

Civilian Oversight of Police in Ontario: Lessons from almost 30 years at the Special Investigations Unit

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Overview of the Special Investigations Unit

On December 13, 1988, the Ontario Legislature created a Task Force on Race Relations and Policing to respond to a sense of crisis following the deaths of Lester Donaldson and Michael Wade Lawson. Both men were black and shot by on-duty police. One man suffered from paranoid schizophrenia and the other was a teenager. After extensive community consultation, the Task Force recommended the creation of an independent organization tasked with investigating police shootings.² This recommendation resulted in the formation of the Special Investigations Unit (SIU) in August of 1990.

The SIU is a civilian police oversight agency mandated to investigate serious injuries and deaths caused by police officers in the province of Ontario.³ It is an arm's length agency of the Ministry of the Attorney General, meaning it is funded by the provincial government but has independence in its daily operations and decision-making. The SIU operates based on the principles of the rule of law, transparency and accountability, and is premised on the belief that public confidence in policing is enhanced when police conduct resulting in serious injury or death is subject to a rigorous and independent investigation. The SIU was the first police oversight agency of its kind in Canada; however, since 1990, five other provinces have created similar agencies of their own.

The SIU's existence, structure and mandate is rooted in section 113 of the *Police Services Act (PSA)*.⁴ Pursuant to the *PSA*, the SIU is comprised of civilian investigators (i.e. non-police officers) with various backgrounds including investigations in regulatory fields, the military and policing. The SIU is headed by a Director who cannot be a former police officer. At the close of a SIU investigation, it is the Director's responsibility to determine whether there are reasonable grounds to believe a police officer committed a criminal offence and, if so, cause criminal charges to be laid against the officer.

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² Race Relations and Policing Task Force, *The Report of the Race Relations and Policing Task Force* by Clare Lewis (Toronto: Race Relations and Policing Task Force, 1989) at p 150.

³ A "serious injury" is interpreted to include an allegation of sexual assault.

⁴ *Police Services Act*, RSO 1990, c P.15, s 113.

When the SIU lays criminal charges against police, the file is referred to a specialized division within the Ministry of the Attorney General for prosecution. If charges are not laid and there has been a full investigation, the Director prepares a final report which provides a summary of the evidence gathered, his or her findings of fact and the reasons why criminal charges were not warranted.

SIU Investigations and their Challenges

Section 113(9) of the *PSA* imposes a duty on members of police services to co-operate fully with the SIU during its investigations.⁵ In 1999, Ontario Regulation 267/10 (the Regulation) was promulgated under the *PSA*, which specified, among other things, that police services must promptly notify the SIU of incidents within its mandate and grant SIU investigators priority over the investigation. The Regulation also distinguishes between “subject officers” (an officer whose conduct appears to have caused the injury or death under investigation) and “witness officers” (any other police officer involved in the incident). Under the Regulation, witness officers can be compelled to give a statement to SIU investigators and to provide the SIU with a copy of their incident notes, but subject officers cannot be so compelled.

Despite the broad duty imposed on police services to cooperate with the SIU, challenges arise when this duty is not properly understood or followed. The following paragraphs describe some of the challenges the SIU has faced when investigating police:

Police Officers Failing to Secure the Scene and Preserve Evidence

Section 4 of the Regulation imposes an obligation on police services to secure the scene of an incident pending the arrival of SIU investigators.⁶ This means that officers must preserve the scene and not take investigative steps that might interfere with evidence.

This rule is not always followed and there have been instances where a delay in notification, lack of training or failure to communicate have compromised a scene resulting in the loss of evidence. Last year, for instance, the SIU investigated an incident where a man fractured his nose at a police station after allegedly hitting a wall during a struggle with police. Police witnesses reported that the incident left blood on the wall, but police staff cleaned up the blood before SIU investigators arrived.

⁵ *Police Services Act*, RSO. 1990, c P.15, s 113(9).

⁶ O Reg 267/10, s 4.

