

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

**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 ONTARIO PROVINCIAL POLICE, IAN SCOTT, DIRECTOR OF THE SPECIAL  
INVESTIGATIONS UNIT and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO  
(MINISTRY OF COMMUNITY SAFETY AND CORRECTIONAL SERVICES)**

**Respondents**

---

**APPLICANTS' FACTUM  
Application returnable May 13, 2010**

---

Plus ça change...

*I understand fully the tremendous sense of conflict police officers must feel when they are required to provide potential evidence against a fellow officer, but the brutal truth is that police officers have an obligation to uphold the law which must supersede any sense of loyalty they may have to one of their own who may have committed a criminal act.*

***Odhavji Estate v. Woodhouse* [1998] O.J. No. 5426 at para. 36 (Day J.)**

*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.*

**Adams Report to the Attorney General (Second), February 26, 2003 at pg. 44, Tab 1G of the 2<sup>nd</sup> Supplementary Application Record, at pg. 33**

*This practice [of retaining the same lawyer] 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.*

**Report of the Ombudsman of Ontario, Sept 2008, Tab 1D of the 2<sup>nd</sup> Supplementary Application Record, at pg. 17**

*Are we into an area where the police officers are "coached" and could it be considered therefore the notes are not truly the officer's notes?*

**Director Scott's SIU Report to the Attorney General on the Death of Levi Schaeffer, Sept 24, 2009, Tab 4C of the Application Record at pg. 92**

## **PART I – OVERVIEW**

1. The Special Investigations Unit (the "S.I.U.") is a civilian investigative unit operating as an arms-length agency of the Ministry of the Attorney General. The S.I.U. investigates the actions of peace officers when there has been serious injury or death as a result of police use of force.
  
2. The Applicants are the family of Douglas Minty and Levi Schaeffer, two mentally disabled men who died as a result of two unrelated Ontario Provincial Police ("O.P.P.") shootings on June 22 and 24, 2009 respectively. These family members have made an

application to this Honourable Court for relief as a result of the actions of the police Respondents which had the consequence of both irreparably prejudicing the S.I.U. investigations and undermining the Applicants' confidence in the investigations.

3. In both cases, the subject officers and witness officers were expressly authorized and instructed to delay completion of their notes. In both cases, subject and witness officers shared the same counsel, Andrew McKay, who happened to act on both shootings<sup>1</sup>. In the Schaeffer shooting it was learned that the officers created two sets of notes, only one of which was produced to either S.I.U. or the O.P.P. The officers' conduct (and that of their superiors) in relation to the S.I.U. investigations is, with respect, embarrassing to the administration of justice. The families directly affected by this behaviour bring this application in the hopes that judicial guidance may accomplish that which three different sets of report recommendations could not (ie. Adams Report No. 1, Adams Report No. 2 and Ombudsman's Report).

4. The following are uncontested facts in this Application:

- (i) The police officers in the Schaeffer shooting created two sets of notes: one for their solicitor and a second set appeared in their memobooks once their lawyer had "approved" the notes (as noted by the Subject Officer Woods: "Told [by Counsel] notes are excellent and to complete notebook", Tab 4H of the Application Record at pg. 176).

---

<sup>1</sup> Mr. McKay was served with the Notice of Application and has been apprised in writing and verbally with respect to the progress of the herein Application. Through counsel, the Applicants advised Mr. McKay that they would consent to him being added to the Application as a Respondent if he requested such. Mr. McKay has advised that he does not intend to participate in the Application

- (ii) In the Schaeffer Investigation, all five involved officers shared the same lawyer. That is, beside the subject and witness officer directly involved in the incident, all other officers who S.I.U. interviewed retained Mr. McKay who is legally prohibited (pursuant to section 2.06(4) of the *Rules of Professional Conduct*) from keeping information confidential amongst his stable of clients.
- (iii) The Minty shooting was not reported to S.I.U. until 1 ½ hours after Douglas Minty's death. In that time, the O.P.P. received statements from the most significant eyewitnesses, had their media officer attend and had the OPPA attend. In other words, the O.P.P. generally ran the scene. Explanation for the Delay?

NONE TO DATE

5. It has been over 11 years since the Honourable George Adams<sup>2</sup> first addressed the issue of a subject officer and witness officer retaining the same counsel during a S.I.U investigation. Still the practice has not stopped. To the contrary, the S.I.U. lead investigator testified that this practise is widespread:

Q. Is the investigation involving the shooting death of Levi Schaeffer the first time you've ever encountered this issue of the same lawyer acting for all the involved Officers?

A. No, sir.

Q. Is it fair to say that this practice goes on from time to time?

A. Yes, sir.

Q. Do you know of any actual limit on the practice? Is there a time that you can be sure it's not going to happen and a time you can be sure it is going to happen?

**A. No. In fact, in most cases, it does happen.**

\*\*\*\*\*

---

<sup>2</sup> The issue was first addressed by the Honourable George Adams in his 1998 Consultation Report to the Attorney General And Solicitor General Concerning Police Cooperation with the Special Investigations Unit at pg. 42

Q. From your evidence previously about the practice of acting for all involved Officers, subject and witnesses, through one Counsel, you state that it happened frequently correct?

A. Yes, sir.

Q. It would be fair, I take it, then, to describe it as a widespread practice.

A. Yes, sir.

Volume 3, Transcript of the Examination of Denis O'Neill, April 15, 2010  
at pg. 94 and pg. 102

6. Similarly, the creation of a "first set of notes" and a "lawyer approved notes" is actively encouraged by lawyers for police associations. In fact a prominent police lawyer in the province, Gary Clewley, wrote the following in a column he authored in a Hamilton Police Association Newsletter:

I was tempted to have a pencil manufactured with the slogan "shut the F up" embossed on it so that when police officers began to write their notes, they would pause and first given me or their association a call. I think I may still do it. The first few hours of an SIU investigation are the most important. They decide the future of your career. They may even decide your liberty.

Exhibit "B" to the Affidavit of Ruth Schaeffer, Tab 2 of the Application Record at pg. 23

7. In a public statement following the completion of the S.I.U.'s investigation into the death of Levi Schaeffer, Director Scott commented on the propriety of this note-taking procedure:

Shortly after the incident, the subject officer was instructed not to write up his notes in his memo book until he spoke with Ontario Provincial police Association (OPPA) legal counsel. The association lawyer advised the officer to prepare notes which only he would review. Once the lawyer approved the notes, the officer wrote up his memo book two days later based on a combination of his confidential notes to counsel and discussions with him.

The only witness to the shooting, the second officer, was also advised not to contemporaneously write up his notes in his memo book. He too wrote up a set of notes which he shared with the same legal counsel before entering them into his

memo book two days later. Neither officer provided the SIU investigators with their first set of notes.

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 OPPA lawyer approved notes.

I have a statutory responsibility to conduct independent investigations and to decide whether a police officer probably committed a criminal offence. In this most serious case, I have no informational 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 in the firearms death of Mr. Schaeffer.

Director Scott Press Release, September 28, 2009, Exhibit "A" to the Affidavit of Ruth Schaeffer, Tab 2 of the Application Record at pg. 21

8. In his Report to the Attorney General on the Schaeffer death, Director Scott states his concern that the two sets of notes approach relied upon by the Respondent Officers gives rise to a perception that the officers' notes were "coached". A senior investigator with the S.I.U. and a former Deputy Chief of Police (for 11 years), Denis O'Neill, testified as follows:

Q. You'd also agree with me would you not? That officers could well be acting in good faith, but have received legal advice to change certain words from draft, from the first set of notes to the second set of notes.

A. Oh, absolutely.

Q. That is what you meant when you said the words at the bottom of page 30: "Are we into an area where the police officers are coached?" Is that what you meant?

A. Yes.

Volume 3, Transcript of Examination of Denis O'Neill, April 15, 2010, at pg. 86; S.I.U. Report to the Attorney General re: Death of Levi Schaeffer, Tab 4C of the Application Record at pgs. 92-94

9. Can the O.P.P. command regulate and prohibit this practice? Undoubtedly. To the contrary, however, the O.P.P. internal policy condones these practices. In the result, there is no other process that can be accessed by the Applicants to have the above noted practices judicially interpreted. With no other recourse available, the families of Douglas Minty and Levi Schaeffer respectfully request that this Honourable Court exercise its jurisdiction to adjudicate over this Application.

10. It is respectfully submitted that the relief the Applicants seek is neither moot nor trivial. Since there are now detailed regulations that apply to the expected conduct of officers especially, witness officers; there is a legal framework upon which a Court, if so disposed, can provide judicial guidance. The Applicants seek an interpretation of the statutes and regulations that affect their rights (and the public's right) to a fair and impartial investigation in respect of the death of their respective family members. Further, the families seek an interpretation of section 113(9) of the *Police Service Act* and sections 3, 5, 6(1), 6(2), 9(1) and 9(2) of the *Ontario Regulation 673/98* to determine whether the conduct of the Respondent Officers (including the Respondent Commissioner), which is not materially in dispute, is prohibited and/or authorized by law.

11. The following parties have filed notices of appearance on the herein application: [1] Commissioner Fantino; [2] the individually named Respondent officers; and [3] S.I.U. Director, Ian Scott. As stated above, Mr. McKay chooses not to participate.

Affidavit of Sandy Pahlina, Letter from Julian Falconer to Mr. McKay, March 9, 2010, Tab 1C of the 2<sup>nd</sup> Supplementary Application Record; Affidavit Sandy Pahlina, Letter from Julian Falconer to Mr. McKay, November 10, 2019, Tab 1B of the 2<sup>nd</sup> Supplementary Application Record; Affidavit of Sandy Pahlina, Letter from Andrew McKay to Mr. Falconer dated November 9, 2009, Tab 1A of the 2<sup>nd</sup> Supplementary Application Record.

**PART II – FACTS**

12. The facts presented on this application come directly from the experiences of the S.I.U. Director and the S.I.U. Investigators as recounted in their reports and their out-of-court examinations. The facts are confirmed by the police officers' notes and stand unchallenged by the Respondents. There has been no cross-examination of the affiants (family members) and no cross-examination of the S.I.U. investigators by counsel for any of the Respondents. Put simply, the Respondent Officers defend their actions on the basis that there is no problem and they are within their rights.

