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# Niagara Regional Police Service

Chief of Police Wendy E. Southall

C.168

## REPORT OF THE POLICE SERVICE TO THE REGIONAL MUNICIPALITY OF NIAGARA POLICE SERVICES BOARD

**Board Report Number:**

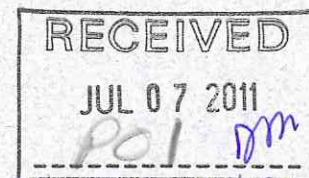
C128 / 2011

**Date of Report:**

2011-06-27

**Date of Board Meeting:**

2011-07-28



*Confidential agenda*

**Mr. Todd Shoalts, Acting Chairperson  
and Members of the  
Regional Municipality of Niagara Police Services Board**

**Reference:**

Special Investigations Unit investigation into an In-Custody Injury – Incident # 10-120318, SIU Case Number 10-0VI-272

**Recommendation:**

1. That the Board receives the report.
2. That the Board makes the report available to the public.

**Background:**

On Saturday December 18<sup>th</sup>, 2010 at approximately 1:40 AM, two Niagara Regional Police Service Officers on routine patrol observed a green Jeep Liberty on Queenston Street in St. Catharines. The Jeep was unplated and had a price sticker on the



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windshield of \$8995. Investigation later determined that the vehicle had been stolen from a dealership just minutes prior to being observed by the officers. Based on the belief that the vehicle was stolen, the officers attempted to initiate a traffic stop, however the vehicle did not stop.

A vehicle pursuit ensued, with the vehicle fleeing from police at a high rate of speed, at one point striking one of the cruisers at the entrance of the Fairview Mall parking lot. The Jeep continued northbound on Geneva Street and eventually turned eastbound onto Evangelista Court, a dead-end roadway situated in the north-end of St. Catharines. Another responding officer positioned his cruiser onto the median to eliminate a potential escape route, however the Jeep drove directly at the cruiser, striking it head-on, before coming to rest.

The 26-year-old male driver of the jeep ignored demands by police to exit the vehicle and had to be forcibly removed by NRPS officers and taken into custody. The driver refused EMS treatment for his injuries at the scene. A 31-year-old female passenger was uninjured and was taken into custody without incident.

The driver was transported later to the St. Catharines General Hospital after complaining of a sore jaw. He ultimately became uncooperative with hospital staff and signed a waiver refusing medical treatment. Later that same day, the male was taken to the hospital again, where it was discovered he had a broken jaw.

The Special Investigations Unit was immediately notified and invoked their mandate to investigate the incident.

Two (2) Niagara Regional Police Service Constables were named as 'Subject Officers' and eight (8) officers were named as a 'Witness Officers'.

The male driver was subsequently charged and later convicted of numerous criminal charges, including: Break, Enter & Commit, Flight While Pursued by Peace Officer and Resisting Arrest.

The S.I.U. investigation has concluded and the file has been closed with no further action contemplated. In a letter dated, February 23, 2011, Joseph Martino, acting Director of the Special Investigations Unit, concluded:

*“... there are no reasonable grounds, in my view to believe that the named subject officers committed a criminal offence in connection with the injuries caused to the complainant. The complainant led NRPS officers on a police chase after apparently stealing a Jeep vehicle from a St. Catharines dealership. He fled from police at high speeds, at one point striking one of the cruisers at the entrance of the Fairview Mall parking lot, and eventually turned eastbound onto Evangelista Court from Geneva Street. Evangelista Court is a dead-end roadway. Mr. ██████ proceeded down to the end of the road with several police cruisers right behind him. He maneuvered the Jeep the wrong way around the north side of the grassy median and then mounted the median to evade a cruiser blocking his path. One of the officers drove his cruiser onto the median to eliminate Mr. ██████ escape route, and had his cruiser struck head on by the Jeep.*

*It may well be that Mr. ██████ sustained his injury during the course of the collision with the officer's cruiser. If it did, it cannot be said to be connected with any criminal conduct on the part of the officers. The evidence does not establish that the officers drove dangerously or were criminally negligent during the Suspect Apprehension Pursuit regulation of the Police Services Act for the theft of a vehicle. And, given the sparse traffic that would have been present on the roadway at the time of the events in question and the officers' use of their emergency equipment, it cannot be said that the pursuit ought to have been terminated in the interest of public safety at some earlier point. The officers were entitled to converge upon Mr. ██████ at the end of Evangelista Court and it was Mr. ██████ who caused the collision when he drove in the direction of the cruiser attempting to break through the blockade.*

