

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

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 THE
RIGHT OF ONTARIO (MINISTRY OF COMMUNITY SAFETY AND
CORRECTIONAL SERVICES)**

Respondents

**FACTUM OF THE INTERVENER
THE CANADIAN CIVIL LIBERTIES ASSOCIATION**

GOWLING LAFLEUR HENDERSON LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3
Tel: (613) 786-0213
Fax: (613) 788-3642

Wendy J. Wagner (LSUC # 46380Q)
Ryan W. Kennedy (LSUC # 58069F)

Counsel for the Intervener
The Canadian Civil Liberties Association

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I. OVERVIEW

1. These submissions present the CCLA's perspective on aspects of the decision of the Court below that have a broad impact on the availability of public interest standing and associated relief. The CCLA has also provided its perspective on the rights to counsel of subject and witness police officers involved in an S.I.U. investigation, and the balancing of these rights against the integrity of investigations undertaken by the S.I.U.

II. FACTS

2. The CCLA relies upon the facts outlined in the Appellants' Factum at paragraphs 13-41.

III. ISSUES

3. The CCLA makes submissions on the following issues:
 - a. Whether the Court below erred in denying public interest standing?
 - b. Whether the Application is moot?
 - c. Whether declaratory relief is appropriate in the circumstances of this Application?
 - e. The merits of the Application, including
 - i. joint retainers between multiple police officers involved in an S.I.U. investigation; and
 - ii. the note taking practices of the Respondent Police Officers.

IV. LAW AND ARGUMENT

a. Whether the Court Below Erred in Denying Public Interest Standing?

4. Public interest standing is available to challenge the lawfulness of administrative action and to obtain a declaration that administrative action is outside the scope of statutory or regulatory authority. In order to prevent the immunization of legislation or public acts from challenge, the Courts should take a liberal and generous approach to resolving the issue of standing.¹ The CCLA submits that the Court below erred in its application of the test for public interest standing and thereby excessively limited its breadth and availability.

i. “Serious Issue to be Tried” Regarding Police Conduct in Issue

5. The Court below erred in finding that there was no “serious issue” raised by the application because the acts of the Respondent Officers constituted the exercise of “private rights”. The Court’s determination of this issue within the context of the test for standing precluded a substantive analysis of the extent to which the Officers’ acts were governed and constrained by the *Police Services Act (PSA)* and *S.I.U. Regulations*, when properly interpreted. When the central issue of a dispute is whether a specific act undertaken by a public office holder is governed by law, a predetermination of this issue in the context of the test for standing unduly restricts the availability of judicial review to ensure proper accountability of those occupying a public office.

6. In her reasons for denying public interest standing, Justice Low held:

¹ *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607 at 630 (Book of Authorities of the Intervener, The Canadian Civil Liberties Association (“CCLA BOA” Tab 5); *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236 at 253, (CCLA BOA, Tab 2).

The retention of counsel by police officers who are or may be designated as subject officers under the regulation is the exercise of a private right. It is not an administrative action.

The manner and timing in which the police officers perform their duties is an employment issue between them and their employer. Accordingly, the first part of the test is not satisfied.²

7. The above finding improperly predetermined the substantive issues of the extent to which the retention of counsel and note-taking practices of police officers during S.I.U. investigations are acts which are governed and constrained by law, versus “private rights”.
8. In the instant case, it is at the very least arguable that the impugned acts are governed by the *PSA* and *S.I.U. Regulations*, and furthermore are not authorized by this legislation when properly construed. This position is supported by reference to *Odhavji v. Woodhouse*, in which the Supreme Court of Canada confirmed that police officers are under a statutory obligation to cooperate fully with members of the S.I.U. in the conduct of its investigations and that the decision not to cooperate with an investigation constitutes an unlawful breach of statutory duty.³
9. At its core, the present dispute is about the lawfulness of administrative action, and specifically the lawfulness of the conduct of officers within the context of an investigation that is itself governed by statute. Disagreement as to whether a specific act or acts undertaken within the context of the S.I.U. investigation are constrained by the relevant legislation is a matter of statutory interpretation that is properly reviewable by the courts.

