

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

Respondents

**FACTUM OF THE INTERVENOR
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AND TO: **This Honourable Court**

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PART I - STATEMENT OF THE CASE

1. Effective August 1, 2011, the *SIU Regulations* have been amended.¹ These amendments render the relief which the Appellants seek moot. The OACP relies on the submissions of the Respondent police officers and the Respondent Commissioner Fantino on these issues.

2. As a result of the amendments to the *SIU Regulations*, the only remaining live issues in this Appeal are the two issues raised by Director Scott; namely, the right of police officers to consult counsel at all prior to completing their notes and the joint retainer of counsel by multiple subject officers or by multiple witness officers.

3. The OACP submits that this Court should not hear or decide the issues raised by Director Scott. The record was not developed with a view to establishing or responding to these issues. It would be both unfair and contrary to the principles of natural justice to hear these arguments, which bear profound consequences for the rights to counsel and freedom of association of police officers, without giving the parties (including the intervenors) an opportunity to adduce evidence.

4. It is the position of the Ontario Association of Chiefs of Police (“OACP”) that police executives should not interfere with their officers seeking counsel before interviews by the SIU or in the preparation of their notes. Fundamentally, police officers have a right to counsel under the common law, the *Police Services Act*, R.S.O. 1990, c.P.15 (the “PSA”),² and the *Canadian Charter of Rights and Freedoms*. In addition, the OACP respectfully submits that the right to counsel without delay and prior to

¹ O. Reg. 283/11, *Ontario Regulation Made Under the Police Services Act, Amending O.Reg 267/10, Conduct & Duties of Police Officers Respecting Investigations by the SIU* (“*SIU Regulations*”).

² R.S.O. 1990, c. P-15.

completing their notes in SIU investigations is owed to police officers under the common law duty of procedural fairness.

5. If argument is heard by this Court with respect to the two additional issues raised by the Respondent Director Scott, the OACP submits that it is imperative that subject and witness officers be provided the right to counsel without delay, whether or not they have completed their notes in SIU investigations, and that the joint retainer of the same lawyer by multiple subject officers or by multiple witness officers is permissible in the absence of an actual conflict.

PART II - SUMMARY OF THE FACTS

6. Evelyn Minty, Diane Pinder and Ruth Schaeffer, (collectively, “the Appellants”) commenced an application on November 4, 2009, pursuant to Rules 14.05(3)(d), (g) and (h)³ seeking declaratory relief (the “Application”). The Application was returnable May 13, 2010.⁴ The Appellants sought declaratory relief in the form of a judicial interpretation of certain statutory and regulatory provisions of the *PSA* and Regulation 673/98 (now Regulation 267/10), *Conduct & Duties of Police Officers Respecting Investigations by the SIU* (“*SIU Regulations*”). The Appellants also sought an interpretation of several of the LSUC’s *Rules of Professional Conduct*.⁵

7. The Application named as Respondents Police Constable Kris Wood, Acting Sergeant Mark Pullbrook and Police Constable Graham Séguin (collectively, the “Respondent police officers”), Julian Fantino, then-Commissioner of the Ontario Provincial Police (the “Respondent Commissioner Fantino”), Ian Scott, Director of the

³ *Courts of Justice Act* RRO 1990, Reg. 194.

⁴ Appellants’ Appeal Book and Compendium, “Notice of Application, dated November 4, 2009” Tab 2.

⁵ Appellants’ Notice of Application, above note 3, p. 10-12.

Special Investigations Unit (the “Respondent Director Scott”), and Her Majesty the Queen in Right of Ontario.⁶

8. On January 13, 2010, the Respondent police officers served on the Appellants a motion to strike the Application (the “Motion to Strike”).⁷

9. Between the commencement of the Application and its hearing, the parties developed the record with a view to establishing or responding to the specific issues raised in the Notice of Application. Throughout this process, the Respondent Director Scott supported the Respondent police officers. Like the Respondent police officers, he filed a motion to strike (which he later withdrew on the eve of the hearing of the Respondent police officers’ own motion to strike).⁸

1) The Respondent Director Scott Expands the Scope of the Application

10. On Friday, May 7, 2010, four business days before the Motion to Strike and the Application were to be heard, the Respondent Director Scott filed his factum on the merits of the Application with the Court.⁹

11. In his factum, the Respondent Director Scott expanded the scope of the Application by introducing two additional substantive issues. First, he raised the propriety of a police officer consulting counsel prior to the officer completing his or her notes. The Respondent Director Scott alone took the position that police officers should not be able to consult with counsel until *after* they have completed their notes.¹⁰

⁶ Appellants’ Appeal Book and Compendium, “Notice of Application, dated November 4, 2009” Tab 2.

