Court File No. C52414

COURT OF APPEAL FOR ONTARIO

BETWEEN:

RUTH SCHAEFFER, EVELYN MINTY
and DIANE PINDER

Appellants

-and-

POLICE CONSTABLE CHRIS 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

FACTUM OF THE INTERVENER
POLICE ASSOCIATION OF ONTARIO

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PART I - OVERVIEW

1. The Police Association of Ontario (www.policeassociationofontario.com) was founded in 1933 and is the official voice and representative body for Ontario's front line police personnel. Its membership consists of over 33,000 police and civilian members from every municipal police association and the Ontario Provincial Police Association. The PAO promotes the mutual interests of Ontario's police personnel in order to uphold the honour of the police profession and elevate the standards of police services.

2. The PAO was granted leave to intervene in this appeal by the Honourable Mr. Justice Sharpe, with participation limited to a 15 page factum and 15 minutes of oral argument.

3. The position of the PAO is as follows.

   - This appeal is moot, and in any event should not be heard because it would constitute inappropriate intrusion into the legislative sphere.

   - Civilian oversight of policing activity by the SIU is desirable, and must be carried out in a way that balances three equally important but sometimes competing imperatives: oversight must be effective; it must not impair the discharge of essential policing tasks; and it must be fundamentally fair to all officers involved.

   - Police officers, like every other person in Canada, have a long standing freedom to consult counsel confidentially as they wish and when they wish. In the present context that freedom to consult counsel is subject only to the limited restrictions set out in Ontario Regulation 267/10 which deals with SIU investigations. This freedom to engage with counsel includes the freedom to communicate with counsel in any manner an officer chooses.

   - It is a matter of fundamental fairness to police officers that they continue to exercise their freedom to consult counsel as it is presently constructed under our constitutional law, the common law, and Ontario Regulation 267/10. There is no evidence that the way police officers currently exercise their freedom to consult counsel impairs the effectiveness of policing in Ontario or the effectiveness of SIU oversight. Accordingly there is no reason for this Court to direct any departure from the current status quo.

   - As an organization whose members are clients of the legal profession during SIU investigations, the PAO has unreserved confidence that counsel who represent officers do so professionally, ethically and effectively under the current regimes governing both SIU investigations and the legal profession. PAO members have for decades placed their trust in the professional responsibility and ethics of the counsel they retain, and that trust has not been betrayed. Put colloquially, the present system ain't broke, so there is no need to fix it.

4. The PAO respectfully adopts in their entirety the submissions of the Respondent officers, and the interveners Andrew McKay and the Ontario Association of Chiefs of Police, and the mootness submissions of Commissioner Fantino. In fleshing out the PAO's basic position set out above, the PAO will make only limited additional submissions.

PART II - FACTS

5. The PAO makes no observations on the facts.

PART III – ISSUES AND LAW

The appeal is moot, and in any event should not be heard on the merits

6. The PAO has only one additional point to make beyond those already made by the other parties and interveners taking the same position.

7. One of the three policy imperatives underlying the doctrine of mootness is the need for the court to be sensitive to its role in our political framework.[1] In this case, as noted by the Respondent Officers in their mootness factum, the Honourable Mr. LeSage Q.C. was commissioned by the government of Ontario, and engaged in a wide ranging consultative process with all SIU stakeholders before coming up with recommendations which were implemented by the government through amendments to Ontario Regulation 267/10.

8. Given the eminence and widely reknown practicality of the Honourable Mr. LeSage, and given his commissioning for his task by the Ontario government, the parties who participated in that consultative process were entitled to assume in good faith that recommendations made by Mr. LeSage and implemented by the province would settle the issues they addressed, at least for the foreseeable future. Indeed the efficacy of such a consultative process as was undertaken here depends on the implemented outcomes being given a reasonable chance to unfold in practice before being revisited.

9. If any party feeling only a tiny bit dissatisfied with the outcome of even the most comprehensive and fair consultative/legislative process were free to toddle off to the courts and seek a second kick at the can by relitigating the same issues on their merits, no one would bother participating in the legislative/consultative process. Accordingly, out of respect for these legislative processes in general, and this highly respectable legislative

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[1] *Maystar General Contractors* v. *P.A.T. Local 1819* 2008 ONCA 265 at para.33

process in particular, this Court should not permit itself to be used by the Appellants and the Respondent SIU Director Scott as a forum for a second kick at the can.