13. Ruth Schaeffer, the mother of Levi Schaeffer, prepared an Affidavit detailing the information provided by the S.I.U. investigators during the course of the October 19, 2009, meeting. The S.I.U. lead investigator on the Schaeffer case, Denis O'Neill, testified that the contents of Ms. Schaeffer's Affidavit were accurate and true. The Respondents have not cross-examined Ms. Schaeffer nor have they presented any evidence contradicting the information contained in the Affidavit.

Volume 1, Transcript of the Examination of Denis O'Neill, December 7, 2009 at pg. 10;  
Affidavit of Ruth Schaeffer, Tab 2 of the Application Record

14. Diane Pinder, the sister of Douglas Minty, also prepared an Affidavit detailing the information provided by the S.I.U. investigators during the course of an October 30, 2009 meeting. During cross-examination, the S.I.U. lead investigator, Dan Marshall, agreed that the contents of the Affidavit were accurate and true. The Respondents have not cross-examined Ms.



Pinder nor have they presented any evidence contradicting the information contained in the Affidavit.

Volume 2, Transcript of the Examination of Dan Marshall, December 7, 2009 at pg. 6; Affidavit of Diane Pinder, Tab 3 of the Application Record

### **Douglas Minty Death Investigation**

15. On the evening of June 22, 2009, the subject officer, Police Constable Graham Seguin ("P.C. Seguin"), was dispatched to Evelyn Minty's residence to investigate a reported altercation between a door-to-door salesman ("salesman") and Evelyn Minty's son, Douglas Minty. Mr. Minty was fifty-nine years old and was developmentally disabled.

Professional Standards Bureau Investigation Report, Tab 5C of the Application Record at pg. 239; S.I.U. Report to the Attorney General re: Death of Douglas Minty, Tab 5B of the Application Record at pg. 212

16. Upon attending Ms. Minty's residence, P.C. Seguin spoke to the salesman and his co-worker who remained on the scene after the original altercation. The salesman advised P.C. Seguin of the altercation with the deceased.

Professional Standards Bureau Investigation Report, Tab 5C of the Application Record at pg. 239; S.I.U. Report to the Attorney General re: Death of Douglas Minty, Tab 5B of the Application Record at pg. 212

17. P.C. Seguin then approached the deceased who was standing near the carport of the Minty residence. Mr. Minty began to approach P.C. Seguin. P.C. Seguin observed a knife in Mr. Minty's hand. P.C. Seguin ordered Mr. Minty to drop his weapon and withdrew his sidearm. Mr. Minty did not comply with the order and continued to approach P.C. Seguin. As a result, P.C. Seguin shot Mr. Minty five times. Mr. Minty collapsed to the ground and was later

transported by Emergency Services to a Royal Victoria Hospital where he was pronounced dead at 9:40 p.m.

Professional Standards Bureau Investigation Report, Tab 5C of the Application Record at pg. 239; S.I.U. Report to the Attorney General re: Death of Douglas Minty, Tab 5B of the Application Record at pg. 212

18. At 8:17 p.m., Police Constable Richard Boyd (“P.C. Boyd”) arrived at Ms. Minty’s residence and found P.C. Seguin performing CPR on Mr. Minty. At 8:23 pm, Sergeant Michael Burton (“Sgt. Burton”), P.C. Seguin’s superior officer, attended at Ms. Minty’s residence to secure the scene. At that time, P.C. Seguin advised Sgt. Burton of the incident thereby making Sgt. Burton a witness officer. The Professional Bureau Investigation Report indicates that Sgt. Burton informed the officers that it is O.P.P. procedure to ensure that the officers complete their memobook entries prior to reporting off duty:

While at the scene, Sgt. Burton advised all officers that they may be designated as witness officers by SIU. He instructed officers not to make any further notes until they had spoken to legal counsel. Sgt. Burton also informed the officers that it is OPP procedure to ensure that they complete their memo book entries prior to reporting off duty.

Professional Standards Bureau Investigation Report, Tab 5C of the Application Record at pg. 249-250; Notes of Sgt. Burton, Tab 5D of the Application Record at pg. 256; Notes of Sgt. Amy Thompson, Tab 5L of the Application Record at pg. 313

19. Sgt. Burton’s notes indicate that on June 22, 2009, at 11:45 p.m. he spoke to counsel Andrew McKay. On a second occasion, at 7:20 a.m. on June 23, 2009, Sgt. Burton again spoke to Andrew McKay. Following the second entry, Sgt. Burton’s notes indicate as follows:

Notes from 20:07, 22<sup>nd</sup> June 2009 to 08:00 23<sup>rd</sup> June were made at 19:30 on 23<sup>rd</sup> June based on original notes made at rear of notebook.

Notes of Sgt. Burton, Tab 5D of the Application Record at pgs. 266, 271-272

20. Sgt. Burton failed to follow his own direction on O.P.P. note taking policy. Sgt. Burton did not complete his notes prior to the completion of his shift despite having advised other officers, including the subject officer, to complete their notes prior to the completion of their shift.

21. At 8:42 pm, Sergeant Amy Thompson (“Sgt. Thompson”) arrived at the scene and at 8:45 p.m. she seized P.C. Seguin’s use of force equipment. At 9:40 p.m., Sgt. Thompson escorted the salesman and his co-worker to the O.P.P. Huronia West detachment. The salesman and his co-worker were the closest civilian witnesses to the shooting. While driving the two witnesses, Sgt. Thompson took detailed notes of the statement provided by the two civilian witnesses. At no time did Sgt. Thompson advise the witnesses that they should not provide statements until the S.I.U. had an opportunity to take statements.

Notes of Sgt. Amy Thompson, Tab 5L of the Application Record at pgs. 313-315; Professional Standards Bureau Investigation Report, Tab 5C of the Application Record at pg. 250; Notes of Sgt. Burton, Tab 5D of the Application Record at pg. 265;

22. Despite the fact that the O.P.P. knew of the shooting as early as 8:17 p.m., the S.I.U. was not notified until 9:40 p.m. The O.P.P. delayed notification for approximately one hour and twenty three minutes. The O.P.P. media liaison officer was notified of the incident prior to the S.I.U. No explanation was provided for the late notification to the S.I.U. The S.I.U. lead investigator, Angela Mercer, admitted that there was no reason why the S.I.U. was not immediately notified of the shooting and that “[the O.P.P.] should have called [the S.I.U.] right away”.

Professional Standards Bureau Investigation Report, Tab 5C of the Application Record at pg. 251; S.I.U. Report to the Attorney General re: Death of Douglas Minty, Tab 5B of the Application Record at pg. 236; Volume 4, Transcript of

the Examination of Angela Mercer, April 15, 2010, at pg. 30; Answers to Undertaking, Tab 1 of Supplementary Application Record at pg. 2, Answer 2

23. As a result of the S.I.U. investigation, P.C. Seguin was designated as a subject officer on June 23, 2009. The following officers were designated as witness officers by the S.I.U.:

- (a) Sgt. Mike Burton (designated on June 26, 2009)
- (b) Constable Richard Boyd (designated June 26, 2009)
- (c) Sgt. Amy Thompson (July 16, 2009)
- (d) Constable Gwyn Seymour (July 6, 2009); and
- (e) Constable Kelly Daniels –Griffis (July 6, 2009)

S.I.U. Report to the Attorney General re: Death of Douglas Minty, Tab 5B of the Application Record at pg. 213

24. P.C. Seguin and the witness officers were all interviewed by the S.I.U. Pursuant to section 9(1) of *Ontario Regulation 673/98*, the witness officers were obligated to provide their notes to the S.I.U. P.C. Seguin, pursuant to section 9(3) of *Ontario Regulation 673/98*, opted not to provide his notes to the S.I.U. but did submit to an interview.

25. Counsel Andrew McKay acted as counsel for the subject officer P.C. Seguin and several witness officers including P.C. Seymour and P.C. Daniels – Griffis. On the day of the shooting, Mr. McKay also provided advice to Sgt. Burton with respect to the Minty investigation.

Volume 4, Transcript of the Examination of Angela Mercer, April 15, 2010, at pg. 16 and pg. 42

26. On October 14, 2009, the Director of the S.I.U., Ian Scott, provided the Attorney General with his report as required by section 113(8) of the *Police Services Act*. In the report, the Director indicates that there are no reasonable grounds to believe that P.C. Seguin committed

a criminal offence in relation to the firearm death of Douglas Minty. In addition, the report indicates that Director Scott intended on addressing the Commissioner of the O.P.P., Julian Fantino, with respect to the following issues:

There are a number of s.11 issues I would like to bring to your attention.

First, there is an issue of delayed notification in this incident in apparent breach of s. 3 of O.Reg 673/98. This shooting incident occurred at approximately 2071 hrs on June 22, 2009. The OPPA was notified at 2049 hrs, and an association representative was on scene at approximately 2100 hrs. Further, according to the notes of Sgt. Thompson, a media spokesperson was already en route at 2125 hrs. However, the SIU was not notified until 2140 hrs, approximately one and one half hours after the incident and after the OPPA and the media representative were notified.

Second, Sgt. Thompson took statements from the two most material civilian witnesses, (redacted), in apparent breach of s. 5. of O.Reg 673/98 making the SIU the lead investigator.

Finally, Sgt. Burton instructed all witness officers not to write up their notes until they spoke to counsel, a counsel who has a professional duty to share information among his clients. This would appear to be a *prima facie* breach of s. 6 of the same Regulation.

S.I.U. Report to the Attorney General re: Death of Douglas Minty, Tab 5B of the Application Record at pgs. 237-238

27. On October 15, 2009, Director Scott addressed the above noted issues in a letter to Commissioner Fantino. The letter indicates as follows:

You have made it clear that you do not intend to respond to my letters pointing out these apparent breaches of the regulations to the *Police Services Act*. I intend to continue documenting these issues in my letters to your office and my reports to the Attorney General.

