

**Consultation Report  
of the  
Honourable George W. Adams, Q.C.  
to the  
Attorney General  
and  
Solicitor General  
Concerning  
Police Cooperation  
with the  
Special Investigations Unit**

**May 14, 1998**

**The Honourable George W. Adams, Q.C.**

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May 14. 1998

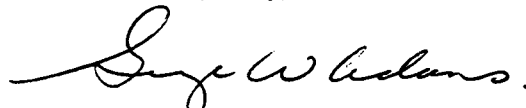
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Dear Ministers,

Please accept my report on the consultation. With its recommendations, the report is somewhat unusual. You asked me to identify and facilitate a consensus concerning the matters in question. The recommendations, therefore, represent my estimate of the common ground between the parties who participated in the process. However, because I did not request the parties to signify agreement by signing a document, you will need to make your own assessment of the accuracy of this estimate. Nevertheless, the parties are to be commended for their efforts which I believe create a foundation for a mutually acceptable resolution of the problems remitted to the process.

Yours very truly,

A handwritten signature in black ink, appearing to read "George W. Adams", written in a cursive style.

Hon. George W. Adams, Q.C.

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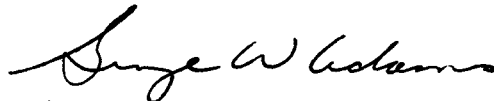
May 14, 1998

Dear Participants,

Please find enclosed my report to the Government with covering letter to the Ministers. The "recommendations" relate only to my estimate of the degree of consensus existing at the conclusion of the talks. Where the parties remained apart on what I have characterized as "details", this too has been identified. I hope my interpretation of the talks meets with your recollection. If not, you will want to advise the Government and I urge you to do so.

This possibility aside, I thank all the parties for their impressive efforts during the process. It was an honour to work with you. While it is for the Government to decide what can and ought to be done, I believe the consultation can provide a strong foundation to a timely resolution of the problems in issue.

Yours very truly,

A handwritten signature in cursive script, appearing to read 'George W. Adams'.

Hon. George W. Adams, Q.C.

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## Appendices

## **Mandate**

I was appointed by the Attorney General and the Solicitor General in September to consult with community and police organizations on ways to improve the relationship between the Special Investigations Unit (SIU) and the police in the areas of: (i) timely notification of incidents to the SIU by the police; (ii) control of the incident scene pending arrival and investigation by the SIU; and (iii) timely cooperation of police officers involved in the incidents being investigated. The SIU is a civilian agency reporting to the Attorney General which investigates deaths and serious injuries arising in the course of police work.

This consultation was the product of a series of incidents involving SIU investigations of police shootings of members of the public.<sup>1</sup> In these cases, it was perceived that the investigations by the SIU were overwhelmed by controversies which developed over its processes. Problems alleged to have occurred included:

- ▶ delays and even refusals by police officers who were witnesses to the incident to complete notebooks and to attend SIU-requested interviews;
- ▶ delays in notifying the SIU about the incident in question;
- ▶ access of unauthorized persons behind police lines prior to the arrival of the SIU and failure to segregate involved officers from each other pending SIU interviews;
- ▶ police statements to the media about the incident without SIU approval; and

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<sup>1</sup> I was appointed September 23, 1997. The 1997 shootings of Hugh Dawson, Manish Odhavji, and Edmund Yu in Toronto are examples where problems of cooperation occurred.

- ▶ interview and release of civilian witnesses by police officers without the consent of the SIU.

There is often intense public interest in, and media scrutiny of, police use of force, particularly when the victim is a member of a visible minority community. The investigation of such incidents must be carried out in a transparent manner and any deviation from what is understood to be standard investigation practices undermines public confidence. While there was a growing sense that this state of affairs could not continue, it was also accepted that any durable solution had to respond to the underlying causes and be fashioned with participation by affected parties. Accordingly, the Ministers requested me to explore the potential for consensus among interested parties which I did in meetings held from late October, 1997 until the end of April, 1998.<sup>2</sup>

## **The Consultation's Purpose and Methodology**

### **Purpose**

The purpose of this consultation was to identify areas of common ground and, through a principled and problem-solving dialogue, to build consensus where possible. The writing of a report with recommendations was a matter of discretion to be exercised in a manner I thought consistent with the project's consensus-seeking aim. It was not the mandate of the consultation to conduct a public inquiry by hearing evidence and submissions of counsel, culminating in the finding of facts. Experts in police administration, civilian oversight, forensic investigation or systemic racism were not retained, nor were written

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<sup>2</sup> I was assisted throughout this period in the organization and conduct of the consultation meetings, as well as related research, by lawyers Mark Leach of the Ministry of the Attorney General, Jeff Andrew of the law firm Cavalluzzo Hayes Shilton McIntyre and Cornish, and John Lee, a former law clerk with the Ontario Court of Justice (General Division).

submissions requested wherein the parties could stake out positions and make demands of each other and the State. Instead, I listened to and questioned people who have been active in this area for many years. They were people of colour, Aboriginal peoples, many representatives of and advisors to these constituencies and representatives of and advisors to police communities.<sup>3</sup>

Why this approach? One explanation lies in the incendiary nature of these issues. All constituencies tend to see police oversight in "life and death" terms. For this reason, public dialogue can be very emotional and very strident. Unfortunately, these parties do not regularly speak to each other, making more public discourse sometimes tense and always difficult. Therefore, the belief was that a more informal, less public dialogue through an intermediary might prove productive.

Another justification for the process chosen was that there had been several previous public inquiries with attendant fact finding and report writing. These parties had, on those occasions, filed written briefs, attended public consultations and staked out their positions.

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<sup>3</sup> For a discussion on dispute resolution and conflicts involving allegations of racism, see: H. Gadlin, "Conflict Resolution, Cultural Differences, and the Culture of Racism" (1994) 10 N.J. 33. There is also a wealth of available information on police use of force, oversight of police conduct, systemic racism in the justice system and Aboriginal justice issues. See for example: Australia, *Royal Commission into Aboriginal Deaths in Custody - National Report* (Canberra: Australian Government Publishing Service, 1991) (Commissioner: E. Johnston); Manitoba, *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: Queen's Printer, 1991) (Commissioners: A.C. Hamilton & C.M. Sinclair); The Ontario Civilian Commission on Police Services, *Report of an Inquiry into Administration of Internal Investigations by the Metropolitan Toronto Police Force* (August 1992) (Chair: F.M. D'Andrea); Canada, Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide, A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Queen's Printer, 1996) (Co-Chairs: R. Dussault & G. Erasmus). Other authorities are discussed in detail elsewhere in this report.



The exercises were important and illuminating, but failed to produce concrete policy change.

Finally, the process chosen reflects the view that public policy should not be out of touch with widespread community acceptance. By this I mean that those who are most affected by a law must see it as fair. That perception may best be attained if those same people have a hand in fashioning the policies that will come to guide their conduct.

It was in this context, therefore, that all parties came to understand that the process was not likely to permit any one constituency to hit "a home run". Instead, "balance" became a watchword.

### **Methodology**

The Government or the courts will have the final say on the issues examined in this process. For this reason, it would be wrong to characterize this process as a negotiation. It is also important to acknowledge that not everyone who may be affected participated or participated equally. The process was confined in time and geographic scope. Moreover, responses to the issues in question, regardless of agreement, must meet certain minimum standards of public and legal entitlement. Thus, this process is better described as a consultation.

On the other hand, there has been a policy paralysis in this area for years, possibly because it is an emotional intersection of constitutional law and other fundamental policy interests such as racial justice, public accountability and public safety. All parties, therefore, can link their positions to immovable claims of legal or moral entitlement and, in their discretion, assert "minimum" standards from which they will not compromise. While this ongoing debate has been important, the resulting stalemate in public policy has been in no one's interest. While racial, procedural and constitutional justice must prevail, there

are many policy tools which can achieve these ends provided there can be broad agreement on the problem or policy goal. Thus, the consultation aimed at developing consensus on: (i) the problems to be tackled; (ii) rational standards of constitutional law, public accountability and investigatory fairness; and (iii) a range of acceptable policy tools which could fairly meet (ii) and respond to (i).

The consultation was announced in late September and immediately encountered difficulty because of its perceived narrow mandate and pre-Christmas tentative deadline. Civilian communities were particularly sceptical of the Government's "real" objectives given the recent controversy associated with Bill 105.<sup>4</sup> But, as I met with the parties and received these concerns, I also learned more about the substantive issues and obtained advice on the kind of consultation process in which the parties could have confidence. Everyone came to accept that the consultation's mandate and duration needed to be broadened to permit a full and frank discussion. Everyone also saw value in conducting indirect "discussions" by meeting with me separately. It came to be understood that a problem solving methodology was needed which could identify underlying interests, highlight fundamental standards of fairness and accountability and create appropriate policy responses. To that end, I issued an interim report in January 1998 outlining who I had met with, a proposed future process and an undertaking that I would conduct an identical dialogue with all participants. Finally, all participants accepted my ambiguous role of mediator/facilitator and possible reporter to the Government.

I met with all parties on at least three occasions as well as several times with lawyers active in the field. While I did not request briefs, I asked questions, received many suggestions and encouraged the parties to understand each other's perspective. Above all, I listened.

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<sup>4</sup> *An Act to Renew the Partnership between the Province, Municipalities and the Police and to Enhance Community Safety*, 1st Sess., 36th Leg. Ont. 1997, now S.O. 1997, c.8.

The process began with an emotional review of the many underlying incidents of police shootings and in-custody deaths. Whether people of colour, Aboriginal communities or the police, everyone has been moved by these events. A second set of meetings was designed to come to grips with the issues by identifying the problems, all underlying interests and a full range of possible responses pertaining to notification of the SIU, control of the incident scene and police officer cooperation. At this time, meetings were convened in Thunder Bay and Kenora. In these meetings, Aboriginal leaders expressed concern over the limitations inherent in the process and stressed the need for ongoing dialogue between nations. A third set of meetings in Toronto further refined those policy options which had the greatest potential for attracting consensus. During this last phase of the process, I travelled to Cincinnati, Ohio to spend a day with representatives of that city's Homicide Unit, Internal Investigation Unit and Office of Municipal Investigations to provide the process with a better understanding of how Americans have come to operationalize their constitutional guarantees in a similar setting.

## **The Special Investigations Unit**

### **Civilian Oversight and the Creation of the SIU**

Policing is the provision of an important public service. However, unlike most public service providers, the police are given extraordinary powers to detain civilians and, when reasonably necessary to prevent death or serious injury to themselves or civilians, to use lethal force. Therefore, the daily decisions of police officers may have a dramatic impact on the communities they serve as well as on their own lives. Any public service career is a demanding one, but given the nature of police work and the need to exercise related police powers responsibly, there are few public service careers more challenging. Public and police officer safety in a democratic society have led inevitably to issues of accountability.

Great changes in the area of police accountability have occurred over the past three decades. In the United States, citizen complaints were dealt with informally by the police themselves until the 1960's when the civil rights movement and related mass protests demonstrated to many Americans the problems of unchecked police conduct<sup>5</sup>. Demands for rigorous review mechanisms were made.<sup>6</sup> The police did not vigorously oppose internal review, but were strongly against civilian review of their conduct.<sup>7</sup> Such opposition, however, only seemed to increase public support for civilian review.<sup>8</sup> Eventually, civilian oversight of police conduct was adopted in many jurisdictions in the United States, taking several forms. In some jurisdictions, the police conduct the investigation under review by civilian bodies which may have their own powers to conduct further inquiries. In other jurisdictions, virtual stand-alone investigatory bodies exist whose sole responsibility is to investigate allegations of police misconduct on behalf of the civilian community.<sup>9</sup>

Civilian review of police conduct in Ontario has its own unique history. The 1970's saw a great deal of unrest in some Canadian cities - especially Toronto. The tensions created in those years were not only between police and visible minorities, but encompassed

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- <sup>5</sup> D. W. Perez & W.K. Muir, "Administrative Review of Alleged Police Brutality," in *Police Violence: Understanding and Controlling Police Abuse of Force*, W.A. Gellar & M. Toch, eds. (New Haven: Yale University, 1996).
- <sup>6</sup> *Ibid.*
- <sup>7</sup> *Ibid.*
- <sup>8</sup> See for example J.M. Skolnick & J.J. Fyfe, *Above The Law: Police and the Excessive Use of Force* (Toronto: The Free Press, 1993) at 223 describing the establishment of civilian oversight in New York City.
- <sup>9</sup> Perez & Muir, *supra*, note 5. See also E.J. Littlejohn, "The Civilian Police Commission: A Deterrent of Police Misconduct" (1988), 59 J. Urban L. 5.

disparate factions of the community.<sup>10</sup> *The Report of the Ontario Royal Commission into Metropolitan Toronto Police Practices*<sup>11</sup> of 1976 identified some of the serious deficiencies with the then current system of handling civilian complaints about police conduct, including concerns about tampering with notebooks. At that time, civilian oversight was essentially through the Ontario Police Commission and local police boards. However, day-to-day control over police services rested with the chiefs of police who were the first line of review and investigation of police conduct.

As a result of concerns over police policing themselves, the Office of the Public Complaints Commissioner was created in 1981, with jurisdiction only in respect to the Metropolitan Toronto Police Service. The police retained responsibility for the investigation of public complaints, but the Commissioner monitored the progress by receiving 30 day interim reports on the status of the investigations. Following completion of the investigation and after the final decision of the Chief of Police about the complaint, the complainant could request the Commissioner to review the Chief's decision. The Commissioner, after conducting such a review, had the power to decide to take no further action or to order a hearing by an independent civilian Board of Inquiry. The Board, if it found misconduct proven beyond a reasonable doubt, could then impose discipline against an officer. There was a right of appeal to the courts. The Commissioner was also able to make recommendations on the practices and procedures of the police service and any law affecting the resolution or prevention of public complaints.<sup>12</sup>

When two black men were fatally shot by police in 1988, the Government created the Task Force On Race Relations and Policing, chaired by Clare Lewis. In 1989, the Lewis Task

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<sup>10</sup> S. Watt, "The Future of Civilian Oversight of Policing" (1991) 33 Can. J. Criminology 347 at 349.

<sup>11</sup> (Toronto: Queen's Printer, 1976) (Commissioner: D.R. Morand).

<sup>12</sup> See: Watt, *supra*, note 10.

Force reported that visible minorities did not believe they were policed fairly and that this problem could not be ignored.<sup>13</sup> Among the Task Force's recommendations were proposed changes in the law and procedures governing police use of force and reforms to police training. Of particular interest to this consultation was the recommendation to create an independent agency to investigate police shootings and to determine whether charges should be laid:

The Task Force recommends that the Solicitor General create an investigative team to investigate police shootings in Ontario. That investigative team should be comprised of homicide investigators chosen from various forces other than the force involved in the shooting, together with at least two civilian members drawn from government investigative agencies independent of the Ministry of the Solicitor General. When warranted, criminal charges should be laid within 30 days of commencing the investigation except when special circumstances justify extension.<sup>14</sup>

A new *Police Services Act*<sup>15</sup> was enacted in 1990, with several features bearing on civilian oversight. The Ontario Police Commission was renamed the Ontario Civilian Commission on Police Services (OCCOPS). It retained certain powers to monitor the activities of the local police service boards, police chiefs and the provision of police services and was an appellate body for police discipline cases. Issues of policing standards were assumed by the Ministry of the Solicitor General. The Toronto complaints system was made a province-wide police complaints system known as the Office of the Police Complaints Commissioner, with powers to monitor and, in some cases, initiate investigations of police

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<sup>13</sup> Ontario, *Report on the Race Relations and Policing Task Force* (Toronto: Queen's Printer, 1989) (Chair: Clare Lewis).

<sup>14</sup> *Ibid.* at 150.

<sup>15</sup> R.S.O. 1990, c. P.15

conduct. Finally, the enactment created the SIU for the investigation of deaths and serious injury arising in the course of policing.

The Office of the Police Complaints Commissioner and the Board of Inquiry mechanism have recently been eliminated with the passage of Bill 105. Under the present regime, OCCOPS has an appellate function over public complaints and police discipline cases, both of which are investigated by chiefs of police. Bill 105 had no direct effect on the SIU.

### **The SIU - The Statutory Mandate**

The provision of police services is heavily regulated by the *Police Services Act* and its regulations. Against this regulatory detail, it is surprising that the Act includes only a single section with nine brief sub-sections to establish the SIU. There is no companion regulation.

Section 113 provides for the appointment of a Director of the Unit who cannot be a police officer or a former police officer. It also prohibits persons who are police officers from being appointed as investigators, though it does not prohibit former police officers from being appointed as investigators. The one proviso is that an investigator is not permitted to participate in an investigation that relates to members of a police service of which he or she was a member. The section provides that the Director has a discretion to "cause investigations to be conducted into the circumstances of serious injuries and deaths that may have resulted from criminal offences committed by police officers." At the request of the Solicitor General or Attorney General, the Director must cause such an investigation to occur. Where, in the Director's opinion, there are reasonable grounds to do so, an information must be laid against the officer. Although the SIU Director reports to the Ministry of the Attorney General for administrative purposes, only the Director is responsible for the decision to lay charges. Charges are referred to the Crown for

prosecution. The prosecutions are conducted by a specialized team in the Crown Law Office called the Special Prosecutions Unit. The SIU Director is required to report the results of an investigation to the Attorney General. No express provision is made for the public release of this report.

With respect to the cooperation police officers are expected to provide to an SIU investigation, the Act says only:

113(9)           Members of police forces shall cooperate fully with the members of the unit in the conduct of investigations.

There are no other references in the statute or in the regulations to the conduct of SIU investigations. However, the express duties of police officers in the Act and the regulations are cast in sufficiently general terms so that a failure to cooperate with the SIU is a breach of duty. Nevertheless, the generality of s. 113(9) and its potential relationship with the *Canadian Charter of Rights and Freedoms*<sup>16</sup> have proven fertile ground for dispute and confusion over what precisely is expected of police officers and chiefs of police by this subsection.

In May of 1992, immediately after a riot on Yonge Street in Toronto, the Government appointed Stephen Lewis as its advisor on race relations and asked that he consult widely and make recommendations. A month later, on June 9, 1992, Mr. Lewis made recommendations on policing which included those specifically dealing with the SIU.<sup>17</sup> The report noted the Unit's credibility problem and recommended more funding for it. Mr. Lewis, however, rejected the suggestion from some communities that the Unit should be

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<sup>16</sup> Part I of the *Constitution Act, 1882* being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>17</sup> S. Lewis, *Untitled Report* (9 June 1992).



composed only of persons with no past or present relationship with policing. Instead, he wrote:

Criminal investigation takes years and years of experience to acquire, and in the process of investigation, there is equally the need to be intimately familiar with police culture. Independence must be absolutely assured, but it should be possible to find and attract skilled police criminal investigators of excellence, who would wish to join the Special Investigations Unit because they believe, above all, in a fair, law-abiding and incorruptible police force, and they are prepared to devote their careers to that end.

It will take dollars and tenacity to assemble such a Unit. But it can be done. And to provide a frame of further public confidence, civilian employees, of unblemished reputation with some non-criminal investigative background, should round out the Unit, and be part of each investigation.<sup>18</sup>

Mr. Lewis recommended that the SIU should report to the Attorney General, not the Solicitor General, and that it should receive adequate funding to ensure total independence in the conduct of investigations.

On September 29, 1992, the Attorney General announced the transfer of the SIU from the Ministry of the Solicitor General to the Ministry of the Attorney General and confirmed its arms length agency status. However, as will become apparent, adequate resourcing of the SIU has remained a persistent problem.

Mr. Lewis also recommended that the Task Force on Race Relations and Policing be reconstituted to assess the status of the implementation of its 1989 recommendations and

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<sup>18</sup> *Ibid.* at 9.

to make further recommendations where necessary. Finally, he recommended that there be established an inquiry into race relations and the criminal justice system.

The Task Force on Race Relations and Policing was reconstituted in July of 1992 and reported back to the Government later that year.<sup>19</sup> The report noted that the SIU differed markedly from the concept which was originally recommended. While the SIU was created as an entirely civilian unit, the 1989 Task Force had argued that the skills of the best criminal investigators available were necessary to provide the expertise required for proper investigation:

We said that the best criminal investigators available were serving police officers and that such officers should be selected for these investigations. We recommended that they should be teamed with civilian investigators to provide the balance and degree of independence required for public confidence.

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The Task Force continues to maintain that, at least until civilian investigators can be thoroughly trained, top grade seconded police officers must be permitted to be used by the Unit.

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<sup>19</sup> Ontario, *Report on the Race Relations and Policing Task Force* (Toronto: Queen's Printer, 1992) (Chair: Clare Lewis).

We encourage the Ministry of the Attorney General to conduct extensive community outreach in explanation and support for the need for the use of seconded police officers in the Unit.<sup>20</sup>

The Task Force also commented on the problem of SIU resources in light of its broad mandate which had been extended beyond police shootings to any serious injury or death resulting from police conduct:

If it is intended to act in matters which are far beyond the police shootings which the task force identified as critically in need of independent, skilled investigations, then it must be provided the resources to enable it to do so effectively. In a sense, we are urging that government keep in mind the genesis of the creation of the Unit. Its roots were in the need, identified particularly, but not exclusively, by racial minority communities, for independent criminal investigations of police shootings. Whatever the scope of jurisdiction of the Unit, it must have public credibility in its investigations of police shootings. If its jurisdiction remains wide, and its resources remain inadequate, that critical function will suffer and be the subject of severe public criticism.<sup>21</sup>

On December 19, 1995, the Commission on Systemic Racism in the Ontario Criminal Justice System, created in 1992 following the recommendation of Stephen Lewis, reported its findings.<sup>22</sup> A full chapter of the Commission's report deals with systemic responses to

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<sup>20</sup> *Ibid.* at 119-120.

<sup>21</sup> *Ibid.* at 121-122.

<sup>22</sup> Ontario, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer, 1995) (Co-Chairs: D.P. Cole & M. Gittens).

police shootings. In that chapter, the Commission found that the shooting of black Ontarians had come to symbolize the ultimate manifestation of daily discrimination and harassment that many black people experience, especially in their interactions with police. The Commission also found that the response of the criminal justice system to shootings, for communities of colour, lacked accountability. It concluded that the establishment of the SIU had not improved police accountability in the use of force. Three basic problems were found to have frustrated the SIU in carrying out independent and effective investigations. They were: (i) inadequate funding, (ii) a lack of cooperation from police services, and (iii) the refusal of individual officers to be interviewed.

The Commission made the following recommendations concerning the SIU:

- ▶ increased funding for the SIU to allow it to carry out its statutory function effectively;
- ▶ amendment of the *Police Services Act* to require that any officer involved with the jurisdiction of the SIU be required to turn any requested information and evidence over to it forthwith, and, in any event, no later than 24 hours after the request;
- ▶ amendment of the *Police Services Act* regulations to provide the Director of the SIU with authorization to charge any officer who fails to provide such information or evidence in a timely fashion with a misconduct offence under the Act;
- ▶ amendment of the *Police Services Act* to require that any officer who fails to answer questions from an SIU investigator be suspended without pay; and
- ▶ amendment of the *Police Services Act* regulations to provide that when the Director of the SIU informs a chief of police that an officer under the chief's command has failed to give a complete statement to an SIU investigator, the chief shall suspend the officer forthwith without pay.