⁷ Respondent police officers’ Appeal Book, “Respondents Notice of Motion”, Tab H.

⁸ Respondent police officers’ Exhibit Book, “Notice of Motion dated January 22, 2010”, Tab 3Q

⁹ Factum of the Respondent Ian Scott, Director of the Special Investigations Unit, filed May 7, 2010 in the Ontario Superior Court of Justice.

¹⁰ *Ibid*, para 22 *ff*.

12. Second, the Respondent Director Scott raised the propriety of a subject or witness officer retaining the same lawyer as another officer involved in the same SIU investigation. Director Scott alone took the position that an officer's right to consult counsel does not include a right to share a lawyer or law firm with other officers.¹¹

13. In the following four business days, neither the Appellants, nor any of the other Respondents had the opportunity to develop the application record before the Court in order to establish or respond to these issues.

2) The Application is Struck as Non-Justiciable

14. The Motion to Strike was heard beginning May 13, 2010. The OACP filed materials seeking leave to intervene in the Application on its merits. The motion seeking leave to intervene was to be heard following the Motion to Strike and prior to the hearing of the Application on its merits.

15. On May 18, 2010, Low J. reserved judgment on the Motion to Strike and declined to hear the Application on its merits before ruling on the Motion to Strike.¹² By decision and reasons dated June 23, 2010, Low J. granted the Respondent police officers' Motion to Strike.¹³

16. As the Application was never heard on its merits at first instance, no intervenors, including the OACP, were granted intervenor status.

¹¹ *Ibid*, para 80 *ff*.

¹² Appellants' Appeal Book and Compendium, "Decision of Justice Low dated May 18, 2010", Tab 4.

¹³ *Schaeffer et al. v. Woods et al.*, 2010 ONSC 2916.

3) The Appellants Launch the Present Appeal

17. On July 19, 2010, the Appellants filed their Notice of Appeal (the “Appeal”). They asked this Court to set aside the Application judge’s decision on the Motion to Strike, and to decide the Application on its merits.¹⁴

18. On February 4, 2011, this Court decided that it would hear the Appeal from the Motion to Strike, and leave to the panel the issue of whether it would entertain hearing the Application on its merits for the first time.¹⁵

19. In his factum filed in this Court, the Respondent Director Scott supported the Appellants’ position on both the Motion to Strike and the merits of the Application. Director Scott again made submissions that added to the substantive issues raised by the Appellants. Specifically, he once again was alone in taking the position that police officers should not be able to consult with counsel at all prior to completing their notes.¹⁶ He also took the position that the *SIU Regulations* do not permit the “the joint retainer of counsel by a subject officer and another officer involved in the same SIU investigation.”¹⁷ Given his position in the Application broadly opposing joint retainers, it is unclear as to whether Director Scott is or is not opposed to the joint retainer of counsel by multiple witness officers in the Appeal.

20. On this latter issue, the Appellants specifically rejected Director Scott’s position at the Application stage:

The Appellants did not argue before Low J. and do not argue on this appeal against any and all forms of joint retainers amongst police officers ... What strikes at the heart of the integrity of the process is that witness officers, who are required by law to "cooperate" and recount all they observed, share the same

¹⁴ Appellants’ Appeal Book and Compendium, “Notice of Appeal dated July 19, 2010,” Tab 1.

¹⁵ *Schaeffer v. Woods*, 2011 ONCA 116.

