Showing Incident Video to Respondent Police Officers in Police Act or Criminal Investigations

A DISCUSSION PAPER

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Beyond the Call

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Contents

I Purpose & Executive Summary

The purpose of this Discussion Paper ("the Paper") is to provide analysis on the issue of showing video to police officers who are being investigated for actions depicted in the video. This issue has generated controversy and polarized views, and there is a lack of analysis. It is hoped this Paper will be useful to inform discussions and policy-making for police agencies and independent agencies responsible to investigate police in B.C. and elsewhere.

With the proliferation of CCTV and cell phone video, police-involved incidents are often recorded, at least partially, creating a rich source of evidence. Some such videos have generated controversy and public concern over the perceived inappropriate actions of police, and have created challenges for the police officers involved and those responsible for investigating their actions. Best practice guidelines are needed to support excellence in such investigations for the benefit of all stakeholders.

The purpose of a police investigation is to find the truth. In a *Police Act* investigation, a respondent officer is compelled to provide a statement and answer questions to provide an accurate account of what occurred. All investigative decisions should be directed towards accomplishing this goal in a manner consistent with good investigative practice, and with fairness and respect for the rights of the respondent officer.

It is important to recognize that, unlike a civilian, when an on-duty police officer is involved in a significant use-of-force incident (e.g., shooting a suspect), there generally will not be reasonable grounds to believe the officer has committed a criminal offence (although clearly a "criminal" investigation must occur). Police officers are duty-bound to arrest sometimes dangerous criminals and are authorized to use whatever force is reasonably necessary. Further, contrary to assertions that police officers subject to a *criminal* investigation shouldn't be able to "delay" providing a statement, in fact, every suspect, including a police officer, has the right to decide when, if ever, he will make a statement.[1]

Compelling research has demonstrated the frailty of human memory, and that significant but honest errors occur in a variety of circumstances, especially those where stress and rapidly unfolding events are involved. This reality must inform police investigative practice.

Police officers are taught to immediately separate witnesses after an incident for statement taking, to avoid witness "tainting," i.e., one witness influenced by the recollections of another. From this practice has evolved a belief among some investigators that police officers subject to criminal or *Police Act* allegations should never be shown video of incidents they were involved in and observed (or could have observed) prior to a statement. This conclusion rests on the belief the statement could be tainted by viewing the video, rather than considering the video, when appropriate, as an aide memoire, as is the case with contemporaneous notes, police radio

[1] For grammatical convenience, masculine pronouns have been used throughout – they should be read as interchangeable with feminine ones.

recordings, and so on. Further, it is sometimes asserted that a non-police suspect would never be afforded the opportunity to review evidence, which is inaccurate, given that evidence – including video – is routinely shown to suspects in the course of interviews. Unintended consequences – including an inaccurate statement and a perception of dishonesty – can result from not allowing police officers to use video as an aide memoire in appropriate cases before being interviewed.

Legal analysis supports showing video as an aide memoire, like other notes and records made contemporaneous with the events, in certain circumstances, particularly if it shows the officer's point of view, such as with body-worn video. Fairness to the suspect is a key element in relevant case law, particularly considering the importance of a suspect's statement. However, there are also circumstances in which caution is advisable and in which there may be justification for obtaining a statement prior to allowing a respondent officer to review video of the incident to avoid improperly influencing his memory of the events. If so, the investigators must be able to provide a reasoned, articulable decision, not simply default to a position that may be unfair and/or counterproductive.

The investigation of police-involved incidents must be conducted professionally in all respects; likewise, guidelines regarding showing video to police respondents must be fair and evidence-based. It may be that in some circumstances an initial statement should be taken prior to showing a respondent officer relevant video. However, when the benefits to the investigation outweigh the risks, consideration should be given to allowing police officers to view video showing events they observed prior to providing a statement. Allowing this may enhance the accuracy of officers' statements, assist in determining the truth, and be more fair to the respondent officer. This analysis should occur on a case-by-case basis. A police officer should generally not be shown video prior to providing a statement in cases involving allegations of deceit, where there is a legitimate interest in learning what the respondent officers' perceptions of the event were before providing the video, or where the video does not provide an accurate depiction of what the officer could have seen. In all cases where an officer is not shown video prior to providing a statement, it is important that investigators and prosecutors understand the research demonstrating that errors that can be reasonably expected because of the complexities of human perception and memory, and that errors should not necessarily lead to an inference of dishonesty.

This Paper recommends that police agencies develop clear guidelines regarding showing video to respondent police officers of events they were involved in. Ideally these guidelines should be harmonized across jurisdictions. The guidelines should clarify that when the video can appropriately be considered an aide memoire and showing it will not realistically compromise the investigation, then the police officers should be shown the video. The guidelines should provide assistance in determining whether there are factors and circumstances that indicate the investigative downsides to showing the video outweigh the benefits. In such cases it may be appropriate that there be a two-stage statement-taking process where the respondent officer provides a statement without having watched any video, but it would be considered a preliminary statement. The second stage would be a follow-up statement taken with the benefit

of the video being viewed. It must also be recognized that investigators may not be able to control an officer's access to video if it is quickly posted to the Internet, as is increasingly the case, and so investigative protocols must be adapted to this new reality. A draft model policy is included in Appendix 1 for consideration.

II Background

With the proliferation of private and public space CCTV, smart phones with video, and police video (e.g., body-worn and dash-mounted cameras), the likelihood of police-involved incidents being captured are very high. The results can be seen frequently on news coverage and accumulate daily on YouTube. The most notorious incident in B.C. involved the Taser-related death of Mr. Robert Dziekanski at the Vancouver International Airport on October 14, 2007 while being arrested by four members of the RCMP. A bystander, Paul Pritchard, caught most of the incident on video and eventually provided it to the media for broadcast, which generated considerable criticism. The incident became even more controversial when the original statements of the officers involved were found to be inconsistent in some respects with the video. The result was a lengthy, two-phase Inquiry.[2] Subsequent to that process, perjury charges were laid against each of the four officers, who were alleged to have lied to the Inquiry, based on the differences between what was captured in the video and their testimony.[3]

An extraordinary incident that received extensive media attention across Canada involves the July 2013 death of 18-year-old Sammy Yatim, who was shot to death by a Toronto police officer while allegedly brandishing a knife on a Toronto streetcar. The incident was captured by several different video recordings quickly posted to the Internet. On August 20, 2013, the police officer involved was charged with second degree murder; the video recordings will certainly be key evidence during the trial.

In the U.S., numerous incidents involving police use of force have been captured on video, such as the controversial July 2014 death of Eric Garner, which the Coroner determined was a homicide caused by the use of a police choke hold by members of the NYPD during an arrest for allegedly illegally selling cigarettes.[4]

The emerging phenomena of police incidents being captured on video has raised questions about whether it is appropriate to allow police officers being investigated for these incidents to view the video prior to being interviewed or providing a statement. A canvas of 16 Canadian police agencies and independent bodies responsible for investigating police-involved incidents

[2] http://www.braidwoodinquiry.ca/; http://www.braidwoodinquiry.ca/report/

[3] The first of the four officers to go to trial, Constable Bill Bentley, was acquitted on July 29, 2013. The decision is under appeal.

[4] One of numerous media stories on the incident is at http://abcnews.go.com/US/nypd-chokehold-death-homicide-medical-examiner-rules/story?id=24811834, downloaded Sept. 5, 2014.

demonstrated a lack of policies specific to the issue and inconsistent practices ranging from "never show" to a more nuanced "case by case decision," an approach promoted in this Paper.[5] (The results of the canvas are summarized in Appendix 3.)

There is great interest in the topic in the United States as well. For example, it was the subject of discussion at a 2012 meeting of the "Major Cities Chiefs Association."[6] There was a variety of opinions expressed (including the VPD's as expanded on in this paper) but no consensus on the issue.

Further, in September 2013, the issue was discussed at a meeting of the Police Executive Research Forum (PERF), where the majority of police executives supported the view that allowing law enforcement officers to review video will "allow officers to recall events more clearly, which helps get to the truth of what really happened," a position supported by PERF. But a minority believed officers should not view video prior to making a statement, believing that what mattered was the officer's perspective of what occurred.[7]

The range of practices may lead to confusion, misinformation and flawed investigations, which is not in the public interest and is also unfair to the police officers involved. It will benefit all stakeholders if best practice guidelines are developed based on informed analysis.

III Discussion & Analysis

Introduction

The implications of a serious allegation for the subject officer, for labour relations and morale, for the reputation of the police agency involved, for the complainant, and for public trust in policing are very significant. Clearly, all aspects of such matters must be handled with the highest degree of care. All stakeholders' interests must be treated with respect, and the investigation and related matters must meet the highest standards of excellence.

Unfortunately, if there are problems in an investigation due to simple human error or incompetence, when the "suspect" is a police officer, cases may take on the sinister tones of

[5] The canvas was conducted by phone and email during August and September, 2013, by Sergeant Joanne Wild.

[6] MCCA is a professional association of Chiefs and Sheriffs representing the largest cities in the United States, Canada and the UK. See https://www.majorcitieschiefs.com/.