None of these recommendations have been implemented.

Earlier, in 1994, the Ministry of the Attorney General sought to address ongoing problems by revising the procedures governing SIU investigations in the form of a draft protocol. To that end, a committee was established with representatives from the Ministry of the Attorney General, the Ministry of the Solicitor General, the Ontario Association of Chiefs of Police, the Ontario Police Association, the Office of the Chief Coroner, the Urban Alliance on Race Relations (which left the committee in protest before it concluded its work) and the SIU. A considerable amount of time was spent attempting to develop a consensus and, in the end, a complex document was issued. Consensus proved impossible on several key points including the definition of serious injury, the mandate in relation to deaths in custody, whether or not information uncovered by the SIU could be disclosed to police chiefs for disciplinary purposes and, significantly, the extent of the duty to cooperate.

The draft protocol adopted some of the SIU's existing procedures.<sup>23</sup> Proposed changes included: narrowing the applicable definition of serious injuries to be investigated and the incidents for which reporting to the Unit was mandatory; requiring the SIU to provide evidence to chiefs of police for disciplinary purposes; requiring witness officers to attend SIU interviews in a timely way - generally within 24 hours - unless too tired or traumatized; requiring chiefs of police to enforce the protocol through normal disciplinary mechanisms; and permitting the SIU to obtain legal advice from the Attorney General whenever a police officer and his counsel allege the SIU have improperly designated the officer as a witness who must cooperate. In the end, the draft protocol was never implemented.

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<sup>23</sup> See discussion of the SIU's Standard Operating Procedure, below.

In October of 1996, the Government asked Roderick McLeod, Q.C. to consider and advise on how the existing system of civilian oversight of police in the Province could be improved given the Government's intention to introduce changes to the *Police Services Act*. Mr. McLeod made recommendations in respect of the control of an SIU incident scene<sup>24</sup> and proposed a consultation process with affected parties regarding the duty to cooperate.<sup>25</sup>

## **The SIU Standard Operating Procedure**

When the SIU was created in 1990, the first director was a respected former Ontario jurist, the Honourable Mr. John Osler. At that time, a standard operating procedure for the Unit's investigations was created as a means of institutionalizing the manner of its investigations. The obvious aim was to provide administrative certainty to these investigations in a way that fairly balanced the interests of police officers with those of the public. Unfortunately,

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<sup>24</sup> *A Report and Recommendations on Amendments to the Police Services Act Respecting Civilian Oversight of Police* (21 November 1996) (R.M. McLeod) at 26-27:

The local police service must assist in the following ways:

- a) report incidents within the SIU mandate immediately to the SIU;
- b) preserve the scene of the incident and all evidence without taking steps to gather further evidence unless asked to do so by the SIU;
- c) segregate the witnesses involved, both civilian and police (not just from a "subject officer" but from each other), in order to ensure the integrity of their evidence;
- d) provide to the SIU all evidence in its possession immediately.

These and similar matters should be addressed in the Regulations and in the SIU protocol process.

<sup>25</sup> *Ibid.* at 31.

affected parties do not appear to have been consulted on the approach and, therefore, have never appreciated its essential features. The Standard Operating Procedure (SOP), as it is known, attempts to grapple with a number of critical issues which may arise in the course of an SIU investigation. In summary:

- ▶ It defines the extent of the mandate and the requirement for immediate reporting of incidents that might reasonably fall within it. All deaths that may have resulted directly from the action of one or more police officers, including those arising in the course of making an arrest, in the course of a pursuit, or while the deceased is in custody or at a hospital following apprehension or custody are included. It also attempts to define "serious injuries" as those which are "likely to interfere with the health or comfort of a victim and are more than merely transient or trifling in nature". It presumes such an injury where a victim is admitted to hospital, suffers from a fracture to a limb, rib, vertebrae or to the skull, suffers burns to a major portion of the body, loses any portion of the body, suffers a loss of vision or hearing, or alleges sexual assault.
- ▶ It anticipates the *Charter's* application by respecting the right to silence of "subject officers" - those officers whose conduct "appears to have caused" the death or serious injury being investigated and who may be charged with a criminal offence. The SOP prevents a chief of police from giving the SIU the subject officer's written duty reports without that officer's consent. Relevant statements and duty reports of other officers must be provided to the SIU by a police service on request - these other officers are known as "witness officers".
- ▶ It requires witness officers to make themselves available for interviews with SIU investigators at reasonable times, typically during a regularly scheduled shift. It recognizes an officer's right to counsel, but it stipulates that preference for a particular counsel may not be permitted to delay the interview unduly.

- ▶ Given the SIU's limited forensics capability, where the SIU is unable to provide its own forensic investigator, it will ask a non-involved police service, often the OPP, to perform evidence gathering tasks.
- ▶ It directs the involved service to protect and preserve the scene until otherwise advised by the SIU. Where potential public hazards or deteriorating weather conditions exist which require the removal of traffic obstructions or when evidence at the scene is perishable, the involved service should secure the evidence with photographs, measurements and/or video recordings.
- ▶ It regulates the Unit's interactions with the involved police service over the collection and accounting of evidence at the incident scene, and the interviewing of witnesses. This is needed where there are underlying crime scenes to be investigated by the involved police service or where the conduct of the involved officers is of independent concern to the chief of police. The police service and SIU are normally to give each other a complete account of evidence seized, evidence submitted for expert analysis and reports which result, unless the SIU believes this may jeopardize either investigation. The SIU gets priority in the collection and inspection of evidence and interviewing of all witnesses. However, on request of the chief of police, the SIU Director may give the involved service priority in certain cases, such as where the service is investigating the more serious incident or where delay in the SIU investigator's arrival could prejudice the police investigation. Where the police service and the SIU are each investigating different deaths in the same incident, the Director will set priorities in consultation with a chief of police, having consideration for the importance of a witness to their respective investigations.
- ▶ The SOP provides for regular status reports on investigations to the Attorney General and the Solicitor General, as well as to the concerned chief of police. It



limits media statements from the involved service to acknowledging that the Unit has become involved. Thereafter, press reports on investigations are issued by the Director provided they do not prejudice the Unit's investigations, the rights of any suspect or the viability of any future criminal charge.

## **Problems**

### **The SIU Perspective**

While not a formal party to this consultation, the Director and staff of the SIU were of assistance in providing information and outlining the organization's perspective on the technical problems encountered in carrying out its important mandate.

While the SOP was designed to give administrative certainty to SIU investigations, a variety of factors have stood in the way. To begin with, the SOP does not have the force of law. It is a policy developed by the SIU and is not a regulation or a legislative enactment. Accordingly, its effectiveness depends on the knowledge of its provisions by the members of a police service and their willingness to comply with its directions. When either condition is absent, the SIU faces direct challenges to its ability to carry out its mandate.

Lack of knowledge about the SIU and its procedures by police officers has on occasion led to the failure to notify the SIU of an incident and to the failure to preserve evidence.

The SOP lacks sufficient detail. It requires the "immediate" reporting of deaths and serious injuries where police officers are involved. However, it does not stipulate who has responsibility for making the report, whether it be involved officers at the scene, their immediate supervisor, the chief of police or his or her designate. As a result, the practice

of police services vary. Some require the incident to be reported by involved officers up the chain of command. When a senior officer at a communications centre, or in some cases the chief of police or his or her designate, such as a legal advisor, determines that the SIU jurisdiction is involved, the call is then made. Often at the same time, other parties are notified. They may include the coroner, other units of the police service and police association representatives. This process of referring the incident up the chain of command takes time and, according to the SIU, has led to delay in notification.

While there are cases where notification occurs in a reasonably prompt manner (e.g. within 30 minutes), this is frequently not the case. For example, the SIU reviewed 44 of the cases it dealt with in 1997 and early 1998 and found, on average, the time between the occurrence and notification of the Unit was almost six hours. Its review showed the notification times tend to be quicker in metropolitan areas such as Toronto (four hours) and Ottawa (84 minutes) and may be greater than the average in distant areas, particularly in the north.

In metropolitan areas, the SIU often finds when it arrives at a scene that police association representatives and lawyers are already there and may have removed involved officers to a police station or hospital. According to the SIU, the latter actions delay its ability to commence the investigation by not allowing investigators to speak to involved officers immediately. Lawyers for officers may also not permit their clients to speak to the SIU immediately, because they themselves are attempting to sort out what happened, or because their clients need time to calm down, are traumatized or in need of medical attention. If the interviews do not happen immediately, they can take days or even weeks to schedule. The SOP requires that the officers make themselves available at "reasonable" times, but provides no mechanism for enforcement of interview requests. Where differences of opinion arise between the SIU and the lawyers representing officers over what is reasonable, the SIU's practical choices are limited. They can schedule a meeting with consent of the officer and wait until the officer's counsel is available, or they can ask

a chief of police to order the officer to attend. In some cases, this order is quickly forthcoming, in others, it may not.

The SOP does not require the segregation of witnesses, nor does it direct the involved service to attempt to identify and keep civilian witnesses at the scene. While these are standard procedures in police investigations, they appear not to be as rigorously practiced by police in SIU investigations. The fact that the SOP is not a law and has no enforcement mechanism, other than by an order from a chief of police of the involved police service, gives the SIU little control or authority over its investigation. While police services may have their own enforceable standing orders concerning SIU investigations, they vary in content from force to force.

A large and overarching problem continues to be inadequate resources. This factor impedes the SIU at every step, including the speed with which it can arrive at incident scenes, its ability to exert control over the scene and its ability to collect evidence without police assistance. This problem undermines the perceived professionalism of the SIU in the eyes of the police who are facing, in many cases, a criminal investigation which could result in officers being charged with the most serious offences in the *Criminal Code*. Regardless of the amount of time it takes to notify the SIU of an incident, it is rarely able to arrive at the scene with the speed and in the numbers that one would expect from a police service. The SIU surveyed 26 cases in 1997 and early 1998 and found that its average response time following notification was 5.3 hours. It was 93 minutes in Toronto, 6.1 hours in Ottawa-Carleton and 7.4 hours elsewhere.

The Unit explains that there are a number of reasons for this. To begin with, it is a relatively small body with jurisdiction over a very large province. While the Unit has 37 full and part-time staff members overall, this includes both investigative and administrative staff. There are presently three full-time investigators, the Director, a head of investigative services and two investigative supervisors. There are 18 part-time investigators,

essentially individuals disbursed throughout the Province who are on call. There is also one full-time forensic investigator, and three part-time forensic investigators. Apparently, all but three investigators of those presently on staff are former police officers.

The limited size of the Unit, the range of its geographic jurisdiction, and the fact that investigative teams may be required to conduct several investigations at the same time all impede the SIU's ability to respond immediately. Investigators may have to travel from distant municipalities to the scene. And SIU vehicles apparently do not have "emergency vehicle" designation under the *Highway Traffic Act* which would enable them to respond as quickly as a police vehicle, ambulance or fire truck.

While a larger police service may send 10 to 15 or even more investigators to a scene,<sup>26</sup> the SIU sends one, two or more recently, three. This kind of response does not inspire confidence in police officers and also results in the SIU not conducting its own investigation. Effectively, it relies on the involved police service to conduct the investigation of secondary and tertiary witnesses and it may also rely on the Ontario Provincial Police for forensic identification assistance. For a number of years, the SIU did not have a forensic investigation capability. More recently, it has been able to develop a small forensic unit. However, its one full-time investigator is formerly of the Metropolitan Toronto Police Service and, accordingly, is unable to work on the high profile cases which occur in Toronto. On-call, part-time investigators must be brought in if available or, otherwise, the OPP is called upon.

There may be a concern that this reliance on active police officers is not in accordance with at least the spirit of s. 113 that investigators not be serving police officers. The SIU's

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Small police services may rely on the OPP to assist with major investigations, such as homicides, and it can dedicate similar resources.

workload can also be very demanding. The Unit dealt with 150 occurrences in 1997 of which three resulted in criminal charges. There was a high of 232 investigations in 1994.

An emerging concern in the Ministry of the Attorney General parallels the issue of the adequacy of SIU resources. The Special Prosecutions Unit has been staffed traditionally by some of the best and brightest Crown counsel in the Province. In recent years, however, it would appear to have experienced a significant decline in resources and status. Apparently, its head no longer has director rank within the Ministry's Criminal Law division and the decline in person years of full-time, SIU-dedicated prosecutorial experience has plummeted from in excess of 69 years to nine.

### **Coroner's Inquest Recommendations**

Jury recommendations from several coroner's inquests have dealt with incidents that involved the SIU. Timely notification, control of the incident scene and officer cooperation with the SIU investigations were problems targeted by many of the recommendations. Other proposals have been directed at the quality of the SIU investigations, the extent of SIU resources and the release of information by the SIU. The following is a list of some of the recommendations from those coroner's juries:

#### **Notification**

- ▶ The SIU should [REDACTED] discharge of a firearm by a police officer and internal police procedures should be revised to avoid unnecessary delay.<sup>27</sup>

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<sup>27</sup> Verdict of Coroner's Jury on the Shooting Death of Raymond Constantine Lawrence (5 November 1993) [hereafter Lawrence Inquest].

## Control of Scene

- ▶ The existing Standard Operating Procedure should be replaced by a regulation under the *Police Services Act* governing the interaction between the SIU and involved police services in cases where the SIU's mandate has been or may be invoked; and the regulation should govern the actions of all members of the involved force immediately following the incident pending the SIU's arrival.<sup>28</sup>
- ▶ Subject officers should be segregated and supervised pending arrival of the SIU in the same manner as any homicide investigation in which police officers are not involved.<sup>29</sup>
- ▶ Normal procedures for crossing police barriers at incident scenes should be followed; for example, lawyers should not be allowed onto the site before the SIU investigators arrive.<sup>30</sup>

## Cooperation

- ▶ Amend the *Police Services Act* to clearly establish the duty of police officers to cooperate with the SIU.<sup>31</sup>

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<sup>28</sup> *Ibid.*

<sup>29</sup> Verdict of Coroner's Jury on the Shooting Death of Lester Donaldson (7 July 1994) [hereafter Donaldson Inquest].

<sup>30</sup> Lawrence Inquest, *supra*, note 27.

<sup>31</sup> Verdict of Coroner's Jury on the Shooting Death of Ian Clifford Coley (18 August 18 1995) [hereafter Coley Inquest].

- ▶ An internal protocol should be developed that includes full cooperation with any investigation team.<sup>32</sup>

### **Other Recommendations**

- ▶ Ensure that the SIU has sufficient resources, staffing and training to carry out its mandate of conducting a thorough and independent investigations.<sup>33</sup>
- ▶ The SIU should have a contact person with each police service to enable the SIU to ask for assistance when required.<sup>34</sup>
- ▶ The involved police service should refrain from releasing information to the media other than the fact that the incident has occurred and the SIU is investigating.<sup>35</sup>
- ▶ Information from an SIU investigation related to death and safety should be made available to the Ministry of Labour and the workplace Joint Health and Safety Committee.<sup>36</sup>
- ▶ Parallel investigations into Health and Safety issues should be allowed as long as they do not infringe on any criminal investigation by the SIU.<sup>37</sup>

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<sup>32</sup> Donaldson Inquest, *supra*, note 29.

<sup>33</sup> Coley Inquest, *supra*, note 31.

<sup>34</sup> Lawrence Inquest, *supra*, note 27.

<sup>35</sup> *Ibid.*

<sup>36</sup> Verdict of Coroner's Jury on the Shooting Death of Jeffrey J. Paolozzi (15 June 1994).

<sup>37</sup> *Ibid.*

- ▶ Develop an interim plan to enable the SIU to conduct investigations pending the completion of the steps necessary to achieve the goal of thorough and independent investigations, by enabling the SIU to second on short notice experienced homicide, forensic identification and other investigators from other police services to assist; civilian investigators should work in partnership with seconded police officers; and no seconded police officer and no other Unit investigator should be permitted to participate in an investigation that relates to members of a police service of which he or she is or was a member.<sup>38</sup>

## Media Reports

In 1997, media scrutiny of SIU investigations in Toronto intensified. Eight civilians in Ontario died as a result of the discharge of police firearms that year. Five of those civilians died in or around the Toronto area. One death occurred in Ottawa, one occurred in Dryden and another in Moosonee. However, nowhere was the level of media scrutiny so great as in Toronto. This level of media attention reflects the public interest in SIU investigations. Apart from the police use of force which underlies the investigations, the progress of the investigations themselves have been closely monitored by the media.

Media reports on the delay in notification and the control of the incident scene have suggested a lack of vigilance on the part of the police. For example, in one incident, the Toronto Star reported that the SIU was not notified of the incident for over an hour.<sup>39</sup> By the time the SIU arrived, almost three hours later, the civilian witnesses had been

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<sup>38</sup> Lawrence Inquest, *supra*, note 27.

<sup>39</sup> R. DiManno, "Boothby's Directive on Shooting Clear, So Why the Delays?" *The [Toronto] Star* (21 April 1997) A7.



released.<sup>40</sup> In one shooting, it was reported that the police officers involved in the incident met twice before they were interviewed by the SIU.<sup>41</sup> This led to reported concerns about the appearance of collusion.<sup>42</sup> Another reported concern was that when witness officers are represented by the same lawyer, the purpose of having them segregated is frustrated.<sup>43</sup>

But the central problem reported by the media was the apparent routine failure of police officers to cooperate with SIU investigators as required.<sup>44</sup> This lack of cooperation was seen to be driven by events in Toronto.<sup>45</sup> Much frustration was also reported in the media over the response of the Metropolitan Toronto Police Services Board and the Chief of Police to failures by police officers to cooperate.<sup>46</sup> In one reported incident, the Director

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<sup>40</sup> *Ibid.*

<sup>41</sup> P. Mascoll, "Police at Fatal Shooting Scene Hold Two Meetings, Sources Say" *The [Toronto] Star* (2 April 1997) A7.

<sup>42</sup> *Ibid.*, and D. Brazao, "Chief's New Rules Make Police Talk" *The [Toronto] Star* (12 April 1997) A1.

<sup>43</sup> C. Blatchford, "Fighting Boothby's Board Bafflegab" *The [Toronto] Sun* (19 September 1997) 5.

<sup>44</sup> G. Swainson, "Make Police Aid SIU: Council" *The [Toronto] Star* (22 May 1997) A3. See also J. Wilkes "SIU Awaits Interview with Police Witnesses to Shooting" *The [Toronto] Star* (26 February 1997) A6 and J. Kingstone, "Chinese in T.O. to Grill Cops in Death" *The [Toronto] Sun* (26 February 1997) 18 which both reported that in the shooting of Edmund Yu on February 21, 1997, three witness officers failed to answer interview requests by the SIU. As well see Brazao, *supra*, note 42, where it is reported that it was ten days before all witness officers present in a particular shooting on March 30, 1997 made themselves available to SIU investigators.

<sup>45</sup> R. DiManno, "Metro Police Group May Force Harnick to Use Tougher Law" *The [Toronto] Star* (1 August 1997) A7.

<sup>46</sup> P. Mascoll, "Deadline Set for Boothby to Get Tough with Officers" *The [Toronto] Star* (11 June 1997) A27.

of the SIU asked the Chief of Police to order an officer whose status was changed from subject officer to witness officer to cooperate with the SIU. This officer had met with the SIU earlier, but apparently only read a statement saying that he had nothing to say. In response to the request for assistance from the SIU, the Chief of Police was reported to be seeking advice from the Attorney General on the legal standing of subject and witness officers before deciding on how to respond. Eventually, the order to cooperate was issued by the Chief, though the involved officer disobeyed that order and is now subject to disciplinary proceedings.

There have been media reports that a police officer's status as a witness or subject officer may change during an investigation. This possibility has apparently prompted the Metro Toronto Police Association to advise all officers to remain silent until assured in writing that they are not suspects in any investigation being conducted by the SIU.<sup>47</sup> The media has also been critical of the SIU's inability to obtain statements from subject officers, despite the fact that under the Standard Operating Procedure there is no obligation for subject officers to make any statement.<sup>48</sup> For example, in the shooting of Xie Pei Yang, the only witnesses were two subject officers. They refused to speak to the SIU and the headline in the Toronto Star was "SIU Probe Stymied as Police Won't Talk".<sup>49</sup>

There have also been several solutions proposed in the media. One suggestion was that as a condition of their employment, all police officers should be required to cooperate

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<sup>47</sup> R. DiManno, "What's Next for Cops - Crime Stoppers Calls?" *The [Toronto] Star* (8 April 1997) A6. See also J. Harder, "Police Forced to Talk to SIU" *The [Toronto] Sun* (17 May 1997) 3.

<sup>48</sup> P. Mascoll, "Constable Cleared in Shooting of Man on Bus" *The [Toronto] Star* (18 April 1997) A1.

<sup>49</sup> P. Mascoll, "SIU Probe Stymied as Police Won't Talk" *The [Toronto] Star* (24 April 1997) A6.

promptly and fully with SIU investigations within a day or two after the incident.<sup>50</sup> In return for this cooperation, anything said during these interviews would not be later used in court against the officer.<sup>51</sup> Another proposal was that the SIU's report to the Attorney General be made available to the public.<sup>52</sup>

## Concerns Raised

What follows is the "voicing" of concerns expressed by community and police representatives during the consultation meetings. Though the strength of convictions by community leaders was sometimes shocking, the comments are important to record in order to demonstrate the seriousness of the issues and how a failure to address them has produced extreme distrust. A similar strident tone will be seen in the record of concerns of police officer representatives. However, it is encouraging that despite such strongly stated views at the outset of this process, both sides were able to engage in the impressive degree of consensus-building which is described in the recommendations.

### The Community Perspective

Community members saw no justification for the delay in notification of the SIU. They feared that current problems were symptomatic of an underlying desire to create time to

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<sup>50</sup> Editorial, "Bad Apples" *The [Toronto] Sun* (10 March 1997) 10; Editorial, "Police Sending the Wrong Message" *The [Toronto] Star* (8 April 1997) A18; Editorial, "Order All Officers to Talk to SIU" *The [Toronto] Star* (16 April 1997) A22.

<sup>51</sup> L. Goldstein, "How to Ease Police Paranoia?" *The [Toronto] Sun* (6 May 1997) 12; Editorial, "Police Accountability" *The [Toronto] Star* (11 June 1997) A22.

<sup>52</sup> See C. Ruby, "Many Questions Linger in Yu Investigation" *The [Toronto] Star* (5 May 1997) A21.

prepare for the coming investigation. Concern was expressed that delay compromises evidence and allows involved officers to get together to "get their stories straight." Aboriginal communities, both urban and rural, could not understand why notification is essentially a self-reporting function by police, which puts the police in the position of determining if the SIU should be notified. While the SIU has a "1-800" telephone number, it is not widely known, nor is a public intake function something the SIU has developed. Community representatives objected to the current system which does not obligate police officers to immediately notify the SIU and let the SIU make the decision whether its mandate is invoked. In this respect, there was repeated mention of the fact that police association representatives and lawyers are notified and arrive at a scene well before the SIU.

