

**A brief response to “Addressing Police Excessive
Use of Force – A proposal to amend the mandate
of the Special Investigations Unit”**

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Ian Scott, in his paper entitled “*Addressing Police Excessive Use of Force – A proposal to amend the mandate of the Special Investigations Unit*” has commenced a dialogue that is worthy of full investigation and rejoinder. I propose, in this brief response, to address some of the views expressed by Mr. Scott from my perspective as a trial counsel who has prosecuted for the last 16 years.

The central thesis of Mr. Scott’s paper is that a study of cases emanating from the Special Investigations Unit (SIU) involving the allegations of excessive use of force by police officers is capable of determining whether or not those cases have had a general deterrent effect. Mr. Scott uses conviction rates to measure whether or not general deterrence has been achieved. In his thesis he concludes that conviction rates in these cases are much lower than conviction rates for similar cases in the general criminal justice system and therefore these prosecutions have no deterrent effect. In this brief response I will attempt to explain my reasons for disputing the methodology chosen by Mr. Scott and the conclusions that he draws. At the outset I should say that I do not disagree with some of Mr. Scott’s recommendations but I do take issue with the notion that general deterrence can only be achieved by the securing of a conviction. I also

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suggest that the utility of the SIU should not be gauged by conviction rates as the purpose of the SIU is not restricted to, or even primarily, to generally deter.

The criminal justice system has as its ultimate goal the protection of the public. It seeks to achieve that goal in many ways, one of which is sentencing. In sentencing an offender, the justice presiding must take into account a number of principles, including but not limited to general deterrence. Accordingly, if one is to assess the legitimacy and efficacy of a criminal law function, one should look to the guiding principle and purpose of the system rather than one of the tools that is available to achieve that purpose.

As Mr. Scott indicates, the criminal justice system is not the only vehicle by which the goal of public protection can be attained. One of the ways that SIU activity endeavours to protect the public is to thoroughly investigate all allegations of police misconduct where serious injury or death has occurred. It is an error to suggest that the public receives no protection when the Director of the SIU decides that no criminal charges should be laid. This will hopefully become apparent later in this response.

Mr. Scott presents a very narrow thesis attempting to assess, by statistical means, the general deterrent effects achieved from the laying of criminal charges by the SIU in cases involving allegations of the excessive use of force by the police. It should be emphasized that his paper does not deal with the wider function of the SIU. Mr. Scott does not attempt to gauge the efficacy of the SIU in performing its larger criminal justice function. I say that although he does, at page 16, embark upon a discussion of the wisdom of spending money on the SIU given the low conviction rates in cases involving allegation(s) of the excessive use of force by the police. In so far as his paper strays into that general area it is important to recognize that the SIU performs a critical "*social safety valve*" function.

Picking up on this point, it is my suggestion that it is an error to judge the efficacy, utility or value of the SIU by conviction rates. It is natural for lawyers to look to conviction rates to gauge the efficacy of their conduct or the conduct of investigating units. It comes down to a notion of win or lose. I have heard some take that analysis even further and suggest that a prosecution was all for naught because even though there was a conviction, the sentence did not include incarceration. This approach, if taken by a prosecutor, would fail to acknowledge the true role of a prosecutor in Canada. As Justice Rand said in *Boucher*: “The role of prosecutor excludes any notion of winning or losing; his [or her] function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.” Those who engage in an analysis of the efficacy, utility or value of the prosecution by means of an assessment of conviction rates or rates of incarceration, in my respectful view, fall into error.

I propose to examine specific parts of Mr. Scott’s paper and thesis in this brief response; however, I acknowledge that Mr. Scott’s paper is worthy of more detailed response and I believe that in time there will be one. The SIU recently committed to tapping into 14 years of Director’s Decisions in an attempt to discern trends in cases such as in-custody deaths, police pursuits, use of lethal force and other categories of cases. We hope to identify trends and see whether actions taken either by the SIU or as a result of SIU investigations, have led to improvements in or alterations to police practice. Indeed, the determination by the SIU to commence this analysis of Director’s Decisions was made prior to Mr. Scott’s paper being distributed; however, Mr. Scott’s paper clearly shows the utility in such an analysis. Regardless of the outcome of that research project, I do not believe that the value of SIU investigations can be measured by conviction rates any more than the efforts that I have made as a trial Crown for more than

16 years can be measured by my own conviction rates. I believe that police policies have changed, individual police practices have been modified and citizens know that they can turn to an independent body for the investigation of at least some of their complaints. Furthermore, police have come to know that they can look to the SIU with trust; trust that they will be treated fairly and that their conduct will be investigated thoroughly. What is the value of all of these results? How is that value to be measured?

