

COURT OF APPEAL FOR ONTARIO

BETWEEN:

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

Appellants

-and-

**POLICE CONSTABLE KRIS WOOD, ACTING SERGEANT MARK PULLBROOK,
POLICE CONSTABLE GRAHAM SEGUIN, JULIAN FANTINO,
COMMISSIONER OF THE 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 RESPONDENTS POLICE CONSTABLE KRIS
WOOD, ACTING SERGEANT MARK PULLBROOK and POLICE
CONSTABLE GRAHAM SEGUIN**

July 26, 2011

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*COURT OF APPEAL FOR
ONTARIO*

B E T W E E N:

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and DIANE PINDER**

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Respondents

**FACTUM OF THE RESPONDENTS,
POLICE CONSTABLE KRIS WOOD, ACTING SERGEANT MARK
PULLBROOK AND POLICE CONSTABLE GRAHAM SÉGUIN
(Motion to Quash the Appeal for Mootness)**

PART I – OVERVIEW

1. Generally, courts will not hear or decide moot cases. This motion is brought by the Respondent police officers for an order quashing the appeal. The Appeal itself has been rendered moot for two reasons. First, the government has promulgated an amended regulation that addresses substantially all of the issues raised in the Appeal. Second, the Appellants have caused statements of claim to be issued that address substantially the same legal and factual issues they raised in the Application and, therefore, the Appeal. In doing so, the Appellants have, in effect, conceded that they lack public interest standing.

2. This Court should not exercise its discretion to hear the moot Appeal. It should have particular regard for the position this Court occupies, in both our political system as well as our adjudicative framework. To answer the questions asked by the Appellants in the face of a newly promulgated regulation is to wade into a political debate. In any event, the Appellants have not raised any case in which a court has decided the merits of an appeal that was found to be moot when it was heard at first instance and for which the Application judge provided no order or reasons on the merits. In the absence of reasons below, this Court is not in a position to make a fully informed decision on the merits and therefore ought not to exercise its discretion to decide the moot Appeal.

PART II – FACTS

The Government Establishes a Consultative Process and Amends the Regulation

3. Following the concerns raised by Director Scott in relation to the Minty and Schaeffer investigations,¹ as well as the commencement of these proceedings,² the Attorney General of Ontario appointed former Chief Justice Patrick LeSage, QC, to:

facilitate focused discussions and negotiations between police organizations and the SIU to explore the potential for consensus among police groups and the SIU on issues such as: ... the conduct and duties of officers in SIU investigations, including the right to counsel and note-taking[.]³

In carrying out his mandate, Mr. LeSage engaged in a wide-ranging consultative process with all stakeholders, including Director Scott.⁴ On April 4, 2011, Mr. LeSage made very specific recommendations respecting changes to the regime governing police officers during SIU investigations.⁵

4. On June 23, 2011, the government announced that it had adopted each of Mr.

¹ Affidavit of Denise Cooney, affirmed July 25, 2011, Exhibit “B,” p. 392-95; Exhibit “C”, p. 539-40 (“Cooney Affidavit”).

² Cooney Affidavit, Exhibit “A”

³ Cooney Affidavit at para 15

⁴ *Ibid* at para 16

⁵ *Ibid* at paras 17-21.

LeSage's recommendations which are relevant to the Appeal. The amendments to the *SIU Regulations* will come into force on August 1, 2011 (the "Amended Regulations").⁶

The Respondent Police Officers Attempt an Early Resolution of the Issue

5. On June 27, 2011, counsel for the Respondent police officers wrote to Sharpe J.A., who is case-managing the Appeal, to ask for directions in light of the Amended Regulations. The Respondent police officers took the position that the Appeal had been rendered moot.⁷ The Appellants took the position that the Appeal was not moot.⁸

6. Justice Sharpe convened a case conference on July 5, 2011, where the parties agreed that the issue of mootness would be addressed at the outset of the hearing of the Appeal, and that they would file factums addressing the issue.⁹

The Respondent Police Officers Learn of the Statements of Claim

7. The Appellants did not inform anyone at the case conference that they had caused statements of claim to be issued on June 21, 2011 and June 23, 2011 addressing substantially the same subject matter as the Application and, therefore, the Appeal.¹⁰ The claims bear Court File Nos. CV-11-429149 (the "Minty Claim") and CV-11-429357 (the "Schaeffer Claim") respectively (together, the "Statements of Claim").¹¹

8. The Respondent police officers did not learn of the Statements of Claim until July 6, 2011, following the case conference.¹²

PART III – ISSUES AND THE LAW

9 This motion raises two issues:

⁶ *Ibid* at paras 22-24.