Issues with preservation of evidence are most concerning when a police officer states they used lethal force because someone was threatening them with a weapon. In these cases, the police officers sometimes move the weapon or, if it is a firearm, make it safe before SIU arrival. For example, this occurred in 2014 following a police shooting. In that case, police witnesses told investigators that the deceased charged at them with a knife before he was shot, but SIU investigators did not locate a knife at the scene. An officer had picked it up and placed it in a brown paper bag before their arrival. Fortunately, civilian witnesses observed the shooting and confirmed the man had a knife. Otherwise, the SIU may have had to rely on the credibility of officers whose very conduct was at issue.

Inappropriate Police Investigative Action

Police officers are sometimes tempted to take their own investigative steps prior to the arrival of the SIU; however, this often fails to respect the SIU's priority over the investigation. When a police officer is aware that there has been a serious injury or death, the SIU should be immediately notified and the police officers, especially those who have witnessed the incident, should generally refrain from taking investigative steps such as interviewing witnesses. These actions can taint an officer's independent recollection of the incident or give rise to the appearance, rightly or wrongly, that an officer is attempting to "get their story straight."

The SIU recognizes that police services often have a strong interest in conducting parallel investigations, especially where a civilian has committed a criminal offence. To ensure that the SIU investigation is not compromised, police officers on the ground regularly communicate with the lead SIU investigator. In practice, this usually results in the SIU and police services agreeing to clear boundaries about what type of investigation the police can engage in without undermining the SIU's ability to effectively fulfill its mandate.

Disagreements as to Scope of Police Duties

One of the most common challenges with SIU investigations is that the SIU and police services might disagree about the meaning and scope of the duty to cooperate. Section 113(9) of the *PSA* states that "members of police forces shall co-operate fully with the members of the [SIU] in the conduct of investigation." This is broad and its precise meaning has been subject to debate. The Regulation provides some clarification in how the duty should be interpreted; however, it does not purport to be a complete rulebook defining its scope. In the past, this has caused confusion about the SIU's power to compel witnesses and police records which has delayed investigations or resulted in the SIU not

receiving evidence to which it is entitled. The SIU normally addresses these disagreements by communicating its concerns to the Chief of Police; however, additional ways the SIU manages refusals to cooperate are discussed in the pages that follow.

Managing Resistance and Obstruction to SIU Investigations

Since the inception of the SIU, tensions of varying degrees have arisen in the SIU's relationship with police services and sometimes with the public at large. The following paragraphs describe various approaches the SIU has adopted to address these tensions.

Initiating Police Disciplinary Proceedings

A police officer's failure to comply with the duty to cooperate amounts to a "neglect of duty" which is a form of police misconduct under the *PSA*. When this occurs, the SIU may complain to the Office of the Independent Police Review Director (OIPRD), the agency in Ontario responsible for investigating police misconduct. However, an OIPRD investigation is rarely a satisfactory solution. The OIPRD's investigation and resulting disciplinary proceedings may be lengthy, thereby leaving the SIU's investigation in limbo until they are resolved. Moreover, even where a complaint is substantiated, police disciplinary tribunals have no statutory power to compel police officers to comply with their duty.⁷ This explains why the SIU has historically refrained from pursuing this course of action in most cases.

Enforcing Police Compliance in the Courts

Unlike a police disciplinary tribunal, the courts in Ontario have remedies capable of enforcing compliance of police officers with their obligations to the SIU. These remedies include declarations about the meaning of the law and extraordinary remedies ordering specific compliance (e.g. mandamus orders).⁸

In *Wood v Schaeffer*, for example, the Supreme Court of Canada ruled that police officers could not consult with lawyers before preparing their notes about an incident under investigation by the SIU.⁹ Prior to the court's decision, police officers would routinely confer with legal counsel prior to writing their notes. This gave rise to the perception that lawyers were compromising the integrity of the notes

⁷ Penalties include dismissal, suspension, reduced hours or pay, a formal reprimand, a direction to take counselling, and/or a direction to participate in a program or activity.

⁸ See, for example, *Independent Investigations Office of British Columbia (IIO) v Vancouver Police Department*, 2018 BCSC 1804, where the IIO (a civilian oversight agency in British Columbia) successfully obtained a mandamus order compelling witness officers to attend interviews when the IIO directs.