*The other possibility raised in the investigation is that Mr. ██████'s jaw was fractured when an officer struck him while he was down on the ground having been removed from the Jeep. The evidence establishes that force, including punches to various parts of Mr. ██████'s body, was used to forcibly extricate him from the Jeep. I am also satisfied that force was used to overcome Mr. ██████'s resistance on the ground and affect his arrest.*

Mr. ██████'s reckless and violent behavior during the pursuit, in the course of which he drove at highway speeds, left the roadway onto the front lawns of a number of residences and collided with two police cruisers, lends credence to the evidence suggesting he resisted his arrest. None of the witness officers saw Mr. ██████'s head being punched repeatedly and the two subject officers chose not to provide the SIU any information. In the circumstances, there is insufficient evidence to form a reasonable belief that any of the involved officers used excessive force on Mr. ██████.

Section 11(1) and (2) of Ontario Regulation 673/98 under the *Police Services Act* states:

- 1) *The chief of police shall also cause an investigation to be conducted forthwith into any incident with respect to which the SIU has been notified, subject to the SIU's lead role in investigating the incident.*
- 2) *The purpose of the chief of police's investigation is to review the policies of or services provided by the police force and the conduct of its police officers.*

With the above in mind, this report will focus on the following three (3) areas:

1. The policies of the police service,
2. The services provided by the police service, and
3. The conduct of its police officers.

## **1) THE POLICIES OF THE NIAGARA REGIONAL POLICE SERVICE**

### ***General Order 079.05 - Special Investigations Unit***

The purpose of this General Order is to ensure that all members of this Service are aware of the policy as it relates to the co-operation with the Special Investigations Unit.

The General Order states:

*3.18 As required by the Act, all witness officers shall attend an interview request from the S.I.U. Failure to meet this obligation shall lead to a direct order to attend or provide documentation. Reasonable attempts will be made to provide the witness officer with legal counsel and or Niagara Region Police Association/Senior Officers Association representation. The preference of an officer for a particular counsel is not a justifiable excuse for unreasonable delay in attending interviews or providing statements.*

*3.19 All notes/reports shall be completed and maintained as per established practice until a request from the S.I.U. has been received. Notes/reports of witness officers shall be made available to the S.I.U. through the Service's designated S.I.U. Liaison Officer. No member of the police service shall provide copies of notes/reports of a subject officer at the request of the S.I.U. unless the subject officer authorizes release.*

*3.23 Duty books are the property of the Service. All members must complete a duty book in the prescribed format pursuant to General Order 168, entitled Duty Books.*

*3.30 Once established as a Witness Officer and directed to attend an interview or provide documentation to the S.I.U., the Witness Officer shall:*

*(a) Attend as directed;*

*(b) Respond to questions; and,*

*(c) Provide their notes to the Inspector-in-Charge of the Policing Standards Unit or their designee within 24 hours after a request for the notes is made by the S.I.U.*

The subject officers involved in this incident followed the guidelines laid out in the Special Investigations Unit General Order. The eight witness officers co-operated fully with the Special Investigations Unit investigation but all eight declined to answer a question about whether their notes were made before or after they had consulted with counsel. This issue will be dealt with in the Officer Conduct section of this report.

Additionally, three of the witness officers declined to draw a diagram for SIU investigators during their interview. This issue will also be dealt with in the Officer Conduct section of this report.

The investigation has determined that there were no violations of General Order 079.06 Special Investigations Unit.

### **GENERAL ORDER 168.05 - OFFICER NOTE TAKING:**

It is the policy of this Service that officers' note taking practices shall be in accordance with procedures taught to police officers attending the Ontario Police College.

The General Order states:

*3.1 Officers in Field Services shall maintain accurate and complete notes, recording in chronological order and in detail, all matters involving police activity coming to the officers' attention, by the end of their shift.*

The investigation has determined that there were no violations of General Order 168.05 Officer Note Taking.

### **GENERAL ORDER 53.13 - USE OF FORCE:**

This General Order provides clear direction on a member's authority to use force on another person in the course of their duties and details the procedures to be followed in the reporting of such force.

The General Order states:

#### **5.3 Empty Hand Techniques**

(a) **Description:** *Empty hand techniques are the first option of physical response to control a resistant person. Soft empty hand techniques refer to controlling or restraint techniques. Hard empty hand techniques refer to the use of strikes to control or defend against an aggressive subject.*

(b) **Use:** *Empty hand techniques may be utilized with passive resistance to grievous bodily harm/death behaviours. The situation, subject/officer impact factors and level of behaviour will dictate the amount of force applied through empty hand techniques.*

#### **3.39 Handcuffing**

(a) **Description:** *Handcuffing is a use of force used to prevent a prisoner's escape and for the member and prisoner's safety. Their use is mandatory on all prisoners unless in the officer's judgment the circumstances make it impossible or unnecessary (i.e.*

elderly, handicapped prisoners or persons requiring sign language to communicate). Members shall use only handcuff models issued or approved by Quartermaster Stores.

