

209-390573

Court File No.

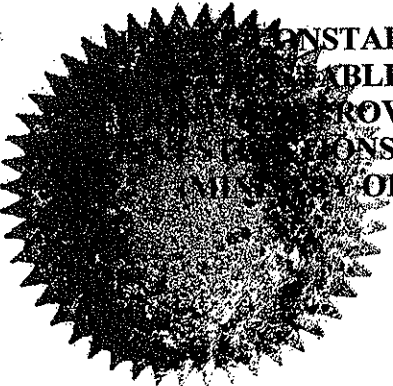
**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**RUTH SCHAEFFER, EVELYN MINTY  
and DIANE PINDER**

**APPLICANTS**

**AND**



**CONSTABLE CHRIS WOODS, ACTING SERGEANT MARK PULLBROOK,  
CONSTABLE GRAHAM SEGUIN, JULIAN FANTINO, COMMISSIONER OF THE  
PROVINCIAL POLICE, IAN SCOTT, DIRECTOR OF THE SPECIAL  
OPERATIONS UNIT and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO  
(MINISTERS OF COMMUNITY SAFETY AND CORRECTIONAL SERVICES)**

**RESPONDENTS**

**NOTICE OF APPLICATION**

**TO THE RESPONDENTS:**

**A LEGAL PROCEEDING HAS BEEN COMMENCED** by the applicants. The claim made by the applicants appears on the following pages.

**THIS APPLICATION** will come on for a hearing on a date and time to be determined by the Registrar of the Superior Court at 393 University Avenue, Toronto, Ontario M5G 1E6.

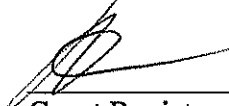
**IF YOU WISH TO OPPOSE THIS APPLICATION**, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicants, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

**IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION**, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it with proof of service, in the court office where the application is to be heard as soon as possible, but at least two days before the hearing.

**IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.**

**DATE:** *November 4, 2009*

**ISSUED BY:**

  
A. Anisimova  
Registrar  
Court Registrar  
Ontario Court of Justice  
393 University Avenue  
Toronto, Ontario  
M5G 1E6

**TO:** **Police Constable Chris Woods**  
Dryden Detachment  
389 Government St.,  
Dryden, ON, P8N 2P4

**AND TO:** **Acting Sergeant Mark Pullbrook**  
Pickle Lake Detachment  
Anne St.  
Pickle Lake, ON, P0V 3A0

**AND TO:** **Police Constable Graham Seguin**  
Huronian West Detachment  
1000 River Rd, W.  
Wasaga Beach, ON, L9Z 2K6

**AND TO:** **Commissioner Julian Fantino,**  
**Commissioner of the Ontario Provincial Police**  
Ontario Provincial Police  
777 Memorial Avenue  
Orillia, ON L3V 7V3

**AND TO:** **Ian Scott,**  
**Director of the Special Investigations Unit**  
Special Investigations Unit  
5090 Commerce Boulevard  
Mississauga, ON  
L4W 5M4

**AND TO: Andrew McKay**  
Warren McKay  
15 Bedford Road  
Toronto, ON M5R 2J7

**AND TO: Her Majesty the Queen in Right of Ontario**  
**(Ministry of Community Safety and Correctional Services)**  
c/o Crown Law Office-Civil  
720 Bay Street, 8<sup>th</sup> Floor  
Toronto, Ontario  
M5G 2K1

## APPLICATION

The Applicants are the family of Douglas Minty and Levi Schaeffer, two mentally disabled men who died as a result of two unrelated O.P.P. police shootings on June 22 and 24, 2009 respectively. These family members apply to this Honourable Court for relief as a result of the actions of the police Respondents which had the consequence of irreparably undermining their confidence in the investigations which followed the shootings.

### THE APPLICANTS MAKE APPLICATION FOR:

1. Declaratory relief in the form of judicial interpretations and guidance in respect of those provisions of the *Police Services Act* and Regulations that govern the police duty to cooperate with investigations by the Special Investigations Unit.
2. The families seek this Honourable Court's guidance pursuant to Rule 14.05(3) of the *Rules of Civil Procedure* in the form of declaratory relief in respect of the following:
  - (A) An interpretation of section 113(9) of the *Police Service Act R.S.O. 1990, c. P.15* ("Act"), and Ontario Regulation 673 / 98, *Conduct & Duties of Police Officers Respecting Investigations by the S.I.U.* ("*S.I.U. Regulations*") to determine whether the legislation expressly or impliedly authorizes the following:
    - (i) The subject and witness officers sharing the same lawyer who, under the Rules of Professional Conduct, is duty bound to share all relevant information as between the clients;
    - (ii) The subject and witness officers preparing and submitting their memobook notes after having the notes reviewed by jointly retained counsel.

