

Criminal

Move to have Special Investigations Unit police incidents with off-duty cops raises questions

By **Terry Davidson**

(September 19, 2017, 9:47 AM EDT) -- Durham Regional Police's decision to now call the Special Investigations Unit (SIU) for off-duty officers involved in civilian-related incidents could succeed in further breaking down the "blue wall of silence," or could end up having "chilling effects" on future policing and recruiting, say lawyers.



Joseph Markson, Markson Law Professional Corporation

Three criminal lawyers regularly involved with legal and disciplinary cases involving police spoke with *The Lawyer's Daily* following the announcement by Durham Region Police Service Chief Paul Martin, who reportedly called the controversial move "the right thing to do for our community."

The announcement comes in the wake of the Durham force making headlines following the alleged beating of 19-year-old Dafonte Miller in Whitby by an off-duty Toronto Police Service officer. That officer, Const. Michael Theriault, faces charges of aggravated assault and assault with a weapon, as well as mischief for allegedly misleading investigators. Theriault's brother, Christian, was also charged in the incident.

Martin had reportedly said Durham Police did not call in the SIU because it was the job of the Toronto Police Service to do that as the officer's employer.

The SIU is a provincially mandated, arms-length law enforcement body which conducts criminal investigations into circumstances involving police and civilians that have allegedly resulted in serious injury, death or sexual assault.

Toronto lawyer and frequent police critic Peter Rosenthal called Durham Police's move a good one, as police officers should not be put in the position of investigating other officers due to the continued

existence of a "blue wall of silence" that has officers sometimes protecting fellow officers.

"Suppose that an off-duty police officer is involved in a car accident that seriously injures or kills someone," said Rosenthal. "It is my firm opinion that the investigation of whether the officer's driving constituted a criminal offence should be undertaken by the SIU rather than by a police force," he said. "The reason is the same as for any investigation of whether any act of a police officer — on or off duty — that seriously injures or kills someone should be investigated by the SIU: the reluctance of police officers to charge other police officers with offences."

Joseph Markson, of Markson Law Professional Corporation, is one of a handful of Toronto-area lawyers known for defending police officers against criminal charges and disciplinary action. He said bringing in the SIU to investigate off-duty officers could cause those off-the-clock to think twice about intervening as good citizens — and could scare off future recruits from the policing profession.

"There must be well-defined legal separations between police officers' professional and personal lives," said Markson.

"Otherwise, citizens who choose policing as their vocation may become subject to unpredictable and Big Brother-like intrusions into their personal lives. Such perceptions and uncertainties will have chilling effects upon effective policing and recruiting."

To this, Rosenthal said officers and recruits afraid of being held accountable should avoid the profession.

"Any person whose behavior would be affected by the fact that their causing serious injury or death would be independently investigated should not be a police officer," Rosenthal said. "The public benefit is well-served if any potential recruits who expect to rely on the blue code of silence get scared off from policing."

Markson emphasized that "not all off-duty conduct should be subject to civilian oversight.

"You have to balance the privacy rights of police officers as private citizens, and you can't throw privacy under the bus with a blanket rule," said Markson. "I'm not saying that is what is being done here, but I am saying that serious consideration needs to be given to the privacy rights of police officers as private citizens and to the obvious point that not all off-duty conduct should be subject to civilian oversight."

Lawyer William MacKenzie acknowledges that police officers "are police officers twenty-four seven," but said that "the SIU wasn't created to investigate officers in their private lives."

"To ... call in the SIU every single time an off-duty police officer is involved in something, just by the fact that they happen to be a police officer, is an abuse of [the SIU's] mandate," said MacKenzie, adding that if the off-duty officer places themselves on duty to deal with a situation, than that falls under SIU jurisdiction.