THE INNOCENCE PROJECT

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October 25, 2017

Attorney General Yasir Naqvi
Office of the Government House Leader
Rm 223, Main Legislative Buil., Queen's Park
Toronto, Ontario, M7A 1A2

Minister Marie-France Lalonde
MCSCS
25 Grosvenor St, 18th Fl, George Drew Buil.
Toronto, Ontario, M7A 1Y6

RE: Need For Immediate Reform of the Ontario *Police Services Act*

Dear Honourable Ministers,

On behalf of Joanne MacIsaac, the Innocence Project at Osgoode Hall Law School is writing to request that the government of Ontario amend the *Police Services Act* immediately to codify a requirement that the police undertake crisis intervention and de-escalation training while at the Ontario Police College level. Regrettably, Ms. MacIsaac, like many before her, lost her brother in yet another fatal police shooting in this province.

Section 44 of the current Ontario *Police Services Act* states,

> **"The police officer shall complete the initial period of training within six months of the day of appointment."**

Our goal is to ensure that officers are properly educated and trained before they are in the field to reduce risk of injury or death to those who are or may be suffering from mental illness; we are simply requesting that a subsection be added to the *Police Services Act* that will help save the lives of Ontarians. We ask that the following words be added to section 44:

> **"This training shall include training with respect to crisis intervention and de-escalation of conflicts with individuals who are or may be mentally ill and individuals in crisis."**

The Innocence Project is a clinic program at Osgoode Hall Law School, which primarily investigates claims of possible wrongful conviction, and also undertakes public interest and test-case litigation. All clinic work undertaken is performed by law students under the supervision of the Project's Director, Professor Alan N. Young. Ms. MacIsaac came to the Innocence Project seeking our assistance to develop a test-case strategy to address the issue of the continuing deprivation of the rights of the mentally ill. We advised her that we would be ready, willing, and able to mount a constitutional challenge to establish police training as a principle of fundamental

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justice under section 7 of the *Charter of Rights and Freedoms*. Please see **Appendix A** for our draft Notice of Application.

However, we question whether a constitutional challenge would be in the best interest of society in this instance. Litigation will be lengthy and costly, and we want to effect change before more lives are lost. We would be willing to forgo this litigation in favour of acting upon the simple proposed amendment noted earlier. We have made this proposal for the following reasons:

1. Since 1979, at least 65 people who were or may have been mentally ill have died as a result of their interactions with Ontario police officers. See **Appendix B** for further detail on these tragic deaths;
2. As a result of these deaths, 43 Coroner's Inquests were conducted, of which 31 have expressed concern about the adequacy of training and have made recommendations for improved training in interacting with the mentally ill. See **Appendix C** for further detail on these inquests and recommendations;
3. The Innocence Project has identified 12 official reports commissioned by various levels of government that discuss the inadequacy of police training and how to improve police interactions with mentally ill individuals, including reports completed by Justice Iacobucci and the Ombudsman of Ontario. These reports make similar recommendations for crisis intervention and de-escalation training for police. See **Appendix D** for further detail of these reports; and
4. In recent years, the government of Ontario has clearly pledged to reform the law of policing in this province, to increase accountability, and to improve the nature of the training police officers receive in terms of their interactions with mentally ill individuals. We discuss these promises in more detail below, as well as in **Appendix E.**

The issue we are raising in this letter is not novel—it has been the subject matter of debate and expressions of concern for almost four decades. In fact, this government has pledged to overhaul the entire *Police Services Act* on multiple occasions; in 2015 Attorney General Yasir Naqvi said that now was the time for a new approach to community safety and well-being, in which the police could be given the tools to build an even safer Ontario. One aspect of this new approach to community safety is for this government to address the fatal interactions between mentally ill individuals and police over the past four decades. We understand that reforming the law of policing is a difficult and complex task, which requires a delicate balancing of many factors; however, there

is no reason to delay addressing this issue of fatal interactions between the police and mentally ill individuals, as the solution to this problem is a simple freestanding amendment to the *Act* that can be effected immediately. We need change now.