10. An apt analogy here is the courts' deference to joint submissions in criminal cases. Such deference is premised not on the resolutions being necessarily perfect, but rather on respecting and preserving the utility of alternative resolution processes. Similar considerations are at play here. There is great utility in the kind of multi-party consultative process undertaken, overseen as it was by such an eminent jurist and deeply practical thinker as the Honourable Mr. LeSage. Such processes should be encouraged. Since Mr. LeSage has directly addressed the issues at hand, this Court should not undermine the government's resort to such practical and fair processes by revisiting the same issues. Not only would it be disrespectful of the government's choice of forum to address policy issues; it would be unfair to the parties who in good faith participated in the legislative/consultative process thinking it would bring at least some finality. And on the flip side, hearing this case would only encourage hard-liners of all stripes to ignore other fair and inclusive legislative processes, and ignore even the most reasonable legislative compromises, to drag other stakeholders through the courts at great unnecessary expense. Legislative activity is all about wise compromise, and courts should not reward intransigent special interest groups by giving them a forum to scupper processes that embody that wisdom.

Freedom to Consult Counsel

11. The Appellants and the SIU have it backwards. Nobody - police officers included - needs any legislative enablement to consult counsel as and when they wish. The freedom to consult counsel whenever has many sources in our legal system, including the following.

- All that is not prohibited is permitted is an elementary foundational presumption of English constitutional law that remains part of Canadian constitutional law. The presumption goes a long way to defining the difference between a free democracy committed to the rule of law, and a totalitarian state. The presumption operates in this context to mean anyone can consult counsel without restriction unless and only to the extent that laws exist to the contrary.

- Section 2(d) of the Charter entrenches freedom of interpersonal association subject only to s.1 limitations which must be reasonable and prescribed by law. Thus the freedom to associate with counsel is a given, and if there is no reasonable limitation prescribed by law, there is no limitation.

- The common law right to counsel, as discussed in this case by the intervener Ontario Association of Chiefs of Police.

- Centuries of legal history teach that access to justice begins with access to counsel.

- The plain wording of Ontario Regulation 267/10: a wide confirmation of the pre-existing freedom to consult counsel, coupled only with the narrowest of limitations on that freedom. [2]

12. _Because the basic analytical point of departure is an unrestricted freedom to speak to a lawyer whenever one chooses, one need not look to applicable statutory instruments to find a grant of this freedom (although a superfluous yet emphatic grant of the freedom is certainly found in O.Reg 267/10). One rather assumes an unrestricted freedom, and looks to the applicable statutory instruments only for reasonable limitations. Ontario Regulation 267/10 does not take away an officer's freedom to consult counsel before preparing his or her notes. So, subject to any lawful commands from superiors, an officer is free to consult counsel whenever he or she wishes, before or after writing notes.

13. The same logic applies to the manner of association between lawyer and counsel - written, oral, e-mail, text messaging, bbm, etc. Freedom to choose how to communicate

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[2] "Subject to subsection (2), every police officer is entitled to consult with legal counsel ..." Subsection 2 speaks to delay in the investigation. It does not speak to consulting before or after notes are prepared, nor does it speak to how a police officer may communicate with his or her lawyer.

is an essential part of freedom to associate with a lawyer. And of course beyond this basic freedom, communications with counsel have an especially weighty independent status by virtue of the sanctity of lawyer-client privilege. What the Appellants and Respondent Scott propose in seeking to prohibit or regulate written communications between police officer clients and their lawyers is nothing less than violating lawyer client privilege to micro-manage the internal dynamics of a lawyer client relationship: all at the instance of a party (the SIU) in an adversarial relationship with the affected client.

The Necessity of a Comprehensive Freedom to Counsel for Officers

14. The underlying deontological premise of basic freedoms - like the freedom to consult counsel – is that the freedom has no mandatory condition precedent that its exercise be either necessary or desirable. However, freedom to consult counsel at the very earliest stages of any SIU investigation is, in fact, essential. The relevant context is as follows.

