CITATION: Schaeffer v. Woods, 2010 ONSC 3647
COURT FILE NO.: CV-09-390573
DATE: 20100623

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
RUTH SCHAEFFER, EVELYN MINTY and DIANE PINDER,	*Julian N. Falconer* and *Sunil S. Mathai*, for the applicants
Applicants	
– and –	
POLICE CONSTABLE CHRIS WOODS, ACTING SERGEANT MARK PULLBROOK, POLICE CONSTABLE GRAHAM SEGUIN, JULIAN FANTINO, COMMISSIONER OF THE PROVINICIAL POLICE, IAN SCOTT, DIRECTOR OF THE SPECIAL INVESTIGATIONS UNIT and HER MAJESTY THE QUEEN IN RIGHT OF ONTRAIO (MINISTRY OF COMMUNITY SAFETY AND CORRECTIONAL SERVICES)	*Ian Roland* and *Michael Fenrick*, for the Respondents Police Constable Kris Wood, Acting Sergeant Mark Pullbrook and Police Constable Graham Seguin
	Marlys Edwardh, for the Respondent Ian Scott, Director of The Special Investigations Unit
	Christopher Diana, for the respondent Julian Fantino, Commissioner of the Provincial Police
Respondent	*David Butt*, for the Applicant to Intervene, Police Association of Ontario
	Joseph Markson, for the Applicant to Intervene, Ontario Association of Chiefs of Police
	HEARD: May 13, 14 and 18, 2010

LOW J.

[1] The applicants have launched an application under rules 14.05(3)(d), (g) and (h). They seek an interpretation of certain provisions in the *Police Services Act*, R.S.O. 1990, c P.15 (the Act), in Ontario Regulation 673/98 which governs the Conduct & Duties of Police Officers

Respecting Investigations by the Special Investigations Unit (the Regulation) and in the Law Society of Upper Canada Rules of Professional Conduct. The provisions in the Act and Regulation relate to the rights and obligations of police officers where an investigation of a policing incident resulting in death or serious injury is required to be led by the Special Investigations Unit (the S.I.U.) under s. 113 of the Act.

[2] The applicants are not police officers.

[3] The respondents Police Constable Kris Wood (incorrectly spelled in the title of proceeding), Police Constable Graham Seguin and Acting Sergeant Mark Pullbrook are officers of the Ontario Provincial Police (OPP). They have brought a motion to strike the application on the grounds that it is not justiciable and because the applicants lack standing. This ruling decides that motion.

FACTUAL BACKGROUND

The Minty Investigation

[4] On the evening of June 22, 2009, in an incident at Elmvale, Douglas Minty, a 59 year old developmentally disabled man, died as a result of gunshots fired by Constable Seguin of the OPP. Constable Seguin had responded to a call at the Minty residence concerning an assault by Mr. Minty on a door to door salesman. Mr. Minty was in possession of a knife and began to approach Constable Seguin. The constable ordered Mr. Minty to drop the knife. Mr. Minty did not comply and continued to approach the constable. Constable Seguin fired five shots at Mr. Minty. His attempts to revive Mr. Minty with CPR were unsuccessful and Mr. Minty died.

[5] Another OPP officer, Constable Richard Boyd, arrived at the scene at 8:17 p.m., followed at 8:23 p.m. by Sergeant Michael Burton, Constable Seguin's senior officer. He was followed by Sergeant Amy Thompson who arrived at 8:42 p.m.

[6] Sergeant Burton advised all of the officers that they may be designated as witness officers by the S.I.U. He instructed the officers not to make any further notes until they had spoken to legal counsel and he reminded the officers that it is OPP procedure to ensure that they complete their notebook entries before reporting off duty.

[7] Sergeant Thompson escorted the two civilian witnesses – the salesman and his co-worker - to the OPP detachment. While the witnesses were being transported in Sergeant Thompson's car, they spoke about their experience. The sergeant subsequently made notes of the witnesses' utterances. She did not tell the witnesses not to speak about the incident until they had first given a statement to the S.I.U.

[8] The S.I.U. received notification of the incident at 9:40 p.m., one hour and 23 minutes after the event. It appears that notification of the incident was passed up and through a number of officials within the OPP before receipt by the S.I.U.

[9] In the S.I.U. investigation of the incident, Constable Seguin was designated as the subject officer. Sergeant Burton, Constable Boyd, Sergeant Thompson, and two other officers were designated as witness officers.

[10] Sergeant Burton spoke with his lawyer, Andrew McKay, on June 22 and again on the morning of June 23, 2009. He did not complete his notebook entries about the incident until June 23 which was after the end of his shift

[11] Andrew McKay also acted as counsel for the subject officer, Constable Seguin, as well as for several of the witness officers.

[12] Under s. 9(1), of the Regulation, the witness officers provided their notes and submitted to interviews by the S.I.U.

[13] Under s. 9(3) of the Regulation, Constable Seguin was not required to provide his notes or to submit to an interview. Nevertheless, Constable Seguin voluntarily submitted to an interview.

[14] Upon completion of the investigation, the respondent Ian Scott, Director of the S.I.U., reported on October 14, 2009 to the Attorney General as required by s. 113(8) of the Act. He indicated that there were no reasonable grounds to believe that Constable Seguin had committed a criminal offence in relation to the death of Douglas Minty.