- (iii) The subject and witness officers creating two sets of police notes: a solicitor's draft (never shared with S.I.U.) and a second draft which, having been vetted by their lawyer, is provided to S.I.U.;
- (B) An interpretation of section 113(9) of the *Act* and sections 9(1) and 9(3) of the *S.I.U. Regulations* to determine whether the legislation and regulations expressly or impliedly permit supervising O.P.P. officers, as a matter of course (pursuant to a newly created O.P.P. Policy), to authorize involved officers (both subject and witness officers) to refrain from preparing their notes to permit consultation with counsel and regardless of the expiry of the police officer's shift;
- (C) An interpretation with respect to section 7(1) of the *S.I.U. Regulations* to determine whether an involved officer's entitlement to counsel includes a right to counsel who is acting jointly for both the subject and witness officer; or whether the term counsel is to be interpreted as counsel capable of acting free of conflict of interest (see *Booth et al. and Huxter* [1994] O.J. No. 52 at para. 79);
- (D) An interpretation of Rules 5 and 2.06(4) of the *Law Society of Upper Canada Rules of Professional Conduct* and sections 6(1) and 6(2) of the *S.I.U. Regulations* to determine whether a joint retainer on behalf of the subject officer (Constable Woods) and the witness officer (Acting Sergeant Pullbrook) in the shooting death of Levi Schaeffer is prohibited.
- (E) An interpretation with respect to sections 41(1)(b) and 113(9) of the *Act* and sections 3, 5, 6(1) and 6(2) of the *S.I.U. Regulations* to determine whether the legislation and regulations permit the Respondent Commissioner of the O.P.P. to:
- (i) Authorize involved officers, as a matter of policy, absent exigent circumstances, to complete their notes after the conclusion of their shifts;
  - (ii) Authorize subject and witness officers to jointly retain legal counsel;
  - (iii) Authorize OPP officers to "de-brief" civilian witnesses prior to the *S.I.U.* being notified of an incident; and
  - (iv) Delay, without reasonable excuse, notification to the S.I.U. of a shooting incident;

(F) A Declaration that the herein described conduct of the of the Respondent officers and the Commissioner of the OPP in respect of the S.I.U. investigations into the police shooting deaths of Doug Minty and Levi Schaeffer violated section 113(9) of the *Act* and sections 3, 5, 6(1), 6(2), 9(1) and 9(2) of the *S.I.U. Regulations*.

2. The costs of this application; and
3. Such further and other relief as counsel may advise and this Honourable Court may permit.

**THE GROUNDS FOR THE APPLICATION ARE:**

Overview

1. The families of Douglas Minty and Levi Schaeffer seek an interpretation of the statutes and regulations that affect their right to a fair and impartial investigation in respect of the death of their respective family members. Further , the families seek an interpretation of section 113(9) of the *Act* and sections 3, 5, 6(1), 6(2), 9(1) and 9(2) of the *S.I.U. Regulations* to determine whether the following conduct, which is not materially in dispute, is prohibited and/or authorized by law:

- (a) In the Schaeffer Investigation, the subject officer and witness officer retained the same counsel;
- (b) In the Schaeffer Investigation the subject officer and witness officer provided “draft” versions of their notes to jointly retained counsel prior to entering the notes in their memobooks and submitting the memobook notes to the *S.I.U.*;
- (c) In the Minty Investigation, the *S.I.U.* was not notified of the shooting until one hour and forty minutes after the incident; and

(d) In both the Schaeffer and Minty Investigation, the involved officers were ordered by their supervisors not to complete their notes until speaking with counsel which resulted in the preparation of notes that were neither independent nor contemporaneous.

2. During the course of the Minty and Schaeffer investigations, the Respondent officers and the Commissioner of the OPP engaged in a course of conduct, authorized by their superiors and OPP policy, which irreparably impacted on the integrity and reliability of the *S.I.U.*'s investigation into the police shooting deaths of Douglas Minty and Levi Schaeffer. In both cases, the subject officers and witness officers were advised not to complete their notes immediately. In the Schaeffer Investigation, the subject officer and witness officer retained the same counsel, Andrew McKay, and provided "draft" copies of their notes to Mr. McKay to be reviewed prior to writing their notes in their official OPP memobooks. This conduct impaired the *S.I.U.*'s ability to conduct an investigation that maintains public confidence in the police's adherence to the rule of law.

