

Court File No. C52414
Motion No.: M40297

COURT OF APPEAL FOR ONTARIO

BETWEEN:

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

APPELLANTS

AND

**POLICE CONSTABLE KRIS WOOD, 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

APPELLANTS' FACTUM ON MOOTNESS

August 18, 2011

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AND TO: **The Court of Appeal for Ontario**

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RESPONDENTS

APPELLANTS' FACTUM ON MOTION TO QUASH

PART I: OVERVIEW

1. The main issues on this appeal are live and are not moot. The Respondents seek to avoid adjudication on the legality of “widespread practices” during S.I.U. investigations based on one narrow (though important) regulatory change. The Appellants’ confidence (and the public’s confidence) in S.I.U. investigations was irreparably shaken, not by one narrow piece of conduct, but by a course of conduct that, absent Court intervention, will continue to undermine the integrity of the administration of justice.
2. The key issue that continues to plague S.I.U. investigations relates to the manner in which witness officers exercise their statutory entitlement to access personal legal counsel while discharging public duties. It is apparent that how these officers access counsel (including the timing of the seeking of advice and the actions of counsel) fundamentally impacts on how the officers perform their public functions. These proceedings call for a determination of the limits, if any, on the conduct of witness officers whose resort to counsel during the S.I.U. process can have the effect of undermining the basic hallmarks of a credible and effective homicide investigation. This was the issue before the amendment and this remains the issue to be argued on the appeal.
3. In particular, the role of the officers’ counsel as it relates to the preparation of officer notes and the interpretation to be given to rule 2.04(6) of the *Rules of Professional Conduct* (the “Rules”) which compels a lawyer to share information between his various clients (as he assists with their notes) were live issues before the amendment and remain live issues now. This point was best expressed by S.I.U. Director, Ian Scott, in his public comments following the announcement of the amendment: “regrettably [the amendments] do not confirm police officers’ existing duty to prepare their notes independently and without conferring with a lawyer.”¹

¹ June 23, 2011, SIU Director Responds to New Regulation in the Police Services Act.

4. The regulatory changes have not resolved the above issues and indeed raise more questions than answers. What is to be made of the new bar against “indirect” communication between officers sharing the same lawyer? When one has regard to the fact that Commissioner Fantino’s delegates excused his officers from preparing their notes in this case, what comfort is to be drawn from the new rule which permits the Chief (or Commissioner) to excuse officers from the timely preparation of their notes?

5. While the amendment addresses the issue of joint retainers between witness and subject officers for future S.I.U. investigations, the Appellants respectfully submit that this Honourable Court should exercise its discretion to hear a moot issue and interpret the relevant legislation and *Rules*, as they existed prior to the amendments, to determine whether a joint retainer between a subject and witness officer was permitted. It is respectfully submitted that this Honourable Court’s guidance on this issue would assist in the proper interpretation of the current legislative scheme in two significant ways: (1) determining whether joint retainers should be permitted between any officers and, if so, (2) how the *Rules*, as they relate to joint retainers, apply in the context of an S.I.U. investigation.

6. Furthermore, there is nothing moot in Justice Low’s error in improperly subordinating the public interest in an effective and credible S.I.U. investigation in favour of the private interests of the officers. Respectfully, maintaining two sets of police notes in a homicide investigation is not simply a private matter between the officers and their employers. It is imperative in the interests of justice that the lower Court’s analysis in this regard be addressed by this Honourable Court.

7. The end result of this Honourable Court declining to, once and for all, hear and determine these issues could easily lead to the following scenario: assume that, unlike the current cases, a police shooting occurs and the subject officer is charged with manslaughter. At trial, it is reasonable to

envisage that a witness officer may well be a central witness. While testifying, the witness officer acknowledges that, following the shooting, he prepared two sets of notes: one outside his memo book for his legal counsel to review and then, having received the lawyer's input on his notes, he created a second set of notes in his memo book. The memo book notes, which were not prepared in an independent or contemporaneous manner, are now being relied on upon as "previous recollection recorded" or "present recollection revived".² When asked to produce the original notes, the witness officer refuses on the basis of solicitor client privilege. What would a trier of fact be left to think?

8. The above scenario is not fanciful. It is a reality given the "widespread practice"³ of police officers relying on their statutory entitlements to frustrate legislative safeguards designed to protect the integrity of S.I.U. investigations. The ramifications for the public perception of the administration of justice are grim and yet the Respondent Officers maintain that these issues are moot.

