Court File No. C52414

COURT OF APPEAL FOR ONTARIO

BETWEEN:

RUTH SCHAEFFER, EVELYN MINTY
and DIANE PINDER

Appellants

and

POLICE CONSTABLE CHRIS WOOD, ACTING SERGEANT MARK PULLBROOK, POLICE CONSTABLE GRAHAM SEGUIN, JULIAN FANTINO, COMMISSIONER OF THE ONTARIO PROVINCIAL POLICE, IAN SCOTT, DIRECTOR OF THE SPECIAL INVESTIGATIONS UNIT AND HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO (MINISTRY OF COMMUNITY SAFETY AND CORRECTIONAL SERVICES)

Respondents

FACTUM ON BEHALF OF THE INTERVENOR ANDREW MCKAY

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PART I

STATEMENT OF THE CASE

1. Andrew McKay acted as counsel to the Respondent officers following their involvement in the traumatic and tragic encounters with Mr. Minty and Mr. Schaeffer. He made himself available to advise the Respondent officers on their rights and obligations in the unfamiliar context of an SIU investigation. At all times, Mr. McKay acted honourably, professionally and lawfully. His representation of multiple witness officers involved no conflict of interest and was in accordance with common practice.

2. Although not named as a party to the proceedings, Mr. McKay sought and obtained intervener status before this Honourable Court in order to address the important issues respecting an officer's basic right to consult counsel of choice. Nothing in the *SIU Regulations* in effect at the time, or in the Law Society *Rules of Professional Conduct*, precludes a lawyer from representing multiple officers, including subject and witness officers. Furthermore, nothing precludes an officer from obtaining legal advice prior to preparing their duty notes.

3. The issues raised on the Application are non-justiciable. In addition, this appeal has been rendered moot by reason of the recent enactment of new Regulations respecting SIU investigations and the issuance of statements of claim by the Appellants. Given the limits imposed on the length of his factum and the time allotted for his submissions, Mr. McKay will not make separate submissions on these issues. Instead, he relies on the submissions made by the Respondents P/C Wood, A/Sgt Pullbrook and P/C Seguin, and the Respondent Commissioner Fantino, in their respective facta on these issues.

PART II
SUMMARY OF THE FACTS

4. It was a superior officer who first instructed P/C Wood and A/Sgt Pullbrook not to prepare their police notes until they had spoken with counsel. On June 24, 2009, D/Sgt Dayna Wellock of the O.P.P. was assigned to attend to secure the scene. Shortly after 13:30, she instructed P/C Graham to tell A/Sgt Pullbrook and P/C Wood not to communicate with each other about the incident. They were also instructed not to write any notes until they had spoken to legal counsel. At 15:52, D/Sgt Wellock attended

Cedar Rapids Landing and spoke with P/C Wood to ensure that he had received her instructions not to communicate with anyone and not to write any notes until he had spoken to legal counsel. D/Sgt Wellock arrived at the scene of the shooting at 16:20 and instructed A/Sgt Pullbrook not to speak to anyone about the incident.[1]

5. Denis O'Neill ("O'Neill") was the lead investigator in the Schaeffer incident. During the interview of A/Sgt Pullbrook, O'Neill learned that Pullbrook had prepared a written account of events for counsel. O'Neill did not ask for a copy of the notes to counsel. He explained: "Right or wrong, I viewed that as lawyer/client privilege so I didn't ask for Mr. McKay's notes."[2]

6. O'Neill was quoted in the Report of the Director as stating the following: "their counsel told me, and I believe him, that there was nothing that was different from the notes he had been given and the notes given to SIU."[3] During his examination on April 15, 2010, O'Neill elaborated by indicating that Mr. McKay told him there were "no significant differences" between the notes to counsel and the notes provided to the SIU.[4]

7. There is a critical distinction between the notes made by an officer to his or her counsel and the notes made by an officer into their notebook. P/C Wood described this difference as follows:[5]

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[1] Report of the Special Investigations Unit to the Attorney General, *Exhibit Book,* Volume II, Tab 8C, pp. 386-387