¹⁶ Factum of the Respondent Director Scott in the Court of Appeal for Ontario, paras 4, 55 *ff.*

¹⁷ *Ibid.*, at paras 4, 86, 87, 93, 94, 99, 100 *ff.*

lawyer with the officer who used lethal force and is the subject of a criminal investigation ... the current practice allows a jointly retained lawyer to sit in on witness interviews even though this lawyer represents the subject officer as well.¹⁸

PART III - ISSUES AND ARGUMENTS

A. THIS COURT SHOULD NOT HEAR OR DECIDE DIRECTOR SCOTT'S ADDITIONAL ISSUES

21. This Court will only hear a new argument on appeal if it has before it all of the facts necessary to fully address the issue. As this Court has held, “the rationale for the principle is that it is unfair to permit a new argument on appeal in relation to which evidence might have been led at trial had it been known the issue would be raised.”¹⁹

22. Similarly, this Court has held that it is procedurally unfair or contrary to the principles of natural justice for an application judge to reach a conclusion not advanced by the parties to the proceeding.²⁰ This outcome is unfair partly because the parties will not have had the opportunity to lead evidence in order to support or refute the issue.²¹

23. In this case, the parties (including the intervenors) have not had the opportunity to adduce evidence to respond to the issues the Respondent Director Scott alone raises. The record was not developed with a view to responding to or supporting Director Scott's submissions. This was impossible because the parties were not aware of his position until four business days before the Application was scheduled to be heard.

24. It would be unfair to permit the Respondent Director Scott to raise these two arguments on Appeal without giving the parties the opportunity to develop a complete factual record. For example, had the OACP been given the opportunity to introduce

¹⁸ Appellants' Factum, para 5.

¹⁹ 767269 Ontario Ltd. v. Ontario Energy Savings L.P. 2008 ONCA 350 at para. 3.

²⁰ Labatt Brewing Company Limited v NHL Enterprises Canada, LP, 2011 ONCA 511 at para. 5.

²¹ Ibid., at para. 16.

evidence, it would have considered responding to Director Scott's submissions by leading evidence of:

- i. the prevalence and effects of critical incident stress upon officers involved in SIU investigations;
- ii. the duty of police employers to recognize and mitigate the impact of critical incident stress upon officers in SIU investigations;
- iii. the role of counsel in the early identification of the effects of critical incident stress and in communicating to the chief of police the potential need for an officer to be excused from completing his or her notes before the end of the officer's tour of duty pursuant to s. 9(5) of the *SIU Regulations*;
- iv. the annual statistics regarding SIU investigations, the percentage of investigations that involve multiple subject and/or multiple witness officers, and the total number of subject and witness officer designations;
- v. the associated costs to police services and associations in providing one lawyer to represent each subject officer and/or each witness officer in an SIU investigation; and
- vi. the availability of more than one lawyer and the logistical challenges involved in providing more than one lawyer for police services in remote areas.

25. This Court should have the "benefit of the full factual context to fairly evaluate the issue."²² There is simply no evidence either to support or refute the issues raised by Director Scott. As such, this Court ought to decline to hear the only two live issues remaining, which are ones that only the Respondent Director Scott has raised.

B. POLICE EXECUTIVES SHOULD NOT INTERFERE WITH OFFICERS' COMMON-LAW RIGHT TO COUNSEL

27. As noted by Justice Low in the court below, the *SIU Regulations* do not create a statutory entitlement to counsel that would otherwise not exist; rather, they affirm and reinforce officers' common-law right to counsel.²³ Like any other citizen, designated police officers have a presumptive right to consult with counsel in order to understand

²² *McCutcheon v. Lebovic Enterprises Ltd.* 251 O.A.C. 150, 62 O.M.B.R. 257 (Div Ct) at para 34.

²³ *Schaeffer et al v. Woods et al*, 2010 ONSC 2916, at paras. 78 and 86.

their rights and obligations. This common law right stems from the centuries-old recognition that the administration of justice depends on the ability of those needing legal advice to consult with those best able to provide it.²⁴ In addition, it flows from the SIU Director's and OACP members' duties of procedural fairness towards the officers that they target in their criminal and disciplinary investigations. The OACP understands and respects officers' common-law right to counsel. In the absence of an explicit or necessarily implied derogation from that right, the OACP's members will neither violate it nor punish officers for exercising it without delay.

