



SUPREME COURT OF CANADA

CITATION: Wood v. Schaeffer, 2013 SCC 71

DATE: 20131219

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BETWEEN:

**Police Constable Kris Wood, Acting Sergeant Mark Pullbrook and Police
Constable Graham Seguin**

Appellants/Respondents on cross-appeal
and

**Ruth Schaeffer, Evelyn Minty, Diane Pinder and Ian Scott, Director of the
Special Investigations Unit**

Respondents/Appellants on cross-appeal
and

Julian Fantino, Commissioner of the Ontario Provincial Police

Respondent/Respondent on cross-appeal
- and -

**Canadian Civil Liberties Association, British Columbia Civil Liberties
Association, Aboriginal Legal Services of Toronto Inc., Criminal Lawyers'
Association (Ontario), Richard Rosenthal, Chief Civilian Director of the
Independent Investigations**

**Office of British Columbia, Urban Alliance on Race Relations, Canadian Police
Association and Police Association of Ontario**

Interveners

CORAM: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver,
Karakatsanis and Wagner JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 90)

Moldaver J. (McLachlin C.J. and Abella, Rothstein,
Karakatsanis and Wagner JJ. concurring)

**DISSENTING REASONS ON
CROSS-APPEAL:**
(paras. 91 to 111)

LeBel and Cromwell JJ. (Fish J. concurring)

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WOOD v. SCHAEFFER

**Police Constable Kris Wood, Acting
Sergeant Mark Pullbrook and Police
Constable Graham Seguin**

Appellants/Respondents on cross-appeal

v.

**Ruth Schaeffer, Evelyn Minty,
Diane Pinder and Ian Scott, Director
of the Special Investigations Unit**

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and

**Julian Fantino, Commissioner of the
Ontario Provincial Police**

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Independent Investigations Office of British Columbia,
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Interveners

Indexed as: Wood v. Schaeffer

2013 SCC 71

File No.: 34621.

2013: April 19; 2013: December 19.

Present: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Police — Investigations — Special Investigations Unit — Right to counsel — Duty to make notes — Whether police officers have right to consult with counsel before making notes on incident — Whether police officers are entitled to basic legal advice as to nature of rights and obligations in connection with incident — Police Services Act, R.S.O. 1990, c. P-15, s. 113 — Duties of Police Officers Respecting Investigations by the Special Investigations Unit, O. Reg. 267/10, ss. 7, 9.

This case arises from two independent fatal incidents in which civilians were shot by the police. In both cases, the involved officers were instructed by superior officers to refrain from making their police notes on the incident until they had spoken with counsel. The families of the two civilians who were killed brought an application seeking an interpretation of various provisions of the *Police Services Act*, R.S.O. 1990, c. P-15, and *Conduct and Duties of Police Officers Respecting Investigations by the Special Investigations Unit*, O. Reg. 267/10. For purposes of this appeal, the pertinent issue raised by the families was whether the legislative scheme permitted officers to consult with counsel before completing their notes.

The families' application was dismissed by the superior court on procedural grounds. The Court of Appeal dealt with the matter on its merits, and held that the regulation did not permit police officers to seek the assistance of counsel in completing their notes. However, it found that, under the regulation, officers were entitled to receive basic legal advice as to the nature of their rights and obligations regarding the incident and the Special Investigations Unit ("SIU") investigation before completing their notes. The officers argue that those limits are too restrictive. The Director of the Special Investigations Unit cross-appeals, arguing that police officers are not entitled to legal advice, basic or otherwise, prior to completing their notes.

Held (LeBel, Fish and Cromwell JJ. dissenting in the cross-appeal): The appeal should be dismissed and the cross-appeal should be allowed.

Per McLachlin C.J. and Abella, Rothstein, **Moldaver**, Karakatsanis and Wagner JJ.: Police officers are entrusted by the communities they serve with significant legal authority, including, in some circumstances, the power to use deadly force against their fellow citizens. The indispensable foundation for such authority is the community's steadfast trust in the police. But that trust can be tested when a member of the community is killed or seriously injured at the hands of a police officer. The SIU is charged with the delicate task of determining independently and transparently what happened and why, in the hope of providing the community with answers. Permitting police officers to consult with counsel before their notes are

prepared is an anathema to the very transparency that the legislative scheme aims to promote. When the community's trust in the police is at stake, it is imperative that the investigatory process be — and appear to be — transparent.