Commissioner Fantino did not respond to Director Scott's letter nor has he contacted the S.I.U. to address these issues.

Letter to Commissioner Fantino from Director Scott, dated October 15, 2009, Tab 5E of the Application Record at pg. 280; Transcript of the Examination of Angela Mercer, April 15, 2010, at pg. 48

28. Pursuant to section 11 of *Ontario Regulation 673/98*, Commissioner Fantino initiated an investigation into several issues, including: [1] late notification of the S.I.U; [2] Sgt. Thompson taking statements from the two civilian witnesses; and [3] Sgt. Burton advising all officers not to prepare their notes until they spoke to legal counsel. The findings of the report are as follows:

The First issue SIU raised was regarding the apparent delay of notification in this incident. The SIU was notified one and one half hours after the incident.

Upon reviewing all the information, it apparent that all required notifications were made in a timely fashion. The SIU notification was as follows: PC Seguin notified the PCC supervisor; Sgt. Burton attended the scene and contacted the detachment commander, Inspector Hunter; PCC notified the regional duty officer Inspector Lee; Inspector Lee notified the regional crime manager, Inspector Cox; Inspector Cox notified the SIU on-call member, Mr. Matteson; and then Inspector Cox notified the GHQ officer that SIU had invoked their mandate; and the GHQ Duty Officer contacted the Commissioner's Group and the OPPA. The order of notification was completed as per the OPP Police Orders Section 2.5.24.

There was no indication that any delay was intentional by the OPP. This incident necessitated time to gather the appropriate information about the shooting and relaying accurate information back to the SIU.

SIU raised the concern of Sgt. Thompson apparently taking statements from two material witnesses, (Redacted), and (Redacted) before the SIU.

As per the Ontario Provincial Police Orders Chapter 2- Member Note Taking, it states that a member shall make all original investigative notes during an investigation or as soon as practicable thereafter. Upon reviewing Sgt. Thompson's notes, she did not take any statements from (redacted) and (redacted). The two civilian witnesses were traumatized from the shooting. As Sgt. Thompson drove the witnesses to the OPP detachment, they recounted the events to the officer. Once Sgt. Thompson dropped the witnesses off at the Huronia West Detachment, she made notation of the information into her notebook.

Thirdly, SIU had concerns with Sgt. Burton instructing all witness officers not to prepare their notes until they spoke to legal counsel. Sgt. Burton did not breach Section 6 of Ontario Regulation 673/98, as stated by SIU. Sgt. Burton provided the officers the opportunity to contact legal counsel, prior to completing their

notebooks. Once the officers spoke with legal counsel they provided a copy of their notes when requested by the SIU investigators, within the prescribed time.

Professional Standards Bureau Investigation Report, Tab 5C of the Application Record at pgs. 251-252

29. Noticeably absent from the Professional Standards Bureau Investigation Report is any discussion of whether it was lawful, pursuant to section 113(8) of the *Police Service Act* and O.P.P. policies on note taking, for Sgt. Burton and P.C. Seguin to prepare their notes after the completion of their shift.

Transcript of the Examination of Angela Mercer, April 15, 2010, at pg. 45

30. During the relevant time, the O.P.P. policy on note taking was as follows:

**Note Taking**

A member shall make all original investigative notes in a Form Cat 1-22—Daily Journal during an investigation or as soon thereafter as practicable, but at all times, prior to the conclusion of the member's daily tour of duty or as approved by a supervisor. Without exception, these original investigative notes shall be completed prior to the entry of such information on to other occurrence or information tracking systems, e.g. Niche RMS, CPIC and prior to their reviewing of any in-car audio or audio/video recordings.

June 2009 OPP Orders, Tab 4 of the Supplementary Application Record at pg. 37

**Levi Schaeffer Death Investigation**

31. In or around March, 2009, Levi Schaeffer, a thirty-year old man diagnosed with schizoaffective disorder, panic disorder and anti-social personality disorder, began a bike journey from Peterborough, Ontario to Pickle Lake, Ontario. Approximately two weeks prior to his death, Mr. Schaeffer began camping on a remote peninsula located in Osnaburgh Lake area.

Affidavit of Ruth Schaeffer, Tab 2 of the Application Record at para. 3;

32. On June 24, 2009 (two days after the shooting death of Doug Minty) at approximately 12:30 p.m., Police Constable Chris Woods (“P.C. Woods”) and Acting Sergeant Mark Pullbrook (“A/Sgt. Pullbrook”) approached Levi Schaeffer’s camp grounds on the peninsula to investigate a report of a stolen boat. There was an interaction between Mr. Schaeffer and the officers which ended with the subject officer, P.C. Woods, discharging his firearm twice and killing Mr. Schaeffer. The only witnesses to the shooting were P.C. Woods and A/Sgt. Pullbrook.

S.I.U. Report to the Attorney General re: Death of Levi Schaeffer, Tab 4C of the Application Record at pg. 63; Professional Standards Bureau Investigation Report dated November 30, 2009, Tab 4A of the Application Record at pg. 32; Professional Standards Bureau Investigation Report dated December 10, 2009, Tab 4B of the Application Record at pg. 51

33. At approximately 1:30 p.m., Inspector Loree contacted Detective Sergeant Dayna Wellock (“D/Sgt. Wellock”) and requested the D/Sgt. Wellock attend on the scene to secure evidence and witnesses. At 1:48 p.m., D/Sgt. Wellock contacted Police Countable Graham (“P.C. Graham”) and requested that he advise P.C. Woods and A/ Sgt. Pullbrook not to speak to each other about the incident; contact their counsel; and prepare notes at the direction of counsel. P.C. Graham passed on D/Sgt. Wellock’s instructions to P.C. Woods at 2:46 p.m. P.C. Graham did not have an opportunity to speak to A/Sgt. Pullbrook.

Professional Standards Bureau Investigation Report dated November 30, 2009, Tab 4A of the Application Record at pg. 36; Professional Standards Bureau Investigation Report dated December 10, 2009, Tab 4B of the Application Record at pg. 55

34. At 3:52 p.m., D/Sgt. Wellock met with P.C. Woods. D/Sgt. Wellock’s notes reflect that P.C. Woods advised that P.C. Graham had briefed him on not communicating with anyone, “contacting lawyer” and “holding off on notes”. D/Sgt. Wellock advised P.C. Woods not to do his notes until consulting counsel because she knew that P.C. Woods would receive further



instructions from counsel on the timeliness and manner in which the notes needed to be completed.

D/Sgt. Wellock's Notes, Tab 2 of the Supplementary Application Record at pg. 4; P.C. Woods' Notes, Tab 4H of the Application Record at p. 151; Professional Standards Bureau Investigation Report dated November 30, 2009, Tab 4A of the Application Record at pg. 36; Professional Standards Bureau Investigation Report dated December 10, 2009, Tab 4B of the Application Record at pg. 55

35. At 4:50 p.m., D/Sgt. Wellock attended on the scene of the shooting and spoke with A/Sgt. Pullbrook. She advised A/Sgt. Pullbrook not to discuss the incident with anybody but could not recall whether she provided him any instructions with respect to the completion of notes.

D/Sgt. Wellock's Notes, Tab 2 of the Supplementary Application Record at pgs. 4-5; Professional Standards Bureau Investigation Report dated November 30, 2009, Tab 4A of the Application Record at pg. 36; Professional Standards Bureau Investigation Report dated December 10, 2009, Tab 4B of the Application Record at pg. 55

36. At 5:12 p.m., P.C. Woods spoke to O.P.P.A. counsel Andrew McKay who advised him to prepare notes for counsel to review. P.C. Woods' notes, made two days after the shooting incident (i.e. June 26, 2009), reflect the following:

17:12 Spoke [with] OPPA lawyer Andy McKay – Provided details on incident. Advised not to allow photos in uniform but to turn over uniform as requested. Further told to prepare notes for counsel to be provided to McKay

P.C. Woods' Notes, Tab 4H of the Application Record at pg. 173

37. At approximately 6:10 p.m., A/Sgt. Pullbrook arrived at the Pickle Lake O.P.P. Detachment. At that time, Inspector Loree provided him with Mr. McKay's number. At that time, A/Sgt. Pullbrook spoke to Mr. McKay who "advised me on the situation [and] not to draft any notes or talk to anyone about the incident".

Notes of A/Sgt. Pullbrook, Tab 4F of the Application Record at pg. 139

38. At approximately 7:02 p.m., A/Sgt. Pullbrook advised Inspector Loree that his counsel had advised him “to go home and to not complete his notes for the evening”. Inspector Loree did not order A/Sgt. Pullbrook to complete his notes.

Professional Standards Bureau Investigation Report dated December 10, 2009,  
Tab 4B of the Application Record at pgs. 56-57

39. At approximately 8:20 p.m., Inspector Loree attended at the residence of P.C. Woods and instructed him that he had to complete his notes before the end of his shift and “that he understood Wood was declining to do this based on the advice of his counsel”. Inspector Loree did not order P.C. Woods to complete his notes.

Professional Standards Bureau Investigation Report dated December 10, 2009,  
Tab 4B of the Application Record at pg. 57

40. Both A/Sgt. Pullbrook and P.C. Woods completed their O.P.P. memobook notes (a second set of notes) of the incident on June 26, 2009, after preparing an account for their jointly retained counsel to review (the original set of notes). Both officers refused to provide the “first set of notes” drafted for their counsel’s review on the account of solicitor-client privilege.

Professional Standards Bureau Investigation Report dated November 30, 2009,  
Tab 4A of the Application Record at pg. 45; Professional Standards Bureau  
Investigation Report dated December 10, 2009, Tab 4B of the Application Record  
at pg. 59; Volume 3, Transcript of the Examination of Denis O’Neill, April 15,  
2010 at pgs. 70-73

41. On June 26, 2009 at 9:00 a.m., P.C. Woods met with Mr. McKay at Mr. McKay’s residence and provided his original notes for counsel to review. Counsel advised P.C. Woods that his notes were excellent. At 9:30 am, A/Sgt. Pullbrook also attended Mr. McKay’s residence. The following notations were made in P.C. Woods’ memobook:

Met with Andy McKay at [Mr. McKay’s residence]. Provided my notes to counsel. Told notes are excellent and to complete notebook.

