

Court File No. CV-09-390573

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**RUTH SCHAEFFER, EVELYN MINTY
and DIANE PINDER**

Applicants

and

**POLICE CONSTABLE CHRIS WOODS, ACTING SERGEANT MARK PULLBROOK,
POLICE CONSTABLE GRAHAM SEGUIN, JULIAN FANTINO,
COMMISSIONER OF THE ONTARIO PROVINCIAL POLICE, IAN SCOTT,
DIRECTOR OF THE SPECIAL INVESTIGATIONS UNIT and HER MAJESTY THE
QUEEN IN RIGHT OF ONTARIO (MINISTRY OF COMMUNITY SAFETY
AND CORRECTIONAL SERVICES)**

Respondents

and

LAW UNION OF ONTARIO

**Applicant
for Intervener Status**

**FACTUM
OF THE APPLICANT FOR INTERVENER STATUS**

Part I – OVERVIEW

1. This factum is in support of the Application of the Law Union of Ontario to be granted intervener status in regard to the costs issue in this matter.
2. The Applicants in this matter launched an application for a declaration concerning the propriety and legality of subject officers and witness officers in a matter being investigated by the Special Investigations Unit using the same lawyer in regard to the preparation of their notes.

3. Counsel for the Respondents, Woods, Pullbrook and Seguin, were successful on a motion to strike the Application on the grounds that it was not justiciable and because the applicants lacked standing.
4. Costs in this matter are being sought on behalf of the Respondents, Woods, Pullbrook and Seguin against the Applicants and against the Respondent Ian Scott, Director of the Special Investigations Unit, and costs are being sought against the Applicants on behalf of the Respondent Fantino.

Part II – THE FACTS

5. On June 23rd, 2010 the Court granted the motion to strike the Application. The Court indicated that if the parties were unable to agree about costs, the Court could be spoken to, upon arrangement with the Court.
6. The parties could not agree on the costs issue and the matter was scheduled to be dealt with on October 22, 2010. The amount of costs being sought by the Respondents Woods, Pullbrook, and Seguin against the Applicants was \$74,616.16.
7. Very late in the day, the Respondents Woods, Pullbrook, and Seguin advised that they were seeking contribution to the costs on a joint and several basis from the Respondent, Ian Scott Director of the SIU in the amount of \$20,000.00.
8. The Respondent Fantino is seeking costs in the amount of \$17,500.00 from the Applicants.
9. The costs matter was scheduled to be argued on October 22nd, 2010.
10. By application dated October 15th, 2010, the Law Union of Ontario applied to intervene on the costs issue in this matter.
11. Counsel for the Respondent Ian Scott filed an application for an adjournment of the October 22, 2010 date. The adjournment application and the Law Union Application for Intervener status were spoken to on October 19, 2010.
12. The adjournment was granted and the costs issue is now scheduled to be heard on November 9, 2010.
13. The Court ordered that written submissions on the Application for Intervener status be filed with the Court in accordance with an agreed upon time schedule for those submissions.

14. One of the important issues in relation to the costs aspect of this matter is whether the application brought by the Applicants should be regarded as public interest litigation.
15. In the view of the Law Union of Ontario, in order for the Court to be able to properly consider the issue of public interest litigation, information should be available to the Court concerning many aspects of the formation of public policy relating to investigations of police in this province and in relation to the activities undertaken by police associations in this province.
16. There has been a very long history of attempts to have effective oversight of police activities in this province. Governments and Police Boards, responding to various public concerns and submissions have, on occasions, taken steps to examine outstanding issues and to create, or legislate, solutions. On many occasions, Police Associations, properly acting in what they perceived as representing the interests of their members, have sought to influence government's decisions or object to, (or litigate against) actions taken by police oversight Boards.
17. The following material and information does not purport to be a totally accurate historical record of the matters described, but in the view of the Law Union of Ontario, this information should assist the Court in its determination as to whether this is public interest litigation.

Public Complaint Process

18. In May 1974 the Metropolitan Board of Commissioners of Police asked Arthur Maloney, Q.C. to examine the complaint process used by the Metropolitan Toronto Police.

See: Policing a World within a City: The Race Relations Initiatives of Toronto Police Service, January 2003, Page 15. Attachment #1.