⁷ *Ibid* at para 26.

⁸ *Ibid* at para 27.

⁹ *Ibid* at para 31.

¹⁰ *Ibid* at paras 32-34.

¹¹ *Ibid* at para 33.

¹² *Ibid* at para 34.

- a. whether the Appeal has been rendered legally moot as a result of the Amended Regulations and/or the Statements of Claim?
- b. if so, whether this Court should nonetheless exercise its discretion to hear and decide the moot Appeal?

a. The Appeal is Moot

10. A case is moot when a factual or legal change occurs between the time that a dispute arises and the time the dispute can be adjudicated, such that one of the parties no longer has a practical interest in its outcome.¹³

11. The present motion concerns the mootness of the Appeal itself. There are two reasons the Appeal is now moot: (1) by reason of the Amended Regulations; and (2) because the Appellants have commenced separate proceedings that concern substantially the same factual and legal issues, but by following the correct procedural route.

(i) The Amended Regulations Render the Appeal Moot

12. Simply put, substantially all of the relief sought on the Appeal has been rendered moot by the government's decision to promulgate the Amended Regulations. This conclusion can be reached by comparing the relief sought in the Appeal, on the one hand, and the changes wrought by the Amended Regulations, on the other.

13. On appeal, the Appellants seek only the relief that they sought in their Notice of Application below, together with the standing needed to seek that relief.¹⁴ For ease of reference, with respect to the Respondent police officers,¹⁵ the Appellants are seeking:

(A) An interpretation of section 113(9) of the *Police Services Act R.S.O. 1990, c. P.15* ("Act") and Ontario Regulation 673 / 98, *Conduct of Duties of Police Officers*

¹³ *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342, 1989 CarswellSask 241 at para 15 [Borowski 1989]

¹⁴ Appellants' Factum at para 131

¹⁵ The prayer for relief also raises issues specific to the Commissioner, including the propriety of permitting the joint retention of counsel by subject and witness officers and the timing of notes, as well as, as ancillary relief, a declaration that the Respondent police officers and the Commissioner violated the legislative scheme.

Respecting Investigations by the S.I.U. ("S.I.U. Regulations") to determine whether the legislation expressly or impliedly authorizes the following:

(i) The subject and witness officers sharing the same lawyer who, under the Rules of Professional Conduct, is duty bound to share all relevant information as between the clients;

(ii) The subject and witness officers preparing and submitting their memobook notes after having the notes reviewed by jointly retained counsel.

(iii) The subject and witness officers creating two sets of police notes: a solicitor's draft (never shared with S.I.U.) and a second draft which, having been vetted by counsel, is provided to S.I.U.;

(B) An interpretation of section 113(9) of the Act and sections 9(1) and 9(3) of the S.I.U. Regulations to determine whether the legislation and regulations expressly or impliedly permit supervising O.P.P. officers, as a matter of course (pursuant to a newly created O.P.P. Policy), to authorize involved officers (both subject and witness officers) to refrain from preparing their notes to permit consultation with counsel and regardless of the expiry of the police officer's shift;

(C) An interpretation with respect to section 7(1) of the S.I.U. Regulations to determine whether an involved officer's entitlement to counsel includes a right to counsel who is acting jointly for both the subject and witness officer; or whether the term counsel is to be interpreted as counsel capable of acting free of conflict of interest (see Booth et al. and Huxter [1994] O.J. No. 52 at para. 79); [and]

(D) An interpretation of Rules 5 [sic] and 2.06(4) [sic] of the Law Society of Upper Canada Rules of Professional Conduct and sections 6(1) and 6(2) of the S.I.U. Regulations to determine whether a joint retainer on behalf of the subject officer (Constable Woods [sic]) and the witness officer (Acting Sergeant Pullbrook) in the shooting death of Levi Schaeffer is prohibited.¹⁶ [Emphasis added.]