PART II: FACTS

9. The Appellants repeat and rely upon the facts as detailed in paragraphs 13 to 39 of the main appeal factum.

10. This case involves two homicide investigations conducted by the S.I.U. after Douglas Minty and Levi Schaeffer were shot to death by O.P.P. officers on June 22, and June 25, 2009, respectively. The Appellants issued a Notice of Application on November 4, 2009. The Application sought a number of declarations relating to the interpretation of various sections of the *Police Services Act*, Ontario Regulation 673/98 "*Conduct & Duties of Police Officers Respecting Investigations by the*

² Pacciocco and Stuesser, "The Law of Evidence", Irwin Law Inc., 2002, 3rd at pg. 334 – the authors suggest that previous recollection recorded amounts to an exception to the hearsay rule where the notes themselves become evidence that the trier of fact may accept for the truth of its contents.

³ The lead investigator on the Schaeffer Investigation, Dennis O'Neill, testified that this practice is widespread and "occurs in most S.I.U. investigations."; Transcript of the Examination of Denis O'Neill, April 15, 2010, at 309, Tab 7 of the Exhibit Book.

S.I.U.”, and the *Rules*. In particular, the Appellants sought to determine if the following conduct was authorized by statute or regulation:

- (i) During the course of an S.I.U. investigation, the subject and witness officers jointly retained the same lawyer who, under the *Rules of Professional Conduct*, was duty bound to share all relevant information as between his clients;
- (ii) During the course of an S.I.U. investigation, the subject and witness officers prepared and submitted their memo book notes after having the notes reviewed by their jointly retained counsel;
- (iii) During the course of an S.I.U. investigation, the subject and witness officers created two sets of notes: a solicitor’s draft (never disclosed to the S.I.U.) and a second draft which, having been vetted by their legal counsel, was provided to the S.I.U.;
- (iv) Superior officers authorized subject and witness officers to complete their notes after the conclusion of their shifts;
- (v) O.P.P. officers “de-briefed” civilian witnesses prior to the S.I.U. being notified of an incident; and
- (vi) Delay, without reasonable excuse, of notification to the S.I.U. of a shooting incident.

11. On June 23, 2011, the Ministry of the Attorney General announced the passing of the amendment. The amendment was made as a result of recommendations made by former Chief Justice Patrick Lesage after he was appointed by the Attorney General to make recommendations regarding changes to the regime governing police officers during S.I.U. investigations. As conceded by the Respondent Officers, the Attorney General appointed former Chief Justice Lesage as a result of the commencement of the Appellants’ application. The amendment made three changes:

Old Provision	Amended Provisions (change indicated in bold)
6. (2) A police officer involved in the incident shall not communicate with any other police officer involved in the incident concerning their involvement in the incident until after the SIU has completed its interviews	6. (2) A police officer involved in the incident shall not communicate directly or indirectly with any other police officer involved in the incident concerning their involvement in the incident until after the SIU has completed its interviews.
No previous section 7(3)	7(3) Witness officers may not be represented by the same legal counsel as subject officers.
No previous section 9(5)	9(5) The notes made pursuant to subsections (1) and (3) shall be completed by the end of the officer’s tour of duty, except where excused by the chief of police

12. With the exception of the issue of joint retainers between witness and subject officers, the above noted amendments do not address the issues reflected in paragraph 6 (ii) to (vi).

13. It is true that the Appellants issued statements of claim in the face of expiring limitation periods (June 2011 is the two year mark in respect of both shootings). The claims have been issued but have not been served on any party.⁴ By virtue of Justice Low's decision, the Appellants have been denied standing to proceed in any other fashion. Nevertheless, it remains the case that there is no prospect that a civil lawsuit will create the level of judicial guidance called for by these unusual circumstances. Respectfully, it would be the ultimate irony if, in attempting to protect against the limitation periods that governed the only proceedings the Families have thus far been permitted to pursue, they were denied the right to proceed with the Application which they have formally stated is their primary and preferred option for addressing the issues. Should this Honourable Court restore the Families' standing, **the Appellants have confirmed in an affidavit filed with this Honourable Court⁵**, that they will not proceed with the actions in respect of the officers' conduct on the S.I.U. investigations. Thus there is no risk of a multiplicity of proceedings.