[7] Police Executive Research Forum "Subject to Debate" newsletter, Vol. 28, No. 4, July/August 2014, p. 7. Downloaded Sept. 4, 2014 from http://www.policeforum.org/assets/docs/Subject_to_Debate/Debate2014/debate_2014_julaug.pdf; Also see: Miller, Lindsay, Jessica Toliver, and Police Executive Research Forum. 2014. *Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned*, p. 29. Washington, DC: Office of Community Oriented Policing Services.

perceived bias and cover-up. On rare occasions, bias, a lack of professionalism, and a failure to carefully manage the investigation of a police officer have allowed an inference to be drawn that this infrequent lack of professionalism is in fact routinely the case. Police agencies throughout North America have suffered the consequences of notorious cases – immortalized on news broadcasts and YouTube – where police apparently engaged in outrageous behaviour and inadequate investigations flowed from those events.

Therefore, it must be recognized that there is already a perception that police officers receive "special treatment" when accused of misconduct, especially around allegations of excessive use of force. This occurs at least in part because of a lack of understanding of good investigative practice and the related legal issues. The following discussion will explore both these matters.

Differences between Criminal Investigations and Police Act Investigations

Any investigation, whether criminal or disciplinary, seeks the truth. The role of the investigator is to follow the evidence wherever it might lead in pursuit of the truth about the events in question. However, the rules and consequences differ between criminal and *Police Act* investigations.

Under Canadian law, anyone who faces possible criminal penalties enjoys the right to silence. A police officer under criminal investigation for using too much force, for example, may choose to give no account of the incident.

In contrast, an officer under *Police Act* investigation must answer questions. The B.C. *Police Act*, s. 101,[8] requires that the officer give information by way of a statement, and/or answer questions at an interview, for which the officer is provided "use immunity" under s.102 (i.e., the statement cannot be used against him in a criminal proceeding). The officer is under a statutory duty to be truthful. The potential consequences of a failure to be truthful include disciplinary action (e.g., for disobeying an order, neglect of duty, or deceit.) Giving a false statement may be prosecuted as perjury.

The *Police Act* compels the officer to reveal what he remembers, without regard to the frailties of his memory of the incident. Considering the consequences to the officer's career and reputation, fairness requires that the officer be permitted to refresh his or her memory from some extrinsic evidence. However, revealing too much extrinsic evidence to a dishonest officer may permit him to construct a narrative which reflects best on him in light of the available evidence. This procedure would undermine the truth-seeking function of *Police Act* investigations.

This is also true in a criminal investigation. For example, an investigator would need to give careful consideration to the impact of showing a suspected bank robber a copy of the security

[8] [RSBC 1996], Chapter 367

video before asking him his role. If the video clearly showed his actions and his identity, then showing it might be a powerful strategy to elicit a confession. Conversely, it might confirm for him that his disguise was effective and that he could not be identified from the video or by any witnesses, and provide a powerful motive to be dishonest, which would undermine this investigative tactic. Any investigative process which assumes the subject is truthful will be easier to deceive.

On the other hand, an investigative process strictly designed to detect contradictions will capture both liars and people who are honestly mistaken. Revealing too little extrinsic evidence to an honest officer may cause harm. For example, a police officer who faces an angry man with a gun may suffer tunnel vision and recall standing alone, even though a video of the event shows his partner by his side.

Arguably the officer runs the risk of being accused of being untruthful in their statement or interview answers if they say something which is shown to be inaccurate by a video. Clearly, it is not in the officer's interest to be exposed to such risk. Nor is it in the interest of getting at the truth, at least as to the question of what happened at an event, to deprive the officer of any video which assists the officer in being both truthful and accurate in his statement. These factors must be considered in developing a fair, truth-seeking investigative strategy.

Different Rules for Police Officers – The Duty to Act

In the face of violence, police officers bear more onerous duties than civilians and different rules apply to police officers who use force. A common allegation made in the media in such circumstances is some variation on, "If it were a regular person, he would already be in jail," or, even more frequently, "A regular person wouldn't get days to consult with a lawyer and collaborate on preparing a statement."[9] One editorial postulated that, "When officers kill or injure someone while on duty, they tend to enjoy a strange immunity from prompt and energetic questioning",[10] implying that a civilian wouldn't have the right to remain silent.

In fact, both these statements are uninformed and usually incorrect. First, "regular citizens" do not have a sworn duty to engage with dangerous criminals and use force – sometimes deadly

[9] For example, when the Toronto police officer was charged on August 19, only three weeks after the July 27 shooting death of Sammy Yatim, civil rights lawyer Julian Falconer said, according to the Globe and Mail on August 21, 2013 (pp. A1 and A12), "…this is cause for concern – the average citizen would be charged and arrested the same day." This is highly disingenuous: the "average citizen" would not have a duty to arrest a knife-wielding man, nor would he be authorized to carry a firearm and use deadly force (with reasonable grounds), so with a private citizen a prima facie case is much more likely to exist. In the case of an on-duty police officer in the performance of his duties, an extensive investigation – including an expert opinion that the use of force was excessive – would likely be necessary before charges could be considered. In fact, as more informed commentators have noted, the speed with which charges were laid in Yatim's death was extraordinary.

[10] Henry Aubin, "Quebec could learn from quick police action in B.C. The rapid investigation of accused officers would be unlikely to happen here." *The Gazette*, January 31, 2009. Downloaded on July 17, 2014 from http://www.canada.com/story_print.html?id=16a4b543-9d42-4141-abf0-69fcd387e5be&sponsor.

force – and go into harm's way to arrest them when lawful grounds exist. Generally speaking, when a police officer uses force, he is doing what is expected of him. In Canada, other than armoured car guards, only police and peace officers are authorized to carry a handgun outside a firearms range. Therefore, other than in those circumstances, the use of a handgun outside a firearms range in Canada is *prima facie* evidence of a criminal act and so cannot be compared to an incident involving a police officer.[11]

Because police officers are authorized, and sometimes duty-bound, to use force in the lawful execution of their duties, there must be evidence that they exceeded their authority for there to be grounds to believe an offence may have occurred. When it is alleged that, "If I had done that, I would have been arrested," this is an uninformed argument. Where a police officer is involved, generally speaking there will be no grounds to believe a criminal offence has occurred and thus no grounds to arrest the police officer at the scene or shortly after. To prove the police actions were criminal, the ensuing investigation would need to reveal compelling evidence that the officer was not entitled to the protection afforded by s. 25 of the *Criminal Code* regarding use of force by peace officers.[12]

Secondly, when a "criminal" investigation is being conducted into a deadly force incident (as must occur), a police officer enjoys the same rights as every other citizen, including the right to silence, which is both a common law right as well as entrenched in s. 7 of the *Charter*. Stated broadly, the common law right to silence simply reflects the general principle that, absent statutory or other legal compulsion, no one is obligated to provide information to the police or respond to questioning.[13] While some police critics express outrage that a police officer was given time to consult with a lawyer (another *Charter* right every suspect enjoys) and to prepare a statement, the fact is that *every* suspect has the right to decide when, if *ever*, he will provide a statement to the police during a criminal investigation.

The rules for a police officer who is the subject of a disciplinary investigation are obviously different, and typically applicable legislation will require cooperation and a statement, as is the case with the B.C. *Police Act*. The consequence of failing to provide a statement could be a finding of a disciplinary default and other adverse employment consequences. But generally there are still provisions aimed at fairness to the respondent officer (e.g., as described above, the compelled statement can't be used in a criminal proceeding without consent, as set out in the "immunity provision" in s.102 of the B.C. *Police Act*).

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[11] With the ubiquitousness of legally possessed handguns in the United States, the situation is somewhat different in this particular respect, but many other aspects discussed in this report remain relevant.

[12] *Criminal Code* Section 25 (R.S., 1985, c. C-46): 25. (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law…(*b*) as a peace officer…is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

[13] See *R. v. Singh* 2007 SCC 48 at para. 27.

The Frailty of Human Memory and Perception

Much has been learned about the frailty of human memory in recent years in the context of witness statements. Ironically, much of the research arises out of wrongful convictions, where it has been forcefully demonstrated that the most common cause of a wrongful conviction is the frailty of witness memory, specifically, witness misidentifications of suspects.[14] Human memory is not like a video recording, i.e., impervious to external influences at the time of the events such as bias, emotion, and selective attention.[15] In fact, human memory can be highly unreliable, as described by J. Don Read, Ph.D., Professor and Director, Law and Forensic Psychology Program, Simon Fraser University:

> What we call memory is really a by-product of our mental processing of an experience that allows us to later recognize or recall some person, place, or action. The by-product may be likened to *trace evidence*…because it is often frail, incomplete, and erodes, changes, or is misplaced with the passage of time…because attention is a truly limited capacity resource its limitations are applicable in every situation: we are simply unable to spread our attention evenly and simultaneously to all aspects of an event…[16]

Commentators express disbelief that a police witness wouldn't fully recall or have perceived notable actions at a high-stress event and may therefore infer dishonesty. Research shows that highly focused attention can reduce to an extraordinary extent the ability to observe and recall what would seem to have been "obvious" in retrospect. Anyone who doubts this need only watch the fascinating "counting the basketball passes" experiment available on the Internet.[17]

Investigative training and practice to avoid witness "tainting"; relevance to an "aide memoir"

Police officers are taught to separate witnesses to crimes so they aren't able to speak to each other and taint each other's memory of the incident before providing a statement. The goal is always to obtain a statement from each witness that is a product of their recollections and perceptions only, without influence from others' memories. The obvious concern is that if witnesses discuss among themselves what they have seen, memories will be contaminated by

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[14] There is a large body of research on this issue, some of which can be found on the website of the Innocence Project at http://innocenceproject.org.