Under the Act and regulation, a police officer who witnessed or participated in an incident under investigation by the SIU is not permitted to speak with a lawyer before preparing his or her notes concerning the incident. While officers, in their capacity as ordinary citizens, may be free at common law to consult with counsel as and when they see fit, we are considering them here in their professional capacity as police officers who are involved in an SIU investigation. In these circumstances, the point of departure is not the common law, but the regulation which governs these situations and which comprehensively sets out their rights and duties, including their entitlement to counsel. So long as police officers choose to wear the badge, they must comply with their duties and responsibilities under the regulation, even if this means at times having to forego liberties they would otherwise enjoy as ordinary citizens.

Read in the full light of its history and context, it is apparent, for three reasons, that the regulation was not meant to permit officers to consult with counsel before they complete their notes.

First, consultation with counsel at the note-making stage is antithetical to the dominant purpose of the legislative scheme because it risks eroding the public confidence that the SIU process was meant to foster. The legislative scheme

specifically combats the problem of appearances that flowed from “police investigating police” by placing investigations of the police in the hands of civilians. Allowing officers to fully consult with counsel at the note-making stage creates an “appearances problem” similar to the one that the SIU was created to overcome: a reasonable member of the public would naturally question whether counsel’s assistance at the note-making stage is sought by officers to help them fulfill their duties as police officers, or if it is instead sought, in their self-interest, to protect themselves and their colleagues from the potential liability of an adverse SIU investigation.

Second, the legislative history demonstrates that s. 7(1) was never intended to create a freestanding entitlement to consult with counsel that extended to the note-making stage. There was no discussion of a role for counsel at the note-making stage in any of the reports related to the regulation, let alone a recommendation to that effect. While the government has long been aware of the practice of officers consulting with counsel prior to preparing their notes, the government is not required to amend regulations to forbid practices that are already inconsistent with the legislative scheme.

Third, consulting with counsel at the note-making stage impinges on the ability of police officers to prepare accurate, detailed and comprehensive notes in accordance with their duty under s. 9 of the regulation. Sections 9(1) and (3) of the regulation require witness and subject officers to “complete in full the notes on the

incident in accordance with [their] duty”. While neither the regulation nor the Act define the duty to make notes, police officers do have a duty to prepare accurate, detailed, and comprehensive notes as soon as practicable after an investigation. Permitting officers to consult with counsel before preparing their notes runs the risk that the focus of the notes will shift away from the officer’s public duty toward his or her private interest in justifying what has taken place. This shift would not be in accord with the officer’s duty.

Without in any way impugning the integrity of counsel or police officers, even the perfunctory consultation contemplated by the Court of Appeal is liable to cause the same threat to public confidence, if on a somewhat diminished scale, because the initial consultation is privileged. A loss of public trust would seem a high price to pay for an initial consultation that is limited to providing officers with basic information that can easily be conveyed in ways that do not generate any appearance problem. Nothing in the regulation prevents officers who have been involved in traumatic incidents from speaking to doctors, mental health professionals, or uninvolved senior police officers before they write their notes, and the regulation empowers the chief of police to allow officers more time to complete their notes when required. Once officers have completed their notes and filed them with the chief of police, they are free to consult with counsel.

Per LeBel, Fish and Cromwell JJ. (dissenting in the cross-appeal):
Everyone is at liberty to consult counsel whenever they wish unless doing so is

precluded by lawful authority or inconsistent with their duty. This freedom reflects the importance of the societal role of lawyers in a country governed by the rule of law and it should not be eliminated in the absence of clear legislative intent.

Interpreting s. 7(1) of the regulation purposively requires that we give effect to police officers' freedom to consult counsel and consider the importance of the SIU's mandate to enhance public confidence in the police. The plain wording of s. 7(1) grants the right to consult with legal counsel and the right to have legal counsel present during an SIU interview. Since this wording does not oust the rights that police officers would otherwise enjoy as ordinary citizens, and since the potential tension between the right to consult and the duty of the officer to write complete and independent notes can be resolved, there is no need to completely eliminate a police officer's liberty to consult counsel.

We must trust that lawyers will know that they cannot give advice about the contents and drafting of the notes, which must remain the result of a police officer's independent account of the events. However, the officer could be advised that he or she is required to complete notes of the incident prior to the end of his or her tour of duty and submit them to the chief of police unless excused by the chief of police; that the chief of police will not pass the notes of a subject officer on to the SIU, but will pass the notes of a witness officer on to the SIU; that the officer will be required to answer questions from the SIU investigators; that the officer will be entitled to consult counsel prior to the SIU interview and to have counsel present

during the interview; and that the notes should provide a full and honest record of the officer's recollection of the incident in the officer's own words. This brief, informative conversation might not be as meaningful as comprehensive legal advice on the relationship between an officer's notes and potential liability, but it might help to remind an officer of his or her duties in the circumstances and put the officer at ease after having experienced a potentially traumatic incident.