[2] Examination of Denis B. O'Neill, dated December 7, 2009, p. 10, l. 20 – p. 11, l. 12, *Exhibit Book,* Volume I, Tab 5, pp. 145-146

[3] Report of the Special Investigations Unit to the Attorney General Respecting the Death of Levi Schaeffer, *Exhibit Book,* Volume II, Tab 8C, p. 393

[4] Examination of Denis B. O'Neill, April 15, 2010, p. 79, l. 20 – p. 84, l. 17, p. 85, l. 7 – l. 25, *Exhibit Book,* Volume I, Tab 7, pp. 286-291, 292

[5] Professional Standards Report dated December 10, 2009, *Exhibit Book,* Volume II, Tab 8B, p. 360.

> I made a privileged document for my counsel, titled "Notes to Counsel" to be used as instructions to my counsel. The document was not my duty notes. My understanding is that this document is confidential, and protected by solicitor-client privilege, however it is entirely consistent with the events as they unfolded on 24 JUN 09. I began the "Notes to Counsel" for my lawyer on the evening of 24 JUN 09. My "Notes to Counsel" were completed on 25 JUN 09.

8. In the Report of the Director, O'Neill indicated that he had no doubt about the accuracy of the memo book notes of officers Pullbrook and Wood.[6] During his examination, he said: "...throughout the investigation and upon my conclusion in [sic] the interview, I felt the officers were honest with me and I felt that their notes that they had given me were honest notes." He based this conclusion on the good faith intentions of the officers, their demeanour, their attitude and "the whole scenario".[7]

9. In his interview with the SIU, A/Sgt Pullbrook made it clear that, although he spoke to Mr. McKay before he made his duty notes, "his counsel did not direct him what to say in his notes."[8]

10. On the issue of how common it would be for one lawyer to represent all officers involved in an incident, including both subject and witness officers, Mr. O'Neill said that it happens "in most cases". He agreed that the practice is "widespread".[9] There is no suggestion that the SIU investigators in the Schaeffer or Minty investigations expressed any concern to Mr. McKay or his clients about Mr. McKay representing multiple officers.

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[6] *Supra* note 3

[7] Examination of Denis B. O'Neill, April 15, 2010, p. 85, l. 3 – l. 25 , *Exhibit Book,* Volume I, Tab 7, pp. 292

[8] SIU Interview of A/Sgt Pullbrook, *Exhibit Book,* Volume II, Tab 8D, p. 398

[9] Examination of Denis B. O'Neill, April 15, 2010, p. 94, l. 2 – 15, p. 102, l. 8 –15, *Exhibit Book,* Volume I, Tab 7, pp. 301, 309

PART III
ISSUES AND THE LAW

The Police Officer's Basic Right to Consult Counsel

11. It is to be expected that witness and subject officers would wish to consult with counsel to understand their rights and obligations in the unfamiliar context of an SIU investigation. Officers would not be expected to know the peculiar rules at play. It is important that counsel be available to provide timely and accurate information in response to questions like: When should notes be prepared? Who receives the notes? Has the officer been designated as a witness or subject officer? What are the implications of that designation? Can one contest that designation? How? What does segregation involve? Are the segregated officers detained? Officers have a legitimate interest in receiving advice on these and other issues before preparing their notes, quite apart from their legitimate interest in reviewing the narrative of events with counsel to ensure that counsel understands their situation.

12. As a matter of common law, it is the presumptive right of an officer, as it is the right of any citizen, to consult with counsel whenever they wish to have advice on their legal rights or obligations. This presumption must apply with added vigour where there is a statutory compulsion to co-operate with the investigating authorities, as in the case of a witness officer who is compelled not only to make notes but to participate in an interview with the SIU. Section 7(1) of the *SIU Regulations* codifies and, arguably, extends the right of an officer to consult counsel in the context of an SIU investigation.

13. As a general proposition, individuals should be free to consult counsel as they see fit, without state interference. However, where there is a state interest in effective law

enforcement, some limits on the right to consult with counsel have been recognized. For example, in criminal investigations, the right to consult with counsel has been subjected to limits in the context of custodial interrogations. Persons who have been arrested are not entitled to have counsel present during the police interview.[10] Additionally, once the detainee has consulted with counsel, the detainee is only allowed a further consultation with counsel in limited circumstances, such as where there has been a change in the detainee's jeopardy.[11] Section 7(1) of the *SIU Regulations* extends the common law right to counsel by expressly providing that an officer does have the right to have counsel present during the interview by the SIU.

