English translation of the judgment of the Court by SOQUIJ

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| Procureur général du Québec c. Fédération des policiers et policières municipaux du Québec | 2024 QCCA 537 |
| COURT OF APPEAL |
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| CANADA |
| PROVINCE OF QUEBEC |
| REGISTRY OF | MONTREAL |
| No.: | 500-09-030114-227 |
| (500-17-108241-194) |
|  |
| DATE: | April 30, 2024 |
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| CORAM: | THE HONOURABLE | ROBERT M. MAINVILLE, J.A.CHRISTINE BAUDOUIN, J.A.FRÉDÉRIC BACHAND, J.A. |
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| ATTORNEY GENERAL OF QUEBEC |
| APPELLANT/INCIDENTAL RESPONDENT – Defendant |
| v. |
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| FÉDÉRATION DES POLICIERS ET POLICIÈRES MUNICIPAUX DU QUÉBEC |
| FRATERNITÉ DES POLICIERS ET POLICIÈRES DE MONTRÉAL |
| DOMINIC OUELLET |
| ANTOINE BROCHET |
| RESPONDENTS/INCIDENTAL APPELLANTS – Plaintiffs |
| and |
|  |
| ASSOCIATION DES POLICIÈRES ET POLICIERS PROVINCIAUX DU QUÉBEC |
| IMPLEADED PARTY/INCIDENTAL IMPLEADED PARTY – Impleaded party |
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| JUDGMENT |
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1. The Attorney General of Quebec is appealing from a judgment rendered on June 16, 2022 (corrected on June 23, 2022), by the Superior Court, District of Montreal (the Honourable Marc St-Pierre), granting in part the respondents’ application for judicial review and declaring invalid certain provisions of the *Regulation respecting the conduct of the investigations of the Bureau des enquêtes indépendantes* enacted under the *Police Act*.
2. The respondents, as incidental appellants, also appeal this judgment, seeking to invalidate other provisions of the regulation in question.
3. For the reasons of Mainville J.A., with which Baudouin and Bachand JJ.A. agree, **THE COURT**:
4. **DISMISSES** the principal appeal;
5. **DISMISSES** the incidental appeal;
6. **THE WHOLE**, without legal costs.

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|  | ROBERT M. MAINVILLE, J.A. |
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|  | CHRISTINE BAUDOUIN, J.A. |
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|  | FRÉDÉRIC BACHAND, J.A. |
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| Mtre Alexandre Duval |
| Mtre Samuel Chayer |
| Mtre Andréa Boivin-Claveau  |
| bernard, roy (justice-québec) |
| For the appellant/incidental respondent |
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| Mtre Mario Coderre |
| Guillaume Rioux, articling student |
| rbd avocats |
| For the respondents/incidental appellants |
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| Mtre André Fiset |
| law firm of mtre André Fiset |
| For the impleaded party/incidental impleaded party |
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| Date of hearing: | October 3, 2023 |
| Date taken under advisement: | March 1, 2024 |

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| REASONS OF MAINVILLE J.A. |
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1. The Court has before it an appeal from a judgment rendered on June 16, 2022 (corrected on June 23, 2022), by the Superior Court, District of Montreal (the Honourable Marc St-Pierre),[[1]](#footnote-1) concerning investigations by the Bureau des enquêtes indépendantes (“BEI”), created under the *Police Act*,[[2]](#footnote-2) conducted according to the procedure established by the *Regulation respecting the conduct of the investigations of the Bureau des enquêtes indépendantes*.[[3]](#footnote-3)
2. The conclusions in that judgment are as follows:[[4]](#footnote-4)

[translation]

[82] **GRANTS** in part the application for judicial review by the plaintiffs;

[83] **DECLARES** invalid and of no force or effect with respect to a police officer *involved* subparagraph (2) of the first paragraph of section 1 of the *Regulation respecting the conduct of the investigations of the Bureau des enquêtes indépendantes* because it infringes their right to protection against self-incrimination.

[84] **DECLARES** that the police officer who believes that they are *involved* need not draw up an account for the defendant Bureau des enquêtes indépendantes and that the police force director (the same defendant) cannot forward the occurrence report or other statement by an officer who declares that they are *involved* unless it appears after the fact that they are not involved;

[85] **DECLARES** that the police officer involved has the right to silence when meeting with investigators of the defendant Bureau des enquêtes indépendantes and that the Bureau must ensure that its investigators inform the police officer *involved* of this right before the meeting begins;

[86] **DECLARES** that the defendant Bureau des enquêtes indépendantes must give the police officer concerned its account, notes by investigators of their meeting with the officer, and where applicable, any other statement in the form of a deposition, report, or other document signed by the officer when the officer’s status changes from witness police officer to police officer *involved*;

[87] **WITHOUT** legal costs.

[Italics in original; footnotes omitted.]

1. The Attorney General of Quebec (“AGQ”) appeals from this judgment to have all the conclusions quashed.
2. Although they support the judgment’s conclusions, the Fédération des policiers et policières municipaux du Québec, the Fraternité des policiers et policières de Montréal and police officers Dominic Ouellette and Antoine Brochet (collectively the “incidental appellants”) also appeal from the judgment to have the Court declare additional provisions in the *Regulation* invalid.

**BACKGROUND**

1. Police officers hold a particular place in society. They are responsible for ensuring the public peace and repressing crime, functions that are essential to every modern society.[[5]](#footnote-5) To allow them to carry out their duties, which are indispensable to citizens, both the common law and the legislation grant police officers significant rights and legal protections.
2. Thus, the police may use as much force as is necessary to carry out their duties, provided this use is based on reasonable grounds.[[6]](#footnote-6) A police officer may even use force that is intended or is likely to cause death or grievous bodily harm: (a) if it is necessary for the self-preservation of the person or the preservation of any one under that person’s protection from death or grievous bodily harm;[[7]](#footnote-7) or (b) if the police officer believes on reasonable grounds that the force is necessary for the purpose of protecting the police officer or any other person from imminent or future death or grievous bodily harm.[[8]](#footnote-8)
3. Moreover, contrary to almost all citizens, police officers may possess, carry, and use firearms in the course of their duties.[[9]](#footnote-9) They are therefore those rare individuals who may openly carry and use a firearm in a public place for the purpose of their duties.
4. The police also have many powers granted by law to repress crime, including broad powers to arrest[[10]](#footnote-10) and to enter a dwelling-house,[[11]](#footnote-11) with or without a judicial warrant depending on the circumstances.
5. Last, the law protects police officers by establishing offences that are liable to harsh punishment for individuals who obstruct officers in the execution of their duties,[[12]](#footnote-12) assault them,[[13]](#footnote-13) or attempt to disarm them.[[14]](#footnote-14)
6. The integrity of police officers is particularly scrutinized, given their role and the significant powers they have been granted. As elsewhere in Canada, the Quebec legislature, in the *Police Act*,[[15]](#footnote-15) established standards of conduct for police officers, in particular through various codes of ethics, including the *Code of Ethics of Québec Police Officers*, which establishes the duties and standards of conduct of police officers in their relations with the public.[[16]](#footnote-16) To this end, the *Police Act* establishes complaint and investigation mechanisms, including internal investigations by the police force[[17]](#footnote-17) and investigations by the Police Ethics Commissioner where the complaint is by a member of the public.[[18]](#footnote-18)
7. As discussed in greater detail below, the scope of internal investigations by the police force has been limited in recent years. In general, they no longer focus on several types of investigations involving police officers given the BEI’s mandate. We will revisit this.
8. Thus, with respect to the Sûreté du Québec, an internal investigation may concern the conduct of a police officer that could compromise the exercise of their duties and functions and result in the police officer’s suspension or dismissal.[[19]](#footnote-19) Similar provisions also apply to the other police forces.[[20]](#footnote-20) However, if an internal investigation reveals an allegation concerning a criminal offence, the Minister must then be notified and may order an independent investigation, specifically by the BEI.[[21]](#footnote-21) If the offence is of a sexual nature, however, the BEI must conduct the investigation, as it must when an investigation concerns a police officer involved in an injury or death caused by the use of their firearm during a police intervention.[[22]](#footnote-22)
9. Ethics investigations are conducted by the Police Ethics Commissioner and may result in a citation before the Tribunal administratif de déontologie policière (formerly the Police Ethics Committee),[[23]](#footnote-23) which is charged with hearing and disposing of any citation in matters of police ethics.[[24]](#footnote-24) The Tribunal administratif de déontologie policière decides whether the conduct of a police officer is a transgression of the *Code of Ethics of Québec Police Officers* and, if so, imposes a penalty on the officer, which may be a reprimand for less serious offences or a dismissal for the most serious offences.[[25]](#footnote-25) The *Act* provides that the Tribunal’s decisions may be appealed before a Court of Québec judge.[[26]](#footnote-26)
10. That being so, although a criminal offence may constitute an ethics breach by a police officer, the Tribunal administratif de déontologie policière has no criminal jurisdiction over police officers. The regular criminal investigative process applies to determine whether a police officer’s conduct, for example, the use of excessive force, may result in criminal charges. The criminal investigative process into police conduct has evolved considerably over time.
11. For many years, the police force itself conducted every criminal investigation into their own officers through internal investigations, including when a person died or suffered grievous injury during a police intervention. Rightly or wrongly, these internal investigations were perceived by many as conducive to conflicts of interest or, at the very least, subject to some form of complacency. Whether or not these criticisms were founded, Quebec has abandoned internal investigations into police officers involved in a death or injury during a police intervention.
12. Thus, based on section 289 of the *Police Act*, which states that the Minister of Public Security may order a police force designated by the Minister to conduct an investigation into “an allegation against a police officer ... concerning a criminal offence”,[[27]](#footnote-27) a ministerial policy was adopted effective November 25, 1996, and incorporated into the Guide to Police Practices (the “ministerial policy”). This ministerial policy put an end to internal investigations into police officers involved in a death or injury during a police intervention.
13. The ministerial policy applied when death, serious injury that could lead to death, or injury resulting from the use of a firearm occurred during a police intervention or while in police custody. Because the enabling legislative provision allowed the Minister to do so where a criminal offence was alleged, it must necessarily be concluded that the investigation contemplated by the ministerial policy of police officers involved in a death or injury during a police intervention was a criminal investigation.
14. For this type of case, the Minister of Public Security designated a police force other than the one to which the police officers involved were attached to conduct the investigation into these events. As a general rule, the Sûreté du Québec was designated when the incident involved police officers from another police force. When Sûreté du Québec police officers were involved, the Montreal police force or, based on geographic location, the Québec police force, conducted the investigation.
15. Once the investigation contemplated by the ministerial policy was completed, the police force designated to conduct the investigation sent its report to the Director of Criminal and Penal Prosecutions (the “DCPP”), who decided whether criminal prosecution was warranted. The investigation report was not made public and the DCPP publicly disclosed only its decision on whether to lay criminal charges.
16. The procedure under the ministerial policy was criticized, particularly by the Ombudsman in a February 2010 report titled “The Québec Investigative Procedure for Incidents Involving Police Officers – For a Credible, Transparent, and Impartial Process That Inspires Confidence and Respect”[[28]](#footnote-28) (the “Ombudsman’s Report”).
17. The Ombudsman’s Report identified flaws in investigations conducted under the ministerial policy, including, in certain cases, the late submission of incident reports by the police officers involved, the failure to question certain police officers, the failure to separate the police officers involved from each other before they were questioned, etc. The Ombudsman was of the view that these flaws undermined the credibility of the investigative process conducted under the ministerial policy, which had to be reviewed.[[29]](#footnote-29)
18. The Ombudsman’s Report also identified the lack of transparency of the investigative process and decision-making under the ministerial policy, given that the only information made available to the public was an announcement that an investigation was being opened by an assigned police force, that an investigation report had been submitted to the DCPP, and that the DCPP had decided whether to lay charges, nothing more.[[30]](#footnote-30) The Ombudsman remarked that this lack of transparency undermined the credibility of the process and therefore recommended more complete public communications during an investigation and when the DCPP decided not to criminally prosecute after the investigation.[[31]](#footnote-31)
19. The Ombudsman’s Report also noted that the investigation under the ministerial policy was conducted by police officers from another police force, which could result in an apprehension of bias given that active police officers were investigating other active police officers.[[32]](#footnote-32) The Ombudsman therefore recommended that henceforth these investigations be conducted by an independent body overseen by competent and qualified civilians who reflect society’s sociocultural diversity.[[33]](#footnote-33) The Ombudsman’s Report therefore recommended that a Special Investigations Bureau be created and set out a series of parameters for its structure and functioning.[[34]](#footnote-34)
20. In 2013, the National Assembly largely used these recommendations to enact the *Act to amend the Police Act as concerns independent investigations*.[[35]](#footnote-35)
21. That law established the BEI, whose mission is to conduct certain investigations into police officers, including when a police officer is involved in a death or injury during a police intervention. We will return to this. The BEI is a police force for the purpose of fulfilling its mission. We will return to this as well.
22. The rules concerning the conduct of BEI investigations following a death or injury sustained during a police intervention and the obligations of the police officers during these investigations are established by government regulation.[[36]](#footnote-36) In 2016, the government enacted such a regulation,[[37]](#footnote-37) the *Regulation respecting the conduct of the investigations of the Bureau des enquêtes indépendantes*.[[38]](#footnote-38) The relevant provisions of this *Regulation* are reproduced in the schedule.
23. The *Regulation* provoked great distrust among police associations, particularly with respect to the obligation of the police officer involved to draw up an account of the occurrence and submit it to the BEI, and the obligation to attend at an interview with BEI investigators. The BEI and the police associations concerned could not reach a consensus on how BEI investigations should proceed, despite the many exchanges between them.
24. In sum, the AGQ submits that a police officer involved in a death or injury sustained during a police intervention has an obligation to draw up an account of the occurrence and submit it to BEI investigators for the purposes of their investigation.[[39]](#footnote-39) Contrary to the incidental appellants, the AGQ is of the view that this measure does not infringe the rights of the police officer involved given that, if criminal charges are subsequently laid against the officer, the account cannot be used against the officer during their criminal trial because it was not freely and voluntarily given.[[40]](#footnote-40)
25. Moreover, even though a police officer involved is compelled by the *Regulation* to attend at an interview with BEI investigators, the AGQ acknowledges that this police officer may nevertheless refuse to answer questions posed during the interview. However, the AGQ argues that BEI investigators have no obligation to caution the police officer involved during the interview, unless the officer is a suspect in a criminal offence they committed during the police intervention.
26. The incidental appellants firmly object to this procedure they claim infringes the police officers’ fundamental rights under both the common law and the *Canadian Charter of Rights and Freedoms* (the “*Canadian Charter*”).
27. In support of its position, the AGQ submits that BEI investigations under the *Regulation* are not necessarily criminal investigations. Thus, as the BEI director explained in a report, [translation] “when an investigation begins, contrary to an investigation into an allegation of criminal offence, the police officer [involved] is not a suspect and is not the subject of any allegation of criminal offence”.[[41]](#footnote-41) Moreover, the AGQ acknowledges that if evidence obtained during the course of the investigation appears to indicate that a police officer may have committed a criminal offence, BEI investigators must immediately consider the officer as a suspect and inform the officer thereof by giving them the usual cautions.[[42]](#footnote-42)
28. On June 10, 2019, the incidental appellants applied for judicial review before the Superior Court to challenge the constitutionality of several aspects of the *Regulation*. The case was heard from May 9 to 13, 2022, by St-Pierre J., who rendered judgment on June 16, 2022.