- It is both trite and uncontroversial to observe that every day thousands of police officers across Ontario have multiple interactions of all kinds with the Ontario public. Common sense therefore dictates that over the past 20 plus years the SIU has been in existence, there have been countless millions of police-civilian interactions. Yet the SIU's own published statistics state that in 20 plus years, only 3,531 civilian-police interactions required SIU investigation.[3] By any measure this is a miniscule percentage of total police-civilian interactions. So for the average Ontario officer on the street, an encounter with the SIU is a rarity.

- The SIU investigates serious injuries or deaths involving the police. So when the SIU intervenes, it is hardly surprising that the officers affected may be shaken up by just having gone through a rare episode of dangerous and tragic proportions.

- Regulation 267/10 requires that promptly after such a rare, volatile, unsettling and often tragic event, the officers involved must be segregated. For investigative purposes, the state substantially deprives the officers of their freedom of movement and communication. If this is not investigative detention which conclusively triggers a right to counsel, it is closely analogous for purposes of the right to counsel. And in any event, by virtue of segregation, a police officer has no one to turn to if he or she has questions or concerns.

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[3] http://www.siu.on.ca/pdfs/occurrence_chart_fiscal_since_inception_with_charges_r.pdf

- Section 11 of Regulation 267/10 states that for every SIU investigation, there must also be a parallel internal investigation by the relevant police service. The internal probe must begin "forthwith". The two parallel investigations, one criminal and one administrative, have very different legal contours, and how the two investigations do and do not intersect is anything but obvious to a non-lawyer, or even a lawyer without hands on experience.

- Regulation 267/10 states that the officers cannot go home before finishing their notes. The notes will be seized by the internal police investigators and may also be provided to the SIU. In other words, the notes are with prejudice statements in at least one and possibly two separate investigations.

15. The overall legal context, then, is that police officers find themselves quickly segregated, their freedom of movement and communication restricted, and facing two complicated and unfamiliar investigations immediately after an event that may have been quite stressful for them: and they must make a written statement of the events before they can go home. In these circumstances the need for counsel is both pressing and obvious. There are a host of important questions a police officer should be able to ask a lawyer immediately. Those that pertain to the SIU investigation alone are the following.

- Why am I segregated? Under what legal authority? How long will I be held in this little room with nothing to do?
- My shift is over and I'm very tired: why can't I go home?
- Can I go to the washroom alone? Can I phone my spouse?
- Am I under investigative detention? Why is there another officer outside this room as if they are guarding me?
- I am feeling totally stressed out by what just happened. My heart is pounding, my head is pounding and I can't think straight. Do I have the right to leave to get checked out by a doctor or trauma counsellor? When? How do we arrange that?
- What is the difference between a subject and a witness officer? Who decides what I am to be? When? What am I likely to be?
- How does the investigation unfold? Do I have to give an interview? When? What will the interview be like? Who conducts the interview? Can I have a lawyer present?
- Do I have to do up my notes now? What happens to the notes once I make them up? Who gets them? Does my service automatically give my notes to the SIU?
- I need to put sensitive confidential informant information in my notes: does that go to the SIU? Does it go to the injured civilian we were just investigating?

- I didn't do anything wrong but I had to shoot that person to save my own life. Am I going to get charged? Am I going to get suspended? Am I going to lose my job? How will I support my family?
- I was arresting a party for a criminal offence when the civilian injury occurred. How does the SIU investigation affect that charge? What about all the paperwork I have to do for that charge? If I am segregated how does that get done? And there was evidence at the scene of my arrest I wanted seized. How can that be done now that I am segregated?
- We followed normal team procedure and used a central note taker. I rely on those central notes every time we do one of these projects. And we always have a team debrief to ensure the central notes are accurate. Can I rely on the central notes now? Can we have a team debrief? How can we do any of that if I'm segregated from the central note taker? What about the integrity of our investigation?