PART III: ISSUES

14. The sole issue to be determined on this motion is whether the herein appeal should be quashed for mootness.

⁴ *Affidavit of Sandy Palhinha*, sworn August 18, 2011, Tab 1 of the Appellants Motion Record at para.4

⁵ *Affidavit of Sandy Palhinha*, sworn August 18, 2011, Tab 1 of the Appellants Motion Record

PART IV: LAW AND ANALYSIS

A. The Legal Test on a Motion to Quash

15. The power to quash an appeal is seldom exercised. To be successful on a motion to quash, the moving party must establish that the appeal is “devoid of merit”.⁶ The test is onerous so as to discourage a party from seeking a full hearing of the appeal under the guise of a motion to quash.⁷

16. In bringing this motion, the Respondent Officers are attempting to argue mootness twice: first on the motion to quash, and if they fail, again on the main appeal. With respect, this approach is not an efficient use of judicial resources. The two additional issues raised on this motion are best left to be argued on the main appeal where this Honourable Court is not bound by the legal test on a motion to quash. Such an approach would be consistent with Justice Sharpe’s February 4, 2011 ruling in which he held “...the parties must be prepared to address all issues, including the relief sought in ground 2, before the panel that hears this appeal.”⁸

B. Legal Principles on the Doctrine of Mootness

17. The leading case on the doctrine of mootness is *Borowski Minister of Justice of Canada v. Borowski*. In *Borowski*, the Supreme Court held that a case will be moot when it raises merely a hypothetical or abstract question.⁹ The principle of mootness applies when the court’s decision will not have the effect of resolving a controversy which affects or may affect the rights of the parties.¹⁰

18. Dean Sossin, in the “Boundaries of Judicial Review: The Law of Justiciability in Canada” described the application of the doctrine of mootness to a change in legislation as follows:

As the *Manitoba Schools* case demonstrates, the proper concern with respect to mootness is whether the impugned legislation continues to leave uncertainty which is central to the dispute.

⁶ *Schmidt v. Toronto-Dominion Bank*, [1995] O.J. No. 1604 at para. 6-8 (C.A.).

⁷ *Ibid.*

⁸ *Schaeffer v. Woods*, 2011 ONCA 116 at para. 2; Appellants’ Responding Factum to Motion to Quash.

⁹ *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at para. 15 [*Borowski*].

¹⁰ *Ibid.* at para. 15.

This may remain the case even where legislation has been judicially interpreted in a particular manner, amended or even repealed. A change in the legislation or its interpretation will only be determinative where it removes the “substratum” of the litigation at issue.¹¹

19. Even where the issues have become moot, a court may exercise its discretion to decide the merits of a case. As was stated in *Borowski*, a court can look to the following three underlying rationales of the mootness doctrine for guidance: (1) the adversarial nature of the case; (2) judicial economy; and (3) the appreciation of the proper role of the judiciary.¹²

C. The Amendment does not Render the Application Moot

(a) Interpreting the statutory entitlement to access counsel in the course of discharging public duties

20. The amendment prohibits the use of joint retainers between the subject and witness officers. The amendment does not, however, address the substratum of the issues in the Application – the proper interpretation of the manner in which witness officers exercise their statutory entitlement to access personal legal counsel while discharging their public duties.

21. The amendment does not resolve the issue of how counsel, jointly retained between witness officers or between subject officers, is to comply with their professional obligations pursuant to rule 2.04(6) of the *Rules*. On the uncontested facts of the Minty Investigation, several witness officers retained the same counsel. This issue is grounded in the facts of the Minty investigation.

22. Rule 2.04(6) of the *Rules* makes the sharing of information between jointly retained clients mandatory. Counsel jointly retained by subject officers or by witness officers must disclose all information between the officers. This requirement directly conflicts with the amendment where it prevents indirect communication between officers.¹³ This Honourable Court’s interpretation of the

¹¹ Sossin, “Boundaries of Judicial Review: The Law of Justiciability in Canada” at p. 107; see also *Reference re Public Schools Act (Manitoba) s. 79(3)* (1993), S.C.R. 839.

¹² *Ibid.* at para. 17.

¹³ Section 6(2) of the S.I.U. Regulations.

Rules in the context of an S.I.U. investigation will assist counsel to discharge their duty to their clients and ensure that a witness officers' entitlement to access personal legal counsel does not negatively impact on the discharge of their public duties.