**TRIAL JUDGMENT**

1. The trial judge identified five principal issues.
2. The first concerns the validity of the impugned provisions of the *Regulation* with respect to the division of powers under ss. 91 and 92 of the *Constitution Act, 1867*. The judge considered, at first glance, [translation] “that certain provisions of the *Regulation* are *ultra vires* because they essentially concern the conduct of a criminal investigation – which falls under 91(27) [of the *Constitution Act, 1867*]”.[[43]](#footnote-43) As such, the judge said that he was bound by the Supreme Court of Canada’s judgment in *Wood v. Schaeffer*[[44]](#footnote-44) which, however, did not deal with a constitutional issue and even less the division of powers.[[45]](#footnote-45) He found that [translation] “the purpose of the *Regulation* is transparency, which corresponds precisely to what counsel for the [AGQ] argues is its *pith and substance*”.[[46]](#footnote-46) By subsuming the purpose of transparency with the pith and substance, the judge held that the *Regulation* is valid with respect to the division of powers.
3. The second issue identified by the judge was whether the obligation under the *Regulation* that the police officer involved submit an account of the occurrence to BEI investigators infringes their right against self-incrimination.[[47]](#footnote-47) While acknowledging that in *Wood v. Schaeffer*,[[48]](#footnote-48) the Supreme Court of Canada stated that a police officer has a duty to make notes on the events that transpired while the officer was on-duty, the judge noted that under the Ontario investigatory scheme at issue in that case, the report of the police officer involved was not submitted to the body responsible for investigating the incident.[[49]](#footnote-49)
4. The judge then rejected all of the AGQ’s arguments that the rights of the police officer involved are protected even if the officer submits their account to the BEI investigators because that account cannot be used against the officer in a criminal proceeding.[[50]](#footnote-50) The judge instead found that this obligation infringes on the police officer’s right not to be compelled to incriminate themselves and that accordingly, the obligation under the *Regulation* was invalid and unenforceable against the officer.[[51]](#footnote-51)
5. The third issue dealt with by the judge was whether [translation] “the *Regulation*, by requiring the police officer to meet with [BEI] investigators, infringes the officer’s right to silence” and whether [translation] “the police officer should be cautioned”.[[52]](#footnote-52) Relying on the AGQ’s arguments that the police officer involved did not have to answer the investigators’ questions, the judge held that this part of the *Regulation* is valid.[[53]](#footnote-53) However, the judge added the police officer involved must be cautioned as soon as the meeting with investigators begins. The judge therefore decided that he [translation] “would issue a declaratory order that the [BEI] must inform the police officer *involved* of their right to silence at the beginning of the meeting”.[[54]](#footnote-54)
6. The fourth issue identified by the judge was whether the police officer involved is detained during the meeting with BEI investigators and therefore has the [translation] “right to counsel and to be informed of this right?”[[55]](#footnote-55) The judge found that this question need not be answered by a declaratory judgment because the answer depends on the specific factual context of each case.[[56]](#footnote-56)
7. The fifth issue concerned the reasonableness of the BEI directive that police officers are prohibited from consulting the calling card to prepare their accounts of the occurrence. Because it was not argued that the police officers’ fundamental rights are being infringed, the judge concluded [translation] “that it is wiser to give the [BEI] the flexibility it deems necessary to properly carry out its mandate regardless of the undersigned’s opinion on the subject”.[[57]](#footnote-57)
8. Last, the judge summarily dealt with the other applications:

- he refused to declare that the BEI must determine the status of a police officer as “involved” or “witness” at the very beginning of the investigation before it has received their accounts; [[58]](#footnote-58)

- he added, however, that [translation] “police officers who participated in the intervention must know whether they are *involved* or merely witnesses; police officers who believe that they are *involved* may ask the police force director to hold onto their account until the [BEI] makes a determination”;[[59]](#footnote-59)

- to this end, the judge decided to issue a declaratory order that [translation] “the police force director cannot submit the police officers’ accounts before the director has been informed of their status by the principal ([BEI]) investigator and cannot submit the account of a police officer *involved*”.[[60]](#footnote-60)

**ISSUES ON APPEAL**

1. The AGQ raises four issues on appeal, worded as follows:[[61]](#footnote-61)
2. Did the trial judge err by failing to conduct a constitutional analysis under section 7 of the *Canadian Charter* when finding that subparagraph (2) of the first paragraph of section 1 of the *Regulation* [obligation to draw up an account and submit it to the BEI] infringes on the protection against self-incrimination?
3. Did the trial judge err by failing to conduct an analysis under section 1 of the *Canadian Charter*?
4. Did the trial judge err by preventing the BEI from receiving and keeping documents other than the account?
5. Did the trial judge err by concluding that police officers have the right to silence when meeting with BEI investigators and that they should be cautioned?
6. The incidental appellants raise three other issues worded as follows:[[62]](#footnote-62)
7. Did the trial judge err by refusing to find and, accordingly, declare that subparagraphs (1), (2), and (3) of the first paragraph of section 1 of the *Regulation* [obligation by police officers to withdraw from the scene of the occurrence, obligation to draw up an account and submit it to the BEI, and obligation to meet with BEI investigators], and subparagraph (4) of the first paragraph of section 2 [obligation of the director of the police force involved to give BEI investigators any document in connection with the occurrence], and section 3 of the *Regulation* [precedence of BEI investigation over other parallel investigations], fall within Parliament’s exclusive jurisdiction over criminal law and procedure under both the *Constitution Act, 1867* and the common law?
8. Did the trial judge err by refusing to find that section 3 of the *Regulation* [precedence of BEI investigation over other parallel investigations] and subparagraph (1) of the first paragraph of section 1 of the *Regulation* [obligation to withdraw from the scene of the occurrence] are *ultra vires* the regulatory powers granted to the government under section 289.4 of the *Police Act*, inconsistent with section 48 of the *Police Act*, and violate the rules governing the independence of police forces in relation to the executive branch of the government and the rule of law?
9. Did the trial judge err in law by refusing to declare that any BEI directive prohibiting the police officer involved or witness police officer from using the calling card when drawing up an account under subparagraph (2) of the first paragraph of section 1 of the *Regulation* is invalid and of no force or effect?
10. These issues should be grouped together and dealt with in three parts:
11. first, the constitutional validity of the impugned provisions under the division of powers pursuant to the *Constitution Act, 1867* will be dealt with; this basically involves answering question 5 set out above, that is, to determine whether the impugned regulatory provisions fall under the exclusive federal jurisdiction over criminal law and procedure;
12. second, the compliance of the impugned provisions of the *Regulation* with the *Canadian Charter*; this will answer questions 1 to 4 above;
13. last, the validity of the impugned provisions of the *Regulation* in light of the principles of statutory interpretation and of administrative law; questions 6 and 7 set out above will be dealt with in this last part.

**ANALYSIS**

**PART ONE: DO THE IMPUGNED REGULATORY PROVISIONS FALL WITHIN THE EXCLUSIVE FEDERAL JURISDICTION OVER CRIMINAL LAW AND PROCEDURE?**

 *Positions of the parties*

1. The incidental appellants argue that the provisions of the *Regulation* requiring police officers to withdraw from the scene of the occurrence, to draw up an account and submit it to the BEI, to meet with BEI investigators, and the obligation of the director of the police force involved to give BEI investigators any document in connection with the occurrence, like the precedence of the BEI investigation over other parallel investigations, are contrary to the criminal law under the common law and thus unconstitutional because they fall within criminal law or criminal procedure, matters within Parliament’s exclusive jurisdiction under section 91(27) of the *Constitution Act, 1867*.
2. The incidental appellants do not challenge the constitutionality of the legislative scheme that led to the BEI’s creation or the independent investigations it conducts. What is being questioned is the procedure prescribed by the *Regulation* for these investigations. In short, the incidental appellants argue that because the BEI conducts police investigations that are criminal in nature, the procedure applicable to any other police criminal investigation should apply. By changing the investigative procedure only for cases where police officers are the subject of a criminal investigation, the provincial legislature is encroaching on Parliament’s exclusive jurisdiction over criminal law and procedure to circumvent the fundamental protections it offers.
3. The incidental appellants rely primarily on *Starr v. Houlden*,[[63]](#footnote-63) where Lamer J. cited with approval the following excerpt from a judgment written by Martin J.A. on behalf of the Court of Appeal for Ontario:[[64]](#footnote-64)

Notwithstanding the overlapping between s. 91(27) and s. 92(14), manifestly it would not be within provincial competence to enact legislation enabling a police officer to summon a suspect before an official and submit the suspect to compulsory examination under oath with respect to his involvement in a crime.  Even though such legislation might be described as legislation in relation to the investigation of offences and thus appear to fall within the category of the administration of justice, such legislation in pith and substance would be legislation in relation to criminal procedure and thus within the*exclusive* competence of Parliament.

