

# Heenan Blaikie

## Of Counsel

The Right Honourable Pierre Elliott Trudeau, P.C., C.C., C.H., Q.C., FRSC (1984 - 2000)  
The Right Honourable Jean Chrétien, P.C., C.C., O.M., Q.C.  
The Honourable Donald J. Johnston, P.C., O.C., Q.C.  
Pierre Marc Johnson, G.O.Q., FRSC  
The Honourable Michel Bastarache  
The Honourable René Dussault, FRSC  
The Honourable John W. Morden  
Peter M. Blaikie, Q.C.  
André Bureau, O.C.

November 27 2009

## By E-mail

Ronald Middel  
Chief Administrative Officer  
Police Association of Ontario  
6730 Davand Drive, Unit 1  
Mississauga, Ontario L5T 2K8

Dear Mr. Middel:

**Re: Opinion Regarding Police Officers' Rights to Counsel in SIU Investigations  
Our File: 055100-0001**

## A. Introduction

You have asked for my opinion on how counsel representing police officers in investigations involving serious bodily harm or death conducted by the Ontario Special Investigations Unit (the "SIU") can fully comply with the Law Society of Upper Canada's *Rules of Professional Conduct* (the "Rules") and the governing law. You have asked that I identify and address all relevant legal issues that impinge upon the provision of the rights to counsel to police officers in SIU investigations and that I address the issues set out below.

## B. Material Reviewed

To assist me in understanding the facts and issues in the litigation on which you have sought my opinion, I have reviewed the following materials:

- (1) SIU Interview Questions;
- (2) Two press releases, one from the SIU and one from the Ontario Provincial Police Association regarding an incident of June 24, 2009 involving two OPP officers that resulted in the death of a civilian, Levi Schaeffer;

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- (3) The factum in *R. v. Jupiter*, which includes an excerpt that the SIU accepted as an accurate description of the investigative process;
- (4) *Police Services Act*, Ontario Regulation 673/98;
- (5) Ontario Regulation 123/98 of the *Police Services Act* regarding the offence of insubordination;
- (6) Two letters from recent cases in which the SIU has been critical of counsel;
- (7) The Law Society of Upper Canada's *Rules of Professional Conduct*;
- (8) G. W. Adams, *The 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*, 14 May 1998 (the "Adams Report I");
- (9) *Review Report on the Special Investigations Unit Reforms prepared for the Attorney General of Ontario by the Honourable George W. Adams, Q.C.*, 23 February 2003 (the "Adams Report II");
- (10) Ombudsman of Ontario, *Oversight Unseen: Investigation into the Special Investigations Unit's operational effectiveness and credibility* (September 2008);
- (11) Paul Ceysens, *Legal Aspects of Policing* (looseleaf) (Salt Spring Island: Earls Court Legal Press, Inc., 1994); and
- (12) Jurisprudence dealing with issues of solicitor-client privilege.

C. Issues

You have asked me to provide my opinion on the following issues.

1. Regarding the practical application of sections 6, 7 and 9 of Ontario Regulation 673/98 of the *Police Services Act*, R.S.O. 1990, Chapter P.15:
  - (a) Do the officers have a right to meet and consult with counsel before and while they are segregated?
  - (b) Do the segregated officers have a right to meet and consult with counsel before SIU investigators attend at the police division?
  - (c) Do segregated officers have the right to meet and consult with counsel before they write up their involvement in the incident in their police notebooks?
  - (d) Is the timing of the involved officers' access to counsel in SIU investigations an issue in any respect?
  - (e) Due to the vastness of the Province, the SIU investigators may take up to 12 hours before they arrive on scene, depending on location and availability of

flights. In those cases, the officers have long since gone home and are no longer at the Detachment or Division. For the same reason, counsel for the officers may be unable to attend quickly. To alleviate problems with communication, some counsel have asked officers to prepare written "Confidential Instructions" for them to review. The SIU and some police forces are of the opinion that officers have a duty to complete their notes before the end of shift and that any notes to counsel, written before any notebook entries are done, should be considered as original notes and disclosed. Is this a legitimate method for the officer to exercise his right to counsel? Should counsel continue this practice of asking for written "instructions", which usually amount to a rendition of the facts?

2. Do counsel have a duty to ensure compliance with Section 6 of Regulation 673/98?
3. Is it permissible under the Law Society of Upper Canada's *Rules of Professional Conduct* (the "*Rules*") for one counsel to represent multiple subject and witness officers involved in an SIU investigation in cases in which no actual conflict arises from the facts of the incident or from the information regarding the incident provided to counsel by the involved officers?
4. If the representation of multiple witness and subject officers is permissible, can the duty under the *Rules* to share client information be reconciled with section 6 of Regulation 673/98 and counsel's other duties under the *Rules*? If so, how?
5. At the outset of witness officer interviews, SIU investigators qualify the officers' notes and ask the questions in a list you have provided to me. Does the seventh question, asking the officer whether his or her notes were written before the officer consulted with counsel, infringe upon solicitor-client privilege? If so, what objections should be made by counsel, keeping in mind that refusing to answer a question may expose the officer being interviewed by the SIU to prosecution under the *Police Services Act*.

**D. Analysis and Opinion**

1. (a) **Whether officers have a right to meet and consult with counsel before and while segregated.**

Sections 6 and 7 of Regulation 673/98 under the *Police Services Act*, R.S.O. 1990, Chapter P.15 (the "*Act*") provide as follows:

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

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

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

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

Section 7(1) specifically provides that officers are entitled to consult with counsel and to have counsel present during their interviews.<sup>1</sup> There is no suggestion in the Regulation that this entitlement cannot be exercised either before or while the officers are segregated. Section 7(1) had its genesis in recommendation 11 of the *Adams Report I*.<sup>2</sup>

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.