(b) The timing of the preparation of notes and the role of counsel in the preparation of an officer's notes

23. At the relevant time, the O.P.P. policy on note-taking required an officer to make all original investigative notes in their memo book as soon as practicable, but prior to the conclusion of the officer's shift. The policy allowed a supervisor to exempt the officer from these requirements.¹⁴ In both investigations, supervising officers allowed the Respondent Officers to complete their notes after the completion of their tour of duty. Section 9(5) of the S.I.U. Regulations simply codifies the existing O.P.P. policy on note-taking. Pursuant to section 2(3) of the S.I.U. Regulations, the Chief of Police (or O.P.P. Commissioner) is permitted to delegate her obligations to a "senior officer."¹⁵ Prior to the amendment, a senior officer would permit officers to complete their memo book notes after the completion of the shift. This is still the reality post-amendment. Put simply, the amendment does not prohibit, as a matter of course, senior officers from advising witness officers to complete their notes at the instruction of counsel and after the completion of their tour of duty.

24. The Respondent Officers concede that the amendment does not address the issue of officers preparing their notes after consulting with counsel, preparing two sets of notes, or failing to disclose the original notes as vetted by legal counsel.¹⁶ Despite conceding this, the Respondent Officers argue that the appeal is moot. The ongoing controversy is made obvious by the Respondents' conflicting

¹⁴ O.P.P. note-taking policy (Tab 12 of the Appeal Book and Compendium, at pg. 12):

A member shall make all original investigative notes in a Form Cat 1-22—Daily Journal during an investigation or as soon thereafter as practicable, but at all times, prior to the conclusion of the member's daily tour of duty or as approved by a supervisor. Without exception, these original investigative notes shall be completed prior to the entry of such information on to other occurrence or information tracking systems, e.g. Niche RMS, CPIC and prior to their reviewing of any in-car audio or audio/video recordings.

¹⁵ Section 2(3) of the S.I.U. Regulations.

¹⁶ See paragraph 20 of the Respondent Officers' Factum on the Motion to Quash.

submissions on the interpretation of the amendments. The Commissioner submits that s. 9(5) precludes a practice whereby officers are routinely excused from completing notes to consult with counsel, while the Respondent Officers submit, “the government has chosen not to abrogate police officers’ right to consult counsel prior to making compelled statements.”¹⁷

(c) Subordinating the public interest in an effective and credible S.I.U. investigation in favour of advancing the private interests of the police officers

25. At paragraph 87 of her decision, Justice Low held, within the context of her public interest standing analysis, that the “manner and timing in which the police officers perform their duties is an employment issue between them and their employer.”¹⁸ The Appellants respectfully submit that characterizing the issues addressed by the Application as a private dispute subordinates the public interest in an effective and credible S.I.U. investigation to the private interests of a police officer. The Appellants respectfully submit that this issue is not moot and that this Honourable Court ought to decide the appeal in order to address this significant error.

D. The Commencement of the Statements of Claim does not render the appeal moot

26. The issuance of the statements of claim does not render this appeal moot. The actions, which have not yet been served, were issued solely because this appeal was to be heard after the expiration of the two year limitation period. If this Honourable Court reverses Justice Low’s decision on standing then the Appellants will discontinue the actions as they relate to allegations of misconduct in the S.I.U. investigation. As argued in the Court below, the interpretations sought by the Appellants are best addressed through an Application, not an action for damages. The Appellants have no intention of creating a multiplicity of proceedings.

¹⁷ See paragraph 11.2 of the Factum of the Respondent Julian Fantino, and paragraph 21 of the Factum of the Respondent Police Officers.

¹⁸ *Schaeffer v. Ontario (Provincial Police)*, [2010] O.J. No. 2770.

E. In the Alternative, the Court Should Exercise its Discretion

27. In the alternative, the Appellants respectfully submit that this is an appropriate case for the Court to exercise its discretion to decide the merits of the case. There can be no doubt that there is an adversarial nature to this dispute. All relevant positions have been presented to this Honourable Court through the lengthy factums filed by the parties on the main appeal, as well as the factums prepared by the six interveners. The positions of the public and police interests are well represented. As such, there is little doubt that the issues on this appeal and the Application will be fully argued.