19. The report of the Metropolitan Board of Commissioners of Police was published in 1975. The Board adopted and implemented the majority of the Maloney recommendations. Some recommendations required substantive legislative changes by the Ontario Government.

Attachment #1, page 15

20. In 1974 the Board asked the province to conduct a public inquiry as a result of a number of citizens complaining about the police.

Attachment #1, page 15

21. The Report of the Royal Commission into the Metropolitan Toronto Police Practices (The Morand Inquiry) was made public on July 28, 1976. Justice Morand recommended the province establish an independent civilian review of public complaints.

Attachment #1, page 15

22. Sidney Linden, then a lawyer, was asked by the province to look at the issue of the police complaint process. His report on that issue led to his appointment in 1981 as the first Police Complaints Commissioner for Metropolitan Toronto.

See: Report on the Police Complaints System in Ontario.
Lesage Report, April 22, 2005, pages 16, 18, Attachment #2

23. In 1990 the Toronto system of the public's complaint process became a province-wide system with the passage of the Police Services Act in 1990.

Lesage Report, April 22, 2005, page 18, Attachment #2

24. The Toronto Police Association in the mid 1990's started the practice of endorsing political candidates. Generally speaking the Toronto Police Association supported Progressive Conservatives in the 1995 election. The Progressive Conservative party won that election and Mike Harris became the Premier of Ontario.

25. In 1997, after the Release of a report by Rod McLeod, Q.C. in October 1996, the Harris government scrapped the Police Complaints Commission.

Lesage Report, April 22, 2005, page 24, Attachment #2

26. On February 26, 2003 the Honourable George W. Adams, Q.C. released the Review Report on the Special Investigation Unit Reforms prepared for the Attorney General of Ontario.

27. The Honourable Patrick J. Lesage, Q.C. was commissioned to do a report on the police complaints system in Ontario. The Report on the Police Complaints System in Ontario was released on April 22, 2005.

Lesage Report, April 22, 2005, Index, pages 1 and 2, Attachment #2

28. Subsequent to the Lesage Report, the Liberal government of Ontario passed legislation called the Independent Police Review Act in 2006.

29. As a result of further studies, eventually the office of the Independent Police Review Director was created. That office opened its doors on October 19, 2009. Gerry McNeilly was appointed as the first Director of that Office.

The Special Investigations Unit

30. In 1999 the Liberal government of Ontario appointed Judge Claire Lewis to create a Race Relations Policing Task Force. The Task Force recommended the creation of the Special Investigations Unit and it came into being on August 8th, 1990.

Bill 103 – Summit, created by Scadding Court Community Centre, 2008
www.scaddingcourt.org/Bill103-summit/briefhistory.html Attachment 3

31. In 1990 Claire Lewis was appointed Police Complaints Commissioner.
32. Relations between the Special Investigations Unit and various of the police forces and police associations that it has dealt with have, at times, been contentious. The use of the same lawyer for subject officers and witness officers has been an issue. The failure, on occasion, of police departments to notify the SIU in a timely fashion has been a problem.
33. In September 2008 Andre Marin, Ombudsman of Ontario released his report entitled Investigation into the Special Investigations Units operational effectiveness and credibility.
34. It was reported in the Toronto Star on October 21, 2010 that an application has been commenced by the Peel Police Service to halt a SIU investigation into an allegation of sexual assault involving a teenage girl and a now retired police officer.

Toronto Star, October 21, 2010 article. [Attachment 4](#)

Police Association involvement in political campaigns

35. The Toronto Police Association endorsed candidates in the 1995 Ontario provincial election.
36. During the 2000's when the Toronto Police Association was involved in the endorsement of candidates, Craig Bromell was the President of the Toronto Police Association.
37. At that time Norm Gardner was the Chair of the Toronto Police Services Board and Julian Fantino was the Chief of Police. Neither the Toronto Police Services Board, nor Chief Fantino took any steps to enforce the provisions of regulation 554/91 of the *Toronto Police Services Act*, which outlines rules regarding the political activity of municipal police officers.

38. It was not until there was a new Chief of Police in Toronto and new executive of the Toronto Police Services Board that the practice of Toronto Police Association endorsing candidates was brought to a halt.