The commentary accompanying recommendation 11 at page 51 of the *Adams Report II* provides that:

This recommendation has been implemented in s.7 of the Regulation. Every police officer is entitled to have legal counsel or an association representative present during his or her interview.

Again, neither recommendation 11 nor its associated commentary suggests that an officer's right to counsel cannot be exercised before or while the officers are segregated. Because officers must be able to consult with their lawyer before and during

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<sup>1</sup> Section 10 (1) of the *Canadian Charter of Rights and Freedoms* provides that "Everyone has the right on arrest or detention ... (b) to retain and instruct counsel without delay ....". In light of the requirement of section 6 of the Regulation that officers be segregated, it may well be that both subject and witness officers are detained within the meaning of section 10 (b), and that they accordingly have a constitutional right to counsel. In light of the specific recognition of the right to counsel in section 7 (1) of the Regulation, however, the issue need not be considered further.

<sup>2</sup> Although none of the recommendations from the Adams Reports are binding, they may assist in a purposive interpretation of various sections in Regulation 673/98.

segregation in order to have a full, meaningful right to counsel, in my opinion officers must be allowed to meet with and consult counsel before and while segregated.

**1. (b) Whether segregated officers have a right to meet and consult with counsel before SIU investigators attend at the police division**

Similarly, there is no suggestion in section 7 of the Regulation, in recommendation 11 of the *Adams Report I*, or in the commentary accompanying recommendation 11 in the *Adams Report II*, that an officer's entitlement to consult counsel cannot be exercised before SIU investigators attend at the police division. In my opinion, the timing of officers' right to consult with counsel is unaffected by section 5 of the Regulation 673/98, which provides that:

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

In my opinion, section 5 cannot be interpreted as a limitation on the timing of an officer's right to consult counsel. The purpose of section 5 is to make it clear that the SIU is to assume the lead role in the investigation, and that the role of other police forces is to be subordinate to that of the SIU. Recognition of the officers' right to consult with counsel before the SIU investigators attend at the police division does not compromise the primacy of the SIU's role as lead investigator in any way. In my opinion, officers have a right to meet and consult with counsel before SIU investigators arrive at the police division.

**1. (c) Whether segregated officers have the right to meet and consult with counsel before they write up their incident notes in their police notebooks**

Again, there is no suggestion in section 7 of the Regulation, in recommendation 11 of the *Adams Report I*, or in the commentary accompanying recommendation 11 in the *Adams Report II*, that segregated officers' entitlement to consult counsel cannot be exercised before they write up their notes in their police notebooks. In my opinion, they have the right to consult with counsel before they write up their notes in their police notebooks.

**1. (d) Whether the timing of the involved officers' access to counsel in SIU investigations is an issue in any respect.**

For the reasons set out above, in my opinion, the timing of the officers' access to counsel in SIU investigations is not an issue in any respect.

**1. (e) Whether counsel's practice of asking for written instructions should continue.**

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Due to the vastness of the Province, the SIU investigators may take up to 12 hours before they arrive on scene, depending on location and availability of flights. In many such cases, the officers will have gone home and are no longer at the Detachment or Division. For the same reason, counsel for the officers may be unable to attend quickly. To alleviate problems with communication, some counsel have asked officers to prepare written "confidential instructions" for them to review. These instructions typically consist of or include the officers' account of the events in question.

Officers are required to complete their notes, which also consist of their account of the events in question, in their police notebooks. Witness officers are required to submit their notes to the chief of police within 24 hours of the SIU's request for their notes<sup>3</sup> (section 9 of Regulation 673/98).

Oral or written communications between a client and his or her lawyer for the purpose of obtaining legal advice are subject to solicitor-client privilege if made with the intention that they be confidential.<sup>4</sup> This principle applies both to the client's account of the facts and to the lawyer's advice.

Where both the SIU and counsel for the officers are able to attend at the Detachment or Division reasonably promptly, the officer's account of the events will ordinarily be imparted to counsel in person. Where counsel cannot attend reasonably promptly, it will be necessary for the officers to describe what occurred by telephone or in writing. For the right to counsel to be meaningful, in any event, it is essential that the officers are assured that what they tell their lawyer about what occurred will be maintained in confidence.

In my opinion, there is nothing objectionable in the practice of officers providing a written account of what occurred to their lawyer so that the lawyer may advise the officers fully.

Such an account is privileged, and neither the officer nor the lawyer can be compelled to divulge it.

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<sup>3</sup> Only witness officers' notes should be submitted to the SIU; a subject officer's notes must be completed but are not to be submitted to the SIU pursuant to Section 9(3) of Regulation 673/98. The Attorney General's Directive of December 23 1998, as outlined at pages 49-50 and 54-55 of the Adams Report II, should alleviate some of the officers' concerns about submitting their notes to the SIU. In this Directive, the Attorney General directed Crown counsel by means of a Crown Policy that a police officer's statement in a compelled interview and the officer's police notebook notes obtained by the SIU are involuntary statements. As such, neither the statement nor any evidence that would not have been found but for the statement is to be used to incriminate the officer in any subsequent criminal proceeding.

<sup>4</sup> *Canada v. Solosky*, [1980] 1 S.C.R. 821 at 837.