The Schaeffer Investigation

[15] On June 24, 2009, at about 12:30 p.m., in an incident at Pickle Lake, Levi Schaeffer, a 32 year old man diagnosed with schizoaffective disorder, panic disorder and anti-social personality disorder, died as a result of gunshots fired by Constable Kris Wood. Constable Wood and Acting Sergeant Pullbrook were investigating a boat theft in the area where Mr. Schaeffer was camping. They had taken or were in the process of taking Mr. Schaeffer into custody when an altercation arose. Mr. Schaeffer was in possession of a knife. Constable Wood fired his gun twice at Mr. Schaeffer, killing him.

[16] At 1:48 p m., Detective/Sergeant Dayna Wellock instructed Constable Wood and Acting Sergeant Pullbrook not to speak to each other about the incident, to contact their legal counsel and to delay making their notebook entries until they had consulted with counsel.

[17] At 5:12 p.m., Constable Wood consulted his lawyer, Andrew McKay, who advised him to prepare notes for counsel to review.

[18] Constable Wood completed his notebook entries concerning the incident two days later, on June 26, 2009, after meeting with Mr. McKay and having a draft of his notes reviewed by counsel.

[19] Acting Sergeant Pullbrook also consulted Andrew McKay. He also gave the lawyer details of the incident and, after receiving legal advice, made his notebook entries on June 26, 2009

[20] Constable Wood and Acting Sergeant Pullbrook declined to produce to the S.I.U. their written communications to their lawyer. There is no suggestion that lawyer McKay told Acting Sergeant Pullbrook what he was told by Constable Wood or that he told Constable Wood what he was told by Acting Sergeant Pullbrook.

[21] Acting Sergeant Pullbrook provided his notebook entries to the S.I.U. investigators and was interviewed.

[22] As the subject officer, Constable Wood was, under s. 9(3) of the Regulation, not required to provide his notes or to submit to an interview. He nevertheless provided a copy of his notebook entries

[23] On September 25, 2009, the Director of the S.I.U. reported the result of the investigation to the Attorney General. After a lengthy examination of the information relating to the incident comprising pages 4 to 31 of the report, the director stated that there were no reasonable grounds to believe that Constable Wood had committed a criminal offence. The following are the closing paragraphs of the report. The Director's comments lie at the heart of the applicants' application.

> I cannot form reasonable grounds that the subject officer, Cst Wood, committed a criminal offence in the firearms death of Mr. Schaeffer. I have no doubt that Cst Wood and A/Sgt Pullbrook approached Mr. Schaeffer in a remote area of Osnaburgh Lake in the Pickle Lake region during an investigation of a stolen boat on June 24th, 2009. And I have no doubt that Cst Wood discharged his firearm at Mr. Schaeffer causing his death at approximately 1300 hrs the same day. Beyond that, I am not sure what happened.
>
> There were only three individuals at the scene: the now deceased Mr. Schaeffer; subject officer Cst Wood; and witness officer A/Sgt. Pullbrook. There is no other contemporaneous information of this shooting incident such as civilian witnesses, audio or video recordings. Obviously, we do not have an accounting from Mr. Schaeffer. For reasons set out below, I cannot place sufficient reliance on the information provided by Cst Wood or A/Sgt. Pullbrook to decide what probably happened.
>
> As previously mentioned, Cst Wood was the subject officer. He provided his notes to the S.I.U. but declined to be interviewed. According to his notes, he was instructed by D/Sgt Wellock shortly after the incident not to write up his notes until he spoke to legal counsel. He then spoke to Ontario Provincial Police association lawyer Andrew McKay at 1712 hrs the same day and was advised to prepare notes for him. He met with Mr. McKay at 0900 on June 26th, 2009, two days after the incident, and provided his notes to him. According to the subject officer's notes, Mr. McKay "adv[ised] notes are excellent and to complete notebook" In other words, after receiving Mr. McKay's approval, he took his notes back from his counsel and wrote up his memo book based upon a combination of his confidential notes to counsel and his discussions with him. At

0930, the only other witness to this shooting, A/Sgt Pullbrook, attended the same location to confer with Mr. McKay.

A/Sgt Pullbrook was designated a witness officer, provided his notes and submitted to a compelled interview. He too was represented by Mr. McKay, who advised him at 1810 hrs on the day of the incident not to write up his notes. According to his notes, A/Sgt Pullbrook made his June 24th, 2009 note book entries based upon his confidential notes to counsel on June 26th, 2009. Needless to say, neither officer provided the S.I.U. investigators with their first set of notes. I might add that Mr. McKay acted for all of the other witness officers in this matter.

This note writing process flies in the face of the two main indicators of reliability of notes: independence and contemporaneity. The notes do not represent an independent recitation of the material events. The first drafts have been 'approved' by an OPPA lawyer who represented all of the involved officers in this matter, a lawyer who has a professional obligation to share information among his clients when jointly retained by them. Nor are the notes the most contemporaneous ones – they were not written as soon as practicable and the first drafts remain in the custody of their lawyer. I am denied the opportunity to compare the first draft with the final entries. Accordingly, the only version of the material events are association lawyer approved notes. Due to their lack of independence and contemporaneity, I cannot rely upon these notes nor A/Sgt Pullbrook's interview based upon them for the truth of their contents.

I have a statutory responsibility to conduct independent investigations and decide whether a police officer probably committed a criminal offence. In this most serious case, I have no information base I can rely upon. Because I cannot conclude what probably happened, I cannot form reasonable grounds that the subject officer in this matter committed a criminal offence.

THE RELEVANT LEGISLATION

[24] The relevant parts of the *Police Services Act*, ("the Act") are set out below. The sections of the Act that are directly in issue in the application have been underlined:

PART IV
POLICE OFFICERS AND OTHER POLICE STAFF

CHIEF OF POLICE

Duties of chief of police

41. (1) The duties of a chief of police include,

....