State authority and governmental systems that are not seen as legitimate by the people, fall into discredit and ultimately may be rebelled against (either physically or intellectually) by the people. Democracies have traditionally adopted “*social safety valves*” to release pressures that build up, in an attempt to avoid disapprobation. The SIU is one such “*social safety valve*”.

One critical function of the SIU is to ensure the citizens of Ontario that allegations of police misconduct are impartially investigated in a thorough and professional manner. The SIU ensures that those investigations are not only impartial and thorough in fact, but equally importantly, that they appear to be impartial and thorough --- perception and actuality meet. Police are entrusted with significant powers and with great power comes great responsibility. Citizens are entitled to and indeed demand a mechanism to ensure that powers are exercised responsibly. The efficacy of institutions such as the SIU in carrying out that oversight function may not admit of empirical analysis.

Methodology

Turning to Mr. Scott’s methodology, I suggest that it is an error to compare rates of conviction in police cases to general rates of conviction in the criminal justice system. At page 13 of his paper, Mr. Scott draws that analogy and comparison. He compares the conviction rate for crimes of violence, which he says are roughly analogous to excessive use of force offences in the general criminal

justice system of 49%, with SIU-laid excessive use of force complaints that he calculates as yielding a conviction rate of approximately 9%. The two figures are not analogous at all. A more apt comparison would be to look to conviction rates in the general criminal justice system in cases of crimes of personal violence where the defence was self-defence. As Mr. Scott himself indicates in his paper, that defence is almost without exception the defence that is raised in SIU cases where the excessive use of force of police is alleged. I suggest that any criminal practitioner would tell you that the law of self-defence is so complex that it is extremely difficult for a trial judge to apply that law, let alone to explain it to a jury of 12 lay people. I suspect that subset of criminal cases (that is, cases of crimes of personal violence where the defence at trial was self-defence) is roughly the same as the conviction rate for SIU-laid charges involving allegations of the excessive use of force by the police.

This also raises the other issue of the utility of comparing conviction rates from general cases to SIU cases. It has been the experience of the SIU that very few of their charges result in guilty pleas. We know that the conviction rate that is referred to by Mr. Scott at page 13 of his paper includes cases where pleas of guilty were entered. I would suggest it would be more appropriate to look to only those cases where trials were held.

I further believe that it is an error to assume that there is no general deterrent effect of a prosecution unless a conviction ensues or jail is the result. As I have indicated the whole *raison d'être* of the SIU is not to deter; however, if one wants to assess the general deterrent effect of the SIU function, one would have to look at whether police policies and procedures have changed as a result of SIU activities. Furthermore, one would also have to accept that no deterrent comes from the fact that a charge is laid or an investigation undertaken. It has been my experience that defence counsel often submit that there is no further need for their client to be deterred once the trial is over, given that the process has

specifically deterred their client. This submission is legitimately made. I suggest that it is quite as legitimately said that those in the same position as the accused in cases where they are deterred by the process, are generally deterred by the experience of their colleagues. I suspect as well that the spectre of prosecution may have a deterrent effect.

I am aware of no study that supports the notion that this general deterrent effect causes officers to make bad decisions in times of extreme stress regarding the appropriate use of force; however, I do suspect that the knowledge that there is civilian oversight and independent investigation deters the institutionalization of the inappropriate use of force.

Specific Comments in respect of “Addressing Police Excessive Use of Force – A proposal to amend the mandate of the Special Investigations Unit”²

In this section of my reply I propose to set out observations that I made as I read Mr. Scott’s paper. On page two of his paper, Mr. Scott talks about the effect of an acquittal on the police community and suggests that an acquittal may legitimize police violence. I would suggest that although there may be pronouncements made in the press by some people to that affect, those who are engaged in the criminal justice system know that an acquittal does not mean exoneration. In cases where an accused person has been called upon to present a case at the close of the Crown’s evidence, we know that the Court has been satisfied that not only are there reasonable grounds to believe that an offence has been committed but also there is a prima facie case presented by the evidence. Yet again though the ancillary effect of the public process, the necessity of a public accounting, is not given its due.

² I would have preferred to have dealt with the matters raised in this part of my paper thematically but time did not allow that approach.

At page four of his paper Mr. Scott refers to a 1966 study emanating from New York City where social scientists discerned that the average citizen of New York City cared more about crime control than about the control of police abuse. I do not believe that the views of those in New York City necessarily match the views of those in Toronto let alone those in Ottawa, Sudbury or London. Additionally I suspect that a more recent survey of the citizens of New York City would yield very different results.