Basis for the Innocence Project's Constitutional Challenge

In 2016, Joanne MacIsaac came to seek the assistance of the Innocence Project to address the concerns she had over the fatal shooting of her brother Michael MacIsaac. Michael was shot by Durham Regional Police Services on December 2, 2013. On this cold December morning, Michael suffered a seizure and was subsequently exhibiting symptoms of postictal psychosis—a rare but serious complication following seizures. While naked, Michael ran through the streets of his Ajax neighbourhood, confusedly made his way to the porch of a neighbouring home, picked up a patio table, and broke off the table's legs. An officer, responding to several concerned 911 calls about Michael, arrived at the scene, exited his car, and told Michael to "drop his weapon." Confused, Michael took one step towards the officer, hoisting a table leg over his shoulder like a baseball bat. The subject officer promptly delivered two fatal shots into Michael's upper body within 12 seconds of getting out of his vehicle. The officer did not take any steps backwards. He did not get back into his car. He did not devise a plan with his two fellow officers on scene. After yelling the standard police command at him, he shot Michael twice. The force of the shots blasted Michael to the ground. He was lying naked and bleeding until the ambulance arrived. Michael succumbed to those gunshot wounds the following day in the hospital.

We wish we could tell you this is an isolated incident, but it is not. Unfortunately, in responding to the many 911 calls received from individuals who are or may be mentally ill, Ontario police officers approach the situation in a manner that tends to escalate the conflict. Instead of trying to help or de-escalate the situation, some officers make matters worse. Police officers need better tools to recognize when individuals are in crisis. They need better tools to de-escalate. They need better training.

As you know, Ms. MacIsaac has already retained counsel for the initiation of a lawsuit against the Durham Regional Police, and more recently, she participated in the Coroner's Inquest into the death of her brother Michael. The Innocence Project is not involved with the civil action, but did lend assistance to Ms. MacIsaac's counsel at the Inquest. The Inquest was conducted in July 2017 and the jury made 47 recommendations as to how to avoid future deaths in similar circumstances. At this time, the jury recommended that specific training should be provided, in a

dedicated block of time, around effective (calming) communication and de-escalation, and that such training focus on individuals with mental health issues. In light of the recommendations emerging from this most recent Coroner's Inquest and the continued failure of the government to legislate crisis intervention and de-escalation training, Ms. MacIsaac is now prepared to proceed with the aforementioned constitutional challenge if this government is unwilling to act immediately upon our proposed amendment.

As a result of extensive research conducted by the Innocence Project, it is our view that a compelling argument can be made that crisis intervention and de-escalation training is a constitutional imperative under the principles of fundamental justice. The proposition we are advancing is that the principles of fundamental justice under section 7 of the *Charter of Rights and Freedoms* require that agents of the state who are statutorily empowered, as per sections 25(1) and (4) of the *Criminal Code*, to deprive individuals of life, liberty, and security of the person, must be properly and sufficiently trained in the use of fatal force and the de-escalation of interactions with persons who are or may be mentally ill or in crisis.

Abandoning the Constitutional Challenge in Favour of Immediate *Police Services Act* Reform

Although we believe that our constitutional claim is compelling, we are aware of the fact that most constitutional challenges are costly and time-consuming. It is not uncommon to see a decade pass before a final resolution of a constitutional issue is made. It is not in the public interest for the government of Ontario and the Innocence Project to spend years in litigation when there is a simple solution that can save lives now. As stated earlier, the problem we have identified can be adequately addressed by the addition of the one sentence proposed at the outset of this letter. This government has a choice between engaging in several years of litigation, or adding several words to an existing statute. If the Ontario government cannot make a binding commitment in writing to us to adopt our proposal by **January 2, 2018**, we will have no choice but to take the matter to the court and embroil this province in lengthy constitutional litigation. Justice delayed is justice denied.

If we are required to address this issue through a court challenge, then in the time it takes to resolve the constitutional claim, a number of troubling questions will remain unanswered. How many innocent citizens must die at the hands of police before training is mandated for police? How many police shooting stories must appear in the media before the government takes action? How

can the government justify inaction for years when a clear consensus has emerged that action must be taken immediately? The government has, time and time again, pledged to institute reform in Ontario policing. The government has also promised specifically, on numerous occasions, that it will be addressing the senseless fatal interactions between the mentally ill and the police. There need not be more waiting; there need not be more patience. The issue can be dealt with *now*. The government has failed to carry through on its promises to us. The lives of Ontarians are at stake.

The Government's Promises to Reform the *Police Services Act*

We are not asking this government to do something that it does not wish to do. We are simply asking that it fulfill its promise immediately for the sake of saving lives, and not delay the inevitable while trying to deal with other contentious areas of police reform. Last year, Attorney General Naqvi said that "[w]e need to create a legislative framework under the *Police Services Act* where we compel and incentivize police and municipalities and other service providers to come together, work together." (Toronto Star, "*How Ontario's community safety minister plans to bring policing into the 21st century*," June 6 2016). The *Police Services Act* has not been the subject of any significant reform in 27 years. Meanwhile, the landscape of policing has significantly changed in 27 years.