The community representatives expressed similar concerns with respect to the control of the incident scene. Unauthorized acts and failures to protect a scene suggested to them carelessness or perhaps even an intention to degrade the evidence at the scene prior to the arrival of the SIU. They pointed to the fact that civilian witnesses are routinely identified, interviewed at the scene and then released by the involved police services before the SIU's arrival. They were dismayed to see senior officers, including police chiefs, attending at the scene and, within moments of their arrival, making media statements intended to favour the involved officers prior to the commencement of an SIU investigation. They also resented the absence of any public expression of concern by these same officials for the families of killed civilians. They further alleged leaks of confidential information from police services.

Community groups indicated that when police officers claim a constitutional right to silence, whether in any legal jeopardy or not, they undermine public confidence in them and in the SIU. Public scepticism, it was stated, is magnified when trained police officers complain of emotional trauma as a further ground for not explaining what happened. More significantly, they saw these failures of immediate cooperation as symptomatic of a refusal

by police to accept effective civilian oversight. Many community representatives felt these continuing problems inhibited scrutiny and control of excess use of force, and reflected the individual and systemic racism that, in their view, underlies the use of force on persons of colour and Aboriginal peoples in Ontario. Many of these same representatives took the position that if officers do not speak right away, it does not matter when they later do, be it 24 or 48 hours after the event. The damage to public confidence is already done.

Time and again community representatives sought to draw attention to the different way civilian witnesses and police officers seem to be treated. Customarily, it was contended, civilians are identified, segregated and interviewed quickly by the police in their own investigations, even if those civilians are injured or upset. This investigative approach is understandably based on the fact that immediate recollection is the most accurate. However, when SIU investigations are involved, communities say it is quite common for officers, including witness officers, to refuse immediate interviews and completion of their notebooks on the grounds that they are upset or suffering from post-traumatic stress disorder. Communities worried that these positions were taken without credible medical intervention, but on the advice of a police association representative or a lawyer.<sup>53</sup>

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<sup>53</sup> In May of 1997, the Metro Toronto Police Association appears to have issued the following notice to its member police officers:

**ATTENTION ALL MEMBERS  
SPECIAL INVESTIGATIONS UNIT**

Regardless of the Chief's recent Routine Orders and comments made by SIU Director Andre Marin in the Toronto Star, officers involved in SIU incidents DO have legal rights which ARE guaranteed by law.

Our Association role is to protect your legal rights by providing you with legal counsel.

Your role as an involved officer is to await your counsel's advice  
**BEFORE YOU SAY OR WRITE ANYTHING.**

Until you speak to counsel, consider yourself to be an "involved officer" which provides you with ALL the fundamental rights guaranteed by the Canadian Charter of Rights and Freedoms.

**SAY NOTHING - WRITE NOTHING**

Even where chiefs of police have issued orders to officers to complete their notebooks and attend SIU interviews, community groups believe chiefs of police delayed in doing so and took no follow-up action to review the actions of the officers. In respect of one shooting of a bank robbery suspect, it was alleged that the chief of police did not discipline officers who delayed in attending SIU interviews, despite the fact that civilian witnesses, even injured civilians, were interviewed by the police moments after the shooting. In that same case and in others, it was alleged that involved officers were not segregated by their supervisors, had met together before being interviewed by the SIU, and failed to complete detailed notes of their actions and observations - all without disciplinary action being taken.

Community representatives expressed alarm at the failure of some officers to complete their notes immediately or, in other cases, completing very brief or uninformative notes, despite the fact that, for most police services, officers are expected to make a detailed written accounting of their activities and observations. When they later prepare more detailed reports, the potential for collusion in their accounts exists - a concern that the SIU must then investigate. Note-taking problems are not isolated to SIU investigations. Reference was made to the *Report of the Commission on Proceedings Involving Guy Paul Morin*,<sup>54</sup> where the Honourable Fred Kaufman also highlighted the issue of police note-taking and recommended that the Ministry of the Solicitor General take immediate steps to implement a province-wide policy for police note-taking and note-keeping. He noted "at the least, such policies should reinforce the need for a complete and accurate record of interviews conducted by police, their observations, and their activities."

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Your counsel will advise you as to what steps should be taken.

**CALL US FIRST**

<sup>54</sup> (Toronto: Queen's Printer, 1998) (Commissioner: F. Kaufman) [hereafter Kaufman Inquiry].

Some community representatives expressed the view that even where officers are segregated, the practice of one police association lawyer representing multiple officers makes this meaningless. They contended that lawyers have a professional obligation to disclose to each of their clients what the others have told them, otherwise they would be in a conflict of interest. In that way, officers learn the recollections of their colleagues and can conceivably alter their recollections.

Many of the community groups either misunderstood or refused to accept the existing distinction in the SIU Standard Operating Procedure between a witness officer, who must speak, and a subject officer who is not so obligated. They pointed out that s. 113(9) of the *Police Services Act* makes no such distinction and that police occupy an extraordinary position in society - particularly one which has repealed the death penalty. Thus, the belief was expressed that in exchange for holding the office of a police officer, all officers have a legal obligation to cooperate fully with the SIU, including filling out their notebooks and answering all questions in interviews even if that may result in a criminal charge being laid against them. Community leaders also feared that the right of subject officers not to speak set the example for witness officers who obviously do not want to criticize or implicate a fellow officer.

Concern was also expressed about disputes over the form of SIU interviews when they do take place. While the SIU normally conducts free-flowing oral interviews, in some cases, officers refuse to cooperate unless they receive written questions from the SIU and are permitted to respond in writing after due reflection. In other cases, officers refuse to be audio taped or videotaped during the course of their interviews. Again mention was made of the Kaufman Inquiry which strongly recommended the video or audio taping of interviews with suspects and significant witnesses.

Ultimately, the community groups expressed the concern that the resistance of police officers and their advisors to immediate cooperation was an example of police self interest

overriding the public interest. Even more troubling was the fact that some representatives actually characterized the conduct in question as a potential obstruction of justice.

Complaints were made that police services boards do little to require chiefs of police to set and enforce clear standards of cooperation. For example, it was alleged that for years the Metropolitan Toronto Police Services Board debated this issue at its meetings and made repeated requests of the various chiefs to act, but to little effect. Apparently, an issue existed over the right of a board to demand this of a chief of police. It was not until 1997 and the public controversies over shooting deaths that year that a proposed standing order proved acceptable to the Board and which detailed the requirements of officers to cooperate. In the end, the version approved paralleled the SIU's Standard Operating Procedure in some respects, but significantly not in others.

Community representatives suggested that the lack of obvious sanctions for failures to cooperate with the SIU, including failures to comply with its SOP, is something which only encourages the public spectacle of non-cooperation. The most effective sanction, in the view of many, would be an amendment of the *Police Services Act* to permit immediate suspension without pay of police officers who refuse to cooperate.

Some community representatives also argued that the small number of charges which have been laid by the SIU is evidence that this oversight mechanism is not effective. Other representatives saw the criminal law as too blunt an instrument for getting at the true causes of these incidents. Many participants suggested the focus of civilian oversight should be on the employment obligations of the involved officers. These representatives argued that all involved officers should be required to speak to the SIU on the understanding that their statements could be used against them, but only in an administrative context. Therefore, they proposed that such statements and any evidence derived from those statements should not be able to be used against the officer in any criminal prosecution. However, they also acknowledged that requiring all officers to speak



to the SIU for administrative purposes only would entirely alter the SIU's existing exclusive criminal focus.

Another concern expressed was the inability of the SIU Director to issue a public report, an arguably incongruous feature in a public oversight mechanism. Where charges are not laid, the SIU currently provides oral briefings to the persons injured and to the families of those killed. A brief press release may be issued and a press conference may also take place. The Director's detailed written report is sent only to the Attorney General. Affected individuals may only get access to the report through the civil discovery process if a lawsuit is commenced. One counsel advised that after receiving the report, but after the expenditure of several years and tens of thousands of dollars in legal fees to do so, his clients discontinued their action because the report satisfied them that the police officers had not acted wrongfully. The hope was expressed by this lawyer that the cost and stress of legal proceedings might be averted if a detailed public account was given as soon as possible.

Aboriginal leaders stated that this failure to issue a written public report was part of a broader problem of the SIU not responding to the unique needs of their communities. In respect of an Aboriginal reserve in Northern Ontario, it was reported that the SIU arrived at an incident scene in a plane with OPP officers, the subject police service. It then conducted an investigation interviewing family members about the specific incident, but refused to discuss with them and the community the history of the deceased's interactions with police in the immediately preceding months. When the SIU later gave a verbal report of its findings to the family, it declined to brief the other members of the reserve. Aboriginal leaders say this failure of the SIU to treat the incident as one involving the community, not just individuals, shows a lack of respect for and understanding of Aboriginal culture. Moreover, the absence of a public report in this case contributed to a decline in the relations between the community and the police service. Rumour and gossip have continued to undermine community confidence. At the time of the incident, it was reported

within the community that the police tactical unit had arrived and ominously lowered a flag on the police station to half mast prior to the shooting. In a much later written response, the police service explained that the flag was lowered and then raised again with an antenna attached to it to improve the transmission between radios carried by the members of the tactical unit. This late explanation by the involved police service has not overcome the rumours and the matter continues to be an issue in the community.

On a similar note, community representatives expressed the need for SIU investigators to be more attuned to, and reflective of, Ontario's cultural and racial diversity. Aboriginal representatives pointed to a number of northern community college and university sites where cross-cultural training and on-reserve experience to reinforce that learning were available. Aboriginal leaders also made the fundamental point that, while willing to speak to me, they expected to meet directly with government officials on a "nation to nation" basis to continue the dialogue and devise appropriate reforms. Too often, they said, a task force passes through their communities in what can only be described as a token consultation. My arrival and departure were no different. This report, therefore, can only be seen as the first step in a process that may lead to meaningful change for these communities.

Another issue raised was SIU resources. All of the community participants expressed a concern that the SIU continues to be under-resourced and thereby hampered in its ability to arrive at a scene in a timely way and to quickly and effectively investigate the matter. The community groups also pointed to the decline in resources for the Special Prosecutions Unit. Lawyers active in this area were so concerned about the latter situation that they called for the use of independent counsel from outside the Ministry of the Attorney General to counter this trend.

Finally, all community representatives complained of an absence of ongoing dialogue with the SIU.

## **The Concerns of Police**

The concerns of police officers with the current framework were said to derive from three sources - confusion over jurisdiction, inadequate resourcing preventing the SIU from quickly and competently investigating incidents, and a belief that politics and public relations pervade SIU investigations.

On the question of notification, police did not dispute that rapid notification of the SIU is essential. However, they noted that swift notification is often complicated by a number of factors. The SIU's legal jurisdiction or mandate is not always clear. For example, the definition of serious injury is not precise and this may result in delays while the nature of any injury is determined and a legal assessment made to determine if the SIU's mandate is invoked. Incident scenes are said to be chaotic, particularly in shooting cases, and officers may be distracted by and even distressed over the events at hand. An officer's focus may be on providing medical attention to injured citizens, suspects and other officers, comforting shaken colleagues and continuing the pursuit of a suspect or a criminal investigation rather than shutting the scene down immediately for the SIU. For many police services, existing procedures require officers at the scene to notify a communications centre where supervisors there take responsibility for notifying all those who may have legal obligations to attend to the incident - i.e. the SIU, the coroner, the chief of police, police legal advisors, and police association representatives.

With respect to the control of the incident scene, officers noted that they are trained to seal-off and preserve evidence and adamantly objected to the suggestion that they would deliberately compromise a scene simply because the SIU is investigating. They submitted that it was in the interests of the involved officers that scenes be preserved. But some officers acknowledged that, as in any police investigation, contamination of a scene sometimes inadvertently happens. In most instances, however, it was believed that scenes

were well preserved and forensic investigators for the SIU received ample cooperation from their police service colleagues. Inevitable chaos at the scene and ongoing police duties can also affect the ability to segregate involved officers from each other. In some cases, it may be impossible to keep officers apart immediately or prevent other officers from approaching them to express their concern or support. Indeed, if there are many involved officers at the scene, finding sufficient transport to take them individually to a station may be impossible. The station to where they are taken may also quickly be overcome by the crisis. Many stations are small and ill equipped to provide a separate room for each involved officer. Indeed, the Metropolitan Toronto Police Service is considering the creation of a central facility to provide the necessary conditions for investigations of this dimension.

Incidents of officers meeting together prior to completing their notes or speaking to the SIU were characterized by some as examples of standard police procedure. Surveillance units, for example, apparently have a practice of officers getting together after a serious incident to review communication tapes and to centrally distribute this information in the interests of accuracy.

Police in northern communities stated that it is important to recognize the challenges that come with preserving a scene in a remote location. When the SIU is hours or, in some cases, a day or more away, the involved police officers may be the only officers in the area. In such instances, it may not be practical to freeze the scene until the SIU arrives. In these situations, it may also be impractical to segregate involved officers with immediate policing responsibilities at the scene. Accordingly, it was urged that solutions must not be "made in Toronto".

The police too were very concerned over the delays in the SIU arriving on the scene and with only one or two investigators. It was pointed out that a metropolitan homicide squad would instantaneously deploy as many as 15 or more investigators in similar

circumstances. Related delays cause problems in preserving the scene, particularly during inclement weather. In such circumstances, the involved force must collect and record the evidence, particularly when the scene is part of an underlying criminal investigation being conducted by the police. Police representatives reported that delays and a shortage of SIU investigators have also compromised the SIU's ability to quickly identify and deal with civilian and other secondary witnesses. The delays associated with two or three SIU investigators, doing what ten or more homicide investigators would normally do, aggravate civilian witnesses who object to waiting for hours at the scene to speak to the SIU. These delays also impede the timely interviewing of involved police officers who are available and waiting to speak to the SIU, either at the scene, a hospital or a police station. It was emphasized that following an incident, they may have been at work fifteen or twenty hours. They, too, are under stress. In this context, waiting for hours in a room for an SIU investigator can be unbearable and fuels antagonism. Representatives said that, in many circumstances, it is simply unreasonable to prevent involved officers from going home to their families until interviewed. It was stressed that these incidents are not identical to crime scenes. Because police officers are professionals and authorized to defend the community and themselves, there is no reason to presume they have committed a crime and to treat them as typical suspects.

Police believed that, with rare exceptions, SIU investigators do not have the training and experience of top homicide investigators undertaking complex crime scene investigations. Because of this belief, the competence of the SIU to do a proper and fair investigation is suspect from the outset, something which further strains relations between SIU investigators and police officers. Police made several allegations to support this concern: an SIU investigator picked up spent shell casings at a shooting scene before they were marked and photographed, and then, after being told about the error by police, placed them back at their approximate location, though the evidence had already been compromised; an SIU investigator arrived at a scene without a pad of paper with which to take notes; and an SIU investigator was unable to track down a prostitute witness to an

alleged sexual assault. Police also complained that many of the retired police officers who have been hired by the SIU do not have sufficient "recent experience" investigating serious crimes. Police had no familiarity with the SIU's ongoing training and peer review procedures. Accordingly, they did not take comfort from the fact most investigators have a police background.

In general, police acknowledged that incident scenes should be controlled in the same manner as any other serious crime scene.

Like community groups, police officers focussed on the requirement to cooperate with the SIU. Police noted that the Constitution provides for a division of legislative powers between the federal government and a provincial government in respect of law enforcement. Section 91(27) of the *Constitution Act, 1867*<sup>55</sup> gives the federal government exclusive jurisdiction over criminal procedure. In contrast, s. 92(14) gives provincial governments exclusive jurisdiction over "the administration of justice". Some police legal advisors argued that various Supreme Court of Canada decisions support the conclusion that the SIU is in effect a provincial criminal inquiry and is, therefore, a process which does not fall within the jurisdiction of a province to establish. In effect, it was contended that s. 113 had been a nullity from the moment of its purported enactment.

Given more emphasis, however, was the *Charter* which the courts have construed to include what is popularly known as the "right to silence" or the right of an individual to not incriminate him or herself. It was noted that no civilian suspect or witness is required to speak to the police or to be segregated. Accordingly, police asserted that subject officers or those who, on advice of counsel, believe themselves to be at risk of constituting subject officers simply cannot be compelled to speak to the SIU. It was argued that there is no justification for requiring witness officers to speak forthwith or to be segregated. These

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<sup>55</sup> (U.K.), 30 & 31 Vict., c. 3.

officers, like civilians, may also be upset, but are now the subject of a criminal investigation. Incomplete recollections of details will be used against them to suggest lying. Thus, time to compose one's thoughts is essential to reaching the truth.

In the case of police officers designated as witnesses, police noted that only the officer and his or her legal advisor will know whether or not the officer has done anything which could potentially attract a criminal charge. Where an officer is aware of such a circumstance, any obligation to speak was disputed, regardless of how the SIU has designated the officer. Examples were given where witness officers, after speaking to the SIU and providing notebooks, were later reclassified as subject officers. Accordingly, a police officer takes no comfort from an SIU designation as a witness officer.

Some lawyers said that they must be cautious in advising any designated witness officer, because even if the officer did not directly cause the death or serious injury, he or she may have had an involvement which might conceivably be the subject of a criminal allegation. Examples included an officer who directs another to shoot a suspect or an officer who is a passenger in a police vehicle and fails to advise the driver to break off a pursuit prior to an accident. Accordingly, these lawyers insist that before a police officer can be required to attend an interview, the SIU must provide assurance that it has no reasonable suspicion that the officer has committed a criminal offence. It was also alleged that at one time the SIU provided these assurances, but no longer.

The police pointed out that the SIU Standard Operating Procedure is not part of the statute or a regulation and is entirely lacking in detail. The absence of a regulation outlining the manner in which officers are expected to cooperate causes confusion, particularly because police officers are by training and background inclined to do things "by the book". In this setting, it was said to be inevitable that officers would challenge the existence of powers and procedures not clearly spelled out in law.

Police officers also objected to a biased statutory mandate of the SIU to investigate possible criminal conduct by police officers. This, they said, created an unfair criminal focus. In contrast, a police investigation is a neutral fact-finding exercise leading to a criminal charge only if reasonable grounds were found to exist. However, even if the reference to “criminal offences” was removed from s. 113, for police officers, the essence of an SIU investigation would remain criminal as long as a criminal prosecution was possible.

There was also the worry that SIU investigations can easily turn into politically motivated “witch-hunts” against the involved officers. In this respect, officers strongly objected to the increased use of the media by the SIU in recent years. They said it had only served to heighten their concern that SIU inquiries were more about politics or public relations than fair reviews of their conduct. Police representatives were also concerned that politicians and community leaders publicly criticize the SIU for the paucity of charges laid. An unfortunate side effect of this type of pressure on the SIU was to increase the fear and associated stress experienced by officers and their families that charges will be laid to justify its existence.

Police association representatives were unsympathetic to concerns that they and their lawyers respond quickly to such incidents. Police unions have a legal obligation to represent members and provide them with legal advice. They noted that the incidents, as well as the investigations, are often traumatic for police officers and their families and that officers have a right to legal representation and trade union advice. Lawyers said that it was not uncommon for experienced officers to be so shaken by their involvement in these situations that they forget basic details about what occurred and even how to get home. In order to ensure an assemblage of accurate details, some officers may need to be given time to calm down and reflect before preparing their notes and being interviewed. They may also be injured or so distracted or disturbed that they require medical attention. In such cases, they should not speak to the SIU until medically ready to do so. As to the



suggestion that civilian witnesses do not get the same treatment, the police countered that they are in no position to stop civilians from taking time to reflect. Indeed, where citizens are too distraught to speak to the police or are medically incapacitated, investigators usually await recovery because it is in the interest of a proper investigation that they do so. For the same reasons, they asked that, where needed, officers should be given up to 48 hours to speak to the SIU. Where interviews have not been immediate, police lawyers claimed it was usually with the consent of the SIU.

Some police association representatives and counsel suggested that the pressure for officers to speak and make notes immediately, even if unfit to do so, was evidence of political motivation. In normal investigatory work, statements from a suspect are not the central focus of the investigation. Investigations are all about understanding the forensic evidence and surrounding circumstances. This suggested to police that the real purpose of wanting police to speak quickly was either largely symbolic or a partisan attempt to obtain confused statements from the officers which could later be used against them or to impeach their testimony on cross-examination.

Some representatives insisted that interviews should be conducted in the form of written questions and answers in order to give the officers the opportunity to reflect and provide complete answers. The SIU has sometimes agreed to this format. In other cases, however, with no notice, it changed its position and demanded either oral audio taped or videotaped interviews. These incidents, have further heightened suspicion about SIU motives.

Officers stressed that statements given to the SIU may have a bearing on and be used in the multiple proceedings which may follow - coroner's inquests, lawsuits by victims and families and disciplinary proceedings. This vulnerability, they said, creates an understandable hesitation to immediately speak to an inadequately resourced criminal probe.

All police officers, including senior officers, feared the SIU's second-guessing of split-second decisions made by officers in life or death situations. They emphasized that this concern highlighted the need to have experienced and properly trained SIU investigators and underlined the advantage of seconding experienced police investigators.

Police officers were also distressed over the absence of ongoing dialogue with the SIU.

### **The Chiefs of Police**

Chiefs of police and their representatives often expressed views similar to those of police officer representatives on the matters at issue. They shared concerns over the SIU's lack of competence and resources, its alleged misuse of the media, as well as the need to respect officers' legal rights and their health and safety concerns. Yet, they added the unique perspective that comes from their many responsibilities to the public, to the SIU, to their board and to their police officers.

In their view, the paucity of legal direction from the statute, the ambiguity of the SOP and the fact that the latter is not a law, has created a legal vacuum and exacerbated the situation. While acknowledging that police management have not always responded effectively to the problems which have arisen, they laid a great deal of the blame at the feet of policy makers who have done nothing in the face of repeated calls for legal reform and increased resources.

As police officers, they are required to observe the legal rights of civilians during the course of investigations. They, therefore, could not accept assertions that they should ignore these legal rights when police officers were the subjects of a criminal investigation. They questioned the validity of interpretations of s. 113 by community representatives requiring officers who are under suspicion of criminal conduct to relinquish their *Charter* right to

silence. They also questioned the usefulness of compelled statements, echoing the belief of the police officer representatives that criminal investigations should not depend on obtaining a statement from a suspect.

However, with respect to witness officers, they acknowledged the need for prompt completion of notebooks in accordance with department policies and prompt attendance at SIU interviews, subject to any *bona fide* health concerns. Chiefs of police submitted that when asked to assist the SIU by issuing orders to officers, they invariably did so. They were unaware of complaints by the SIU to the contrary.

But they emphasized that police associations are sophisticated and well-funded organizations which insist on giving their members prompt legal advice. In this context, police officers are increasingly prepared to defy directions which they, with legal advice, view as ambiguous and open to legal challenge. This not only extended to SIU investigations, but to administrative reviews conducted by chiefs of police as well. However, they acknowledged that a chief and his or her staff have the benefit of much clearer legal authority to demand cooperation for administrative purposes.