(b) ensuring that members of the police force carry out their duties in accordance with this Act and the regulations and in a manner that reflects the needs of the community, and that discipline is maintained in the police force;

....

PART VII

SPECIAL INVESTIGATIONS

Special investigations unit

113. (1) There shall be a special investigations unit of the Ministry of the Solicitor General.

Composition

(2) The unit shall consist of a director appointed by the Lieutenant Governor in Council on the recommendation of the Solicitor General and investigators appointed under Part III of the *Public Service of Ontario Act, 2006.*

Idem

(3) A person who is a police officer or former police officer shall not be appointed as director, and persons who are police officers shall not be appointed as investigators.

Acting director

(3.1) The director may designate a person, other than a police officer or former police officer, as acting director to exercise the powers and perform the duties of the director if the director is absent or unable to act.

Peace officers

(4) The director, acting director and investigators are peace officers.

Investigations

(5) The director may, on his or her own initiative, and shall, at the request of the Solicitor General or Attorney General, cause investigations to be conducted into the circumstances of serious injuries and deaths that may have resulted from criminal offences committed by police officers

Restriction

(6) An investigator shall not participate in an investigation that relates to members of a police force of which he or she was a member.

Charges

(7) If there are reasonable grounds to do so in his or her opinion, the director shall cause informations to be laid against police officers in connection with the matters investigated and shall refer them to the Crown Attorney for prosecution.

Report

(8) The director shall report the results of investigations to the Attorney General.

Co-operation of police forces

(9) Members of police forces shall co-operate fully with the members of the unit in the conduct of investigations.

[25] The relevant sections of O. Reg. 673/98 governing *Conduct & Duties of Police Officers Respecting Investigations by the Special Investigations Unit* ("the Regulation") are as follows:

3. A chief of police shall notify the SIU immediately of an incident involving one or more of his or her police officers that may reasonably be considered to fall within the investigative mandate of the SIU, as set out in subsection 113 (5) of the Act.

....

5 The SIU shall be the lead investigator, and shall have priority over any police force, in the investigation of the incident.

6. (1) The chief of police shall, to the extent that it is practicable, segregate all the police officers involved in the incident from each other until after the SIU has completed its interviews

(2) A police officer involved in the incident shall not communicate with any other police officer involved in the incident concerning their involvement in the incident until after the SIU has completed its interviews.

7. (1) Subject to subsection (2), every police officer is entitled to consult with legal counsel or a representative of the association and to have legal counsel or a representative of the association present during his or her interview with the SIU.

(2) Subsection (1) does not apply if, in the opinion of the S.I.U. director, waiting for legal counsel or a representative of the association would cause an unreasonable delay in the investigation.

8. (1) Subject to subsections (2) and (5) and section 10, immediately upon being requested to be interviewed by the SIU, and no later than 24 hours after the request where there are appropriate grounds for delay, a witness officer shall meet with the SIU and answer all its questions.

(2) A request to be interviewed must be made in person.

(3) The SIU shall cause the interview to be recorded and shall give a copy of the record to the witness officer as soon as it is available.

(4) The interview shall not be recorded by audiotape or videotape except with the consent of the witness officer.

(5) The SIU director may request an interview take place beyond the time requirement as set out in subsection (1).

9. (1) A witness officer shall complete in full the notes on the incident in accordance with his or her duty and, subject to subsection (4) and section 10, shall provide the notes to the chief of police within 24 hours after a request for the notes is made by the SIU.

(2) Subject to subsection (4) and section 10, the chief of police shall provide copies of a witness officer's notes to the SIU upon request, and no later than 24 hours after the request.

(3) A subject officer shall complete in full the notes on the incident in accordance with his or her duty, but no member of the police force shall provide copies of the notes at the request of the SIU.

(4) The SIU director may allow the chief of police to provide copies of the notes beyond the time requirement set out in subsection (2).

....

THE LAW SOCIETY RULE CONCERNING JOINT RETAINERS

[26] Rule 2.04(6) of the *Law Society of Upper Canada Rules of Professional Conduct* provides as follows:

> Except as provided in subrule (8.2), where a lawyer accepts employment from more than one client in a matter or transaction, the lawyer shall advise the clients that

(a) the lawyer has been asked to act for both or all of them,

(b) no information received in connection with the matter from one can be treated as confidential so far as any of the others are concerned, and

(c) if a conflict develops that cannot be re resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

THE APPLICANTS' APPLICATION

[27] On November 4, 2009, the applicants launched their application.

[28] The applicants' prayer for relief is as follows:

1. Declaratory relief in the form of judicial interpretations and guidance in respect of those provisions of the *Police Services Act* and Regulations that govern the police duty to cooperate with investigations by the Special Investigations Unit.

2. The families seek this Honourable Court's guidance pursuant to Rule 14.05(3) of the Rules of Civil Procedure in the form of declaratory relief in respect of the following:

(A) An interpretation of section 113(9) of the *Police Services Act, R.S.O. 1990, c. P.15 ("Act ")*, and Ontario 'Regulation 673/98, *Conduct & Duties of Police Officers Respecting Investigations by the S.I.U.* ("*S.I.U. Regulations*") to determine whether the legislation expressly or impliedly authorizes the following:

(i) The subject and witness officers sharing the same lawyer who, under the Rules of Professional Conduct, is duty bound to share all relevant information as between the clients;

(ii) The subject and witness officers preparing and submitting their memobook notes after having the notes reviewed by jointly retained counsel.