 [Italics in the original, underlining added].

1. Thus, according to the incidental appellants, when a province creates a police force to conduct a criminal investigation, it must necessarily do so in accordance with the fundamental principles of criminal law and procedure. They argue that this is not the case here.
2. The AGQ argues that a BEI investigation in the event of death or serious injury sustained during a police intervention is not fundamentally criminal in nature. The BEI is instead investigating an occurrence to determine the circumstances, which do not necessarily involve criminal responsibility. In fact, the vast majority of BEI investigations do not end in criminal charges. The purpose is rather to bolster the population’s confidence in investigations involving police officers by ensuring that investigations are credible, independent, impartial, and transparent.
3. According to the AGQ, the pith and substance of the impugned regulatory provisions are [translation] “to organize, in the spirit of impartiality and transparency, the professional duties and obligations of police officers in the context of an independent investigation to ensure and uphold public confidence in every police force and in the justice system”.[[65]](#footnote-65) Moreover, the [translation] “fact that the BEI is a police force or that its investigators are peace officers within the meaning of the *Criminal Code* ... does not change the nature of the independent investigation”.[[66]](#footnote-66) These provisions therefore fall within the provincial power over the administration of justice set out in section 92(14) of the *Constitution Act, 1867*, which includes the regulation of police activity in the province. As a result, the impugned provisions of the *Regulation* are constitutional because they do not really concern criminal investigations.
4. That being so, if during an investigation the facts reveal that the police officer involved is a suspect for the purpose of possible criminal charges, that police officer is entitled to all the relevant protections under the law and criminal procedure, as is the case for any other individual. Therefore, the AGQ submits that the investigative procedure under the *Regulation* is not inconsistent with the guarantees provided by the criminal law and procedure and, consequently, there is no encroachment of the federal jurisdiction under section 91(27) of the *Constitution Act, 1867*.

*Analytical approach*

1. The Court must first determine the pith and substance of BEI investigations in the event of death or serious injury during police interventions: are they essentially criminal investigations by a police force, as the incidental appellants argue, or are they instead essentially administrative investigations entrusted to a specialized police force to ensure public confidence but that might eventually become criminal investigations, as the AGQ argues? The analytical approach set out in *Murray-Hall* is useful to this end and the Court will draw from it here.[[67]](#footnote-67)
2. Second, the Court must determine whether criminal law and procedure govern the conduct of these investigations.
3. Last, if so, the Court must determine whether the impugned provisions of the Regulation are inconsistent with criminal law or procedure, which are under exclusive federal jurisdiction.

*Pith and substance of BEI investigations*

1. The intrinsic evidence reveals the following.
2. A BEI investigation is conducted in four circumstances:[[68]](#footnote-68)
3. the first is where a person, other than an on-duty police officer, dies, sustains a serious injury, or is injured by a firearm used by a police officer during a police intervention or while the person is in police custody;[[69]](#footnote-69)
4. the second is when the BEI is notified of an allegation against a police officer concerning a criminal offence of a sexual nature committed in the performance of duties;[[70]](#footnote-70)
5. the third is when the Minister, in exceptional cases, charges the BEI with conducting an investigation on any other occurrence involving a peace officer and related to the peace officer’s functions;[[71]](#footnote-71)
6. the fourth is when the Minister orders the BEI to conduct an investigation to examine an allegation against a police officer concerning a criminal offence;[[72]](#footnote-72) note in this regard that the BEI’s mandate was expanded on September 17, 2018, so that it may also investigate any other allegation of criminal offence lodged by a complainant or Indigenous victim against a police officer, whether or not in the performance of duties.[[73]](#footnote-73)
7. These investigations are conducted by the BEI, a specialized police force for the purposes of this mission whose members are peace officers.[[74]](#footnote-74) That being so, BEI directors must never have been peace officers, otherwise than as members of the BEI.[[75]](#footnote-75) BEI investigators must not be peace officers otherwise than as members of the BEI, which means that former police officers may be hired, although the BEI must encourage parity between investigators who have never been peace officers and those who have.[[76]](#footnote-76)
8. The parties do not question the essentially criminal nature of BEI investigations in the circumstances contemplated under paragraph [61](b), (c), and (d) above. The debate concerns the pith and substance of investigations conducted in the circumstances contemplated in paragraph [61](a), i.e., BEI investigations conducted where a person, other than an on-duty police officer, dies, sustains a serious injury or is injured by a firearm used by a police officer during a police intervention or while the person is in police custody. That is the type of investigation the Court must consider.
9. In these cases, the *Regulation* states that a police officer who witnessed the occurrence and the police officer involved in the occurrence must:
	1. withdraw from the scene as soon as possible;
	2. refrain from communicating with another police officer involved or witness police officer in connection with the occurrence until the police officer has drawn up their account and met with BEI investigators;
	3. draw up independently, without consultation and influence, an accurate, detailed and comprehensive account of the facts that took place during the occurrence and sign it;
	4. submit it to the BEI within 24 hours of the occurrence; and
	5. meet with BEI investigators and remain available for the investigation purposes.[[77]](#footnote-77)
10. For these purposes, a police officer “involved” is a police officer present at an occurrence and whose actions or decisions could have contributed to the death, serious injuries or injuries by a firearm used by a police officer. A “witness” police officer is a police officer in whose presence the occurrence took place, without being a police officer involved.[[78]](#footnote-78)
11. The principal BEI investigator must determine the police officer’s status as witness police officer or police officer involved before meeting with the police officer and notify the police officer of that status in writing as soon as possible as well as of any change in status in the course of the investigation.[[79]](#footnote-79) Police officers involved are usually met within 48 hours of the occurrence, whereas witness police officers are met within 24 hours of the occurrence.[[80]](#footnote-80)
12. A BEI investigation has precedence over any other police investigation into the occurrence; that being so, all police forces involved must cooperate with each other.[[81]](#footnote-81) Moreover, the director of the police force involved must take the necessary measures to secure the scene of the occurrence, prevent the police officers at issue from communicating with one another until they have submitted their accounts, and provide the BEI with the information relevant to the investigation.[[82]](#footnote-82)
13. The investigation must be brought to a close swiftly, unless the BEI director concludes that the police intervention did not contribute to the death or to the serious injury, which means that an investigation may be closed in certain cases of suicide, for example.[[83]](#footnote-83)
14. Once the BEI investigation has been terminated, the investigation file must be sent to the DCPP.[[84]](#footnote-84) The DCPP is then charged with deciding whether to lay criminal charges against the police officer involved.[[85]](#footnote-85)
15. Where appropriate, the investigation report may also be sent to the coroner, the Police Ethics Commissioner, the internal affairs of the police force of which the police officer involved is a member or the Public Protector in order for them to process it.[[86]](#footnote-86)
16. Moreover, the BEI reports to the public, primarily on the status of its activities at least twice yearly[[87]](#footnote-87) and by submitting an annual report to be tabled in the National Assembly.[[88]](#footnote-88) During its investigation, the BEI also communicates with the public on the conduct of the investigation,[[89]](#footnote-89) and with the persons injured following the occurrence and with the members of the families involved.[[90]](#footnote-90) Moreover, the other police forces must make sure that their own communications made to the public and the parties involved do not impede the BEI investigation.[[91]](#footnote-91)
17. The extrinsic evidence reveals the following.
18. As previously noted, the AGQ acknowledges that when the BEI investigates following a complaint, the police officer involved must be treated as a suspect in a criminal investigation and then enjoys all the criminal law protections under the *Criminal Code* and the common law as soon as the investigation is launched. This is expressly stated in a BEI report:[[92]](#footnote-92)

[translation]

In allegations of criminal offences, citizens file a complaint concerning the specific illegal conduct of a police officer. The police officer is therefore suspected of having committed a criminal offence. As soon as the file is opened, the BEI must comply ... with all the legal obligations that apply to a criminal investigation, like any other police force.

1. This same report states that when the BEI investigates a police officer following a death or serious injury during a police intervention, the purpose of the investigation is also to determine whether a criminal offence was committed:[[93]](#footnote-93)

[translation]

The situation is different for independent investigations. Contrary to the public’s image of a traditional criminal investigation, the investigation does not start with a known crime that has been committed to identify and gather evidence against a suspect. The players and outlines of the occurrence are already known, so the only issue is to determine whether a criminal offence was committed.

[Emphasis added.]

1. In that case, however, according to the BEI report, [translation] “when the investigation begins, contrary to an investigation into an allegation of criminal offence, the police officer is not a suspect and is not the subject of any allegation of criminal offence”.[[94]](#footnote-94) That being so, the BEI report adds that if evidence obtained during the course of the investigation appears to indicate that a police officer may have committed a criminal offence, BEI investigators must treat the officer as a suspect and the officer is then afforded, and only as of that point, all the protections granted by the criminal law to a suspect in a criminal matter.[[95]](#footnote-95)
2. Moreover, during parliamentary debates on the adoption in principle of the amendments to the *Police Act* leading to the BEI’s creation, the minister responsible stated the following about the mandate of this new police force during an investigation into a police officer’s involvement in an injury or death that occurred during a police intervention:[[96]](#footnote-96)

[translation]

It gives me great pleasure to speak here today for the adoption in principle of Bill 12, the *Act to amend the Police Act as concerns independent investigations*. The purpose of independent investigations is to verify whether there is evidence indicating that a criminal offence has been committed by police officers involved in an occurrence. They are therefore not intended to verify whether there has been a derogation to the *Code of Ethics of Québec Police Officers*, which is subject to a separate process, or breaches of the disciplinary code, which fall within the aegis of internal police force investigations. Thus, the bureau will be charged with investigating every case where a person other than an on-duty police officer dies, sustains serious injuries or gunshot wounds following a police intervention or while the person is in police custody.

[Emphasis added.]

1. The analysis of the intrinsic and extrinsic evidence supports the conclusion that the pith and substance of these provisions is to ensure that an investigation following an occurrence involving a police officer that might result in criminal charges against the officer, or one following a complaint against a police officer that may also result in charges, is conducted exclusively by an independent police force overseen by civilians and is quick, effective, impartial, independent, and transparent to maintain public confidence in both the administration of justice and the Quebec police forces.
2. While the purpose of the BEI investigation is also to shed light on the events leading to the death or injuries in which police officers were involved and to inform the public about these events, it is nevertheless essentially a criminal investigation because its ultimate purpose is to determine whether a criminal offence was committed by the police officer involved.
3. Therefore, I do not accept the AGQ’s argument that it is not a criminal investigation because the BEI investigates an “occurrence” involving a police officer and the investigation only becomes a criminal investigation once it reveals that the police officer involved is a suspect for the purposes of a criminal charge.
4. First, all kinds of criminal investigations conducted by police forces involve occurrences where no suspect has been identified, which does not make them any less a police criminal investigation. For example, when a cadaver bearing marks of violence is discovered, a police criminal investigation may be launched even though no suspect has been identified. It remains a criminal investigation even if the investigation subsequently reveals that the death was not the result of criminal activity.
5. Moreover, while the end result of the BEI’s investigation may be a decision by the DCPP not to lay criminal charges – which happens most of the time – the fact remains that the ultimate purpose of the BEI investigation is to prepare and submit an investigation report to the DCPP so that the DCPP may decide whether to lay criminal charges against a police officer involved. It is clearly an investigation that is criminal in nature. In this regard, many criminal investigations by the police do not necessarily end with criminal charges.
6. Last, the idea that a police force could conduct an administrative investigation that could become a criminal investigation depending on the evidence gathered is not only hard to conceive, but also a serious threat to rights and freedoms. Police forces are not commissions of inquiry, and their role does not concern administrative or social policy issues. By their very nature, police forces perform duties related to the control and repression of crime. That is why the law, including the *Criminal Code*, grants their members vast powers. This is also expressly stated in section 48 of the *Police Act,* which defines the mission of police forces, including that of the BEI, as being to maintain peace and public security and to repress crime.[[97]](#footnote-97)
7. In conclusion, BEI investigations are essentially criminal in nature.