Where chiefs of police initiate discipline against officers for misconduct, it can take 2 to 4 months to convene the initial hearing before the chief or chief's designate. If the officer appeals the decision to OCCOPS, it can then take another 6 to 10 months for the appeal to be heard. Appeals to the courts can further delay the implementation of discipline if a chief's decision is upheld by OCCOPS. However, it was noted that OCCOPS regularly reverses or reduces disciplinary decisions which dissuades chiefs from taking doubtful action. If criminal proceedings are commenced against the officer, it is customary for a Crown Attorney to direct the chief to stay the proceedings pending the outcome at trial.<sup>56</sup> In this event, years can go by with the officer still on the payroll, although not on the job.

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This is done pursuant to s. 69(15) or (16) of the *Police Services Act*.

Of particular concern, however, was the inability of a chief to require immediate compliance by officers who are prepared to face and challenge discipline rather than cooperate with the SIU. Chiefs, therefore, argued in favour of a regulation which would recognize the *Charter* rights of subject officers, while giving chiefs the power to immediately suspend without pay witness officers who fail to cooperate with the SIU without legal justification.

Chiefs of police also endorsed a substantial increase in resources for the SIU and sought to encourage the development of SIU investigator excellence by increased training and independent peer review procedures. Also endorsed was the seconding of homicide investigators from police services to the SIU for fixed terms in appropriate numbers to maintain a civilian led institution, or the creation of an on-call roster of police investigators, provided that no active police officer would investigate his or her own service.

Finally, the chiefs stressed that the SIU's use of the media was, on occasion, destructive to good working relationships for the SIU to function properly. In their view, the Unit must become much more discrete and seek to build bridges with all its constituencies. In this latter respect, chiefs of police called for the institution of an ongoing dialogue with the Unit.

## **The SIU**

Wishing to maintain its impartiality, the SIU reluctantly responded to some of the concerns raised. As noted earlier in the report, the SIU acknowledged that it is not sufficiently resourced to carry out the mandate contemplated by the statute. While the Unit does not expect to be resourced to the level of a metropolitan police service, it is presently unable to deploy sufficient forensic and other investigative resources to quickly arrive at and take charge of a scene. Its limited resources also preclude effective continuous training for investigators and outreach activities to communities.

But while more resources and more ongoing training for its investigators are vital, the SIU feared that its detractors in the police community will continue to use against it isolated problems which occurred early after its establishment and which no longer reflect its current level of expertise. Its staff point out that SIU investigators now have considerably more experience investigating deaths and other serious incidents than many police investigators in Ontario, outside of a small elite who work in homicide squads in metropolitan centres such as Toronto. SIU investigators worried that proposals for secondment reinforced the erroneous perception that the Unit is incompetent and in need of serving police officers. Secondments also raised the spectre of potential conflict of interest and more community mistrust. The Unit has made great strides in resolving most cases within a 30-day target and was open to having professional observers critique the way investigations are conducted. The SIU was also willing to have have investigators from Toronto Homicide or OPP Major Cases seconded as observers for limited periods of time.

As to the suggestion that the SIU is politically motivated, the Unit totally rejected the charge. It saw its role as an impartial investigation body which will only lay a charge where the Director concludes the legal test for doing so is met - i.e., on reasonable grounds. The very small proportion of its inquiries which have resulted in criminal charges against police officers was hardly evidence of a witch-hunt. The SIU also stated that only 2 or 3 of the approximately 1,500 investigations undertaken since its inception have resulted in a witness officer being reclassified as a subject officer.

As to alleged misuse of the media, the SIU defended press coverage over the lack of cooperation from police officers and chiefs of police. Public awareness can also be an invaluable tool in aiding an investigation. Finally, the SIU pointed to the right of the public to scrutinize the performance of its police oversight mechanism.

Returning to the issue of competence, it was underlined that of the fourteen most recent hires, twelve are former police officers. The Unit has investigated more shooting and serious injury incidents than any comparable body in the world. The only obvious areas where it believed it needed police assistance were in wiretap surveillance and in some aspects of forensic identification. Rather, it should be offering to train experienced detectives on how to objectively investigate incidents where police officers are involved. The Unit could also offer training to personnel from police and civilian agencies outside of Ontario. But it was acknowledged the Unit needed more resources to “blitz” every mandated incident and to create a balance between civilian and ex-police investigators. The SIU also requires a comprehensive in-house training programme for new investigators who hopefully will reflect the cultural and racial diversity of the Province. It was said that on-going training for all investigators, whatever their background, is essential but, at present, inadequate.

Achieving a balance between police and non-police investigators was seen to be important to the credibility of the Unit. Seconding serving officers might only highlight the current imbalance between investigators with and without police backgrounds. Therefore, the advantages of seconding serving officers must be weighed against the perception of a return to the days when police investigated themselves.

## **Legal Framework Underlying these Concerns**

The following is not a legal opinion concerning the subject matter of the consultation. I have already noted that the Government and, ultimately, the courts will have the final say. My role was not to be the author of an authoritative opinion. Rather, I was requested to identify and facilitate consensus in a difficult context that happens to have a complex legal framework. One part of this framework is the *Police Services Act* and another is the

Canadian Constitution, particularly the *Charter*, and a third is the *Freedom of Information and Protection of Privacy Act*.<sup>57</sup>

I am not an expert in the *Police Services Act* and its processes, and I did not become one during this process. Legal submissions from the parties on the operation of the Act were not requested. Rather, the *Police Services Act* was just one of the topics discussed in the consultation and what follows is a very general review of various issues the parties considered in that regard. It is for policy makers and for the Government in particular to make their own assessment of the technical operation of this statute in light of concerns expressed in this report.

Secondly, I did not entertain legal submissions from the parties on the meaning of the *Charter*. And even if I had, it would have been of dubious value for me to have taken this opportunity to express what I think the *Charter* means in these circumstances. The parties' interests were well defended by lawyers consulted throughout the process. While the parties discussed a range of solutions in the shadow of the *Charter*, the process was not considered to be a legal exercise. Rather, the parties sought to find a mutually acceptable solution which might also be seen to fit, broadly speaking, within the *Charter's* framework.

The *Charter*, however, with its related jurisprudence, is excessively complex. These parties have conflicting views on its application to the issues at stake and, for that matter, I suspect any two lawyers commissioned to give opinions on these issues would not entirely agree. This is the nature of our broad Constitutional entitlements. But all of the parties preferred trying to find a mutually acceptable solution in this process, instead of participating in an immediate constitutional reference to the courts. The courts can always be engaged in this adversarial way. Accordingly, the discussion of the *Charter* in this report is intended only to reflect the constitutional law context of exchanges between the

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R.S.O. 1990, c. F.31 [hereafter *FOIA*].

parties and to illustrate how any output from this consultation might be seen to reside reasonably within a *Charter* environment. The Government, of course, will need to make its own assessment of the constitutional implications of the general approach reflected in the parties' discussions and decide for itself what can and should be done.

My discussion on the law dealing with freedom of information should similarly be considered as a guide for discussion and not as an authoritative opinion.

### **The Employment Context**

As noted earlier, policing in Ontario is a highly regulated service. In addition to detailing the general duties of officers, including the requirement to cooperate with the SIU, the Act and its regulations outline conduct for which an officer may be disciplined.

The statute defines misconduct to include such things as committing an offence described in the Code of Conduct, and inducing others to engage in misconduct or withhold their services. Inducing a member of a police service to withhold his or her service or engage in misconduct, and withholding services are also provincial offences punishable by fines or imprisonment.<sup>58</sup> The Code of Conduct is cast in very general terms that could apply to the actions of officers which have been complained of in the context of an SIU investigation.<sup>59</sup> For example:

- a) discreditable conduct includes:

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<sup>58</sup> See *Police Services Act*, ss. 74 & 75.

<sup>59</sup> R.R.O. 1990, Reg. 927, Schedule.



- acting in a disorderly manner, or in a manner prejudicial to discipline or likely to bring discredit upon the reputation of the police force;
- withholding or suppressing a complaint or report against a member of a police force;
- being found guilty of an indictable offence or an offence punishable upon summary conviction under the *Criminal Code* (Canada); or
- contravening any provision of the *Police Services Act* or the regulations.

b) insubordination includes:

- without lawful excuse, disobeying, omitting or neglecting to carry out any lawful order.

c) neglect of duty includes:

- without lawful excuse, neglecting or omitting promptly and diligently to perform a duty as a member of police force;
- failing to report a matter that it is his or her duty to report;
- omitting to make any necessary entry in any official document or book.

d) deceit includes:

- knowingly making or signing a false statement in an official document or book, or knowingly making or signing a false, misleading or inaccurate statement pertaining to official duties.

e) breach of confidence includes:

- without proper authority communicating to the public press or to any unauthorized person any matter connected with the police force.

Community representatives had difficulty seeing why a subject officer can remain silent when there is a statutory duty for all officers to cooperate. Similarly, they did not understand why witness officers who refuse to speak to SIU investigators on advice of counsel are not immediately charged by chiefs of police for discreditable conduct or insubordination or with neglect of duty. The same perspective applied where an officer's notebook is not completed in full at the end of a shift. Chiefs, on the other hand, claimed a general statutory duty to cooperate is insufficient guidance in the face of claims by the lawyers for police officers that the *Charter* prohibits any government from forcing a citizen to incriminate him or herself or that their clients are too upset to submit to immediate SIU interviews or to complete their notebooks. In the face of such arguments there was the distinct possibility that an order to cooperate would not be "lawful" or that a medically incapacitated officer would have a "lawful excuse".

A new legal framework could respond to these concerns through more specific references to SIU requirements in the Code of Conduct and by the creation of an SIU-specific regulation pursuant to s. 135(1), paragraphs 1, 8, 16, 19, 21, 23 and 30 of the *Police Services Act*.<sup>60</sup> These provisions provide:

- 135(1)        The Lieutenant Governor in Council may make regulations,
1.        prescribing standards for police services;

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<sup>60</sup> The McLeod Report, *supra*, note 24 at 31, implies some doubt about the adequacy of this regulation making authority for administering the operation of s. 113. For example, s. 74 makes reference to possible regulations, but s. 113 is silent.

8. respecting the government, operation and administration of police forces;
16. regulating the use of force by members of police forces;
19. governing the conduct, duties, suspension and dismissal of members of police forces;
21. prescribing the records, returns, books and accounts to be kept by police forces and boards and their members;
23. prescribing a code of conduct in which offences constituting misconduct are described for the purposes of section 74;
30. respecting any matter that is necessary or advisable to implement this Act effectively.

In addition to greater clarification, is the issue of how the regulation is to be enforced. For the vast majority of public and private-sector employees in Ontario, a breach of employment obligations has the potential for an immediate disciplinary or contractual response. For non-unionized employees, discharge may often be the response. For those who are unionized, a wider range of immediate discipline is more common, including warnings, suspensions without pay and, ultimately, discharge. In those cases, the employee and his or her union must commence legal proceedings in order to overturn the employer's action. In short, when employers believe their employees have acted wrongfully, they can take immediate corrective action and it is up to the employees to seek to reverse the decision through legal redress. This powerful, if controversial, tool in managing most organizations, does not apply to police officers in Ontario.

Discharge and discipline of police officers is not a matter of private contract or a subject matter of collective bargaining. The powers and process for disciplining police officers who violate their obligations is highly regulated by the *Police Services Act* and its regulations. Those public laws set out a complex mechanism for the discipline of police officers which has the effect of preventing them from being disciplined until wrongdoing has been proven in a hearing and all avenues of appeal have been exhausted. Apparently, this can take more than a year after the allegation of misconduct is first raised. While there are significant historical and public policy reasons behind such protection, in the context of the debate about the SIU, it means that officers who do not comply with the duty to cooperate will not be met with immediate disciplinary sanctions. In short, under the current legislation, it is not possible to impose immediate sanctions when a witness officer wrongfully refuses to cooperate, or to deprive a subject officer of pay when he or she exercises an asserted constitutional entitlement to remain silent.

The courts have recognized that while police officers, including chiefs of police, are appointed by municipal governments in Ontario, once appointed they do not occupy a master-servant relationship with their civilian overseers.<sup>61</sup> Instead, they occupy a public office and the *Police Services Act* vests them with important duties to the community such as preserving the peace, preventing crimes, apprehending offenders, laying charges, participating in prosecutions, and executing warrants. While appointed by a particular municipal council, police officers have authority to act as police officers throughout Ontario.<sup>62</sup> They are also given the powers and duties of a constable at common law, which

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<sup>61</sup> This has been repeatedly recognized by Ontario courts, including the Court of Appeal. See *Re Reference under the Constitutional Questions Act*, [1957] O.R. 28 (C.A.); *Mahood v. Hamilton-Wentworth Regional Board of Police Commissioners* (1977), 14 O.R. (2d) 708 (C.A.) and most recently in *Pembroke (City) Police Services Board v. Kidder* (1995), 22 O.R. (3d) 663 (Gen.Div.).

<sup>62</sup> *Police Services Act*, ss. 42(1) & (2).

includes protecting persons and property, detecting crime, making arrests and enforcing statutes and by-laws.<sup>63</sup>

For many years, Ontario statutes and regulations governing police services have established detailed rules for the exercise of police powers and duties, as well as elaborate procedures for the review of alleged police misconduct and related discipline. The courts have required strict compliance with those procedures. This is because one important rationale for the statutory scheme of disciplining police officers is to insulate them from undue pressure.

A recent exploration of this rationale is found in *Pembroke (City) Police Services Board v. Kidder*<sup>64</sup>. A police services board attempted to dismiss a chief of police by relying on a provision in his ten year long employment contract which permitted it to do so on 30 days notice. The chief not only opposed his termination on the basis that the thirty days notice provision was unlawful, but attempted to have even the ten year limitation in his contract declared contrary to public policy. The court concluded that as a matter of public policy the thirty day provision was void, given that the *Police Services Act* established the sole mechanism by which a chief of police, as a police officer, could be dismissed. It, however, upheld the ten year limitation in the contract. Relying on judicial decisions since the 1950's, the court stated:

The Legislature has made specific provision for the dismissal and manner of dismissal of a municipal police chief. The important public nature of the office and its duties and responsibilities together with the fact that neither the

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<sup>63</sup> See for example *R. v. Dedman* (1981), 118 D.L.R. (3d) 425 (Ont. C.A.) aff'd [1985] 2 S.C.R. 97; *Hayes v. Thompson* (1985), 17 D.L.R. (4th) 751 (B.C.C.A.); and *R. v. Mellquist* (1988), 42 C.C.C. (3d) 231 (Sask. C.A.)

<sup>64</sup> *Supra*, note 61.

municipality nor its appointed Police Services Board are in a master-servant relationship with the chief of police have led to the interpretation in the past, that the Legislature intended no broader grant of power to a municipal authority to dismiss its police chief. I can see no compelling basis for reaching a different conclusion in light of the present statute or circumstances. The necessary independence of the office of chief of police militates against a finding of authority in an appointed Police Services Board to terminate a police chief's services with nothing more than the giving of 30 days notice. Such authority would invite an environment in which a chief's conduct must maintain the pleasure or satisfaction of, in the case of Pembroke, one elected municipal counsellor and two individuals appointed by the provincial cabinet. *Notwithstanding good faith conduct on the part of the Board, such a situation is not at all ideal for an office which must be executed without fear or favour and without regard to the consequences that necessary and proper law enforcement may have on the popularity of the office-holder.*<sup>65</sup> [emphasis added]

Police officers exercise duties and powers which can bring them into conflict with members of the public, including other public officials. Accordingly, they are particularly vulnerable to criticism and complaint. Immediate discipline could, therefore, have the effect of inhibiting them in the exercise of their responsibilities.

In the *Police Services Act*, discipline of police officers commences with a complaint initiated either by a chief of police or a member of the public "who is directly affected by the matter".

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<sup>65</sup> *Ibid.*, at 672. Note that while a chief of police is directly accountable to the police services board, the same is not true for police officers under his or her command. The *Police Services Act* prohibits board members from giving orders to police officers or from directing the chief as to specific operational decisions and day-to-day operations of the police service: ss. 31(3) & (4).

In the latter event, it is the responsibility of the chief of police to investigate the complaint. There are opportunities for informal resolution if the complaint is not of a serious nature, but failing that, a chief of police must hold a hearing into the matter if he or she is of the opinion that the officer's conduct may constitute misconduct. The hearing is convened before the chief of police or a superior officer appointed by the chief of police and the procedure is based on a criminal proceedings model, pursuant to the *Police Services Act*, the regulations and the *Statutory Powers Procedure Act*.<sup>66</sup>

A case must be proven against an officer on "clear and convincing evidence" and the police officer involved is not required to give evidence. If convicted, the chief of police is then given the authority to discipline the officer, which may include such discipline as dismissal, demotion, and suspension without pay for specified periods. A police services board has similar powers to investigate complaints about a chief of police, convene disciplinary proceedings and impose penalties, unless it defers to OCCOPS. The officer or a complainant (but apparently not the chief, unless the subject of the complaint) have rights of appeal to OCCOPS and to the courts on appeal or judicial review.

There may exist an issue of whether the SIU has the status of "a member of the public" and constitutes a complainant "directly affected by the policy, service or conduct that is the subject of the complaint", within the meaning of s. 57. If the SIU does not, it would mean that only a chief of police could pursue the SIU's interests. This lack of clarity surrounding the SIU's standing is troubling and is one of several drafting issues to be considered in crafting any reform. In any event, the effect of the *Police Services Act*, the disciplinary regulations and the *Statutory Powers Procedure Act* is to stay the imposition of any penalty once an appeal is launched until all rights of appeal have been exhausted.<sup>67</sup>

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<sup>66</sup> R.S.O. 1990, c. S.22.

<sup>67</sup> See *Police Services Act*, s. 71(1) & (2); R.R.O. 1990, Reg. 927, s. 18 and *Statutory Powers Procedure Act*, s. 25.

At one time, the regulations governing police conduct were at least thought to permit a chief of police to suspend without pay a police officer suspected of or charged with contravening a statute or committing a Code of Conduct offence. In 1977, however, the Ontario Court of Appeal determined that while suspended from duty, a police officer still retains his or her office and, accordingly, is entitled to be paid.<sup>68</sup> The only circumstance where a police officer could be suspended without pay under the regulations was when convicted of an offence for which a term of imprisonment was imposed. This regime has been retained in the current *Police Services Act*.<sup>69</sup>

A number of provinces in Canada do permit a chief of police to impose an immediate, but limited suspension without pay, generally subject to expeditious review.<sup>70</sup> However, this has not been the practice in Ontario. Therefore, enforcement of an SIU-specific regulation by way of discipline would be subject to the customary disciplinary regime of the *Police Services Act* unless changed.

This, of course, does not mean that a subject officer can insist on remaining on the job pending an SIU investigation. A subject officer may be assigned to desk duty or suspended with pay, as may a refusing witness officer. Immediate administrative reassignments have consequences for officers. For example, a suspension with pay or an assignment to desk duty may result in the loss of substantial overtime payments and other preferred conditions of employment. But independent of whether this is fair for the officer, a lack of resources may discourage chiefs of police from taking these steps. Be this as it

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<sup>68</sup> See *Mahood*, *supra*, note 61.

<sup>69</sup> *Police Services Act*, s. 67.

<sup>70</sup> In Saskatchewan, see *Police Act*, S.S. 1990, c. P-15.01, s. 53; in Alberta, see Alta. Reg. 356/90, s. 8(10); in Nova Scotia, see N.S. Reg. 101/88, ss. 19-22; in British Columbia, see B.C. Reg. 330/75, ss. 44-47.



may, an allegation of misconduct is serious and potentially career limiting whatever the procedures, particularly if it involves a refusal to obey a direct order of a chief of police.

The process of enforcement of police officer cooperation with the SIU can break down, however, if a chief of police and a police services board are reluctant to assist the SIU by issuing the necessary orders. Moreover, where there is a failure to act at these senior levels, the enforcement procedures under the Act also require time to engage. Assuming that the SIU Director will or does constitute a complainant “directly affected” under s. 57(1) of the *Police Services Act*, only after conducting a hearing does OCCOPS have the authority to intervene and to take action. There are also rights of appeal to the courts and the *Statutory Powers Procedure Act* stays the imposition of any penalty pending the outcome of the initial appeal.

## **The Constitution**

Not only must the *Police Services Act* be considered, another legal regime of great importance is the Constitution of Canada.

### **The Division of Powers**

The *Constitution Act, 1867*, divides constitutional powers between the federal and provincial governments in Canada. The federal government has exclusive jurisdiction over criminal procedure by virtue of s. 91(27), and the provinces have exclusive jurisdiction over the administration of justice by virtue of s. 92(14).

This provincial power over the administration of justice involves the establishment, management, supervision, control and discipline of police services by the province, and

includes the power to investigate allegations of wrongdoing by police officers.<sup>71</sup> Nevertheless, in a number of cases, the Supreme Court of Canada has held that it is beyond the competence of a provincial government to constitute a public inquiry with the power to compel citizens by summons to give testimony when the predominant purpose of that inquiry is to gather sufficient evidence to lay a criminal charge - a "substitute police investigation," as it has been called.<sup>72</sup> Accordingly, it has been suggested that because the dominant feature of the SIU investigation is criminal, it was beyond the jurisdiction of the provincial government to enact s. 113 of the *Police Services Act* in the first place.

However, there is an important distinction to be drawn between a public inquiry with the power to summon and enforce the attendance of a witness for the purposes of uncovering criminal conduct and an explicitly criminal investigation by peace officers who are SIU investigators. If a province can establish a police service, surely it can establish a unit to "police" that police service. As one lawyer noted, the SIU is not a "substitute police investigation" in the guise of a public inquiry. It is an *actual* police investigation by a body constituted pursuant to the Province's powers to make laws in relation to the administration of justice. Provided that SIU investigators conduct themselves in a manner which is not inconsistent with our federal laws regulating criminal procedure, including the *Charter* and the *Criminal Code*, their actions can be distinguished from provincial inquiries which have had the effect of circumventing the protections these statutes afford.

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<sup>71</sup> *O'Hara v. The Queen* (1987), 38 C.C.C. (3d) 233 (S.C.C.). See also P.W. Hogg, *Constitutional Law of Canada*, 3d, (Scarborough, ON: Carswell, 1992) c. 19.

<sup>72</sup> *Ibid.* and *Starr v. Houlden* (1990) 55 C.C.C. (3d) 472 (S.C.C.).

## Compellability of Police Officers and the *Charter*

The more challenging question is the right of a government to compel a police officer to provide oral or written statements to the SIU which may self-incriminate.

For those who are truly witness officers, in the sense that they have not engaged in conduct which reasonably puts them at risk of a criminal charge, such compulsion does not present a problem. Because these officers have no reasonable fear of incriminating themselves, a province by contract or statute may require them to cooperate.<sup>73</sup> Despite the fact that civilian witnesses are not compelled to cooperate, employees by contract or statute may be so obliged, particularly where the purpose is public accountability.