09:30 A/Sgt. Pullbrook attending also. Did not speak regarding incident or investigation.

P.C. Woods' Notes, Tab 4H of the Application Record at pg. 176

42. On June 29, 2009, A/Sgt. Pullbrook was interviewed by S.I.U. investigators Damien Parrent and Denis O'Neill. A/Sgt. Pullbrook was accompanied by Mr. McKay. During the interview, Mr. McKay advised that "on his instruction, A/Sgt. Pullbrook made confidential notes to counsel after the incident that are privileged". Mr. McKay advised that there "were no significant differences in the confidential notes that were provided to counsel and the notes that were presented to the investigators".

SIU Follow Up Report re: Witness Officer Interview of Acting Sergeant Mark Pullbrook dated June 29, 2009, Tab 4D of the Application Record at pg. 96

43. P.C. Woods refused to submit to an interview but provided his second version of notes to S.I.U. investigators.

44. On September 25, 2009, the Director of the S.I.U. provided his report on the Schaeffer Investigation to the Attorney General. In his report, the Director advises that he has no reasonable grounds to believe that P.C. Woods committed a criminal offence; however, the Director notes that the manner in which P.C. Woods and A/Sgt. Pullbrook prepared their notes left the Director unable to ascertain exactly what occurred on June 24, 2009:

**Director's Decision Under s. 113 (7) of the *Police Services Act***

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 Prickle 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.

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.

Report of Ian Scott to the Attorney General, dated September 25, 2009, Tab 4C of the Application Record at pgs. 93-94

45. On the same day, Director Scott wrote Commissioner Fantino advising him of the concerns expressed in his report to the Attorney General.

Letter from Director Scott to Commissioner Fantino, dated September 25, 2009, Tab 4G of the Application Record, at pg. 141-142

46. The Commissioner responded to Director Scott on September 30, 2009 and November 2, 2009. On November 2, 2009, Commissioner Fantino wrote the following:

Further to my letter of September 30, 2009, I am writing to again express my dismay over the impact of your recent media statements about the provision of officers' notes pertaining to the firearm death at Osnaburgh Lake to the Special Investigation Unit (SIU)

Using this incident and the media to increase the profile of the SIU is highly unprofessional and has harmed ongoing attempts to resolve the issues. As I said in my earlier letter, the Ontario Provincial Police (OPP) Professional Standards Bureau is investigating the issue of the officers' notes. The matter will be dealt with by the OPP in a thorough manner to ensure that our members and the OPP are accountable for their actions that our policy and procedural processes reflect our regulatory requirements.

Your position as Director of the SIU grants you no authority over how police notes are prepared. Direction in that regard comes from a complex interaction of the police service's policies and procedures, legislative requirements and the charter rights of all citizens.

Letter from Commissioner Fantino to Director Scott, dated September 30, 2009, Tab 4G of the Application Record, at pg. 143-144; Letter from Commissioner Fantino to Director Scott, dated November 2, 2009, Tab 4G of the Application Record, at pg. 146-147

47. On November 4, 2009, Director Scott responded to Commissioner Fantino advising that his office would be “happy to meet with you and/or your representative to discuss the importance of officers writing independent and contemporaneous notes”.

Letter from Director Scott to Commissioner Fantino, dated November 4, 2009, Tab 4G of the Application Record, at pg. 148

48. Commissioner Fantino has made no effort to contact the SIU to address the issues raised by Director Scott in his September 25, 2009 letter to Commissioner Fantino.

Answers to Undertaking, Tab 1 of Supplementary Application Record at pgs. 1-2

49. Pursuant to section 11 of *Ontario Regulation 673/98*, the O.P.P. conducted two investigations into the Schaeffer matter. The first report concluded that P.C. Woods used the appropriate use of force in shooting Levi Schaeffer. In that report. Chief Superintendent Ken Smith, Bureau Commander for the Professional Standards Bureau, suggested clarification on the issue of members note-taking:

**Bureau Commander Comments:**

Clarification should be made to Police Orders that Section 7 of the *Ontario Regulation 673/98, Police Services Act* explicitly recognizes the right of officers involved in an SIU mandated occurrence to seek and retain legal counsel. This recognition does not negate the member’s responsibly 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

direction 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.

Professional Standards Bureau Investigation Report dated November 30, 2009, Tab 4A of the Application Record at pg. 50

50. In the second investigation, the Professional Standards Bureau investigated the allegation that P.C. Woods and A/Sgt. Pullbrook did not complete their duty notes as required by O.P.P. policy. Surprisingly, the report does not address whether it was proper for P.C. Woods and A/Sgt. Pullbrook to complete their notes after the end of their duty. Rather the report finds that there was no breach in O.P.P. policy when P.C. Woods and A/Sgt. Pullbrook refused to provide their “counsel reviewed notes” to the S.I.U. In coming to this conclusion, the report indicates that the Police Association of Ontario obtained a legal opinion from Gavin MacKenzie that materials prepared for the purpose of obtaining and instructing counsel are subject to solicitor-client privilege and neither the officer nor the officers’ counsel may be compelled to produce these records.

Professional Standards Bureau Investigation Report dated December 10, 2009, Tab 4B of the Application Record at pg. 60; Opinion prepared by Gavin MaKenzie, Tab 4K of the Application Record at pg. 300.

51. Under examination, Investigator O’Neill testified that in his 11 years as a Deputy Police Chief, he had never seen an opinion from counsel being relied upon to defend a breach of police duties:

Q. In all that time, have you ever experienced a circumstance in which a legal opinion of a Police Association lawyer constituted a complete defence to an allegation of misconduct under the *Police Services Act*?

A. No, sir.

Q. I just wanted to know if there was a defence out there I didn't know about.

A. I don't know about it.

Volume 3, Transcript of the Examination of Denis O'Neill, April 15, 2010, at pg. 77

52. Neither report addresses the issue of whether the duty to segregate officers, as required by section 6(2) of the *Ontario Regulation 673/98*, is breached when the subject officer and witness office retain the same legal counsel.

### **PART III: ISSUES**

53. The Applicants respectfully submits that the issues to be determined are whether this Honourable Court ought to grant the Applicants the relief sought pursuant to paragraphs 1, 2(a) to (f) in the Notice of Application which states in part as follows:

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 Service 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 *Law Society of Upper Canada 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 5 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;
  - (iii) 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*.

## **PART IV: LAW AND ANALYSIS**

### **A. Standing**

54. The Respondent officers have served a motion to strike based on, amongst other things, an alleged lack of standing on the part of the Applicants. While the Applicants are filing a separate factum in response to the motion to strike, it is useful to reiterate that the Applicants, pursuant to rule 14.05(3)(d), seek a determination of their “rights” based on the interpretation of the *Police Services Act*, the *S.I.U. Regulations* and the *Rules of Professional Conduct*. Alternatively it is argued that the Applicants are entitled to the relief sought on the Notice of Application based on their public interest standing. In the event that the herein Application is permitted to proceed, the two affected Families submit that the judicial guidance and statutory interpretations they seek are essential and in the interests of justice.

55. In seeking the relief detailed above (see para. 53), the Applicants rely on Rules 14.05(3)(d), (g) and (h) of the *Rules of Civil Procedure*. In particular the Applicants respectfully submit that the interpretation of the *Police Services Act*, the *S.I.U. Regulations* and the *Rules of Professional Conduct*, will assist them in a determination of their rights. Rules 14.05(3)(d), (g) and (h) reads as follows:

#### APPLICATIONS — BY NOTICE OF APPLICATION

##### Notice of Application

14.05 (1) The originating process for the commencement of an application is a notice of application or an application for a certificate of appointment of an estate trustee

Application under Rules

(3) A proceeding may be brought by application where these rules authorize the commencement of a proceeding by application or where the relief claimed is,

(d) the determination of rights that depend on the interpretation of a deed, will, contract or other instrument, or on the interpretation of a statute, order in council, regulation or municipal by-law or resolution;

(g) an injunction, mandatory order or declaration or the appointment of a receiver or other consequential relief when ancillary to relief claimed in a proceeding properly commenced by a notice of application;

(h) in respect of any matter where it is unlikely that there will be any material facts in dispute.

56. The Supreme Court of Canada has already recognized that a family in an identical position as the Applicants (i.e. S.I.U. investigation of a police use of lethal force with respect to a deceased family member) has legal causes of action in misfeasance in public office (against the officers) and negligent supervision (against the Commissioner) in relation to the officers who allegedly undermined an S.I.U. investigation. It is therefore settled law that the Applicants have legally recognized “rights”. Based on these rights, the Applicants seek to invoke this Honourable Court’s jurisdiction under Rule 14.05(3)(d) as their rights depend on the interpretation of a statute or regulation (see *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263). In the alternative, the Applicants submit that they satisfy the three pronged test for public interest standing (see *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607). The Applicants submit that the herein Application raises a serious issue; that the Applicants have an acute and genuine interest in the manner in which the police conducted themselves in the two investigations; and that there is no other mechanism to effectively adjudicate these issues. These

arguments will be addressed more fully in the Applicants' responding factum to the Respondents' motion to strike.

## **B. The Legal Framework that Governs Police Officer Interaction with S.I.U.**

57. The statutory framework for the S.I.U. and the obligations of the Commissioner and officers during the course of an S.I.U. investigation are found in the *Act* and the *SIU Regulations*.

58. Section 113 of the *Act* establishes the S.I.U. For the purposes of this Application, the following sub-sections are relevant:

### **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

Section 113(5) to (9), *Police Services Act*, R.S.O. 1990, c. P. 15

59. Section 41(1)(b) of the *Act* requires Commissioner Fantino to ensure that members of the police force carry out their duties in accordance with the *Act* and the S.I.U. Regulations.