(iii) The subject and witness officers creating two sets of police notes: a solicitor's draft (never shared with S.I.U.) and a second draft which, having been vetted by their lawyer, is provided to S.I.U.;

(B) An interpretation of section 113(9) of the *Act* and sections 9(1) and 9(3) of the *S.I.U. Regulations* to determine whether the legislation and regulations expressly or impliedly permit supervising O.P.P. officers, as a matter of course (pursuant to a newly created O.P.P. Policy), to authorize involved officers (both subject and witness

officers) to refrain from preparing their notes to permit consultation with counsel and regardless of the expiry of the police officer's shift;

(C) An interpretation with respect to section 7(1) of the *S.I.U. Regulations* to determine whether an involved officer's entitlement to counsel includes a right to counsel who is acting jointly for both the subject and witness officer; or whether the term counsel is to be interpreted as counsel capable of acting free of conflict of interest (see *Booth et al. and Huxter* [1994] O.J. No. 52 at para. 79);

(D) An interpretation of Rules 4 and 2.06(4) of the *Law Society of Upper Canada Rules of Professional Conduct* and sections 6(1) and 6(2) of the *S.I.U. Regulations* to determine whether a joint retainer on behalf of the subject officer (Constable Woods) and the witness officer (Acting Sergeant Pullbrook) in the shooting death of Levi Schaeffer is prohibited.

(E) An interpretation with respect to sections 41(1)(b) and 113(9) of the *Act* and sections 3, 5, 6(1) and 6(2) of the *S.I.U. Regulations* to determine whether the legislation and regulations permit the Respondent Commissioner of the O.P.P. to:

(i) Authorize involved officers, as a matter of policy, absent exigent circumstances, to complete their notes after the conclusion of their shifts;

(ii) Authorize subject and witness officers to jointly retain legal counsel;

(ii) Authorize OPP officers to "de-brief" civilian witnesses prior to the *S.I.U.* being notified of an incident; and

(iv) Delay, without reasonable excuse, notification to the S.I.U. of a shooting incident;

(F) A Declaration that the herein described conduct of the of the Respondent officers and the Commissioner of the OPP in respect of the S.I.U. investigations into the police shooting deaths of Doug Minty and Levi Schaeffer violated section 113(9) of the *Act* and sections 3, 5, 6(1), 6(2), 9(1) and 9(2) of the *S.I.U.* Regulations.

2. The costs of this application; and

3. Such further and other relief as counsel may advise and this Honourable Court may permit.

[29] The grounds for the application as set out in the Notice of Application are the facts, summarized above, and several paragraphs of argument that the conduct of the OPP officers contravened the Act and Regulation.

[30] Ruth Schaeffer, the mother of Levi Schaeffer filed an affidavit in support of the application. In relation to the applicants' interest in the subject matter of the application, Mrs. Schaeffer deposes,

> 8. My son's death has been devastating for my family. Our grief has been made worse by the actions of the officers in their interaction with S.I.U. after the shooting. We feel that because of the actions of the Subject and Witness officers and their superiors we will never know why my son died. It is impossible for me to trust any claims made by the police officers who last saw Levi alive. In addition to the reasons set out in our Notice of Application, my family and I are seeking this Court's assistance in the hope that other families do not suffer the stress and anxiety we are experiencing from being unable to learn the circumstances surrounding the death of our love one.

[31] Also filed in support of the application was the affidavit of Diane Pinder, sister of Douglas Minty. In relation to the applicants' interest in the subject matter of the application, Ms. Pinder deposes,

> 8. My family and I trusted that as an independent civilian agency with the authority to require cooperation from the police, the S.I.U. would be well placed to get to the bottom of how my brother died and whether the shooting was justified. The actions of the Subject Officer and his superiors in their interaction with S.I.U. have seriously undermined my confidence and that of my family's in the integrity of the S.I.U. investigation. As a result, we will never be confident that we know the true facts surrounding my brother's death. These doubts have made it very difficult for us to move forward in the grieving process.
>
> 9. Doug's violent death has been difficult enough for me and my family to face; these actions by the officers have simply aggravated our grief. In addition to the reasons set out in the Notice Application, my family and I commenced the herein Application in the hope that no other family will have to endure this.

[32] It is common ground from the undisputed facts that the *Coroners Act*, R.S.O. 1990, c. C.37 is engaged and an inquest may be expected at least in respect of Mr. Schaeffer's death as he died while detained by or in the custody of a peace officer (see s. 10(4.6)) and very likely also in respect of Mr. Minty's death.

[33] Section 31 of the *Coroners Act* provides:

> (1) Where an inquest is held, it shall inquire into the circumstances of the death and determine,

(a) who the deceased was;

(b) how the deceased came to his or her death;

(c) when the deceased came to his or her death;

(d) where the deceased came to his or her death; and

(e) by what means the deceased came to his or her death.

Idem

(2) The jury shall not make any finding of legal responsibility or express any conclusion of law on any matter referred to in subsection (1).

Authority of jury to make recommendations

(3) Subject to subsection (2), the jury may make recommendations directed to the avoidance of death in similar circumstances or respecting any other matter arising out of the inquest.

[34] To the extent that a searching inquiry can be made into the circumstances of the deaths of Mr. Schaeffer and Mr. Minty and address the wish of the families to know why and how the deceased died, the procedures established under the *Coroners Act* are the proper forum for such an examination. As of the date of the hearing of this motion, an inquest has not yet started either into the death of Mr. Minty or of Mr. Schaeffer.