1) The SIU Director and Chiefs of Police Owe a Common Law Duty of Procedural Fairness Towards Designated Officers

28. The common law attaches a duty of procedural fairness to every public authority whose decisions affects the rights, privileges or interests of an individual and is not of a legislative nature.²⁵ The duty will apply to an investigative authority where that authority exposes individuals to prosecution, publication, serious adverse findings or other forms of damage.²⁶

29. The SIU Director, Chiefs of Police and their designates owe a duty of procedural fairness to designated officers. Both the Director and Chiefs of Police are public authorities exercising statutory powers under the *PSA* and *SIU Regulations*. The Director (i) may initiate criminal investigations into the conduct of police officers; (ii) designate involved officers as subject and witness officers; (iii) re-designate those officers at any point in the investigation; and (iv) lay informations against those officers, initiating

²⁴ *Anderson v. Bank of British Columbia* (1876), 2 Ch. D. 644 (C.A.) at 649, cited in *Smith v. Jones*, (1999) 132 C.C.C. (3d) 125 (S.C.C.), at para. 26; *Re Director of Investigation and Research and Shell Canada*, (1975) 22 C.C.C. (3d) 70 (F.C.A.) at 78-9; *General Accident Assurance Co. v. Chursz* [1999] O.J. No. 3291 (C.A.) at para. 92.

²⁵ *Cardinal v. Director of Kent Institution* (1985), 23 C.C.C. (3d) 118 (S.C.C.), at 126.

²⁶ *Irvine v. Canada (Restrictive Trade Practices Commission)*, (1987) 34 C.C.C. (3d) 481 (S.C.C.) at 515.

criminal prosecutions against them.²⁷ The Chiefs of Police are responsible for implementing the *SIU Regulations* and ensuring that involved officers cooperate in accordance with their duties under the *PSA*.²⁸ Chiefs of Police are also required to conduct a parallel investigation into involved officers' conduct that may lead to the officers' demotion, suspension or dismissal.²⁹ The exercise of these powers affect the rights and interests of designate officers. As such, the Director and Chiefs of Police owe them a common-law duty of procedural fairness.

2) The Duty of Procedural Fairness Requires that Designated Officers Be Afforded the Right to Counsel

30. The rights that flow from the duty of procedural fairness are determined by the legislative and administrative context in which an authority operates.³⁰ In the context of criminal and disciplinary investigations targeting involved officers, the duty of procedural fairness gives rise to a right to counsel.

31. The content of the duty of fairness is ascertained by having regard to a series of factors, including the nature of the decision being made and the process followed in making it, the nature of the statutory scheme pursuant to which the authority operates, and the importance of the decision to the individuals affected.³¹

i) A Criminal Investigation by the SIU Necessitates the Right to Counsel

32. SIU investigations are law enforcement investigations. In determining whether fairness requires the right to counsel during such investigations, courts consider the nature of the investigation, the powers of the decision-maker and the consequences that

²⁷ *PSA*, s. 113 (1)-(7); *SIU Regulations*, ss. 1(1), 10 (1)-(2).

²⁸ *PSA*, s. 41(b), s. 113(9).

²⁹ *SIU Regulations*, s. 11.

³⁰ *Canada (Attorney General) v. Mavi*, [2011] S.C.J. No. 30 at para. 41.

³¹ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39 (QL), at paras. 23-27.

the decision may have on persons affected by it.³² As Estey J. noted for the Supreme Court of Canada in *Irvine v. Canada* (1987):

The characteristics of the [investigative] proceeding [...] and the penalties which will result [...] determine the extent of the right to counsel and, where counsel is authorized by statute without further directive, the role of such counsel [...] Where [...] the investigation is conducted by a body seized of powers to determine, in a final sense or in the sense that detrimental impact may be suffered by the individual, the courts are more inclined to intervene.³³