⁹ *Wood v Schaeffer*, 2013 SCC 71, [2013] 3 SCR 1053.

by creating a record to protect their client from liability, rather than notes which truly reflected the officer's independent recollection of the incident. The Supreme Court declared that such practice was not permitted because allowing "police officers to consult with counsel before their notes are prepared is an anathema to the very transparency that the [SIU legislation] aims to promote."¹⁰

Additionally, in *Peel (Regional Municipality) Police v Ontario (Director, Special Investigations Unit)* the Ontario Court of Appeal considered a police challenge to the SIU's jurisdiction to investigate incidents that pre-dated the creation of the office in 1990, or involved persons who used to be police officers but were no longer officers at the time of the SIU investigation.¹¹ In both instances, the court ruled that the SIU had the jurisdiction to investigate.

In both *Schaeffer* and *Peel*, the issues in dispute were systemic in nature and produced outcomes that have greatly assisted the SIU in pursuing its oversight objectives. The courts are less conducive as a means of checking police challenges to the SIU's authority that are more immediate and case-specific. For example, although the SIU could apply to the courts to compel a police service to provide records that it has denied producing, this legal process is an extraordinary remedy which can delay the investigation by several months.

Criminal Charges Against Police for Obstruction of Justice

In some cases, there are criminal remedies for interference with SIU investigations. Section 139(2) of Canada's *Criminal Code* makes it an offence for anyone to wilfully attempt to "obstruct, pervert or defeat the course of justice", which includes the conduct of a criminal investigation.¹² Persons convicted of the offence are subject to a prison term not exceeding ten years. This provision is a further tool in the arsenal of the SIU to deal with resistance to and obstruction of their investigations. However, as a criminal offence, the proof requirement is high and stringent. It is only pursued by the SIU in the clearest cases.

Future Powers: A Provincial Offence for Police Non-Compliance

Last year, the provincial government enacted the *Special Investigations Unit Act, 2019 (SIUA)*, which will replace the SIU's current legislative scheme.¹³ Once in force, the *SIUA* will empower the SIU to charge officers with a provincial offence when they fail to comply with the SIU's requests and directions.

¹⁰ *Ibid* at para 6.

¹¹ *Peel (Regional Municipality) Police v Ontario (Director, Special Investigations Unit)*, 2012 ONCA 292, 110 OR (3d) 536.

¹² *Criminal Code*, RSC 1985, c C-46, s 139(2).

¹³ *Special Investigations Unit Act, 2019*, SO 2019, c 1, Sched 5.

Punishment for failing to comply includes a fine of up to CAN\$5000 and/or a term of imprisonment for up to one year in the case of a first offence; and, a fine up to CAN\$10,000 and/or a prison term of up to one year for a second or subsequent offence. The efficacy of the provision remains to be seen although it will hopefully have a deterrent effect.

Assurances of Confidentiality for Civilian Witnesses

The SIU also faces challenges with securing civilian witness statements. Civilians who decline to provide a statement cite a myriad of reasons, including the fear of reprisal from police officers, distrust in the criminal justice system, and concerns over publicity or a loss of anonymity. A civilian who stands in criminal jeopardy may also fear that their statement could be used as evidence against them. In order to secure the cooperation of civilian witnesses, the SIU has a longstanding policy of assuring the civilian that the SIU is investigating the police and not the civilian, and that whatever the civilian says to the SIU will remain confidential except in specified circumstances. The assurance presently reads as follows:

I am an investigator with the SIU. The SIU is a civilian law enforcement agency, which independently investigates the circumstances of serious injuries, which includes sexual assault allegations, or deaths involving the police. We are not investigating you. We are investigating the conduct of the police. Anything you tell us will be kept confidential by the SIU, unless you consent to its release or unless we have to release it by operation of law. The only other times your information would be released is if you give me information about an offence that is still happening or one that is yet to happen or if you attempt to deceive me.

While not an ironclad guarantee of confidentiality, the assurance has proven a critical tool in persuading otherwise skeptical witnesses to cooperate with the SIU.