[35] In contrast to the investigation by the S.I.U. which is focused on whether there are reasonable grounds to believe that the subject officer has committed a criminal offence and where the subject officer is, by statute, not required either to produce his notes or to submit to an interview – thus limiting the pool of information available to the S.I.U. – the information that may be brought to light at an inquest is significantly more wide ranging: at an inquest, the officers involved, whether as witnesses or as subjects in the S.I.U. investigations, are compellable witnesses and the applicant families will have rights under s. 41 (2) of the *Coroners Act* to be represented, to call evidence and to cross-examine witnesses.

[36] The families of the deceased men are in grief over their loss and, I believe, are *bona fide* in their desire to understand what happened. It is evident, however, that if the objective of the applicants is to know in greater detail the circumstances surrounding the deaths of Mr Minty and Mr. Schaeffer, declarations one way or the other in this application cannot result in achieving that objective or in bringing the applicants closer to it. An adjudication of the application will not have the result of making more or different information available. The S.I.U. investigation has been completed.

OPP INTERNAL INVESTIGATIONS

[37] After the applicants launched their application and before the hearing of this motion, the OPP conducted two investigations in the Schaeffer matter concerning the conduct of the subject and witness officers. The investigations addressed the shooting itself and issues surrounding officers' consulting legal counsel and delay of note making following the shooting.

[38] The results of the first investigation are in the report of Chief Superintendent Ken Smith, Bureau Commander for the Professional Standards Bureau, dated November 30, 2009. Chief Superintendent Smith concluded that Constable Wood had used appropriate force in shooting Mr. Schaeffer.

[39] On the issue of the right to legal counsel and the obligation to make notes of what happened during an officer's shift, Chief Superintendent Smith wrote:

> Clarification should be made to Police Orders that Section 7 of the Ontario Regulation 673/98, Police Services Act explicitly recognized the right of officers involved in an S.I.U. mandated occurrence to seek and retain legal counsel. This recognition does not negate the member's responsibility as stated in Police Orders to complete their notes in respect of on duty activities prior to the end of shift or as authorized by their supervisor.
>
> Members who have been involved in traumatic incidents involving death or serious injury and are unable due to psychological duress or physical injury may be properly directed by supervisors to prepare their notes at a later time.
>
> Members who are incapacitated by physical or emotional duress must communicate this to their first line supervisor so that appropriate supervisory directions may be given. It is not the role of legal counsel or Association representatives to direct members to remove themselves from duty.
>
> The Role of our supervisors should not be to direct members to contact legal counsel prior to making their required Duty book entries but to advise them of their legislated right to speak to counsel pursuant to the Police Services Act. Appropriate opportunity should be provided for our members to complete this communication This will apply in circumstances where it is reasonably envisioned that the Special Investigations Unit mandate might apply and members may be or have been designated as Subject or Witness officers.

[40] The report dated December 10, 2009 from the second investigation concluded that Constable Wood and Acting Sergeant Pullbrook did not complete their duty notes as required by OPP policy (i.e., before the end of shift) but held that there was no breach of OPP policy in the officers' refusal to provide their "counsel reviewed notes" to the S.I.U. Reliance was placed on a legal opinion from lawyer Gavin MacKenzie to the effect that the notes, prepared for the purpose of obtaining legal advice and instructing counsel, were subject to solicitor/client privilege.

THE APPLICANTS' POSITION

[41] The position that the applicants will take on the application proper is that the actions referred to in the prayer for relief are prohibited: that it is unlawful for two or more police officers involved in an incident that is being investigated by the S.I.U. to share the same solicitor in relation to the incident; that it is unlawful for an officer to discuss with his solicitor the particulars of the incident prior to making entries into his notebook without disclosing what he has communicated to the solicitor – in particular, where the solicitor has also been retained by another officer involved in the incident. These two issues appear to be at the heart of the matter.

[42] On the issue of standing, counsel for the applicant argues that it is not necessary that the applicants assert any legal right of their own or claim relief in reliance upon it. It is said that the applicants are entitled to lawful conduct on the part of the police, to a fair and impartial investigation, and to compliance by the OPP officers with the Act and Regulations.

[43] A second argument advanced to support the justiciability of the application is that the applicants are entitled to know whether or not they might have a cause of action in the tort of misfeasance in public office.

[44] As set out in *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263 at para. 22-23, the tort may take one of two forms: the first, conduct that is specifically intended to injure a person or class of persons, and the second, action by a public officer who acts with knowledge both (a) that he had no power to do the act complained of and (b) that the act is likely to injure the plaintiff. There are two necessary constituent elements in either form of the tort: deliberate, unlawful conduct in the exercise of public functions, and awareness that the misconduct is unlawful and likely to injure the plaintiff. Needless to say, the plaintiff must also show harm.

[45] It is the applicants' position that they ought not to be put to the expense and time required to prosecute a civil action alleging the tort of misfeasance in public office where they do not know for sure whether or not one of the constituent elements of the tort is present – that is, unlawful conduct on the part of the officers. It is argued that a lawsuit will take some six years to complete and that this application is the best way to find out whether or not the applicants have a viable action. This application is, in effect, a private reference.

[46] In the application, the applicants do not claim a declaration of their own rights or any relief arising out an infringement of one of their own rights. The only relief they seek is a declaration that the respondent OPP officers and their superiors have acted unlawfully.

CONTEXT OF THE DISPUTE

[47] Before dealing with the justiciability of the application, it is useful to look at the context in which the proceeding arises.

[48] There is abundant evidence in the record that long before the deaths of Mr. Schaeffer and of Mr. Minty, the issue of the retainer of one solicitor by more than one officer involved in an incident being investigated by the S.I.U. has been the subject of significant disagreement among stakeholders in the policing arena.

