

Panel reserves decision on Levi Schaeffer family's appeal, decision could take months

GALEN EAGLE

TORONTO - TORONTO — A process that allows officers to seek advice from a lawyer before preparing their notes is a festering boil that needs to be lanced.

Those were the parting words of Julian Falconer, the lawyer representing the families of a Peterborough man and an Elmvale, Ont. man shot dead by OPP in separate incidents, as he addressed the three-member panel of the Ontario Court of Appeal Thursday.

"If we don't lance this boil... it will fester," Falconer said. "The obvious answer is we do the tough thing and create limits. Simply give (officers) the right to counsel after they do their notes."

Levi Schaeffer, 30, of Peterborough, who was diagnosed with schizoaffective disorder, panic disorder and anti-social personality disorder, and Doug Minty, 59, of Elmvale, west of Barrie, a developmentally disabled man, died in separate incidents in June 2009.

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Falconer, whose first argument in Superior Court of Justice failed, took his fight on behalf of the families to the province's top court this week.

His arguments challenged the practice that allows lawyers to advise police officers under investigation or vet their notes before officers submit them to the Special Investigations Unit.

"We want police officers' notes to be police officers' notes," Falconer said in an impassioned final statement to Justices Robert Sharp, Robert Armstrong and Paul Rouleau. "I plead with you."

The small courtroom in Toronto's Osgoode Hall was packed with some 15 lawyers representing various stakeholders in the case. Families and supporters of both Mr. Schaeffer and Mr. Minty filled in the back of the court.

Lawyer Ian Roland, who represents the subject officers in both deaths, told the court it had no right to even deliberate on the appellants' concerns.

He echoed sentiments from the lower court that threw out Falconer's case in June 23, 2010 on those very grounds.

"You should not be interfering in the political process of policy making," Roland said Thursday. "That's not your role."

As to Falconer's arguments, Roland said every Canadian citizen, including police officers, has the right to seek counsel when facing an investigation. Society places police officers in extraordinary circumstances that sometimes put them in major conflicts with members of the public, Roland said.

"Providing officers with the right to counsel ... is a societal contract," he said. "The officer is entitled to legal advice with respect to responding to an SIU investigation."

But Mr. Justice Robert Sharp interrupted Roland, suggesting the public perception is that lawyers would influence an officer's notes, creating a different version of events.

"It's going to be shaded. It's going to be coloured ... in a way that best presents the officer. Lawyers will look after their clients. They will give them advice about how to best present themselves," Sharp said.

In that case the lawyers are simply doing their jobs, Sharp said, but it's obvious why the public might have some concern, he added.

"It's just a matter of common sense," he said. "The public would see a lawyer's involvement as an undermining of the note taking process."

Roland scoffed at the idea that lawyers would put the administration of justice into disrepute by sully an officer's notes.

"It has to be presumed that a lawyer will perform services in an ethical manner," he said. "You can't assume that the truth-seeking is interrupted by the introduction of a lawyer to the process."

Lawyer Christopher Diana, representing the OPP commissioner's office and former commissioner Julian Fantino, conceded the current regulations open the door for officers to seek legal advice to vet their notes, but that practice is not condoned by the OPP.

Diana said the court should rule against Falconer's arguments because the province had substantively addressed the concerns last month.

Attorney General Chris Bentley has agreed to implement recommendations made by former Chief Justice Patrick LeSage in a report released in April.

Among his recommendations, LeSage commented that subject and witness police officers in an SIU investigation have the right to counsel, but not by the same attorney.

He also said the provincial government should make it clear to lawyers representing several witness officers that their notes should not be shared with each other.

But Falconer said that process was not public and LeSage merely met with the SIU and police organizations.

"These families were not invited," he said, referring to the Schaeffer and Minty families. "Justice LeSage would never suggest it was a public process because it was not."

Lawyer Joseph Markson, who represents the Ontario Association of Chiefs of Police, said officers involved in fatal shootings are often suffering from critical incident stress while segregated in a interview room waiting for an SIU investigation to begin. Access to a lawyer is a crucial part of ensuring an officer is fit to make notes in the first place, he argued.

"We know as fellow human beings that that trauma can be very real," Markson said.

Falconer concluded by saying no outside influence on an officer's notes, no matter the intentions of a police association lawyer, should be tolerated.

"As soon as the outside influence is being exerted, the independence is gone," Falconer said.

The panel reserved its judgment Thursday, which is expected to take many months. It will be released in writing upon completion.

geagle@peterboroughexaminer.com