28. The Appellants submit that a decision on the Application would be an appropriate use of judicial resources because (i) the outcome of the case will have a practical effect on how S.I.U. investigations are conducted; (ii) the outcome of the case will impact on the statutory entitlements of officers when subject to an S.I.U. investigation; (iii) the conduct in question in the Application is brief in duration¹⁹ and recurring in nature²⁰; and (iv) the issues raised by the appeal and the Application are of public importance. Finally, the Appellants submit that a decision on appeal will not overstep the proper boundaries of the judiciary. The Appellants seek nothing more than an interpretation of relevant provisions of the *Police Services Act*, the S.I.U. Regulations and Rule 2.04(6) of the *Rules*. Courts routinely provide interpretations of rules and legislation. Providing the requested interpretation does not require this Honourable Court to overstep its proper role.²¹

¹⁹ In an S.I.U. investigation, counsel is usually retained, notes are prepared and officers interviewed all within days of an incident; see *R. v. Ahmad [Toronto Star Newspapers Ltd. v. Canada]*, [2009] O.J. No. 288 (C.A.); varied [2010] S.C.J. No. 21.

²⁰ The lead investigator on the Schaeffer Investigation, Dennis O'Neill, testified that this practice is widespread and "occurs in most S.I.U. investigations."; Transcript of the Examination of Denis O'Neill, April 15, 2010, at 309, Tab 7 of the Exhibit Book; see *R. v. Ahmad [Toronto Star Newspapers Ltd. v. Canada]*, [2009] O.J. No. 288 (C.A.); varied [2010] S.C.J. No. 21.

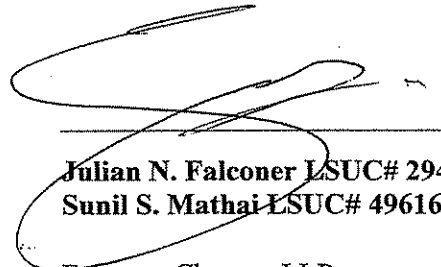
²¹ *Catholic Children's Aid Society of Metropolitan Toronto v. O (L.M.)*, [1996] O.J. No. 3018 at para. 60; aff'd [1997] O.J. 3041 (CA).

PART V: ORDER REQUESTED

29. The Appellants respectfully request an order dismissing the Respondent Officers' motion to quash and their costs of the motion on a partial indemnity basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at Toronto, this 18th day of August, 2011.



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Schedule "A"
LIST OF AUTHORITIES

TAB DESCRIPTION

CASE

1. *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342
2. *Catholic Children's Aid Society of Metropolitan Toronto v. O(L.M)*, [1996] O.J. No. 3018
3. *R. v. Ahmad [Toronto Star Newspapers Ltd. v. Canada]*, [2009] O.J. No. 288 (C.A.); varied [2010] S.C.J. No. 21.
4. *Reference re Public Schools Act (Manitoba) s. 79(3)*, (1993), S.C.R. 839
5. *Schaeffer v. Ontario (Provincial Police)*, [2010] O.J. No. 2770
6. *Schaeffer v. Woods*, 2011 ONCA 116
7. *Schmidt v. Toronto-Dominion Bank*, [1995] O.J. No. 1604 (CA)

LEGAL TEXTS

8. Lorne M. Sossin, "*Boundaries of Judicial Review: The Law of Justiciability in Canada*" (Toronto: Carswell, 1999)
9. Pacciocco and Stuesser, "The Law of Evidence", Irwin Law Inc., 2002, 3rd

SCHEDULE B
RELEVANT LEGISLATION

Police Services Act

ONTARIO REGULATION 267/10

**CONDUCT AND DUTIES OF POLICE OFFICERS RESPECTING
INVESTIGATIONS BY THE SPECIAL INVESTIGATIONS UNIT**

Definitions and interpretation

1. (1) In this Regulation,

“SIU” means the special investigations unit established under section 113 of the Act;
 (“UES”)

“subject officer” means a police officer whose conduct appears, in the opinion of the SIU director, to have caused the death or serious injury under investigation; (“agent impliqué”)

“witness officer” means a police officer who, in the opinion of the SIU director, is involved in the incident under investigation but is not a subject officer. (“agent témoin”) O. Reg. 267/10, s. 1 (1).