Speaking Notes for Vice-Chair Dr. Alok Mukherjee from the Law Union of Ontario Annual Conference Panel: Police Involvement in Politics.
For the Defence. Vol. 26. No. 2, page 29. Attachment 5

39. In the winter of 2006 the Ottawa Police Association announced that it would endorse candidates in the Ottawa election. The Toronto Police Services Board provided information to the Ottawa Police Services Board regarding the plans of the Ottawa Police Association to endorse candidates in the Ottawa municipal election.
40. Input from the Toronto Police Services Board put a quick end to endorsing of candidates by the Ottawa Police Association.

Operation True Blue

41. The Toronto Police Association started selling decals to members of the public under a program called "Operation True Blue".
42. The decals came in bronze, silver, and gold colour and were sold for amounts up-to \$100.00. It was contemplated that the decals would be placed on cars.
43. The issue of the propriety of "Operation True Blue" became a subject matter of litigation before Mr. Justice Winkler. That was one of the pieces of litigation in which the Law Union of Ontario was granted Intervener status. Howard Morton, on behalf of the Law Union of Ontario played a significant role in the Court granting of an interim injunction to the Toronto Police Association Operation True Blue fundraising. That litigation settled out of court and the Toronto Police Association terminated its fundraising activities under "Operation True Blue".
44. Attached articles from the CBC and from the Toronto Star describe certain aspects of the end of the "Operation True Blue" campaign.

Operation True Blue dispute settled out of Court. CBC News article, May 2, 2000. Attachment 6.

Police union slammed by council. Toronto Star. January 28, 2000. By Bruce DeMara and Rebecca Bragg Attachment 7.

'Bullying' police union blasted by Lastman. Toronto Star. By John Duncanson. February 4, 2000. Attachment 8

Whether this litigation is in the public interest

45. In the submission of the Law Union of Ontario, this Honourable Court at paragraph 61 of its judgment recognized that this is a public interest matter. The Court said:

“... it is not the proper function of this Court to act as a policy maker of last resort. The issue was placed before the Attorney General in the thoughtful and compelling reports of Mr. Marin and Mr. Adams. Whether the legislature adopts the suggestions in the reports and enacts laws to implement them is within its province alone.”

46. The Court included in its decision the statement released by the Director of the SIU on September 25, 2009 in regard to his investigation of the Schaeffer matter.
47. The statement of the Director of the SIU contained the following:

This note writing process flies in the face of the two main indicators of reliability of notes: independence and contemporaneity. The notes do not represent an ‘approved’ by an OPPA lawyer who represented all of the involved officers in this matter, a lawyer who has a professional obligation to share information among his clients when jointly retained by them. Nor are the notes the most contemporaneous ones – they were not written as soon as practicable and the first drafts remain in the custody of their lawyer. I am denied the opportunity to compare the first draft with the final entries. Accordingly, the only version of the material events are association lawyer approved notes. Due to their lack of independence and contemporaneity, I cannot rely upon these notes nor A/Sgt Pullbrook’s interview based upon them for the truth of their contents.

I have a statutory responsibility to conduct independent investigations and decide whether a police officer probably committed a criminal offence. In this most serious case, I have no information base I can rely upon. Because I cannot conclude what probably happened, I cannot form reasonable grounds that the subject officer in this matter committed a criminal offence.

Part III – ISSUES

48. The Law Union of Ontario submits that there are three issues that the Court must consider when deciding whether to grant intervener status to the Law Union of Ontario. Those issues are:
1. The Courts exercise of its discretion in costs matters relating to public interest litigants.
 2. What is the appropriate definition of a public interest litigant?
 3. Is the Law Union of Ontario an appropriate organization to be an intervener in this matter?

Part IV – THE LAW

49. *Rules 13.01 and 13.02 of the Rules of Civil Procedure* apply to persons or organizations seeking to intervene as an added party or as a friend of the court.
50. The Law Union of Ontario seeks to intervene as a friend of the Court for the purposes of rendering assistance to the Court by way of argument. The Law Union of Ontario is only seeking to be added as an intervener in regard to the costs aspects of this matter.
51. It is respectfully submitted that the Law Union of Ontario has an interest in the costs aspect of this proceeding.
52. It is respectfully submitted that the intervention by the Law Union of Ontario will not unduly delay or prejudice the determination that the rights to parties to the proceeding.