At page six of his paper, Mr. Scott comments that the lack of discretion by the Director of the SIU to lay a charge where he or she forms the belief that a criminal offence has been committed is anomalous in the criminal justice process. What Mr. Scott says is true, obviously police officers often exercise discretion against charging people when they have grounds to believe that an offence has been committed. This is done numerous times every day in Ontario. However, it appears to me that the lack of discretion was a public policy decision made at the time of the inception of the SIU. It is quite likely to be difficult, if not impossible, for the public to understand why a public officer, such as a police officer, would not be charged with an offence when there are reasonable grounds to believe that he or she committed one. That having been said, Mr. Scott, of course, is simply raising this as an issue and suggesting that perhaps this should be changed. For my part, I believe that if this aspect of the Director's job is changed the Director will have to explain, in a very public and fulsome manner, his or her reasons for exercising the discretion to not charge.

On that same page, Mr. Scott comments about the lack of public availability of the Director's reports which are generated at the close of an investigation where no charges are laid. The reader would be well advised to view the totality of Justice Adams most recent report on the review of the SIU. There are very real legal issues in respect of the release of the Director's reports. It is also

recognized by Justice Adams that the Director's Report is not the only way decisions or concerns are disseminated. It should be remembered that the Director can, and often does, issue press releases at the close of an investigation when a decision has been made to not charge in a specific case. Furthermore, there is always a letter written to the Chief of Police for the relevant police agency. It is my understanding that those letters are likely to be released on any Freedom of Information and Protection of Privacy Act request. Additionally, there are often meetings at the close of an investigation between the Director and the Chief of Police of the affected agency. Those meetings are meant to ensure a flow of information to the police agency for the Section 11 investigations and also to attempt to affect change of police practice and policies. The Director also engages in discussions with the Coroner who may be investigating a death and the investigators at the SIU play a key role in Coroner's Inquests. The Director or investigators also meet throughout an investigation with the family of the affected party to explain the process and discuss that information that can be discussed. For all of these reasons, it would be inaccurate to assume that the only way the public can understand the actions of the SIU when there are no charges laid is for the report of the Director to be released to the public.

At page ten, Mr. Scott indicates that he is focussing his statistical analysis of SIU cases on those involving the alleged application of excessive force. Of course, the SIU does not only investigate cases involving allegations of the excessive use of force by the police. The SIU investigates all cases where there is an allegation that police conduct caused serious injury or death. Accordingly, the SIU becomes involved in motor vehicle collision cases, in custody death cases and the like. There is, of course, a public protection function in those cases as there is in cases involving allegations of the excessive use of force.

At page 14, Mr. Scott hits upon one of the challenges that any Crown Attorney has in the conduct of a criminal prosecution, namely the expectations of those

involved. It has always been my view that as a Crown Attorney part of my function is to explain to complainants in cases where they have suffered serious injury or loved ones have died, that there are no guarantees in the criminal justice system. It has been my experience that usually, not always but usually, complainants and the families of complainants will understand that a fair trial does not mean there will be a conviction. Most will understand that there is not even a guarantee of a probability of conviction but that there is a case to be presented to a trier of fact who will judge whether or not the presumption of innocence has been displaced by the state. The Crown can only present the evidence that is available that forms the foundation of the case and press that evidence to its legitimate strength. It is for the trier of fact to decide whether or not a person has been proven guilty. The efficacy of the use of state resources should not be judged by conviction rates especially where the public institution being judged has more than general deterrence as its purpose.

At page 15, Mr. Scott makes an observation that criminal charges cause enormous personal stress on police officers. That is no doubt true. Those charges cannot lightly be laid. However, Mr. Justice Adams in his most recent report on the SIU dealt with that issue saying, in effect, that non-police are charged and acquitted frequently in Ontario and he could see no compelling reason to treat public officers in a manner different than civilians. Justice Adam's words were, "Civilians have the experience of being charged and acquitted. Community representatives did not understand why the police should be in a preferred position."³

Mr. Scott, on this page, also asserts that the criminal justice system is failing both the police and the general community when so many SIU charges lead to acquittals. Again, Mr. Scott has switched from a very narrow thesis (that being to study the general deterrent effect of SIU charges in cases of the excessive use of

³ Page 29, "Justice Adams Review of SIU", 2003

police force by examining conviction rates) to a general proposition that acquittals mean failure. First, Mr. Scott should be examining the total conviction rate for SIU charges if he seeks to substantiate the claim that the criminal justice system is failing both the police and the general community. Second, such a claim does not give appropriate weight to the 97% clearance rate by the SIU of allegations of police misconduct. Third, it fails to take into account the deterrent effect that occurs by virtue of the process itself. Fourth, it does not take into account the social safety valve function of the SIU as a public institution. It is in that latter respect particularly that I do not agree that the public is being failed.