16. These questions are all very important. Many raise complicated legal issues. Officers in fairness need and deserve answers immediately: before writing notes. Furthermore, in an incident that may have unfolded in the blink of an eye, the officers involved are turned from objective criminal investigators to the targets of a criminal investigation themselves. No one would be surprised if self-interest rushed in like a rip-tide, drowning the officers' objectivity: which means the need for objective advice from counsel escalates markedly because the officers cannot figure out the answers to these questions on their own.
17. The Respondent SIU Director Scott and the Appellants seek to deprive officers of their right to counsel when the need for counsel is, as explained above, both obvious and pressing. This position is both contextually insensitive and statutorily unfounded. Further, this position entrenches significantly on matters outside the SIU's jurisdiction: the parallel internal police administrative investigation under s.11 of Regulation 267/10 which must start "forthwith"; and which includes criminal investigation of conduct that did not cause serious injury or death and so is not within the SIU mandate.
18. These internal investigations police investigations under s.11 of Regulation 267/10 can lead to disciplinary hearings under the *Police Services Act*, R.S.O. 1990 c.P.15.

Disciplinary penalties can include forfeiture of days off, forfeiture of pay, suspension without pay, demotion, and dismissal.[4] Officers have no right to refrain from giving a statement to internal police investigators regardless of the employment jeopardy they face. And of course the notes they must write before they can go home become the property of the investigating police service and can be used in discipline proceedings against the officer. In addition, internal investigators must address possible criminal behaviour that is outside the scope of the SIU's statutory mandate: namely criminal acts by police officers that do not cause serious injury or death. In these circumstances, officers have a compelling need to consult counsel immediately, regardless of the SIU investigation. Questions about the internal investigation that officers need answers to immediately after an SIU event are many and varied, and include the following.

- Why is there also an internal investigation?
- How does it differ from the SIU investigation?
- Are the two separate or intertwined and in what ways?
- Do I have to do an interview for the internal investigation? When? What will the interview be like? Can I have a lawyer present?
- Will the internal investigators seize my notes? Will they give them to the SIU?
- What is the standard of misconduct for an internal investigation?
- What charges could be laid in an internal investigation? What are the penalties?
- Am I going to get charged internally? Criminally? Can I be charged with both? How is that fair?
- Am I going to be suspended while the charges are outstanding? Would that be suspended with pay or without pay? Am I going to lose my job? How will I provide for my family?

For any conscientious officer these are matters of very serious concern that will arise immediately upon an event that triggers the operation of Regulation 267/10. They have nothing to do with the SIU, and deserve immediate answers from counsel.

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[4] *Police Services Act* ss.84,85

19. The attempt by the Appellants and Director Scott to exclude counsel at a crucial stage of the SIU investigation fails to take account of the big picture which includes the s.11 internal police investigation: an investigation that has nothing to do with the SIU but which can dramatically affect an officer's job and his or her life, and which unfolds "forthwith" after the events in question. By trying to deprive officers their freedom to consult counsel at the crucial early stages of the s.11 internal investigation, the SIU Director is seeking to truncate important rights and compromise the fairness of investigative processes over which he has no statutory reach.
20. Then there is the episode itself that resulted in civilian injury. An incident that escalates into use of lethal or harmful force may well have a host of legal complications far beyond the analytical abilities of the officers involved, through no fault of their own. Yet these same officers must accurately note up the events in what amounts, practically speaking, to a with-prejudice written statement. What insight can a 20 year old kid with a few months at police college realistically bring to the much litigated niceties of s.25 of the *Criminal Code* when she has never before fired her Glock outside the shooting range?
21. Overlaying the complexities around the use of force may be multiple complexities in the criminal investigation the officers were undertaking when the use of force occurred. A third layer of bedevilling complexities may also be lurking in the internal service conduct issues that arise on the same facts. Thus an SIU event can be a rat's nest of widely varying legal and factual issues for the officer to sort out and address in his or her notes, precisely when they feel shaken by the events, and have no objectivity. Reassuring advice from counsel about how to address these issues honestly, fully, and forthrightly is

deeply necessary. And conversely, depriving officers of access to such obviously necessary legal guidance in these circumstances is fundamentally unfair.