Cases Cited

By Moldaver J.

Referred to: *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, [2005] 1 S.C.R. 533; *R. v. Sussex Justices, Ex parte McCarthy*, [1924] 1 K.B. 256; *R. v. Bailey*, 2005 ABPC 61, 49 Alta. L.R. (4th) 128; *R. v. Zack*, [1999] O.J. No. 5747 (QL); *R. v. Stewart*, 2012 ONCJ 298 (CanLII); *R. v. Vu*, 2013 SCC 60.

By LeBel and Cromwell JJ. (dissenting on cross-appeal)

Referred to: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *R. v. Hall*, 2002 SCC 64, [2002] 3 S.C.R. 309; *R. v. Nguyen* (1997), 119 C.C.C. (3d) 269; *Irvine v. Canada (Restrictive Trade Practices Commission)*, [1987] 1 S.C.R. 181.

Statutes and Regulations Cited

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Conduct and Duties of Police Officers Respecting Investigations by the Special Investigations Unit, O. Reg. 267/10, s. 1(1) “subject officer”, “witness officer”, 6(1), (2), 7, 8(1), (2), 9, 10(3)(b), (c), 12.

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APPEAL and CROSS-APPEAL from a judgment of the Ontario Court of Appeal (Sharpe, Armstrong and Rouleau JJ.A.), 2011 ONCA 716, 107 O.R. (3d) 721, 284 O.A.C. 362, 341 D.L.R. (4th) 481, 278 C.C.C. (3d) 57, 246 C.R.R. (2d) 181, [2011] O.J. No. 5033 (QL), 2011 CarswellOnt 12463, setting aside a decision of Low J., 2010 ONSC 3647 (CanLII), [2010] O.J. No. 2770 (QL), 2010 CarswellOnt 4564. Appeal dismissed and cross-appeal allowed, LeBel, Fish and Cromwell JJ. dissenting on cross-appeal.

Brian H. Greenspan, David M. Humphrey and Jill D. Makepeace, for the appellants/respondents on cross-appeal.

Julian N. Falconer and Sunil S. Mathai, for the respondents/appellants on cross-appeal Ruth Schaeffer, Evelyn Minty and Diane Pinder.

Marlys A. Edwardh, Daniel Sheppard and Kelly Doctor, for the respondent/appellant on cross-appeal Ian Scott, Director of the Special Investigations Unit.

Christopher Diana and Kenneth W. Hogg, for the respondent/respondent on cross-appeal Julian Fantino, Commissioner of the Ontario Provincial Police.

Wendy J. Wagner and Ryan W. Kennedy, for the intervener the Canadian Civil Liberties Association.

Andrew I. Nathanson and Gavin R. Cameron, for the intervener the British Columbia Civil Liberties Association.

Christa D. Big Canoe and Emily R. Hill, for the intervener the Aboriginal Legal Services of Toronto Inc.

Howard L. Krongold and Michael Spratt, for the intervener the Criminal Lawyers' Association (Ontario).

Marian K. Brown, for the intervener Richard Rosenthal, Chief Civilian Director of the Independent Investigations Office of British Columbia.

Maureen L. Whelton and Neil Wilson, for the intervener the Urban Alliance on Race Relations.

David B. Butt, for the interveners the Canadian Police Association and the Police Association of Ontario.

The judgment of McLachlin C.J. and Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ. was delivered by

MOLDAVER J. —

I. Introduction

[1] Police officers are entrusted by the communities they serve with significant legal authority, including, in some circumstances, the power to use deadly force against their fellow citizens. The indispensable foundation for such authority is the community’s steadfast trust in the police. Each and every day, thousands of officers across this country work diligently to earn that trust, often putting their own lives on the line.

[2] But that trust can be tested — sometimes severely — when a member of the community is killed or seriously injured at the hands of a police officer. For that reason, the citizens of Ontario have charged an all-civilian Special Investigations Unit (the “SIU”) with the delicate task of investigating such tragic incidents. The SIU’s

mission is clear: it is to determine independently and transparently what happened and why, in the hope of providing the community with answers.

[3] No one is above the law. When a member of the community is killed or seriously injured by a police officer, it is not only appropriate to ask whether the police were acting lawfully, it is essential. To that end, the SIU plays a vital role in ensuring that our society remains fair and just and that everyone is treated equally before and under the law.

[4] This appeal concerns one aspect of the way in which the SIU conducts its investigations. The question presented is whether, under the scheme that Ontario has crafted, a police officer who witnessed or participated in an incident under investigation by the SIU is entitled to speak with a lawyer *before* preparing his or her notes concerning the incident. In my view, the answer is “no”.