In 2016, the Minister of Community Safety and Correctional Services (MCSCS) also said that now is the time for a new approach to community safety. *Now* cannot last forever. The government is decades overdue to produce the reformed *Act*. In early 2016, City News reported that Ontario Premier Kathleen Wynne has acknowledged that this has been an issue "raised for a number of years" (City News, "*Ontario taxpayers paying millions to suspended cops, investigations show*," January 29 2016). Earlier this year, CBC News reported Wynne's promise that the government would introduce reforms to policing in Spring 2017 (CBC News, "*Policing in Ontario faces its biggest reform in a generation*," February 7 2017).

City News also reported that newly appointed MCSCS Minister, Marie-France Lalonde, is spearheading the reforms and said that she "is confident that [they will] be able to bring something in the Legislature this spring." She also said that a strategy for a safer Ontario, alongside new legislation, would be launched in Fall 2017 (City News, "*Province faces legal challenge to make police use of force training mandatory*," June 14 2017). It is now the end of October. We have yet to see any reform on this matter. In fact, we are very concerned about continuing delay, because CTV recently reported that the government has a set of priorities this fall, none of which relate to

the *Police Services Act* (CTV News, "*Ontario legislature resumes amid two Liberal trials; focus on labour and pot*," September 10 2017). Once again, this issue has slipped through the cracks and been put off indefinitely. For further history of the government's promises to tend to this issue and its subsequent delays, see **Appendix E**.

Regulations are an Insufficient Vehicle for Reform—The Legislation Itself Must be Amended

Beyond the addition of the one sentence reform we are proposing, we wish to also make it clear that the Innocence Project would not withdraw its constitutional challenge if this government simply chooses to introduce the training requirement in a mere regulation. Including the training within a regulation trivializes its importance. Regulations do not have the stature of a legislative enactment. It is essential that the training be codified in the *Police Services Act* itself to ensure its public visibility and to ensure that it cannot be repealed without public awareness. Without embedding this requirement within the statute, we may repeat the mistakes of the past by initiating reform that never sees fruition. For example, after the 1994 Coroner's Inquest into the death of Lester Donaldson, the **government did institute a crisis resolution training program, but it was abandoned three years later due to a lack of funds** (Urban Alliance on Race Relations, "*Saving Lives: Alternatives to the Use of Lethal Force by Police*," 2002). If training is a statutory requirement, it cannot be so readily abandoned, and if it is abandoned, it will be a matter of public record.

We are aware that the current regulations to the *Police Services Act* do make some mention of training, but only with respect to fatal force and firearms (RRO 1990, Reg 926). As it currently stands, there is no statutory requirement for the police to undertake crisis intervention and de-escalation training in Ontario. In fact, the only "mandated" training is contained within the regulations, and not the enabling statute, and this mandated use of force training in the regulation only relates to: (1) legal requirements; (2) exercise of judgment; (3) safety; (4) theories relating to the use of force; and (5) practical proficiency. The "use of force" training regulation shows that it is possible to impose specific training requirements for police officers by law. However, the current "use of force" regulation does not explicitly include de-escalation or crisis intervention, nor does it require that officers be trained on how to interact with individuals who are or may be mentally ill. Legislating crisis intervention and de-escalation training should be done, and it can be done.

Models to Follow in Other Jurisdictions

It must be recognized that what we are requesting is not unprecedented, controversial, nor logistically impossible to achieve. In fact, Ontario can take cues from how other jurisdictions throughout the world have handled similar issues with fatal interactions between police and individuals who are or may be mentally ill.

For example, in the United States, the federal government has intervened to address problems with police departments that had patterns of excessive or deadly use of force. To effect needed change, the Department of Justice's Civil Rights Division will initiate an action under the *Violent Crime Control and Law Enforcement Act of 1994* (Section 14141). The Department of Justice (DOJ) and the police department can then choose to enter into an agreement called a 'consent decree,' as opposed to engaging in lengthy litigation. A consent decree is a vehicle for the DOJ to enforce rights defined and protected by the Constitution, such as the right to be free from excessive force. The agreement is usually overseen and monitored by a federal judge and has the force and effect of a final judgment, allowing the DOJ to sue for non-compliance. Consent decrees demonstrate that action against police misconduct can be taken without the time and expense of a constitutional challenge. The DOJ realized it was in the public interest to facilitate a resolution of this fatal issue, and not leave it to slow and gradual resolution through a judicial process. As reported by City Lab, reforms mandated by consent decrees "have led to modernized policies, new equipment, and better training, police chiefs, city leaders, activists, and Justice officials agree" (City Lab "*Why the DOJ Is Investigating the Chicago Police Department,"* December 7 2015).