3. In the Schaeffer Investigation, the conduct of the officers (described in greater detail below) prompted the Respondent Director of the *S.I.U.*, Ian Scott, to formally state the following:

This note writing process flies in the face of the two main indicators of reliability of notes: independence and contemporaneity. The notes do not represent an independent recitation of the material events. The first drafts have been 'approved' by an OPPA lawyer who represented all of the involved officers in this matter, a lawyer who has a professional obligation to share information among his clients when jointly retained by them. Nor are the notes the most contemporaneous ones – they were not written as soon as practicable and the first drafts remain in the custody of their lawyer. I am denied the opportunity to compare the first draft with the final entries. Accordingly, the only version of the material events are OPPA lawyer approved notes.

I have a statutory responsibility to conduct independent investigations and to decide whether a police officer probably committed a criminal offence. In this most serious case, I have no informational base I can rely upon. Because I cannot conclude what probably happened, I cannot form reasonable grounds that the subject officer in this matter committed a criminal offence in the firearms death of Mr. Schaeffer."

The Minty Investigation

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

5. As the subject officer approached the home, Mr. Minty began walking toward Constable Seguin with a closed pocket knife in his hand. As a result, Constable Seguin discharged his firearm several times at Mr. Minty, causing him to fall to the ground. Mr. Minty was taken to Royal Victoria Hospital where he was pronounced dead. A post-mortem attributed his cause of death to multiple gunshot wounds.

6. Shortly after the shooting, Constable Seguin was instructed not to write up his notes in his memobook until he spoke with Ontario Provincial Police Association (OPPA) legal counsel, Andrew McKay.

7. Section 3 of the *S.I.U. Regulations* requires the Commissioner to notify the *S.I.U.* immediately of an incident involving one or more of his police officers that may reasonably be considered to fall within the investigative mandate of the *S.I.U.* Despite this requirement, the *S.I.U.* was not notified of the incident until one hour and forty minutes after the fatal shooting.

8. Section 5 of the *S.I.U. Regulations* identifies the *S.I.U.* as the lead investigator in an investigation. Despite this requirement, members of the OPP took the door-to door salesman and his supervisor, both of whom who were in close proximity to the shooting, to an OPP detachment to be debriefed prior to the *S.I.U.* being notified of the incident.

9. On October 21, 2009, the *S.I.U.* decided that there were no reasonable grounds to charge Constable Seguin with a criminal offence.

*The Schaeffer Investigation*

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

11. On June 24, 2009 (two days after the shooting death of Doug Minty) at approximately 12:30 p.m., Police Constable Woods and Acting Sergeant Pullbrook approached Levi Schaeffer's camp grounds on the peninsula to investigate a report of a stolen boat. There was an interaction between Mr. Schaeffer and the officers which ended with the subject officer, Constable Woods, discharging his firearm twice and killing Mr. Schaeffer.

12. Shortly after the shooting, Constable Woods was instructed not to write up his notes in his memobook until he spoke with Ontario Provincial Police Association (OPPA) legal counsel. The association lawyer, Mr. McKay, advised Constable Woods to prepare notes which only he would review. Two days following the shooting, and after the lawyer approved the notes, Constable Woods wrote up his memobook notes based on a combination of his confidential notes to counsel and discussions with him. Constable Woods did not voluntarily submit to an interview with the S.I.U.

13. The only witness to the shooting, Acting Sergeant Pullbrook, was also directed not to contemporaneously write up his notes in his memobook. He too wrote up a set of notes which he shared with Mr. McKay before entering them into his memobook two days later, on June 26, 2009. Also on June 26, 2009, Acting Sergeant Pullbrook was interviewed by the S.I.U.

14. Neither Constable Woods nor Acting Sergeant Pullbrook provided the S.I.U. investigators with their first set of notes.

15. On September 28, 2009, the S.I.U. decided that there were no reasonable grounds to charge Constable Woods because the post-shooting conduct of Constable Woods and Acting Sergeant Pullbrook affected the investigation to the extent that it was impossible to determine what happened on June 24, 2009.

Statutory Provisions regarding S.I.U. Investigations

16. Section 113(9) of the *Act* requires all police officers to co-operate fully with the members of the S.I.U. during the course of an investigation. Section 41(1)(b) of the *Act* requires Commissioner Fantino to ensure that members of the police force carry out their duties in accordance with the *Act* and the regulations, including the *S.I.U. Regulations*.

