to give a statement, the statement cannot be used against the member in criminal proceedings. That is why it is important that a member be ordered to give a statement if the department believes that it is essential that the member provide a statement. Notes or reports that a police officer has been compelled to produce are not admissible against the police officer,

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[1] *Police Act*, section 111.

[2] With obvious exceptions, like a charge of perjury.

except possibly on cross-examination if the police officer testifies inconsistently with notes or report: *R. v. Calder* [1996] 1 SCR 660. Thus, the interest of the public in obtaining an officer's evidence is balanced against the rights that a police officer has as a citizen, the right against compulsory incrimination.

37. The interplay between police officers' duty to produce evidence and their right to remain silent is illustrated by the Ontario *Police Services Act.* That act creates a statutory obligation on police officers to prepare and disclose their notes in certain cases. See *Wood v. Schaeffer,* 2013 SCC 71. (There is no similar statutory duty under the British Columbia *Police Act*.) The obligation created by the Ontario statute means the notes are created under legal compulsion. Further, while *witness* officers must provide their notes to the Special Investigations Unit (the Ontario agency that investigates criminal offences against police officers), *subject* officers cannot be obliged to provide their notes. If a witness officer who provided his notes is later re-classified as a subject officer, the SIU is obliged to return the original of the notes and all copies to the officer (see *Wood v. Schaeffer, supra,* para. 20).

38. The principle that a person may be compelled to give evidence necessary for the functioning of the civil law and regulatory regimes, coupled with use immunity, is essential to balance the needs of litigants and regulators against the constitutional rights of the persons who are compelled to provide the evidence. This interplay between the *Charter* right to remain silent, and the public policy obligation to provide information or evidence in regulatory proceedings is not unique to policing. This principle is recognized in civil, administrative and regulatory proceedings where a person may be compelled to provide evidence. Thus, in a civil law action a party can be compelled to answer incriminating questions necessary for that action, but the compelled answers cannot be used against the party in criminal proceedings. In regulatory regimes persons can be compelled to give information to regulators, but the answers cannot be used against the person in criminal proceedings. The best example, close at hand, is found in ss. 101 and 102 of the *Police Act*. Section 101 provides a duty on members to provide statements in PSS investigations, and section 102 provides use immunity. Since s. 101 is a form of compulsion, the use immunity extends beyond he express terms of s. 102, and includes immunity from use in criminal proceedings.

39. In summary, a person who gives a statement voluntarily does not enjoy use immunity. A person who is compelled to give a statement does enjoy use immunity. In Ontario statutory duty provides the necessary element of compulsion. In British Columbia there is no statutory compulsion for ordinary police reports or statements.[3] The missing element can be supplied only if the member is ordered to provide a statement.

40. In the present case, had Cst. Batiuk been ordered to provide a statement to Cst. Mizrahi, that order would have achieved two functions: first, it would have made clear the expectation of her department that she provide a statement; and second, the order would have constituted the element of compulsion sufficient to engage the use immunity principle.

3.2.2 Neglect of Duty Defined

41. The relevant subsections of the misconduct of neglect of duty are defined as follows:

> 77 (m) **"neglect of duty",** which is neglecting, ***without good or sufficient cause,*** to do any of the following:
>
> …
>
> (ii) promptly and diligently do anything that it is one's duty as a member to do;
>
> (iii) promptly and diligently obey a lawful order of a supervisor.

42. Sub-paragraph (iii) does not apply because Cst. Batiuk was never ordered by a supervisor to prepare a report, even though the department was well of the fact that she had not provided one to the RCMP. The consequences of this will be examined in detail below.

43. The first step in any analysis of sub-paragraph (ii) is to determine whether the member in question (as opposed to the department as a whole) had a particular duty.

44. In the present case the policies that the discipline authority relied on in his Form 3 did not in fact create a duty on Cst. Batiuk in the circumstances of this case.