*Do criminal law and procedure govern the conduct of these investigations?*

1. The creation of a police force to conduct investigations that might lead to criminal charges falls under the provincial power over the administration of justice under section 92(14) of the *Constitution Act,* *1867*. As Dickson J. stated in *Di Iorio v. Warden of the Montreal Jail:*[[98]](#footnote-98)

Both the federal and provincial governments have accepted for over a century the status of the provincial governments to administer criminal justice within their respective boundaries. The provincial mandate in that field has consistently been recognized as part and parcel of the responsibility of a provincial government for public order within the province.

Under head 92(14) of our Constitution, as I understand it, law enforcement is primarily the responsibility of the Province and in all provinces the Attorney General is the chief law enforcement officer of the Crown. He has broad responsibilities for most aspects of the Administration of Justice. Among these within the field of criminal justice, are the court system, the police, criminal investigation and prosecutions, and corrections. The provincial police are answerable only to the Attorney General as are the provincial Crown Attorneys who conduct the great majority of criminal prosecutions in Canada.

[Emphasis added.]

1. Provincial jurisdiction over the administration of justice therefore does include the organization and management of police forces created by provincial legislation, which includes the appointment, control, and discipline of municipal and provincial police officers.[[99]](#footnote-99)
2. Even though the line between federal power over criminal law and procedure and provincial power over the administration of justice may be porous,[[100]](#footnote-100) when a provincial police force conducts an investigation to determine whether criminal charges should be laid, the investigation is governed by the law and procedure that applies under the *Criminal Code* and the common law. Dickson C.J., then Chief Justice of Canada, said the following on the subject in *O’Hara v. British Columbia*:[[101]](#footnote-101)

… A province must respect federal jurisdiction over criminal law and criminal procedure. For example, a province may not compel a person charged with a criminal offence to testify as a witness before a provincial inquiry into the circumstances giving rise to that charge: *Batary v. Attorney General for Saskatchewan*, [1965] S.C.R. 465. Nor may a province enact legislation enabling a police officer to summon a suspect before an official and submit that suspect to a compulsory examination under oath with respect to his involvement in a crime solely for the purpose of gathering sufficient evidence to lay criminal charges. See *Attorney General of Canada v. Canadian National Transportation, Ltd.*,*supra*.

[Emphasis added.]

1. Moreover, in *Starr v. Houlden*, Lamer J. cited with approval the following excerpt from a judgment of the Court of Appeal for Ontario:[[102]](#footnote-102)

It is well established that a Province may create provincial agencies such as coroners, fire marshalls, securities commissions and commissions of inquiry and endow them with the power to summon witnesses and compel them to give evidence under oath in an inquiry conducted for a valid provincial purpose, notwithstanding that any witness required to give evidence may potentially be a defendant in a subsequent criminal proceeding . . .

The investigation of most crime is, however, conducted by the police acting principally under their common law powers and statutory powers of search and seizure and electronic surveillance, occasionally assisted in their investigation by the fruits of inquiries such as those mentioned above. The police are entitled to question any person, whether suspected or not, in order to ascertain whether a crime has been committed, and if so, to discover the person who committed it. The police, while they are entitled to question suspects have, in general, no power however, to compel answers.

Notwithstanding the overlapping between s. 91(27) and s. 92(14), manifestly it would not be within provincial competence to enact legislation enabling a police officer to summon a suspect before an official and submit the suspect to compulsory examination under oath with respect to his involvement in a crime. Even though such legislation might be described as legislation in relation to the investigation of offences and thus appear to fall within the category of the administration of justice, such legislation in pith and substance would be legislation in relation to criminal procedure and thus within the*exclusive* competence of Parliament.  [Emphasis added.]

[Emphasis added by Lamer J.]

1. Iacobucci J. made similar remarks in *R. v. White*:[[103]](#footnote-103)

The provinces are entitled to inquire into factual circumstances that may involve the commission of a criminal offence, but their jurisdiction does not extend so far as to trench upon the federal power under s. 91(27) of the *Constitution Act, 1867* over the criminal law:  see, e.g., *Starr v. Houlden*, [1990] 1 S.C.R. 1366.

[Emphasis added.]

1. BEI investigations must therefore comply with the criminal law and procedure set out in the *Criminal Code* and the applicable common law.
2. That being so, this does not mean that the provincial legislature cannot legislate on investigations conducted by a police force, such as the BEI. It may certainly do so. However, this provincial legislation can neither contradict nor quash the rules and principles of criminal law and procedure, which fall under Parliament’s exclusive jurisdiction.

*Are the impugned regulatory provisions inconsistent with criminal law or procedure?*

1. The Court must now determine whether the impugned provisions are inconsistent with criminal law or procedure, as the incidental appellants claim. Each impugned provision will be analyzed in turn.

*Withdrawal of witness police officers and police officers involved from the scene and priority of BEI investigation*

1. Pursuant to subparagraph (1) of the first paragraph of section 1 of the *Regulation*, the police officer involved and the witness police officer must withdraw from the scene. Section 3 of the *Regulation* grants priority to the BEI investigation.
2. These provisions raise no concern with respect to their constitutional validity under the division of powers. They are clearly measures for the organization of police services in the province that were enacted to ensure the preservation evidence and to encourage harmonious and ordered cooperation between the police forces concerned.
3. The incidental appellants have failed to convince the Court that they are measures that infringe criminal law or procedure, especially since they have not precisely identified which aspect of criminal law or procedure is alleged to be inconsistent with these regulatory provisions.

*Obligation of the police officer involved to draw up an account of the occurrence and submit it to the BEI*

1. Subparagraph (2) of the first paragraph of section 1 of the *Regulation* compels the police officer involved and the witness police officer to draw up an account of the occurrence and submit it to the BEI. This provision clearly does not conflict with criminal law or procedure when applied to a witness police officer and the incidental appellants do not challenge this measure with respect to those police officers.
2. What of the police officer involved? This police officer is assuredly the subject of the BEI investigation, whose very purpose is to determine whether criminal charges should be laid against the officer following the occurrence. According to the incidental appellants, this provision of the *Regulation* allegedly excludes the common law rule of criminal law that individuals can refuse to incriminate themselves.
3. This common law rule is one of fundamental justice, however, that is in essence protected under section 7 of the *Canadian Charter*. Therefore, the common law rule and the *Canadian Charter* overlap. Insofar as the obligation imposed on the police officer involved by the impugned provision of the *Regulation* is inconsistent with the common law rule, it will also be contrary to section 7 of the *Canadian Charter* and *ultra vires* provincial power. *Vice versa*, if the impugned provision is consistent with the common law rule, it will then be consistent with section 7 of the *Canadian Charter* and *intra vires* provincial power.
4. Because the analysis on the division of powers and the analysis under the *Canadian Charter* largely overlap, it is preferable to analyze the validity of the regulatory obligation imposed on the police officer involved from the perspective of the *Canadian Charter*.

*Caution to the police officer involved during their meeting with BEI investigators*

1. Subparagraph (3) of the first paragraph of section 1 of the *Regulation* compels witness police officers and police officers involved to meet with BEI investigators. The incidental appellants do not contest the witness police officers’ obligation to meet with BEI investigators and answer their questions. Moreover, the AGQ acknowledges that a police officer involved has no obligation to answer investigators’ questions.
2. Without questioning the obligation of the police officer involved to attend at an interview with BEI investigators, the incidental appellants nevertheless argue that this provision is *ultra vires* provincial jurisdiction because the police officer involved is not obliged under the common law to participate in an interview during a police investigation unless they have been cautioned on how their statements might be used.
3. In this instance, the incidental appellants’ argument is based on the *Canadian Charter* rather than the division of powers. Indeed, the incidental appellants suggest that the regulatory provision in question would be *intra vires* provincial power if accompanied by a caution.
4. The presumption of constitutional validity assumes that the legislature, in this instance the Quebec government, does not intend to exceed its powers under the *Constitution Act, 1867*. Therefore, if the impugned regulatory provision may be read so that its application is limited to subjects falling within provincial jurisdiction, that is the interpretation that must prevail. Insofar as the obligation set out in subparagraph (3) of the first paragraph of section 1 of the *Regulation* may be understood as implicitly requiring the appropriate caution if the circumstances so demand, it will be *intra vires*.
5. The question of whether this caution is required will therefore be analyzed below in the discussion on its consistency with the *Canadian Charter*.

*Giving documents*

1. Subparagraph (4) of the first paragraph of section 2 of the *Regulation* compels the director of the police force involved to give the BEI investigators any document in connection with the occurrence involving a police officer.
2. The respondents improperly argue, indeed for the first time, that this provision is unconstitutional under the division of powers. Only the provision’s constitutional invalidity under the *Canadian Charter* was properly raised. In the application for judicial review before the Superior Court, the provision was mentioned, among other regulatory provisions, as encroaching on federal jurisdiction.[[104]](#footnote-104) Subsequently, however, there was no analysis in the application of the provision’s constitutional validity under the division of powers and no conclusion in this regard. Nor was the issue raised at the hearing before the Superior Court. Only the issue of the provision’s validity under the *Canadian Charter* was raised.
3. The AGQ rightly argues that the incidental appellants are barred from raising the provision’s constitutional invalidity on appeal under the division of powers. Indeed, the conditions are not met for the Court to exercise its discretion to authorize raising the issue of the provision’s validity under the division of powers for the first time on appeal. The incidental appellants have offered no justification for why they are raising this issue for the first time, despite having the burden of proving that no prejudice would result if it were considered by the Court.[[105]](#footnote-105)

**PART TWO: CONSISTENCY OF THE IMPUGNED PROVISIONS WITH THE *CANADIAN CHARTER***

1. Section 7 of the *Canadian Charter* reads:

|  |  |
| --- | --- |
| **7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. | **7.** Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu’en conformité avec les principes de justice fondamentale. |

1. Sections 8 to 14 of the *Canadian Charter* are intended to prevent specific violations of the right to life, liberty and security of the person in breach of the principles of fundamental justice, but these provisions are not an exhaustive list of those principles. They are merely particular manifestations of the principles of fundamental justice that protect the right to life, liberty, and security of the person. Section 7 constitutionalizes other principles of fundamental justice that are not otherwise set out in the *Canadian Charter*, but that are just as important.
2. In *Re B.C. Motor Vehicle Act*,[[106]](#footnote-106) the Supreme Court was asked to interpret section 7 of the *Canadian Charter* for the first time. Lamer J. stated that the expression “principles of fundamental justice” found therein refers to the basic tenets of our legal system that lie in the inherent domain of the judiciary as guardian of the Canadian justice system.[[107]](#footnote-107) Whether any given principle may be said to be a principle of fundamental justice within the meaning of section 7 of the *Canadian Charter* will rest upon an analysis of the principle’s nature, sources, rationale and essential role within the judicial process and the Canadian legal system. Consequently, the expression “principles of fundamental justice” cannot be given any exhaustive content or precise definition, but will take on concrete meaning as the courts address alleged violations of section 7.
3. The case law after *Re B.C. Motor Vehicle Act* developed three tests to elevate a principle to the ranks of a principle of fundamental justice.[[108]](#footnote-108) First, the principle alleged must be a legal principle; it must be an essential element of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and a foundational requirement for the dispensation of justice. Second, there must be sufficient consensus that the alleged principle is vital or fundamental. Last, it must be capable of being identified with precision and applied to yield predictable results and provide a justiciable standard.
4. The Supreme Court added that laws that impinge on life, liberty or security of the person must not be arbitrary, overbroad, or have consequences that are disproportionate to their object.[[109]](#footnote-109) It is understood that the state cannot save a law from overbreadth for reasons of administrative convenience.[[110]](#footnote-110) In short, the analysis under section 7 is qualitative and the fundamental question is whether the provision in question deprives a person of the right to life, liberty, or security of the person in a manner that is disproportionate, overbroad, or arbitrary. To this end, determining the purpose of the impugned provision is vital to the analysis.
5. With these general principles in mind, the Court will analyze whether the impugned regulatory provisions are consistent with the *Canadian Charter*.