[5] The legislative scheme at issue here reflects the promise of a series of public inquiries and task forces urging reform of the old approach of “police investigating police”. Time and time again, reports of these groups have underscored the importance of creating an independent body charged with transparently investigating whether what happened reflected a breach of the public’s trust or not.

[6] Permitting police officers to consult with counsel before their notes are prepared is an anathema to the very transparency that the legislative scheme aims to promote. Put simply, appearances matter. And, when the community’s trust in the

police is at stake, it is imperative that the investigatory process be — and appear to be — transparent.

[7] Manifestly, the legislature did not intend to provide officers with an entitlement to counsel that would undermine this transparency. The SIU's governing regulation hews closely to the specific recommendations of those tasked with proposing reforms — down to many of its specific provisions. Read in the full light of its history and context, it is apparent that the regulation was not meant to afford officers an entitlement to consult with counsel before they complete their notes.

[8] Nor is such an entitlement consistent with an officer's duties under the legislative scheme. Such an expansive understanding of the entitlement to counsel impinges on the ability of police officers to prepare accurate, detailed, and comprehensive notes in accordance with their duty. Permitting consultation with counsel before notes are prepared runs the risk that the focus of the notes will shift away from the officer's public duty toward his or her private interest in justifying what has taken place. This shift would not be in accord with the officer's duty.

[9] In the result, I would dismiss the appeal and allow the cross-appeal.

II. Facts

[10] This case arises from two independent fatal incidents in which Douglas Minty and Levi Schaeffer were shot by the police. The facts surrounding the incidents are not in dispute.

A. *The Minty Investigation*

[11] On June 22, 2009, Mr. Minty was shot to death by Cst. Seguin of the Ontario Provincial Police (“OPP”). That evening, Cst. Seguin had been dispatched to investigate an alleged assault committed by Mr. Minty on a door-to-door salesman. When Cst. Seguin arrived at the scene, he approached Mr. Minty. Mr. Minty walked quickly toward Cst. Seguin. He had a knife in his hand. Cst. Seguin instructed Mr. Minty to put down or drop his weapon. Mr. Minty ignored these commands and “charged at Cst Seguin with his arm extended and the knife pointing at the officer” (SIU Report, A.R., vol. III, at p. 661). Cst. Seguin shot Mr. Minty five times.

[12] Cst. Seguin reported that shots had been fired and additional officers arrived at the scene. Sgt. Burton, Cst. Seguin’s senior officer, told all of the officers in the area that the SIU might consider them to be witnesses to the incident and instructed them not to make any further notes until they had spoken with counsel.

[13] On October 14, 2009, Mr. Scott, the Director of the SIU (the “SIU Director”), provided his report on the incident to the Attorney General. In his report, the SIU Director found that Cst. Seguin “had a reasonable apprehension of imminent death or grievous bodily harm” from which he could not escape and concluded that

“the lethal force used was not excessive” in the circumstances (SIU Report, A.R., vol. III, at p. 661).

[14] Significant for present purposes, the SIU Director noted in his report that he would be raising several issues of concern with the OPP Commissioner. Among them, the SIU Director included his concern that all witness officers had been instructed not to write up their notes until they had spoken to counsel.

B. *The Schaeffer Investigation*

[15] On June 24, 2009, Mr. Schaeffer was shot and killed by Cst. Wood of the OPP. Cst. Wood and Acting Sgt. Pullbrook had traveled by boat to a rocky peninsula on Osnaburgh Lake to investigate a reported theft. When they arrived at the peninsula, the officers approached Mr. Schaeffer, questioned him, and attempted to detain him. According to the officers, Mr. Schaeffer physically resisted and pulled a knife out of his pocket. Both officers retreated as Mr. Schaeffer advanced towards them. Mr. Schaeffer did not comply with commands to drop the knife. At that point, Cst. Wood shot Mr. Schaeffer twice in the chest, killing him.

[16] After the shooting, Det. Sgt. Wellock was assigned to attend the scene. Before leaving the detachment, she instructed another officer to tell Cst. Wood and Acting Sgt. Pullbrook not to communicate with each other and not to write any notes until they had spoken to counsel. Cst. Wood and Acting Sgt. Pullbrook retained the same lawyer as their counsel and spoke to him, separately, several hours after the

shooting. Their lawyer advised both officers to refrain from completing their notes and to provide him with a draft set of notes for his review. Both officers completed their notebook entries two days after the shooting, on June 26, 2009, after counsel had reviewed their draft notes.

