

## Lawyers can't vet officers' notes in SIU cases, court rules

November 15, 2011

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Police officers involved in fatal shootings and other serious incidents are not permitted to have a lawyer vet or help prepare their notes before they're turned over to the Special Investigations Unit, the Ontario Court of Appeal has ruled.

In a 3-0 decision Tuesday, the court said allowing lawyers into the process to shape and refine the finished product would defeat "the fundamental nature and purpose of a police officer's notes" – to provide an independent and contemporaneous recollection of what happened.

"An officer eager to have ... a legally valid explanation for his or her own conduct would naturally emphasize and present the facts in accordance with the lawyer's advice," said Justice Robert Sharpe, who wrote the judgment.

There's nothing to prevent an officer immersed in the "stressful" aftermath of a police shooting from getting some basic legal advice about their rights and duties, such as whether they are required to answer questions from SIU investigators, Sharpe said.

But officers must complete their notes before the end of their shift and can't delay for the purposes of getting advice from a lawyer, he said on behalf of a panel that included Justices Robert Armstrong and Paul Rouleau.

The decision is a victory for the families of Douglas Minty, 59, and Levi Schaeffer, 32, two mentally ill men shot dead by the Ontario Provincial Police two days apart in June 2009.

Their families were shocked by some of the practices employed by officers during investigations by the SIU, the independent civilian agency set up to investigate when police are involved in cases involving death, serious injury or sexual assault.

They've also been a concern to SIU director Ian Scott, who has complained such practices frustrate the agency's investigations.

"This judgment is a huge step forward in the battle against police manipulation of SIU investigations," said Julian Falconer, a lawyer representing the families.

At a hearing earlier this year, the appeal court was told it is common for officers involved in SIU investigations to prepare double sets of notes, one to be vetted by their lawyer and a second for public consumption.

The court was also told that in a Hamilton Police Association newsletter in 2009, a Toronto lawyer who frequently represents officers, recommended anyone involved in an SIU investigation be vague about how many times they fired their gun.

The lawyer also offered an example of how an officer might logically explain such an incident.

“The obvious needs to be said again and again,” he wrote. “He pointed the firearm at me and, fearing for my life and the life and safety of my fellow officers and members of the public, I fired at him several times.”

About five hours after Schaeffer was killed during an investigation into a boat theft at Pickle Lake, the officer who fired the fatal shot consulted his lawyer, Andrew McKay, who asked him to prepare notes for him to review.

The officer, Constable Kris Wood, later wrote in his notebook that Wood advised him that his notes “were excellent and to complete his notebook.”

The families sued, asking a judge to rule on whether the note-vetting custom and other practices followed by officers in the course of SIU investigations were authorized under the Police Services Act.

The officers and the Commissioner of the OPP argued the families had no standing to bring that question before a court as a matter of public interest. They also argued the family’s concerns had become moot as a result of recent amendments to rules governing SIU investigations.

The appeal panel disagreed.

The court awarded the families \$100,000 in legal costs, to be paid by police respondents.