*Obligation of the police officer involved to draw up an account of the occurrence and submit it to the BEI*

1. As previously stated, pursuant to subparagraph (2) of the first paragraph of section 1 of the *Regulation*, the police officer involved must draw up an account of the occurrence and submit it to the BEI. Because the conduct of the police officer involved is the subject of the BEI investigation and because the ultimate purpose of this investigation is to determine whether criminal charges should be laid against the police officer, the legislative obligation to draw up an account for the purpose of this investigation appears, at first glance, to infringe the police officer’s right to silence and the right against self-incrimination.
2. The right to silence is closely entwined with the principle against self-incrimination.[[111]](#footnote-111) Therefore, a suspect cannot be used as a source of information about his or her own criminal conduct.[[112]](#footnote-112) The principle against self-incrimination is manifested in several constitutional and common law rules that apply both before and after a criminal trial.
3. During a trial, the principle is reflected in the protection provided under section 11(c) of the *Canadian Charter* whereby the accused cannot be compelled to testify, the presumption of innocence under section 11(d), and the Crown’s burden to prove its case beyond a reasonable doubt, as well as in the protection under section 13 of the *Canadian Charter* prohibiting incriminating testimony given in any proceedings from being used to incriminate that witness in any other proceedings.[[113]](#footnote-113)
4. Before trial, the law allows suspects to remain silent when questioned by the police and imposes no general duty to disclose with respect to the police.[[114]](#footnote-114) Residual protection against self-incrimination is also provided under section 7 of the *Canadian Charter*.[[115]](#footnote-115) The section 7 protection, however, is context-dependent and does not provide absolute protection against all uses of information that has been compelled by statute or otherwise. Therefore, one should not automatically accept that section 7 of the *Canadian Charter* comprises a broad right against self-incrimination on an abstract level.[[116]](#footnote-116)
5. Thus, the legislature has included obligations in certain statutes for individuals to account for their activities when those activities are regulated by the state. In most cases, individuals may not refuse to account according to law by raising an abstract right against self-incrimination. The question, however, then becomes whether these accounts are admissible in criminal proceedings. Depending on the circumstances, the courts have admitted certain types of mandatory accounts during a criminal trial and excluded them at other times.[[117]](#footnote-117)
6. In other words, while the common law rule allows, in principle, any individual to refuse to give oral or written statements to the police that incriminate them in a criminal proceeding,[[118]](#footnote-118) the application of this rule is highly complex when a law compels an individual to make a statement.
7. The situation is not the same, however, when the individual in question is the very subject of a criminal investigation, because the relationship between the state and the individual is then aimed at potentially depriving the individual of liberty. In *R. v. Jarvis*,[[119]](#footnote-119) the Supreme Court stated that “where the predominant purpose of a particular inquiry is the determination of penal liability, [state] officials must relinquish the authority to use the inspection and requirement powers”.[[120]](#footnote-120)
8. The question that often arises in such cases is at what point is the line between the administrative investigation and the criminal investigation crossed. This line is generally established when the state agents reasonably believe that an offence has been committed, but this last requirement is not necessarily determinative. All the circumstances must also be considered, including whether the state conduct suggests that they are pursuing a criminal investigation or an administrative one and whether the evidence sought during the investigation is relevant to an administrative or a criminal investigation.[[121]](#footnote-121)
9. What is the case here?
10. There is no doubt that police officers must draw up an account of an occurrence, even if the police officer is involved within the meaning of the *Regulation*. As Moldaver J. noted in *Wood v. Schaeffer*, “such a duty to prepare notes is, at a minimum, implicit in an officer’s duty to assist in the laying of charges and in prosecutions”.[[122]](#footnote-122) That being so, because the BEI investigation is a criminal one in that its purpose is to determine whether criminal charges should be laid against the police officer involved, the officer’s obligation to draw up an account must be reconciled with their right to silence during a criminal investigation that directly concerns them.
11. Here, contrary to the situation in *R. v. White*, the *Regulation* requires the police officer involved to draw up an account in the context of a police investigation whose ultimate purpose is precisely to decide whether criminal proceedings should be brought against the officer. Even though the Supreme Court acknowledged in *Wood v. Schaeffer*[[123]](#footnote-123) that a province may impose this obligation on a police officer, it was in the context of a provincial regulation prohibiting the account of the police officer involved from being submitted to the investigators and where the constitutional validity of this obligation was not questioned.
12. While it is indisputable that a police officer involved has a professional duty to draw up an account of the occurrence, I am nevertheless of the view that the officer should not be required to submit their report to the BEI, even though the officer may do so voluntarily. To decide otherwise would be to ignore the constitutional rights of the police officer involved as an individual who is under criminal investigation. This is the appropriate way to reconcile both the professional duties of the police officer involved in an occurrence that potentially incurs the officer’s criminal responsibility and their constitutional rights during a criminal investigation that directly concerns them. As Lamer C.J. stated in *R. v. Jones*:[[124]](#footnote-124)

Any state action that coerces an individual to furnish evidence against him- or herself in a proceeding in which the individual and the state are adversaries violates the principle against self-incrimination. Coercion, it should be noted, means the denial of free and informed consent.

1. It is not insignificant to note that it was this reconciliation of rights that was adopted in other provincial laws in Canada concerning investigations similar to those conducted by the BEI. I will return to this.

*Caution to the police officer involved during meetings with BEI investigators*

1. Pursuant to subparagraph (3) of the first paragraph of section 1 of the *Regulation*, the police officer involved must meet with BEI investigators. However, while acknowledging that the police officer involved does not have to answer the BEI investigators’ questions, the AGQ argues that the investigators do not have to caution the police officer involved at the start of the interview. What is the case here?
2. The confessions rule, a common law rule, protects an individual’s right to silence at all times during a police investigation whether or not the interviewee is in detention, whereas the residual *Canadian Charter* protections of section 7 generally arise only on detention.[[125]](#footnote-125)
3. Therefore, when an individual questioned by the police becomes a “suspect” for the purpose of the criminal investigation – rather than a witness – a caution on the voluntariness of a statement is required.[[126]](#footnote-126) An individual detained by the police, whether or not a suspect, is always entitled to a caution.[[127]](#footnote-127)
4. In this case, the *Regulation* requires the police officer involved to attend an interview with BEI investigators. It should be recalled once more that the police officer involved is the very subject of the BEI’s criminal investigation. The effect of this legal obligation to attend at an interview, combined with the fact that the subject of the investigation is the potential criminal responsibility of the police officer involved, means that the police officer is legally detained during the interview with BEI investigators. As a result, the police officer involved is entitled to a caution as soon as the interview starts.
5. When an individual is legally required to comply with a direction or demand by the police, especially when the goal is to determine the individual’s criminal responsibility, it must be likened to a detention.[[128]](#footnote-128) This is clearly the case for the police officer involved with respect to the mandatory interview with BEI investigators. Therefore, the police officer involved must be cautioned, as the trial judge held.

*Section 1 of the Canadian Charter*

1. The AGQ argues that if any of the impugned provisions of the *Regulation* limit the rights guaranteed under the *Canadian Charter*, these limits are reasonable and justified in a free and democratic society, given that the purpose of these provisions is to maintain public confidence in the police through an independent and transparent investigation, which is a pressing and substantial legislative objective.[[129]](#footnote-129) Moreover, the AGQ claims that if the right to silence or the one against self-incrimination is impaired, this impairment is minimal because the police officer involved has immunity from the evidence and derivative evidence being used, if the BEI investigation results in a criminal trial.[[130]](#footnote-130)
2. The AGQ’s arguments are rejected.
3. The right to silence and against self-incrimination form part of the basic tenets of Canadian law and were constitutionalized, namely, under section 7 of the *Canadian Charter*.[[131]](#footnote-131) Moreover, section 1 of the *Canadian Charter* has a special relationship with section 7. A violation of the rights to life, liberty, or security of the person guaranteed by section 7 of the *Canadian Charter* will rarely be considered reasonable or justifiable in a free and democratic society.[[132]](#footnote-132) Therefore, the constitutional protections under section 7 of the *Canadian Charter* are only exceptionally outweighed by section 1.[[133]](#footnote-133) As an example of exceptional circumstances, Lamer J., in *Re B.C. Motor Vehicle Act*, referred to “natural disasters, the outbreak of war, epidemics, and the like”.[[134]](#footnote-134) On their own, the exceptional circumstances required appear to relate primarily to circumstances of urgency.[[135]](#footnote-135)
4. Moreover, the AGQ’s claim that the occurrence report of the police officer involved cannot be used against the officer in a future criminal trial does not seem to be as straightforward as the AGQ suggests. In any event, it is not for the Court to decide in advance whether such a report is admissible during a criminal trial of the police officer involved. Regardless of the report’s admissibility in a possible criminal trial, the issue here is the rights of the police officer involved to silence and against self-incrimination guaranteed by the common law and the *Canadian Charter*.
5. The AGQ has also failed to convince this Court that the obligation of the police officer involved to submit their account to the BEI or the absence of a caution during the interview with BEI investigators are truly necessary to ensure that the investigation is quick, effective, impartial, independent, and transparent or to maintain public confidence in both the administration of justice and the Quebec police forces. In fact, the other Canadian provinces that adopted similar investigation measures do not require such obligations of the police officer involved and there is no evidence in the record to suggest that it adversely affects these investigations or undermines public confidence.
6. For example, the Ontario law creating the Special Investigations Unit, the BEI equivalent, states that “[n]o person shall give to an investigator the original or a copy of any incident notes of a subject official respecting the incident”.[[136]](#footnote-136) Furthermore, the unit director must return to the police force the notes of the police officer who was initially a witness but whose status becomes that of involved.[[137]](#footnote-137) Under the Ontario statute, only the witness police officer must attend an interview requested by the Special Investigations Unit to answer questions from investigators.[[138]](#footnote-138) Once again, if the witness police officer’s status changes to involved, the Special Investigations Unit director must give the police officer the original and all copies of the recording of the interview.[[139]](#footnote-139)
7. In Nova Scotia, the provincial legislature established the Serious Incident Response Team (SIRT) to investigate incidents in which the actions of a police officer may have resulted in the death, serious injury or sexual assault of any person.[[140]](#footnote-140) The regulation governing SIRT investigations states that, contrary to a witness police officer,[[141]](#footnote-141) a police officer involved is not required to provide their incident notes and no other person may do so without the officer’s consent.[[142]](#footnote-142) The regulation states that only a witness police officer must attend at an interview with SIRT investigators and answer questions.[[143]](#footnote-143) If there is a change of status from witness police officer to police officer involved, the original and all copies of the recording of the interview are given to the police officer and the original and all copies of the incident notes are given to the chief of the officer’s police force.[[144]](#footnote-144)
8. In Alberta, in the event of death or serious injury following a police intervention, the regulation states that a police officer involved is not required to provide their incident notes and no other person may provide them to the investigating police service without the officer’s express permission.[[145]](#footnote-145) Once again, only the witness officer must provide their notes and attend at an interview with investigators and answer their questions.[[146]](#footnote-146) Last, should the status of a witness officer change to police officer involved, the officer will be given the original and all copies of the record of the interview and their chief of police will be given the officer’s incident notes.[[147]](#footnote-147)
9. Although Quebec is not bound by the approach in other Canadian provinces, the fact that they can successfully conduct independent investigations into police officers involved without requiring them to provide their incident reports for the purpose of the investigations into them or attend at interviews with investigators supports the conclusion that the AGQ’s justification is not convincing and cannot be accepted.