Limited nature of those submissions

53. The Law Union of Ontario does not propose to get into detailed argument about the issue of the Court's exercise of its discretion in costs matters relating to public interest litigants. That issue is much more clearly a matter for submissions if intervener status is granted. But to the extent that it is an issue on the intervention application, the Law Union makes the following brief submissions.

A Court's exercise of its discretion in costs matters relating to public interest litigants.

54. Mr. Justice Perell, in the case *Incredible Electronics Inc. et al. v. Canada (Attorney General)* addressed in great detail the issue of the exercise of the

Court's discretion with respect to costs in public interest litigation. His findings are contained in paragraphs 58 to 85 of his judgment.

Incredible Electronics Inc. v. Canada (Attorney General)
80 O.R. (3d) 723

55. The Law Union of Ontario respectfully submits that there is a significant body of law in Ontario that indicates that costs should not be awarded against public interest litigants.

Defining Public Interest Litigant and the Public Interest Litigant

56. Justice Perell in the Incredible Electronics Inc. case from paragraphs 86 to 109 reviewed the law on the exercise of discretion in regard to costs.

57. At paragraph 83 Justice Perell said:

In my opinion, in the case at bar, the proposition that public interest litigation requires special treatment should guide the exercise of my discretion. Put differently, in my opinion, the applicants should not be subject of the normal two-way costs regime if they can satisfy the court that they are special interest litigants.

58. Justice Perell in the Incredible Electronics Inc. case from paragraphs 91 to 100 reviewed the law in regard to the definition of the public interest litigant.

59. Mr. Justice Doherty, in the Pearson v. Inco Ltd. case dealt with the application for intervener status brought by the Environmental Commissioner of Ontario. Justice Doherty declined to grant intervener status to the Environmental Commissioner of Ontario. Justice Doherty was not satisfied that the Commissioner could make a "useful contribution to the resolution of the appeal". Justice Doherty did find that the Commissioner might bring a broader perspective to the issue raised by the Appellants on the appeal from the costs order. Justice Doherty saw no danger of prejudice to the respondent if the Commissioner was allowed to intervene on the costs issue and address the broader "public interest concern, said to be generated by the costs order".

Pearson v. Inco Ltd. [2005] O.J. No. 803

60. Justice Doherty in paragraphs 8 and 9 set stringent terms and conditions to the intervention.

Pearson v. Inco Ltd. (supra)

61. Chief Justice Dubin in the *Peel v. Great Atlantic & Pacific Co.* case granted intervener status as a friend of the Court to the People for Sunday Association of Canada.

62. Justice Dubin at paragraph 10 said:

... "in my opinion matters to be considered are the nature of the case, the issues which arise and the likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties."

Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd. [1990] O.J. No. 1378

63. In the *Ontario v. Dielman* case, Justice Adams declined to grant intervener status to the Canadian Centre for Law and Justice in regard to an application for interlocutory and permanent injunctions restraining the named defendants from engaging in unlawful conduct outside the work locations and homes of healthcare workers providing abortion services. Justice Adams reviewed the caselaw and at paragraph 14 he set out standards for granting intervenor status:

In summary, where intervener status is granted to a public interest group, either as party or as a friend of the court, at least one of the following criteria is usually met:

a) the intervenor has a real, substantial and identifiable interest in the subject matter of the proceedings;

b) the intervenor has an important perspective distinct from the immediate parties; or

c) the intervenor is a well recognized group with a special expertise and with a broad identifiable membership base.

Ontario (Attorney General) v. Dieleman, 1993CanLII 5478 (ON S.C.)

64. In the *Ontario Society for the Prevention of Cruelty to Animals v. Toronto Humane Society*, Justice Brown granted intervener status to Linda Mackinnon as an added party with a party's full rights of participation, i.e. the right to file evidence, cross-examine any witness, and make submissions at the hearing of the application. Justice Brown reviewed the law on intervention in his decision.

Ontario Society for the Prevention of Cruelty to Animals v. Toronto Humane Society [2010] O.J. No. 466. (paragraphs 7-10)

65. In the *Law Society v. Groia*, the discipline panel considered whether to grant intervener status in that matter to the Criminal Lawyers' Association (CLA).
66. The panel reviewed the law on granting leave to intervene. The panel in the circumstances of the case declined to grant intervener status to the CLA.