33. *Irvine* stands for the proposition that the right to counsel will flow from an investigative authority's duty of procedural fairness where the authority is empowered to initiate criminal prosecutions.³⁴ This is precisely the situation in which designated officers find themselves during SIU investigations. The Director both investigates *and* initiates criminal proceedings against police officers by laying an information and referring the matter to the Crown Attorney for prosecution.³⁵ The moment an officer is designated by the Director as an involved officer, they are exposed to the threat of criminal prosecution, along with the sanctions, stigmatization and anxiety that such a prosecution entails.³⁶

ii) *The Chief of Police's administration of the SIU Regulations and investigation into involved officers' conduct necessitates the right to counsel*

34. Chiefs of Police and their designates are responsible for administering the *SIU Regulations* and enforcing involved officers' compliance with their duties to cooperate with the SIU investigation.³⁷ They are effectively tasked with ensuring that involved

³² *Irvine v. Canada* (1987), 34 C.C.C. (3d) 181 (S.C.C.) at 518.

³³ *Ibid.* at 518 and 521.

³⁴ *Ibid.*, at 518-519

³⁵ *PSA*, ss. 113 (5), (7).

³⁶ *R. v. Askov* (1990), 59 C.C.C. (3d) 449 (S.C.C.), at 455-456.

³⁷ *PSA*, s. 41(b).

officers may exercise their right to counsel in accordance with the Director's duty of procedural fairness.

35. Chiefs of Police are also required to conduct a parallel investigation into the involved officers' conduct.³⁸ The investigation's findings may trigger disciplinary proceedings leading to the officers' demotion, suspension or dismissal.³⁹ The *SIU Regulations* compel witness and subject officers to provide their notes to the Chief of Police before the end of their tour of duty, with their failure to do so constituting a service offence.⁴⁰ These notes can form the basis for the investigation's findings of misconduct and be used as evidence in subsequent disciplinary proceedings.

36. Police officers have the right to counsel's advice and assistance in disciplinary proceedings that may result in serious employment consequences.⁴¹ In the context of a Chief of Police's parallel investigation, this right attaches once an involved officer is compelled to provide their employer with notes that may ultimately form the basis for their dismissal.

37. Procedural fairness cannot tolerate a procedure where an involved officer is threatened with criminal prosecution, compelled to expose themselves to severe employment consequences, and at the same time be expected to objectively advise themselves how to proceed.⁴² Fairness demands that they be able to consult with counsel

³⁸ *SIU Regulations*, s. 11.

³⁹ *PSA*, ss. 76, 85.

⁴⁰ *SIU Regulations*, s. 9(5); *PSA*, s. 113(9).

⁴¹ *Chisholm v. Jamieson et al.* [1974] B.C.J. No. 674 (B.C.S.C.), at para. 14; *Joplin v. Vancouver (City) Police Department* (1982), 2 C.C.C. (3d) 396 (B.C.J.), aff'd (1985), 19 C.C.C. (3d) 331 (B.C.C.A.) at 409; *Cramm v. Canada (Commissioner of the RCMP)* [1987] F.C.J. No. 940 (C.A.) at para. 37.

⁴² *Joplin v. Vancouver (City) Police Department* (1982), above note 41, at 410.

without delay so that they may understand their rights and obligations and receive independent advice on how to exercise them.⁴³

3) The SIU Director and Chiefs of Police cannot infringe the right to counsel in the absence of an express or implied derogation

38. The common-law rights flowing from the duty of procedural fairness only yield when there is clear statutory language or necessary implication to the contrary.⁴⁴ Neither the *PSA* nor the *SIU Regulations* prohibit involved officers from exercising their right to counsel without delay, prior to completing their notes.

i) No express derogation from right to consult counsel without delay

39. Section 7(1) of the *SIU Regulations* outlines involved officers' right to counsel. The Regulation does not create a statutory entitlement that would otherwise not exist; rather, it affirms and reinforces officers' common-law right to counsel by extending it to encompass the presence of counsel during SIU interviews.⁴⁵ Although the *SIU Regulations* permit the Director to override that right where waiting for counsel would cause an unreasonable delay, that restriction merely articulates the common-law requirement that citizens exercise reasonable diligence in their efforts to contact counsel.⁴⁶ Moreover, the *SIU Regulations* do not require the Chiefs of Police to segregate involved officers from counsel. Had the legislature wished to further restrict involved officers' right to counsel, it would have expressly set out those restrictions in the *SIU Regulations*.