The difficulty lies with officers designated as subject officers or with witness officers who reasonably fear that they may be compelled to disclose potentially incriminating information. The legal implications flow primarily from the principle against self-incrimination incorporated in the *Charter* and from the common law confessions rule.<sup>74</sup>

The common law confessions rule operates to exclude from a trial those pre-trial statements made to "persons in authority" which are not made freely or voluntarily.<sup>75</sup> A "person in authority" is someone who has the power of arrest, detention, examination or

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<sup>73</sup> *R. v. Calder* (1996), 105 C.C.C. (3d) 1 (S.C.C.) implicitly stands for this principle. See further discussion of this case, below.

<sup>74</sup> A related principle is the *Charter* right to counsel, a right also aimed at preventing a detained person from incriminating him or herself. See: *R. v. Simmons* (1988), 45 C.C.C. (3d) 296 (S.C.C.) at 331. However, there is little or no controversy between the parties over affording police officers counsel and union representation.

<sup>75</sup> *R. v. S.(R.J.)* (1995), 96 C.C.C. (3d) 1 (S.C.C.) at 35.

prosecution of an accused.<sup>76</sup> This would include a peace officer, and may also include an employer if he or she has power to initiate a prosecution.<sup>77</sup> In this context, an SIU investigator and the Director are certainly persons in authority.

The requirement of voluntariness demands the ability of a person to choose whether to make a statement to the authorities or not.<sup>78</sup> While there is older Supreme Court of Canada authority that voluntariness is not affected by statutory compulsion alone,<sup>79</sup> in the era of the *Charter* and given the express criminal investigatory focus of the SIU, it seems more likely today that a statutory obligation of self-incrimination on pain of discipline constitutes compulsion even at common law.<sup>80</sup> If that is so, the resulting involuntary

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<sup>76</sup> *R. v. Alexis* (1994), 35 C.R. (4th) 117 (Ont. Gen. Div.) at 163-164. See also P. Mirfield, "Confessions - The 'Person in Authority' Requirement" [1981] Crim L.R. 92.

<sup>77</sup> *R. v. Rimmer* (1969), [1970] 1 C.C.C. 165 (B.C.C.A.), though this determination will largely turn on whether the employer has such authority. For a contrary finding see *Alexis*, *supra*, note 76.

<sup>78</sup> See: *R. v. Whittle* (1994), 92 C.C.C. (3d) 11 (S.C.C.). See also: E.G. Ewaschuk, *Criminal Pleadings & Practice in Canada*, 2d (Aurora, ON: Canada Law Book, 1998) at 16-172.

<sup>79</sup> *Walker v. The King* (1939), 71 C.C.C. 305 (S.C.C.).

<sup>80</sup> See cases such as: *R. v. Spyker* (1990), 63 C.C.C. (3d) 125 (B.C.S.C.); *R. v. Mascia* (1993), 93 C.L.L.C. 14,039 (Ont. Gen. Div.); and *R. v. Bata Industries Ltd.* (1991), 70 C.C.C. (3d) 391 (Ont. Prov. Div) which have held that statutorily compelled statements violate s. 7 of the *Charter* and are inadmissible as evidence. *Contra*: *R. v. Lloyd* (9 December 1996) Doc. Victoria 81280 (B.C.S.C.). See also: *R.W.D.S.U., Local 580 v. Dolphin Delivery Ltd.* (1986), 33 D.L.R. (4th) 174 (S.C.C.) at 198; *R. v. Swain* (1991), 63 C.C.C. (3d) 481 (S.C.C.) at 510; and *R. v. Salituro* (1991), 68 C.C.C. (3d) 289 (S.C.C.) at 305 all suggesting that common law rules should be consistent with the *Charter*.

statement cannot be used for any purpose including the purpose of impeaching an accused's credibility on cross-examination.<sup>81</sup>

As will be pointed out momentarily, a statutory compulsion to incriminate may also engage the *Charter*. The "immunity effect", however, may be somewhat more nuanced than the law of confessions because of s. 24(2). In this latter regard, *Calder*<sup>82</sup> dealt with the use of statements made by a police officer, subsequently charged with a criminal offence, to two senior officers conducting a criminal investigation and a disciplinary investigation pursuant to the *Police Services Act*. The officer's statement was initially excluded in the Crown's case because he had not been advised of his *Charter* rights. In coming to that conclusion, the trial judge determined that the interrogation was not a mere disciplinary proceeding where the *Charter* would be inapplicable. Rather, the officer believed he was obliged to attend and answer questions, and was given a caution that the inquiry was a criminal investigation. He was then interrogated without counsel and was not left on his own from the time of his arrival to meet his superiors. The trial judge concluded he had been detained within the meaning of the *Charter*. Accordingly, the statement was excluded, having been obtained in violation of the accused's right to counsel.

The Crown, thereafter, attempted to rely on the statement in cross-examining the accused when he testified, arguing that the use was not to incriminate the accused, but rather to impeach his credibility. This use would have been precluded by the law of confessions had it been applicable. The trial judge again refused to admit the evidence pursuant to s. 24(2) of the *Charter* and the Supreme Court of Canada upheld this refusal. In this respect, Sopinka J. wrote:

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<sup>81</sup> *Monnette v. The Queen* (1956), 114 C.C.C. 363 (S.C.C.).

<sup>82</sup> *Supra*, note 73.

If use of the statement is seen to be unfair by reason of having been obtained in breach of an accused's *Charter* rights, it is not likely to be seen to be less unfair because it is only used to destroy credibility.

In view of the foregoing, I conclude that it will only be in very limited circumstances that a change in use as proposed in this case will qualify as a material change in circumstances that would warrant reopening the issue once evidence has been excluded under s. 24(2). I would not, however, entirely rule out the possibility in some very special circumstances.<sup>83</sup>

Thus, an involuntary statement cannot be used for any purpose against a police officer at common law and, where obtained in violation of the *Charter*, the result will rarely be different.

Turning directly to a *Charter* analysis of a statutory pre-trial compulsion to self-incriminate, the principles of fundamental justice guaranteed by s. 7 embrace a right to remain silent which is even broader than the common law confessions rule and the privilege against self-incrimination. Indeed, it has been held to be broader than ss. 11(c) and 13 of the *Charter*.<sup>84</sup> In *R. v. Hebert*, it was found that this right to silence "must be broad enough to accord to the detained person a free choice on the matter of whether to speak to the authorities or to remain silent".<sup>85</sup> In the Court's view, a fundamental tenet of our criminal

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<sup>83</sup> *Ibid.*, at 15.

<sup>84</sup> *S.(R.J.)*, *supra*, note 75 at 43. For this reason, s. 7 is referred to as having a "residual role".

<sup>85</sup> *R. v. Hebert* (1990), 57 C.C.C. (3d) 1 (S.C.C.) at 36.

justice system is that the state bears the burden of establishing a case to meet against an accused person.<sup>86</sup> Thus, McLachlin J., in *Hebert*, stated:

From a practical point of view, the relationship between the privilege against self-incrimination and right to silence at the investigatory phase is equally clear. The protection conferred by a legal system which grants the accused immunity from incriminating himself at trial, but offers no protection with respect to pre-trial statements would be illusory.<sup>87</sup>

However, the Court in *Hebert* also stated that the *Charter* right to remain silent is not absolute and can be limited in accordance with the principles of fundamental justice given that individual interests must also be balanced with other legitimate public purposes.<sup>88</sup> Thus, in the recent case of *S.(R.J.)*<sup>89</sup> the Supreme Court of Canada held that the right against self-incrimination did not prevent an accused from having to testify against a fellow accused person in a separate trial even though as a witness he would be forced to give potentially self-incriminating testimony. Statement and derivative evidence immunity were sufficient protections. A related ruling was rendered in *British Columbia Securities Commission v. Branch*<sup>90</sup> to the effect that a person could be compelled to testify in a securities investigation where an immunity against the use of both the person's testimony and any evidence that would not have been found but for this testimony was provided.

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<sup>86</sup> *Calder, supra*, note 73, as we have seen, held that a police officer was detained when summoned to a compulsory interview with a criminal investigatory purpose, thereby triggering the *Charter's* application. See also: *R. v. Therens* (1985), 18 C.C.C. (3d) 481 (S.C.C.) at 505.

<sup>87</sup> *Hebert, supra*, note 85 at 33.

<sup>88</sup> *Ibid.* at 6 and 46.

<sup>89</sup> *Supra*, note 75.

<sup>90</sup> (1995), 97 C.C.C. (3d) 505 (S.C.C.).

Therefore, in both *S.(R.J.)* and *Branch*, the Supreme Court of Canada held that an overriding public purpose in the testimony sought from a witness can be balanced against the protection of the witness' right against self-incrimination by providing an immunity from use of the statement and any evidence derived from the statement in future criminal proceedings against the witness. This latter "derivative use immunity" has been limited to any evidence which could not have been otherwise obtained, or the significance of which would not have been appreciated, "but for" the compelled testimony of the witness.<sup>91</sup>

While SIU investigations deal with information obtained before trial, a solution to the present difficulties associated with witness officers is one which recognizes the societal imperative of initially having the cooperation of individuals designated as witnesses by the SIU during the course of its investigation, but which also accords those persons immediate protection against compelled disclosure of incriminating information by enforceable assurances of statement and derivative evidence immunities. In this way, the SIU would be empowered to conduct the investigation as it in good faith deems fit, but the officer wrongly designated as a witness officer would be immediately protected when honouring his or her statutory obligation to cooperate.

In *S.(R.J.)* and *Branch* the Supreme Court of Canada also recognized that the need to strike an appropriate balance between the state's interest in obtaining evidence for a valid public purpose and the individual's right to remain silent may not always be met by statement and derivative evidence immunity. Thus, while an SIU interview is not a testimonial occasion, the two-stage analysis developed to determine whether a witness is compellable in a particular proceeding may be a helpful guide in fashioning an appropriately balanced reform to resolve the witness officer problem:

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<sup>91</sup> See *S.(R.J.) supra*, note 75 at 80-81.



- ▶ First, a court must consider the nature and public importance of the proceeding, the purposes for which the compelled testimony is sought, and the likely importance of that testimony. If the court is of the opinion that the proceedings are undertaken primarily to obtain evidence for the prosecution of the witness, then s. 7 of the *Charter* requires that the person be exempted from testifying.
- ▶ However, where a court finds that the proceedings were designed to achieve goals of substantial public importance and not to further criminal prosecution against that individual, the court must balance the rights of the individual against the interest of the state in receiving the compelled testimony in a way that ensures that all of the requirements of the *Charter* are upheld. Where the only prejudice is the possible future use of the testimony, the compulsion to speak will cause no prejudice because that person will be protected against that event by statement and derivative evidence immunity. To be protected from speaking, the individual must show that another significant prejudice may arise such that the right to a fair trial will be jeopardized.

This analysis, together with *Hebert*, suggests that persons who are in fact the subject of a criminal probe - subject officers - should not be compelled to speak and any law or order which requires them to do so may lead to a stay of prosecution. However, in the case of a designated witness officer, where the intent is not to further a criminal investigation against that officer, an enforceable and immediate assurance of statement and derivative evidence immunity should be sufficient to protect his or her *Charter* right against self-incrimination.

The *Charter* must also be considered in the context of notes made by police officers in the course of their duties and the use to which they may be put in an SIU investigation. While the practices of each police service with respect to the creation of notebooks differ, it is clear that the purpose of notebooks is to comprise an accurate record of the officer's

activities and observations during the course of a shift. As a result, access to these written statements by SIU investigators is of particular concern to subject officers and to witness officers who fear they may become subject officers once the SIU reviews their notes.

In *R. v. Fitzpatrick*,<sup>92</sup> the Supreme Court of Canada decided that the principle against self-incrimination did not require an accused be granted immunity against subsequent use by the Crown of a report he was required by statute to file. In determining whether an immunity was necessary, the Court considered the presence or absence of an adversarial relationship between the State and the individual at the time the information was provided, the presence or absence of coercion and whether the compulsion to make the statement threatened the underlying rationales behind the principle against self-incrimination (e.g. protection against unreliable confessions and the abuse of power by the State). In the case of police officers, the obligation to complete a notebook arises after an incident and thus, at the very time there may be an adversarial relationship with the State. From this vantage point, there seems little difference between a compelled oral statement and a compelled written statement.

Using this analysis, because the preparation of reports by police officers is a normal part of their duties, notebooks must be completed in full by true witness officers and provided to the SIU. The same is so for designated witness officers who nevertheless have a reasonable fear that anything they disclose in their notes could lead to redesignation as subject officers once the information is disclosed, provided enforceable statement and derivative evidence immunities are assured to them in respect of subsequent criminal proceedings. Such an approach should fairly balance the need to have their immediate cooperation in the context of an SIU investigation of another officer against the designated witness officer's concern of self-incrimination.

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<sup>92</sup> (1995), 102 C.C.C. (3d) 144 (S.C.C.).

Of course, there is no *Charter* entitlement against the use of compelled statements in a purely disciplinary or administrative proceeding. An officer, whether subject or witness, can be required to submit to an administrative interview by a chief of police where the police officer is adequately assured that the statement given and any evidence arising from it will not be used against him or her in a criminal proceeding other than one for perjury or obstruction of justice. In other words, all officers have to cooperate with an internal investigatory review conducted by a chief of police. To date, however, chiefs of police have not fashioned purely administrative reviews and, to that end, have not requested the Attorney General's assistance in providing officers with enforceable statement and derivative evidence immunities.

Looked at from the point of view of the SIU providing information to a chief of police, the SIU does not disclose police officers' statements without the officers' consent. While there is no *Charter* obligation to withhold an officer's statement from a chief of police, the SIU practice is nevertheless interesting because it shows that criminal and administrative investigations can be separated into two distinct reviews. With the Attorney General's cooperation in the form of Crown policies creating enforceable and immediately available immunities, two appropriately balanced investigatory structures may be made available. This is the experience in the United States.

### **United States**

The American law on compelled interviews of public officials is represented by *Garrity v. New Jersey*.<sup>93</sup> The case involved police officers being investigated for allegations that they

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<sup>93</sup> 385 US 493 (1967). See also: *Gardner v. Broderick*, 392 US 273 (1968) and A.M. Herzig, "To Serve and Yet to be Protected: The Unconstitutional Use of Coerced Statements in Subsequent Criminal Proceedings Against Law Enforcement Officers" (1993) 35 Wm. & Mary L.R. 401. Note that the Fifth Amendment is a free standing right against self-incrimination whereas s. 7 of the *Charter* is not.

were fixing traffic tickets. They were required to attend interviews at which they were informed that anything they said might be used against them in a criminal proceeding. They were also told they had the right not to answer if the disclosure would tend to incriminate them, but that exercising that right might result in them being removed from office. The officers answered the questions and some of their answers were used in subsequent criminal proceedings in which they were convicted.

The United States Supreme Court upheld their appeals. It held that law enforcement employers, indeed any public employer, can require employees to answer questions pertaining to job-related conduct or face discipline for refusing. However, for that condition to prevail, the employees so compelled must be assured by the investigators that any statement made by them and evidence derived from those statements cannot be used against them in any subsequent criminal proceeding. Whether or not the interrogator promises such immunity by administering a "*Garrity* warning", the *Garrity* decision provides that all statements obtained from these public officials cannot be used in any subsequent criminal proceeding where the official was compelled to answer the questions under threat of punishment. By the same token, where the *Garrity* warning is administered, thereby making the purpose of the interview solely to pursue administrative or disciplinary action, it is possible to compel answers with prejudice and to discipline refusals.

Therefore, in the United States, the following pertains to forced interviews of police officers:

1. An officer may refuse to answer when advised that any statement could be used against him or her in a criminal prosecution. A right to silence can be waived. But where not waived, the officer cannot be disciplined solely on the basis of the refusal to answer questions. However, where there is a disciplinary proceeding and the officer chooses to remain silent, he or she may be disciplined on the basis of any other uncontroverted evidence.

2. An officer may refuse to answer when he or she has not been asked to waive the right to silence, but is granted immunity ("the *Garrity* situation"). However, any refusal in this case is a basis for discipline, including dismissal.
3. An officer may respond to questions in either a *Garrity* compelled interview, or a voluntary criminal interview and, in either case, he or she can be disciplined based on any of the answers provided.

Of course, a decision by the employer to pursue an administrative process where immunity is granted does not necessarily preclude a criminal prosecution. Independent criminal and administrative investigations may be conducted. However, statements and evidence arising out of statements obtained in the administrative investigation can in no way be the basis of subsequent criminal proceedings.

### **Garrity in Action - Cincinnati**

During the course of the consultation I visited the City of Cincinnati, Ohio where I was given a brief introduction to the practical application of *Garrity*. Cincinnati is a city of 1.5 million citizens, forty percent of whom are African-American. It is a city with its own unique racial discourse and its policing structures are obviously a product of this uniqueness. There is also an ever-present possibility of federal government intervention into civil rights abuses which is a factor not present in Canada. I should caution that this was a very brief review. While it was instructive, I cannot purport to give a detailed analysis of American practices. The visit, however, did serve to suggest the practicality of certain policy options discussed with the parties in this consultation.

When an on-duty police officer shoots a civilian, three municipal agencies in Cincinnati are immediately engaged in the investigation of the incident. The body charged with immediately attending and controlling the scene and investigating the shooting for criminal

law purposes is the Cincinnati Police Department's Homicide Unit. The officer responsible for the shooting has his or her gun immediately taken away and is advised of his or her constitutional rights. The officer is not required to make a statement to the investigating officers, nor is he or she required to provide them with any notes. However, other officers involved are required to assist fully and failure to do so can result in immediate disciplinary action. In that event, the onus is on the officers and their representatives from the Police Benevolent Association to bring any proceedings to overturn such discipline.

Following closely on the heels of the Homicide Unit's investigation, is a dual investigation by the Police Department's Internal Investigation Unit as well as a civilian oversight body known as the Office of Municipal Investigations (OMI). The Internal Investigation Unit has an exclusively administrative function. It investigates the incidents to determine whether all standards and practices were complied with and to look at such issues as the need for further training, discipline and administrative reform. All police officers are required to speak to the Internal Investigation Unit, including those directly responsible for the shooting upon the administration of a *Garrity* warning. OMI has a recommendatory function only and is also required to give a *Garrity* warning if it seeks a compulsory interview of a police officer. At the outset of the interview, OMI administers the following *Garrity* warning:

I wish to advise you that you are being questioned as part of an official investigation of the Office of Municipal Investigation (OMI). You will be asked questions specifically directed and narrowly related to the performance of your official duties or fitness for office. You are entitled to all the rights and privileges guaranteed by the laws and the constitution of the State and the constitution of the United States, including the right not to be compelled to incriminate yourself (and to have an attorney of your choice present during questioning). I further wish to advise you that if you refuse to testify or to answer questions relating to the performance of your official duties or fitness for duty, you will be subject to departmental charges which

could result in your discipline from the police department or other city employment subject to appropriate appeals. If you do answer, neither your statement nor any information or evidence which is gained by reason of such statements can be used against you in any subsequent criminal proceeding. However, these statements may be used against you in relation to subsequent departmental charges.

The Internal Investigation Unit reads a similar statement which makes clear that refusal to answer is a failure to obey an order which may result in disciplinary action and possibly dismissal. If during its interview, the Internal Investigation Unit investigators feel the officer is disclosing something previously unknown to them which could be criminal conduct, they immediately caution the officer. They may then continue with a criminal investigation and pass the disciplinary review to another team which has had no prior involvement in the investigation. These investigators would continue with the administrative interview, and do not share incriminating statements or related evidence with anyone conducting a criminal investigation.

While the Homicide Unit is free to share information with both the Internal Investigation Unit and the OMI, both of these administrative units are prohibited from disclosing any incriminating evidence to the Homicide Unit. A breach of this confidentiality requirement is considered to be a serious disciplinary matter.

Ultimately, the reports prepared by all these investigative bodies and supporting documentary evidence, including witness statements, become public information which must be disclosed by virtue of Ohio's freedom of information laws. Should this publicity threaten the fairness of a criminal trial, the venue for it may be moved if instructions from the presiding judge are not likely to be adequate. When asked whether this openness attracted lawsuits, the belief was expressed that the potential for lawsuits reinforced responsible conduct on the part of government agencies.

Experience in Cincinnati illustrates the practicality of separating criminal and administrative investigations and the possibility of providing police officers with necessary assurances to accommodate their constitutional entitlements. This approach may provide an appropriate balance between the constitutional rights of involved officers and the need for their public accountability. This American experience seems in harmony with Canadian constitutional learning and suggests the practicality of a reform that would provide immediately enforceable *Garrity*-like assurances to designated witness officers compelled to speak by the SIU in a criminal investigation and to all officers compelled to speak in an administrative review.<sup>94</sup>

### **Public Release of the SIU Report**

The parties discussed the current inaccessibility of the SIU Director's report. All parties were interested in having this report made public. Transparency goes hand in hand with public confidence. The 1989 Task Force on Race Relations and Policing stated:

Immediately upon the police force involved having secured the scene, the team [SIU] would be called in to take over the investigation. Its mandate would be to investigate the facts surrounding the shooting and to disclose appropriate information to the public on an on-going basis. Such a process, by which the public would be provided with information on a continuous basis from an early stage, would be invaluable in dissipating ignorance of the event and resentment by the public. The team would be charged with deciding whether or not criminal charges against the police officer in question are warranted. It would be required to convey its finding to the public and when

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<sup>94</sup> For a discussion on the scope and limitations of statement and derivative evidence immunity see: I. Bloom *et al.* "The Residual Protection Against Self-Incrimination in Canada: The Road Not Taken" (1996), 5 N.J.C.L. 363 and Herzig, *supra*, note 93.



warranted to lay criminal charges within 30 days of commencing the investigation.<sup>95</sup>

While the *Police Services Act* provides explicitly that the SIU Director report to the Attorney General, the Act does not preclude the release of the report to the public. Although it may be problematic to release a detailed report to the public where charges are laid, the desirability of releasing a public report where no charges are laid is considerable.

Any release of the report to the public would have to consider the requirements of the *Freedom of Information and Protection of Privacy Act* unless the *Police Services Act* was to explicitly provide for release notwithstanding the *FOIA*. The *FOIA* seeks to allow access to certain information under the Government's control and, at the same time, to protect the privacy of individuals by restricting the disclosure of personal information. This area of law is complex and technical.

There have been a number of requests to the Ministry of the Attorney General to have the Director's report released. Related refusals by the Ministry have been reviewed by the Information and Privacy Commissioner and applicants have not been successful.<sup>96</sup> In each case, the Ministry has successfully relied on s. 42(2)(a) of the *FOIA* which grants it "the discretion" to refuse to disclose a report prepared in the course of law enforcement by an agency which has the function of enforcing and regulating compliance with a law. However, the real underlying concern appears to be the possible invasion of privacy of persons mentioned in the report.

Part III of the *FOIA* which deals with the protection of individual privacy lies at the heart of the matter. Section 42 provides that an institution shall not disclose personal information

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<sup>95</sup> *Supra*, note, 13 at 149.