45. If the evidence discloses a duty, the next step is to determine whether the member neglected, without good of sufficient cause, to carry out a duty. In the present case it will be

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[3] As noted earlier, a police officer can be compelled to give a statement to a *Police Act* investigator, but the member then enjoys use immunity.

argued that reliance on legal advice that Cst. Batiuk insist that she see the video before providing a statement, particularly in the absence of a contradictory order from her supervisors, constituted good and sufficient cause for Cst. Batiuk to defer providing a statement until she had had an opportunity to view the video.

3.2.3 The Policies the Discipline Authority Relied On Do Not Create a Duty On an Officer in Cst. Batiuk's Position

46. It is acknowledged that an officer in Cst. Batiuk's position has a general duty to cooperate with the RCMP in the investigation they were conducting. However, the scope and nature of the duty is not found in any of the policies that the discipline authority relied on. Further, the manner in which Cst. Batiuk's duties are balanced against her own constitutional rights cannot be resolved merely by looking at Transit Police policies, whatever they may say.

47. The discipline authority relied on paragraphs from the Transit Police Patrol Responsibilities policy.[4] He relied on paragraph 5. He stated:

> Section 5 of the Transit Police Patrol Responsibilities Policy states:
>
> > "Members will prepare a report of all ***requests for police attendance.*** If the Member is unable to respond or attend, the Patrol Supervisor must be notified."

48. The discipline authority did not give any explanation for why he thought this section is relevant.

49. Section 5 is confined to reports of "requests" for "police attendance." Presumably this refers to requests that come to the officer directly from a citizen rather than through the dispatch system. Requests for police attendance that come through the dispatch system are fully recorded in the records of the 911 call center, the computer assisted dispatch (CAD) transcripts, and the audio of the radio communications between the dispatcher and the officers. It would be redundant for a police officer to record what has already been recorded completely and accurately.

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[4] The full policy is found following page 431 of the FIR (all page references are to the electronic version).

50. Whatever may be the extent of the duty of individual officers to record requests for police attendance, the clear and simple fact is there was no request for police attendance in this case. The incident unfolded when Cst. Batiuk and her partner saw a man engaged in suspicious activity, and they began to investigate **(Police Statement of Cst. Lever, FIR p. 247 ff)** They were not responding to a request for police attendance either through the dispatch system, or directly from a citizen. Therefore, s. 5 of the policy is completely irrelevant to the issues in this case.

51. The discipline authority also referred to s. 16 of the policy. To put that section into context, one must first refer to sections 8 and 9 of the policy, which provide as follows:

> 8. When the Jurisdictional Police Department (JPD) assumes responsibility for an investigation, the SCBCTAPS [the Transit Police] will support and assist the JPD as requested, and liaise with the JPD until the case is concluded.
>
> 9. In some cases, the SCBCTAPS may be the sole investigating agency for incidents involving TransLink operations. All investigative responsibilities must be carried out according to SCBCTAPS policies, legislative requirements, and agreements.

52. These provisions arise from the unique position of the Transit Police within municipal policing in the lower mainland. The transit system operates throughout the GVRD. In each location where the Transit Police operate there is a regular police force – the "Jurisdictional Police" – responsible for investigating offences in that area. In the present case, the jurisdictional police department was the Surrey RCMP. Reading sections 8 and 9 together, it is evident that when the jurisdictional police department assumes responsibility, it is the "investigating agency". Section 9 contemplates that instances where the Transit Police will be the investigating agency are not the norm.

53. In the present case, the Surrey RCMP did assume jurisdiction. It was the investigating agency, and Cst. Mizrahi was the investigator. The Transit Police was not the investigating agency for investigating the actions of the man who drove at Cst. Batiuk with his car, and Cst. Batiuk was not the investigating member.

54. With this background, one can examine Section 16 of the Patrol Policy, which the discipline authority relied on. It provides as follows:

> 16. The investigating Member will complete and submit a detailed investigation report before the end of shift. Any overtime required to complete reports, including Reports to Crown Counsel (RTCC), must be authorized by the Patrol Supervisor. The investigation report will include, when available … :

55. This section imposes duties on an "investigating member" who is tasked with preparing a Report to Crown counsel. Cst. Batiuk was not the investigating member: the investigating member was Cst. Mizrahi of the Surrey RCMP. It was not Cst. Batiuk's duty to prepare the Report to Crown counsel.