Section 41(1)(b), *Police Services Act*, R.S.O. 1990, c. P. 15

60. The *S.I.U. Regulations*, passed pursuant to the *Act*, provide a non-exhaustive list of requirements that must be followed in any S.I.U. investigation:

- (a) The chief of police shall notify the S.I.U. 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 S.I.U. (section 3)
- (b) The S.I.U. shall be the lead investigator and shall have priority over any police force in the investigation of the incident (section 5);
- (c) The chief of police shall segregate all the police officers involved in the incident from each other until after the S.I.U. has completed its interviews (section 6(1));
- (d) A police officer involved shall not communicate with any other police officer involved in the incident concerning their involvement in the incident until after the S.I.U. has completed its interviews (section 6(2));
- (e) 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 S.I.U. (section 7(1));
- (f) Immediately upon being requested to be interviewed by the S.I.U., and no later than 24 hours after the request where there are appropriate grounds for delay, a witness officer shall meet with the S.I.U. and answer all its questions (section 8(1));
- (g) A witness officer shall complete in full the notes on the incident in accordance with his or her duty and shall provide the notes to the chief of police within 24 hours after a request for the notes is made by the S.I.U. (section 9(1)); and
- (h) 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 S.I.U. (section 9(3)).

## B. Analysis

### (i) *Subject Officer and Witness Officer Retaining the Same Counsel*

61. Pursuant to section 7(1) of the *S.I.U. Regulations*, all officers are entitled to consult with legal counsel and have counsel present during an S.I.U. investigation. Pursuant to section 6(2) of the *S.I.U. Regulations*, subject and witness officer shall not communicate with each other until after the SIU has completed its interviews. Section 6(1) of the *S.I.U. Regulations* requires the Commissioner to ensure that the subject officer and witness officer are segregated until after the SIU has completed its interviews.

62. The Applicants respectfully submit that section 6(1) and 6(2) of the *S.I.U. Regulations* should not be interpreted so as to allow a subject officer and witness officer to jointly retain counsel. The Applicants further submit that section 7(1) of the *S.I.U. Regulations* cannot be interpreted in a manner that allows joint retainers.

63. As detailed above, the issue of “joint retainers” in S.I.U. investigations has been addressed by a number of reports. In addition to the Honourable George Adams’ two reports (1998 & 2003), the Ombudsman recently condemned the practice of a subject officer and witness officer retaining the same counsel:

A number of SIU investigators told us that 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 involved 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 noted, “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.

Ombudsman of Ontario, Investigation into the Special Investigations Unit's Operational Effectiveness and Credibility "Oversight Unseen", Tab 1D of the 2<sup>nd</sup> Supplementary Application Record, at pg. 33

64. In light of his concerns, the Ombudsman recommended that the relevant legislation be amended to prohibit the retention of the same counsel:

Recommendation 42

There should be a legislative prohibition against legal counsel representing police officers involved in the same incident under investigation by the Special Investigations Unit to ensure that the integrity of its investigations is maintained.

Ombudsman of Ontario, Investigation into the Special Investigations Unit's Operational Effectiveness and Credibility "Oversight Unseen", Tab 1D of the 2<sup>nd</sup> Supplementary Application Record, at pg. 19

65. Section 6(2) of the *S.I.U Regulations* was implemented to ensure the "integrity of an SIU investigation":

Recommendation 8

The regulation should provide that all involved officers (subject and witness officers) shall be segregated from each other to the extent that this is practicable and prohibit the discussion of the incident with each other until they are interviewed by the SIU.

This recommendation has been implemented through s. 6 of the Regulation. The recommendation was made in the earlier report in response to the concern that segregation of involved officers was necessary to maintain the integrity of an SIU investigation. The recommendation also recognized that, in remote locations, the investigation may have to accommodate the inherent delay associated with the SIU's attendance, and the segregation of officers from each other may not be

practical. The Regulation, therefore, proscribes any discussion of the incident between involved officers until they are each interviewed by the SIU.

The Honourable George W. Adams, Q.C., 2003, Review Report on the Special Investigations Unit Reforms prepared for the Attorney General of Ontario, February 26, 2003, Tab 1G of the 2<sup>nd</sup> Supplementary Application Record, at pg. 33

66. Section 2.04(6) of the *Rules of Professional Conduct* prohibits a jointly retained lawyer from treating any information provided by one client as confidential from another client. As a result, in a joint retainer situation there is likelihood that indirect communication may be had by officers who share the same lawyer. Section 2.04(6) reads as follows:

(6) 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 resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

*Rules of Professional Conduct*, section 2.04(6).

67. As a result of section 2.04(6), a lawyer jointly representing a subject officer and witness officer is obligated to share information obtained from each officer to the other. Investigator O'Neill described the problem of "joint retainers" in S.I.U investigations as follows:

A. I'm left with the opinion that certainly and I might be wrong, but if I'm a lawyer and I'm representing 'A' and 'B', and 'A' tells me a certain thing, and 'B' tells me the same thing, then I feel like they have to be able to share that information. So if they do that, if you're sharing information between a subject Officer and a witness Officer, I think it flies in the face of legislation. The legislation says they're supposed to be separated, they're not supposed to talk to each other, they're segregated, the whole thing; but that defeats all of that. If my lawyer comes to me and says: "Well, Denis you know, Bill said this and I notice that you said this...", well, I might as well sit down with Bill myself. To me, it's

whether it's legal or not, I don't know. To me, as a person, it's not the right thing to do and that's what I believe.

Volume 3, Transcript of the Examination of Denis O'Neill, April 15, 2010, at pg. 90

68. The requirement that officers be segregated helps ensure, amongst other things, that the officers involved in the investigation complete their notes independently of each other so that an officer does not adopt another officer's observations. The Honourable Roger Salhany, Q.C., former justice of the Ontario Superior Court, noted the importance of independent note taking in his report on the Taman Inquiry:

The practice is now considered improper: Barrett (1993), 82 C.C.C. (3d) 266 (Ont. C.A.). The proper practice is for each officer to make his or her own independent set of notes. When officers collaborate in preparing notes, there is a serious risk that one officer may unconsciously supplement something from the other officer's recollection which he or she never observed. If it is then written down in the officer's notebook to be used to refresh his or her memory, it will become part of the officer's recollection even though he or she never saw it. Once combined memories are committed to a uniform set of notes, each officer will later refresh his or her memory as to an event that they never saw.

Report of the Taman Inquiry, Honourable Roger Salhany, at pg. 137, Tab 1E of the 2<sup>nd</sup> Supplementary Application Record, at pg. 27

69. The importance of the independence of a police officer's notes was described by Justice Malloy in *R v. Green*:

It is not uncommon for police officers preparing their notes to confer with others or with central notes taken by a designated officer in order to obtain some details, particularly of times, specific addresses or the like. It is preferable that the notes reflect which information comes from a source other than the officer's own recollection, although I recognize that this is perhaps an ideal standard, and one not often reached in actual practice. Some limited degree of confirming details with others for the purpose of making notes more comprehensible may be necessary and might not undermine the reliability of the notes as a whole or the officer's testimony. However, it is not acceptable police practice for notes to be prepared with the degree of collaboration practised by those two officers.

There are important reasons for requiring that officers prepare their notes independently. The purpose of notes made by a police officer is to record the



observations made by that officer. The notes themselves are not admissible as evidence for the truth of their contents. An officer with relevant evidence to offer may testify at trial as to the act or observations made by him or her. However, that officer is not permitted to testify as to the information received from other officers for the purpose of proving their truth. Such evidence is hearsay and inadmissible.

An officer's notes perform a valuable function at trial. It is usually many months, sometimes years, from the time of an occurrence to the time that the officer is called upon to testify at trial. Without the assistance of notes to refresh his or her memory, the evidence of the officer at trial would inevitably be sketchy at best. If the officer's notes are prepared without any indication of which is the officer's independent recollection and which is somebody else's recollection, there is every likelihood that that officer at trial will be "refreshing" his or her own memory with observations made by someone else. In effect, the officer will be giving hearsay evidence as if it was his or her own recollection rather than the observations of somebody else written into the notes without attribution.

Police witnesses are not different from other witnesses. While it is inevitable and indeed necessary that the members of a police team confer with one another during the course of an investigation, it is nevertheless important that the integrity of each officer's personal observations be preserved as much as possible. One way to achieve that result is for each officer to separately record his own observations in his own notebook as soon as possible after the event. To the extent that the officer obtains information about other officer's observations before doing her notes, her memory may become tainted with the observation of others and both her notes and her own evidence may be rendered less reliable.

*R v. Green*, [1998] O.J. No. 3598 at paras. 18-22

70. The entitlement to legal counsel is not without limitation. Section 7(2) of the *S.I.U. Regulations* explicitly allows the director of the S.I.U. to disregard the entitlement to counsel if waiting for legal counsel would cause an unreasonable delay in the investigation. Read as a whole, section 7 (1) and (2) indicates that the entitlement to counsel should not affect the integrity of an S.I.U. investigation. As such, in interpreting section 7(1), it is respectfully submitted that it must be interpreted in a manner that is consistent with the purpose of the *S.I.U. Regulations* – ensuring the integrity of the S.I.U.'s investigation.

71. In order to ensure the integrity of the S.I.U. investigation, the entitlement to counsel must be interpreted in manner that is consistent with the administration of justice. As such, counsel retained pursuant to section 7(1) must be free from any conflict of interest:

No client has the right to retain counsel if that counsel, by accepting the brief, puts himself in a position of having a conflict of interest between his new client and a former one.

While the accused has the right to counsel he has no right to counsel who, by accepting the brief, cannot act professionally. A lawyer cannot accept a brief if, by doing so, he cannot act professionally, and if the lawyer so acts the client is denied professional services.

In assessing the merits of a disqualification order, the court must balance the individual's right to select counsel of his own choice, public policy and the public interest in the administration of justice and basic principles of fundamental fairness. Such an order should not be made unless there are compelling reasons.