⁴³ *R. v. Manninen* (1987), 34 C.C.C. (3d) 385 at 392.

⁴⁴ *Joplin v. Vancouver* (1982), above note 41, at 408-9; *Canada v. Mavi* (2011), above note 30 at para. 39.

⁴⁵ *SIU Regulations*, s. 7(1); *Schaeffer v. Ontario (Provincial Police)* (2010), above note 12 at para. 78.

⁴⁶ *SIU Regulations*, s. 7(2); *R. v. Mannien*, above note 43.

ii) *No implied derogation from the right to consult with counsel without delay*

40. The doctrine of necessary implication may limit a common-law right only where there is evidence that the limitation is necessary for the authority in question to achieve its purposes.⁴⁷

41. The Appellant and Respondent Director Scott seek to accomplish by judicial fiat what they cannot through the legislative process: deny involved officers' right to counsel through a restrictive interpretation of section 7 of the *SIU Regulations*, or by making it a service offence to exercise that right prior to completing their notes. There is no evidence that doing so is necessary for the SIU or Chief of Police to effectively conduct their investigations.

42. The *PSA* and *SIU Regulations* ensure that an officer's written recollection of the incident remains independent and contemporaneous. From the outset, involved officers are segregated, prohibited from communicating with one another and required to submit their notes before the end of their tour of duty, while their memories are still fresh.⁴⁸ Consultation with counsel facilitates this process by giving officers the opportunity to be reminded of the importance of recording a complete account and ensuring that they do not omit any relevant information.

43. The common law right to counsel cannot be imperilled on the basis of speculative concerns that counsel compromise the notes' integrity. Counsel are officers of the court and under a professional duty to refrain from influencing the course of justice by fraudulent or deceptive means.⁴⁹ Absent convincing evidence to the contrary, they are

⁴⁷ *ATCO Gas and Pipelines Ltd. v. Alberta* [2006] S.C.J. No. 4 (QL), at para.77.

⁴⁸ *SIU Regulations*, ss. 6, 9(5).

⁴⁹ *Rules of Professional Conduct*, Rule 4.01(2)

assumed to discharge their obligations in a manner that reflects their status as independent officers of the court playing a key role in the administration of justice.⁵⁰

C. THE MERIT OF DIRECTOR SCOTT'S TWO ADDITIONAL ISSUES

44. The Respondent Director Scott's objections to officers' consulting with counsel before they complete their notes and joint retainers rest in part upon an unsupported premise, namely, "a recognition that human memory is susceptible to inadvertent and *unconscious* influence and an acknowledgement that a lawyer's role in assisting his or her client extends beyond providing abstract advice about legal obligations."⁵¹

45. This bald statement ignores the legal training, the professional obligations, and the ethical focus that counsel bring to their very *conscious* duties to their clients and the truth. If it were to be writ large to the administration of justice, then no investigative or judicial finding based upon the evidence of witnesses who had conferred with a lawyer before they made their first written or oral statement in respect of an incident could be made without expressing the reservation that the evidence may have been unconsciously influenced by counsel and may have to be discounted accordingly.

46. Speculative concerns should not diminish the right to counsel of police officer's in SIU investigations. Police officers should not be temporally segregated from counsel or placed in a sub-class of persons for whom the right to counsel is significantly less than what the law provides to the average citizen.

47. OACP members rely upon counsel as regulated professionals and officers of the court to identify and act upon conflicts if and when they arise in the course of their

⁵⁰ *R. v. Campbell* (1999), 133 C.C.C. (3d) 257 (S.C.C.), at 294; *Dublin v. Montessori Jewish Day School of Toronto* [2007] O.J. No. 1062 (Ont. S.C.J.), at para.43; *Lavallee, Rackel & Heintz v. Canada (Attorney General)* (2002), 167 C.C.C. (3d) 1 (S.C.C.) at para. 52.

⁵¹ Factum of the Respondent Ian Scott, Director of the Special Investigations Unit, filed May 12, 2011, at para. 100.

representation of police officers in SIU investigations and to involve other counsel as required.