[15] A great deal of research into the issue of the unreliability of memory has been conducted by Washington State psychologist Dr. Elizabeth Loftus, such as described at in her article "Planting misinformation in the human mind: A 30-year investigation of the malleability of memory" available at http://learnmem.cshlp.org/content/12/4/361.short.

[16] J. Don Read, Ph.D., "Features of Eyewitness Testimony Evidence Implicated in Wrongful Convictions," Manitoba Law Journal, 31 Man. L.J. 523, 2006.

[17] See http://www.theinvisiblegorilla.com/videos.html (viewed on July 31, 2013). Newer variations on the video can also be seen. For example, see http://www.youtube.com/watch?v=bioyh7Gnskg (viewed on July 31, 2013).

information that wasn't available to the witnesses. Separating witnesses to avoid such statement tainting is simply good investigative practice.

Unfortunately, from this well-founded practice, among some investigators and observers there has evolved a belief that a police witness shouldn't *ever* be shown video of actions that the witness himself was involved in and observed. Some investigators assert they need to obtain a "pure version statement," or follow "the best evidence rule," and that will only be accomplished if the statement is provided unassisted and only from memory.

These are distortions of what is meant by the terms "pure version statement"[18] and "the best evidence rule."[19] While there may be many specific occasions where it is desirable and justifiable to obtain an initial statement without assistance from video of the incident, there are others where this is counterproductive to fairly obtaining an accurate statement. Therefore, there should be a case-by-case analysis based on reasonable criteria, without a default position in either direction that may be unsupportable. A lawyer highly experienced in Police Act matters, Kevin Woodall, has compared the full disclosure provided to respondents in other civil discipline proceedings against the more limited practice with police in B.C. and commented:

> Some may argue that giving the respondent [disclosure of video and other materials] would deprive the investigators of a "pure" version of the events from the respondent. If "pure" in this context means a statement based entirely on the officer's unaided recollection, it is difficult to see how this would aid in achieving the truth-seeking objective. Police officers, like anyone else, may have faulty recollections because of the passage of time, because the incident at issue was short, violent, chaotic or stressful, or for other reasons. A "pure" statement may be inaccurate even though the officers try their best to tell the truth. Obtaining an inaccurate statement, that may later be amended to reflect reality when contemporaneous evidence is shown the officer, is hardly an efficient means of reaching the truth.[20]

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[18] As described in the textbook *The Reid Technique of Interviewing and Interrogation*, a pure version statement is part of a "behaviour analysis interview." It is produced without interruption or questioning until the subject has exhausted their recollection, so as not to influence the statement by interjected questions. It would typically be initiated by the interviewer asking a question such as, "Please tell me everything that occurred from the time you arrived at work on Monday until you left at the end of the day." A pure version statement should then always be followed by focused "clarification questions." A pure version statement does **not** mean a statement provided without reference to notes and other aids to memory, but has been misinterpreted and redefined that way by some investigators and prosecutors.

[19] While it had broader application historically, in modern times, the "best evidence rule" now refers only to documentary evidence, requiring that where an original exists, a copy will not be admissible. The term has been co-opted, sometimes inappropriately, by many police officers to generically refer to the best source of evidence.

[20] M. Kevin Woodall, Coristine Woodall, *Best Practices for Taking Statements of Subject Officers in Criminal and Disciplinary Investigations*. Paper presented at The Canadian Institute's Western Canadian Conference on The Law of Policing: Navigating the Changing Landscape of Oversight, Discipline & Civil Liability, November 23, 2010, Vancouver, B.C.

It has also been claimed that police wouldn't show a suspect in a criminal investigation its crime scene evidence (e.g., fingerprints, blood spatter analysis, witness statements), to avoid tainting their statement. Therefore, the argument goes, it is inappropriate, and amounts to "special treatment," to show a police officer being investigated video showing the event the police officer was involved in.

There are two problems with this assertion. First, the police officer being investigated is generally not a "suspect" in the usual sense of the word because, as described earlier, when it comes to deadly force incidents, there generally aren't reasonable grounds to believe a crime has occurred. (But obviously it is prudent to proceed investigatively as if there were a potential crime to avoid compromising the integrity of the investigation.) Second, even if the officers are necessarily considered suspects from the outset, the assertion that evidence isn't shown to non-police suspects simply isn't true: suspects are routinely confronted with the existence of crime scene evidence, including video, in the course of suspect interviews as a strategy to elicit a truthful statement, as described by Chief Constable Jim Cessford of the Delta Police Department:

> Our interrogation/interviewing techniques today involve us (the Police) preparing various forms of presentations to suspects to essentially paint a picture for them as to why we suspect they are involved in an incident. The suspects are being shown evidence which also includes power points, charts and graphs, statements from other accused, pictures and videos to aid them with their memories and to assist the police in gaining a confession or at least a version of the subject's involvement…showing a taped confession in a Mr. Big scenario is a prime example of the police providing evidence to an accused to assist with his recall. The argument that we would not show evidence to suspects so why would we show it to the police is not correct.[21]

And unlike physical evidence such as fingerprints or blood spatter analysis, video showing events the police officer was part of and observed is an aid to memory that may help him produce an accurate statement.

An example of the unintended consequences of not reviewing video before giving a statement

Given the frailty of human memory under stress, it is not surprising, therefore, that in the first perjury trial arising out of the Robert Dziekanski death, B.C. Supreme Court Justice Mark McEwan found there were "…other explanations, inconsistent with the guilt of the accused, that remain open on the evidence." As a result, he acquitted Constable Bentley.[22] He also noted that the civilian witnesses made the same sort of mistakes as the RCMP members in what they

[21] Email correspondence with the author, August 14, 2014.

[22] 2013 BCSC 1364; Keven Drews (Canadian Press), "Mountie not guilty of perjury," in *The Vancouver Sun*, July 30, 2013, p. A1.

perceived and remembered of the incident. When Bentley was asked about his inaccurate notes of the incident at the Inquiry, he said he was confused about a fast-moving situation. That is consistent with the research on the frailty of human memory and, based on Justice McEwan's verdict, did not support a finding that he had lied about his recollections.

Yet in the Braidwood Inquiry, Commissioner Braidwood had found that the evidence of Constable Bentley and another RCMP member was "patently unbelievable" and that they engaged in "deliberate misrepresentations…"[23] In a separate investigation conducted by the Commission for Public Complaints Against the RCMP (CPC), the then-Chair, Paul Kennedy, found that, "[w]hen tracked against the Pritchard video, the recollections of the members fall short of a credible statement of the events as they actually unfolded."[24] However, Mr. Kennedy did not go nearly as far in his criticism as Commissioner Braidwood, noting he was "aware of no evidence to confirm that any aspect of the members' accounts of the events was concocted, that the members colluded in their accounts or that they were being intentionally deceptive."[25]

This situation raises the questions of whether there would have been more accurate statements and explanations if the RCMP members had viewed the video showing their actions prior to completing their statements, and whether this would have been more fair. It wasn't a situation where they could have changed their actions as shown on the video; instead, they could have provided an accurate statement, filling in the gaps where the video was not helpful, and explaining why they took certain actions, to the extent they could be explained. Instead, an investigative decision was made not to show the involved members the Pritchard video in the course of taking their statements.[26] This begs the question of whether it served the interests of justice and finding the truth to create a situation in which the RCMP members were made to appear to be liars (however unintentional) because their recollections didn't match the video. (Again, it was noted in the trial that civilian witnesses with no reason to lie made the same sort of errors as the RCMP members.) Another view is that the goals expressed above could have been achieved by allowing the members to view the video after an initial statement had been taken without the aid of the video.

In commenting on this issue, Mr Kennedy noted that the investigators appeared not to have appreciated the value of showing the video to the respondent members as an investigative strategy and in Finding 20 stated:

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[23] *Why? The Robert Dziekanski Tragedy.* Braidwood Commission on the Death of Robert Dziekanski, Part 6: The Response of the RCMP, Richmond Fire-Rescue, and BC Ambulance service, p. 243

[24] *Report Following a Public Interest Investigation into a Chair-Initiated Complaint Respecting the Death in RCMP Custody of Mr. Robert Dziekanski*, Commission for Public Complaints against the Royal Canadian Mounted Police, December 2009, p. 24. (Retrieved from http://www.cpc-cpp.gc.ca/cnt/decision/pii-eip/dziekanski/yvr-inter-eng.pdf on September 7, 2013.)

[25] Ibid, p. 26.

[26] Ibid, pp. 60-62.

> If for no other reason than to be fair to the responding members and give them an opportunity to address the significant and readily apparent discrepancies between their versions of events and the video, it would have been appropriate to provide the responding members with an opportunity to view the Pritchard video prior to taking further statements from them.[27]

In February 2011, the RCMP released a statement noting it had accepted all but one of the 23 findings of the CPC investigation.[28] (The one not accepted was unrelated to video evidence.) To its credit, the RCMP has since modified its investigative practices concerning showing available video to respondent officers to reflect Finding 20.