14. The *SIU Regulations* include just a single, narrow limitation on an officer's right to counsel. Section 7(2) of the *SIU Regulations* provides that the right to counsel does not apply if, in the opinion of the Director, waiting for legal counsel would cause unreasonable delay in the investigation. This narrow restriction on the right to counsel is consistent with the narrow restriction on the right to counsel in cases decided under section 10(b) of the Charter.[12] Courts have held that police investigators must "hold off" questioning a detainee until he has had a reasonable opportunity to consult counsel. However, if there is delay by reason of the detainee failing to exercise reasonable diligence in his efforts to consult counsel, then the police can proceed with their interview.[13] The Legislature must have intended that the *SIU Regulations* would codify the right to counsel in SIU investigations to include this delay-related common law limit on the right to consult counsel. Had the legislature intended to impose other restrictions

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[10] *Regina v. Sinclair* (2010), 259 C.C.C. (3d) 443 at paras. 33-42 (S.C.C.)
[11] *Ibid* at para 65
[12] *Ibid.*
[13] See *Sinclair, supra,* and *Regina v. Manninen* (1987), 34 C.C.C. (3d) 385 (S.C.C.)

or limits on an officer's basic right to consult with counsel, it would have done so expressly.

15. Thus, the *SIU Regulations* essentially codifies the common law right to counsel. To the extent that the right to counsel is any different for witness and subject officers in SIU investigations than it is for detainees in criminal investigations, it appears that these law enforcement officers have been extended a more expansive right to counsel.

Joint Retainers

16. The Intervener McKay submits that joint retainers are permissible under the legislative scheme that applied at the time of the relevant events. In addition to the submissions found in the factum of the Respondents Wood, Pullbrook and Seguin, which he adopts, the Intervenor McKay relies on the following submissions.

17. The central premise underling the challenge to joint retainers is that jointly retained counsel will, wittingly or unwittingly, communicate information as between subject and witness officers and will thereby taint the accounts given in their police notes or in their interviews with the SIU. This flawed premise assumes the worst of lawyers advising police officers. It ignores the obligation of lawyers to act competently, with integrity, and at all times within the law. And it ignores the special position lawyers occupy in the administration of justice. In *Andrews v. Law Society of British Columbia,*[14] Justice McIntyre emphasized the reliance of the justice system on the legal profession and the competent discharge of its duties to its clients, the courts and society:

> It is incontestable that the legal profession plays a very significant -- in fact, a fundamentally important -- role in the administration of justice, both in the criminal and

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[14] [1989] 1 S.C.R. 143

> the civil law. I would not attempt to answer the question arising from the judgments below as to whether the function of the profession may be termed judicial or quasi-judicial, but I would observe that in the absence of an independent legal profession, skilled and qualified to play its part in the administration of justice and the judicial process, the whole legal system would be in a parlous state.[15]

18. Courts have long recognized that lawyers are more than mere advocates for their clients. They are officers of the court.[16] Lawyers are bound by the *Rules of Professional Conduct* and the Barrister's Oath[17] to conduct themselves with "honesty and integrity", to "not pervert the law to favour or prejudice anyone", to "improve the administration of justice" and to "champion the rule of law." It can be seen that in many contexts, which are analogous to the "segregation" scenario in an SIU investigation, lawyers are trusted by our courts to ensure that there is no tainting of witness accounts.