48. In addition to the submissions made above, the OACP adopts the submissions of the Respondent police officers, the Intervenor Andrew MacKay, the Intervenor Police Association of Ontario and the opinion of Gavin Mackenzie on the right of police officers to consult with counsel without delay before they complete their notes in SIU investigations and the joint retainer of counsel by multiple witness officers or by multiple subject officers.⁵²

PART IV - ORDER REQUESTED

49. The OACP seeks no costs and asks that no costs be awarded against it.

DATED this 15th day of August, 2011.

The total length of the Appellant's oral argument is 15 minutes.

Joseph J. Markson
Counsel for the Intervenor, Ontario
Association of Chiefs of Police

⁵² Letter from Gavin McKenzie, Heenan Blaikie, to Ronald Middel, Police Association of Ontario, dated November 27, 2009, Appellants' Exhibit Book Vol. II, Tab 8K, pp. 613-14.

SCHEDULE A
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Lavallee, Rackel & Heintz v. Canada (Attorney General) (2002), 167 C.C.C. (3d) 1 (S.C.C.)

Dublin v. Montessori Jewish Day School of Toronto [2007] O.J. No. 1062 (Ont. S.C.J.)

Legislation

Courts of Justice Act RRO 1990, Reg. 194.

Police Services Act, R.S.O. 1990, c. P.15, ss. 41, 76, 85, 113

O. Reg. 267/10, ss. 1, 2, 6, 7, 9, 10, 11

Rules of Professional Conduct, Rule 4.01(2)

SCHEDULE B
LEGISLATION

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

Duties of chief of police

- 41.** (1) The duties of a chief of police include,
- (a) in the case of a municipal police force, administering the police force and overseeing its operation in accordance with the objectives, priorities and policies established by the board under subsection 31 (1);
 - (b) ensuring that members of the police force carry out their duties in accordance with this Act and the regulations and in a manner that reflects the needs of the community, and that discipline is maintained in the police force;
 - (c) ensuring that the police force provides community-oriented police services;
 - (d) administering the complaints system in accordance with Part V. R.S.O. 1990, c. P.15, s. 41 (1); 1995, c. 4, s. 4 (8, 9); 1997, c. 8, s. 27.

Complaints by chief

76. (1) A chief of police may make a complaint under this section about the conduct of a police officer employed by his or her police force, other than the deputy chief of police, and shall cause the complaint to be investigated and the investigation to be reported on in a written report. 2007, c. 5, s. 10; 2009, c. 30, s. 57.

Same

(2) A chief of police who makes a complaint under subsection (1) is not a complainant for the purposes of this Part. 2007, c. 5, s. 10.

Notice

(3) Upon making a complaint about the conduct of a police officer, the chief of police shall promptly give notice of the substance of the complaint to the police officer unless, in the chief of police's opinion, to do so might prejudice an investigation into the matter. 2007, c. 5, s. 10.

Investigation assigned to another police force

(4) A municipal chief of police may, with the approval of the board and on written notice to the Commission, ask the chief of police of another police force to cause the

complaint to be investigated and to report, in writing, back to him or her at the expense of the police force to which the complaint relates. 2007, c. 5, s. 10.

Same, re O.P.P. officer

(5) In the case of a complaint about the conduct of a police officer who is a member of the Ontario Provincial Police, the Commissioner may, on written notice to the Commission, ask the chief of police of another police force to cause the complaint to be investigated and to report, in writing, back to him or her at the expense of the Ontario Provincial Police. 2007, c. 5, s. 10.

Same, more than one force involved

(6) If the complaint is about an incident that involved the conduct of two or more police officers who are members of different police forces, the chiefs of police whose police officers are the subjects of the complaint shall agree on which police force, which may be one of the police forces whose police officer is a subject of the complaint or another police force, is to investigate the complaint and report, in writing, back to the other chief or chiefs of police and how the cost of the investigation is to be shared. 2007, c. 5, s. 10.