*R. v. Speid* (1983), 43 O.R. (2d) 596 (C.A) at pg. 2-3

72. In ensuring that counsel can “act professionally” a court must consider the public interest in the administration of justice. Where the appearance of justice is affected then a court is entitled to hold that a lawyer cannot act professionally:

If only the private interests of the clients were involved, a different conclusion might have been reached had mutual waivers been executed. However, the coroner's ruling was designed, in large measure, to ensure the public's confidence in the administration of justice and to avoid the appearance of impropriety. Given the public interest mandate of the Board and its stated desire to delve into the systemic issues arising out of D's death, it was difficult to see how any member of the public could feel confident that counsel for the Board would pursue these objectives fearlessly and with undivided loyalty, when bound at the same time by an identical duty towards the officers.

In this case, the coroner concluded that A could not act professionally on behalf of both the officers and the Board.

*Booth v. Huxter* (1994), 16 O.R. (3d) 528 (Div. Crt) at pg. 2

73. Put simply, a lawyer ought to decline these retainers. The Applicants submit the practice of a subject and witness officer retaining the same counsel, at minimum, gives rise to the

“appearance of impropriety” if not the fact of an actual conflict. As such, it is respectfully submitted that section 7(1) of the *S.I.U. Regulations* should be interpreted to mean counsel acting professionally, thereby prohibiting the practice of allowing a subject and witness officer retaining the same counsel. Such an interpretation of section 7(1) is consistent with Rule 6.01 (1) of the *Rules of Professional Conduct* that requires a lawyer to conduct themselves in such a way as to maintain the integrity of the profession. The integrity of the profession is called into doubt where officers of the court become a tool to circumvent section 6(2) segregation rules.

74. The Applicants respectfully submit that permitting subject and witness officers to retain the same counsel is inconsistent with a proper interpretation of the Commissioner’s duty to ensure that officers are segregated (pursuant to section 6(2) of the *S.I.U. Regulations*) and that the officers comply with their duties under the *S.I.U. Regulations* (pursuant to section 41(1)(b) of the *Act*).

**(ii) The Note Taking Practices of the Respondent officers**

75. Sections 9(1) and 9(4) of the *S.I.U. Regulations* require a subject or witness officer to complete his or her notes in accordance with his or her duty. As detailed above, the O.P.P. policy on note taking requires an officer to complete his or her notes prior to the completion of their shift **or as authorized by their supervisor.**

76. In both the Minty and Schaeffer Investigations, the involved officers were advised not to prepare their notes until the officers consulted counsel. As a result, in the Schaeffer Investigation the notes (second set) of P.C. Woods and A/Sgt. Pullbrook were prepared two days after the shooting incident. In the Minty Investigation, Sgt. Burton’s notes were not completed until the day after the incident. In the Schaeffer Investigation, the subject officer and witness

officer only prepared their second set of memobook notes after having counsel review and approve the first original set of notes. The Applicants respectfully submit that this conduct is inconsistent with a proper interpretation of section 113(9) of the *Act* and section 9(1) and 9(4) of the *SIU Regulations*.

77. The issue of contemporaneous note-taking by subject and witness officers has been identified and discussed in several reports:

The SIU reported that there have been some occasions where officers once designated have failed to complete their notes promptly after an incident in compliance with their duty as a result of alleged stress. In some cases, officers have received legal advice to refrain from completing their notes until they have consulted with their lawyers. This is very problematic. It has also been noted that there is a lack of consistency amongst police services on the requirement of the completion of notes at the end of each shift.

The Honourable George W. Adams, Q.C., 2003, Review Report on the Special Investigations Unit Reforms prepared for the Attorney General of Ontario, February 26, 2003, Tab 1G of the 2<sup>nd</sup> Supplementary Application Record, at pg. 35

The SIU has reminded its investigators to fully canvass the circumstances surrounding the making of notes by witness officers to ensure that there has been no improper influence. However, we learned that it is not uncommon for notes to appear days after they have been requested, and often not until the officer attends for an interview. There have been instances where notes have arrived with improper redactions. An August 23, 2005 Director's report noted that pre-edited statements had been provided and that unedited copies should be requested. The SIU warned its investigators about this practice in June 2006, after it learned that an officer had removed several relevant comments made by a subject officer from the notes she gave to the SIU. The SIU should ensure that it inquires into and records information relating to the preparation of police notes, such as when and how they were prepared, whether any aids to preparation were used, whether the officer discussed information concerning the incident, whether the notes were edited, and if so, why.

Ombudsman of Ontario, Investigation into the Special Investigations Unit's operational effectiveness and credibility "Oversight Unseen", Tab 1D of the 2<sup>nd</sup> Supplementary Application Record, at pg. 18

78. The Respondents have provided no explanation for why P.C. Woods, A/Sgt. Pullbrook and Sgt. Burton were allowed to complete their notes after the completion of their shifts. As detailed above, the entitlement to counsel is not absolute and the clear intention of the *SIU Regulations* is to ensure that the entitlement to counsel does not jeopardize the integrity of an S.I.U. investigation (i.e. section 7(2)). As such, the Applicant's respectfully submit that section 9(1) and 9(4) of the *SIU Regulations* should not be interpreted in such a manner as to allow an officer, absent exigent circumstances such as severe trauma or injury, to complete his notes after the end of his or her shift.

79. The failure to complete notes prior to the end of a shift limits the reliability that can be placed on the notes because they have not been prepared contemporaneously. The reliability of officers' notes is essential to an S.I.U investigation. The Applicants respectfully submit that engaging in conduct that undermines the reliability of officers' notes is inconsistent with the duty to co-operate with the S.I.U., pursuant to section 113(9) of the *Act*.

80. In the Schaeffer Investigation, the reliability of the notes prepared by P.C. Woods and A/Sgt. Pullbrook are further impugned by the fact that they were prepared after counsel reviewed or vetted the original notes (which were not disclosed to the S.I.U.). Investigator O'Neill commented on the affect that this practice had on his investigation:

A. I...throughout the investigation and upon my conclusion in the interview, I felt the officers were honest with me and I felt that their notes that they had given me were honest notes. My concern was: 'Are they the original notes?', because I can't see the original notes. So I don't even know if they're a true copy. That was my concern, but I believe there was no deceitfulness or untruthfulness with the officers. So when the Counsel told me that there was no significant difference, what I believed from that was that the notes that I had, there was nothing else that would've been of interest to me, as an investigator with the SIU. That's what I believe.

Q. That's, as you put it, based on your faith in the good faith intentions of the officers that day.

A. Yes. Their demeanour, their attitude, their the whole scenario, if you will yes.

Q. You would agree with me that in an ideal world, an investigator would prefer to simply access the original notes to check for himself.

A. Oh, absolutely.

Q. And that it is a poor substitute in assessing consistency of statements to have to trust the police officer's lawyer.

A. Absolutely.

Q. So you're in a position of disadvantage you can't fix; am I right?

A. That's right. That's correct.

Q. You'd also agree with me would you not that Officers could well be acting in good faith, but have received legal advice to change certain words from draft, from the first set of notes to the second set of notes.

A. Oh, absolutely. That is what you meant when you said the words at the bottom of page 30: "Are we into an area where the police officers are coached?" Is that what you meant?

A. Yes.

Q. That officers, even officers acting in good faith, if their lawyer tells them: "This word would be better than that...", would be well advised to simply follow the lawyer's advice; am I right?

A. Absolutely.

Q. Notwithstanding what you said before, which is that you believe these Officers, you have absolutely no basis to be confident that there are not, in fact, differences between the first set of notes and the second set of notes; am I right?

A. Absolutely.

**Q. The only way you would have any confidence about whether the first set of notes is the same as the second set of notes is if you actually eyeballed the first set of notes; am I right?**

A. Exactly. Yes, sir.

Q. So absent that opportunity to eyeball the first set of notes, you simply don't know.

A. Right.

Q. You go on to say at the bottom of page 30: "Could it be considered, therefore, the notes are not truly the officer's notes?" Do you see that?

A. Yes, sir.

Q. What did you mean by that?

A. Well, I meant that what we talked about, the difference of words where if I could give an example like, an officer, when you're talking to him, he may say: "Well, I arrested the guy..."; but then you look at some notes and they say: "Well, I took him into investigative detention..."; and then when you you know, you would talk to the Officer and he'd say: "Well, where did those words go...?" Well, it's you know, "My lawyer said that..." you know, it's accurate, it's true; but they're not words he uses. So what my position is: when I can't go back to the original set of notes, then whose notes are they? That was my question that I put out there. It's doesn't deal with the accuracy. **They may well, in fact, be accurate; but are they really the officer's notes or are they a combination of the officer's thoughts and legal counsel's words? So whose notes are they?**

Q. That was a concern in this case.

A. Yes.

Q. At the top of page 31, you refer to the fact quote: "This relationship may lead to a compromising position relating to the independence of the involved officer's notes..." closed quotes. What did you mean by that?

A. In relation to the notes, in my view, I can't say that they are independently those officers' notes, if it's a combination of people involved or a combination of the officer and their lawyer or like, the combination of anybody. **Are they really the independent thoughts and notes of that officer? I'm left in a compromising position and I can't say that at least, I believe I am.**

Q. Could you assist me on why it is important to you that there be independent notes of the involved officer. As an investigator, why is that important?

A. I believe that's the best vehicle to get at the truth. That's what I believe.

Volume 3, Transcript of Examination of Denis O'Neill, dated April 15, 2010 at pgs. 85-89

81. Director Scott precisely identified the effects on the reliability of notes created by the conduct of P.C. Woods and A/Sgt. Pullbrook:

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 OPPA lawyer approved notes.

Director Scott Press Release, September 28, 2009, Exhibit "A" to the Affidavit of Ruth Schaeffer, Tab 2 of the Application Record, pgs. 20-21

82. Having a "first set of notes" reviewed and approved by counsel automatically limits the reliability of the notes. This conclusion is reflected in Director Scott's conclusion that "In this most serious case, I have no informational 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 in the firearms death of Mr. Schaeffer". The Applicants respectfully submit that the duty to co-operate (section 113(9) of the *Act*) is violated when the conduct of the officers interferes with the ability of the S.I.U. to determine whether criminal conduct has occurred.