[49] It has been the practice of police associations to permit, if not to encourage, joint retainers of legal counsel in the interests of economy. There is no express prohibition in the legislation and it appears that the existence of the appearance of opportunity for collusion is not a sufficient incentive to discontinue the practice.

[50] In his 2003 review report on the Special Investigations Unit Reforms prepared for the Attorney General of Ontario, the Honourable George Adams raised the issue of the potential for actual or apparent opportunity for contamination of an officer's information and he observed, at page 44 ,

> It was reported by the SIU that officers have frequently gone off duty, some with claims of stress related injury, and their counsel are often unavailable immediately. It has also been reported that least one police association lawyer took the position, without objection by police supervisors, that this provision in the Regulation could not be used as a basis for requiring officers to remain at the scene or at the detachment until the SIU arrives. In cases where officers do stay on duty and remain physically segregated, the SIU has sometimes encountered one lawyer acting for multiple witness officers and, surprisingly, even including subject officers. Given the ethical obligation of disclosure of a lawyer to his or her client, this practice can undermine the purpose of segregating the officers and clearly needs review.

[51] Ombudsman Andre Marin in his 2008 report titled "Oversight Unseen" on the Investigation into the Special Investigations Unit's operational effectiveness and credibility observes, at para. 204,

> *Police Services Act* regulations require that officers involved in an incident be separated from one another. This reflects standard investigative procedure and helps ensure their testimony and written notes – which must also be provided quickly – are not affected by any outside influences. The SIU operational orders require that if witnesses have not been segregated, the investigator is to reconstruct each of their actions and find out whether they have spoken to anyone else about the incident prior to the interview. It is noted that:
>
> > THE OBJECT OF THIS IS TO PROTECT THE WITNESS FROM ANY SUBSEQUENT ALLEGATION THAT HIS OR HER EVIDENCE HAS BEEN CONTAMINATED BY EXPOSURE TO THIRD PARTIES.

And at paragraph 207,

> A number of SIU investigators told us officers routinely make their notes after consulting with counsel. Another concern identified by Mr. Adams, which continues to apply today, is that at times the same legal counsel will represent all officers in an incident – sometimes not only witness officers but subject officers as well While police associations follow this practice in an effort to reduce costs,

> as Mr. Adams note, "this commendable sensitivity cannot defeat the legal requirement of segregating officers." This practice raises ethical issues, particularly in light of the officers' duty not to communicate with other involved officers until the SIU interviews have concluded. While recognizing that legal representation can be costly to police associations, and to services that have committed to pay their members' legal costs, I believe that the utmost care should be taken to foster the integrity of the investigative process. This includes avoiding any potential for witness information to be tainted or tailored, intentionally or otherwise. The practice of the same lawyer representing various officers involved in an incident should be prohibited. [Emphasis added.]

[52] Within the context of the investigation into the incident leading to the death of Mr. Schaeffer, Ian Scott, the director of the S.I.U., raised the issue in his report to the Attorney General, in a letter to Commissioner Fantino dated September 25, 2009 in which he replicated the 3 penultimate paragraphs quoted at para 23 above, and in a media release.

[53] Commissioner Fantino responded to the media release in a letter to Mr. Scott dated September 30, 2009, saying that the Director had inflamed an already volatile situation and urging him to "fully explore all avenues available to address policy and procedural issues before making inflammatory public statements."

[54] Mr. Scott offered to meet with the commissioner and his representatives to discuss the importance of officers writing independent and contemporaneous notes, an offer which the commissioner declined on November 13, 2009 on the grounds that the preparation of officers' notes was outside the director's mandate.

[55] In the volley of correspondence between the director and the commissioner between September 25, 2009 and November 13, 2009, there is no suggestion by Director Scott that the officers had acted unlawfully. Rather, the dispute was over policy, jurisdiction, and methodology.

IS THE APPLICATION JUSTICIABLE?

[56] It is apparent that this litigation, while it cannot advance any articulated interest of the applicants – i e to know what happened – will have the effect of adding yet another voice to the debate about the merits and demerits of joint retainers of a lawyer by more than one police officer involved in a S.I.U. investigation. The chief protagonists in the debate appear to be Mr. Scott, the Director of the S.I.U., and the Commissioner of the OPP, both of whom are respondents in the application and both of whom have filed vigorous materials promoting their opposing views of the matter. As well, the Ontario Association of Chiefs of Police and the Police Association of Ontario have filed applications to intervene.

[57] The issue lies at the intersection of a number of values, interests and rights that are not easily balanced. Among them are the interest in ensuring public security, the value of an effective civilian oversight of police action, the interest in ensuring accountability on the part of those in whom extraordinary powers have been vested, the rights of police officers to counsel

and to silence where they are potentially accused persons by reason of actions performed in the course of their duties, the appropriate checks upon those who are empowered to use force in the discharge of their duties, and the appropriate protections to be accorded to those who are called upon to undertake extraordinary risk.

[58] Where the balance lies is a matter of policy upon which policy makers disagree. The Regulation was enacted after a process of consultation with the stakeholders and after the receipt of an earlier study and report from Mr. Adams in 1998 making some 25 recommendations, most of which were enacted into the Regulation.

[59] Since the enactment, members of the police force and police associations have maintained the practice of joint retainers of legal counsel. The practice has been the subject of criticism and it is a policy issue upon which there is deeply divided opinion.

[60] Counsel for the applicants argues that legislative change will not happen because the police lobby in this province is so strong that the executive branch has been intimidated to the extent that there will not be legislative reform to prohibit the practice. It is said that the court and these applicants' application for the declarations they seek is the only recourse.