<sup>96</sup> See Orders P-1315 and P-1336.

in its custody or under its control except in certain limited circumstances. Personal information is defined in s. 2(1) as recorded information about an identifiable individual, and includes the views or opinions of another individual about the individual. There have been several Orders by the Commissioner which have held that information involving the evaluation of an employee's performance or an investigation into his or her conduct is personal information.<sup>97</sup> Furthermore, information provided by a witness to a crime is the personal information of the witness, the affected person and the complainant.<sup>98</sup> Given the broad definition of personal information and the nature of an SIU investigation, the information in an SIU report would likely contain personal information. As a result, release of the SIU report would have to be consistent with the provisions of Part III.

Although s. 42 of Part III of the Act prohibits disclosure of personal information except in certain defined circumstances, s. 37 appears to exempt Part III from applying where the personal information is maintained for the purpose of creating a record that is available to the general public. It seems that all personal information in a class must be made available to the public in all cases if s. 37 is to be relied upon, as the existence of exceptions would indicate that the personal information in question was not maintained for the purpose of creating a public record. Thus, reports of the SIU could be disclosed to the general public as long as the SIU chooses, as a formal policy matter, to adopt a standard and fixed approach whereby a class of reports would be made available to the public. By this reasoning, a defined class of reports, such as those where no charges are laid, could be disclosed.

Disclosure of SIU reports may also be possible pursuant to s. 23 of the *FOIA*. Section 42(a) of the *FOIA* provides that personal information may be disclosed in accordance with

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<sup>97</sup> See Orders P-721, P-746, P-757, P-758, P-813, P-814, P-816, P-828, P-1052, and P-1180.

<sup>98</sup> Order M-84.

Part II of the Act which governs formal freedom of information requests. Whether a formal request is really necessary for an institution to release personal information by relying on s. 42(a) is unclear. One would think that there is little difference in the resulting invasion of privacy. If Part II is interpreted not to require a request, personal information may be released in accordance with s. 21(1). This section permits the disclosure of personal information in a report if the disclosure would not constitute an unjustified invasion of personal privacy.<sup>99</sup> Under s. 21(3)(b), however, release of personal information that was compiled and is identifiable as part of an investigation into a possible violation of law is presumed to constitute an unjustified invasion of personal privacy. Nevertheless, this can be rebutted under s. 23 which allows disclosure of personal information if a compelling public interest in its disclosure clearly outweighs the privacy interests of those affected.

There is some case law pertaining to s. 23<sup>100</sup>, but none of these cases deal directly with the release of an SIU report. In determining whether there exists an overriding public interest in the disclosure of an SIU report, one must consider factors such as the history of the SIU; its role in investigating serious incidents relating to police conduct; the public location of these incidents; the fact that officers are public officials; the need for community confidence; and the understandable media interest in these investigations.

Whenever there are serious incidents concerning the police, the media has been very vigilant in its coverage. These media reports reflect the degree of public concern and interest in SIU related matters. The concern is not only over the incidents themselves, but also in the investigation of these incidents. The SIU's actions have been continuously scrutinized since its creation. One would have difficulty finding another area of State involvement which has generated as much compelling and consistent public interest as

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<sup>99</sup> s. 21(1)(f).

<sup>100</sup> See for example: *Ministry of Finance v. Higgins* (6 February 1998) Court File No. 451/97 (Ont. Div. Ct.).

incidents involving the SIU. The fact that the police are involved, the fact that the police are agents of the State and that the SIU only investigates police officers who have caused death or serious injury in the course of their duties create a strong argument for tipping the balance in favour of satisfying the public's need to be informed. Public understanding and appreciation of police action is also very much in the interests of the police officers involved.

One final avenue for the disclosure of an SIU report is s. 42(c). This section authorizes an institution to disclose personal information for the purpose for which it was obtained or compiled or for a consistent purpose. Under s. 43, where information has been collected directly from the person to whom it relates, a disclosure is consistent only if the person concerned would reasonably expect the disclosure. The Commissioner has indicated that, where personal information is collected indirectly, a disclosure would be consistent where it would be reasonably compatible with the purpose behind the collection of the information.<sup>101</sup>

In this context, one must examine the history of the SIU, its role in investigating serious incidents relating to police conduct and the media scrutiny that these investigations entail. The SIU's creation was premised on the belief that the Unit would be transparent in its investigations so that it could properly account to the public on the police conduct investigated. This is its essential purpose - public accountability of public officials.<sup>102</sup> From this perspective, it can be argued that the information is being gathered about a public event for the express purpose of assuring the public that no wrongdoing has occurred. It was in this light that all parties to the consultation saw the value to their respective

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<sup>101</sup> Privacy Investigation Report I95-008M.

<sup>102</sup> F.H. Cate *et al.*, "The Right to Privacy and the Public's Right to Know: The 'Central Purpose' of the Freedom of Information Act" (1994) 46 Admin. L.R. 41.

constituencies in the release of SIU reports where charges are not laid and that a judicious editing of names would be sufficient to quell any lingering concerns.

## **Recommendations**

### **A Feasible Framework for Change**

Although this process has been characterized as one of consensus-building, at its end I did not ask the participants to agree formally to any of the solutions discussed. Instead, the following recommendations are informed by my understanding of the dialogue and the parties' efforts to identify possible accommodations. In short, they are simply my estimate of the consensus that now exists. They must also be subject to the observation of Aboriginal representatives that this is but one step in an ongoing dialogue between nations. However, I am pleased to be able to provide my estimate of the present consensus. From the rancour of the positions expressed at the outset of this consultation, all parties have come a very long way to now visualizing an approach which can meet most, if not all, of their underlying interests. Even where the parties remain apart, it is my view that the differences are more a matter of detail than of fundamental principle. The following description of the extent of consensus, as I have gauged it, should provide the basis to producing discussions with government policy makers aimed at effecting swift and mutually acceptable reforms.

### **Resources**

Resources have been a longstanding problem for the SIU. Without adequate resources, no regulatory framework will function in an acceptable manner. The police regularly send

15 or more investigators to a homicide scene. Understandably, therefore, the police are discomforted when the SIU sends two or three investigators to review police shootings.

The fact that recommendations for more resources have been made time and time again is troublesome. Indeed, it caused me to discuss with the parties whether the SIU should be accorded its own statute and a reporting relationship to the Legislature. Somehow the budgetary voice of the SIU needs to be heard. SIU investigations are critical to the well-being of our communities. Government investment in the SIU should reflect this reality. The parties were unanimous in agreeing that current resources are entirely inadequate. But they also wanted to give the Government that established this consultation the opportunity to redress the situation without changing the reporting relationship.

Resource inadequacies, however, are seen to pervade all three of the consultation issues. Timely notice is irrelevant if the SIU takes hours to attend an incident or, once there, expects everyone to suspend their activities while two or three SIU investigators undertake what should be assigned to ten. Issues like segregation of involved officers become academic when SIU investigators cannot possibly interview involved officers within a few hours of an incident. Effective control of an incident scene requires ample numbers of trained personnel. Inadequate resourcing of the SIU undermines both police officer confidence and cooperation.

Currently, the SIU relies frequently on the OPP for forensic investigation assistance and the involved police service for the investigation of secondary and tertiary witnesses. There are also many occurrences where the SIU allows the involved police service to investigate the entire incident and the SIU oversees that investigation. There is nothing wrong with these latter decisions if they are made on policy grounds and having regard to all the circumstances. It is troublesome, however, if such decisions are made because of a shortage of resources.

**Recommendation 1:**

**The SIU should be resourced in a manner commensurate with its important mandate.**

**Enforceability**

A major criticism of the SOP is that it is unclear and difficult to enforce. It is not “a law”. The current SOP should be more detailed and enacted as an enforceable regulation. Enforceability is a key issue. If the regulation is to be enforced through the normal disciplinary procedures of the statute, the SIU must be assured complainant status and appropriate drafting of the regulation and the Code of Conduct is very important. The parties discussed other approaches which would have created other, but more divisive, forums (e.g. a provincial offences model). Ultimately, with the exception of a disagreement over the need for the power of immediate suspension of an officer without pay, a disciplinary approach was preferred, provided it was enforceable. This option permits chiefs of police to continue to play a central role in compliance by working with the SIU.

However, to facilitate an efficient working relationship between a chief of police and SIU investigators, a police service should designate an SIU liaison officer for each incident. This officer can be trained in SIU procedures to assist the Unit’s investigators in explaining those procedures to officers, in supervising compliance with the regulations and in coordinating the necessary cooperation of the involved officers. Consideration, however, must also be paid to the adequacy of the regulation making powers of the statute; to revising the Code of Conduct to make specific mention of SIU-related offences in the context of chief of police powers to discipline; and to ensuring complainant status of the SIU under the Act. The SIU will need to be resourced to pursue, when necessary, its interest as a complainant.

The parties discussed the need for police chiefs to have the power to immediately suspend officers without pay when they refuse to cooperate with an SIU investigation. Although police management and the community groups strongly favoured this approach, police associations were equally adamant that it was not necessary and out of tune with the regulatory history of policing in Ontario. It was pointed out that few direct orders of chiefs of police have been disobeyed. Under the conditions of immunity recommended in this report, police associations submitted that there would be fewer still. These representatives argued that the mere possibility of being discharged after a hearing will be more than enough incentive to cooperate. If this proves not to be the case, the issue can always be revisited. Obviously, there was no agreement on this issue of detail. But this fact should not detract from the broad consensus on enforceability that was achieved.

**Recommendation 2:**

**A detailed and clear SIU Standard Operating Procedure should be adopted as a lawful regulation. It shall explicitly provide that failure of a police officer to comply with any of its provisions is serious misconduct. The Code of Conduct should be amended accordingly. If the regulation's enforceability is to be through the normal disciplinary procedures at the direction of the chief of police, the SIU must be accorded the status of complainant.**

**Recommendation 3:**

**The regulation shall provide that, in respect of every incident, a police officer from the involved police service will be designated to liaise between the chief of police of that service and the SIU investigators to ensure full understanding of the investigatory processes and the prompt enforcement of the regulation when necessary.**



## **Notification and Control of the Incident Scene**

There was broad consensus that notification of the SIU must be forthwith and that the incident scene should be controlled by the involved service in the same manner as any crime scene. The current SOP does not specify how notification is to occur, nor does it specify with any precision the control of the incident scene. These procedures should be set out in the regulation with sufficient specificity to be capable of enforcement.

The problem in the area of notification has been delay. In several instances, this has been caused by uncertainty over the SIU's jurisdiction and by bureaucratic procedures which impaired timely notice. While there was some discussion about limiting the SIU's jurisdiction to deaths, no consensus evolved. Ultimately, it was accepted that the SIU should be resourced to meet its current role and, if possible, its mandate should be clarified.

There was broad agreement that the SIU should be notified immediately whenever its jurisdiction is reasonably suspected to have been engaged. 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. While this may involve a few unnecessary calls to the SIU, it will avoid a police service being in breach of its duty of timely notification. Each service, therefore, should put in place an appropriate administrative procedure for causing immediate notification by or through the first supervising officer in attendance. Notification can no longer involve a lawyer's interpretation as to the SIU's mandate. Who does what can be sorted out once representatives of the SIU are present. Failure to notify or notify in a timely manner will be a disciplinable offence on complaint by the SIU to a chief of police, and failure to put an appropriate notification procedure in place should also be subject to complaint by the SIU

to a police services board and, ultimately, to the Ontario Civilian Commission on Police Services.

Furthermore, the public must be able to notify the SIU of an incident. There have been instances where the SIU has been notified by the media before the responsible police service. In more isolated communities, there is a particular need for the public to be able to contact the SIU. Apparently, the SIU has a "1-800" number, but few seem familiar with this fact.

The issue of control of the incident scene is, in part, related to that of effective notice. There have been occasions when, by the time the SIU investigators arrived, civilian witnesses had been interviewed by the police and released. In several instances, involved police officers were taken away in one vehicle to a hospital, apparently at the direction of their lawyers or their police services out of concern for possible emotional trauma, but all without SIU knowledge or approval. Additional problems have involved permitting unauthorized persons behind police lines.

The SIU investigators are never going to be the first on the scene. Therefore, the securing of the incident scene must be given a high priority by the involved police service. Pending the arrival of the SIU, attending officers shall do all that is immediately necessary to preserve not only the integrity of the incident scene, but also the integrity of the investigation. The latter, it was acknowledged, should include segregating all involved officers from each other. 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 as practical. The regulations should also proscribe any discussion of the incident between involved officers until they are each interviewed by the SIU.

**Recommendation 4:**

**The regulation should provide that the SIU be notified immediately whenever its jurisdiction is reasonably suspected to be engaged.**

**Recommendation 5:**

**Public notification of the SIU is to be made readily accessible.**

**Recommendation 6:**

**The regulation should provide for securing of the incident scene in a detail consistent with usual police practices for serious incidents and be capable of enforcement.**

**Recommendation 7:**

**The regulation should make clear that the SIU has the lead investigatory role in gathering evidence and interviewing witnesses.**

**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.**

**Police Officer Cooperation**

A most difficult discussion concerned the SOP's subject/witness officer distinction. Community groups had not been consulted when this distinction was conceived in 1991. They, therefore, did not understand its purpose and felt the subject officer's right to silence was wrong and set a troubling example. Police associations had not been consulted either, but had lived with the distinction since the SIU's inception and had come to see the

concept as an expression of a police officer's *Charter* rights. The consultation confirmed that the distinction appears to be a practical concept premised on the principle against self-incrimination now entrenched in the *Charter*.

A suggestion was made that all officers be required to speak until there is reasonable suspicion that an officer being interviewed had committed a crime. In the latter event, that officer would be cautioned in accordance with the *Charter*. While this approach may reflect the usual investigative method, the nature of an SIU investigation is not typical because it usually focuses on one or more target officers. In effect, one cannot draw too fine a line between a subject officer as that term is currently conceived and "a suspect" who has a right to silence. Indeed, should the line be drawn, the initial compelled statements of a target officer would be involuntary within the meaning of the law of confessions in any event and hence inadmissible. The existing subject/witness officer distinction, therefore, seems to provide appropriate levels of legal certainty and administrative practicality.

Support for the approach also exists in the United States. In Cincinnati, for example, a target officer is not required to speak to the Homicide Unit's investigators pursuant to that officer's constitutional right against self-incrimination.

#### **Recommendation 9:**

**The current subject/witness officer distinction should be preserved. The regulation will define subject and witness officers in current terms and provide that the SIU's assessment of who is a subject and who is a witness officer shall govern in any given case. Designated subject officers will not be compelled to submit to an SIU interview. Officers designated by the SIU as witness officers will be so obligated.**

There was also common ground in the area of witness officer cooperation. All agreed that, ideally, witness officers should cooperate fully and immediately with the SIU. However, this consensus was subject to police concerns that: (i) the SIU may wrongly designate a

subject officer as a witness officer and seek to compel that officer to incriminate him or herself; and (ii) that an officer may be too upset or medically incapable to be interviewed by the SIU forthwith.

While a change in designation has happened only two or three times over 1,500 investigations, police officers were troubled by this possibility. Police associations were also concerned that an officer may be too upset to be fairly interviewed immediately. These are legitimate concerns, but it was also recognized that they must be balanced against both the interest of the State to have its public officials explain their conduct in a timely manner and the need for the SIU to conduct prompt and effective investigations.

Guided by the Supreme Court of Canada cases of *S.(R.J.)* and *Branch*, and the United States Supreme Court approach in *Garrity*, the parties saw the merits of a balanced solution to address the potential problem of a mistakenly designated witness officer while providing for accountability. This proposal requires that the Attorney General develop a Crown policy for all Crown counsel providing that statements which are obtained by the SIU in a compelled interview are involuntary statements. In light of this fact and the requirements of the *Charter*, the statement and any evidence that would not have been found but for the statement cannot be used to incriminate the maker of the statement in a subsequent criminal proceeding nor can it be used for the purpose of impeaching credibility. The immunity, however, should not include use in a prosecution concerning the intentional giving of a false statement.

There was also broad agreement that an officer was entitled to legal and police association representation at SIU interviews, provided such representation did not result in unwarranted delay.

**Recommendation 10:**

**The Attorney General should direct Crown counsel by means of a Crown policy that a police officer's statement obtained by the SIU in a compelled interview is an involuntary statement. In light of this fact and requirements of the *Charter*, the policy shall provide that neither the statement nor any evidence that would not have been found but for the statement will be used to incriminate the officer in any subsequent criminal proceeding. The policy should also recognize that the statement cannot be used for the purpose of impeaching credibility, but these immunities would not apply in any prosecution concerning the intentional giving of a false statement.**

**Recommendation 11:**

**The regulation should stipulate that an officer is entitled to representation by legal counsel and/or a police association, provided the availability of such advisors will not lead to an unwarranted delay.**

There was general acceptance that interviews should be conducted as soon as possible after the incident. There was also acceptance that emotional upset and medical incapacity should be dealt with in the regulations in accordance with reasonable conditions. At present, however, the parties remain apart on the details of those conditions.

Police associations sought a maximum delay of 48 hours before officers are obligated to submit to an interview in order to accommodate possible emotional upset and a greater period of time for those medically incapacitated. Some community groups would reluctantly accept a maximum delay of 24 hours to deal with possible upset, while others insisted that interviews occur forthwith. Community groups feared that, with a fixed time limit, all officers would delay their cooperation to the last moment. Police associations argued that most officers now provide statements forthwith and that this would not likely change especially with an assurance of statement and derivative evidence immunity.

Community groups agreed that some time, possibly a few hours, should be given if an officer was too upset to be interviewed forthwith, but worried that more time would defeat the very purpose of segregating officers. Some community representatives also relied on the fact that all authoritative investigative handbooks recommend questioning of witnesses as soon as possible. On the other hand, it was generally accepted that an officer with a demonstrated medical incapacity should be accommodated for whatever time required.

Surely, an enforceable administrative mechanism can be devised to ensure that most statements continue to be given forthwith, but providing for appropriate exceptions. The differences between the parties are not great.

Given the importance of an SIU investigation and the availability of the protections discussed, it was generally accepted that the failure to comply with an interview request should be treated as a serious act of misconduct. Again, while chiefs of police will be responsible for enforcing the regulation, the Director of the SIU will constitute an affected person and a "complainant" under the *Police Services Act* to ensure an adequate enforcement methodology, particularly because chiefs of police appear not to have a right of appeal.

**Recommendation 12:**

**The regulation should provide that interviews of witness officers are to be generally forthwith at the request of the SIU, but also allow for the possibility of delay where appropriate grounds exist. An unjustified failure to comply with an SIU interview request should be treated as a serious act of misconduct.**

There was discussion over SIU interview methodology. Should the interviews be oral or written, audio taped or videotaped or recorded by simple note taking? All parties agreed that there must be a predictable standard for SIU interviews. At present, the usual method

is an oral one recorded in writing. It was agreed that a copy of the interview should be given. The SIU, however, in this latter respect may want to impose reasonable conditions.

**Recommendation 13:**

**Regulations should provide for oral interviews to be recorded manually. A copy or transcript of the interview must be provided to the officer following the interview on appropriate conditions.**

The parties also discussed the issue of officer notebooks. Notebooks are intended to be a full account of an officer's activities and observations during a shift and, as a general matter, must be completed for the service before the officer concludes that shift. It was acknowledged by the parties to this process that witness officer notebooks should be completed as required and provided by a service to the SIU forthwith upon request, subject to the same procedures and immunities available in the compelled interview situation. Unjustified delay and incomplete entries should be treated as serious misconduct. In view of the principle against self-incrimination, subject officer notebooks should be completed for the police service, but not given to the SIU, on the understanding that the statements in the notebook and any evidence that would not have been found but for these statements cannot be used in connection with a criminal proceeding against the subject officer including for the purpose of impeaching credibility.

**Recommendation 14:**

**The regulation should confirm that witness officers must complete their notebooks in full as currently required and police services must provide such notebooks to the SIU forthwith upon request, but subject to the same procedures and Crown policy applicable to their oral statements. Subject officers shall also continue to be required to complete their notebooks in full and to provide them to their police services, but they shall not be provided to the SIU. Subject officers, by a Crown policy, will also be assured that their notebook accounts and any evidence that**



would not have been found but for their notebook accounts will not be used to incriminate the officers in any subsequent criminal proceeding. The policy should also recognize that the statement cannot be used for the purpose of impeaching credibility, but the immunity would not apply in any proceeding concerning the giving of a false statement.

The community perceives a general reluctance of police officers to explain their conduct, and a related failure by the chiefs of police to conduct rigorous reviews of SIU-related incidents. This perception has been destructive of community trust. Chiefs of police, however, protested that reviews have been conducted and that community groups have actually objected to parallel investigations. Police associations denied the reluctance and raised the concern that internal reviews can be troubling if criminal charges may arise from them. *Calder* is an example.

Ultimately, there was little objection to chiefs of police conducting purely and relatively immediate administrative inquiries subject to the SIU's lead role. In this latter respect, s. 13 of Reg. 926 of the *Police Services Act* dealing with use of force must be clarified to confirm that it does not give a chief or local police service an equal or greater authority to investigate than the SIU. In view of the fact that the SIU is undertaking the criminal investigation, an exclusively administrative or internal investigation should be guaranteed by an enforceable assurance to all involved officers that the statements given in that process and any evidence that would not have been found but for those statements will not be used against the officers in subsequent criminal proceedings.

A chief of police shall be required to report the results of this administrative inquiry to the police services board no later than 30 days after the release of the SIU's report or decision. In this way, full public accountability will be assured.

#### **Recommendation 15:**

**The regulation should require a chief of police to conduct an administrative inquiry forthwith into any incident involving the SIU, subject to the SIU's lead role in gathering evidence and interviewing witnesses. The chief of police shall make a report of all findings and actions taken and/or recommended to the police services board no later than 30 days following the issuance of the SIU report. The regulation will confirm that all involved officers must cooperate forthwith with this internal investigation subject to the existence of a Crown policy directing Crown counsel that a police officer's statement obtained in a compelled administrative or disciplinary interview is an involuntary statement. In light of this fact and the requirements of the *Charter*, the policy will provide that the statement and any evidence that would not have been found but for that statement will not be used to incriminate the officer in any subsequent criminal proceeding. The policy should also recognize the statement cannot be used for the purposes of impeaching credibility, but these immunities would not apply in any prosecution concerning the intentional giving of a false statement.**

#### **Other Issues**

There was broad agreement that the SIU Director's report should be made public in cases where no charges are laid. A public report seems central to providing the necessary accountability and community confidence. Indeed, the SIU currently releases an oral summary of its report to affected families and officers. Concerns about personal information can be accommodated by judicious editing of the written report prior to release.

A related issue is public communication during an investigation. All agreed that a chief of police should only state or confirm that the SIU is involved. Thereafter, the SIU is to be responsible for all public communications concerning the investigation. There was a

complaint about some SIU communications and contacts with the media. Police organizations accepted, however, that the SIU may have a responsibility to issue statements during an investigation to preserve the integrity of the investigation. Ultimately, a general consensus arose that all incident specific SIU media communications should be aimed at preserving the integrity of the investigation.