- (b) **Use:** (i) After arrest the custody and safety of a prisoner becomes the responsibility of the arresting officer. Reasonable caution shall be exercised during handcuff application to control the prisoner and prevent injuries;
- (ii) Where possible, handcuffs must be applied to the prisoner with the hands behind the back and palms facing out.

Following application, officers shall:

- a) check the tightness of the handcuffs, making necessary adjustments;
- b) double lock the handcuffs; and,
- c) conduct a search of the handcuffed subject for weapons or other articles which could be used for escape.
- (iii) In an active handcuffing situation, officers must ensure that the subject has been controlled prior to the application of handcuffs;

The investigation has determined that there were no violations of General Order 53.13 Use of Force.

## **2) SERVICES PROVIDED BY THE NIAGARA REGIONAL POLICE SERVICE:**

There were no issues identified relating to the services provided by the Niagara Regional Police Service.

## **3) CONDUCT OF THE OFFICERS AT THE TIME OF THE INCIDENT:**

Consistent with policy and their legislated duty to do so, the officers took steps to affect the arrest of the accused. Having the legal right to make the arrest, the involved officers used minimal force to control and handcuff the male.

Upon review of the statements of all the involved officer's, both witness and subject officer's, it is clear that various empty hand techniques, namely punches to various parts of the accused's body, were utilized to remove the accused from the Jeep. While on the

ground, force was also used to counter the male's resistance and non-compliance in order to take him into custody.

It should be noted that the accused subsequently filed a public complaint with the Office of the Independent Police Review Director (OIPRD) alleging excessive use of force on behalf of the involved officers. The investigation was retained and investigated by OIPRD Investigator's, Robert Zufelt and Larry McMorran.

In a report dated June 22, 2011, the OIPRD concluded that there was an insufficient body of evidence available to form reasonable grounds to believe that officers used excessive force with the complainant, and therefore the allegation was unsubstantiated.

There is no evidence to suggest that any of the officers used any unnecessary or excessive use of force. Using the guidelines of the Ontario Use of Force Model, the force that was used was not excessive for the level of resistance the male was exhibiting.

The eight witness officers were required by the Niagara Regional Police General Orders and the Ontario *Police Services Act* to reply to questions posed to them during their interviews with Special Investigations Unit investigators.

SIU Acting Director, Mr. Joseph Martino was critical of three witness officers, who during their interviews, declined to draw a diagram depicting the incident scene and the location of involved vehicles. In accordance with section 113(9) of the *Police Services Act*, Mr. Martino expressed concerns that the officers were legally obligated to cooperate with the SIU investigation and should have drawn a diagram of the scene for the investigators.

As part of this investigation, the relevant witness interviews were reviewed to address the concerns of Mr. Martino.

It should be noted that in each instance where an officer was asked by the SIU to draw a diagram, it was their counsel, who informed the SIU investigators that the officer would not be drawing a diagram. The rationale for this decision was that SIU investigators had earlier been provided with a diagram of the scene that was completed by an Acting Sergeant assigned specifically to investigate the motor vehicle collision.

Counsel for the involved officers took the position that the SIU Investigators had an accurate diagram at their disposal and that the officers were there to answer questions of the SIU. The witness officers simply followed the advice of their counsel, who was attempting to have all of the involved officers refer to one diagram for greater consistency and clarity.

Accordingly, the writer is of the view that the failure to draw a diagram upon request of the Special Investigations Unit is not one that clearly and convincingly illustrates "misconduct" on behalf of the involved officers.

SIU Acting Director, Mr. Joseph Martino was also critical of several witness officers' responses to a question with respect to whether their notes were written before consulting with counsel. The officers, in the presence of their legal counsel, declined to answer the question on the advice of legal counsel. Mr. Martino felt this was a breach of duty under section 8 of O. Reg. 267/10 mandating officers to answer all questions posed to them by the investigators.

Section 8 of O. Reg 267/10 states:

*Subject to subsections (2) and (5) and section 10, immediately upon receiving a request for an interview by the SIU, and no later than 24 hours after the request if there are appropriate grounds for delay, a witness officer shall meet with the SIU and answer all its questions.*

There is a significant question of relevance with respect to this question and the SIU investigation. In the absence of a basis for believing that the officers' counsel participated or encouraged a breach of section 8 of O.Reg.267/10, then this question can have no relevance to the SIU investigation. Section 8 of the Regulation does not require witness officers to answer questions that are not related to the SIU's investigative authority, which is limited to the investigation of serious injury or death resulting from the commission of a criminal offence(s) committed by a police officer(s).