² *Schaeffer v. Wood*, 2010 ONSC 3647 (Reasons for Decision) at paras. 86-87, (CCLA BOA, Tab 19).

³ *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, (CCLA BOA, Tab 9).

10. In *Finlay*, the Supreme Court of Canada clarified that public interest standing is available to challenge the lawfulness of administrative action and to obtain a declaration that administrative action is outside the scope of statutory or regulatory authority.⁴ S.I.U investigations, and more broadly, the unique duties and rights afforded to police officers, all occur in a highly regulated and statute-oriented environment.⁵ Whether a specific action undertaken by a police officer as a public office holder is governed by, and authorized by law, raises an important, serious, and triable issue regarding the lawfulness of administrative action. In the CCLA's view, to deny public interest standing by predetermining the issue of whether the specific act is one that is governed by law will have the effect of immunizing crucial public acts that impact on the rights of the public from challenge.

ii. **“Reasonable and Effective” Way to Bring the Issue Before the Court**

11. The CCLA submits that the Court below failed to take into account the multi-faceted nature of the Appellants' application in determining there were other reasonable and effective alternatives by which to bring the issues before the courts, and as such stripped the application of its “central thesis”. Individual proceedings would not be a reasonable and effective means by which to address all of the issues raised in the application. It is essential that the test for public interest standing not be construed so narrowly as to deny standing to an appropriate applicant on the basis that there may be private standing to bring an action that would result in an incomplete or inferior remedy.

⁴ *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, (CCLA BOA, Tab 5).

⁵ *R. v. Campbell*, [1999] 1 S.C.R. 565 at para. 27, (CCLA BOA, Tab 12).

12. In *Downtown Eastside Sex Workers*, the application judge denied to the Downtown Eastside Sex Workers United Against Violence Society (SWUAV) public interest standing to challenge the constitutional validity of various sections of the *Criminal Code* sanctioning prostitution-related offences on grounds that persons charged with offenses under the various sections of the *Criminal Code* could bring the issues before the Court. The British Columbia Court of Appeal disagreed, stating:

In considering whether there is another reasonable and effective alternative to test the constitutionality of the impugned laws, the judge focused, as in most cases, upon the availability of another challenge to the constitutional validity of these provisions. That, of course, is one measure. There is, however, another aspect to be considered in determining the availability of a reasonable and effective alternative, which is the multi-faceted nature of the proposed challenge...

I conclude, with respect, that the reasons for judgment do not fully reflect the systemic and comprehensive nature of the challenge advanced. In likening this action to the cases listed and by referring to the number of prostitution-related charges laid, and therefrom concluding there was a sufficient prospect that a reasonable and effective alternative exists, the action was stripped of its central thesis.⁶

13. The reasoning of the British Columbia Court of Appeal is equally applicable to the circumstances of this application, which addresses systemic issues affecting the integrity of S.I.U. investigations. A civil action in tort and complaints made under the *Law Society Act* or the *PSA* will fail to have all of the parties to this application involved in a single proceeding. Further, the various proceedings will have differing impacts and binding effects on the parties that are involved, as well as different appeal procedures or potential for judicial review. Moreover, a multiplicity of proceedings may produce inconsistent

⁶ *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2010 BCCA 439 at paras. 55 and 62, leave to appeal to S.C.C. granted, March 31, 2011, (CCLA BOA, Tab 4).

results and will be of little guidance to both the parties and the public with regards to the lawfulness of the impugned actions of the Respondent Police Officers.

b. Whether the Application is Moot?