Consent decrees regarding police crisis intervention training have had success in four major US cities: New Orleans, Oakland, Los Angeles, and Albuquerque (The Crime Report, "*Police Reform's Best Tool: A Federal Consent Decree*," July 15 2014). For example, in Albuquerque, New Mexico, the Justice Department required officers be trained to de-escalate conflicts and generally prohibited some tactics, such as restraining a person by the neck. The DOJ's measures have resulted in a decrease in officers using force by 57 percent; Chief Gordon Eden Jr. attributed the drop to the fact that most officers are now trained in crisis intervention, since "officers are taking more time at the calls…[and] more time to assess the situation." (Washington Post, "*Forced Reforms, Mixed Results*," November 13, 2015). Moreover, in Los Angeles, the consent decree was terminated after 8 years because "the LAPD had sufficiently complied in reforming itself to no longer require th[at] oversight." (Los Angeles Police Department, "*No More Consent Decree for*

LAPD," July 19 2009). For further detail and examples of successful Consent decrees, see **Appendix F.**

Although Canada has not had the benefit of a statutory mechanism that allows for consent decrees, it must also be recognized that the province of British Columbia has taken initiative in this area as a result of concerns identified in a commission of inquiry. British Columbia is the only Canadian province to have standardized de-escalation or mental health training for police officers. British Columbia took this initiative after the fatal tasering incident between an RCMP officer and Polish immigrant, Robert Dziemanski (Government of British Columbia, "*About BC's Justice System, Recent Inquiries: The Braidwood Commissions of Inquiry*," 2009). As a result of this incident, the Braidwood Commission was assembled in 2008. After an extensive review of all relevant information, the Braidwood Commission concluded that insufficient police training was a critical problem that had to be addressed immediately. The British Columbia government responded to the calls for reform, and actually followed through: As of January 30, 2015, all frontline police officers in British Columbia are required to complete British Columbia's Crisis Intervention and De-escalation course as mandated by *British Columbia Provincial Policing Standards*, Section 3.2.2, "Crisis Intervention and De-escalation Training."

Expert Evidence Demonstrates the Necessity & Feasibility of the Project's Proposal

The ability of other jurisdictions to implement crisis intervention and de-escalation training demonstrates that what we strive for in Ontario is not a pipe-dream. There truly are steps that can be taken. In fact, in preparation of our constitutional challenge, the Innocence Project has retained and interviewed a number of expert witnesses, who all attest to the feasibility, importance, and necessity of introducing this type of training. The expert evidence we have obtained clearly indicates that there are no practical or logistical obstacles in the face of introducing this change. Once the draft affidavits are finalized, the Innocence Project would be happy to share them with the government of Ontario so it can see for itself how developed the understanding is of the necessity of crisis intervention and de-escalation training.

The expert witnesses who are assisting with our constitutional claim are:

1. **Dr. Amy Watson**, Professor at Jane Addams College of Social Work at University of Illinois at Chicago with a focus on police encounters with persons with mental illness and the Crisis Intervention Team model;
2. **Terry Coleman**, former Chief of Police of Moose Jaw with a focus on police and crisis intervention and de-escalation training;

3. **Dr. Jennifer Teller,** former Program Manager of the College of Education, Health, and Human Services at the University of Michigan with a focus on police and crisis intervention training;
4. **Dr. Peter Silverstone**, Professor at the University of Alberta department of Psychiatry and Neuroscience with a research focus on police training, the use of force, de-escalation tactics, and interactions with mentally ill and emotionally disturbed persons;
5. **D.P. Van Blaricom**, retired Chief of Police of Bellevue, Washington, United States, and member of the American Academy of Forensic Science, International Association of Chiefs of Police, FBI National Academy Associates, and International Association of Directors of Law Enforcement Standards and Training;
6. **Scott DeFoe**, retired SWAT member for the Los Angeles Police Department with expertise in police practices, use of force, crisis negotiation, and mental health training; and
7. **Michael Brown**, Officer of the West Midlands Police and Mental Health Coordinator of the United Kingdom National Police Chiefs' Council and College of Policing.