**PART THREE: VALIDITY OF THE IMPUGNED PROVISIONS WITH RESPECT TO THE PRINCIPLES OF STATUTORY INTERPRETATION AND THOSE OF ADMINISTRATIVE LAW**

*Withdrawal of witness police officers and police officers involved from the scene and priority of BEI investigation*

1. The incidental appellants argue that the precedence of the BEI investigation over other parallel police investigations into the same occurrence or closely related occurrences, as provided in section 3 of the *Regulation*, and the obligation of witness police officers and police officers involved to withdraw from the scene of the occurrence, as provided in subparagraph (1) of the first paragraph of section 1 of the *Regulation*, are: (a) *ultra vires* the regulatory powers granted the government under section 289.4 of the *Police Act*; (b) inconsistent with section 48 of the *Police Act*; and (c) violate the rules governing the independence of the police force in relation to the executive branch of government and the rule of law.
2. Let us deal with these arguments in turn.
3. Section 289.4 of the *Police Act* is the enabling legislative provision of the *Regulation*. That provision grants the government broad regulatory powers over both the conduct of BEI investigations and the obligations of police officers involved and witness police officers, as well as the director of the police force involved.
4. *Katz Group Canada Inc. v. Ontario (Health and Long‑Term Care)* (“*Katz*”) stated that “[a] successful challenge to the *vires* of regulations requires that they be shown to be inconsistent with the objective of the enabling statute or the scope of the statutory mandate”.[[148]](#footnote-148)
5. Regulations benefit from a presumption of validity. This presumption has two aspects: it places the burden on challengers to demonstrate the invalidity of regulations, rather than on regulatory bodies to justify them; and it favours an interpretative approach that reconciles the regulation with its enabling statute so that, where possible, the regulation is construed in a manner which renders the enabling provision *intra vires*.[[149]](#footnote-149)
6. Consequently, they must be “irrelevant”, “extraneous” or “completely unrelated” to the statutory purpose to be found to be *ultra vires* on the basis of inconsistency with statutory purpose.[[150]](#footnote-150) In effect, although it is possible to strike down regulations as *ultra vires* on this basis, “it would take an egregious case to warrant such action”.[[151]](#footnote-151)
7. That is clearly not the case here. First, it should be recalled the section 289.4 of the *Police Act* authorizes a regulation concerning BEI investigations and that investigations must be impartial, independent, and transparent. Furthermore, the government regulation may also determine “the obligations of the police officers involved in the occurrence, the police officers who witnessed the occurrence and the director of the police force involved.” In this context, the obligation of witness police officers and police officers involved to withdraw from the scene, set out in subparagraph (1) of the first paragraph of section 1 of the *Regulation,* is clearly *intra vires* the government’s regulatory powers.
8. Indeed, this rule is not completely foreign to the purpose of the enabling legislative provision. On the contrary, it is in line with the recommendation in the Ombudsman’s Report to create an obligation on the part of the police force involved to preserve the integrity of the evidence and scene pending the arrival of independent investigators.[[152]](#footnote-152) As previously noted, the purpose of this provision is to preserve the evidence, primarily to ensure an impartial investigation and public confidence in it. This provision is therefore *intra vires* the regulatory powers set out in the *Police Act*.
9. The same is true for section 3 of the *Regulation* requiring the BEI and the other police forces conducting parallel investigations to cooperate and giving the BEI investigation precedence over these other police forces with regard to the evidence, testimonies, and control of the scene of the occurrence. This provision prevents potential misunderstandings between the BEI and other police forces involved and ensures that the BEI has access to all the essential elements to carry out its investigation. In fact, the Ombudsman’s Report recommended this precedence.[[153]](#footnote-153)
10. Section 48 of the *Police Act* states that the mission of police forces and police officers is to maintain peace, order and public security and to prevent and repress crime. In pursuing their mission, they must act in collaboration and in partnership with the persons and various stakeholders from the communities concerned by their mission, among others, to foster the complementarity and effectiveness of their interventions. The incidental appellants argue that the priority granted to BEI investigations by the *Regulation* is contrary to this legislative provision.
11. Nothing in the evidence supports the conclusion that the precedence of the BEI investigation adversely affects parallel police investigations or that section 48 of the *Police Act* might be breached due to a BEI investigation. The incidental appellants’ argument to the contrary is not based on any evidence and therefore cannot be accepted.
12. Nor can the Court accept the arguments of the incidental appellants with respect to the rules governing the independence of police forces in relation to the executive branch of government and the rule of law. Indeed, aside from stating it, the incidental appellants offer no explanation as to the basis of their arguments in this regard.
13. It should be noted that the unwritten constitutional principles, including the rule of law, cannot on their own serve as the basis for a declaration that a legislative measure is invalid under section 52(1) of the *Constitution Act, 1982*.[[154]](#footnote-154) Moreover, the principle of police independence must be understood as the absence of partisan pressure in police affairs.[[155]](#footnote-155) That is not the case here given that the impugned provisions cannot be reasonably characterized as partisan pressure.

*BEI directive on calling cards*

1. The incidental appellants also ask the Court to declare that the BEI cannot prohibit witness police officers and police officers involved from having access to what is known as the “calling card” when they draw up their accounts of the occurrence in accordance with subparagraph (2) of the first paragraph of section 1 of the *Regulation*. They allege that the trial judge refused to grant their application in this regard. Note that the “calling card” contains information gathered by the police force involved during a police intervention.
2. With respect, this question is related to the conduct of the BEI police investigation and raises no constitutional issue or even a legal issue. The BEI can conduct its investigation as it sees fit and it is not for the courts to manage these investigations in place of this independent police force.

**CONCLUSION**

1. For these reasons, I propose that the Court dismiss the principal appeal and the incidental appeal, without legal costs, as was the case at trial.

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| ROBERT M. MAINVILLE, J.A. |

SCHEDULE

Excerpts from the *Regulation respecting the conduct of the investigations of the Bureau des enquêtes indépendantes*, CQLR, c. P-13.1, r. 1.1.

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| [**1.**](https://www.legisquebec.gouv.qc.ca/en/document/cr/P-13.1%2C%20r.%201.1#se:1) A police officer involved and a witness police officer must, where a person, other than an on-duty police officer, dies, sustains a serious injury or is injured by a firearm used by a police officer during a police intervention or while the person is in police custody:(1)  withdraw from the scene of the occurrence as soon as possible;(2)  draw up independently, in particular without consultations and influence, an accurate, detailed and comprehensive account of the facts that took place during the occurrence, sign the account and submit it to the investigators of the Bureau des enquêtes indépendantes within 24 hours of the occurrence, unless the director of the Bureau grants a time extension;(3)  meet with the investigators of the Bureau.(4)  refrain from communicating with another police officer involved or witness police officer in connection with the occurrence until the police officer has submitted the account and met with the investigators of the Bureau; and(5)  remain available for the investigation purposes.A police officer involved is a police officer present at an occurrence referred to in the first paragraph and whose actions or decisions could have contributed to the death, serious injuries or injuries by a firearm used by a police officer. A witness police officer is a police officer in whose presence such an occurrence took place, without being a police officer involved.Constitutes a serious injury any physical injury that could lead to death or that results in serious physical consequences. | **1.** Un policier impliqué et un policier témoin doivent, lorsqu’une personne, autre qu’un policier en devoir, décède, subit une blessure grave ou est blessée par une arme à feu utilisée par un policier, lors d’une intervention policière ou lors de sa détention par un corps de police:1°  se retirer de la scène de l’événement dès que possible;2°  rédiger de manière indépendante, notamment sans consultation et sans influence, un compte rendu exact, détaillé et exhaustif portant notamment sur les faits survenus lors de l’événement, le signer et le remettre aux enquêteurs du Bureau des enquêtes indépendantes dans les 24 heures suivant l’événement, à moins que le directeur du Bureau ne lui accorde un délai supplémentaire;3°  rencontrer les enquêteurs du Bureau;4°  s’abstenir de communiquer avec un autre policier impliqué ou témoin au sujet de l’événement jusqu’à ce qu’il ait remis son compte rendu et qu’il ait rencontré les enquêteurs du Bureau;5°  rester disponible aux fins de l’enquête.Un policier impliqué est un policier présent lors d’un événement visé au premier alinéa et dont les actions ou les décisions pourraient avoir contribué au décès, aux blessures graves ou aux blessures causées par une arme à feu utilisée par un policier. Un policier témoin est un policier en présence de qui s’est déroulé un tel événement, mais qui n’est pas un policier impliqué.Constitue une blessure grave toute blessure physique pouvant entraîner la mort ou résultant en des conséquences physiques importantes. |
| [**2.**](https://www.legisquebec.gouv.qc.ca/en/document/cr/P-13.1%2C%20r.%201.1#se:2) A director of a police force involved must(1)  take the necessary measures to secure the scene of the occurrence and to ensure preservation of the evidence and the premises’ integrity until the arrival of the investigators of the Bureau;(2)  take reasonable measures to prevent the police officers involved or witness police officers from communicating with one another in connection with the occurrence until they have submitted their accounts to the investigators of the Bureau and met with them;(3)  send to the director of the Bureau the name of the person deceased or injured and the nature of the person’s injuries, the names of the persons present at the occurrence, the parameters and limits of the scene of the occurrence, the evidence collected so as to preserve it, as well as any other information collected in connection with the occurrence;(4)  give the investigators of the Bureau any document in connection with the occurrence;(5)  make sure that the communications made to the public about the occurrence do not impede the Bureau’s investigation; and(6)  take the necessary measures so that the director of the Bureau may ensure the communications related to the independent investigation with the person seriously injured or injured by a firearm used by a police officer during a police intervention or while the person is in police custody and with the family members of that person or of a person who died during such an occurrence.A police force involved is a police force counting among its members or exercising authority over, as the case may be, the police officers who are involved in the occurrence or who witness it. | **2.** Un directeur d’un corps de police impliqué doit:1°  prendre les mesures nécessaires pour sécuriser la scène de l’événement et pour s’assurer de la conservation de la preuve et de l’intégrité des lieux jusqu’à l’arrivée des enquêteurs du Bureau;2°  prendre les mesures raisonnables pour éviter que les policiers impliqués ou témoins communiquent entre eux au sujet de l’événement jusqu’à ce qu’ils aient remis leur compte rendu aux enquêteurs du Bureau et qu’ils les aient rencontrés;3°  transmettre au directeur du Bureau l’identité de la personne décédée ou blessée ainsi que la nature de ses blessures, l’identité des personnes présentes lors de l’événement, les paramètres et les limites de la scène de l’événement, les éléments de preuve recueillis afin d’en assurer la conservation ainsi que tout autre renseignement recueilli relatif à l’événement;4°  remettre aux enquêteurs du Bureau tout document en lien avec l’événement;5°  s’assurer que les communications faites au public au sujet de l’événement ne nuisent pas à l’enquête du Bureau;6°  prendre les mesures nécessaires afin que le directeur du Bureau puisse assurer les communications relatives à l’enquête indépendante avec la personne blessée gravement ou blessée par une arme à feu utilisée par un policier, lors d’une intervention policière ou lors de sa détention par un corps de police, et avec les membres de la famille de celle-ci ou d’une personne décédée lors d’un tel événement.Un corps de police impliqué est un corps de police dont sont membres ou sous l’autorité de qui agissent, selon le cas, les policiers impliqués dans l’événement ou qui en sont témoins. |
| [**3.**](https://www.legisquebec.gouv.qc.ca/en/document/cr/P-13.1%2C%20r.%201.1#se:3) The Bureau and any other police force conducting parallel investigations based on common evidence or testimonies must cooperate with each other. Despite the foregoing, the Bureau has precedence over the police force with regard to the evidence, testimonies and control of the scene of the occurrence. | **3.** Le Bureau et tout autre corps de police qui mènent parallèlement une enquête basée sur des éléments de preuve ou des témoins communs doivent collaborer entre eux. Toutefois, le Bureau a préséance sur ce corps de police quant aux éléments de preuve, aux témoignages et au contrôle de la scène de l’événement. |
| [**7.**](https://www.legisquebec.gouv.qc.ca/en/document/cr/P-13.1%2C%20r.%201.1#se:7) The principal investigator must, before meeting with a police officer involved or a witness police officer, determine the police officer’s status and, as soon as possible, notify the police officer of that status in writing. The principal investigator must also inform the police officer of any change in status in the course of the investigation and notify the police officer of the change in writing as soon as possible. The principal investigator also informs the director of the police force involved of the status of the police officer and of any change in their status. | **7.** L’enquêteur principal doit, avant de rencontrer un policier impliqué ou un policier témoin, déterminer son statut et, dans les meilleurs délais, l’en aviser par écrit. Il doit, de même, informer ce policier dès qu’il y a changement de son statut en cours d’enquête et l’en aviser par écrit dans les meilleurs délais. Il avise également le directeur du corps de police impliqué du statut de ce policier et de tout changement de ce statut. |
| [**9.**](https://www.legisquebec.gouv.qc.ca/en/document/cr/P-13.1%2C%20r.%201.1#se:9) The investigators of the Bureau assigned to an investigation must meet with all the police officers involved within 48 hours of their arrival on the scene of the occurrence and with all the witness police officers within 24 hours of their arrival, unless the director of the Bureau grants a time extension. | **9.** Les enquêteurs du Bureau assignés à une enquête doivent rencontrer tous les policiers impliqués dans les 48 heures suivant leur arrivée sur les lieux de l’événement et tous les policiers témoins dans les 24 heures de celle-ci, à moins que le directeur du Bureau n’accorde un délai supplémentaire. |
| [**11.**](https://www.legisquebec.gouv.qc.ca/en/document/cr/P-13.1%2C%20r.%201.1#se:11) Insofar as it does not impede the director’s investigation or a parallel investigation, the director of the Bureau informs the public, in particular, of the beginning of an investigation, its conduct and the transmission of the investigation record to the Director of Criminal and Penal Prosecutions and, if applicable, to the coroner. | **11.** Dans la mesure où cela ne nuit pas à son enquête ou à une enquête parallèle, le directeur du Bureau informe le public, notamment du début d’une enquête, de son déroulement et de la transmission du dossier d’enquête au directeur des poursuites criminelles et pénales et, s’il y a lieu, au coroner. |
| [**12.**](https://www.legisquebec.gouv.qc.ca/en/document/cr/P-13.1%2C%20r.%201.1#se:12) The director of the Bureau ensures the communications with the person seriously injured or injured by a firearm used by a police officer during a police intervention or while the person is in police custody and with the family members of that person or of a person who died during such an occurrence. The director communicates to them all relevant information regarding the independent investigation process insofar as it does not impede the investigation. | **12.** Le directeur du Bureau assure les communications avec la personne blessée gravement ou blessée par une arme à feu utilisée par un policier, lors d’une intervention policière ou lors de sa détention par un corps de police, et avec les membres de la famille de celle-ci ou d’une personne décédée lors d’un tel événement. Le directeur leur communique toute information pertinente relative au processus d’enquête indépendante dans la mesure où cela ne nuit pas à l’enquête. |