14. In summary, the issues can be divided into three categories. These are:
- a. primarily, the propriety of the joint retention of counsel by subject and witness officers (paragraphs (A)(i) and (ii), (C), and (D));
 - b. the propriety of officers making their memobook notes following the end of an officer's shift (paragraph (B)); and
 - c. the propriety of officers instructing counsel in writing and not disclosing those privileged communications to the SIU (paragraph (A)(iii)).

15. First, respecting the propriety of subject and witness officers jointly retaining counsel, this issue has been addressed squarely by the government through the addition of s. 7(3). Section 7(3) of the Amended Regulations provides bluntly that:

¹⁶ Cooney Affidavit, Exhibit "A."

Witness officers may not be represented by the same legal counsel as subject officers.¹⁷

This amendment is a complete answer to paragraphs (A)(i) and (ii), (C) and (D) (above).

16. That the joint retention of counsel by subject and witness officers is the only issue raised by the Appellants is confirmed by the Appellants' factum filed in the Appeal. In it, the Appellants repeatedly confirm that their concern is with the joint retention of counsel by subject and witness officers, and not with other possible joint retainers.¹⁸ The very issue that the Appellants allege "strikes at the heart of the integrity of the process" is now the subject of an express prohibition.

17. Despite this, in their letter to Sharpe J.A., the Appellants now appear to change tack, saying that:

The Appellants take the respectful position that this Honourable Court's legal interpretation of the information sharing obligation on counsel [contained in Rule 2.04(6) of the *Rules of Professional Conduct*] takes on even more importance given recent amendments [that prohibit both direct and indirect communication between police officers involved in an SIU incident].¹⁹

However, this novel issue only arises as a result of the change to the *SIU Regulations*. As they say in their letter, "[p]rior to the amendments, there existed no bar to indirect communication amongst the witness officers."²⁰ The Appellants are attempting to raise an issue on appeal that they could not have raised at first instance. The very language they are asking this Court to interpret will not even be in force until August 1, 2011, or more than two years after the underlying incidents.²¹

18. Moreover, while the Appellants raised the interpretation of Rule 2.04(6) of the *Rules of Professional Conduct* in paragraph (D) of the Application (above) they did so

¹⁷ *Conduct and Duties of Police Officers Respecting Investigations by the Special Investigations Unit*, O Reg 267/10, s 7(3) [*SIU Regulations*].

¹⁸ Appellants' Factum at para 5. See also paras 106-115

¹⁹ Cooney Affidavit, Exhibit "J" at 3

²⁰ *Ibid* Exhibit "J" at 2.

²¹ *Ibid* at para 24.

expressly in the context of the joint retention of counsel by subject and witness officers. In any event, the Law Society, not the courts, is the proper forum for the interpretation of the *Rules of Professional Conduct*.²²

19. Second, respecting the preparation of officers' memobook notes, the Amended Regulations now expressly provide that:

The notes made pursuant to subsections (1) [a witness officer's notes] and (3) [a subject officer's notes] shall be completed by the end of the officer's tour of duty, except where excused by the chief of police.²³

This new provision establishes when a police officer is to complete his or her memobook notes (i.e. "by the end of the officer's tour of duty") and when it will be appropriate for police officers to refrain from completing their notes (i.e. "where excused by the chief of police"). In other words, s. 9(5) answers paragraph (B) of the Application (above).

20. Finally, it is acknowledged that the third issue (i.e. the propriety of police officers instructing counsel in writing) is not expressly addressed by the Amended Regulations. However, it is just as important what the government has chosen not to address as what it did. That the government did not address this issue, despite awareness of it,²⁴ is significant.