19. The most common and closely analogous situation is that of witness exclusion orders at trial, which the authors of Wigmore on Evidence describe as "sequestration" orders. In the case of *R. v. O'Callaghan,*[18] the trial judge made an addition to the usual order directing witnesses not to discuss their evidence with any other witness. The trial judge ordered that the Crown and defence counsel could not communicate with any witness who was expected to testify at trial, as counsel would be privy to the evidence already given by other witnesses. The trial judge was concerned that counsel might inadvertently communicate to one witness information that had been previously given by another (the very concern at issue here). In overturning that order, the reviewing Justice

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[15] *Ibid* at para 55
[16] See *Fortin v. Chretien*, [2001] 2 S.C.R. 500 at para 49
[17] Law Society of Upper Canada, *Barristers and Solicitors' Oath*, By-Law 4, s. 21(1)
[18] *Regina v. O'Callaghan* (1982), 65 C.C.C. (2d) 459 (Ont. H.C.J.)

made the following observations, which can and should be applied in the SIU segregation context:

> Although nothing should sanction any indirect method of conveying to the prospective witnesses information as to testimony already given, the rationale behind orders for "sequestration" (Wigmore's term) of witnesses is to prevent the possibilities of abuse by unscrupulous persons. Surely, honest counsel may consult with a sequestered or excluded witness. Mere "suspicion of impropriety, even though it may not exist" is not enough to interfere with the right of an officer of the court to confer "in a proper manner" with witnesses even though subject to an exclusion order. To decide otherwise would belie centuries of tradition of an independent and professional bar.[19]

20. Lawyers are also trusted not to facilitate improper communication between witnesses and accused persons. For example, bail orders usually include a condition that the accused not communicate with the alleged victim, with other potential witnesses, and with co-accused. Those bail conditions usually include an exemption allowing for such communications “through or in the presence of counsel”, reflecting the court's confidence that lawyers can be trusted to ensure that there will be no collusion or tainting of accounts. As stated in his authoritative text, *The Law of Bail in Canada, 3rd ed.*, Justice Trotter offers the following:[20]

> [W]hile the object of this type of condition is to prevent an accused person from pressuring a witness to alter his/her testimony (or not testify at all), an accused's counsel is entitled to interview any witness, whether or not that witness will be called by the prosecution. Exercising common sense, most counsel will realize the problems that might arise if his/her client were present during the interview.
>
> Enjoining communication between co-accused raises interesting issues. This is usually done to prevent the accused from colluding with each other in terms of their evidence. Now, with greater concern about terrorism activities, and with the enactment of myriad measures to combat terrorism, this type of condition may have a new application. It may be imposed to prevent furtherance of group terrorist activities by cutting off the lines of communication. As this type of condition must not impair legitimate trial preparation, it ought to be drafted in a manner that permits contact between co-accused in the presence of their counsel.

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[19] *Ibid* at para 16

[20] The Honourable Mr. Justice G. T. Trotter, *The Law of Bail in Canada,* 3rd ed. (Toronto: Carswell, 2011), p. 6-29 – 6-30

21. Lawyers have training and experience in the careful segregation of information. It is basic to maintaining confidentiality of information received from clients and others. On a daily basis lawyers are required and expected to avoid even inadvertent communication of privileged and confidential information. When lawyers are appointed to be judges, they are expected and trusted to completely ignore evidence excluded following a *voir dire,* and to not allow such evidence to affect how they decide the case. There is simply no reason to assume that a lawyer is incapable of representing a witness and subject officer and not fully adhering to the segregation requirements until after the SIU interviews have been conducted.[21]

Brief Deferral of Sharing Information Between Joint-Retainer Clients

22. The Appellants argue that Rule 2.04(6) precludes a joint retainer because, they allege, the lawyer must share information received from one client with his other client(s). The Intervener McKay adopts the opinion of Gavin McKenzie, and the submissions of the Respondents Wood, Pullbrook and Seguin, to the effect that the segregation rule and the *Rules of Professional Conduct* can be easily reconciled. The lawyer need only defer sharing information as between clients until after the SIU interviews have been conducted, at which time the segregation requirement lapses and the lawyer is free to fully share information between his clients.[22]

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[21] *Conduct and Duties of Police Officers Respecting Investigations by the Special Investigations Unit,* O. Reg. 267/10 amended to O. Reg. 283/11, s. 6(2)
[22] This argument is fully set out in the factum of the Respondents Wood, Pullbrook and Sequin at paragraphs 88 – 106.