Community and Police Education Campaigns

In many cases, lack of knowledge about the SIU is at the root of problems that occur in the course of its investigations. Civilians, for example, often confuse us for a police service. This misperception feeds their distrust and makes them less likely to cooperate with SIU investigations. Police officers are often unsure about the rules that govern SIU investigations. In order to obtain cooperation, an important part of a SIU investigator's job is the ability to educate police and non-police witnesses about the SIU.

At a broader level, the SIU has an "Outreach Coordinator" whose sole responsibility is to raise awareness about the SIU throughout the province. This is done through presentations at community functions, schools, civic associations, child welfare authorities, and advocacy groups. The province's Indigenous communities and racialized communities are a focal point of the SIU's outreach efforts given their histories and experiences with policing. The Outreach Coordinator also educates policing groups,

including making yearly presentations to police recruits at the Ontario Police College, which ensures that all people entering the policing profession are exposed to the SIU as part of their training.

Outreach of this nature pays the greatest dividends in securing the public's acceptance of the value of the work done by the SIU. It is a never-ending process in which there are always more things to be done. In order to reach more people at a low cost, the SIU also focuses increasingly on technology to spread its message, including a revamped web page, an enhanced presence on social media (including an active Twitter account), and video conferencing.

Greater Transparency

In the *Report of the Independent Police Oversight Review*,¹⁴ a study commissioned by the provincial government in 2016 of Ontario's police oversight agencies, The Honourable Michael H. Tulloch called for added transparency in the operations of the SIU. Justice Tulloch was of the view that opening the doors wider to the work of the office would enhance the SIU's credibility in the eyes of the public. Thus, while recognizing that criminal investigations must retain a significant cloak of confidentiality while they are ongoing, Justice Tulloch recommended the public release of the SIU's final reports.

Acting largely on recommendations contained within Justice Tulloch's report, the present provincial government passed the *SIUA*. The new legislation requires the release of SIU final reports in cases where no charges are laid against the police. While the statute is not yet in effect, the SIU began publishing its final reports in the wake of the release of Justice Tulloch's report in March 2017. To the extent greater information flow to the public about the results of SIU investigations instills public confidence the SIU as an institution, the hope is that witnesses, both police and non-police, will harbour less suspicion about the work of the office and be more inclined to cooperate with its investigations.

Prioritizing Investigations

The SIU's present mandate stretches over around 50 police services consisting of over 23,000 police officers in a province of about 14.5 million people. In the last year, the SIU opened investigations in 382 cases. While many of those cases involved the police using force against a civilian, others did not, such as in the case of self-inflicted deaths and injuries. The following chart breaks down the number and type of incidents the SIU has investigated in the past ten years:

¹⁴ Justice Michael Tulloch, *Report of the Independent Police Oversight Review* (Ontario: 2017), online: <https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/police_oversight_review/>.

Occurrences	'09	'10	'11	'12	'13	'14	'15	'16	'17	'18
Firearm Deaths	7	9	6	7	9	5	7	7	6	7
Firearm Injuries	9	8	14	8	10	3	8	7	5	2
Custody Deaths	19	21	21	322	17	19	27	25	19	36
Custody Injuries	184	171	142	229	194	169	188	197	229	198
Vehicle Deaths	7	6	6	9	7	10	4	8	3	6
Vehicle Injuries	54	27	27	44	39	37	37	37	42	46
Sexual Assault Allegations	29	37	53	49	39	43	40	43	68	58
Other ¹⁵	3	2	0	4	3	6	1	3	8	19
TOTAL	312	281	269	382	318	292	312	327	380	382

As with most oversight agencies, expectations are high and money is tight. The SIU's total annual expenditures last year was \$10,161,280. That budget supported a staff of 15 full time investigators, 10 forensic investigators and 39 regional investigators who were stationed throughout the province, along with management and support staff.¹⁶ Last year's caseload was a record high and significantly taxed SIU resources, detrimentally impacting the SIU's ability to close cases in a timely manner.¹⁷ The SIU has hired additional counsel in order to expedite the review of completed investigations. In so doing, however, the SIU has had to negotiate a delicate balance to avoid diverting resources from investigative field work.