Same

(7) If the chiefs of police cannot agree under subsection (6), the Commission shall decide how the cost of the investigation is to be shared and,

- (a) shall decide which of the chiefs of police whose police officer is a subject of the complaint shall cause the complaint to be investigated and report in writing back to the other chief or chiefs of police; or
- (b) shall ask another chief of police to cause the complaint to be investigated and to report back in writing to the chiefs of police. 2007, c. 5, s. 10.

Unsubstantiated complaint

(8) If at the conclusion of the investigation and on review of the written report submitted to him or her the chief of police is of the opinion that the complaint is unsubstantiated, the chief of police shall take no action in response to the complaint and shall notify the police officer who is the subject of the complaint in writing of the decision, together with a copy of the written report. 2007, c. 5, s. 10.

Hearing to be held

(9) Subject to subsection (10), if at the conclusion of the investigation and on review of the written report submitted to him or her the chief of police believes on reasonable grounds that the police officer's conduct constitutes misconduct as defined in section 80 or unsatisfactory work performance, he or she shall hold a hearing into the matter. 2007, c. 5, s. 10.

Informal resolution

(10) If at the conclusion of the investigation and on review of the written report submitted to him or her the chief of police is of the opinion that there was misconduct or unsatisfactory work performance but that it was not of a serious nature, the chief of police may resolve the matter informally without holding a hearing, if the police officer consents to the proposed resolution. 2007, c. 5, s. 10.

Consent of police officer

(11) A police officer who consents to a proposed resolution under subsection (10) may revoke the consent by notifying the chief of police in writing of the revocation no later than 12 business days after the day on which the consent is given. 2007, c. 5, s. 10.

Disposition without a hearing

(12) If an informal resolution of the matter is attempted but not achieved, the following rules apply:

1. The chief of police shall provide the police officer with reasonable information concerning the matter and shall give him or her an opportunity to reply, orally or in writing.
2. Subject to paragraph 3, the chief of police may impose on the police officer a penalty described in clause 85 (1) (d), (e) or (f) or any combination thereof and may take any other action described in subsection 85 (7) and may cause an entry concerning the matter, the penalty imposed or action taken and the police officer's reply to be made in his or her employment record.
3. If the police officer refuses to accept the penalty imposed or action taken, the chief of police shall not impose a penalty or take any other action or cause any entry to be made in the police officer's employment record, but shall hold a hearing under subsection (9). 2007, c. 5, s. 10.

Employment record expunged

(13) An entry made in the police officer's employment record under paragraph 2 of subsection (12) shall be expunged from the record two years after being made if during that time no other entries concerning misconduct or unsatisfactory work performance have been made in the record under this Part. 2007, c. 5, s. 10.

Agreement

(14) Nothing in this section affects agreements between boards and police officers or associations that permit penalties or actions other than those permitted by this section, if the police officer in question consents, without a hearing under subsection (9). 2007, c. 5, s. 10.

Powers at conclusion of hearing by chief of police, board or Commission

- 85.** (1) Subject to subsection (4), the chief of police may, under subsection 84 (1),
- (a) dismiss the police officer from the police force;
 - (b) direct that the police officer be dismissed in seven days unless he or she resigns before that time;
 - (c) demote the police officer, specifying the manner and period of the demotion;
 - (d) suspend the police officer without pay for a period not exceeding 30 days or 240 hours, as the case may be;
 - (e) direct that the police officer forfeit not more than three days or 24 hours pay, as the case may be;
 - (f) direct that the police officer forfeit not more than 20 days or 160 hours off, as the case may be; or
 - (g) impose on the police officer any combination of penalties described in clauses (c), (d), (e) and (f). 2007, c. 5, s. 10.

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.

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).

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).

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.

(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. 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 maynot be represented by the same legal counsel as subject officers. O. Reg. 283/11, s. 2

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).

Law Society of Upper Canada, Rules of Professional Conduct

R. 4.01(2)

When acting as an advocate, a lawyer shall not

[...]

b) knowingly assist or permit the client to do anything that the lawyer considers to be dishonest or dishonourable,

[...]

e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed, or otherwise assisting in any fraud, crime or illegal conduct.

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

Respondents

**FACTUM OF THE INTERVENOR
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