23. The *Rules of Professional Conduct* should be given a *purposive* interpretation.[23] The obvious purpose of the information sharing requirement in joint retainer cases is to ensure that clients suffer no prejudice from the unequal sharing of information between clients. The rule is intended to make sure that one client is no worse off by reason of sharing the same lawyer with another client. In joint retainers, where the lawyer is merely delaying the sharing of information during the brief segregation period, the clients are no worse off by reason of having the same lawyer as opposed to separate lawyers. If the officers had separate lawyers, those lawyers would still be bound by the segregation requirement that the officers involved "not communicate with any other officer involved in the incident concerning their involvement in the incident until after the SIU has completed its interviews."[24] The result for the clients is the same. In either case their lawyer will respect the segregation requirement and the client officer will not be given information from other involved officers until after the interviews have been completed.

The Right to Counsel Authorizes Police Officers to Consult Counsel Prior to Completing Their Notes

24. As a general proposition, the state can only limit an individual's right to counsel by reference to an express statutory provision or by "necessary implication" from statutory provisions.[25] Only in the rarest of circumstances could there be legal justification for denying anyone the right to consult with a lawyer when that person faces

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[23] *Bell ExpressVu Limited Partnership v. Rex,* [2002] 2 S.C.R. 559 at paras. 27 - 30: It is necessary, in every case, for the court charged with interpreting a provision to undertake the contextual and purposive approach set out by Driedger, and thereafter to determine if "the words are ambiguous enough to induce two people to spend good money in backing two opposing views as to their meaning".

[24] *Conduct and Duties of Police Officers Respecting Investigations by the Special Investigations Unit,* O. Reg. 267/10 amended to O. Reg. 283/11, s. 6(2)

[25] *Regina v. Elias* (2005), 196 C.C.C. (3d) 481 at 497 - 8 (S.C.C.); *Regina v. Thomsen* (1988), 40 C.C.C. (3d) 411 at 653 (S.C.C.)

a legal compulsion to cooperate with the investigating authorities. There is one circumstance, involving the investigation of suspected drinking drivers, where the right to counsel has been circumscribed despite a statutory compulsion to co-operate. However, as can be seen from the submissions that follow, the justifications for limiting access to counsel in that context do not arise in the context of officers consulting with counsel before the preparation of their police notes.

25. When a motorist is detained by police at the roadside, pursuant to a lawful exercise of the general statutory vehicle stop powers, police are entitled to check the sobriety of the driver prior to affording the driver an opportunity to consult with counsel. This includes conducting all reasonable police screening measures to determine whether there are reasonable and probable grounds to justify a demand for a breath or blood sample under section 254 of the *Criminal Code.* These screening measures include questioning the driver about their alcohol consumption, requesting that they perform certain sobriety tests, or demanding that they provide a breath sample into a roadside screening device. The Supreme Court of Canada[26] has upheld the findings of this Honourable Court[27] that the implementation of the right to counsel at the roadside is incompatible with performance of these roadside screening measures in light of the time sensitive nature of breath testing procedures. An additional justification for this limitation is that the information obtained as a result of a motorist's participation without the right to counsel can only be used as an investigative tool to confirm or reject an officer's suspicion that the driver might be impaired. The information, including the

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[26] *Ibid* at paras. 40 – 48, 52-58

[27] *Regina v. Milne* (1996), 107 C.C.C. (3d) 118 at 128-131 (Ont. C.A.), leave to appeal refused

readings from the roadside screening device, cannot be used as direct evidence to incriminate the driver.

26. In the case of officers wishing to consult with counsel before preparing their duty notes, these justifications for denying access to counsel are absent. First, an officer's recollection of events will not disappear from his memory in the way that alcohol will be immediately, inexorably and permanently eliminated from a driver's body. Second, there is no blanket protection against an officer's notes being used as evidence against the officer in future proceedings. Witness and subject officers are required to prepare full notes of the incident.[28] Witness officers must provide their notes to the Chief of Police.[29] The Chief then provides those notes to the SIU upon request.[30] Witness officers must also submit to an interview with the SIU.[31] Officers may be subject to a discipline hearing under the *Police Services Act*, and may face sanctions as serious as suspension, demotion and dismissal.[32] There is no express protection against officer notes, or an SIU interview, being used in evidence against the officer in a hearing under the *Police Services Act*.