21. On this issue, Director Scott, a Respondent, goes even farther than the Appellants, advancing a pejorative speculation that a lawyer contaminates an officer's recollections by speaking to the officer prior to the officer completing his or her notes.²⁵ However, this pejorative speculation was also squarely in front of the government when it promulgated the Amended Regulations. Director Scott had previously raised it in his reports to the

²² *Bussin v St. Germain*, 2009 ONCA 272 at para 37.

²³ *SIU Regulations*, *supra* note 17, s 9(5).

²⁴ Cooney Affidavit, Exhibit "B," p 392-95; Exhibit "C", p. 539-40.

²⁵ Factum of the Respondent Ian Scott at para 79.

Attorney General concerning the relevant incidents,²⁶ and in his materials filed below and on the Appeal.²⁷ Presumably, he did so again as part of his consultation with Mr. LeSage. Neither Mr. LeSage nor the government accepted it and, despite his submissions, the government has chosen not to abrogate police officers' right to consult counsel prior to making compelled statements.

(ii) The Statements of Claim Have Rendered the Appeal Moot

22. The Statements of Claim issued on behalf of the Appellants address substantially the same subject matter as the Application. By doing so, the Appellants have acknowledged that an action is capable of addressing the issues raised by the Application and now the Appeal.

23. A comparison of the Application to the Statements of Claim discloses that:

- a. the Appellants have pleaded the same underlying material facts,²⁸ and
- b. the Appellants have raised legal claims that require the interpretation of the same legislative scheme that they seek an interpretation of in this Court.²⁹

24. Though the Respondent police officers do not concede that the Appellants' claims have any merit, the Appellants have at least now brought their claims by following the correct procedural route. The legal test for public interest standing includes consideration of whether there is another reasonable and effective manner to bring the issue before the courts,³⁰ which there clearly is: an action in the nature of the Statements of Claim, and in

²⁶ Affidavit of Denise Cooney, sworn July 25, 2011, Exhibit "B," p. 392-95; Exhibit "C", p. 539-40.

²⁷ Factum of the Respondent Ian Scott at paras 78-85.

²⁸ Compare paras 4-9 of the Notice of Application (Cooney Affidavit Exhibit "A") with paras 11-22 of the Minty Claim (Cooney Affidavit Exhibit "M") and paras 10-15 of the Notice of Application with paras 10-23 of the Schaeffer Claim (Cooney Affidavit Exhibit "N")

²⁹ Compare para 2 of the prayer for relief from the Notice of Application (Cooney affidavit Exhibit "A") to paras 27-29 of the Minty Claim (Cooney Affidavit Exhibit "M") and paras. 26-28 of the Schaeffer Claim (Cooney Affidavit Exhibit "N")

³⁰ *Borowski v Canada (Minister of Justice)*, [1981] 2 SCR 575, 1981 CarswellSask 167 at para 56.

which the Appellants have a direct interest. In effect, the Appellants have conceded that there is another reasonable and effective alternative manner in which substantially all of the issues raised in the Application and now the Appeal may be brought before the courts. In effect, the Appellants have conceded that they do not meet the test for public interest standing. The Appeal as it relates to public interest standing is therefore moot.

b. This Court Should Not Exercise Its Discretion to Hear and Decide the Appeal

25. Courts will generally not hear moot cases.³¹ However, in *Borowski v Canada (Attorney General)*, Sopinka J. held that, in exceptional circumstances, a court may exercise its discretion to adjudicate a case that does not raise a live controversy.³² In considering whether to exercise its discretion, a court should bear in mind the policy rationales underlying the mootness doctrine.³³ Sopinka J. identified three that justify the general rule against hearing moot cases,³⁴ which have recently been distilled by Gillese J.A. in *Maystar General Contractors v P.A.T., Local 1819*. As she summarized:

- (1) the presence of an adversarial context,
- (2) the concern for judicial economy, and
- (3) the need for the court to be sensitive to its role as the adjudicative branch in our political framework.³⁵

26. Although the Appeal (like the Application itself) fails to satisfy any of these criteria, it is primarily the third which is at issue in this motion (i.e. the role of the adjudicative branch); specifically, in light of the fact that the government has spoken by way of the Amended Regulations, it would now be patently anti-democratic for this Court to re-write what the government has so recently and deliberately written. The Amended

³¹ *Borowski* 1989, *supra* note 13 at para 15

³² *Ibid* at para 15.