An example of an investigation where respondents were shown video prior to statements

In contrast, consider the March 2009 fatal shooting of Michael Vann Hubbard, a homeless schizophrenic man brandishing a utility knife, by a VPD member in downtown Vancouver. The incident achieved even more notoriety than would normally be expected because of a self-proclaimed "witness," Adam Smolcic. He claimed that he had captured the incident on cell phone video, that Vann Hubbard had been shot four or more times, that he posed no danger to the two officers involved, and that a VPD member seized his cell phone and erased the video before returning it to him. (It was eventually confirmed that his allegations were a fabrication and charges of public mischief were recommended by the independent police agency that investigated.)

In this case, two CCTV videos of excellent quality captured the entire incident from the point of the first interaction between the police officers and Van Hubbard and through to the point that he was seen advancing on the officers. He is shown accelerating his pace and then was shot only once, immediately going down. With respect to showing the involved officers the video, in a thorough "Managing Officer's Review"[29] written by then Superintendent Rob Rothwell, the issue was resolved as follows:

> Once the value of the video was determined, executive discussion arose around the propriety of allowing [the constables] to view the video prior to providing

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[27] Ibid, "Finding 20," pp. 62 and 205.

[28] News releases retrieved on September 9, 2013 from http://www.cpc-cpp.gc.ca/cnt/nrm/nr/2011/20110210-eng.aspx and http://www.rcmp-grc.gc.ca/news-nouvelles/speeches-stat-discours-decl/2011/20110210-cpc-cpp-eng.htm.

[29] A Managing Officer Review is an internal VPD debrief report of significant incidents by a senior officer assigned at the outset to ensure all aspects of the investigation proceed smoothly, and to benefit from any lessons learned. In this case, the Managing Officer performed mostly a liaison function, since the criminal and *Police Act* investigation were assigned to the Abbotsford Police Department. This particular review was submitted to Chief Constable Chu in January 2010.

> written statements. Some initial reluctance to do so was exhibited by [the Team Commander for the independent investigation by the Abbotsford Police Department]. After familiarizing himself with an opinion expressed by Regional Crown Counsel Terry Schultes and also consulting with the BC Police Complaint Commissioner Dirk Reyneveld, [the team commander] concluded that the constables were in fact entitled to view the video evidence. Identity was not an issue and the video did not depict any element of the incident that would not have been seen by [the constables] at the time it occurred.

The CCTV videos clearly showed what occurred and that it was an entirely justifiable shooting. There was nothing to be gained from seeking a statement prior to the officers watching the video, other than to very likely produce a statement that would be inaccurate on issues such as distance and timing of events and create a possible inference of dishonesty. The purpose of the investigation was to determine the truth of what occurred, not to test the police officers' memories against the irrefutable accuracy of the two CCTV videos.[30] There was no value in demanding that the officers describe actions that were already clearly shown in the video. The only value was in asking the members to explain the actions they took, and to describe elements that could not be shown in the video (e.g., what was said, since there was no audio, although the actions of all parties made it very clear what was occurring).

As described by the Disciplinary Authority who reviewed the investigation, Chief Constable Jim Cessford:

> I was most impressed with the manner in which the video was shown to the respondent officers and in the presence of their counsel. The statements of the officers were accurate, detailed and they articulated their account of the event, their mind set and their actions which ultimately lead to the shooting of Mr. Van Hubbard. While watching the video, I was very surprised by how quickly the incident changed and I watched as Mr. Van Hubbard charged after the two officers. The video also clearly recorded the number of shots fired, which contradicted one of the..witness's accounts. I supported the showing of the video with the officers in that particular investigation…it is important that we are aware of the fact that if the video is going to provide the best evidence and accurate accounting of an incident it is proper to show the video. Our purpose is not to "trap" our officers or discredit them our purpose is to get at the facts.

This case is a classic example of a case where the benefits to showing the officers the video far outweighed any concerns. It is appreciated, however, that in many if not most cases the risk/benefit analysis is not so easily conducted.

[30] Notably, since this incident and since an opinion from Crown counsel, the VPD Professional Standards Section has adopted a business rule regarding showing video that is consistent with the opinion, as documented in an October 25, 2011 memo from then Staff Sergeant Laurence Rankin to Inspector Mike Serr, then officer in charge of PSS.

Analysis supporting showing respondents video depicting events they participated in

It is entirely appropriate for witnesses to refer to notes and records they made contemporaneously with the events to assist them in providing their statement. Where police officers are concerned, such records will include audiotapes and transcripts of radio broadcasts they heard and participated in; Computer Aided Dispatch records in which their actions have been recorded and – importantly – time stamped; and notes they have made at the time of the events or shortly after. The *R. v. Violette* decision from the Supreme Court of B.C. is useful in that it summarizes the law around reference to notes, and the differences between "present memory revived" and "past recollection recorded." The Court found that, "A review of the case law makes it clear that witnesses do not have to exhaust their memories before being allowed to refer to their notes for the purpose of refreshing their memories."[31] While the context of this decision was using notes to assist in giving evidence, there are clear parallels with using notes to assist in providing a statement.

A video recording made of events that the police officer observed can often be simply considered another contemporaneous record of events to assist in providing an accurate statement. Unlike speaking to another witness which could result in tainting a statement with *inaccurate* information, the "video doesn't lie" (although it may not capture important information or may present a skewed view), and it is therefore generally unlikely that a witness will be *improperly* "tainted" with the truth. The danger with contamination of a witness statement was always that *inaccurate* information would influence memory (e.g., from the faulty recollection of another witness.).

While a video may be incomplete and require context, it is generally highly accurate in showing actions and is particularly useful for precisely recording the timing of events. This is an important issue because memories may become greatly distorted in the perception of the police officers involved because of the influence of stress, fear, selective attention, and so on. Showing the "suspect" officer the video may produce a more accurate statement, and is fairer to the officer, both of which are desirable outcomes.

Terry Schultes, then the Regional Crown Counsel for Vancouver (and now a Justice of the Supreme Court of B.C.), provided this legal advice in 2009:[32]

> A witness is entitled to refresh their memory from anything that might assist them in making a statement. A video is an excellent aid to memory and an excellent example of something that should be provided to the witness, and in no way taints their memory. [This practice would be consistent with VPD policy

[31] *R. v. Violette*, 2009 BCSC 503 (CanLII) retrieved on 2013-09-04 from http://www.canlii.org/en/bc/bcsc/doc/2009/2009bcsc503/2009bcsc503.html

[32] The advice was provided by phone to the first author and reflected in detailed notes made at the time.

> regarding providing police Computer Aided Dispatch records to assist officers preparing a witness statement in a *Police Act* investigation.] It would be unreasonable and counterproductive to ask a witness to provide a statement, which will almost certainly be inconsistent with the best evidence (the video), without seeing the video first. Not allowing a witness to see the video prior to preparing a statement is "setting them up." Even if the "aid" (e.g., a video) is inadmissible in evidence for some reason, it is still proper to let them view it to assist their memory in preparing a statement. The two caveats are as follows.
>
> First, if identification is an issue, then an investigator would need to be cautious in case it is viewing the video that allows the witness to identify the suspect, and not their recollection of the suspect (e.g., showing a bank teller CCTV video of the suspect). It would still be permissible to do this, as long as the potential avenue of weakness in the evidence was understood.
>
> Second, the witness must have been able to see what the video shows, i.e., police shouldn't show a video depicting information the witness couldn't see himself.

It should be clear, however, that this opinion was provided in the context of legal advice (pursuant to the "Legal Advice to the Police" policy) regarding one specific fact pattern and was not adopted as a formal policy position by the BC Criminal Justice Branch. The current official position of the Criminal Justice Branch, however, is consistent with the case-by-case approach proposed in this paper, as described below:

- Investigative decisions, including what evidence to gather or the methodology to employ, are within the independent discretion of police, including where the suspect is a police officer.

- CJB does not support an automatic, default position of showing video evidence to police suspects, unless the video evidence was created by the officer and therefore is the evidentiary equivalent to an officer's notes or a statement.

- Rather, consistent with the approach taken to non-police officer suspects, a cautious case by case analysis must be completed to determine whether showing the video is appropriate, including an assessment of the potential detrimental impacts to the officer's evidence, such as: tainting, a constructed response to what is seen on the video, and/or allegations at trial of unfair practice and/or abuse of process.[33]

In reviewing the case law, it is necessary to distinguish between the investigation of an event that may be considered as potentially criminal conduct by the officer(s) involved, those which are purely matters that could only involve police disciplinary issues, and those which are a combination of both. These distinctions will have some bearing upon the processes and procedures to be followed when conducting an investigation concerning the propriety of the conduct of a police officer, and specifically those relating to the obtaining of a statement from the police officer. In some cases there is the real potential for the interests of law enforcement,

[33] Written comments from Assistant Deputy Attorney General M. Joyce DeWitt Van Oosten on October 10, 2014.

versus those of the police officer personally, and those of police disciplinary authorities, to be in conflict.