14. The CCLA submits that the Court below erred in finding that there was no “live controversy” between the parties. The lawfulness of the impugned actions of the Respondent Police Officer remains at issue between the parties today and cannot be described as “academic”.⁷

15. The CCLA further submits that the amendments to the *S.I.U. Regulations* promulgated by O.Reg 283/11 do not render this proceeding moot.⁸ The amendments do not alter the note-taking practices of officers subject to an S.I.U. investigation. Prior to the amendments, senior officers had instructed witness and subject officers to delay preparation of their duty notes until after they had consulted legal counsel, as a matter of practice. The amendments codify this practice by conferring on the Chief of Police or his designate (i.e. a senior officer) the authority to excuse delayed preparation of notes.⁹ The amendments do not resolve the “live controversy” of whether the vetting of notes by counsel fundamentally conflicts with sections 9(1) and (3) of the *S.I.U. Regulations*, which require a witness or subject officer to complete notes on the incident “in accordance with his or her duty”. The ongoing controversy is made manifest by the Respondents’ conflicting submissions on the impact of the amendments – the

⁷ *Horsemen’s Benevolent and Protective Association v. Ontario Racing Commission, et al.*, (1997) 37 O.R. (430) (C.A.) at paras. 21-22 (CCLA BOA, Tab 7); *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at 353, (CCLA BOA, Tab 1).

⁸ *Police Services Act*, O. Reg. 283/11.

⁹ *Conduct and Duties of Police Officers Respecting Investigations by the Special Investigations Unit (S.I.U. Regulations)*, O. Reg. 267/10, ss 2, 9(5).

Commissioner submits that section 9(5) precludes a practice whereby officers are routinely excused from completing notes to consult with counsel, while the Police Officers submit that by the amendment, “the government has chosen not to abrogate police officers’ right to consult counsel prior to making compelled statements.”¹⁰

16. While the amendments render moot the issue of whether witness and subject officers may jointly retain counsel, the amendments do not address whether two or more witness officers may jointly retain counsel, or whether two or more subject officers may jointly retain counsel. This Court’s guidance regarding the impact of counsel’s ethical obligations regarding disclosure in the context of joint retainers on the integrity of S.I.U. investigations is required to resolve what has been left silent by the legislature.

17. The factors outlined by the Supreme Court of Canada in *Borowski* favour this Court exercising its discretion to hear the issues raised by the application, notwithstanding the amendments. In particular:

(1) the requisite adversarial relationship still exists between the parties, who remain at odds regarding the interpretation of section 113 of the *PSA* and the *S.I.U. Regulations* and whether the impugned actions of the Respondent Officers were lawful under the statutory instruments in force at the time of the relevant S.I.U. investigations;¹¹

(2) the resolution of the issues raised in the application is in the public interest in order to ensure the integrity underlying investigations of the S.I.U. This appeal raises similar issues to appeals meeting the analogous test applicable to moot criminal appeals,

¹⁰ See paragraph 11.2 of the Factum of the Respondent Julian Fantino, and paragraph 21 of the Factum of the Respondent Police Officers.

including police conduct, potential systemic failure in the justice system, and the spectre of a serious injustice to the family of a deceased individual. Civilian oversight of police conduct resulting in death or serious injury is an ongoing issue of high public concern in Canadian society;¹²

(3) The amendments have not relieved this Court of its role in the interpretation and enforcement of statutory obligations. A proper interpretation of the provisions of the *PSA* and the *S.I.U. Regulations* in force at the time of the impugned acts will resolve issues that remain unresolved by the amendments, with the effect that this matter continues to possess a sufficient legal component to warrant a decision by this Court.¹³

c. Whether Declaratory Relief is Appropriate in the Circumstances of this Application?

18. The CCLA submits that the Court below erred in finding that the matter before it was not justiciable because the past actions of the Respondent Officers were complete, there was “no threat” to the interests of the Applicants, and there was no “legal nexus” between the Applicants and the Respondents.¹⁴ Where public interest standing is sought, a “useful purpose” or “preventative role” exists if the court’s guidance will benefit the public, even if it does not prevent future harm to the Applicants themselves.
19. In *Certified General Accountants Association of Canada*, the respondent asserted that declaratory relief was not available to the applicant because it would not resolve any

¹¹ *Payne v. Wilson*, [2002] O.J. 2566 (C.A.) at para. 21 (CCLA BOA, Tab 11).

¹² *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at 361 (CCLA BOA, Tab 1); *R. v. Smith*, [2004] 1 S.C.R. 385 at para. 48 (CCLA BOA, Tab 17).

¹³ *Friends of the Earth v. The Governor in Council*, 2008 FC 1183 (CCLA BOA, Tab 6).