[17] On September 25, 2009, the SIU Director provided his report on this incident to the Attorney General. He concluded that he could not form reasonable and probable grounds to believe that that Cst. Wood had committed a criminal offence because he could not “place sufficient reliance on the information provided by Cst Wood or Acting A/Sgt Pullbrook to decide what probably happened” (A.R., vol. III, at p. 516). The SIU Director expressed specific concern over the manner in which Cst. Wood and Acting Sgt. Pullbrook completed their notes. The SIU Director wrote:

This note writing process flies in the face of the two main indicators of reliability of notes: independence and contemporaneity. The notes do not represent an independent recitation of the material events. The first drafts have been “approved” by an OPPA lawyer who represented all of the involved officers in this matter, a lawyer who has a professional obligation to share information among his clients when jointly retained by them. Nor are the notes the most contemporaneous ones — they were not written as soon as practicable and the first drafts remain in the custody of their lawyer. I am denied the opportunity to compare the first draft with the final entries. Accordingly, the only version of the material events are association lawyer approved notes. Due to their lack of independence and contemporaneity, I cannot rely upon these notes nor A/Sgt Pullbrook’s interview based upon them for the truth of their contents.

I have a statutory responsibility to conduct independent investigations and decide whether a police officer probably committed a criminal offence. In this most serious case, I have no informational base I can rely

upon. Because I cannot conclude what probably happened, I cannot form reasonable grounds that the subject officer in this matter committed a criminal offence. [Emphasis added; A.R., vol. III, at p. 517.]

III. Relevant Legislative Provisions

A. *The Police Services Act*

[18] The SIU was established by s. 113 of the *Police Services Act*, R.S.O. 1990, c. P.15. Section 113(5) of the Act empowers the SIU to “cause investigations to be conducted into the circumstances of serious injuries and deaths that may have resulted from criminal offences committed by police officers”. The SIU Director cannot be a police officer or a former police officer, and SIU investigators cannot be current police officers (s. 113(3)). The SIU Director determines whether charges will be laid against police officers (s. 113(7)). Police officers are required by the *Act* to “co-operate fully” with the SIU in the conduct of investigations (s. 113(9)).

B. *The Regulation*

[19] The regulation governs the conduct of SIU investigations (*Conduct and Duties of Police Officers Respecting Investigations by the Special Investigations Unit*), O. Reg. 267/10). Officers involved in an incident triggering an SIU investigation fall into two categories: officers whose conduct appears to have caused the death or serious injury are designated “subject officers”, and involved officers who are not subject officers are deemed to be “witness officers” (s. 1(1)).

[20] The regulation provides that all involved officers must be segregated from each other, to the extent practicable, until after the SIU has completed its interviews (s. 6(1)). The regulation also provides all officers with an entitlement to “consult” with legal counsel and to have counsel “present” during their SIU interviews (s. 7(1)), unless the SIU Director is of the opinion that waiting for counsel would cause an unreasonable delay in the investigation (s. 7(2)). Witness officers are required to meet with the SIU and answer all of its questions (s. 8(1)). Both subject and witness officers are required to complete their notes on the incident “in accordance with [their] duty” (s. 9(1) and (3)). However, only witness officers are required to provide their notes to the SIU (s. 9(1) and (3)). If a witness officer is later designated a subject officer by the SIU, the SIU is required to provide the officer with the original and all copies of his interview with the SIU and his officer notes (s. 10(3)(b) and (c)).

[21] The proper interpretation of the regulation lies at the heart of this appeal. The entitlement to counsel under s. 7(1) and the duty to make notes under s. 9(1) and (3) are of particular importance. These provisions read as follows:

7. [Right to counsel] (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.

...

9. [Notes on incident] (1) A witness officer shall complete in full the notes on the incident in accordance with his or her duty and . . . shall

provide the notes to the chief of police within 24 hours after a request for the notes is made by the SIU.

...

(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

IV. Proceedings Below

A. *Superior Court of Justice for Ontario, 2010 ONSC 3647 (CanLII)*

[22] Mr. Schaeffer's mother, Ruth Schaeffer, and Mr. Minty's mother and sister, Evelyn Minty and Diane Pinder (the "Families") brought an application under Rule 14.05(3) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, seeking "declaratory relief in the form of judicial interpretations and guidance in respect of those provisions of the *Police Services Act* and regulations that govern the police duty to cooperate with investigations by the Special Investigations Unit" (A.R., vol. I, at p. 91). One of the issues raised by the Families was whether the legislative scheme permitted officers to consult with counsel before completing their notes. The Families named Cst. Seguin, Cst. Wood, Acting Sgt. Pullbrook (the "Officers"), OPP Commissioner Julian Fantino, the SIU Director, and the Ministry of Community Safety and Correctional Services as respondents.