The SIU accepts for investigation all reports of serious injuries or deaths involving on-duty police officers. The conduct of off-duty investigators is treated differently. Unless the off-duty officer has used police equipment or invoked their status as a police officer during the incident, the SIU will not open a file in these cases. The SIU is simply not equipped with the resources required to investigate off-duty police conduct at this time.

The SIU generally treats each case equally with respect to its resources, although investigations may be triaged in some circumstances, such as:

¹⁵ "Other" refers to cases where a death or injury was not caused while in police custody or with a firearm or vehicle.

¹⁶ More information about the SIU's cases and its expenditures can be found in its Annual Reports which are available to the public. See, for example, Special Investigations Unit, "SIU Annual Report 2018" (2019), online: <https://www.siu.on.ca/en/annual_report_2018.php>.

¹⁷ Another factor leading to the delay in the closing of files is the fact that there presently only exists one official at the SIU, the Director, with the statutory authority to decide whether criminal charges are warranted. The *Special Investigations Unit Act, 2019*, once in force, will allow the Director to share this decision-making authority with another SIU staff member whom she or he appoints.

- Where there is a delay in notification and a scene is no longer available for examination, the start of an investigation may be delayed while SIU investigators are deployed to cases requiring an immediate scene examination;
- Where the offence under consideration is subject to a limitation period, added resources will be devoted to those investigations to ensure a charging decision is made before the limitation period expires; and
- Where an affected person, be they the person who has been injured, a family member of a person who is deceased or the subject officer, has a pressing and substantial need for a resolution of the investigation (such as a medical concern), the SIU will prioritize the investigation.

While investigations take up the bulk of resources, the SIU has other important initiatives such as an Affected Persons Program, which provides emotional support to those affected by an incident under investigation and makes referrals to victims-services and mental health resources.

Appraising the SIU's Impact on Policing in Ontario

The SIU assesses its effectiveness and its impact on policing using a variety of methods, including the mechanisms described in the following paragraphs.

External Reviews of Civilian Oversight of Policing in Ontario

The most direct way that the SIU assesses its performance and monitors its impact on policing is by participating in external reviews on the effectiveness of civilian police oversight in Ontario. These reviews are conducted by independent bodies which consults with community groups, legal advocacy clinics, academics and police services, and makes recommendations for improvements to the SIU. These recommendations have a significant importance to the SIU and have preceded legislative action involved in creating the SIU, the Regulation and the new legislation which is not yet in force. Where possible, the SIU also implements recommendations in the absence of legislative changes. The more significant of these reviews, including two studies conducted by Ontario's Ombudsman, may be found at the SIU's website: www.siu.on.ca.

The Public's Perception of the SIU's Impact

The SIU regularly appraises its own performance and its impact on policing through direct engagement with the public. Since 2002, the SIU has facilitated a Director's Resource Committee comprised of representatives of various ethnic and community groups which meet with the Director throughout the year. These meetings give the SIU an invaluable opportunity to receive feedback from the community and to learn about issues that the community perceives with policing. Of course, the SIU also receives

feedback from the public on a daily basis through public outreach and in its contact with civilians. In addition, the SIU monitors news publications about the SIU and other civilian oversight agencies in an ongoing effort to learn more about the public's perception of issues related to the SIU.

Oversight from the Courts

Finally, the SIU monitors its effectiveness through the courts. The SIU is sometimes involved in litigation that is separate and apart from prosecutions resulting from its investigations. This can include applications to the court for mandamus or declaratory relief where there are issues of police non-compliance, and it can also include the SIU being named a defendant in a civil action alleging the tort of negligent investigation. To date, the SIU has been mostly successful in the litigation it has been involved in, which provides some assurance that the SIU's investigations and decision-making have been conducted in a fashion that is in line with community standards and the law.

An Invitation for Future Dialogue

The authors of this paper thank this seminar for permitting us to submit this paper and regret not being able to present our experiences in person.

More information about the SIU can be found on our website at www.siu.on.ca. We also are happy to answer any additional questions or speak with you about your own experiences personally. Our contact information is:

- Joseph Martino, Director – joseph.martino@ontario.ca
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Lastly, you are welcome to visit the SIU's office in Mississauga if you ever find yourself in Ontario.