¹⁴ Reasons for Decision at para. 67 (CCLA BOA, Tab 19).

existing legal dispute and rather was sought for political objectives. The Ontario Divisional Court refused to quash the application on this basis, stating:

The jurisprudence does not support the conclusion that declaratory relief should be granted only in those cases in which the declaratory relief, if granted, will resolve a specific present or existing legal dispute. In the decisions of *Morneault v. Canada (Attorney General)* (2000), 189 D.L.R. (4th) 96 (F.C.A.) and *Operation Dismantle Inc. v. Canada*, [1985] 1 S.C.R. 441, the Court recognized that it was a much broader relief justified by “serving a “useful purpose” or even a “preventative role”.¹⁵

20. *Morneault* was an application for judicial review of findings made in the report of a Commission of Inquiry into the deployment in 1992 of Canadian Forces to Somalia, which contained statements that the applicant alleged adversely impacted his reputation.

Regarding the availability of declaratory relief, the Court held:

There was a time when declaratory relief was not available if it would have no legal effect, but this is no longer so. In *Merricks v. Nott-Bower*, [1964] 1 All E.R. 717 (C.A.), at page 721, Lord Denning stated:

If a real question is involved, which is not merely theoretical, and on which the court's decision gives practical guidance, then the court in its discretion can grant a declaration.¹⁶

21. The authorities hold that declaratory relief will be available in any circumstances where there is a real question as to the validity of law or legality of administrative action, and the link between the action and future harm is provable.¹⁷ It is apparent that where public interest standing is sought, the “future harm” sought to be prevented need not relate to the Applicant, otherwise the Applicant would be directly affected and entitled to private interest standing.

¹⁵ *Certified General Accountants Assn. of Canada v. Canadian Public Accountability Board*, [2008] O.J. No. 194 (Div. Ct.) at para. 69 (CCLA BOA, Tab 3).

¹⁶ *Morneault v. Canada (Attorney General)*, [2000] F.C.J. No. 705 (F.C.A.) at para. 27 (CCLA BOA, Tab 8).

¹⁷ *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441 at para. 33 (CCLA BOA, Tab 10).

22. On a proper interpretation of the law, the present application is amenable to declaratory relief. There is a “real” question regarding the legality of joint retainers and the involvement of legal counsel in the process of preparing officer’s duty notes. This Court’s intervention is required to give guidance concerning the propriety of these practices, which remains in issue notwithstanding the amendments promulgated by O.Reg 283/11. The consequences of these practices are not hypothetical, but rather have a continuing impact on the process of S.I.U. investigations that is concrete and capable of proof. The fact that the Applicants may no longer be directly affected by these practices is irrelevant when standing is sought on the basis of public interest standing.
23. The CCLA takes no position on whether the Applicants might also be entitled to declaratory relief based on private law standing. Justice Low’s decision regarding the unavailability of declaratory relief is, however, of serious concern to the CCLA as an organization that frequently seeks public interest standing. Requiring a public interest applicant to show that its own legal interests are threatened in essence strips public interest litigants of the availability of declaratory relief.

d. The Merits of the Application

i. Joint Retainer Between Multiple Police Officers Involved in an S.I.U. Investigation

24. The CCLA submits that the right to counsel conferred on officers by section 7 of the *S.I.U. Regulations* cannot be interpreted to sanction retention of joint counsel in the course of an S.I.U. investigation. This practice has the effect of undermining section 6 of the *S.I.U. Regulations*, which requires segregation of officers involved in an incident and prohibits communication between officers until S.I.U. interviews are completed. Due to

counsel's ethical obligations regarding disclosure in the context of joint retainers, these requirements cannot be properly respected if joint retainers are permitted.