The SIU Director has publically stated that he would like police officers to compose their notes on cases involving the SIU without reference to legal counsel.

The Ontario Association of Chiefs of Police Association (OACP) Special Investigations Unit Committee is responsible for providing advice and guidelines to Police Services in Ontario regarding SIU issues.

The OACP's position on this issue is that police executives will not interfere with their officers seeking counsel before interviews by the SIU or in the preparation of their notes. Services vary on the issue of counsel and working agreements are different but, fundamentally, police officers have a right to Counsel as guaranteed all citizens under the Canadian Charter of Rights and Freedoms.

In 2010, the Honourable Patrick J. LeSage was retained by the Ministry of the Attorney General to review issues among various police organizations and the SIU, and to provide advice and recommendations on potential resolutions concerning these issues.

One of the issues reviewed by Mr. LeSage included the conduct and duties of officers in SIU investigations, including their right to counsel and note-taking.

In a report dated April 4, 2011, Mr. LeSage outlined several recommendations concerning his review of the SIU to the Honourable Chris Bentley - Attorney General of Ontario. With respect to the right to counsel issue, Mr. LeSage reiterated the position of the OACP and made the following recommendation:

*Section 7 of O. Reg. 267/10 is clear. All officers have the right to counsel.*

*My recommendation is that Regulation 267/10 be amended to provide as follows:*

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

In keeping with this recommendation and the position of the OACP, the writer is of the view that the officers involved in this incident were within their legal right to consult with counsel prior to composing their notes.

The investigation has determined that there were no violations of General Order 079.06 Special Investigations Unit, or Ontario Regulation 267/10 of the *Police Services Act*.

**Conclusion:**

This matter was investigated by the Special Investigations Unit who cleared the officers of any criminal wrong-doing.

The investigation conducted pursuant to Section 11(1) of Ontario Regulation 673/98, made under the *Police Services Act*, has examined the policies of or services provided by the police force and the conduct of the police officers involved.

This investigation has concluded that no further action needs to be taken. Relevant policies were adhered to and said policies were found to be adequate. No service issues were identified and the officers were found to have conducted themselves appropriately and professionally throughout this incident.

**The Decision Whether or Not to Make This Report Available to the Public:**

Subsection 11(4) of Ontario Regulation 673/98 made under the *Police Services Act* provides that, upon receiving this report, the Board may make it available to the public.

The *Police Services Act* provides that meetings of the Police Services Board shall be open to the public subject to exceptions that are set out in Subsection 35(4). The applicable exception to be considered in this case is whether or not "the desirability of avoiding disclosure in the interest of any person affected or in the public interest outweighs the desirability of adhering to the principle that proceedings be open to the public."

In considering whether or not to make this report available to the public, it is respectfully submitted that the Board consider the following factors:

1. The incident is a serious matter that resulted in serious injury to a man while being lawfully taken into police custody.
2. There are no public security matters revealed in this report.
3. This report does not reveal any intimate financial or personal matters.

**Recommendation:**

The applicable legislation creates a presumption that the actions taken by a Police Services Board should be open to the public. With that in mind and in consideration of the aforementioned, it is respectfully recommended that the Board should make this report available to the public.

**Relevant Policy Considerations:**

Section 11(4) of Regulation 673/98 under the *Police Services Act*

**Cost of Recommendations:**

There are no costs associated to the recommendations

**Alternative Options:**

1. Not to receive the report.
2. Not to make the report available to the public

**Reasons for Recommendation:**

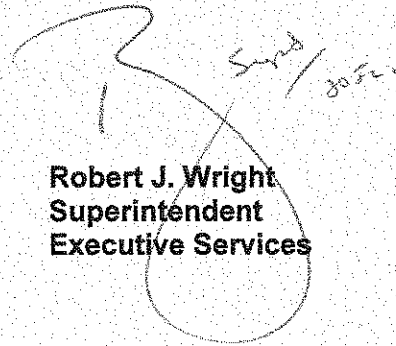
To comply with provisions of Section 11(4) of Regulation 673/98 under the *Police Services Act*

**Prepared by:**



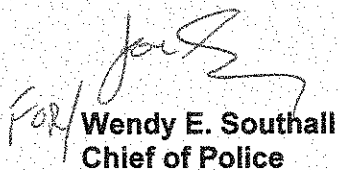
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**Wendy E. Southall  
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