This risk of conflict has been acknowledged to exist by the Supreme Court of Canada in at least one case where it was recognized that the right to silence, and the right against self-incrimination, may conflict with the duty to cooperate with a disciplinary investigation.[34]

The issue of showing video to police officers is similar in some respects to the taking of a statement from suspects in criminal investigations. There is a considerable body of case law which deals with the issues surrounding the propriety of certain police questioning techniques and conduct during the course of a criminal interrogation of a suspect. For example, in a decision from Mr. Justice Frankel of the B.C. Court of Appeal in *R. v. Ashmore*,[35] there were comments about showing the accused a video depicting him confessing to a murder in a "Mr. Big" undercover operation during an in-custody interview. Relevant comments in the decision include:

> [18] Part way through that interview, Inspector Pike played a video clip of Mr. Ashmore admitting…he participated in Mr. Sabine's murder. After seeing that clip, Mr. Ashmore confessed his involvement in the murder and described in detail his role, and the roles of the other parties.
>
> [68] In playing the video clip, Inspector Pike did no more than accurately disclose evidence the police had already gathered. That the police might show Mr. Ashmore evidence, even bogus evidence, was a matter on which Mr. Ashmore had received legal advice, so it cannot be said that what occurred was unanticipated.

Clearly the Court wasn't concerned about the police disclosing video evidence to a suspect. If the purpose of the disclosure is to get the suspect to be truthful when giving a statement to the police, and the video "accurately discloses the evidence the police had already gathered," then it flows that there should not be any criticism of the police when they do this when investigating a police officer. (This does not mean that the practice is appropriate in all situations.)

It should be noted, however, that such case law deals largely with the issues surrounding the voluntariness of statements rather than the question of witness tainting; there is very little on this subject in Canadian case law. This fact was noted in the case of *R v. Buric*[36] which was affirmed by the Supreme Court of Canada. The law concerning the issue of witness tainting is focussed upon whether the subsequent testimony of a witness at a trial is admissible. It concludes that in most cases the testimony will be admissible, even if there is a suggestion that

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[34] See *Odhavji Estate v. Woodhouse* 2003 SCC 69

[35] 2011 BCCA 18.

[36] Reported at (1996), 106 C.C.C. (3d) 97 (Ont. C.A.)

the witness has been tainted by some activity taking place prior to testifying. Further, the case law speaks to the fact that while showing a suspect a part of the evidence does not necessarily undermine the investigation, it doesn't establish the practice as appropriate in all situations.

Recently, the decision in the trial of two accused, Cody Haevischer and Matthew Johnston, charged in the notorious "Surrey Six" murders (tried without a jury) provided some helpful comments regarding witness tainting (emphasis added):

> During an interview on April 6, 2009, police showed K.M. videos and photographs, and played audio recordings…Mr. Haevischer and Mr. Johnston argue that K.M.'s evidence is compromised or tainted by the information presented to her by the police…Both accused relied on *R. v. Spence,* 2011 ONSC 5587…I do not accept that the *Spence* decision is applicable in the circumstances of this case. In *Spence,* the prosecution improperly used the video footage to convince the witness that his evidence was wrong…That is not what occurred here…The police showed K.M. still photos from video clips of her own movements, and those of the accused, in and around the Stanley before and after the murders**. They did so not to influence her memory of events or her evidence about them**, but to satisfy her that they knew of the comings and goings of the accused on the day of the murders and had compelling evidence of her role as an accomplice to the offences. As the Crown submits, there is nothing improper about such an approach and, in fact, the information did not influence or alter K.M.'s memory in any significant way. **With respect to allegations of tainting, the factual context is everything**.[37]

With regard to the methods used by investigators in obtaining statements from suspects in criminal investigations, the common law is evolving such that, at least with regard to the voluntariness of confessions, there is an emerging concern with fairness to the suspect in the investigative process.[38] To some extent this concern with fairness to a suspect in the criminal process was exemplified recently by the judgements in the Supreme Court of Canada in the case of *R. v. Sinclair,*[39] which dealt with the right to counsel; however, in this case there were strong dissenting judgements based upon the issue of fairness to a suspect who is in custody, and whom the police wish to interrogate.

Fairness to a suspect in the investigative process is arguably the most compelling reason why it may be appropriate, especially in the case of a *Police Act* compelled statement, to allow a police officer to view a video of the event before the officer must provide a statement in writing. Further, basic legal principles must be kept in mind, including the presumption of innocence, which applies to *all* persons who are considered possible suspects in a criminal investigation.

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[37] *R v. Haevischer* 2014 BCSC 1863, at paragraphs 491 to 496.

[38] See *R. v. Oickle* [2000] 2 S.C.R. 3, and *R. v. Hodgson* [1998] 2 S.C.R. 449. Also see David Watt's *Manual of Criminal Evidence*, Confessions, at para. 37.01.

[39] 2010 SCC 35.

Finally, the importance of a statement of a suspect cannot be underestimated. The statement itself may become evidence against the person, and therefore the accuracy and reliability of that statement are critical to the proper administration of justice.[40] The statement may also form the basis for either refreshing the person's memory prior to or at a trial, or as a past recollection that is recorded and later adopted by the person as the truth. In either case it could become evidence at a trial or hearing. Therefore, in the context of taking a statement from a suspect officer where identity is not an issue, obtaining the most accurate and truthful statement must be the overriding goal.

Analysis suggesting caution necessary regarding showing video prior to statement

The arguments and legal analysis in support of showing video will not apply in every circumstance. In some cases, a cautious approach is necessary. In the context of refreshing memory prior to testifying at trial, Osborne J.A. of the Ontario Court of Appeal in *R v. B.(K.G.),*[41] found:

> What triggers recollection is not significant. This was long ago made clear in 1814 in *Henry v. Lee* (1814), 2 Chit. 124, where Ellenborough L.C.J. said: "If upon looking at any document he can so far refresh his memory as to recollect a circumstance, it is sufficient; and it makes no difference that the memorandum is not written by himself, for it is not the memorandum that is the evidence but the recollection of the witness."

The above-referenced statement is cited in *McWilliams' Canadian Criminal Evidence* under the heading "Refreshing Memory Prior to Trial," where the author also points out there is a risk of creating inaccurate memories that are erroneously accepted as true by the fact finder at trial. But he then lists a number of factors which counter this risk. He points to the ethical duty of counsel to not provide a witness with materials that are likely to foster inaccurate memories or cause a witness to consciously tailor testimony to match other evidence. Accordingly, he says, "Material should only be provided to a witness where there is a reasonable possibility that it will revive a memory that might otherwise be forgotten."

These statements of law were made in the context of the preparation of a witness testifying at a trial and go to the issue of the weight to be given to such testimony. The preparation of a statement prior to any trial or hearing is a somewhat different matter. But insofar as there may be questions regarding accuracy of memory and tainting, both going to the accuracy and reliability of what the person is saying, the concerns are the same.

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[40] For example, in *R. v. Singh, supra,* the majority stated at para. 49, "Of course, the information obtained from a suspect is only useful in the elucidation of crime if it can be relied upon for its truth…"

[41] Reported at (1998), 125 C.C.C. (3d) 61 (Ont. C.A.) at pp. 67-68.

In *R v. Buric*, the trial judge was concerned about the extent of tainting of a material witness's testimony. The police, in attempting to obtain the witness's cooperation in the investigation, had shown the witness various pieces of evidence and statements of other witnesses during their investigative interviews. The extent to which this occurred was such that the trial judge held the witness's evidence was so tainted that it should not be admitted. On appeal, the Ontario Court of Appeal held that the degree of tainting of a witness's evidence generally only goes to the weight to be attached to that evidence and not to its admissibility. Part of what the trial judge found troubling was that the police did not have any initial statement from the witness about the witness's memory of the events before the police started to present other pieces of evidence to the witness. If they had, they would have been better able to assess the degree to which the witness's testimony at trial was tainted.

This concern by the trial judge in *Buric* seems a legitimate reason for a cautious approach regarding showing a third party video recording of an event to a police officer prior to taking a statement. If what he learned about certain details of an event by viewing the video made its way into that officer's statement as a "memory" of an event, then viewing the video could become problematic. However, if the officer observed the same events captured by the video, then this would be much less of a concern.

In some respects the issue is no different from concerns about allowing the respondent police officer to speak to other police officers who were present at an incident prior to receiving that officer's statement (e.g., the potential for collusion). However, it is different in the case of a video because the video doesn't create *false information* (unlike reliance upon another person's information, which may well be incorrect).

Where the questions to be answered are what the officer saw, heard and perceived about an event, there is at least a risk that the showing of the video prior to the giving of the statement may influence, perhaps improperly, what the officer decides to put in his statement. It is conceivable that false memories could be created by the showing of the video to the officer, as the video will be a powerfully suggestive source of information, information the officer may not have been aware of at the time of the event in question.

While showing a video to the officer cannot reveal what the officer was thinking or perceiving at the time of an event, it does raise the potential for conflicts between the officer's perceptions or beliefs of an event and the apparent truth as revealed by the video. Often what is in an officer's mind is an important factor to be considered in the pursuit of the facts and a just result. Anything which may interfere with, or influence improperly, the officer's perceptions of an event at the time he acted, can be critical to the outcome of a case, be it criminal, civil, or disciplinary in nature.[42]

It is also important to know what is truly part of the officer's memory of an event, because of the rules of evidence regarding the weight to be attached to the officer's testimony. The trier of fact

[42] See for example *Berntt v. Vancouver (City of)* 1999 BCCA 345.

needs to know this, and also whether the officer relied upon the video to create a memory because he did not observe or perceive a certain part of the event.