25. The CCLA is certainly supportive of the right to counsel of choice. However, in the context of an S.I.U. investigation, the right to counsel of choice must yield to the statutory scheme of the investigation, which permits officers a right to counsel while maintaining the integrity of the investigation. In particular, section 6 of the *S.I.U. Regulations* is designed to protect the integrity of the investigative process from perceptions of police officer collusion by segregating officers and prohibiting communications between them regarding the events being investigated. This provision plays an important role in ensuring that the S.I.U.'s investigative process can function effectively, and that public confidence is maintained in the investigation.
26. The purposes underlying segregation of officers involved in an S.I.U. investigation are undermined by permitting officers to jointly retain the same counsel. A jointly retained lawyer is under a professional obligation to not withhold information from clients that is received in connection with the matter for which counsel has been jointly retained. Although this ethical obligation may not result in the jointly retained counsel disclosing information received from one officer to another during the course of a specific investigation, the practice of joint retainers gives rise to an opportunity for collusion, and thereby undermines the purpose of section 6 and public confidence in the integrity of the investigatory process.
27. While interpreting sections 6 and 7 of the *S.I.U. Regulations* as prohibiting joint retainers between counsel and officers involved in an investigation may result in some officers

being deprived of their first choice of counsel and police associations being required to spend additional resources on legal fees, the integrity of the S.I.U.'s investigative process will be protected to the ultimate benefit of the public's faith in the police and the independent oversight process. Properly interpreted, the statutory scheme maintains a balance between the relevant rights and interests by conferring on officers a right to counsel, but imposing a reasonable limitation on this right that respects the integrity of the investigation and ensures its effectiveness.

28. While the amendments to the *S.I.U. Regulations* promulgated by O.Reg 283/11 resolves the issue of joint retainers between subject and witness officers, an interpretation of sections 6 and 7 of the *S.I.U. Regulations* remains necessary to provide guidance regarding the propriety of joint retainers between two or more witness officers or two or more subject officers. The CCLA submits that a proper interpretation of the *S.I.U. Regulations* in force prior to the amendments precludes all joint retainers between officers subject to an S.I.U. investigation. Due to the silence of the legislature, this interpretation remains relevant to the present conduct of S.I.U. investigations.

ii. Note Taking Practices of the Respondent Police Officers

29. The CCLA submits that the right to counsel does not justify an interpretation of the *S.I.U. Regulations* that would permit delayed preparation of duty notes by officers subject to an S.I.U. investigation or the involvement of legal counsel in the process of preparing duty notes for submission to the S.I.U. These practices are contrary to section 9 of the *S.I.U. Regulations*, which states that an officer shall complete in full the notes on the incident "in accordance with his or her duty" and with a purposive interpretation of the *S.I.U. Regulations* that would promote public confidence in the integrity of the S.I.U. process.

30. The CCLA has been a strong and consistent advocate of the right to counsel and has intervened in Supreme Court of Canada proceedings to uphold this right.¹⁸ The S.I.U. process promotes the right to counsel and the associated right against self-incrimination by conferring on officers a right to consult counsel and by the protections against self-incrimination found in the *S.I.U. Regulations*, including the provision that a subject officer's duty notes cannot be used during the course of an S.I.U. investigation. A balance between these important rights and the efficacy of the S.I.U. investigation is, however, achieved by ensuring that duty notes, which cannot be viewed as anything other than a fundamental component of the officers' duties of employment, are prepared contemporaneously and independently.
31. The importance of accurate and reliable notes is consistently reinforced in judicial decisions, not least because officers' notes are often the foundation for a criminal conviction. These points were emphasized in *R. v. Chura*, in which the B.C. provincial court stated:

Cst. Sims reviewed Cst. Gormick's report before giving evidence. I do not know what instructions are given to police witnesses these days, but this is a practice that should be avoided, as it allows of the suggestion that the officer has included her partner's evidence in her own testimony, albeit perhaps unintentionally. I might add that the importance of accurate notes for court purposes cannot be overemphasized. Any practice of relying upon reports made well after the fact based on scanty notes should be discouraged, much as it may add to the workload of our already beleaguered police forces. Given the onus of proof beyond a reasonable doubt, there is no room for discrepancies between notes and reports, or failure to note crucial evidence immediately or very shortly after the events.¹⁹

¹⁸ See *R. v. Sinclair*, [2010] 2 S.C.R. 310 (CCLA BOA, Tab 16); *R. v. McCrimmon*, [2010] 2 S.C.R. 402 (CCLA BOA, 14); *R. v. Willier*, [2010] 2 S.C.R. 429 (CCLA BOA, Tab 18).