1. *Fédération des policiers et policières municipaux du Québec c. Procureur général du Québec*, 2022 QCCS 2201 (the “trial judgment”). [↑](#footnote-ref-1)
2. *Police Act*, CQLR, c. P-13.1, ss. 286 to 289.27. [↑](#footnote-ref-2)
3. *Regulation respecting the conduct of the investigations of the Bureau des enquêtes indépendantes*, CQLR, c. P-13.1, r. 1.1. [↑](#footnote-ref-3)
4. *Supra* note 1 at paras. 82–87. [↑](#footnote-ref-4)
5. *Police Act,* CQLR, c. P-13.1, s. 48. [↑](#footnote-ref-5)
6. Sections 25(1) and 26 *Criminal Code* (“*Cr. C.*”); s. 2 *Cr. C.*, definition of “peace officer”. [↑](#footnote-ref-6)
7. Section 25(3) *Cr. C.* [↑](#footnote-ref-7)
8. Section 25(4) *Cr. C.* [↑](#footnote-ref-8)
9. Section 117.07 *Cr. C.* [↑](#footnote-ref-9)
10. Sections 31, 495, 495.1 *Cr. C.* [↑](#footnote-ref-10)
11. Sections 529, 529.1, 529.3 and 529.4 *Cr. C.* [↑](#footnote-ref-11)
12. Section 129 *Cr. C.* [↑](#footnote-ref-12)
13. Sections 270, 270.01, 270.02 and 270.03 *Cr. C.* [↑](#footnote-ref-13)
14. Section 270.1 *Cr. C.* [↑](#footnote-ref-14)
15. *Police Act,* CQLR, c. P-13.1. [↑](#footnote-ref-15)
16. *Code of Ethics of Québec Police Officers*, CQLR, c. P-13.1, r. 1; *By-law respecting the internal discipline of members of the specialized anti-corruption police force*, CQLR, c. P-13.1, r. 2.001; *By-law respecting the internal discipline of members of the Sûreté du Québec*, CQLR, c. P-13.1, r. 2.01; *By-law respecting the internal discipline of police officers of Ville de Montréal*, CQLR, c. P-13.1, r. 2.02. [↑](#footnote-ref-16)
17. *Police Act,* CQLR, c. P-13.1, s. 64 and ss. 256–259. [↑](#footnote-ref-17)
18. *Ibid* at ss. 143, 166 to 178. [↑](#footnote-ref-18)
19. *Ibid* at s. 64. [↑](#footnote-ref-19)
20. *Ibid* at s. 258. [↑](#footnote-ref-20)
21. *Ibid* ats. 64 *in fine,* ss. 286 and 289. [↑](#footnote-ref-21)
22. *Ibid* at s. 286 *in fine* and s. 289.1, para. 2. [↑](#footnote-ref-22)
23. *Ibid* at s. 178. For a fuller description of the ethics system applicable to Quebec police officers, see André Fiset, David Coderre, Patrick J. Verret & Eliane Beaudry, *Traité de déontologie policière au Québec*, 3rd ed. (Montreal: Yvon Blais, 2019). [↑](#footnote-ref-23)
24. *Ibid* at s. 194. [↑](#footnote-ref-24)
25. *Ibid* at ss. 233 and 234. [↑](#footnote-ref-25)
26. *Ibid* at ss. 241 and 252 to 254. [↑](#footnote-ref-26)
27. *Ibid* at s. 289, emphasis added. [↑](#footnote-ref-27)
28. Exhibit PGQ-8: Ombudsman, *The Québec Investigative Procedure for Incidents Involving Police Officers – For a Credible, Transparent, and Impartial Process That Inspires Confidence and Respect*, February 2010. [↑](#footnote-ref-28)
29. *Ibid* at 16–22. [↑](#footnote-ref-29)
30. *Ibid* at 23–25. [↑](#footnote-ref-30)
31. *Ibid* at 25–26. [↑](#footnote-ref-31)
32. *Ibid* at 26–28. [↑](#footnote-ref-32)
33. *Ibid* at 28–41. [↑](#footnote-ref-33)
34. *Ibid* at 41–56. [↑](#footnote-ref-34)
35. *Act to amend the Police Act as concerns independent investigations*, S.Q. 2013, c. 6. Legislative amendments to the *Police Act* provisions concerning BEI investigations were also subsequently enacted, primarily under the *Act to increase the jurisdiction and independence of the Anti-Corruption Commissioner and the Bureau des enquêtes indépendantes and expand the power of the Director of Criminal and Penal Prosecutions to grant certain benefits to cooperating witnesses*, S.Q. 2018, c. 1, s. 35 and the *Act to amend various provisions relating to public security and to enact the Act to assist in locating missing persons*, S.Q. 2023, c. 20, ss. 90 to 94. [↑](#footnote-ref-35)
36. *Police Act*, s. 289.4. [↑](#footnote-ref-36)
37. *Order in Council 405-2016 concerning the* *Regulation respecting the conduct of the investigations of the Bureau des enquêtes indépendantes*, (2016) 148 G.O.Q. II, 2237. [↑](#footnote-ref-37)
38. *Regulation respecting the conduct of the investigations of the Bureau des enquêtes indépendantes*, CQLR, c. P-13.1, r. 1.1. [↑](#footnote-ref-38)
39. Exhibit PGQ-2: Madeleine Giauque, *Rapport du Bureau des enquêtes indépendantes* *(Loi modifiant la Loi sur la police concernant les enquêtes indépendantes, 2013, chapitre 6, article 10)* (Québec: Publications du Québec, 2019) at 22. [↑](#footnote-ref-39)
40. *Ibid* at 23. See also the testimony of Mélissa-Amélie Plourde, BEI representative, reproduced in the hearing transcript of May 10, 2022, at 78, line 21, to 80, line 17. [↑](#footnote-ref-40)
41. Exhibit PGQ-2: Madeleine Giauque, *Rapport du Bureau des enquêtes indépendantes* *(Loi modifiant la Loi sur la police concernant les enquêtes indépendantes, 2013, chapitre 6, article 10)* (Québec: Publications du Québec, 2019) at 7. [↑](#footnote-ref-41)
42. *Ibid* at 8. [↑](#footnote-ref-42)
43. Trial judgment at para. 25. [↑](#footnote-ref-43)
44. *Wood v. Schaeffer*, 2013 SCC 71, [2013] S.C.R. 1053. [↑](#footnote-ref-44)
45. Trial judgment at paras. 26 and 32. [↑](#footnote-ref-45)
46. *Ibid* at para. 32, emphasis in the original. [↑](#footnote-ref-46)
47. *Ibid*, question preceding paragraph 48. [↑](#footnote-ref-47)
48. *Wood v. Schaeffer*, 2013 SCC 71, [2013] S.C.R. 1053. [↑](#footnote-ref-48)
49. Trial judgment at paras. 48–52. [↑](#footnote-ref-49)
50. *Ibid* at paras. 53 and 55. [↑](#footnote-ref-50)
51. *Ibid* at para. 56. [↑](#footnote-ref-51)
52. *Ibid,* question preceding para. 57. [↑](#footnote-ref-52)
53. *Ibid* at paras. 57–60. [↑](#footnote-ref-53)
54. *Ibid* at para. 61. [↑](#footnote-ref-54)
55. *Ibid*, question before para. 62. [↑](#footnote-ref-55)
56. *Ibid* at paras. 62–70. [↑](#footnote-ref-56)
57. *Ibid* at para. 75. [↑](#footnote-ref-57)
58. *Ibid* at para. 77. [↑](#footnote-ref-58)
59. *Ibid* at para. 78, emphasis in the original. [↑](#footnote-ref-59)
60. *Ibid* at paras. 79–80, emphasis in the original. [↑](#footnote-ref-60)
61. Brief of appellant AGQ at 3 and 4, paras. 12 to 16. [↑](#footnote-ref-61)
62. Brief of incidental appellants at 32–33. [↑](#footnote-ref-62)
63. *Starr v. Houlden*, [1990] 1 S.C.R. 1366. [↑](#footnote-ref-63)
64. *Ibid* at 1396–1397, citing *R. v. Hoffmann-La-Roche Ltd.* (1981), 33 O.R. (2d) 694 at 724, 1981 CanLII 1690. See also *O’Hara v. British Columbia*, [1987] 2 S.C.R. 591 at 611–612 (at para. 23). [↑](#footnote-ref-64)
65. Brief of the incidental respondent AGQ at para. 86. [↑](#footnote-ref-65)
66. *Ibid* at para. 92. [↑](#footnote-ref-66)
67. *Murray‐Hall v. Quebec (Attorney General)*,2023 SCC 10 at paras. 21–27 and 30–34. [↑](#footnote-ref-67)
68. *Police Act*, CQLR, c. P-13.1, s. 289.6. [↑](#footnote-ref-68)
69. *Ibid* ats. 289.1, para. 1. [↑](#footnote-ref-69)
70. *Ibid* at s. 289.1, para. 2. [↑](#footnote-ref-70)
71. *Ibid* at s. 289.3. [↑](#footnote-ref-71)
72. *Ibid* at ss. 289 and 289.6. [↑](#footnote-ref-72)
73. Exhibit PGQ-2: Madeleine Giauque, *Rapport du Bureau des enquêtes indépendantes* *(Loi modifiant la Loi sur la police concernant les enquêtes indépendantes, 2013, chapitre 6, article 10)* (Québec: Publications du Québec, 2019) at 4. [↑](#footnote-ref-73)
74. *Ibid* at s. 289.5, para. 2. [↑](#footnote-ref-74)
75. *Ibid* at s. 289.9, para. 2. [↑](#footnote-ref-75)
76. *Ibid* at ss. 289.11, para. 1 and 289.10, para. 2. [↑](#footnote-ref-76)
77. *Regulation respecting the conduct of the investigations of the Bureau des enquêtes indépendantes*, CQLR, c. P-13.1, r. 1.1, s. 1, para. 1. [↑](#footnote-ref-77)
78. *Ibid* at s. 1, para. 2. [↑](#footnote-ref-78)
79. *Ibid* at s. 7. [↑](#footnote-ref-79)
80. *Ibid* at s. 9. [↑](#footnote-ref-80)
81. *Ibid* at s. 3. [↑](#footnote-ref-81)
82. *Ibid* at s. 2. [↑](#footnote-ref-82)
83. *Police Act*, CQLR, c. P-13.1, s. 289.1.1. [↑](#footnote-ref-83)