Viewing video evidence taken by some third party is somewhat different from listening to radio transmissions (as alluded to earlier) involving the police officer in question prior to him giving a statement. Presumably the officer was actually participating in making or hearing the various transmissions at the time, and so is simply refreshing his memory from those transmissions. In that case, there is no issue about a third party record being used to supply the officer with additional, and perhaps different, information than what he had through personal involvement, perception and interpretation.

In the case of video evidence taken by a third party camera, this cannot be said to be the same as the radio transmissions, as the video will present a somewhat different view of the events than what the police officer actually personally experienced. It will not be exactly what the officer saw or observed at the time of the events, unless the officer was actually taking the video footage at the time of the events. (With the increasing proliferation of body worn cameras in policing, this will more frequently be the case.) It can therefore be argued that the showing of a video prior to taking a statement has the *potential* to have an improper impact by tainting the officer's memory of an event.

But the important question remains whether this risk of tainting is outweighed by the potential benefits in obtaining reliable, accurate, and truthful evidence from the police officer by way of his statement. The officer's beliefs about key facts and questions (e.g., "How many shots did you fire? How were you positioned? How was the suspect positioned?") can depend upon what the officer perceived and his state of mind. These factors can be highly relevant, but called into question, and/or become confused in the mind of the police officer by viewing the video. There is some risk that an officer will write his statement to fit the video, which may not be in the best interests of the officer, or the administration of justice.

Therefore, in circumstances where a police officer's memory is potentially capable of being tainted, the viewing of the video may be counterproductive to the officer's interest and the interests of justice. While the arguments against showing the video will not always outweigh the benefits, it is important that the potential for a negative, unintended consequence be carefully considered in making an investigative decision whether or not to show video prior to taking a statement. One strategy could be to ask the officer for his best recollection first, then show the video and ask if it refreshes his recollection on any details. This is an approach supported in the research of "force science" expert Dr. Bill Lewinski, who has pointed out the benefits, including that a review of video can be a highly effective tool because it places "the officer back within the context of the incident and thus stimulate[s] his 'recognition recall.'" But Dr. Lewinski also notes the limitations of using video to refresh memory, including lack of context and distortion of depth of field and light levels. Despite the limitations, Dr. Lewinski's view is that an officer "seeing any

available video recordings is vital in many cases, if a comprehensive mining of the officer's memory is the goal."[43]

The Impact of Wood v. Schaeffer 2013 SCC 71

It can be argued that officers should view relevant video before making their field notes. If one accepts this argument, it makes little sense to suggest that officers should not view video before giving statements of events that occurred in the field. In a ruling that touches on this issue, the Supreme Court of Canada considered the question of whether a police officer involved in a shooting was entitled to consult with counsel before preparing notes concerning that incident. This decision was carefully reviewed for any relevance to the subject of this Paper and the authors' conclusion is that the Supreme Court of Canada's findings in *Wood v. Schaeffer* do not alter the findings and proposals made in this Report. A comprehensive analysis of *Wood v. Schaeffer* is included in Appendix 2.

IV Conclusion

The ever-increasing use of CCTV and smartphone video has provided a rich new source of powerful evidence for police investigations, including those involving allegations against police officers. It is crucial for accused police officers, and for public confidence in the police, that investigations be conducted professionally, thoroughly and ethically, and in such a way that mitigates any perceptions of bias. It is worth remembering that if police officers are expected to treat suspects with respect and fairness, and conduct investigations that respect their rights, they too must be treated with the same degree of professionalism.

Therefore, it is important that well thought out practices be developed to ensure both fairness and efficacy in the use of this evidence. Credible research has underpinned other changes in police practice to enhance both the desired outcomes and fairness to the suspects. For example, research was the basis for moving from photo line-ups presented by the lead investigator to sequential photo-packs presented by an investigator unfamiliar with the suspect's identity. Guidelines regarding showing video to police officers involved in incidents subject to *Police Act* and/or criminal allegations must strive for the same level of truth-seeking and fairness.

There are arguments for and against showing police officers video of incidents they were involved in depicting events they observed prior to taking their statements. There does not appear to be any Canadian case law which states that it is improper for a police officer to be shown a video of an event depicting his conduct before he provides a statement, for either a criminal or *Police Act* investigation. In fact, it will sometimes be investigatively desirable to allow police officers to view video depicting their actions before providing a statement. Since the

[43] Force Science News #114: *Should Officers See Video of Their Encounters? Force Science States its Case*, downloaded in May 2014 from http://www.forcescience.org/fsnews/114.html.

video will often show accurately *what* happened, the officer can then focus on explaining *why* he perceived what he did and *why* he conducted himself the way he did. Where it is a *Police Act* matter, he will be able to fulfill his obligation to provide a truthful account of his actions.

In some circumstances, however, there may be a risk in showing the video prior to taking a statement because of concern that this may taint the officer's memory of an event. In criminal matters, either Crown counsel or defence counsel may argue that such tainting adversely impacts upon the credibility, reliability, or accuracy of the officer's statement and testimony. The extent to which that argument may have some merit will depend upon the circumstances. As described in the "Surrey Six" decision, "the factual context is everything."[44]

As with any statement of a suspect in an investigation, it is desirable to obtain the suspect's cooperation. In the investigation of a police officer, if obtaining that cooperation involves giving the officer access to video of events he participated in and observed so that the officer may provide a more accurate and truthful statement than he could without the assistance of that information, then overall the interests of justice will be better served. As long as showing the video increases the probability of obtaining the most accurate statement without improperly tainting the officer's memory, then that is the investigatively sound and fair decision, but to arrive at the right conclusion requires a careful analysis.

There will be cases where it will generally be inappropriate to show an officer video prior to taking a statement. These would include allegations of deceit or dishonesty against the officer where there are investigative reasons not to provide the video. There may also be circumstances where the investigator has a legitimate interest in learning what the respondent officer's perceptions of the event were before providing the video and seeking an updated statement. In the latter case, though, it is important that the officer be provided an explanation, so that he can make an informed decision as to whether to provide a statement (when it is not compelled, as in a *Police Act* investigation). Further, while investigators and prosecutors obviously cannot provide a guarantee that no prejudice will attach to errors made in a statement, a goal of this discussion paper is that investigators and prosecutors become better informed that errors can reasonably be expected in statements describing a stressful event.

If the investigator believes it would compromise the investigation to show the respondent officer the video prior to taking a statement, then he should be able articulate the reasons to the officer, i.e., *why* it would *improperly* impact upon his statement or answers to questions. This is no different than the explanation that would be necessary to give an officer who was told he could not refer to his notes or other contemporaneous records that would assist in providing an accurate statement. Like any other investigative strategy, it must be lawful and proportionate, and the investigator must be prepared to articulate why he took the steps he did. As suggested from the research of Dr. Bill Lewinski, "Where discrepancies exist, investigators need to be knowledgeable and sensitive enough, in the absence of other incriminating evidence, to explain to the officer, the administration, and the public how an officer's perception of an incident can be

[44] *R v. Haevischer,* 2014 BCSC 1863, at paragraph 496.

vastly different from what's seen on a video recording and still be legitimate."[45] Clear policy guidelines may assist in this regard.

It should be noted, however, that efforts to control the viewing of incident video by involved officers will often be quixotic. As was shown in the Sammy Yatim shooting in Toronto, cell phone video may be posted very quickly to the Internet before it can be secured. With the increase in "citizen journalists," investigators will have to adapt to the reality that the officers involved will often have seen publicly available video prior to being interviewed, regardless of the decisions investigators may have made. (This reality will have to be addressed during interviews of respondent officers, such as by a standard preamble canvassing the issue that asks the officers to attempt to disabuse their minds to the extent possible of video they have seen and to draw from their own memories in describing the event.)

Generally, anything which can truly be viewed as simply an aide memoire should be made available to a police officer prior to him giving a statement.[46] This will further the interests of finding the truth, since it will enhance the accuracy and reliability of that officer's statement, without undue risk of tainting it. The objectives are the same regardless of whether the purpose of the statement is for a criminal investigation or a *Police Act* investigation, both of which are, simply put, to find out the truth of what happened, and whether the officer acted on objectively reasonable grounds. However, when it comes to video of police involved incidents, the question of whether it can be considered simply an aide memoire is more complex. Therefore, a careful, case-by-case analysis is necessary. There is ample justification for the development of guidelines and policies that allow for police officers to view such video prior to providing a statement in those cases where a careful risk/benefit analysis justifies it, rather than applying a rigid policy to every case.

In the future, with the expected proliferation of police body-worn video systems, it may be that such recordings will become "notes" of the officers wearing them. As the law seems increasingly to require police officers to articulate their reasons for the actions they took, a possible outcome is that written notes will be limited to the officer's reasons for actions taken, and body-worn video will provide the record for everything else.

[45] Force Science News, *op. cit.*

[46] However, this should not impose a positive obligation on the investigators to always seize all incident video before interviewing the officer. In some cases, it may be preferable to interview the officer first in order to obtain preliminary information about the incident and then seize the video. Or it may not be practical to seize all the incident video before interviewing the officer. The possibility of finding additional video after a statement is taken also raises the question of whether investigators have an obligation to show the new video to the officer and take an additional statement.