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

- (a) The chief of police shall notify the S.I.U. immediately of an incident involving one or more of his or her police officers that may reasonably be considered to fall within the investigative mandate of the S.I.U. (section 3)
- (b) The S.I.U. shall be the lead investigator and shall have priority over any police force in the investigation of the incident (section 5);
- (c) The chief of police shall segregate all the police officers involved in the incident from each other until after the S.I.U. has completed its interviews (section 6(1));
- (d) A police officer involved shall not communicate with any other police officer involved in the incident concerning their involvement in the incident until after the S.I.U. has completed its interviews (section 6(2));
- (e) Every police officer is entitled to consult with legal counsel or a representative of the association and to have legal counsel or a representative of the association present during his or her interview with the S.I.U. (section 7(1));
- (f) Immediately upon being requested to be interviewed by the S.I.U., and no later than 24 hours after the request where there are appropriate grounds for delay, a witness officer shall meet with the S.I.U. and answer all its questions (section 8(1));

- (g) A witness officer shall complete in full the notes on the incident in accordance with his or her duty and shall provide the notes to the chief of police within 24 hours after a request for the notes is made by the S.I.U. (section 9(1)); and
- (h) A subject officer shall complete in full the notes on the incident in accordance with his or her duty, but no member of the police force shall provide copies of the notes at the request of the S.I.U. (section 9(3)).

18. Failure to comply with any of the *S.I.U. Regulations* is a violation of an officer's or Commissioner's duty to co-operate fully with the S.I.U.

*Compliance with the Act and the S.I.U. Regulations*

19. Mr. McKay's joint retainer in the Schaeffer Investigation is a conflict of interest and violates an officer's duty not to communicate with fellow officers about an incident that gives rise to a S.I.U. investigation. Section 2.04(6) of the *Law Society Rules of Professional Conduct* prohibits counsel, in a joint retainer situation, from treating information received by one client as confidential from another client. As a result, the joint retainer allows officers to indirectly communicate with each other through their jointly retained lawyer prior to the preparation of their notes or participation in S.I.U. interviews.

20. Commissioner Fantino, in knowingly allowing the practice of joint retainers between subject officers and witness officers to continue, has violated his obligation to ensure that all the police officers involved in an incident are segregated from each other until after the S.I.U. has completed its interviews.

21. In both the Minty and Schaeffer Investigations, the involved officers were ordered by their supervisors, pursuant to Ontario Provincial Police Orders, Chapter 2, Assistance Service, not to complete their notes contemporaneously with the shooting incident. In the Schaeffer Investigation, the notes were not entered into the officers' memobooks until two days after the shooting. No exigent

circumstances have been provided for permitting the officers to complete their notes days after the fatal shooting.

22. The manner in which the memobook notes were written (i.e. vetted by jointly retained counsel and days after the incident) significantly undermines the reliability of the memobook notes. The duty to co-operate fully with the S.I.U. is violated when officers engage in conduct that impacts on the integrity of the S.I.U. investigation.

23. In the Minty Investigation, the S.I.U. was not notified of the fatal shooting until one hour and forty minutes after the incident. As a result, Commissioner Fantino breached his duty to ensure, pursuant to section 3 of the *S.I.U. Regulations*, that the S.I.U. was immediately notified of Douglas Minty's death.

*Rules, Statutes and Regulations Relied Upon*

24. Her Majesty the Queen in Right of Ontario and the Director the S.I.U., Ian Scott, have been added as named respondents to the herein application pursuant to Rule 5.03(4) of the *Ontario Rules of Civil Procedure* as both parties are necessary to enable the court to adjudicate effectively and completely on the issues raised by the herein application.

25. The Applicants rely on the *Police Service Act R.S.O. 1990, c. P.15* and the regulations passed pursuant to the *Act*, including Ontario Regulation 673/98, *Conduct & Duties of Police Officers Respecting Investigations by the S.I.U.*

26. The Applicants rely on Rules 14.05(3)(d), (g) and (h) and 5.03 of the *Ontario Rules of Civil Procedure*.

27. The Applicants rely on Rule 5 and Rule 2.04 of the *Law Society Rules of Professional Conduct*.

**THE FOLLOWING DOCUMENTARY EVIDENCE WILL BE USED AT THE HEARING OF THE APPLICATION:**

- i) The S.I.U. press releases dated September 28, 2009, and October 21, 2009;
- ii) Ombudsman Report, Oversight Unseen: Investigation into the S.I.U.'s operational effectiveness and credibility, by André Marin (Ombudsman of Ontario), September 2008;
- iii) 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, by the Honourable George W. Adams, May 14, 1998;
- iv) The affidavit of Ruth Schaeffer;
- v) The affidavit of Diane Pinder; and
- ii) Such further and other material as counsel may advise and this Honourable Court permit.

DATE: November 4, 2009

**Falconer Charney LLP**

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-and- POLICE CONSTABLE CHRIS WOODS ET AL  
*W 09-390573*  
Court File No:

ONTARIO  
SUPERIOR COURT OF JUSTICE

Proceedings Commenced in Toronto

NOTICE OF APPLICATION

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