¹⁹ *R. v. Chura*, [2006] B.C.J. No. 912 (B.C.P.C.) at para. 60 (CCLA BOA, Tab 13).

32. Providing accurate notes to record the facts regarding an incident in which a police officer causes death or serious bodily harm to an individual in the course of duty is no less important than providing accurate notes in support of the conviction of an accused person. It is well established that the reliability of duty notes is contingent upon the notes being contemporaneous and independent. A failure on the part of an officer to complete his or her duty notes at the end of his or her shift compromises their contemporaneity; whereas vetting of the officer's notes by counsel affect their independence. The jurisprudence and a purposive analysis therefore support an interpretation of section 9(1) that promotes accuracy and reliability of duty notes by prohibiting these practices.
33. An analogy can be drawn between duty notes, the preparation of which is a fundamental component of the employment responsibilities of a police officer, and the notes that are prepared by nurses or physicians in the context of their duties. The latter are considered inherently reliable and admissible *prima facie* for the truth of their contents in legal proceedings as an exception to the hearsay rule, specifically because the contemporaneous preparation of the notes in the course of the professional duties of the medical professional imparts the necessary credibility.²⁰
34. The CCLA submits that it is appropriate that officers do not have a right to consult counsel in the preparation of their notes, which is a key aspect of their regular employment duties. Regardless of the consequences to the officer, it is imperative that there is a record of the facts that led to serious injury or death of a civilian as a result of police action. At the same time, officers are afforded appropriate protection against self-incrimination and the right to have counsel present when undergoing an S.I.U. interview,

a procedure which in contrast to note-taking is not part of the regular employment duties of the officer and is potentially foreign and intimidating.

iii. **Other Issues**

35. The CCLA supports and relies upon the Applicants' position regarding debriefing of civilian witnesses and timely notification of the S.I.U. of an incident.

V. **ORDER REQUESTED**

36. The CCLA respectfully requests an Order setting aside the decision of Justice Low. And granting the declarations sought in the Appellants' application.

37. The CCLA does not seek its costs, and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of August, 2011.



GOWLING LAFLEUR HENDERSON LLP

Wendy J. Wagner
Ryan W. Kennedy
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3
Tel: (613) 786-0213
Fax: (613) 788-3642

Counsel for the Intervener
The Canadian Civil Liberties Association

²⁰ *R. v. Owen*. 2003 SCC 33 at para. 58 (CCLA BOA, Tab 15).

Schedule “A” – LIST OF AUTHORITIES

1. *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342
2. *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236
3. *Certified General Accountants Ass. of Canada v. Canadian Public Accountability Board*, [2008] O.J. No. 194 (Div. Ct.)
4. *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2010 BCCA 439
5. *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607
6. *Friends of the Earth v. The Governor in Council*, 2008 FC 1183
7. *Horsemen’s Benevolent and Protective Association v. Ontario Racing Commission et al.* (1997), 37 O.R. (3d) 430 (C.A.)
8. *Morneault v. Canada (Attorney General)*, [2000] F.C.J. No. 705 (C.A.)
9. *Odhavji v. Woodhouse*, [2003] 3 S.C.R. 263
10. *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441.
11. *Payne v. Wilson*, [2002] O.J. No. 2566 (C.A.)
12. *R. v. Campbell*, [1999] 1 S.C.R. 565
13. *R. v. Chura*, [2006] B.C.J. No. 912 (B.C.P.C.)
14. *R. v. McCrimmon*, [2010] 2 S.C.R. 402
15. *R. v. Owen*, 2003 SCC 33
16. *R. v. Sinclair*, [2010] 2 S.C.R. 310
17. *R. v. Smith*, [2004] 1 S.C.R. 385
18. *R. v. Willier*, [2010] 2 S.C.R. 429
19. *Schaeffer v. Wood*, 2010 ONSC 3647

Schedule “B” – Statutes and Regulations

1. *Police Services Act*, R.S.O. 1990, c. P.15

PART VII SPECIAL INVESTIGATIONS

Special investigations unit

113. (1) There shall be a special investigations unit of the Ministry of the Solicitor General. R.S.O. 1990, c. P.15, s. 113 (1).