Communications with Counsel in Writing

27. It is important that any client, including a police officer, be free to consult with counsel in the most convenient and effective manner. Depending on the circumstances, communications may be oral or in writing, or may employ a combination of communications. Clients are free, and should remain free, to communicate with their counsel through written notes to counsel. This would include providing a written

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[28] *Conduct and Duties of Police Officers Respecting Investigations by the Special Investigations Unit,* O. Reg. 267/10, amended to O. Reg. 283/11, s. 9
[29] *Ibid,* s. 9(1)
[30] *Ibid,* s. 9(2)
[31] *Ibid*, s. 8
[32] *Police Services Act,* R.S.O. 1990, c. P-15, s. 76(9) and s. 85

narrative to counsel before providing a compelled statement in the form of police notes or participation in an SIU interview. There is no sound legal or policy basis for precluding such solicitor – client communications.

Conclusion

28. The Appellant's concerns rest on mere speculation that the involvement of lawyers will taint the note making process. To the contrary, the presumption should be that lawyers will enhance that process. It should be recognized, as it is in all other areas of the law where tainting concerns arise, that lawyers can be relied on to maintain the integrity of witness accounts. In accordance with their legal and professional obligations, lawyers would have to advise officer clients to be truthful and accurate in making their notes and answering questions. This involvement should be encouraged, not further curtailed.

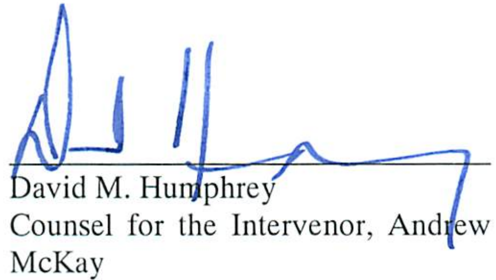
PART IV

ORDER REQUESTED

29. It is respectfully requested that the appeal be dismissed.

DATED this 15 day of August, 2011.

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



David M. Humphrey
Counsel for the Intervenor, Andrew McKay

SCHEDULE A

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Regina v. Milne (1996), 107 C.C.C. (3d) 118 (Ont. C.A.)

Secondary Sources

The Honourable Mr. Justice G. T. Trotter, *The Law of Bail in Canada,* 3rd ed. (Toronto: Carswell, 2011)

SCHEDULE B

STATUTORY REFERENCES

Law Society of Upper Canada, *Barristers and Solicitors' Oath*, By-Law 4, s. 21(1)

21. (1) The required oath for an applicant for the issuance of a licence to practise law in Ontario as a barrister and solicitor is as follows:

I accept the honour and privilege, duty and responsibility of practising law as a barrister and solicitor in the Province of Ontario. I shall protect and defend the rights and interests of such persons as may employ me. I shall conduct all cases faithfully and to the best of my ability. I shall neglect no one's interest and shall faithfully serve and diligently represent the best interests of my client. I shall not refuse causes of complaint reasonably founded, nor shall I promote suits upon frivolous pretences. I shall not pervert the law to favour or prejudice any one, but in all things I shall conduct myself honestly and with integrity and civility. I shall seek to ensure access to justice and access to legal services. I shall seek to improve the administration of justice. I shall champion the rule of law and safeguard the rights and freedoms of all persons. I shall strictly observe and uphold the ethical standards that govern my profession. All this I do swear or affirm to observe and perform to the best of my knowledge and ability.

***Conduct and Duties of Police Officers Respecting Investigations by the Special Investigations Unit,* O. Reg. 267/10, amended to O. Reg. 283/11**

...

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.

...

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.

(2) A request for an interview by the SIU must be made in person.

(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.

(4) The interview shall not be recorded by audiotape or videotape except with the consent of the witness officer.

(5) The SIU director may request an interview take place beyond the time requirement as set out in subsection (1).

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.

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

...

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.

Same
(2) A chief of police who makes a complaint under subsection (1) is not a complainant for the purposes of this Part.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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).

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.

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).

...

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).