[23] Prior to the hearing of the application on its merits, the Officers brought a motion to strike the application on the grounds that the application was not justiciable

and that the Families lacked standing to bring it. Low J. allowed the Officers' motion and struck the application. Before this Court, the Officers have abandoned these procedural arguments. It is therefore unnecessary to consider them further.

B. *Court of Appeal for Ontario, 2011 ONCA 716, 107 O.R. (3d) 721*

[24] The Families appealed to the Ontario Court of Appeal seeking to have the application decided on its merits. Sharpe J.A., writing for a unanimous court, held that the application was justiciable, that the Families had public interest standing, and that the Court of Appeal had jurisdiction to decide the substantive issues raised in the application without the need to remit the matter to the Superior Court.

[25] The Court of Appeal found that the assistance of counsel in the preparation of an officer's notes "would be inconsistent with the purpose of police notes and with the duty imposed on police officers to prepare them" primarily because any legal advice received by the officer would be "geared to the officer's own self interest, or the interests of fellow officers, rather than the officer's overriding public duty" (paras. 71-72). As a result, the court concluded that s. 7(1) did not permit police officers to seek the assistance of counsel in completing their notes.

[26] However, in the Court of Appeal's view, s. 7(1) of the regulation did entitle officers to "basic legal advice as to the nature of [their] rights and obligations in connection with the incident and the SIU investigation" (paras. 79 and 81).

V. Issue

[27] The Officers have appealed to this Court, asserting that the Court of Appeal erred in restricting the entitlement to counsel in s. 7(1) to nothing more than “basic legal advice”. The SIU Director has cross-appealed and takes the opposite view, arguing that, although the Court of Appeal was correct in holding that officers are not entitled to the assistance of counsel in the preparation of their notes, it erred in concluding that police officers are entitled to “basic legal advice” prior to completing their notes. The Families and the OPP Commissioner are content with the decision of the Court of Appeal and defend its correctness.

[28] The primary issue on appeal is whether s. 7(1) of the regulation entitles officers involved in incidents triggering SIU investigations to speak with counsel before completing their notes. Given my conclusion that the answer to this issue is no, I need not go on to consider the nature or extent of any such entitlement.

VI. Analysis

A. *The Source of the Disputed Right to Counsel*

[29] At the outset, it is important to be clear about the focus of our inquiry. This case concerns the scope of an entitlement to counsel that flows from a regulatory provision. We are not here concerned with the right to counsel that exists under s. 10(b) of the *Canadian Charter of Rights and Freedoms*. No party has sought to

determine whether witness or subject officers are “detained” within the meaning of s. 10(b) during SIU investigations. Two of the interveners before this Court argued that the regulation triggers an officer’s right to counsel under s. 10(b) of the *Charter*: see factums of the Canadian Civil Liberties Association and the Canadian Police Association. The SIU Director brought a motion to strike out the paragraphs of the interveners’ factums that raised this issue on the grounds that it had not been raised by any of the parties to this appeal, and the interveners were precluded from raising new issues on their own accord. I agree with the SIU Director that the s. 10(b) issues are not properly before this Court, and would therefore allow the motion.

[30] Nor has any party questioned whether the right to silence or the common law confessions rule prevents an officer’s notes from being used against that officer in a subsequent criminal prosecution. Accordingly, I refrain from expressing any opinion on those issues. Finally, this case does not concern the liberty citizens generally enjoy at common law to consult with counsel as and when they see fit. The Officers argue that, no matter how s. 7(1) is interpreted, they are free at common law to consult with counsel in the preparation of their notes.

[31] With respect, I cannot agree. We are not here dealing with police officers in their capacity as ordinary citizens. We are dealing with them in their professional capacity as police officers who are the subject of an SIU investigation because they have been involved in an incident that has resulted in serious injury or death. In these circumstances, the point of departure is not the common law liberty to consult with

counsel. Rather, we must begin with the regulation which governs these situations and which comprehensively sets out their rights and duties, including their entitlement to counsel.

[32] This starting point requires that an officer's entitlement to counsel at the note-making stage be determined purposively, through the lens of the legislative scheme, thus ensuring the entitlement will be in harmony with the scheme and its overarching purpose. The first question, therefore, is whether s. 7(1) of the regulation, interpreted purposively, entitles officers to consult with counsel at the note-making stage. If such an entitlement is inconsistent with the regulation, then officers involved in SIU investigations are precluded from such consultations and we need not reach the question of what residual liberty officers may retain at common law. In short, so long as police officers choose to wear the badge, they must comply with their duties and responsibilities under the regulation, even if this means at times having to forego liberties they would otherwise enjoy as ordinary citizens.