I agree with Mr. Scott that there can be no two-tier criminal justice system; one for non-police, where full *Charter* rights are available and one for police, where *Charter* rights are limited. However, that does not mean that we abandon the criminal justice system in attempting to cope with allegations of police misconduct. What does follow from this line of reasoning is that there should be more than one avenue of recourse available to the SIU or to some other oversight institution.

At page 15, Mr. Scott also refers to police associations attacking the competence of the SIU and/or its Directors. I take it Mr. Scott and I both agree that the fact that an acquittal ensues as a result of a prosecution does not mean that the Director or the investigators were incompetent. Mr. Scott sights only the first Adams review report as authority for the proposition that police associations frequently attack the competence of the SIU. Readers should look to the second report of Mr. Justice Adams where he makes reference to the fact that certain police associations have come to accept, if not respect, the capacity of the SIU to investigate. Indeed Mr. Justice Adams comments that police associations for both the Toronto Police Service and the Ontario Provincial Police have come to respect the SIU or at least to not be resistant to the SIU's efforts at investigation. He comments that most of the friction between the SIU and police associations

now occurs where that police association has had very little experience in dealing with the SIU. He suggests that police associations should become familiar with the Toronto Police Service and the Ontario Provincial Police procedures in dealing with the SIU in an effort to cure some of these operational difficulties.

On page 18, Mr. Scott refers to the *Deane* case and suggests that the sentence Mr. Deane received was a non-custodial sentence. I believe that what he meant to say was that traditional jail was not the sentence of the Court but rather that Mr. Deane received a conditional sentence (house arrest).

Again at page 19, Mr. Scott refers to studies in the American experience to support the thesis that the criminal justice system in Canada is ineffective in providing accountability for the misuse of force by police. Again, I do not believe that the efficacy of the system can be judged solely upon whether or not convictions are the result of trials. Furthermore, I do not believe that the American experience can be equated with the Canadian experience. Even assuming that such an analogy is valid, the reader should remember that the Rodney King case which resulted in an acquittal in the state criminal charge was prosecuted again as a federal civil rights violation and a conviction secured. This observation led me to remember that for years the criminal justice system of the United States of America was thought to be ineffective in civil rights cases in southern United States. That lack of effectiveness was not a good reason to stop trying those cases and eventually, with the perseverance of the authorities and the prosecutors, inroads were made in those civil rights cases.

On page 24, Mr. Scott refers briefly to the concerns of the community groups and how the SIU process may, in his words, “mollify” them. He goes on to say that SIU investigations are often met with resistance from the rank and file of police and also from the management of the affected police services. That is not the recent experience of the SIU. Mr. Scott refers to an American report from 1995

in support of that proposition. I suggest that we should look to the Ontario experience in 2004.

CONCLUSION:

While I disagree with much of what Mr. Scott has said in his paper, I do believe that he raises important points for discussion. I would suggest that the statistical approach that was taken by Mr. Scott was flawed in the ways that I have mentioned. However, his conclusion that there should be an amendment to civilian oversight in Ontario is obviously worthy of much discussion. There may well be merit to Mr. Scott's position that the mandate of the SIU should be increased. But I would suggest that does not mean that we should remove the criminal option from the toolbox that is available to the SIU. We should also not judge the success of this public institution on conviction rates alone.

I would also suggest that simply because disciplinary proceedings could be commenced in cases where there may be reasonable grounds to believe a criminal offence occurred, that does not mean that the criminal charge should not proceed. I would ask the reader to consider these questions:

- 1) Does the discipline process achieve the same end as a criminal investigation and prosecution process?
- 2) What does the internal discipline proceeding do in cases where the conduct that is identified may be institutional in nature?

I believe that the questions themselves illustrate that the criminal justice process and the internal discipline process achieve similar yet strikingly different ends.

As I indicated at the commencement of this critique, Mr. Scott's thesis is worthy of a much more detailed response. In time that will come. But for now I will leave the reader with this: The SIU performs a critical public function and that is to ensure all the citizens of Ontario (police and non-police alike) that there is one criminal law for everyone. The process of civilian oversight of police conduct is a journey not a destination.

“Every day you make progress. Every step may be fruitful. Yet there will stretch out before you an ever-lengthening, ever-ascending, ever-improving path. You know you will never get to the end of the journey. But this, so far from discouraging, only adds to the joy and glory of the climb.”⁴

⁴ Sir Winston Churchill