Law Society of Upper Canada v. Joseph Peter Paul Groia 2010 ONLSHP
95 (CanLII) (paragraphs 16-19)

Material concerning this case relevant to whether this is public interest litigation

67. Attached hereto and marked Attachment 9 is an undertaking chart from the proceedings relating to the examination of Denis O'Neil. Question 5 relates to the refusal of Commissioner Fantino to take any steps to address the concern about joint retention of counsel by the OPP. Mr. Fantino's response in his letter dated November 13 was: "I will not be meeting with you (the Director of the SIU) to discuss the preparation of officers' notes".
68. The undertaking chart from the examination of Angela Mercer, which is attached hereto and marked Attachment 10, indicates that the Honourable Patrick LeSage had been appointed by the Attorney General to try to mediate the issues that relate, inter alia, to the joint retainer of counsel.
69. Attached hereto and marked Attachment 11 is a Memorandum dated June 3, 2010 regarding the OACP conference program dealing with the Schaeffer, Minty Court case.
70. Attached hereto and marked Attachment 12 is a message from Karl Wash the, President of the OPP Association, concerning the Schaeffer, Minty litigation and the issue of one lawyer representing both the subject officers and the witness officers in an SIU investigation. This document was Exhibit L to the affidavit of Asha James in these proceedings.
71. It is the respectful submission of The Law Union of Ontario that having regard to the case law and the material contained and referred to in this factum, the issue of the effective operation of the Special Investigations Unit is a matter of public interest and that the Applicants in this case should be considered public interest litigants.

Is the Law Union of Ontario Appropriate to be an Intervener in this Matter?

72. The Affidavit of J. Robert Kellermann in paragraphs 13, 14, 16, 18, and 19 outlines part of the history of The Law Union of Ontario in regard to policing matters.

73. As outlined in paragraph 20 of Mr. Kellermann's affidavit, The Law Union of Ontario has been granted standing in a number of matters relating to policing issues.

74. Having regard to the history of the Law Union of Ontario's involvement in regard to policing matters in Ontario, and having regard to the fact that the Law Union of Ontario has been granted standing on a number of matters relating to policing issues, and having regard to what we submit is a very important public policy issue regarding the costs that may be awarded in this public interest litigation, it is respectfully submitted that the Law Union of Ontario is an appropriate group to be granted intervener status in this matter. It is also submitted that the Law Union of Ontario will be in a position to assist the Court on the issue of the exercise of its discretion in regard to costs in this matter.

Part V- ORDER SOUGHT

75. The Law Union of Ontario respectfully submits that this Court should grant the application for Intervener status on the costs aspect of this case.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Toronto, this 26th day of October, 2010.



COPELAND, DUNCAN
Barristers & Solicitors
31 Prince Arthur Avenue
Toronto, Ontario M5R 1B2

Paul D. Copeland
LSUC #10775N

Tel: (416) 964-8126 Ext. 142
Tax: (416) 960-5456

Counsel for the Law Union of Ontario,
Applicant for Intervener Status on the
costs issue in this matter.

Court File No. CV-09-390573

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**RUTH SCHAEFFER, EVELYN MINTY
and DIANE PINDER**

Applicants

and

**POLICE CONSTABLE CHRIS WOODS,
ACTING SERGEANT MARK PULLBROOK,
POLICE CONSTABLE GRAHAM SEGUIN,
JULIAN FANTINO,
COMMISSIONER OF THE ONTARIO
PROVINCIAL POLICE, IAN SCOTT,
DIRECTOR OF THE SPECIAL
INVESTIGATIONS UNIT and HER MAJESTY
THE QUEEN IN RIGHT OF ONTARIO
(MINISTRY OF COMMUNITY SAFETY
AND CORRECTIONAL SERVICES)**

Respondents

and

LAW UNION OF ONTARIO

Applicant

for Intervener Status

**FACTUM
OF THE APPLICANT
FOR INTERVENER STATUS**

**COPELAND, DUNCAN
Barristers & Solicitors
31 Prince Arthur Avenue
Toronto, Ontario M5R 1B2
Paul D. Copeland
LSUC #10775N
Tel: (416) 964-8126 Ext. 142
Tax: (416) 960-5456**