Current Police Training

The experts can attest to the fact that crisis intervention and de-escalation training must be a distinct component of police training with a significant amount of time dedicated to it; that it should include the sharing of lived experiences of mentally ill individuals who have interacted with the police, and that the course should be refreshed yearly. It is clear that the training in Ontario falls short. Currently, police recruits in Ontario are required to complete a 12-week basic constable training program at the Ontario Police College (OPC). Every aspiring municipal police or Ontario Provincial Police officer must attend the OPC. Here, foundational policing skills are taught, such as: leadership skills; diversity in policing; evidence collection; defensive tactics; use of force; domestic violence; and community policing. A great deal of their training focuses on "use of force," however, this training is not, in essence, equivalent to de-escalation techniques, therefore mandating just this type of training is clearly not sufficient. Without immediate codification of crisis intervention and de-escalation training, we have very little confidence that this will be an integral and permanent part of the training that every officer receives.

After 12 weeks at the OPC, each officer goes off to their own force, and each force usually adds 1-8 weeks of training for their officers. However, there is no way of knowing whether any of these police forces offer the training we are proposing because there is no uniform and standardized requirement mandated by regulation or statute. We are hoping that some forces provide this training, but mere hopes are not sufficient to protect the lives of Ontarians. The 12 weeks of training at the OPC-level is where the crisis intervention and de-escalation training should be introduced because after that, there is no standardized training. To do this, we must have the subsection we propose within the *Police Services Act*.

Conclusion

The Ontario government is clearly aware of the problem Ontario faces. It has pledged its support, but we have yet to see change. The lack of proper training has taken the lives of Ontarians, and we have seen the effects of this through the lived experience of countless individuals, including Ms. MacIsaac. It must not be forgotten that this recurring problem has been in the public eye for decades, and yet, Ontarians suffering from mental health issues are needlessly being killed because of this lack of effective police training.

Almost twenty years ago, the jury in the Coroner's Inquest into the death of Edmond Wai-Kong Yu recommended that "the Solicitor General should amend the Police Services Act to require annual Crisis Resolution training." The jury rationale for this recommendation was that by mandating this training by legislation, it will be difficult, if not impossible, to abandon the training in the future. The jury felt that it should be an integral part of police training on an annual basis. This recommendation was made in 1999, and it is now 2017. We have countless jury recommendations from numerous Coroner's Inquests. At this moment, these recommendations are mere abstractions. By instituting the reform we propose, we can give practical effect to the abstractions in a way that will save lives and improve police-community relations.

Let us not echo the mistakes of the past. It is up to this provincial government to institute a simple change that will have momentous benefits for Ontarians. It is up to this provincial government to decide whether or not the lives of vulnerable individuals are worth saving.

THE INNOCENCE PROJECT

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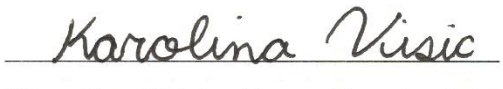
Sincerely,

Osgoode Innocence Project

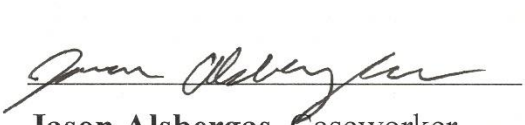
Alan Young
Director



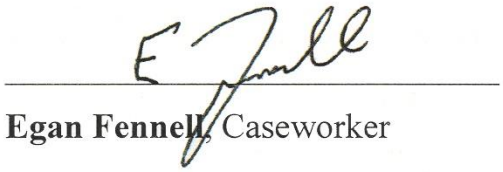
Karolina Visic, Executive Assistant & MacIsaac Caseworker

Hana Bell, MacIsaac Caseworker

Claire Horsnell, Caseworker

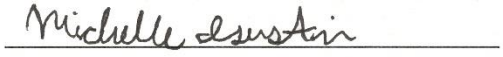


Jason Alsbergas, Caseworker

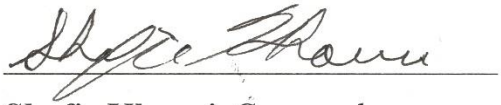


Egan Fennell, Caseworker

Isaac Heo, Caseworker



Michelle Isenstein, Caseworker



Shafic Khouri, Caseworker

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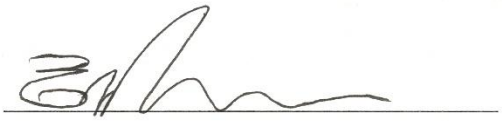
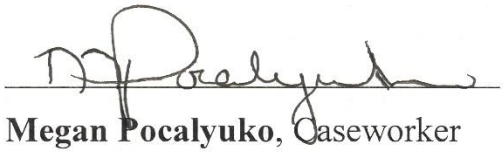


Elisa Mastrorillo, Caseworker



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