[61] In my view, it is not the proper function of this court to act as a policy maker of last resort. The issue was placed before the Attorney General in the thoughtful and compelling reports of Mr. Marin and Mr. Adams. Whether the Legislature adopts the suggestions in the reports and enacts laws to implement them is within its province alone. The court's function is to adjudicate issues which are both justiciable and within its jurisdiction.

[62] I am persuaded that the application is not justiciable.

[63] The application seeks declarations characterizing certain past actions of certain of the police officer respondent parties as in violation of legislation. The impugned acts of those respondent parties are complete. The S.I.U. investigations are also complete.

[64] Although it is not necessary to show actual damages to obtain a declaratory judgment, it is nevertheless necessary to show that a party's interest is threatened. In such cases, the court has a discretion to grant a declaration but is not obligated to do so. As Professor Lorne Sossin states in *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Toronto: Carswell, 1999) at 217:

> . it is still required that the applicant show a causal link between an action and the future harm alleged to flow from it. If such a link cannot be proven, no declaratory remedy will be available. As Samuel Eager concludes in his study, *The Declaratory Judgment Action*:
>
> > 3. The remedy [of declaratory relief] is not generally available where the controversy is not presently existing but merely possible or remote; the action is not maintainable to settle disputes which are contingent upon the happening of some future event which may never take place.

> 4. Conjectural or speculative issues, or feigned disputes or one-sided contentions are not the proper subjects for declaratory relief.

[65] The Supreme Court in *Canada v. Solosky*, [1979] S.C.J. No. 130; [1980] 1 S.C.R. 821; 105 D.L.R. (3d) 745; 30 N.R. 380; 50 C.C.C. (2d) 495; 16 C.R. (3d) 294; 4 W.C.B. 177 instructs as to the availability of the declaratory remedy. At para 16, Dickson J. wrote,

> As Hudson suggests in his article "Declaratory Judgments in Theoretical Cases: The Reality of the Dispute" (1977), 3 Dal.L.J. 706, p. 708:
>
> > The declaratory action is discretionary and two factors which will influence the court in the exercise of its discretion are the utility of the remedy, if granted, and whether, if it is granted, it will settle the questions at issue between the parties.
>
> The first factor is directed to the "reality of the dispute". It is clear that a declaration will not normally be granted when the dispute is over and has become academic, or where the dispute has yet to arise and may not arise. As Hudson stresses, however, one must distinguish, on the one hand, between a declaration that concerns "future" rights and "hypothetical" rights, and, on the other hand, a declaration that may be "immediately available" when it determines the rights of the parties at the time of the decision together with the necessary implication and consequences of these rights, known as "future rights".

[66] In this application, there is no legal dispute between the applicant parties and the respondent parties. The obligation owed by the respondent police officers to conduct themselves lawfully and to enable a fair and impartial investigation, which is articulated as that to which the applicants are entitled, is the same obligation owed by police officers to all members of society.

[67] There is no legal nexus between the applicants and the respondent officers. It is a matter of one group of citizens saying of another group of citizens: they have conducted themselves unlawfully, and we seek the court's concurrence in that opinion.

[68] As Smith J. pithily put it in oral reasons in *McConnell v. Rabin*, (1986) 13 C.P.C. (2d) 184 (H.C.J.) at para. 11:

> I have great difficulty accepting the notion that private individuals may go around asking the courts for declarations to the effect that provisions of statutes have been breached simply on the basis that they assert an interest in having the declaration made. Surely there must be more. As stated at the outset, we are not now concerned with a cause of action for damages or any other cause for redress but only with a declaration. How can a declaration that the defendant breached the regulation in this case be of any assistance to anyone? The declaration will stop there. No useful purpose will have been achieved if a declaration is made by the Court. The commission will maintain its jurisdiction and its obligation to deal

> with the defendant as a Registrant and exercise its powers under s. 26 of the *Securities Act*, quite independently of the Court declaration if one were made.

[69] As for the utility of a declaration to the applicants, it is said that there will be some utility in that if the court holds that the respondent officers have violated legislation, then the applicants will know that if they should decide to sue in the tort of misfeasance in public office, their action will not be doomed to failure for absence of conduct that is objectively unlawful.

[70] In that light, the application is in essence a private reference. There is no provision in the Rules for a private reference and an application of this kind is not a proper use of court resources. Although counsel for the applicants made reference to a possible civil action in tort for misfeasance in public office, there is no evidence in the record that such an action has been or will be commenced. If an action were commenced, the issue of whether the defendants had violated a statute would necessarily be litigated within the lawsuit as it is a constituent element of the cause of action and a separate application for the court's opinion is unnecessary. The Rules do not contemplate litigation in this piecemeal fashion whereby a litigant uses Rule 14 to fly a trial balloon.

[71] There is no question of future harm to the applicants that the declarations sought could possibly prevent. The actions of the police officers are spent and the issues are moot. No practical interest and no legal interest of the applicants is engaged in the application. The result of the application cannot resolve a dispute between the parties as none has been articulated for determination.

[72] As Doherty J.A. stated in *Tamil Co-operative Homes Inc. v. Aruluppah*, [2000] O.J. No. 3372 at para. 13, "Courts exists to resolve real disputes between parties and not to provide opinions in response to hypothetical or academic problems."

[73] In *Borowski v. Canada (Attorney-General)*, [1989] 1 S.C.R. 342 at para. 15, Sopinka J. stated for a unanimous court:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot.