**Counsel for the Law Union of Ontario,
Applicant for Intervener Status on the costs
issue in this matter.**

Copeland, Duncan

Barristers, Solicitors

31 Prince Arthur Avenue, Toronto, Ontario M5R 1B2

Telephone (416) 964-8126

Fax: (416) 960-5456

facsimile transmittal

To: **Julian Falconer**
Sunil Mathai
Falconer Charney LLP

Fax (416) 929-8179

Ian Roland
Michael Fenrick
Paliare Roland Rosenberg Rothstein LLP

(416) 646-4320

Marlys Edwardh
Barrister and Solicitor

(416) 597-0070

Christopher Diana
Ministry of Community Safety & Correctional Services

(416) 314-3518

David Butt
Barrister & Solicitor

(416) 361-9443

Joseph Markson
Markson MacDonald

(416) 366-5845

From: Paul D. Copeland
Barrister & Solicitor

Date: October 26, 2010

Re: Law Union of Ontario Intervener Application Factum

Pages: 16 (Including cover)

Urgent

Please Comment

Please Reply

Please Recycle

As per attached letter and Factum.

The contents of this telecommunication are governed by the laws of Solicitor-Client privilege and contain confidential information intended only for the person(s) named above. Any other distribution, copying or disclosure is strictly prohibited. If you have received this telecommunication in error please notify us immediately by telephone and return the original to us, at our expense, via regular mail. If you experience any problems, or do not receive all transmitted pages, please contact the sender (Diana) at (416) 964-8126 ext 146.

Paul D. Copeland, B.Sc, LLB.
Tamara Duncan, B.A., LL.B.

Barristers, Solicitors

Copeland, Duncan

Thirty One Prince Arthur Avenue, Toronto, Ontario M5R 1B2

Telephone 416-964-8126

Fax 416-960-5456

October 26, 2010

Julian Falconer

Fax: (416) 929-8179

Sunil Mathai

Falconer Charney LLP

8 Prince Arthur Avenue

Toronto, Ontario M5H 4C7

Lawyers for the Applicants

AND TO: Ian Roland

Fax: (416) 646-4320

Michael Fenrick

Paliare Roland Rosenberg Rothstein LLP

250 University Avenue, Suite 501

Toronto, Ontario M5H 2N7

Lawyers for the Respondents:

Police Constable Kris Wood,

Acting Sergeant Mark Pullbrook and

Police Constable Graham Seguin

AND TO: Marlys Edwardh

Fax: (416) 597-0070

Barrister and Solicitor

20 Dundas Street West, Suite 1100

Toronto, Ontario M5G 2G8

Lawyer for the Respondent, Ian Scott,

Director of the Special Investigations Unit

AND TO: Christopher Diana

Fax: (416) 314-3518

Legal Services Branch

Ministry of Community Safety and Correctional Services

77 Grenville Street, 8th Floor

Toronto, Ontario M5S 1B3

Lawyer for the Respondent

Julian Fantino, Commissioner of the Provincial Police

Copeland, Duncan

AND TO: **David Butt**
Barrister & Solicitor
205 Richmond Street West, Suite 501
Toronto, Ontario M5V 1V3

Fax: (416) 361-9443

Lawyer for the Applicant to Intervene,
Police Association of Ontario

AND TO: **Joseph Markson**
Markson MacDonald
120 Adelaide Street West, Suite 1905
Toronto, Ontario M5H 1T1

Fax: (416) 366-5845

Lawyer for the Applicant to Intervene,
Ontario Association of Chiefs of Police

Dear Sirs and Madam:

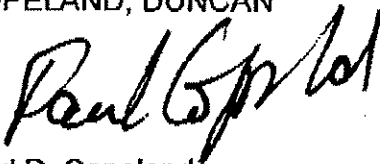
Re: Law Union of Ontario Intervener Application Factum

Attached please find the Law Union of Ontario Factum on its application for intervener status. Please note that I have not included the attachments.

I hope to have a bound copy of the factum (with the attachments) delivered to all of you today.

Yours truly,

COPELAND, DUNCAN



Paul D. Copeland
PDC/dm

Encl.