22. SIU Director Scott's argument that officers should have no access to counsel before writing their notes is also self-defeating. The SIU's own published statistics show that 97.5% of SIU cases are closed without charges laid.[5] The SIU itself therefore confirms that in the overwhelming majority of cases, civilians are injured when police are present for reasons other than police misconduct. This is the elephant in the room. It must be acknowledged and integrated into the analysis. In this context, where full cooperation with the SIU is required, counsel is the source of advice to an officer to note up a matter with sufficient care to ensure the true picture emerges. This advice-giving role of counsel greatly assists the SIU by improving both the quality and quantity of information the SIU receives. Yet ironically it is a role the Appellants and SIU Director seek to eliminate.

23. The Appellants and SIU Director seem concerned that counsel will undermine the necessary segregation of involved officers provided for in Regulation 267/10. This concern is misplaced. Anyone with investigative or courtroom experience knows that segregation to maintain independence of witness recollection powerfully aids truth seeking. And SIU statistics show overwhelmingly that vigilant truth seeking exonerates officers. So the baseless, uncharitable implication that counsel who represent officers don't want the truth not only disparages the integrity of counsel in the absence of evidence: it also misses an essential reality of SIU investigations: vigilant truth-seeking is desirable from everyone's perspective, and therefore so is effective witness segregation.

24. The Appellants and SIU Director Scott also overlook the crucial role of counsel in ensuring compliance. Lawyers are officers of the court, duty bound to uphold the law. It

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[5] Charges were laid in 90 cases out of the 3,531 that the SIU investigated between 1990 and 2010, for a

is a cliché that lawyers frequently displease clients by honourably giving unwelcome advice that clients must obey the law. By giving compliance-focused advice, as all ethical counsel must, counsel actively assist the SIU in getting to the truth of the matter.

25. Ontario police officers are as a whole honourable and highly professional, which the SIU's extremely high closure rates prove dramatically. But officers are not immune to fear, inexperience and bad judgment, which if left unchecked can lead to substandard decision making. And these human frailties may arise in the unfamiliar and sticky situation of an SIU investigation. Accordingly, early, comprehensive advice from counsel about full compliance and how to achieve it is an essential safeguard to the integrity of the SIU's investigative process. As such counsel for police officers and the SIU are complementary partners in an important justice enterprise.

26. In a similar vein, Crown and defence counsel may engage with full adversarial vigour in a courtroom without undermining the abiding appreciation each must have for the importance of the other in maintaining the integrity of the trial process. So likewise, the sometimes adversarial relationship between counsel for police officers and the SIU should not diminish either side's appreciation of the crucial role both play in effective yet fair civilian oversight of police activity. Yet the SIU Director and Appellants, who seek to eliminate counsel's crucial duties, overlook this important part of the big picture.

Freedom to Consult Counsel: No Downside

27. When the ornate verbiage of the SIU Director and the Appellants is peeled away, their core assertion is this: lawyers are a hindrance to the administration of justice, so their role should be curtailed. Their core assertion is unsustainable on its face.

28. If ethical legal advice before officers write notes compromises the integrity of those notes, the following examples, and no doubt many others, must also be true.

- Family lawyers giving advice before their clients submit mandatory financial statements compromises the integrity of those statements.
- Tax lawyers giving advice before clients submit tax returns compromises the integrity of those returns.
- Securities lawyers giving advice before an IPO goes out compromises the integrity of the IPO.
- Crown Attorneys and defence lawyers who have reviewed the full brief and then interview witnesses before trial will inevitably taint the witnesses they interview. So will every criminal investigator (including SIU investigators) who interviews witnesses knowing what other witnesses have said.
- Business lawyers giving advice before any regulatory filing is made by the client will taint that filing.
- Defence lawyers giving accused persons advice on testifying, or worse letting them read the disclosure, renders their testimony inherently untrustworthy.
- Any lawyer helping a client prepare an affidavit is tainting sworn evidence.
- Trial or appellate counsel drafting factums, who transform turgid tedious transcripts into sparkling succinct summaries, are polluting the evidence.

Every day, in countless ways, lawyers help their clients structure and deliver factual information to authorities in ways that maximize the client's legal position without misrepresenting the truth. This is what lawyers do. The Appellants and Director Scott seem to think it is wrong. If they are right, advocacy is ethically impossible.