Director Scott Press Release, September 28, 2009, Exhibit "A" to the Affidavit of Ruth Schaeffer, Tab 2 of the Application Record, pgs. 20-21

83. The Applicants respectfully submit that the Commissioner, in permitting the O.P.P. note taking policy to be applied in the manner described above, has breached his duty, pursuant to



section 41(1)(b) of the *Act*, to ensure that officers comply with their duties as detailed in the *S.I.U Regulations* (namely, section 9(1) and 9(3) of the *Regulations*).

***(iii) Late Notification of SIU in the Minty Investigation***

84. Section 3 of the *S.I.U. Regulations* requires the chief of police to notify the SIU immediately of an incident considered to fall within the investigative mandate of the SIU, as set out in subsection 113 (5) of the *Act* . In the Minty Investigation the S.I.U. was notified an hour and twenty three minutes after the O.P.P. had knowledge of the shooting of Douglas Minty. No explanation is offered by the O.P.P. for this delay.

85. The issue of delayed notification was also addressed by the Honourable George Adams, Q.C. and the Ombudsman in their reports on the S.I.U.:

In order for the SIU to effectively investigate an incident of serious injury or death involving police, it has to know about it. Delayed notification of incidents has posed a chronic problem for the SIU. When Mr. Adams reviewed the situation in 1998, he said:

It is not practical for a police service to attempt to determine the SIU's jurisdiction in a strict legal sense before notification is effected because of the inherent uncertainty of many incidents. The issue of notification must be treated more like that of calling an ambulance – when in doubt, call.

The law is now quite clear: Chiefs of police are required to notify the SIU immediately of any incident that may reasonably be considered to fall within its mandate. Given the speed and facility of modern communication, one could reasonably expect notification of the SIU to take place in most cases within a matter of minutes. Under the circumstances, it is hard to explain why notification was still a problem in numerous cases we reviewed. Police services often failed to notify the SIU entirely, or did so well after an incident had occurred. Late notification leads to late response, which in turn can lead to critical evidence being lost. Officers may have gone off shift, civilian witnesses may have vanished, evidence may have washed away and the SIU may have to rely on the very force it is investigating not only to guard but also to gather evidence.

Some SIU investigators identified the Ontario Provincial Police as particularly slow in notifications because of its bureaucratic structure. Calls must go up

through the OPP's chain of command before the SIU is notified, and this can take hours. A senior SIU staff member told us it is a good day when the OPP notify the SIU within an hour, and that in the past, delays of 2-3 hours had been the norm.

When notification of an incident is delayed, every other step in the investigative process is also affected, particularly the SIU's ability to mobilize a response.

In the world of criminal investigations, response time is critical. In the words of OPP Commissioner Julian Fantino: "It's really important to hit the scene quickly, take that immediate charge, make an assessment of what the priorities are.... Evidence very often evaporates, witnesses walk away, stories change... scenes change..." The faster and more intense the response, the better the chances of gathering quality evidence – which can disappear and degenerate as quickly as it is created.

Ombudsman of Ontario, Investigation into the Special Investigations Unit's Operational Effectiveness and Credibility "Oversight Unseen", Tab 1D of the 2<sup>nd</sup> Supplementary Application Record at pgs. 12-14

86. The Professional Standards Bureau Investigation concluded that that the O.P.P. provided timely notification to the S.I.U. Investigator Mercer took issue with the Professional Standards Bureau's findings:

Q. Turning to page 12 of Exhibit C go ahead.

A. The time that I arrived was not at ten fifty three. It was twelve fifty.

Q. A.M.?

A. Yes.

Q. Is the time in relation to SIU Investigators Ford and Marshall accurate?

A. That, I cannot answer. It would be recorded in their notes.

Q. Other than the correction of the ten fifty three p.m. to twelve fifty a.m., to your knowledge, is everything else accurate?

A. Yes.

Q. Could you assist me: you see where this Report identifies the chain of notification. It starts at page 11...

A. Yes.

Q. ...and it goes on to page 12 when, finally, it states in the third to last paragraph on page 12: "Inspector Cox, the SIU Liaison Officer, gathered all the information about the shooting and made all appropriate notifications to the SIU. At nine forty eight, Mr. Dave Matteson of the SIU called Inspector Cox and advised the SIU mandate would be invoked..." Is it fair to say that there would have been about a five to ten minute span of time that passed between the time OPP notified SIU and SIU called back saying their mandate would be invoked?

A. That would that question would be answered on the Intake that's being faxed.

Q. Do you see any explanation for why the Cox call or the call from OPP couldn't have happened earlier than nine forty or thereabouts?

A. I don't understand why. It we could've been called sooner.

Q. Do you see how it says Inspector Cox made all appropriate notifications?

A. Yes.

Q. Do you consider an hour and a half delay to be an appropriate notification?

A. No, I do not.

Q. At page 13, the Professional Standards Report states: "Upon reviewing all the information..." do you see that in the fourth paragraph?

A. Yes.

Q. "...all required notifications were made in a timely fashion."

A. No, I don't believe that they were.

Q. It states in the next paragraph:

"There was no indication that any delay was intentional by the OPP. This incident necessitated time to gather the appropriate information about the shooting and relaying accurate information back to the SIU." Are you familiar with the injuries that were sustained by Mr. Minty?

A. Yes.

Q. How many bullet wounds were sustained by Mr. Minty?

A. Five.

Q. Would you consider five bullet wounds to one's body to be serious injury?

A. Yes, I would.

Q. Could there have possibly been any doubt that it was Constable Seguin who discharged a firearm causing those wounds?

A. No.

Q. As you sit here today, can you understand any reason that it would not have been understood as an SIU incident immediately?

A. There would be no reason. They should've called us right away.

Volume 4, Transcript of Examination of Angela Mercer, dated April 15, 2010 at pgs. 28-30

87. In addition, Investigator Mercer explained that the delayed notification in this case led to a concern of “tampering”:

Q. Ms Mercer, because Master Abrams has directed that this refused question be answered, I'm now asking you: could you, please, assist me on how a delay in notification can impact or did impact on the investigation.

A. It did impact on the investigation.

Q. Could you help me.

A. The way it impacted: it delayed in speaking to witnesses; it delayed in the evidence. It just delayed the investigation in the whole and it gave enough time for the police to organize what they were going to do, and the fact that they had an association rep arrive maybe a few probably a few minutes after the shooting.

Q. When you say it created a situation in which the police were allowed to do what they wanted to do, what were you precisely concerned about in that regard?

A. **Well, what my main concern was tampering of evidence.** I thought it was odd that the Association was notified hours before SIU was, and the association member had arrived at the shooting scene. I have no idea if that association member had crossed the shooting scene or not. It's never been recorded. I asked for the logs, and they had not recorded his name on there. That does not mean he did or he didn't go into the scene.

Q. Are there other concerns you have about the impact of delay?

A. **The only concern, as I said before, is the fact that we weren't notified immediately which causes a concern to me as in 'Why why such a long time in delay? Are they getting together to make notes? What are they doing? I**

**can't answer that. I'm just speculating. That caused me concern at the time especially when this association member arrived at the scene.**

Volume 4, Transcript of Examination of Angela Mercer, April 15, 2010, at pgs. 60-62

88. In the absence of any adequate explanation for the delay in notification, it is respectfully submitted that section 3 of the *S.I.U. Regulations* was breached in the Minty Investigation. The delayed notification negatively impacted the investigation as described by Investigator Mercer.

*(iv) Interviewing witnesses prior to the S.I.U. being notified*

89. Section 5 of the *S.I.U. Regulations* stipulates that the S.I.U. shall be the lead investigator and shall have priority over any other force during the investigation. In the Minty Investigation, Sgt. Thompson took witness statements from two civilian witnesses who were the closest in proximity to the shooting. These statements were taken prior to the S.I.U. being notified of the shooting. Investigator Mercer acknowledged that in this Minty Investigation, Sgt. Thompson could have advised the witnesses not to discuss the incident with her:

Q. Well, let me ask you what I asked you before: in the course of your work, do you routinely have to tell civilians that 'It's best not to talk about this now in the company of one another and you'll give a formal statement in a little while...?'

A. Yes.

Q. Do you routinely do that?

A. Yes.

Q. Was there anything, to your knowledge, stopping Sergeant Thompson from doing that?

A. No.

Q. Would you agree with me that two civilians who describe an event, a homicide, in the presence of one another essentially risk polluting each other's accounts.

A. That's right.

Q. Do you know of anything that would have stopped Sergeant Thompson from simply cautioning them to wait for SIU?

A. No, I do not.

Q. Upon reflection, given what I've just asked you, do you see the problem in what happened?

A. Yes, I do.

Q. So would you agree with me, first of all, that SIU was to take the lead in this investigation?

A. Yes, I do.

Q. Now, were these not the two civilian witnesses who were the closest eyewitnesses to the scene?

A. Yes.

Q. Would you describe their potential information as pivotal?

A. Yes.

Volume 4, Transcript of Examination of Angela Mercer, April 15, 2010 at pgs. 33-36

90. In the circumstances, the Applicants respectfully submit that section 5 of the *S.I.U. Regulations* was violated when Sgt. Thompson took witness statements from the two witnesses prior to the S.I.U. having the opportunity to interview the two important witnesses.

#### **PART IV: ORDER REQUESTED**

91. The Applicants respectfully request declaratory relief in the form of judicial interpretations and guidance in respect of those provisions of the *Police Services Act* and *S.I.U. Regulations* that govern the police duty to cooperate with investigations by the Special Investigations Unit.