V Recommendations

1. Police agencies (and any agency responsible for investigating allegations against police officers) should develop clear, well-founded guidelines regarding showing video to respondent police officers of events they were involved in and observed. The more harmonized these guidelines are across jurisdictions, the better for all concerned. A draft model policy is included for consideration in Appendix 1.

2. Generally speaking, the guidelines should clarify that when the video can appropriately be considered an aide memoire, and a risk/benefit analysis supports showing the video prior to taking a statement, then this should occur.

3. Police body-worn video recordings should be considered the evidentiary equivalent to an officer's notes and made available to a respondent officer before taking a statement.

4. The guidelines should provide assistance in determining whether there are factors and circumstances that indicate the investigative downsides to showing the video outweigh the benefits. (For example, in the Vann Hubbard case, it is very difficult to see how there was any downside to showing the video; it was complete, unobstructed and accurate. There was nothing investigatively to be gained in refusing to allow the officers to view the video, but much risk, in terms of producing an inaccurate and unfairly obtained statement. The Pritchard video of the Dziekanski incident was somewhat different, in that the view was partially obstructed.)

5. Where it is determined that the investigative downsides outweigh the benefits of providing the video to the respondent officers prior to a statement, it may be appropriate that there be a two-stage statement-taking process. In the first stage, the respondent officer would provide a statement without having watched any video. Investigators and prosecutors would be mindful of the potential for honest errors because of the complexity of perception and memory, particularly regarding stressful, rapidly unfolding events.

   The second stage would be an amended statement taken with the benefit of the video being viewed. Any changes or additions would then be duly noted. The extent of discrepancies, any explanation given for those, would go to the weight to be attached to the officer's testimony later. Again, errors would need to be considered in the context of the research regarding perception and memory without an automatic inference of dishonesty.[47]

[47] Such a process would obviously have to be available to non-police suspects in criminal offences unless it can be articulated why it shouldn't be. For example, in many criminal cases, the suspect denies committing the offence upon arrest, so there may be investigative reasons to show video only after taking an initial statement. It should be noted, however, that it is quite routine to show suspects video evidence in the course of a formal interview to elicit a confession, or at least to obtain an admission that the suspect is the party shown in the video. In other words, this procedure is not "new." (In contrast, the opposite situation is almost always true of an on duty police incident: the identity of the officer is not in question, only the justification for the actions taken.)

APPENDIX 1 – DRAFT MODEL POLICY

Showing Incident Video to Respondent and Witness Police Officers Subject to Investigation

Policy

In all police investigations, regardless of whether the subjects are police officers, the purpose is to find the truth. Where the subject is an on-duty police officer, the results will determine whether the police officer had lawful grounds to take the action he or she did (such as in a criminal investigation into use of force). For a *Police Act* investigation, a respondent officer is compelled to give a statement and answer questions to provide an accurate and truthful account of his actions. All investigative decisions should be directed towards accomplishing these goals in a professional manner consistent with good investigative practice, fairness, and respect for the rights of the respondent officer.

With the increasing availability of video evidence showing police-involved incidents, there are some circumstances where the video should be considered an "aide memoir" in the same way as contemporaneous notes, Computer Aided Dispatch printouts, and audio of police radio transmissions. This is particularly true of police body worn cameras. It will sometimes be investigatively desirable to allow police officers to view other video depicting their actions before providing a statement. Since the video will often show accurately *what* happened, the officers can then focus on explaining *why* they perceived what they did and *why* they conducted themselves the way they did.

Therefore, on a case by case basis, careful consideration must be given to providing respondent and witness officers access to the video to assist the officers in providing an accurate statement, particularly with regards to such issues of distances and the sequence of events. It is important to understand that obtaining a factual statement is not a "memory test," and that a statement that is inconsistent with video evidence may be indicative of the frailties of human memory, not a lack of truthfulness. Investigative decisions must be made based on the best information and analysis on this subject available.

In some circumstances there may be a risk in showing the video prior to taking a statement because of a concern that this may taint the officer's memory of the event. Such tainting could adversely impact upon the credibility, reliability, or accuracy of the officer's statement and any subsequent testimony.

When the benefits to the investigation outweigh the risks, police officers should be permitted to view video showing events they observed and participated in prior to providing a statement. This will enhance the accuracy of officers' statements, assist in determining the truth, and be fairer to the respondent officer. The benefits would likely not outweigh the risks in cases of alleged deceit or corruption, circumstances where there is a legitimate interest in learning what

the respondent officers' perceptions of the event were before providing the video, or circumstances where the video does not provide an accurate depiction of what the officer could have seen.

Guidelines/Procedure

1. Respondent police officers should only be provided access to video of an incident if they could have observed the events depicted and/or their actions are depicted in the video.

2. Respondent officers should not be shown video of events they could not have seen themselves.

3. Police body-worn video recordings should be considered the evidentiary equivalent to an officer's notes and made available to a respondent officer before taking a statement.

4. If identification is an issue in the investigation, then the possibility that the police officer's identification of a person is a result of being shown a video rather than their recollection of the person must be considered.

5. For *Police Act* investigations, to avoid the potential for allegations about, or the reality of, improper "witness tainting," requests for a copy of such video in advance of an interview should generally be declined.

6. Video should be shown in a controlled environment so that the circumstances may be carefully documented. It may be prudent to videotape the member reviewing the video in the company of the investigator.

7. For criminal investigations, respondent officers have the same *Charter* rights as all suspects, including the right not to provide a statement or answer questions. While the investigating officers may desire to control the environment as described above, if the "suspect" officer wishes to review the video showing their actions and/or events they observed prior to providing a statement or being interviewed, then serious consideration must be given to this request. The benefits of obtaining cooperation, i.e., a statement from the respondent officer, must be weighed against the risks of providing advance access to the video. A decision must be made about which option best serves the interest of obtaining an accurate statement.

8. Considerations must include what is to be gained from seeking a statement prior to the officers watching the video, given that the purpose of the investigation is to determine the truth of what occurred, not to test the police officer's memory against accurate video which clearly shows the entire interaction. In such cases, there may be more value in showing the video and asking the respondent officers to explain the actions they took, and to describe elements that could not be shown in the video (e.g., what was said if there's no audio, why the officers perceived certain actions the way they did, etc.).

9. In cases where the events are clearly, incontrovertibly shown in available video, any value around determining "feelings and perceptions" may be far outweighed by the value gained by having the officer use the video as an aide memoire in providing an accurate statement.

10. However, if the officer's perceptions of events are seen as an important factor to be considered in determining the facts and obtaining a just result, then anything which may interfere with, or influence improperly, the officer's perceptions at the time he acted can be critical to the outcome of a case.

11. In such cases, it may be advisable to conduct a two-stage interview:

    a. In the first stage, the respondent officer would be asked to provide a statement about his perceptions of what occurred. Investigators and prosecutors would be mindful that errors of fact do not necessarily indicate a lack of truthfulness, particularly around issues such as times, distances, and sequence of events in a rapidly evolving incident.

    b. In the second stage, the officer would be allowed access to the video of the incident to refresh his memory and assist him in ensuring the statement is amended if necessary to be accurate. No automatic inference of untruthfulness should be drawn simply from inaccuracies in the initial statement.

12. In any circumstance in which an officer will be shown video at any point in the statement-taking process, if there are multiple video sources capturing an incident from different angles, only provide access to the video which best shows what the officer could have seen unless there are compelling investigative reasons to proceed differently.

13. Ensure that an exact copy of the video shown to the member is preserved as evidence. Investigators must be able to say precisely what video was shown to the member and all the surrounding circumstances. In addition, any video of the incident the member viewed outside the control of the investigation (e.g., video posted on the Internet) should be canvassed in the interview and a copy preserved as well. It may be advisable to have a standard preamble to read to an officer canvassing the issue of whether they have seen any video of the incident from any source (media, YouTube, etc.) Excellent documentation is crucial.

APPENDIX 2: An Analysis of *Wood v. Schaeffer* 2013 SCC 71

It can be argued that officers should view relevant video before making their field notes. If one accepts this argument, it makes little sense to suggest that officers should not view video before giving statements of events that occurred in the field. In a ruling that touches on this issue, the Supreme Court of Canada considered the question of whether a police officer involved in a shooting was entitled to consult with counsel before preparing notes concerning that incident.

While the focus of the Court's decision was upon the specific regulatory regime which governed the police officer's duty to prepare notes under that regime in Ontario, the Court discussed the purpose and function of police notes, and the reasons why the 6-3 majority held that a police officer should not be permitted to consult with counsel prior to the preparation of duty notes. (A different analysis was applied to the issue of subsequently giving a statement to the Special Investigations Unit, as would also be required.)

The majority held that consulting with counsel at the note-making stage impinges on the ability of police officers to prepare accurate, detailed and comprehensive notes in accordance with their duty under s. 9 of the regulation. Further, the Court found that permitting officers to consult with counsel before preparing their notes runs the risk that the focus of the notes will shift away from the officer's public duty toward his or her private interest in justifying what had taken place. This shift would not be in accord with the officer's duty.