Composition

(2) The unit shall consist of a director appointed by the Lieutenant Governor in Council on the recommendation of the Solicitor General and investigators appointed under Part III of the *Public Service of Ontario Act, 2006*. R.S.O. 1990, c. P.15, s. 113 (2); 2006, c. 35, Sched. C, s. 111 (4).

Idem

(3) A person who is a police officer or former police officer shall not be appointed as director, and persons who are police officers shall not be appointed as investigators. R.S.O. 1990, c. P.15, s. 113 (3).

Acting director

(3.1) The director may designate a person, other than a police officer or former police officer, as acting director to exercise the powers and perform the duties of the director if the director is absent or unable to act. 2009, c. 33, Sched. 2, s. 60 (3).

Peace officers

(4) The director, acting director and investigators are peace officers. R.S.O. 1990, c. P.15, s. 113 (4); 2009, c. 33, Sched. 2, s. 60 (4).

Investigations

(5) The director may, on his or her own initiative, and shall, at the request of the Solicitor General or Attorney General, cause investigations to be conducted into the circumstances of serious injuries and deaths that may have resulted from criminal offences committed by police officers. R.S.O. 1990, c. P.15, s. 113 (5).

Restriction

(6) An investigator shall not participate in an investigation that relates to members of a police force of which he or she was a member. R.S.O. 1990, c. P.15, s. 113 (6).

Charges

(7) If there are reasonable grounds to do so in his or her opinion, the director shall cause informations to be laid against police officers in connection with the matters investigated and shall refer them to the Crown Attorney for prosecution. R.S.O. 1990, c. P.15, s. 113 (7).

Report

(8) The director shall report the results of investigations to the Attorney General. R.S.O. 1990, c. P.15, s. 113 (8).

Co-operation of police forces

(9) Members of police forces shall co-operate fully with the members of the unit in the conduct of investigations. R.S.O. 1990, c. P.15, s. 113 (9).

Co-operation of appointing officials

(10) Appointing officials shall co-operate fully with the members of the unit in the conduct of investigations. 2009, c. 30, s. 60.

2. *Ontario Regulation 276/10, 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 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).

Note: On August 1, 2011, subsection (2) is amended by striking out “shall not communicate with any other police officer” and substituting “shall not communicate directly or indirectly with any other police officer”. See: O. Reg. 283/11, ss. 1, 4.

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).

Note: On August 1, 2011, section 7 is amended by adding the following subsection:

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

See: O. Reg. 283/11, ss. 2, 4.

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).

Note: On August 1, 2011, section 9 is amended by adding the following subsection:

(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.

See: O. Reg. 283/11, ss. 3, 4.

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.

3. Ontario Regulation 283/11, enacted pursuant to the *Police Services Act*, R.S.O. 1990, c. P.15

1. Subsection 6 (2) of Ontario Regulation 267/10 is amended by striking out “shall not communicate with any other police officer” and substituting “shall not communicate directly or indirectly with any other police officer”.

2. Section 7 of the Regulation is amended by adding the following subsection:

(3) Witness officers may not be represented by the same legal counsel as subject officers.

3. Section 9 of the Regulation is amended by adding the following subsection:

(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.

Commencement

4. This Regulation comes into force on August 1, 2011.

RUTH SCHAEFFER ET AL.
Appellants

- and -

POLICE CONSTABLE KRIS WOOD ET AL.
Respondents

Court File No. C52414

COURT OF APPEAL FOR ONTARIO
(Proceeding commenced at Toronto)

**FACTUM OF THE
INTERVENER
THE CANADIAN CIVIL LIBERTIES ASSOCIATION**

GOWLING LAFLEUR HENDERSON LLP
Barristers & Solicitors
Suite 2600,
160 Elgin Street
Ottawa ON K1P 1C3

Wendy J. Wagner (LSUC #46380Q)
Ryan W. Kennedy (LSUC #58069F)
Tel: (613) 786-0213
Fax: (613) 788-3642

Counsel for the Intervener
The Canadian Civil Liberties Association