92. The families seek this Honourable Court's guidance in the form of declaratory relief in respect of the following:

- (A) An interpretation of section 113(9) of the *Police Service 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 5 and 2.06(4) of the *Law Society of Upper Canada’s 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;
- (iii) 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*.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

**DATED at Toronto, this 5<sup>th</sup> day of May 2010.**



---

**Julian N. Falconer LSUC# 29465 R**  
**Sunil S. Mathai LSUC# 49616 O**

Falconer Charney LLP  
Barristers-at-Law  
8 Prince Arthur Avenue  
Toronto, Ontario M5R 1A9

Tel: (416) 964-3408  
Fax: (416) 929-8179  
Lawyers for the Plaintiffs

**Schedule “A”****LIST OF AUTHORITIES**

1. *Booth v. Huxter* (1994), 16 O.R. (3d) 528 (Div. Ct)
2. *Case of Ramsahai and Others v. The Netherlands*, Application No. 52391/99, judgment of 15 May 2007
3. *Odhavji Estate v. Woodhouse* , [1998] O.J. No. 5426
4. *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263
5. *Finlay v. Canada (Minister of Finance)* [1986] 2 S.C.R. 607
6. *R. v. Green*, [1998] O.J. No. 3598
7. *R. v. Speid* (1983), 43 O.R. (2d) 596 (C.A)
8. *Saunders et. al. v. The Independent Police Complaints Commission et. al.* [2008] EWHC 2372 (Admin)
9. Ombudsman of Ontario, Investigation into the Special Investigations Unit’s Operational Effectiveness and Credibility “Oversight Unseen” (Ombudsman Report)
10. Report of the Taman Inquiry, Honourable Roger Salhany
11. Rules of Professional Conduct, Law Society of Upper Canada, adopted June 22, 2000, amendments current to February 2010
12. The Honourable George W. Adams, Q.C., 1998, Consultation Report to the Attorney General and the Solicitor General Concerning Police Cooperation with the Special Investigations Unit, May 14, 1998 (Adams I)
13. The Honourable George W. Adams, Q.C., 2003, Review Report on the Special Investigations Unit Reforms prepared for the Attorney General of Ontario, February 26, 2003 (Adams II)

**Schedule “B”**

**RELEVANT STATUTES & REGULATIONS**

*Rules of Civil Procedure*

APPLICATIONS — BY NOTICE OF APPLICATION

Notice of Application

14.05 (1) The originating process for the commencement of an application is a notice of application or an application for a certificate of appointment of an estate trustee  
Application under Rules

(3) A proceeding may be brought by application where these rules authorize the commencement of a proceeding by application or where the relief claimed is,

(d) the determination of rights that depend on the interpretation of a deed, will, contract or other instrument, or on the interpretation of a statute, order in council, regulation or municipal by-law or resolution;

(g) an injunction, mandatory order or declaration or the appointment of a receiver or other consequential relief when ancillary to relief claimed in a proceeding properly commenced by a notice of application;

(h) in respect of any matter where it is unlikely that there will be any material facts in dispute.

*Police Services Act*

R.S.O. 1990, c. P. 15

**PART IV**

**POLICE OFFICERS AND OTHER POLICE STAFF**

**CHIEF OF POLICE**

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

(a) in the case of a municipal police force, administering the police force and overseeing its operation in accordance with the objectives, priorities and policies established by the board under subsection 31 (1);

(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;

- (c) ensuring that the police force provides community-oriented police services;
- (d) administering the complaints system in accordance with Part V. R.S.O. 1990, c. P.15, s. 41 (1); 1995, c. 4, s. 4 (8, 9); 1997, c. 8, s. 27.

## PART VII SPECIAL INVESTIGATIONS

### Special investigations unit

**113. (1)** There shall be a special investigations unit of the Ministry of the Solicitor General. R.S.O. 1990, c. P.15, s. 113 (1).

### 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*. R.S.O. 1990, c. P.15, s. 113 (2); 2006, c. 35, Sched. C, s. 111 (4).

### 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. R.S.O. 1990, c. P.15, s. 113 (3).

### 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. 2009, c. 33, Sched. 2, s. 60 (3).

### Peace officers

(4) The director, acting director and investigators are peace officers. R.S.O. 1990, c. P.15, s. 113 (4); 2009, c. 33, Sched. 2, s. 60 (4).

### 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. R.S.O. 1990, c. P.15, s. 113 (5).

### 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. R.S.O. 1990, c. P.15, s. 113 (6).

### 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. R.S.O. 1990, c. P.15, s. 113 (7).

### Report

(8) The director shall report the results of investigations to the Attorney General. R.S.O. 1990, c. P.15, s. 113 (8).

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.

**Police Services Act  
ONTARIO REGULATION 673/98**

**CONDUCT AND DUTIES OF POLICE OFFICERS RESPECTING INVESTIGATIONS BY  
THE SPECIAL INVESTIGATIONS UNIT**

**1.** (1) In this Regulation,

“SIU” means the special investigations unit established under section 113 of the Act;

“subject officer” means a police officer whose conduct appears, in the opinion of the SIU director, to have caused the death or serious injury under investigation;

“witness officer” means a police officer who, in the opinion of the SIU director, is involved in the incident under investigation but is not a subject officer. O. Reg. 673/98, s. 1 (1).

(2) The SIU director may designate an SIU investigator to act in his or her place and to have all the powers and duties of the SIU director under this Regulation and, if the SIU director appoints a designate, any reference to the SIU director in this Regulation, excluding this subsection, means the SIU director or his or her designate. O. Reg. 673/98, s. 1 (2).

**2.** (1) The chief of police may designate a member of the police force who is not a subject officer or witness officer in the incident to act in the place of the chief of police and to have all the powers and duties of the chief of police in any matter respecting an incident under investigation by the SIU. O. Reg. 673/98, s. 2 (1).

(2) If the chief of police appoints a designate under subsection (1), any reference to the chief of police in this Regulation, excluding this section, means the chief of police or his or her designate. O. Reg. 673/98, s. 2 (2).

(3) The person appointed under subsection (1) must be a senior officer. O. Reg. 673/98, s. 2 (3).

**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. O. Reg. 673/98, s. 3.

**4.** The chief of police shall ensure that, pending the SIU taking charge of the scene of the incident, the scene is secured by the police force in a manner consistent with all standing orders, policies and usual practice of the police force for serious incidents. O. Reg. 673/98, s. 4.

**5.** The SIU shall be the lead investigator, and shall have priority over any police force, in the investigation of the incident. O. Reg. 673/98, s. 5.

**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. O. Reg. 673/98, s. 6 (1).

(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. O. Reg. 673/98, s. 6 (2).

**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. O. Reg. 673/98, s. 7 (1).

(2) Subsection (1) does not apply if, in the opinion of the SIU director, waiting for legal counsel or a representative of the association would cause an unreasonable delay in the investigation. O. Reg. 673/98, s. 7 (2).

**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. O. Reg. 673/98, s. 8 (1).

(2) A request to be interviewed must be made in person. O. Reg. 673/98, s. 8 (2).

(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. O. Reg. 673/98, s. 8 (3).

(4) The interview shall not be recorded by audiotape or videotape except with the consent of the witness officer. O. Reg. 673/98, s. 8 (4).

(5) The SIU director may request an interview take place beyond the time requirement as set out in subsection (1). O. Reg. 673/98, s. 8 (5).

**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. O. Reg. 673/98, s. 9 (1).

(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. O. Reg. 673/98, s. 9 (2).

(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. O. Reg. 673/98, s. 9 (3).

(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). O. Reg. 673/98, s. 9 (4).

**10.** (1) The SIU shall, before requesting an interview with a police officer or before requesting a copy of his or her notes on the incident, advise the chief of police and the officer in writing whether the officer is considered to be a subject officer or a witness officer. O. Reg. 673/98, s. 10 (1).

(2) The SIU shall advise the chief of police and the police officer in writing if, at any time after first advising them that the officer is considered to be a subject officer or a witness officer, the SIU director decides that an officer formerly considered to be a subject officer is now considered to be a witness officer or an officer formerly considered to be a witness officer is now considered to be a subject officer. O. Reg. 673/98, s. 10 (2).

(3) If, after interviewing a police officer who was considered to be a witness officer when the interview was requested or after obtaining a copy of the notes of a police officer who was considered to be a witness officer when the notes were requested, the SIU director decides that the police officer is a subject officer, the SIU shall,

- (a) advise the chief of police and the officer in writing that the officer is now considered to be a subject officer;
- (b) give the police officer the original and all copies of the record of the interview; and
- (c) give the chief of police the original and all copies of the police officer's notes. O. Reg. 673/98, s. 10 (3).

(4) The chief of police shall keep the original and all copies of the police officer's notes returned under clause (3) (c) for use in his or her investigation under section 11. O. Reg. 673/98, s. 10 (4).

**11.** (1) The chief of police shall also cause an investigation to be conducted forthwith into any incident with respect to which the SIU has been notified, subject to the SIU's lead role in investigating the incident. O. Reg. 673/98, s. 11 (1).

(2) The purpose of the chief of police's investigation is to review the policies of or services provided by the police force and the conduct of its police officers. O. Reg. 673/98, s. 11 (2).

(3) All members of the police force shall co-operate fully with the chief of police's investigation. O. Reg. 673/98, s. 11 (3).

(4) The chief of police of a municipal police force shall report his or her findings and any action taken or recommended to be taken to the board within 30 days after the SIU director advises the chief of police that he or she has reported the results of the SIU's investigation to the Attorney General, and the board may make the chief of police's report available to the public. O. Reg. 673/98, s. 11 (4).

(5) The Commissioner of the Ontario Provincial Police shall prepare a report of his or her findings and any action taken within 30 days after the SIU director advises the Commissioner that he or she has reported the results of the SIU's investigation to the Attorney General, and the Commissioner may make the report available to the public. O. Reg. 673/98, s. 11 (5).

**12.** (1) The police force may disclose to any person the fact that the SIU director has been notified of an incident and is conducting an investigation into it. O. Reg. 673/98, s. 12 (1).

(2) Except as permitted by this Regulation, the police force and members of the police force shall not, during the course of an investigation by the SIU, disclose to any person any information with respect to the incident or the investigation. O. Reg. 673/98, s. 12 (2).

**13.** The SIU shall not, during the course of an investigation by the SIU, make any public statement about the investigation unless such statement is aimed at preserving the integrity of the investigation. O. Reg. 673/98, s. 13.

**14.** A chief of police or police officer shall not be required to comply with a provision of this Regulation if, in the opinion of the SIU director, compliance is not possible for reasons beyond the chief of police's or police officer's control. O. Reg. 673/98, s. 14.

**15.** Omitted (provides for coming into force of provisions of this Regulation). O. Reg. 673/98, s. 15.