84. *Ibid* at s. 289.3.1. [↑](#footnote-ref-84)
85. *Act respecting the Director of Criminal and Penal Prosecutions*, CQLR, c. D-9.1.1, s. 13. [↑](#footnote-ref-85)
86. *Police Act*, CQLR, c. P-13.1, s. 289.3.1. [↑](#footnote-ref-86)
87. *Police Act*, CQLR, c. P-13.1, s. 289.22. [↑](#footnote-ref-87)
88. *Ibid* at s. 289.27. [↑](#footnote-ref-88)
89. *Regulation respecting the conduct of the investigations of the Bureau des enquêtes indépendantes*, CQLR, c. P-13.1, r. 1.1, ss. 10 and 11. [↑](#footnote-ref-89)
90. *Ibid* at s. 12. [↑](#footnote-ref-90)
91. *Ibid* at s. 2, para. 1, subparas. (5) and (6) and s. 4. [↑](#footnote-ref-91)
92. Exhibit PGQ-2: Madeleine Giauque, *Rapport du Bureau des enquêtes indépendantes* *(Loi modifiant la Loi sur la police concernant les enquêtes indépendantes, 2013, chapitre 6, article 10)* (Québec: Publications du Québec, 2019) at 7. [↑](#footnote-ref-92)
93. *Ibid.* [↑](#footnote-ref-93)
94. *Ibid.* [↑](#footnote-ref-94)
95. *Ibid* at 8. [↑](#footnote-ref-95)
96. Exhibit PGQ-7A: Quebec, National Assembly, *Journal des débats*, 40-1, Vol. 43, No. 31, (20 March 2013) at 2064 (S. Bergeron). [↑](#footnote-ref-96)
97. *Police Act*, CQLR, c. P-13.1, s. 48. [↑](#footnote-ref-97)
98. *Di Iorio v. Warden of the Montreal Jail*, [1978] 1 S.C.R. 152 at 205. [↑](#footnote-ref-98)
99. *O’Hara v. British Columbia*, [1987] 2 S.C.R. 591 at 606–608; *Bisaillon v. Keable*, [1983] 2 S.C.R. 60 at 79. See also by analogy *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372. [↑](#footnote-ref-99)
100. *Di Iorio v. Warden of the Montreal Jail*, [1978] 1 S.C.R. 152 at 207. [↑](#footnote-ref-100)
101. *O’Hara v. British Columbia*, [1987] 2 S.C.R. 591 at 607. [↑](#footnote-ref-101)
102. *Starr v. Houlden*, [1990] 1 S.C.R. 1366 at 1397–1398, citing the remarks of Martin J. in *R. v. Hoffmann-Laroche Ltd*. (1981), 33 O.R. (2d) 694 at 724, 1981 CanLII 1690. [↑](#footnote-ref-102)
103. *R. v. White*, [1999] 2 S.C.R. 417 at para. 72. [↑](#footnote-ref-103)
104. Application for judicial review and originating application dated June 10, 2019, at para. 1. [↑](#footnote-ref-104)
105. *Guindon v. Canada*, 2015 SCC 41 at paras. 20–23. [↑](#footnote-ref-105)
106. *Re B.C. Motor Vehicle Act,* [1985] 2 S.C.R. 486. [↑](#footnote-ref-106)
107. *Ibid* at 512–513. [↑](#footnote-ref-107)
108. *R. v. Malmo-Levine; R. v. Caine*, [2003] 3 S.C.R. 571 at paras. 110–129; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76 at paras. 8–12; *Application under s. 83.28 of the Criminal Code (Re),* [2004] 2 S.C.R. 248 at para. 68; *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3 at para. 46; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44 at para. 23. [↑](#footnote-ref-108)
109. *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101 at para. 105; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331 at para. 72; *R. v. Safarzadeh-Markhali*, 2016 SCC 14, [2016] 1 S.C.R. 180 at para. 22. [↑](#footnote-ref-109)
110. *R. v. Ndhlovu*, 2022 SCC 38 at paras. 103–108; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101 at para. 113; *R. v. Safarzadeh-Markhali*, 2016 SCC 14, [2016] 1 S.C.R. 180 at para. 53. [↑](#footnote-ref-110)
111. *Application under s. 83.28 of the Criminal Code (Re),* 2004 SCC 42, [2004] 2 S.C.R. 248 at para. 69. [↑](#footnote-ref-111)
112. *R. v. J.J.,* 2022 SCC 28 at paras. 144–145. [↑](#footnote-ref-112)
113. *Ibid* at para. 145. [↑](#footnote-ref-113)
114. *Ibid* at para. 145, referring to *R. v. P. (M.B.)*, [1994] 1 S.C.R. 555 at 578; *R. v. Singh*, 2007 SCC 48, [2007] 3 S.C.R. 405 at para. 21. [↑](#footnote-ref-114)
115. *Ibid* at para. 146. [↑](#footnote-ref-115)
116. *R. v. White*, [1999] 2 S.C.R. 417 at para. 45; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission),* [1990] 1 S.C.R. 425 at 538. [↑](#footnote-ref-116)
117. *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154; *R. v. White*, [1999] 2 S.C.R. 417. [↑](#footnote-ref-117)
118. *R. v. J.J.*, 2022 SCC 28 at paras. 144–145; *R. v. Jones*, [1994] 2 S.C.R. 229 at 248–249 (dissenting reasons of Lamer C.J.); *R. v. Hébert*, [1990] 2 S.C.R. 151 at 176–178; *R. v. Liew*, [1999] 3 S.C.R. 227 at paras. 37–40; *R. v. Singh*, 2007 SCC 48 at paras. 43–46. [↑](#footnote-ref-118)
119. *R. v. Jarvis*, [2002] 3 S.C.R. 757. [↑](#footnote-ref-119)
120. *Ibid* at para. 54. [↑](#footnote-ref-120)
121. *Ibid* at paras. 89–94. [↑](#footnote-ref-121)
122. *Wood v. Schaeffer*, 2013 SCC 71, [2013] 3 S.C.R. 1053atpara. 67. [↑](#footnote-ref-122)
123. *Ibid.* [↑](#footnote-ref-123)
124. *R. v. Jones*, [1994] 2 S.C.R. 229 at 249. See also *R. v. Hebert*, [1990] 2 S.C.R. 151 at 176–178. [↑](#footnote-ref-124)
125. *R. v. Tessier*, 2022 SCC 35 at paras. 39 and 55. [↑](#footnote-ref-125)
126. *Ibid* at paras. 59 and 65. [↑](#footnote-ref-126)
127. *Ibid* at para. 79. [↑](#footnote-ref-127)
128. *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353 at paras. 30 and 34; *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692atpara. 25; *R. v. Tessier*, 2022 SCC 35 at para. 105. [↑](#footnote-ref-128)
129. Brief of the appellant AGQ at paras. 85–92. [↑](#footnote-ref-129)
130. *Ibid* at paras. 93–98. [↑](#footnote-ref-130)
131. *R. v. Singh*, 2007 SCC 48, [2007] 3 S.C.R. 405 at paras. 21 and 34; *R. v. White*, [1999] 2 S.C.R. 417 at para. 44. [↑](#footnote-ref-131)
132. *Re B.C. Motor Vehicle Act* [1985] 2 S.C.R. 486 at 518 (majority reasons of Lamer J.) at 523–524 (dissenting reasons of Wilson J.); *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331 at para. 95. [↑](#footnote-ref-132)
133. *R. v. Brown*, 2022 SCC 18 at para. 166; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350 at para. 66; *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844 at para. 91. [↑](#footnote-ref-133)
134. *Re B.C. Motor Vehicle Act,* [1985] 2 S.C.R. 486 at 518. [↑](#footnote-ref-134)
135. Henri Brun, Guy Tremblay & Eugénie Brouillet, *Droit constitutionnel*, 6th ed. (Cowansville, Qc: Yvon Blais, 2014) at para. XII-6.24. [↑](#footnote-ref-135)
136. *Special Investigations Unit Act*, S.O. 2019, c. 1, Schedule 5, s. 24(1). [↑](#footnote-ref-136)
137. *Ibid* at s. 24(2). [↑](#footnote-ref-137)
138. *Ibid* at ss. 22, 25(1) and (2). [↑](#footnote-ref-138)
139. *Ibid* at s. 25(7). [↑](#footnote-ref-139)
140. *Police Act*, S.N.S. 2004, c. 31, ss. 26A, 26I(1)(a). [↑](#footnote-ref-140)
141. *Serious Incident Response Team Regulations*, S.N.S.2004, c. 31, s. 6(3). [↑](#footnote-ref-141)
142. *Ibid* at s. 6(5). [↑](#footnote-ref-142)
143. *Ibid* at s. 7(2). [↑](#footnote-ref-143)
144. *Ibid* at s. 8(2). [↑](#footnote-ref-144)
145. *Police Service Regulation*, Alta Reg. 356/1990, s. 10.4(6). [↑](#footnote-ref-145)
146. *Ibid* at ss. 10.4(2) and 10.5(1). [↑](#footnote-ref-146)
147. *Ibid* at s. 10.6(3). [↑](#footnote-ref-147)
148. *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810 at para. 24. [↑](#footnote-ref-148)
149. *Ibid* at para. 25. [↑](#footnote-ref-149)
150. *Ibid* at para. 28. [↑](#footnote-ref-150)
151. *Ibid,* citing *Thorne’s Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106 at 111. [↑](#footnote-ref-151)
152. Exhibit PGQ-8: Ombudsman, *The Québec Investigative Procedure for Incidents Involving Police Officers – For a Credible, Transparent, and Impartial Process That Inspires Confidence and Respect*, February 2010 at 21. [↑](#footnote-ref-152)
153. *Ibid.* [↑](#footnote-ref-153)
154. *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34 at paras. 5, 51 and 63. [↑](#footnote-ref-154)
155. *R. v. Campbell*, [1999] 1 S.C.R. 565 at paras. 29, 32–33; *Smith v. Ontario (Attorney General)*, 2019 ONCA 651 at paras. 38–64, in particular paras. 48–49. [↑](#footnote-ref-155)