³³ *Ibid* at para 30.

³⁴ *Ibid* at paras 31-42.

³⁵ 2008 ONCA 265 at para. 33.

Regulations are clear evidence that the government has occupied the field.

27. The effect of the Amended Regulation is to define what police officers can and cannot do lawfully in the face of an SIU investigation. That is a legal issue. However, there remains a vigorous debate in society more broadly as to what protections should be afforded to police officers in these circumstances. This is a political, rather than a legal debate. The possibility that this Court's ruling on the merits of the moot Appeal could be perceived as a judicial intervention supporting one side of the political debate over another should militate against hearing the Appeal.³⁶

28. Moreover, unlike any case the Appellants have put to this Court, it is relevant when this Court considers whether to exercise its discretion that the Application itself was held to be moot at first instance and was never adjudicated on its merits. This raises an issue related to the role of this Court; namely, the need for this Court to be sensitive to its role as an appellate court within our adjudicative framework. As this Court has held:

While we have the complete record of the parties, we do not have the benefit of a reasoned decision from the court of first instance. In my view, there is a significant difference between the procedure and holdings in the authorities referred to and the facts of this case. Most significant is the fact that in the case at bar the application judge dismissed the application solely because the case was moot at the time of the first hearing. In each case to which this court was referred, there were decisions of the court below on the merits of the actual dispute between the parties.

....

An appeal to this court lies from a final order or judgment. The only decision of the application judge is that the appellant's application was moot. ... This court, in my view, should not act as a court of first instance in this case. [Emphasis added.]³⁷

29. In short, this Court ought not to exercise its discretion to hear the moot Appeal, as, respectfully, to do so would be overstepping its role both within our political and our adjudicative framework.

³⁶ *Payne v Ontario (Minister of Energy, Science and Technology)*, [2002] O.J. No. 2566, 162 O.A.C. 48 at para 32 (CA).

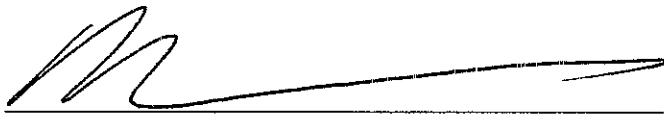
³⁷ *Jane Doe v. Canada (Attorney General)* (2005), 75 OR (3d) 725, 198 OAC 225 at paras 40, 42 (CA).

PART IV – ORDER SOUGHT

30. The Respondent police officers ask this Court for the following relief:
- a. an order quashing the Appeal; and
 - b. costs of the proceedings on a partial indemnity basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

July 26, 2011



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Police Constable Graham Séguin

SCHEDULE "A" – SOURCES CITED

1. *Borowski v. Canada (Attorney General)*, [1989] 1 SCR 342, 1989 CarswellSask 241
2. *Bussin v St. Germain*, 2009 ONCA 272.
3. *Borowski v Canada (Minister of Justice)*, [1981] 2 SCR 575, 1981 CarswellSask 1
4. *Maystar General Contractors v. P.A.T., Local 1819*, 2008 ONCA 265
5. *Payne v Ontario (Minister of Energy, Science and Technology)*, [2002] O.J. No. 2566, 162 OAC 48.
6. *Jane Doe v. Canada (Attorney General)* (2005), 75 OR (3d) 725, 198 OAC 225

SCHEDULE "B" – STATUTORY REFERENCES***Conduct and Duties of Police Officers Respecting Investigations by the Special Investigations Unit, O Reg 267/10.*****Segregation of police officers involved in incident**

6. (2) A police officer involved in the incident shall not communicate with any other police officer involved in the incident concerning their involvement in the incident until after the SIU has completed its interviews.

Right to counsel

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

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

(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.

(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.

(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).

(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.

SCHAEFFER et al. vs. **WOOD et al.**
Appellant(s) Defendant(s)

Court File No. **C52414**

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