29. But it is the Appellants and Director Scott who have placed themselves in an impossible bind. They cannot credibly argue police officers have less freedom to consult counsel merely by virtue of their occupation. So they are forced to argue the lawyers are the

problem: even the most ethical counsel services are unjust. But this creates the intractable problems for ethical counsel work in every other context as outlined above.

30. SIU Director Scott argues at paragraph 75 of his factum that legal advice before officer notes are written compromises the "independence" of an officer's recollection. The very case law he cites defeats this submission. The independence he trumpets is independence from *other witnesses*, not counsel. Nobody disagrees independence from other witnesses is important: it is why segregation aids truth seeking so well. But independence from other witnesses is vastly different from legal advice. Counsel was not present at the incident so has no evidence on it. Counsel cannot possibly compromise independence of recollection as defined in the authorities. Unless of course one blithely assumes counsel will violate ethical precepts they have sworn to uphold, and commit the criminal offence of obstructing justice by misusing the sanctity of the lawyer-client relationship to surreptitiously taint an officer's notes with information gleaned from other witnesses. If that is Director Scott's assumption it is so pernicious and unfounded as to be offensive.

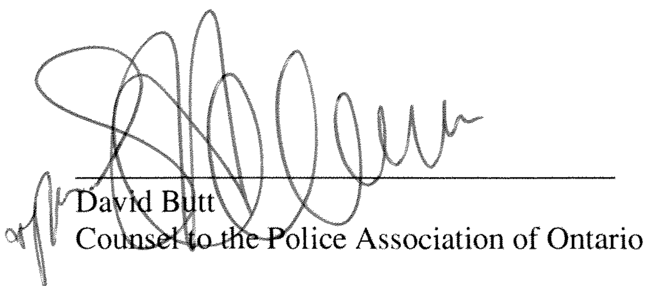
31. SIU Director Scott uses the same analytical approach to disparage multiple retainers. It fails there too, for the same reasons. By emphasizing the need for public accountability in SIU investigations Director Scott implies the public will buy his contemptuous view of lawyers as toxic to the administration of justice. The fully informed reasonable public is smarter than that. Further, the expert opinion of Gavin Mackenzie easily reconciles the lawyer's primary legal duty to ensure segregation, with the secondary ethical duty of full disclosure to each client: postpone full disclosure until after the SIU interview, and withdraw without disclosure if any client does not agree.

32. Every lawyer should know the relevant law better than the client. That is the only reason a client would ever seek, much less pay for, a lawyer's advice. Therefore, in every case, in every area of the law, the lawyer's greater breadth of legal knowledge and experience could be deployed malevolently or inadvertently to frustrate the policy objectives of the regulatory regime in question. And by that logic, lawyers are a danger to the administration of justice right across the spectrum. Such is the view of the Appellants and the SIU Director taken to its logical conclusion. It is a jaundiced, flawed view of lawyering. Because legal expertise alone is far from sufficient to discharge the lawyer's role. The amoral lawyer is unworthy of the name. Uncompromising ethical commitment to fostering compliance and respect for the law plays an equal if not greater part. And it is that commitment to ethics – especially in the impenetrable privacy of the lawyer-client relationship - that defines and preserves the exalted position of lawyers as the linchpin in the machinery of delivering justice – not necessarily desired results - to clients. The SIU Director and the Appellants wrongly diminish the centrality of ethics in delivery of legal services. That core mistake impoverishes their analysis beyond redemption.

PART IV - ORDER REQUESTED

33. The PAO asks that the appeal be dismissed. The PAO does not seek costs.

ALL OF WHICH is respectfully submitted on 16 August, 2011 by



David Butt
Counsel to the Police Association of Ontario

Schedule "A"- SOURCES CITED

1- http://www.siu.on.ca/pdfs/occurrence_chart_fiscal_since_inception_with_charges_r.pdf

2- *Maystar General Contractors* v. *P.A.T. Local 1819* 2008 ONCA 265 at para.33

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DIVISIONAL COURT

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FACTUM OF THE INTERVENOR POLICE ASSOCIATION OF ONTARIO

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