Same
(2) Subject to subsection (4), the board may, under subsection 84 (2),

(a) dismiss the chief of police or deputy chief of police from the police force;

(b) direct that the chief of police or deputy chief of police be dismissed in seven days unless he or she resigns before that time;

(c) demote the chief of police or deputy chief of police, specifying the manner and period of the demotion;

(d) suspend the chief of police or deputy chief of police without pay for a period not exceeding 30 days or 240 hours, as the case may be;

(e) direct that the chief of police or deputy chief of police forfeit not more than three days or 24 hours pay, as the case may be;

(f) direct that the chief of police or deputy chief of police forfeit not more than 20 days or 160 hours off, as the case may be;

(g) impose on the chief of police or deputy chief of police any combination of penalties described in clauses (c), (d), (e) and (f).

Same
(3) The board shall promptly take any action that the Commission directs it to take under subsection 84 (3).

Notice needed
(4) The chief of police or board, as the case may be, shall not impose the penalties of dismissal or demotion under subsection (1) or (2) unless the notice of hearing or a subsequent notice served on the chief of police, deputy chief of police or other police officer indicated that they might be imposed if the complaint were proved on clear and convincing evidence.

Calculation of penalties
(5) Penalties imposed under clauses (1) (d), (e) and (f) and (2) (d), (e) and (f) shall be calculated in terms of days if the chief of police, deputy chief of police or other police officer normally works eight hours a day or less and in terms of hours if he or she normally works more than eight hours a day.

Same
(6) If a penalty is imposed under clause (1) (e) or (2) (e), the chief of police, deputy chief of police or other police officer, as the case may be, may elect to satisfy the penalty by working without pay or by applying the penalty to his or her vacation or overtime credits or entitlements.

Additional powers
(7) In addition to or instead of a penalty described in subsection (1) or (2), the chief of police or board, as the case may be, may under subsection 84 (1) or (2),

(a) reprimand the chief of police, deputy chief of police or other police officer;

(b) direct that the chief of police, deputy chief of police or other police officer undergo specified counselling, treatment or training;

(c) direct that the chief of police, deputy chief of police or other police officer participate in a specified program or activity;

(d) take any combination of actions described in clauses (a), (b) and (c).

Notice of decision
(8) The chief of police or board, as the case may be, shall promptly give written notice of any penalty imposed or action taken under subsection (1), (2), (3) or (7), with reasons,

(a) to the chief of police, deputy chief of police or other police officer who is the subject of the complaint;

(b) in the case of a penalty imposed or action taken by a municipal chief of police, to the board; and

(c) in the case of a penalty imposed or action taken in respect of a complaint made by a member of the public, to the complainant.

Employment record
(9) The chief of police or board, as the case may be, may cause an entry concerning the matter, the action taken and the reply of the chief of police, deputy chief of police or other police officer against whom the action is taken, to be made in his or her employment record, but no reference to the allegations of the complaint or the hearing shall be made in the employment record, and the matter shall not be taken into account for any purpose relating to his or her employment unless,

(a) misconduct as defined in section 80 or unsatisfactory work performance is proved on clear and convincing evidence; or

(b) the chief of police, deputy chief of police or other police officer resigns before the matter is finally disposed of.

Restriction on employment
(10) No person who is dismissed under section 84, or who resigns following a direction under section 84, may be employed as a member of a police force unless five years have passed since the dismissal or resignation.

RUTH SCHAEFFER, EVELYN MINTY and DIANE PINDER -and- **POLICE CONSTABLE CHRIS WOOD, ACTING SERGEANT MARK PULLBROOK, POLICE CONSTABLE GRAHAM SEGUIN, JULIAN FANTINO, COMMISSIONER OF THE ONTARIO PROVINCIAL POLICE, IAN SCOTT, DIRECTOR OF THE SPECIAL INVESTIGATIONS UNIT, AND HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO (MINISTRY OF COMMUNITY SAFETY . CORRECTIONAL SERVICES)**

Appellants *Respondents* C52414

COURT OF APPEAL FOR ONTARIO

FACTUM ON BEHLAF OF THE INTERVENOR ANDREW MCKAY

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