**Recommendation 16:**

**The written report of the SIU should be made public where no charges are laid. If need be, the *Police Services Act* should be amended to provide for its release notwithstanding the *Freedom of Information and Protection of Privacy Act*.**

**Recommendation 17:**

**Following the occurrence of an incident, a police service shall only advise the public that the SIU is involved. The SIU will be responsible for all public communications concerning the investigation. SIU public statements about an incident during an investigation will be aimed at preserving the integrity of the investigation.**

Also discussed was the need for: (i) more initial and ongoing training of SIU investigators; (ii) more cross-cultural education of personnel; and (iii) more cultural and racial diversity of investigators. The ongoing training of SIU investigators was particularly important to police groups. Interest was also expressed in independent peer review of investigatory practices and training programs. Community groups remain wary of the recruitment of former police officers by the Unit, but acknowledged that any attempt to increase its complement of civilian investigators will require a heavy commitment to training and independent review mechanisms.

The secondment of active police investigators to the SIU has been recommended by previous reports. Experienced investigators must be employed by the SIU and this makes persons with previous police service experience natural candidates. However, it has not

been possible to date to attract many police officers to permanent positions in the SIU prior to retirement. Secondments of two to five years would solve that problem. Secondments would also have the advantage of police officers returning back to their services and vouching for the organization's integrity and competence. Community groups, however, feared that eventual return to a police service might cause officers to worry about their careers while carrying out SIU investigations.

SIU investigations may not be as complex as other homicide investigations involving unknown persons and causes. For that reason, civilian investigators such as lawyers might perform at the desired level of excellence. Over the course of one or two years, a typical SIU investigator participates in many more serious investigations than the vast majority of police officers in Ontario, save for members of a homicide squad in a major metropolitan area or of the OPP.

A compromise was discussed involving the creation of mixed teams of permanent SIU investigators and seconded police, with permanent SIU investigators being numerically superior. The proposal would have provided for community participation in the selection of seconded officers and for that selection to promote greater cultural and racial diversity. No consensus, however, was achieved.

Cultural and racial diversity was an important issue discussed by the parties. Cross-cultural education is a particularly important concern for Aboriginal communities. With respect to the latter, the SIU must do more outreach and establish channels of communication between themselves and the Aboriginal communities appropriate to the latter's unique status in Canadian society. Dissatisfaction was expressed over the SIU's failure to communicate with Aboriginal communities in an appropriate manner and this has led to misunderstanding over the SIU's role and its independence from the police. Appropriate cross-cultural training should be undertaken in conjunction with those educational institutions in Ontario offering Aboriginal studies. Aboriginal leaders also made

clear that this limited consultation was only one step in what must become an ongoing dialogue between nations. In this dialogue, consideration must be given to the SIU's continuing role, if any, as Aboriginal communities move to a self-policing model.

**Recommendation 18:**

**Increased resources for the SIU should provide for more substantial initial and ongoing training of investigators including independent peer review of its investigatory practices.**

**Recommendation 19:**

**There should be cross-cultural education opportunities for SIU investigators and a commitment to recruit qualified investigators from more culturally and racially diverse backgrounds.**

**Recommendation 20:**

**The SIU should also establish channels for regular communication between itself and the Aboriginal communities of Ontario appropriate with the latter's unique status in Canadian society.**

All the parties agreed that the SIU, the police and affected communities should meet on a regular basis to discuss general SIU-related matters. It is clear that much can be achieved through regular meetings with key parties. The SIU should be resourced so that it can commit to an ongoing dialogue with affected parties.

**Recommendation 21:**

**The SIU, the police and community groups should meet on a regular basis to discuss general SIU-related matters. SIU resources should reflect this commitment.**

The Special Prosecutions Unit has experienced a reduction in both the number of lawyers and its status within the Ministry of the Attorney General. This has worried communities and was acknowledged by the parties to be a problem. Pay, responsibilities and conditions of employment can be structured to attract lawyers to these demanding jobs. For example, the Unit might be given the responsibility for prosecuting all conflict of interest or public accountability matters throughout government as well as SIU-related charges. It should be seen as a necessary posting for future promotions. If these changes are not forthcoming, several parties suggested that consideration be given to using barristers from the private sector as is apparently done elsewhere.

**Recommendation 22:**

**The Special Prosecution Unit should be much better resourced and its standing within the Ministry of the Attorney General restored.**

The parties were also in agreement that police officers must be trained in all SIU related duties so that they are aware of their roles and those of the SIU when investigations do take place. The recommendation that each service designate a liaison officer for an SIU investigation should assist. Many of the problems that have existed can be attributed to a lack of understanding. The liaison officer will be an expert in SIU procedures and he or she will assist the SIU in communicating with the officers and supervising their compliance with the regulation. Training on the SIU regulation should also be available at police colleges. The SIU can provide invaluable assistance in this regard.

**Recommendation 23:**

**All Ontario police officers should be provided with ongoing training concerning SIU procedures. There should be similar training at police colleges.**

The issue of providing greater security of tenure to the SIU Director was discussed. Tenure and salary are keys to attracting and maintaining the best candidate for this

important job. Also discussed was the suggestion that a Director-selection process could be subject to consultation with community and police representatives. Indeed, some suggested that a special advisory panel to the SIU along the lines of a police services board might be established or that the SIU Director report to the Legislature.

**Recommendation 24:**

**The Ministry of the Attorney General should ensure that the tenure and compensation of the Director of the SIU are commensurate with the responsibilities of this important office.**

The criminal investigation process is ill-designed to provide a compassionate explanation to those injured or who have lost loved ones. It was suggested, in response, that a voluntary forum might be made available to interested parties to pursue conciliatory discussions. Police and community representatives expressed interest in this concept in the hope that it might afford a more humane setting for dealing with these tragedies. Participation would be strictly voluntary and without prejudice. The forum could be administered by trained facilitators.

**Recommendation 25:**

**The Ministry of the Attorney General should consider charging the Dispute Resolution Centre with the responsibility of designing and providing specialized facilitation services to parties in SIU matters who may wish to pursue conciliatory discussions.**

## **Summary of Recommendations**

### **Recommendation 1:**

**The SIU should be resourced in a manner commensurate with its important mandate.**

### **Recommendation 2:**

**A detailed and clear SIU Standard Operating Procedure should be adopted as a lawful regulation. It shall explicitly provide that failure of a police officer to comply with any of its provisions is serious misconduct. The Code of Conduct should be amended accordingly. If the regulation's enforceability is to be through the normal disciplinary procedures at the direction of the chief of police, the SIU must be accorded the status of complainant.**

### **Recommendation 3:**

**The regulation shall provide that, in respect of every incident, a police officer from the involved police service will be designated to liaise between the chief of police of that service and the SIU investigators to ensure full understanding of the investigatory processes and the prompt enforcement of the regulation when necessary.**

### **Recommendation 4:**

**The regulation should provide that the SIU be notified immediately whenever its jurisdiction is reasonably suspected to be engaged.**

### **Recommendation 5:**

**Public notification of the SIU is to be made readily accessible.**



**Recommendation 6:**

**The regulation should provide for securing of the incident scene in a detail consistent with usual police practices for serious incidents and be capable of enforcement.**

**Recommendation 7:**

**The regulation should make clear that the SIU has the lead investigatory role in gathering evidence and interviewing witnesses.**

**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.**

**Recommendation 9:**

**The current subject/witness officer distinction should be preserved. The regulation will define subject and witness officers in current terms and provide that the SIU's assessment of who is a subject and who is a witness officer shall govern in any given case. Designated subject officers will not be compelled to submit to an SIU interview. Officers designated by the SIU as witness officers will be so obligated.**

**Recommendation 10:**

**The Attorney General should direct Crown counsel by means of a Crown policy that a police officer's statement obtained by the SIU in a compelled interview is an involuntary statement. In light of this fact and requirements of the *Charter*, the policy shall provide that neither the statement nor any evidence that would not have been found but for the statement will be used to incriminate the officer in any subsequent criminal proceeding. The policy should also recognize that the statement cannot be used for the purpose of impeaching credibility, but these**

**immunities would not apply in any prosecution concerning the intentional giving of a false statement.**

**Recommendation 11:**

**The regulation should stipulate that an officer is entitled to representation by legal counsel and/or a police association, provided the availability of such advisors will not lead to an unwarranted delay.**

**Recommendation 12:**

**The regulation should provide that interviews of witness officers are to be generally forthwith at the request of the SIU, but also allow for the possibility of delay where appropriate grounds exist. An unjustified failure to comply with an SIU interview request should be treated as a serious act of misconduct.**

**Recommendation 13:**

**Regulations should provide for oral interviews to be recorded manually. A copy or transcript of the interview must be provided to the officer following the interview on appropriate conditions.**

**Recommendation 14:**

**The regulation should confirm that witness officers must complete their notebooks in full as currently required and police services must provide such notebooks to the SIU forthwith upon request, but subject to the same procedures and Crown policy applicable to their oral statements. Subject officers shall also continue to be required to complete their notebooks in full and to provide them to their police services, but they shall not be provided to the SIU. Subject officers, by a Crown policy, will also be assured that their notebook accounts and any evidence that would not have been found but for their notebook accounts will not be used to incriminate the officers in any subsequent criminal proceeding. The policy should**

also recognize that the statement cannot be used for the purpose of impeaching credibility, but the immunity would not apply in any proceeding concerning the giving of a false statement.

**Recommendation 15:**

The regulation should require a chief of police to conduct an administrative inquiry forthwith into any incident involving the SIU, subject to the SIU's lead role in gathering evidence and interviewing witnesses. The chief of police shall make a report of all findings and actions taken and/or recommended to the police services board no later than 30 days following the issuance of the SIU report. The regulation will confirm that all involved officers must cooperate forthwith with this internal investigation subject to the existence of a Crown policy directing Crown counsel that a police officer's statement obtained in a compelled administrative or disciplinary interview is an involuntary statement. In light of this fact and the requirements of the *Charter*, the policy will provide that the statement and any evidence that would not have been found but for that statement will not be used to incriminate the officer in any subsequent criminal proceeding. The policy should also recognize the statement cannot be used for the purposes of impeaching credibility, but these immunities would not apply in any prosecution concerning the intentional giving of a false statement.

**Recommendation 16:**

The written report of the SIU should be made public where no charges are laid. If need be, the *Police Services Act* should be amended to provide for its release notwithstanding the *Freedom of Information and Protection of Privacy Act*.

**Recommendation 17:**

Following the occurrence of an incident, a police service shall only advise the public that the SIU is involved. The SIU will be responsible for all public communications

concerning the investigation. SIU public statements about an incident during an investigation will be aimed at preserving the integrity of the investigation.

**Recommendation 18:**

Increased resources for the SIU should provide for more substantial initial and ongoing training of investigators including independent peer review of its investigatory practices.

**Recommendation 19:**

There should be cross-cultural education opportunities for SIU investigators and a commitment to recruit qualified investigators from more culturally and racially diverse backgrounds.

**Recommendation 20:**

The SIU should also establish channels for regular communication between itself and the Aboriginal communities of Ontario appropriate with the latter's unique status in Canadian society.

**Recommendation 21:**

The SIU, the police and community groups should meet on a regular basis to discuss general SIU-related matters. SIU resources should reflect this commitment.

**Recommendation 22:**

The Special Prosecution Unit should be much better resourced and its standing within the Ministry of the Attorney General restored.

**Recommendation 23:**

All Ontario police officers should be provided with ongoing training concerning SIU procedures. There should be similar training at police colleges.

**Recommendation 24:**

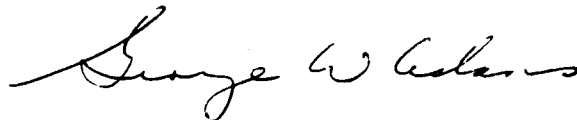
The Ministry of the Attorney General should ensure that the tenure and compensation of the Director of the SIU are commensurate with the responsibilities of this important office.

**Recommendation 25:**

The Ministry of the Attorney General should consider charging the Dispute Resolution Centre with the responsibility of designing and providing specialized facilitation services to parties in SIU matters who may wish to pursue conciliatory discussions.

## **Concluding Comment**

The SIU is a bulwark of democracy in Ontario. Hopefully, the important consensus building efforts of all parties in this process to understand each other's interests and reconcile differences will provide the needed foundation for meaningful and long overdue changes. To everyone, my sincere thanks.

A handwritten signature in cursive script, reading "George W. Adams".

Hon. George W. Adams, Q.C.

Dated at Toronto, this 14th day of May, 1998

## **Appendix I**

**News Release of Appointment  
Letter of Invitation to the Parties  
Interim Report - 23 December 1997**

# News Release Communiqué



**Ministry of the Attorney General**  
**Ministère du Procureur général**

September 23, 1997

## **Attorney General Appoints Mediator To Improve Special Investigations Unit/Police Relationship**

**TORONTO**--Attorney General Charles Harnick announced today the appointment of the Honourable George W. Adams, Q.C., a former superior court judge, to look into ways to improve the relationship between the Special Investigations Unit (SIU) and the police.

The SIU is an agency of the Ministry of the Attorney General. It is responsible for investigating police action that has resulted in serious injury or death. Concerns about both the difficulties encountered by the SIU during its investigations and the lack of clear procedures regarding the need for police officers to cooperate with the agency must be addressed.

"The police play an important, difficult, and often dangerous role as protectors in our society," said Mr. Harnick. "As well, the Special Investigations Unit has an equally difficult job to investigate police use of force. Each is accountable to the public they serve, and their actions have a direct impact on the public's faith and confidence in the justice system."

Mr. Adams, a recognized expert in mediation, will seek to open the lines of communication between members of the public, community groups, the police, and the SIU and will proceed with further discussions if the potential for an agreement exists.

"George Adams will listen to what people have to say. With his assistance, I hope that all involved in this matter will want to work together and develop solutions which address the issues," Mr. Harnick said.

Mr. Adams has devoted much of his law career to mediation—as an arbitrator, lawyer, teacher, author, and former judge. He is known for designing dispute resolution systems including those which are now a part of Ontario's no-fault motor vehicle insurance legislation. He will try to discuss and develop solutions with police chiefs, police associations, and community representatives that could maximize the effectiveness of SIU investigations on behalf of the public while protecting the rights of the police officers involved.

"We need the support of both the police and the community so that the Special Investigations Unit can conduct fair and effective investigations," said Mr. Harnick. "This process opens up to all parties a rare opportunity to participate and provide input into how we can make that happen."

-30-

Contact: Barry Wilson  
Minister's Office  
(416) 326-4443

Brendan Crawley  
Communications Branch  
(416) 326-2210

*Ce document est aussi disponible en français.*



**The Honourable George W. Adams, Q.C.**

52 Alcorn Avenue, Toronto Ontario M4V 1E4 (416) 515-2797 Fax. (416) 515-7862

September 23, 1997

I have been asked by the Attorney General and the Solicitor General to undertake a consultation with police officers and their representatives, with members of community groups, with representatives of police services, and with members of the public who are interested in policing issues in Ontario. The purpose of the consultation would be to identify ways in which the work of the Special Investigations Unit might be made more effective.

There have been a number of high profile incidents that have occurred in recent months in which issues have arisen surrounding the notification of the SIU, access to the incident scene, and the availability of witnesses (both police and civilian) to SIU investigators. The government would like me to discuss the operational and procedural steps that take place from the time that the SIU mandate is activated. My task would be to explore whether there are areas of consensus among interested groups and individuals which would enhance the professional relationships involved, and improve the quality and certainty of SIU investigations.

I am advised that the role or expectations of those police officers who are often described as subject officers will remain as presently outlined in the SIU operating procedures. I am advised as well that the SIU will continue to report to the Attorney General under its current mandate. These matters will not be, therefore, the subject of consultation.

In order to enable you to consider this consultation proposal and your interest in meeting with me, I propose to begin at the end of October or in early November. Because the issues I have been asked to review are fairly narrow and of a practical nature, I expect that I will be able to draw conclusions about the areas and degrees of consensus during November. I expect to conclude this assignment before Christmas.

I would be very interested in meeting with you to discuss these matters. A member of my staff will be in touch with you shortly. In the meantime if you would like any more information, you may telephone Mark Leach at (416) 326-2051.

I look forward to our discussions.

Yours very truly,

Hon. George W. Adams, Q.C.

**The Honourable George W. Adams, Q.C.**

2 St. Clair Avenue East, Suite 301, Toronto Ontario M4T 2T5 (416) 515-2797 Fax. (416) 515-7862

**Report on Special Investigations Unit Consultation Process  
December 23, 1997**

**Introduction**

I was appointed by the Attorney General and the Solicitor General on September 23, 1997 to consult community and police organizations on ways to improve the relationship between the Special Investigations Unit (SIU) and the police in the areas of (i) timely notification of the SIU; (ii) control of the incident scene; and (iii) the availability of witness police officers to SIU investigators. The ministers requested that I explore the potential for consensus on these issues among interested parties. With this purpose in mind, I wrote to many organizations and individuals known to be interested or to have expertise in these issues and conducted meetings from late October to the end of November. I was assisted by Mark Leach of the Ministry of the Attorney General, Jeff Andrew of Cavalluzzo, Hayes, Shilton, McIntyre and Cornish and John Lee, a former law clerk with the Ontario Court of Justice (General Division).

I wish to thank everyone I met for the generous commitment of their time and for their helpful views. A list of those with whom I met is attached.

The meetings revealed the importance of these issues to our communities and police organizations. They also demonstrated how difficult, complex and emotionally charged this area of human interaction has been over the years. My review of newspaper articles, inquest recommendations, commission and consultation reports, the literature on civilian oversight and police use of force, and the SIU's legislative history has served to underline the concerns raised in these discussions and explain the unsettled nature of related public policy.

These discussions indicated to me that there exists widespread consensus that the current situation can and must be improved. Indeed, many of those to whom I spoke have been and continue to be very active in promoting a thoughtful examination of the way police officers and their organizations relate to SIU investigations in order to achieve greater community confidence. However, the discussions also revealed that the consultation process could not proceed without dialogue on the responsibilities and interests of all police officers involved in SIU-mandated incidents and not just witness officers. I therefore advised the ministers of my concerns and by letter dated November 19, 1997 I reported to community and police organizations that the consultation had been broadened to include the topic of subject officers.

With the benefit of the parties' earlier views on process, I am now writing to propose how I would like to proceed.

### **The Process**

Almost everyone felt comfortable meeting with me individually and accepted that such informal discussions had the best chance of promoting both rational dialogue and timely consensus on these emotional issues. While there is a pressing need to build other forums to promote greater understanding between communities and police organizations, I believe everyone appreciated that improvements in the areas of the consultation are needed as soon as possible. Indeed, most representatives expressed the view that early action was possible and desirable without the need for more elaborate and obviously more delicate facilitative processes. In this respect, an end of April deadline was not seen as unrealistic. Accordingly, I propose to continue this consultation process as a series of individual informal discussions aided by a deadline which I consider practical and necessary if timely improvements are to be achieved. The ministers have agreed to extend the process in this manner.

Nevertheless, we need to encourage the ongoing efforts of many of the parties in facing the challenges of race relations through longer term democratic dialogue in order to create stronger communities. This consultation process cannot be a substitute for those important initiatives.

### **The Location**

In the first phase of discussions I went to interested parties and was graciously received. In the next round of meetings our discussions should strive for an active problem-solving focus, a focus I believe can be best supported by an appropriately equipped conference room setting. To that end, I would like to invite you to my offices located at:

2 St. Clair Avenue East  
Suite 301  
Toronto, Ontario  
M4T 2T5  
Tel: (416) 515-2797  
Fax: (416) 515-7862

### **Content**

While some individuals and organizations have provided me with written briefs, I have not requested formal submissions and I do not propose to now. While I would, of course, be pleased to accept this form of input, I believe informal problem-solving discussions conducted on an individual basis will be more manageable for most of the parties and more helpful to me.

To repeat, the issues to be discussed will be:

- (i) timely notification of the SIU;
- (ii) effective control of the incident scene; and
- (iii) police officer relationships with SIU investigators

I propose to conduct all individual discussions in the following manner:

- (i) identify key concerns and interests;
- (ii) identify objective criteria to evaluate possible solutions; and
- (iii) identify as many options as possible that might merit consideration.

### **When**

I propose to meet with the community organizations on **January 20, 22, 23 and February 2, 1998**; with police organizations on **February 18, 19, 20 and 25, 1998**; and with the SIU on **March 2, 1998**. While I do not consider the SIU "a party" to the consultation, I have benefited from its experience and hope to continue to do so. I also intend to visit Thunder Bay and Kenora on **February 26 and 27, 1998** to consult with interested parties in those communities.

Subject to the progress made in these rounds of consultation, I would like to again meet in Toronto with community groups on **March 11, 12 and 24, 1998** and with police officer organizations on **March 26, 27 and 30, 1998**.

### **Deadline**

I wish to provide advice to the Attorney General and Solicitor General by **April 30, 1998** in order to provide sufficient time for the Government's consideration.

Those assisting me will be organizing these meetings as soon as possible. I look forward to your continued cooperation and assistance.

Do not hesitate to contact me at the above address if you have any questions or comments. Alternatively you may contact Mark Leach at (416) 326-2051.

Dated at Toronto this 23rd day of December, 1997.

*George W. Adams*

Hon. George W. Adams, Q.C.