(2) The SIU director may designate an SIU investigator to act in his or her place and to have all the powers and duties of the SIU director under this Regulation and, if the SIU director appoints a designate, any reference to the SIU director in this Regulation, excluding this subsection, means the SIU director or his or her designate. O. Reg. 267/10, s. 1 (2).

(3) For the purposes of this Regulation, a person appointed as a police officer under the *Interprovincial Policing Act, 2009* is deemed to be,

- (a) if the person was so appointed by a member of the Ontario Provincial Police, a member of that police force;
- (b) if the person was so appointed by a member of a municipal police force, a member of that police force; or
- (c) if the person was so appointed by a member of a board, a member of the municipal police force for which the board is responsible. O. Reg. 267/10, s. 1 (3).

(4) A police officer appointed under the *Interprovincial Policing Act, 2009* shall comply with all directions given to him or her for the purposes of this Regulation by the chief of police of the police force of which the officer is deemed to be a member or by the designate of that chief of police appointed under subsection 2 (1). O. Reg. 267/10, s. 1 (4).

Designate of chief of police

2. (1) The chief of police may designate a member of the police force who is not a subject officer or witness officer in the incident to act in the place of the chief of police and to have all the powers and duties of the chief of police in any matter respecting an incident under investigation by the SIU. O. Reg. 267/10, s. 2 (1).

(2) If the chief of police appoints a designate under subsection (1), any reference to the chief of police in this Regulation, excluding this section, means the chief of police or his or her designate. O. Reg. 267/10, s. 2 (2).

(3) The person appointed under subsection (1) must be a senior officer. O. Reg. 267/10, s. 2 (3).

Notice to SIU

3. A chief of police shall notify the SIU immediately of an incident involving one or more of his or her police officers that may reasonably be considered to fall within the investigative mandate of the SIU, as set out in subsection 113 (5) of the Act. O. Reg. 267/10, s. 3.

Securing scene of incident

4. The chief of police shall ensure that, pending the SIU taking charge of the scene of the incident, the police force secures the scene in a manner consistent with all standing orders, policies and usual practice of the police force for serious incidents. O. Reg. 267/10, s. 4.

SIU as lead investigator

5. The SIU shall be the lead investigator in the investigation of the incident and shall have priority over any police force in the investigation. O. Reg. 267/10, s. 5.

Segregation of police officers involved in incident

6. (1) The chief of police shall, to the extent that it is practicable, segregate all the police officers involved in the incident from each other until after the SIU has completed its interviews. O. Reg. 267/10, s. 6 (1).

(2) A police officer involved in the incident shall not communicate directly or indirectly with any other police officer involved in the incident concerning their involvement in the incident until after the SIU has completed its interviews. O. Reg. 267/10, s. 6 (2); O. Reg. 283/11, s. 1.

Right to counsel

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. O. Reg. 267/10, s. 7 (1).

(2) Subsection (1) does not apply if, in the opinion of the SIU director, waiting for legal counsel or a representative of a police association would cause an unreasonable delay in the investigation. O. Reg. 267/10, s. 7 (2).

(3) Witness officers may not be represented by the same legal counsel as subject officers. O. Reg. 283/11, s. 2.

Interview of witness officers

8. (1) 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. O. Reg. 267/10, s. 8 (1).

(2) A request for an interview by the SIU must be made in person. O. Reg. 267/10, s. 8 (2).

(3) The SIU shall cause the interview to be recorded and shall give a copy of the record to the witness officer as soon as it is available. O. Reg. 267/10, s. 8 (3).

(4) The interview shall not be recorded by audiotape or videotape except with the consent of the witness officer. O. Reg. 267/10, s. 8 (4).

(5) The SIU director may request an interview take place beyond the time requirement as set out in subsection (1). O. Reg. 267/10, s. 8 (5).

Notes on incident

9. (1) A witness officer shall complete in full the notes on the incident in accordance with his or her duty and, subject to subsection (4) and section 10, shall provide the notes to the chief of police within 24 hours after a request for the notes is made by the SIU. O. Reg. 267/10, s. 9 (1).

(2) Subject to subsection (4) and section 10, the chief of police shall provide copies of a witness officer's notes to the SIU upon request, and no later than 24 hours after the request. O. Reg. 267/10, s. 9 (2).

(3) A subject officer shall complete in full the notes on the incident in accordance with his or her duty, but no member of the police force shall provide copies of the notes at the request of the SIU. O. Reg. 267/10, s. 9 (3).