B. The Proper Approach to Statutory Interpretation

[33] Answering the question posed by this appeal requires interpreting s. 7(1) of the regulation. The words of the provision must be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the regulation, its objective, and the intention of the legislature. Critically, the provisions of the regulation must be read in light of the purpose of the enabling legislation — the Act. That purpose “transcends and governs” the regulation (*Bristol-Myers Squibb Co. v.*

Canada (Attorney General), 2005 SCC 26, [2005] 1 S.C.R. 533, at para. 38). An interpretation of s. 7(1) that leads to conflict with another provision of the regulation, or that runs contrary to the purpose of the legislative scheme, must be avoided.

C. *The Origin and Purpose of the Special Investigations Unit*

[34] Before turning to the interpretation of s. 7(1) of the regulation, it is necessary to describe the origin and purpose of the legislative scheme. Doing so provides the context for the analysis that follows.

(1) The Creation of the Special Investigations Unit

[35] Before the SIU was formed, incidents of serious injuries or deaths involving police officers were investigated internally by the police (A. Marin, *Oversight Unseen: Investigation into the Special Investigations Unit's operational effectiveness and credibility* (2008), at para. 23). This changed in 1990 with the enactment of the Act, which created the SIU.

[36] The creation of the SIU followed on the heels of a report released in 1989 by the Task Force on Race Relations and Policing (*Report of the Race Relations and Policing Task Force* (1989)). The Task Force was commissioned by the provincial government after two black Ontarians were fatally shot by the police in 1988. Its report contained a host of recommendations, one of which called for the creation of an “investigative team” comprised partially of civilians “to investigate police

shootings” in the province (p. 150). The Task Force recommended civilian participation in investigations of the police because, in its view, the practice of “police investigating the police” could not “satisfy the public demand for impartiality” and fostered “a serious deterioration in the public confidence” (p. 147).

[37] The Solicitor General, during legislative debate on the Act, confirmed that the creation of the SIU was a direct response to the recommendation of the Task Force. He stated that the government had listened to the concerns raised by the Task Force and that the Act “addresses the concern, heard by the general public, of police investigating police” (Legislative Assembly of Ontario, *Official Report of Debates (Hansard)*, 2nd Sess., 34th Parl., May 17, 1990, at p. 1318).

(2) The Creation of the Regulation

[38] The SIU operated without a regulation governing the conduct of its investigations until 1998 when O. Reg. 673/98, the predecessor to the regulation at issue in this appeal, was adopted following another government report. In 1997, the Honourable G. W. Adams was appointed by the government to consult with community and police organizations and to make consensus-based recommendations for improving the relationship between the SIU and the police.

[39] Mr. Adams released his report in 1998 (*Consultation Report Concerning Police Cooperation with the Special Investigations Unit* (1998) (“Adams 1998”). In his report, Mr. Adams recognized that SIU investigations had to be carried out in a

“transparent manner” and that “any deviation from what is understood to be standard investigation practices undermines public confidence” (p. 4). The report contained 25 recommendations that were intended to provide the standard investigatory practices necessary to ensure public confidence in these investigations. Chief among them was the creation of a comprehensive regulation to govern SIU investigations.

[40] The various provisions of O. Reg. 673/98 — and certainly the key ones — tracked Mr. Adams’ recommendations. Indeed, Mr. Adams can fairly be described as the father of the SIU’s governing regulation. All of the following provisions of O. Reg. 673/98 can be traced back to his recommendations:

- section 1 of the regulation distinguished between subject and witness officers (recommendation 9);
- section 3 required the police to immediately notify the SIU of an incident triggering its jurisdiction (recommendation 4);
- section 4 required the police to secure the scene of the incident until the SIU’s arrival (recommendation 6);
- section 5 provided that the SIU was to be the lead investigator (recommendation 7);
- section 6 required witness and subject officers to be segregated until the completion of their SIU interviews (recommendation 8);
- section 7 provided an entitlement to consult with counsel (recommendation 11);

- section 8 required witness officers to submit to SIU interviews forthwith (recommendation 12);
- section 9 required officers to complete their notes on the incident in accordance with their duty (recommendation 14);
- section 11 required chiefs of police to also conduct an investigation into the incident (recommendation 15); and
- sections 12 and 13 regulated public statements by the police and the SIU (recommendation 17).

[41] O. Reg. 673/98 was never amended and remained in force until 2010. In 2010, it was revoked and O. Reg. 267/10, the regulation at issue in this case, came into force. Little of O. Reg. 673/98, however, was modified as a result of this change.¹ The s. 7(1) entitlement to counsel and the s. 9 duty to make notes, which are at the centre of this appeal, were worded identically in both regulations.