[74] Here, the opinion of the court may have a significant impact on the rights of the respondents but that is not sufficient to make the application justiciable. The applicants have no legal interest in the outcome of the application.

[75] As Hood J. wrote in *Fraser v. Houston*, [1996] B.C.J. No. 2096 at para. 29 (B.C.S.C.),

> It is my opinion, that while there need not necessarily be a cause of action between the parties before the court will have jurisdiction to grant declaratory relief, and that jurisdiction is quite, broad, it is not at large or unfettered. A litigant seeking declaratory relief must demonstrate he or she has a right which has been infringed by, or requires protection from, the other party. If the right cannot be demonstrated, the party does not have standing and the court does not have declaratory jurisdiction.

[76] The applicants have disclosed no right which has been infringed.

[77] The question can be viewed from this perspective: do the applicants have a right to restrain the police officer respondents from the acts said to be unlawful, of or to require them to conduct themselves in a different manner? For example, do the applicants have a legal right to require a police officer not to retain a particular solicitor of his choosing? Do the applicants have a legal right to require a police officer to complete his notebook entries at any particular time and in any particular way? Do the applicants have a legal right to require the lawyer, Mr. McKay, to refuse a retainer? Do the applicants have a legal right to require a police force to report an incident to the S.I.U. within a particular number or minutes or hours? In my view, they do not.

[78] Police officers have no less right to retain counsel of choice than any other citizen: it is a private right which, in the context of an investigation by the S.I.U., is reinforced in the regulation. While special obligations may fall upon a solicitor to his clients in the event a conflict of interest arises, no duty is owed by the officer to any particular citizen in relation to the exercise of his right to counsel.

[79] The duties of police officers to act lawfully is owed to the public at large and not to any particular citizen. The duties of OPP officers to comply with OPP policies and procedures is owed to the OPP. If an officer is derelict in the discharge of those duties, there are disciplinary measures which may be taken but the duty of officers to do their job in the manner required by their employer's policies does not confer a private right or cause of action to a citizen to enforce compliance. Were it otherwise, there would be significant mischief to the administration of justice.

[80] I am satisfied therefore that the applicants have no private interest standing to bring the application.

[81] I turn next to the question of whether they have public interest standing.

[82] The test for granting public interest standing to a litigant without a direct interest in the outcome of the proceeding comprises three elements: (see *Borowski v. Canada*, [1981] 2 S.C.R. 575 at 598 and *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607 at 30 -40):

(a) There is a serious issue raised as to the invalidity of a statute or an allegation that administrative action has been taken in the absence of statutory authority.

(b) It has been established that the applicant is directly affected by the legislation or administrative action, and, if not, he has a genuine interest in the validity of the legislation or challenged administrative action.

(c) There is no other reasonable and effective way to bring the issue before the courts.

[83] Public interest standing is not shown in this case.

[84] The application does not raise a question concerning the validity of any piece of legislation. There is no allegation that any administrative action has been taken in the absence of statutory authority.

[85] The actions said to be unlawful are the manner of exercise by police officers of their rights to retain counsel and the timing of performance by police officers of certain of the duties inherent in their employment as officers of the OPP.

[86] The retention of counsel by police officers who are or may be designated as subject officers under the regulation is the exercise of a private right. It is not an administrative action.

[87] The manner and timing in which the police officers perform their duties is an employment issue between them and their employer. Accordingly, the first part of the test is not satisfied.

[88] The second part of the test is inapplicable as the validity of a statute has not been called into question and there is no allegation of administrative action without statutory authority.

[89] Even if both the first and second parts of the test had been satisfied, and in my view they have not, the applicants have not satisfied the third part of the test as there are clearly several reasonable and effective ways to bring the issue before the courts, the most obvious of which is the civil action in tort for misfeasance in public office. In the context of such a civil action, the legal nexus between the applicants and those respondents against whom they seek relief (i.e. the cause of loss and damage to one by the other) can be set out and, as mentioned above, the issue of whether there has been unlawful conduct will necessarily be litigated because the cause of action cannot be established without it. There are also complaints procedures both against the solicitor, Mr. McKay, and against the police officers that can be pursued, appealed, and appropriate cases, judicially reviewed.

[90] Public interest standing is intended to address cases where the constitutional validity of statutes would otherwise be immune from challenge or where the public interest in the maintenance of respect for the limits of administrative and executive authority dictates that a case must be heard (see *Canadian Bar Association v. British Columbia*, 2006 BCSC 1342 at 44).

[91] The applicants have not shown public interest standing or private interest standing.

[92] For the foregoing reasons it is my view that the application is not justiciable. I would therefore grant the motion and strike the application.

[93] If the parties are unable to agree about costs, I may be spoken to upon arrangement with my assistant.

Low J.

Date: June 23, 2010

CITATION: Schaeffer v. Woods, 2010 ONSC 3647
COURT FILE NO.: [Click and Type]
DATE: 20100623

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

RUTH SCHAEFFER, EVELYN MINTY and DIANE PINDER,

Applicants

– and –

POLICE CONSTABLE CHRIS WOODS, ACTING SERGEANT MARK PULLBROOK, POLICE CONSTABLE GRAHAM SEGUIN, JULIAN FANTINO, COMMISSIONER OF THE PROVINICIAL POLICE, IAN SCOTT, DIRECTOR OF THE SPECIAL INVESTIGATIONS UNIT and HER MAJESTY THE QUEEN IN RIGHT OF ONTRAIO (MINISTRY OF COMMUNITY SAFETY AND CORRECTIONAL SERVICES)

Respondent

REASONS FOR JUDGMENT

Low J.

Released: June 23, 2010