(4) The SIU director may allow the chief of police to provide copies of the notes beyond the time requirement set out in subsection (2). O. Reg. 267/10, s. 9 (4).

(5) The notes made pursuant to subsections (1) and (3) shall be completed by the end of the officer's tour of duty, except where excused by the chief of police. O. Reg. 283/11, s. 3.

Notice of whether subject officer or witness officer

10. (1) The SIU shall, before requesting an interview with a police officer or before requesting a copy of his or her notes on the incident, advise the chief of police and the officer in writing whether the officer is considered to be a subject officer or a witness officer. O. Reg. 267/10, s. 10 (1).

(2) The SIU shall advise the chief of police and the police officer in writing if, at any time after first advising them that the officer is considered to be a subject officer or a

witness officer, the SIU director decides that an officer formerly considered to be a subject officer is now considered to be a witness officer or an officer formerly considered to be a witness officer is now considered to be a subject officer. O. Reg. 267/10, s. 10 (2).

(3) If, after interviewing a police officer who was considered to be a witness officer when the interview was requested or after obtaining a copy of the notes of a police officer who was considered to be a witness officer when the notes were requested, the SIU director decides that the police officer is a subject officer, the SIU shall,

- (a) advise the chief of police and the officer in writing that the officer is now considered to be a subject officer;
- (b) give the police officer the original and all copies of the record of the interview; and
- (c) give the chief of police the original and all copies of the police officer's notes. O. Reg. 267/10, s. 10 (3).

(4) The chief of police shall keep the original and all copies of the police officer's notes received under clause (3) (c) for use in his or her investigation under section 11. O. Reg. 267/10, s. 10 (4).

Investigation caused by chief of police

11. (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. O. Reg. 267/10, s. 11 (1).

(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. O. Reg. 267/10, s. 11 (2).

(3) All members of the police force shall co-operate fully with the chief of police's investigation. O. Reg. 267/10, s. 11 (3).

(4) The chief of police of a municipal police force shall report his or her findings and any action taken or recommended to be taken to the board within 30 days after the SIU director advises the chief of police that he or she has reported the results of the SIU's investigation to the Attorney General, and the board may make the chief of police's report available to the public. O. Reg. 267/10, s. 11 (4).

(5) The Commissioner of the Ontario Provincial Police shall prepare a report of his or her findings and any action taken within 30 days after the SIU director advises the Commissioner that he or she has reported the results of the SIU's investigation to the Attorney General, and the Commissioner may make the report available to the public. O. Reg. 267/10, s. 11 (5).

Disclosure of information

12. (1) The police force may disclose to any person the fact that the SIU director has been notified of an incident and is conducting an investigation into it. O. Reg. 267/10, s. 12 (1).

(2) The police force and members of a police force shall not, during the course of an investigation by the SIU into an incident, disclose to any person any information with respect to the incident or the investigation,

- (a) except as permitted by this Regulation;
- (b) except that a police officer appointed under the *Interprovincial Policing Act, 2009* may disclose the information to his or her extra-provincial commander during the course of the investigation; or
- (c) except that the chief of police of the police force of which a police officer appointed under the *Interprovincial Policing Act, 2009* is deemed to be a member may disclose the information during the course of the investigation to,
 - (i) the extra-provincial commander of the officer, or
 - (ii) an appointing official as defined in that Act if the chief of police is not such an official and the investigation relates to the officer. O. Reg. 267/10, s. 12 (2).

Public statements

13. The SIU shall not, during the course of an investigation by the SIU, make any public statement about the investigation unless the statement is aimed at preserving the integrity of the investigation. O. Reg. 267/10, s. 13.

Non-application of this Regulation

14. A chief of police or police officer shall not be required to comply with a provision of this Regulation if, in the opinion of the SIU director, compliance is not possible for reasons beyond the chief of police's or police officer's control. O. Reg. 267/10, s. 14.

15. Omitted (revokes other Regulations). O. Reg. 267/10, s. 15.

16. Omitted (provides for coming into force of provisions of this Regulation). O. Reg. 267/10, s. 16.

RUTH SCHAEFFER ET AL
Appellants

-and- POLICE CONSTABLE KRIS WOOD ET AL
Respondents

Court File No: C52414
Motion No. M40297

COURT OF APPEAL FOR ONTARIO

Proceedings Commenced in Toronto

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