The majority commented [at para 67] that "police officers do have a duty to prepare accurate, detailed, and comprehensive notes as soon as practicable after an investigation." The reason that a police officer should not be permitted to consult with counsel prior to preparing his notes was because such consultation "creates a real risk that *the focus* of an officer's notes will shift away from his or her *public duty* under s. 9, i.e., making accurate, detailed, and comprehensive notes, and move toward his or her *private interest*, i.e., justifying what has taken place, the net effect being a failure to comply with the requirements of the s. 9 duty" [at para 72]. The Court held [at para 77], "this creates a real risk that the focus of an officer's notes will shift – perhaps overtly, perhaps more subtly – away from the rather mechanical recitation of *what* occurred (which is required by their duty) toward a more sophisticated explanation for *why* the incident occurred (which detracts from that duty)."

With respect to the question of whether or not consultation with counsel prior to the preparation of notes would undermine the independence of a witness of officer's account of an event, the majority stated [at para. 71]:

> And as far as independence is concerned, although I acknowledge the possibility of some risk, I am not prepared to find that consultation with counsel would, in fact, undermine the *independence* of a witness or subject officer's account. Such a conclusion is inconsistent with the position of trust counsel rightly enjoy in our justice system.

The majority concluded that in this case:

> [80] In short, Acting Sgt. Pullbrook's notes read like a prepared statement designed, at least in part, to justify his and his partner's conduct, unlike a set of police notes that simply record the events in a straightforward fashion. And while I would not suggest there is anything inaccurate or dishonest in the notes as a result of counsel's participation, an officer's notes are not meant to provide a "lawyer-enhanced" justification for what has occurred. They are simply meant to record an event, so that others – like the SIU Director – can rely on them to determine *what* happened. In this case, that is what the SIU Director was unable to do.

The minority decision would have permitted a police officer to consult with counsel prior to the preparation of his notes, provided that the consultation did not affect the drafting of the notes. The minority held that the police officer's notes must remain the result of a police officer's independent account of the events, and that the notes should provide a full and honest record of the officer's recollection of the incident in the officer's own words:

> We agree with [Sharpe J.A. in the Ontario Court of Appeal] that police officers should not be allowed to consult about the drafting of the notes themselves where such consultation affects the independence of notes. The contents and drafting of the notes should not be discussed with counsel. The drafting should not be directed or reviewed by counsel. The notes must remain the result of a police officer's independent account of the events. However, eliminating any form of consultation before the drafting of the notes is an entirely different matter. Such an overly cautious approach takes no account of the basic freedoms that police officers share with other members of society. Everyone is entitled to seek the advice of a lawyer.

The questions arises, then, as a result of the decision in *Wood v. Schaeffer*, of whether a police officer may look at incident video before preparing his **notes**, or whether the viewing of such video would be contrary to the underlying purpose and objective of notes, as articulated in both the majority and minority findings in that case.

It must be kept in mind that a police officer is duty-bound to provide accurate notes of what happened, which gives rise to a series of questions:

- Does the viewing of video by an officer prior to the preparation of his notes give rise to a real risk that the officer will fail to comply with his duty, by providing inaccurate notes about what happened, as a consequence of viewing the video?

- Does the viewing of video give rise to a real risk that the officer's notes will not be an accurate account of their independent account of the events (that being the minority's position as to the purpose of police notes expressed in Wood v. Schaeffer)?

- Will the viewing of the video have a tendency to lead the officer to prepare his notes in such a manner that they focus upon justifying his actions, as opposed to complying with his duty to prepare notes?

- Would the viewing of the video impinge on the ability of police officers to prepare accurate, detailed and comprehensive notes in accordance with the duty?

- Does the viewing of a video provide the officer with a "video enhanced" ability to provide accurate notes, in such a way that it is at odds with the officer's public duty, so as to impinge upon the ability of that officer to comply with the duty to provide accurate, detailed and comprehensive notes, or that is not reflective of that officer's independent account of events?

- Would viewing video somehow tend to result in the notes that the officer prepares being either inaccurate or otherwise contrary to the requirements articulated by the majority in *Wood v. Schaeffer*?

This Paper argues that the viewing of video prior to notes being made does not give rise to one of the key concerns expressed by the majority in *Wood v. Schaeffer* relating to "appearances":

> [6] Permitting police officers to consult with counsel before their notes are prepared is an anathema to the very transparency that the legislative scheme aims to promote. Put simply, appearances matter. And, when the community's trust in the police is at stake, it is imperative that the investigatory process be – and appear to be – transparent.
>
> [7] Manifestly, the legislature did not intend to provide officers with an entitlement to counsel that would undermine this transparency. The SIU's governing regulation hews closely to the specific recommendations of those tasked with proposing reforms – down to many of its specific provisions. Read in the full light of its history and context, it is apparent that the regulation was not meant to afford officers an entitlement to consult with counsel before they complete their notes.

The reason for this conclusion is that the process of the officer viewing the video prior to making his notes will be completely open to scrutiny, unlike the inability to examine the communications between the officer and his lawyer (due to solicitor client privilege).

Therefore, to expand on the analysis, the following questions are posed:

What is the primary purpose of police notes? Is the purpose to be the first record made by the officer about his own completely unaided memory or recollection of an event, unaided in any way by extrinsic video information that recorded that officer's conduct, i.e., without the use of a visual aid that can assist the officer in making (more) accurate, detailed notes, presumably based upon his recollection, about *what he did*?

Or, is the purpose of notes to be the officer's first record of his aided recollection, so as to make the notes (more) accurate, detailed, and complete than what they might otherwise have been, but for the aid provided by viewing the video?

Also, which is more likely to result in the notes reflecting the truth: those that are aided by viewing video, or unaided?

In answer to these questions it is suggested that the purpose of notes is not to demonstrate how inaccurate a police officer's recollection of an event may be. No public benefit is served from demonstrably inaccurate notes, but much public, and private, harm can result. Therefore, the Court's findings in *Wood v. Schaeffer* do not alter the findings and proposals made in this Report.

APPENDIX 3
PRACTICES OF CANADIAN POLICE AGENCIES

Police Agency	Written Policy / Guidelines	Summary of Current Practice
RCMP - E Division	None	The decision is made on a case by case basis but the practice is to show the video prior to the member providing a statement, taking into consideration that it isn't from a significantly different angle.
Vancouver Police Department	Professional Standards Section Directive	The decision is made on a case by case basis. Generally, any video that shows the respondent police officer in it is shown to the member prior to a statement being provided.
Calgary Police Service	None	For criminal investigation it is determined on a case by case basis depending on the type of investigation (criminal or Police Service Regulations), investigative strategy, etc. In relation to PSR investigations, video is often shown before members provide a statement, as is in-car video or seized video. Presently in the process of writing SOPs.
Edmonton Police Service	None	Any independent video from a private business, citizen, police facilities would not normally be disclosed. The general practice is that if the video has evidentiary value, most of the time it would not be shown. If the member is facing serious jeopardy, may have EPS lawyer make the final decision on disclosure.

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Alberta Serious Incident Review Team (ASIRT)	None	Determine whether or not to show the video on a case by case basis. If it is reasonable and helpful for the member to see it, will show it and in use of force investigations, lean toward showing the video. In-car video, dash cams and body-worn cameras can be used by the members for evidence and believe members should have access to this evidence prior to providing a statement.
Law Enforcement Review Agency (LERA)	None	LERA investigates administrative process complaints and not criminal complaints. If the video is presented by the complainant when they register their complaint, it will be provided to the Respondent officer(s). If the video is from another source, the Respondent officer(s) is advised of its existence and, in most cases, their legal counsel will request to review it prior to the interview. Access to the video is provided as requested.
Winnipeg Police Service	None	Do not provide the video in regulatory or criminal investigations. For most criminal investigations witness and respondent officers would have lawyers accompany them. The video is not provided and there is very little disclosure.
Regina Police Service	None	In general, the video is not disclosed but during the interview may mention there is video. Often a member's lawyer will request the video for criminal or disciplinary investigations.

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Saskatoon Police Service	None	Providing the video prior to obtaining a statement would be on a case by case basis, dependent on the circumstances of the complaint and incident. There is Policy in relation to accessing Saskatoon Police Service Audio and Video Systems.
Halton Regional Police Service	None	Generally request a statement beforehand. Any serious allegations are investigated by SIU.
Peel Regional Police	None	Presently does not have a service wide directive or policy. The video is viewed as an investigative tool and the decision to provide it, or not, prior to obtaining a statement is decided on a case by case basis.
Office of the Police Independent Review Director (OIPRD)	None	In most cases, a written statement is not obtained from an officer prior to an interview being conducted. The video would be shown during the course of the interview and not provided beforehand.
Ottawa Police Service	None	Generally do not provide the video prior to obtaining a statement. It would be up to the investigating officer and depend on the type of investigation. Case by case decision.
Special Investigation Unit (SIU)	None	As a matter of practice do not show video prior to obtaining a statement.
Toronto Police Service	None	Prefer to obtain the member's rendition of events, their perspective. Will look at providing the video on a case by case basis depending on the circumstances.
Halifax Regional Police	None	There is no obligation for HRP members to provide a statement. Investigators would determine whether or not to provide the video on a case by case basis. Prefer to have the member's version from their perspective.