56. Therefore, s. 16 was not relevant to this case.

57. When the Transit Police is not the investigating agency, the "support and assist" provisions of section 8, *supra*, are engaged. This does not create any duty on an individual member, much less a duty to provide a statement on the terms unilaterally imposed by the RCMP investigator in the present case. Section 8 recognizes a duty on the Transit Police as an organization, not on individual members. Further, the obligation on the Transit Police is engaged by a request from the requesting agency to the Transit Police. When the Transit Police receives such a request, it can determine how to respond in a manner consistent with its own policies and practices.

58. This means that an individual member like the RCMP investigator in the present case cannot impose unilateral demands on a member from the Transit Police that may be inconsistent with the expectations and policies of the Transit Police.

59. From the perspective of an individual member, section 8 of the policy means that the Transit Police, not the outside agency, will decide on the nature and extent of the required cooperation. One would expect the Transit Police to apply its own policies and practices. Further, if the Transit Police is of the opinion that the member should provide some form of assistance the outside agency requests, that decision will be communicated to the member by an order from a superior officer in the Transit Police.

60. Such an order would have two consequences. First, the expectations of the member's own agency would be made abundantly clear to her. Second, an order to provide a statement

would have the element of compulsion necessary to engage the balance between the member's duties and her constitutional rights.

61. In the present case, the discipline authority seems to have believed that the existence of the written policies created a duty without the need for an order from the department. Indeed, he was of the mistaken opinion that the policy created a duty on Cst. Batiuk to prepare a statement for Cst. Mizrahi even though the department was aware she had not done so, and took no steps to direct her to do so. For the reasons set out above, the discipline authority was in error when he wrote that the policies created a duty to prepare a report without first seeing the video.

3.3 Transit Police Did Not Require Cst. Batiuk To Prepare a Report

62. It is submitted that when a supposed duty is found only in a departmental policy, as a general matter a member should not be found to have committed misconduct when the department is aware that the member is not complying with the policy, but does nothing about it. Policies are guidelines, not criminal statutes. Every violation of a criminal statute is a crime; not every departure from policy is misconduct.

63. There may, of course, be cases where the department finds out about a failure to follow policy after the damage has been done, and it cannot be remediated by later compliance. This was not such a case. Here, the RCMP investigator had ample time to make a formal request to the Transit Police. Even without a formal request, the Transit Police were well aware of the disagreement between Cst. Batiuk (through her counsel) and the RCMP investigator about whether Cst. Batiuk would be able to see the video before providing a statement. The natural inference that a member in Cst. Batiuk's position would draw is that the Transit Police did not consider it obligatory for her to provide a statement under those circumstances.

64. If, contrary to the foregoing, Cst. Batiuk was under a clear duty to provide a statement to the RCMP, then the Chief Constable and Cst. Batiuk's other supervisors also had duties to ensure that she carried out her duty. In *Odhavji Estate v. Woodhouse* 2003 SCC 69 the Supreme Court of Canada considered whether a civil suit for misfeasance in public office lay against a chief of police for failing to ensure that members of his department cooperated with an Ontario SIU investigation into a police shooting. The Supreme Court of Canada said the following:

> As described above, police officers are under a statutory obligation to cooperate fully with members of the SIU in the conduct of investigations, pursuant to s. 113(9) of the *Police Services Act*. On the face of it, the decision not to cooperate with an investigation constitutes an unlawful breach of statutory duty. Similarly, the alleged failure of the Chief to ensure that the defendant officers cooperated with the investigation also would seem to constitute an unlawful breach of duty. Under s. 41(1)(b) of the *Police Services Act*, the duties of a chief of police include ensuring that members of the police force carry out their duties in accordance with the Act. A decision not to ensure that police officers cooperate with the SIU is inconsistent with the statutory obligations of the office.