## **Appendix II**

### **Individuals and Organizations Consulted**

## **Meetings in Cincinnati**

Sergeant McKinley E. Brown, Homicide Unit - Cincinnati Police  
Sergeant Anthony Carter, Integrity Management Section - IIU - Cincinnati Police  
Cincinnati Police  
Sergeant Daniel Gerard, Integrity Management Section - IIU - Cincinnati Police  
Mark Gissiner, International Association of Civilian Oversight of Law Enforcement  
Captain Gary L. Glazier, Integrity Management Section - IIU - Cincinnati Police  
International Association of Civilian Oversight of Law Enforcement  
Ernest F. McAdams, Jr., Esq., Chief Investigator, Office of Municipal Investigation  
Lieutenant Clarence Mullis, Homicide Unit Commander - Cincinnati Police  
Office of Municipal Investigation  
Lieutenant Larry J. Powell, Integrity Management Section - IIU - Cincinnati Police  
Sergeant Ken Wells, Integrity Management Section - IIU - Cincinnati Police

## **Meetings in Kenora**

Grand Chief Francis Cavanagh, Grand Council, Treaty 3  
Chief Bill Fobister, Grassy Narrows First Nation  
The Hon. Judge Don Fraser, Ontario Court (Provincial Division)  
David Gibson, Barrister & Solicitor  
Grand Council, Treaty 3  
Rhonda Kelly, Grand Council, Treaty 3  
Kenora OPP Detachment  
Kenora Police Association  
Kenora Police Services Board  
Peter Kirby, Barrister & Solicitor  
The Hon. Judge Judyth Little, Ontario Court (Provincial Division)  
Sonny MacGinnes, Grand Council, Treaty 3  
Staff Sgt. Judd Meeks, Kenora, Ontario Provincial Police  
Inspector Olinych, Kenora, Ontario Provincial Police  
Deputy Chief Bruce Ponton, Kenora Police  
Chris Ratchford, Kenora Police Association  
Cheryl Red Sky, Native Court Worker  
Inspector Brian Rupert, Kenora, Ontario Provincial Police  
Lorne Silver  
Chuck Tyrell, Chair, Kenora, Police Services Board

## **Meetings in Thunder Bay**

Sandra Bair, Nishnawbe Aski Nation Legal Services  
Laura Calm Wind, Cat Lake First Nation  
Cat Lake First Nation

Joy Fedorick, Kashadaying Centre  
Grand Chief Charles Fox, Nishnawbe Aski Nation - Treaty 9  
John Fox  
Deputy Chief Bob Herman, Thunder Bay Police Services  
Rosanna Hudson, Native Friendship Centre  
Leo Kashinen  
Kinn-Aweya Legal Clinic  
Anne Lesage, Native Friendship Centre  
Les Louttit, Nishnawbe Aski Nation  
Jim Morrow, Thunder Bay Police Association  
Nishnawbe Aski Nation - Treaty 9  
Nishnawbe Aski Nation Legal Services  
Beth Ponka, Kinn-Aweya Legal Clinic  
Brenda Small, Confederation College  
Thunder Bay Police Association  
Thunder Bay Police Services  
Kelly Walsh  
Chief Wilfred Wesley, Cat Lake First Nation

### **Meetings in Toronto**

Aboriginal Legal Services of Toronto  
Bob Adair, Special Investigations Unit  
Enzo Addressa, North York Committee on Community Rights and Ethnic Relations  
Brian Adkin, Ontario Provincial Police Association  
African Canadian Legal Clinic  
David Baker, African Canadian Legal Clinic  
Bob Baltin, Peel Police Association  
Bill Baxter, Police Association of Ontario  
Rusty Beauchesne, Ontario Association of Chiefs of Police  
Harry Black, Barrister & Solicitor  
Black Action Defence Committee  
David Boothby, Chief of Police, Toronto Police Services  
Alan Borovoy, General Counsel, Canadian Civil Liberties Association  
Sandy Brohman, Peel Police Association  
Craig Brommell, Toronto Police Association  
Cindy Buckingham, Urban Alliance on Race Relations  
Dr. James Cairns, Deputy Chief Coroner  
Canadian Association of Black Lawyers  
Canadian Civil Liberties Association  
Staff Inspector Ken Cenzura, Ontario Senior Officers Association  
Keith Chen, Metropolitan Toronto Chinese Community Policing Liaison Committee  
Barry Chercover, Barrister & Solicitor

Ken Christopherson, Superintendent Commander, Professional Standards, Ontario  
Provincial Police  
Rocky Cleveland, Toronto Police Services  
Gary Clewley, Barrister & Solicitor  
Murray Chitra, Chair, Ontario Civilian Commission on Police Services  
Michael Code, Barrister & Solicitor  
Paul Copeland, Barrister & Solicitor  
Crown Law Office - Criminal, Special Prosecutions Unit  
Sheila Cuthbertson, Ontario Civilian Commission on Police Services  
Lynn Dobson, Peel Police Association  
Jim Drennan, Ontario Provincial Police Association  
Bruce Durno, Barrister & Solicitor  
Susan Eng, Barrister & Solicitor  
Julian Falconer, Barrister & Solicitor  
Brian Fazackerley, Ontario Association of Chiefs of Police  
Norm Gardner, Toronto Police Services Board  
Sheryl Gaspar, Urban Alliance on Race Relations  
Aimee Gauthier, Crown Law Officer - Criminal, Special Prosecutions Unit  
Rick Gauthier, Toronto Police Services  
Avvy Go, Metro Toronto Chinese and Southeast Asian Legal Clinic  
Richard Gosling, North York Committee on Community Rights and Ethnic Relations  
Dave Griffen, Police Association of Ontario  
James Harding, Executive Officer, Special Investigations Unit  
Charles Harnick, Attorney General  
Ed Hoey, Ontario Senior Officers Association  
Jim Hunt, Urban Alliance on Race Relations  
Deputy Chief Hunter, Toronto Police Services  
Jamaican Canadian Association  
Gareth Jones, Investigator, Special Investigations Unit  
Andromache Karakatsanis, Deputy Attorney General  
Bob Kates, Urban Alliance on Race Relations  
Robert Kellerman, Barrister & Solicitor  
John Kousik, Ontario Association of Chiefs of Police  
Law Union of Ontario  
Dudley Laws, Black Action Defence Committee  
Howard Liebovich, Crown Law Office - Criminal, Special Prosecutions Unit  
Andre Marin, Director, Special Investigations Unit  
Joe Martino, Articling Student, Special Investigations Unit  
Winston Mathis, Barrister & Solicitor  
Steve McCammon, Canadian Civil Liberties Association  
Metro Police Chief's Community Policing Liaison Committee  
Metro Toronto Chinese and Southeast Asian Legal Clinic  
Metropolitan Toronto Chinese Community Policing Liaison Committee  
Metropolitan Toronto Police Services Board  
Paul Milborne, Urban Alliance on Race Relations



Timothy Millard, Deputy Solicitor General  
Howard Morton, Barrister & Solicitor  
Joanne Mulcahy, Barrister & Solicitor  
Kim Murray, Aboriginal Legal Services of Toronto  
North York Committee on Community Rights and Ethnic Relations  
Office of the Chief Coroner  
Al Olsen, Toronto Police Association  
Al O'Mara, Chief Counsel to the Chief Coroner  
Ontario Association of Chiefs of Police  
Ontario Provincial Police  
Ontario Provincial Police Association  
Ontario Senior Officers Association  
Margaret Parsons, African Canadian Legal Clinic  
Stephanie Payne, Jamaican Canadian Association  
Peel Police Association  
Judith Pfeifer, Toronto Police Services Board  
Police Association of Ontario  
Dr. Bonita Porter, Deputy Chief Coroner  
Maureen Prinsloo, Toronto Police Services Board  
Graham Reynolds, General Counsel, Department of Justice  
Charles C. Roach, Barrister & Solicitor  
Peter Rosenthal, Barrister & Solicitor  
Clayton Ruby, Barrister & Solicitor  
Robert Runciman, Solicitor General  
Bart Sackrile, North York Committee on Community Rights and Ethnic Relations  
Ian D. Scott, Barrister & Solicitor  
Mike Sheard, Ontario Provincial Police  
Antoni Shelton, Urban Alliance on Race Relations  
Bob Slack, Special Investigations Unit  
Herman Stewart, Jamaican Canadian Association  
Superintendent Marty Swadron, Ontario Senior Officers Association  
Inspector Roy Teeft, Ontario Senior Officers Association  
Mike Temple, Barrister & Solicitor  
Sandy Thomas, Barrister & Solicitor  
Ted Thornley, Police Association of Ontario  
Toronto Police Association  
Toronto Police Service  
Toronto Police Service - Chief's Advisory Council  
Jay Tseng, Metropolitan Toronto Chinese Community Policing Liaison Committee  
Urban Alliance on Race Relations  
Laurie Vechter, Ontario Association of Chiefs of Police  
Mark Wainberg, Barrister & Solicitor  
Detective Sergeant Tony War, Toronto Police Services  
Inspector Bill Watts, Ontario Senior Officers Association  
Jerry Wiley, Toronto Police Services

Sam Wilkes, North York Committee on Community Rights and Ethnic Relations  
Jason Wong, Metropolitan Toronto Chinese Community Policing Liaison Committee  
Lily Wong, Metropolitan Toronto Chinese Community Policing Liaison Committee  
Michelle Wright, African Canadian Legal Clinic  
Dr. James Young, Chief Coroner

## **Appendix III**

***Police Services Act, R.S.O. 1990, c. P. 15, Part VII***

## ***Police Services Act, R.S.O. 1990, c. P.15, Part VII***

### **Section 113**

- (1) There shall be a special investigations unit of the Ministry of the Solicitor General.
- (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 the *Public Service Act*.
- (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.
- (4) The director and investigators are peace officers.
- (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.
- (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.
- (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.
- (8) The director shall report the results of investigations to the Attorney General.
- (9) Members of police forces shall co-operate fully with the members of the unit in the conduct of investigations.

## **Appendix IV**

### **Special Investigations Unit Standard Operating Procedure**

# **Special Investigations Unit**

## **Standard Operating Procedures**

1. These statements and directions shall be read and interpreted in the light of the statutory mandate of the Unit to investigate and the obligation of members of police forces to co-operate fully with the members of the Unit in the conduct of investigations.
2. Due recognition will be given by the Unit to the obligation of police forces to prevent and control crime and to apprehend criminals and bring them to justice. In its investigations, the Unit will interfere as little as possible with that obligation. However, the Unit may have to deviate from these procedures from time to time to fulfil its mandate and will make every reasonable effort to notify the concerned police force when this occurs.

### **APPLICATION OF S. 113(5) AND REPORTING BY POLICE FORCES**

3. All deaths that may have resulted directly from the action of one or more police officers, deaths that occur in the course of making an arrest, deaths that occur in the course of a pursuit and deaths that occur while the deceased is in police custody or at a hospital following apprehension or custody by police shall be reported immediately to the SIU, through the communication channels indicated from time to time.
4. All serious injuries resulting from any of the circumstances described above shall similarly be reported. "Serious injuries" shall include those that are likely to interfere with the health or comfort of the victim and are more than merely transient or trifling in nature and will include serious injury resulting from sexual assault. "Serious injury" shall initially be presumed when the victim is admitted to hospital, suffers a fracture to a limb, rib or vertebrae or to the skull, suffers burns to a major portion of the body or loses any portion of the body or suffers loss of vision or hearing, or alleges sexual assault. Where a prolonged delay is likely before the seriousness of the injury can be assessed, the Unit should be notified so that it can monitor the situation and decide on the extent of its involvement.
5. Police officers shall be considered to be those engaged in the execution or purported execution of their duties. The Unit will not normally investigate incidents involving off-duty police officers acting in the course of their private lives. Exceptions may be made and shall be made when police equipment or property is involved or the officer identifies himself as such in the course of the occurrence.

## INVESTIGATIONS

6.
  - (a) The Unit anticipates the establishment of its own forensic identification unit in due course. Until that has been accomplished and in circumstances when the SIU is unable to supply the necessary service, the SIU may sometimes request a non involved force, which will frequently be the OPP, to collect and preserve physical evidence. When extra costs are incurred by a police force as a result of the operation of this paragraph requests for reimbursement shall be submitted to the Director of the SIU for consideration and recommendation to the Ministry.
  - (b) In every case reported to the SIU, the concerned police force shall protect and preserve the scene of the occurrence until otherwise advised by the SIU.
    - (i) When potential hazard to the public exists or deteriorating weather makes it advisable for the responsible officer at the scene to order the removal of vehicles or other obstructions to traffic or when evidence at the scene is perishable, as much evidence as possible shall first be secured by photographs, measurements and/or video recordings.
7. When investigations being conducted by a police force and by the SIU arise from the same occurrence, each shall provide the other with a complete account of evidence seized, articles and samples submitted for analysis and copies of reports from CFS or other experts to whom submissions have been made for analysis or examination. Exceptions may be made by the Director when in his opinion such disclosure would jeopardise either investigation.
8. When investigations undertaken by the Unit parallel or overlap investigations being conducted by a concerned police force, priorities with respect to witness interviews and the collection or inspection of physical evidence may sometimes have to be established. In such cases the investigations being conducted by the Unit shall have priority, subject to the following:
  - a) When the Unit is investigating a non-fatal injury and the police force is investigating a homicide or when no death is involved in either investigation or when a delay in the arrival of SIU personnel would prejudice the investigation by the police force, the police investigation may be given priority in the discretion of the Director if so requested by the Chief of Police or the Commissioner of the OPP.
  - b) When both the police force and the Unit are investigating different deaths stemming from the same incident, each team shall have priority in accordance with the importance of a proposed witness to their respective inquiries as determined by the Director after consultation with the Chief of Police. Upon completion of each interview the witness shall be made available to the other team.

## **STATEMENTS**

9. As required by the statutory duty to co-operate, the Chief of Police or his or her deputy shall supply copies of all relevant statements and duty reports made by police officers except those of subject officers who have withheld consent. A "subject officer" shall be one whose conduct appears to have caused the death or injury being investigated and who may be charged with a criminal offence as a result. "Duty reports" include all accounts of matters occurring during the time on duty of a police officer and include note book entries.
10. As required by law, the Unit will respect the Charter and Common Law rights of all police officers, including the right of a subject officer to remain silent and the right to counsel. The preference of an officer for a particular counsel may not be permitted to delay an investigation unduly.
11. The Unit will expect and require officers who are in a position to provide information about an occurrence being investigated, other than subject officers, to make themselves available at reasonable times for interviews by Unit investigators. So far as possible officers will be interviewed during a regularly scheduled shift.

## **COMMUNICATION**

12. The Director of the SIU will provide status reports on the matters being investigated to the Attorney General and the Solicitor General at frequent intervals and shall provide each concerned Chief of Police with status reports not less frequently than monthly.
13. The Director of the SIU shall issue public reports on investigations from time to time as they progress, provided that in his opinion any such report would not prejudice the Unit's investigation, the rights of any suspect or the viability of any future criminal charge that may be laid. Beyond an initial statement that the Unit has become involved, a concerned police force shall not publicly report on an investigation in progress by the Unit.
14. When the Director of the SIU has caused Informations to be laid against police officers, they shall be referred to the Crown Attorney for prosecution. The assignment of prosecuting counsel will remain the responsibility of the Attorney General or his designate. Should an investigation disclose that no criminal offence appears to have been committed but that a Highway Traffic Act infraction may have occurred, the Director may cause an information so alleging to be laid.
15. The reports required by s. 113(8) to be made to the Attorney General will be made after decisions whether or not to lay Informations have been made by the Director.



## **INQUESTS**

16. Where feasible, or at the request of the Chief Coroner, the SIU is willing to prepare the coroner's brief and assist the Crown Attorney at an inquest resulting from an incident which SIU has investigated in order to avoid duplicate investigations; however, in order to meet the statutory provisions of the Coroner's Act, a police officer shall be assigned as the co-ordinator of the coroner's investigation.

April 14, 1992

## **Appendix V**

### **SIU Statistics and Resources**



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SPECIAL INVESTIGATIONS UNIT • UNITÉ DES ENQUÊTES SPÉCIALES

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**Number of Occurrences Reported to the SIU Annually**

Dates	Total
1990*-1991	96
1992	164
1993	201
1994	232
1995	176
1996	160
1997	150

**Types of Occurrences Investigated by the SIU Annually**

Types of Occurrences	1990* - 1991	1992	1993	1994	1995	1996	1997
Firearm Deaths	7	8	2	3	2	7	8
Firearm Injuries	15	12	13	9	18	9	12
Custody Deaths	6	14	14	11	20	27	11
Custody Injuries	10	14	73	99	68	43	48
Vehicle Deaths	6	5	11	12	6	7	8
Vehicle Injuries	29	13	73	89	52	59	54
Sexual Assaults	-	4	15	9	10	8	9

\* The Unit began operations in September 1990  
Compiled by SIU: January 1, 1998

*Efficient Investigations ~ Effective Oversight*

*Enquêtes efficaces pour une surveillance efficace*

## STATISTICAL OVERVIEW

**-45 cases were canvassed**

**-as agreed, these consist of 1997 and 1998 (to date) incidents involving all fatalities and shooting incidents**

### INCIDENT NOTIFICATION

**BASE: 44 CASES**

Overall average time between occurrence and Unit notification:	358.91 minutes
Metro (and, in 1998, Toronto) (13 cases):	249.15 minutes
Other (not including Metro) (31 cases):	404.94 minutes
Ottawa-Carleton (6 cases):	84 minutes

### SIU RESPONSE TIME

**BASE: 26 CASES**

Overall average time between time of notification and SIU arrival at the scene:	321.65 minutes
Metro (and, in 1998, Toronto) (9 cases):	93 minutes
Other (not including Metro) (17 cases):	442.71 minutes
Ottawa-Carleton (5 cases):	367.6 minutes

### DELAY IN INTERVIEWING WITNESS OFFICERS

**BASE: 8 cases with total of 29 witness officers**

Overall average time between occurrence and witness officer interviews:	8.27 days
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Metro (and, in 1998, Toronto)

**-6 out of 14 ( 42.9%) Metro cases canvassed revealed major problems in this area**

**--of these 6 cases, there was an average delay of 6.3 days with respect to 24 witness officers**

## 1997-98 SIU Budget

Salaries and Wages	1 600 000
Benefits	225 700
Other Operating Expenditures	391 000
<b>TOTAL</b>	<b>\$2 224 000</b>

In fiscal 1997-98, the SIU applied and received approval to overspend by \$214 000 for costs associated with the hiring of ten additional "as needed" investigators.

### SIU Staffing

#### Office of the Director

- 1 Director
- 1 Communications Advisor
- 1 Articling Student

#### Investigative Services<sup>103</sup>

- 1 Executive Officer
- 2 Investigative Supervisors (shared position, 3 days per week)
- 2 Co-op College Students
- 3 Full-time Investigators
- 18 "As Needed" Investigators
- 1 Full-time Forensic Identification Investigator
- 3 "As Needed" Forensic Identification Investigators

#### Administrative Services

- 1 Administrative Manager
- 1 Part-time Systems Administrator (1 day per week)
- 2 Administrative Secretaries
- 1 Brief Coordinator/Filing Clerk
- 1 Receptionist

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<sup>103</sup>Of the 18 "as needed" investigators, 3 have no policing background. The remaining 15 have police experience such as general criminal investigations, homicide investigations, major crime investigations and M.V.A. reconstruction. Two "as needed" investigators hold law degrees. All 4 forensic identification investigators have previous police experience.

### Training

Full time investigative staff with no police experience are sent to the Ontario Police College in Aylmer where they complete the same specialized courses as police criminal investigators:

- basic criminal investigation course
- major crime course
- case management course

Full time and "as needed" staff are given opportunities to attend courses throughout the year. Typical courses are:

- forensic training seminars
- sexual assault training
- interviewing/interrogation techniques

### Location of Investigators

1	Thunder Bay (Manitouwadge)
1	Sault Ste. Marie
1	Sarnia
1	Petrolia
2	Waterloo
1	Brantford
1	Barrie
1	Cambridge
1	Hamilton
1	Trenton
2	Ottawa
2	Oshawa
2	Toronto
1	Chatsworth (Owen Sound)

## **Appendix VI**

### **Description of Office of Municipal Investigation**

### **Manual of Rules and Regulations and Disciplinary Process for the Cincinnati Police Division, Rule 2.26**

**OFFICE OF MUNICIPAL INVESTIGATION**  
**City Hall, Room 134**  
**801 Plum Street**  
**Cincinnati, Ohio 45202**

The Office of Municipal Investigation (OMI) for the City of Cincinnati was created in 1979 to investigate all allegations of serious misconduct by all employees of the City of Cincinnati. It was proposed by a specially created task force as one of many elements to improve relations between the Cincinnati Police Division and the African-American community after a series of incidents that created significant racial tensions in the city. In 1979, the issue was very controversial and, at times, OMI is still seen as an adversary to the police division and its police union. The selection of a new Safety Director and a new Chief of Police has led to improvements in relations between OMI and the Cincinnati Police Division.

OMI was formed by legislative ordinance of the Cincinnati City Council.

Citizen complaints against police officers may be filed at OMI or with the police division. OMI reviews complaints and determines whether they constitute an allegation of serious misconduct. By ordinance, OMI also immediately commences an investigation upon notification of shots fired by police officers.

In reference to shots fired, OMI is immediately notified and responds to the scene. Three (3) parallel investigations are then conducted. The police division's Violent Crimes Squad conducts a criminal investigation, and OMI and the police division's Internal Investigations section conduct administrative investigations. For one period, from January 1 to October 31, 1993, OMI opened fifteen shots fired investigations.

Due to lack of staff, many of the less serious complaints (verbal abuse, unlawful search and seizure, etc.) are referred to the Police Division for investigation. The Police Division then forwards the report and finding to OMI for review. OMI may then conduct its own investigation, accept the Police Division finding, or send the case back for additional investigation.

Of the complaints investigated by OMI, the report and findings are submitted to the City Manager. The Assistant City Manager/OMI's Chief Investigator reports to the City Manager. Also, OMI reports are public documents.

Because of the Ohio Supreme Court's decisions on government records, essentially all OMI records, as well as Police Division records, are public documents accessible to anyone, with few exceptions.

OMI can make disciplinary recommendations; however, discipline is carried out by the Police Chief, Safety Director and the City Manager. However, given the legislative



empowerment to provide reports to the public, OMI is satisfied that the public and media can and does actively participate in the process.

In order to effectively manage resources, OMI can only investigate the most serious cases, and rely on the Police Division for less serious cases. This reduces the potential for serious backlog of cases, allows OMI to maintain its credibility in the community, and permits the Police Division to continue to participate in the citizen complaint process. On average, for Police Division cases, OMI investigates approximately forty to fifty major cases per year. Aside from shots fired cases, OMI attempts to ensure that investigations are conducted on cases of willful and malicious acts of misconduct.

OMI is convinced that the model in place is effective, credible and accountable. Over the years, many highly publicized cases have been investigated by OMI with general satisfaction throughout the community. Given the individual nature of citizen-police contacts, objective measures of success are difficult to formulate. One must rely on public opinion to determine needs and successes of these types of programs. In approximately 20% of the investigations conducted on complaints against police, OMI has made a finding of misconduct. However, whether this can be used as a comparison with other agencies is unclear because OMI does screen initial complaints to determine whether they should be referred to the Police Division.

In subjective terms, OMI is convinced that the public is confident that OMI will do an impartial and objective investigation. OMI also believes that during the fourteen years it has been in existence, the number of major injury complaints has dropped dramatically, there are very few "repeater officers" in terms of complaints, OMI does act as a deterrent to "willful and malicious" acts of misconduct, the Police Division Internal Investigation Section has improved significantly, and the Safety Department expresses commitment to improved police-community relations, including implementing community-based policing throughout the City.

**Rule 2.26 - Manual of Rules and Regulations and Disciplinary Process for the Cincinnati Police Division**

A member must, upon direction of the Police Chief or his designated representative, respond completely and truthfully to all questions that are specifically, directly and narrowly related to his performance as a police officer. Since the member is required by rule and case law to answer, and has no right against self incrimination, the response to such questions may be used only in the application of administrative justice. The member is immune in any subsequent related criminal proceeding from the uses of his answers or fruits thereof.

Should the member fail or refuse to respond completely and truthfully to all questions of this nature directed to him as a member of the Police Division, he will be given a direct order to do so. Refusal or failure to then respond will result in the pursuit of disciplinary action against the member for failure to obey the order. That disciplinary action may result in administrative sanction against the member which may include dismissal from his employment as a member of the Police Division

You are now ordered to respond truthfully and fully to all questions.

Signature\_\_\_\_\_

Date\_\_\_\_\_