65. *Odhavji Estate* is distinguishable from the present case in that the officers in that case were under a *statutory* duty, while in the present case all the discipline authority relies on is a policy (which does not apply in any event). If, however, one were to agree with the discipline authority and treat the policy as if it created a binding obligation, the violation of which brings disciplinary consequences, then it follows that Cst. Batiuk's superior officers had a duty to ensure that she complied. No one took any such steps.

66. It is submitted that it would be unjust to visit disciplinary consequences on Cst. Batiuk when her own superiors, up to and including the Chief Constable, would also be guilty of misconduct on the same theory used to condemn Cst. Batiuk. Indeed, the culpability of Cst. Batiuk's superiors would be worse, because if any of them had carried out the duty to ensure that Cst. Batiuk complied with the policy, Cst. Batiuk herself would have complied, and would therefore not be liable herself.

3.4 Reliance on Legal Advice is "Good and Sufficient Cause" For Insisting on Pre-Statement Disclosure

67. There is no doubt that a police officer has the right to union assistance or legal counsel when she is going to be interviewed as part of a *Police Act* investigation into her own conduct. If there was any doubt, that doubt was removed by the ruling of Adjudicator Oppal in the case of *Constable Stephen Todd of the Vancouver Police Department*[5]. Nor can there be any doubt that a police officer who is asked for a statement in part of a criminal investigation of a third party has the right to obtain legal or union advice when the statement in the criminal investigation may

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[5] 12 March 2015.

also be used against the officer in subsequent *Police Act* proceedings. That was precisely the case here.

68. In *Constable Stephen Todd* police in Oak Bay, with the help of the RCMP, were re-investigating the death of a man who had died ten years earlier. One of the suspects was the cousin of Cst. Todd. The Oak Bay investigators, with the encouragement and cooperation of the Professional Standards Section ("PSS") of the Vancouver Police Department, compelled Cst. Todd to attend an interview in which he was asked about his cousin's involvement, if any, in the death. In the same interview the investigators intended to ask Cst. Todd about queries he had made of his cousin on police data bases several years earlier, and also ask Cst. Todd whether he had given his cousin any confidential information. The Vancouver Police Department PSS officers intended to use his answers to these questions in their own investigation of Cst. Todd for misuse of police data base systems and improper disclosure of police information. The Vancouver Police Department PSS officers recognized that Cst. Todd had the right to union assistance or legal counsel because of the questions the investigators were going to ask about possible misconduct that Cst. Todd might have committed. The PSS supervisors actually began making arrangements to have a union agent present at the interview held by the Oak Bay investigators who were investigating Cst. Todd's cousin's possible involvement in the death. At the last minute, however, the PSS officers decided not to allow the respondent to have a union agent, and decided that if the respondent asked for a union agent, the request would be denied. Having ensured that the respondent would not have union assistance, the investigators employed a variety of deceptive and coercive tactics that the adjudicator later described as "well beyond the pale". The statement that Cst. Todd gave to the Oak Bay investigators later became the core of a *Police Act* case against Cst. Todd himself.

69. One of the issues in a subsequent public hearing before Adjudicator Oppal was whether Cst. Todd had been wrongfully denied the right to union assistance and legal counsel. Public hearing counsel argued that police officers have no right to union assistance or legal counsel during *Police Act* interviews, and more narrowly they have no such right during an interview for a *Criminal Code* investigation of a third party, even though the interview might also be used against the member in a *Police Act* investigation. The OPCC apparently supported this position. Adjudicator Oppal disagreed. He ruled as follows:

> Much has been said about the denial of Todd's request for a union representative to be present at the time he was being questioned. To that extent, I agree with the comments of Constable Stamatakis. He makes reference of, "A fundamental breach of his rights, not only as a citizen but as an employee of this organization." The question of whether a police officer should be compelled to cooperate in any investigation under the *Police Act* was the subject of much debate in the 1990s. In 2010, the Act was amended. The Act now makes it compulsory for a member to cooperate fully in an investigation. Clearly any form of civilian oversight that deals with alleged police misconduct, must have the cooperation of an officer whose conduct is being investigated. However, concomitant with that duty to cooperate is the right to advice either from counsel or a union representative. This is a fundamental right based on the principles of fairness. In fact, the Act allows an officer 5 days in which to seek advice. That right was flagrantly denied to Todd. It has been established practice to permit officers who are being questioned under the *Police Act* to have the right to counsel or a union representative.[6]

70. Two principles emerge. First, police officers have a right to the assistance of union agents or legal counsel when giving a statement that may be used against the officer in *Police Act* proceedings, even if there is another primary purpose for giving the statement. Second, and more broadly, a police officer who is called upon to give a statement that may be used against the officer in *Police Act* proceedings should enjoy the same protections even if the statement has some other primary purpose. It is submitted that this necessarily incudes the right to the same limited pre-statement disclosure that the officer would have received if she was giving a *Police Act* statement under s. 101 of the *Police Act*.

71. There would be no point in recognizing the right of police officers to receive the advice of union agents or legal counsel if the officer can later be penalized for following the advice. It is therefore submitted that if a member neglects a duty in good faith reliance on legal advice, and the legal advice is also given in good faith, that should be recognized as “good and sufficient cause” for neglecting the duty.

72. It is further submitted that the fact that a member seeks out legal advice from competent advisors should be considered *prima facie* evidence of good faith. The onus should be on a party alleging bad faith to prove it. Evidence of bad faith might come from statements of the member; from evidence that the duty in question is well known and unambiguously clear, yet the member

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[6] *Constable Stephen Todd, supra,* at p. 20.

purports to accept advice to the contrary; or where a member "shops around" for a favourable opinion.

73. In the present case there is direct evidence of good faith. Cst. Mizrahi, who spoke directly with Cst. Batiuk, accepted that she was relying in good faith on legal advice. He said the following:

> If you care for my personal opinion, I would say after directly hearing the full extent of my request Cst. BATIUK did want to provide me her statement, however due to the pending process from your office, the advice provided to her from at least two Counsels prevented her from doing so.
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> **FIR, p. 390, line 57 ff**

74. Cst. Batiuk's first received advice from her union. Her union provided her with the opportunity to receive advice from David Butcher, QC, a lawyer who is experienced in police law and criminal law.

75. It cannot reasonably be maintained that it was plain and obvious that the position that Cst. Batiuk took after receiving the advice was wrong or purely self-serving. To the contrary, no reason in law or logic has been given why it would have prejudiced the Surrey RCMP investigation for Cst. Batiuk to review the video. Since any statement that she would make to the Surrey RCMP would likely also have been used in the *Police Act* proceedings against her, the principle discussed in *Constable Stephen Todd* should have applied; that is, the protections a police officer normally receives when giving a statement in a *Police Act* investigation of herself should be accorded when she is giving a statement for some other purpose, if the statement may also be used in the *Police Act* proceedings. Among those protections is limited pre-statement disclosure.

76. Therefore, there is no evidence that Cst. Batiuk opportunistically relied on self-serving legal advice that was obviously wrong. It is submitted that if, contrary to the foregoing submissions, Cst. Batiuk had a duty under Transit Policy to provide a statement to the Surrey RCMP, Cst. Batiuk's reliance in good faith on legal advice constituted good and sufficient cause for not carrying out the duty.

4. RECOMMENDATIONS

77. It is submitted that the Adjudicator may wish to consider making recommendations on the following questions:

(a) What changes, clarifications, or additions should be made to Transit Police policy concerning disclosure to members who are called upon to make statements regarding police incidents when the member may face jeopardy from the same incident?

(b) What changes, clarifications, or additions should be made to Transit Police policy concerning the duties of a supervisor to give orders or direction to members who are not complying with departmental policy?

ALL OF WHICH IS RESPECTFULLY SUBMITTED

December 19, 2015.

M. Kevin Woodall
Counsel for Cst. Batiuk