[42] Since 2010, ss. 7 and 9 of the regulation were amended in O. Reg. 283/11, while this case was pending in the Court of Appeal, following a brief report by the Honourable P. J. LeSage (*Report regarding SIU Issues* (2011)). Mr. LeSage had been asked to “review some issues that [had] arisen over the last few years” in SIU investigations (p. 1).

¹ The new regulation added two subsections to s. 1, clarified s. 8(2), expanded on the s. 12 prohibition on police disclosure of information relating to SIU investigations, added translations to the definitions section, and added marginal notes. Aside from these changes, the regulation’s wording was identical to O. Reg. 673/98.

[43] In his report, Mr. LeSage recommended four amendments to the regulation, three of which were implemented in 2011: that officers involved in the incident be forbidden from communicating *directly or indirectly* with other officers involved in the incident during SIU investigations (p. 2; s. 6(2)); that witness officers not be represented by the same counsel as subject officers (p. 2; s. 7(3)); and that notes be completed by the end of an officer's tour of duty, except where excused by the chief of police (p. 2; s. 9(5)).² Mr. LeSage's report was silent on the issue of police officers consulting with counsel before making their notes.

(3) Conclusion on the Purpose of the Special Investigations Unit

[44] In establishing the SIU, the legislature intended to create an independent and transparent investigative body for the purpose of maintaining public confidence in the police and the justice system as a whole. This was the rationale for the Task Force's recommendation, and it was explicitly adopted by the government of the day when the Act was enacted. The regulation was created to facilitate this purpose. It provided a regulatory framework designed to ensure that the SIU could conduct its investigations in an independent and transparent fashion.

D. *Interpreting the Section 7(1) Entitlement to Counsel*

² Mr. LeSage's report did not provide any explanation for these recommendations. His fourth recommendation is unrelated to the issue at hand.

[45] As indicated, this appeal turns on the proper interpretation of s. 7(1) of the regulation, which reads in relevant part:

. . . 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.

[46] The Officers urge an expansive interpretation of s. 7(1). They argue that s. 7(1) provides two distinct entitlements to counsel. First, officers are entitled to “consult” with counsel. Second, they are entitled to have counsel “present” during their interview with the SIU. The right to “consult” with counsel is said to be a freestanding right that includes the right to consult with counsel in the preparation of notes.

[47] With respect, I cannot accept this submission. Read in its entire context, s. 7(1) does not provide a freestanding entitlement to consult with counsel at the note-making stage. I reach this conclusion for three reasons. First, consultation with counsel at the note-making stage is antithetical to the dominant purpose of the legislative scheme because it risks eroding the public confidence that the SIU process was meant to foster. Second, the legislative history demonstrates that s. 7(1) was never intended to create a freestanding entitlement to consult with counsel that extended to the note-making stage. Third, consulting with counsel at the note-making stage impinges on the ability of police officers to prepare accurate, detailed and comprehensive notes in accordance with their duty under s. 9 of the regulation.

(1) The Purpose of the Legislative Scheme

[48] The SIU was born out of a crisis in public confidence. Whether or not police investigations conducted into fatal police shootings in the 1980s were actually biased, the public did not perceive them to be impartial (see, e.g., Task Force Report). This history teaches us that appearances matter. Indeed, it is an oft-repeated but jealously guarded precept of our legal system that “justice should not only be done, but should manifestly and undoubtedly be seen to be done” (*R. v. Sussex Justices, Ex parte McCarthy*, [1924] 1 K.B. 256, at p. 259, *per* Lord Hewart C.J.). And that is especially so in this context, where the community’s confidence in the police hangs in the balance.

[49] The legislative scheme is designed to foster public confidence by specifically combating the problem of appearances that flowed from the old system of “police investigating police”. The problem under that system, of course, was that it created the unavoidable *appearance* that officers were “protecting their own” at the expense of impartial investigations. The legislature deemed this appearance unacceptable and created the SIU to guard against it by placing investigations of the police in the hands of civilians.

[50] The difficulty with allowing officers to fully consult with counsel at the note-making stage is that it creates an “appearances problem” similar to the one that the SIU was created to overcome. A reasonable member of the public would naturally question whether counsel’s assistance at the note-making stage is sought by

officers to help them fulfill their duties as police officers, or if it is instead sought, in their self-interest, to protect themselves and their colleagues from the potential liability of an adverse SIU investigation. Given that solicitor-client privilege attaches to these discussions, the public's unease is unanswerable.

[51] In this regard, the facts of the Schaeffer investigation are especially troubling. Both officers completed their notes only after their lawyer had reviewed their draft notes. Neither officer ever provided their original draft notes, which, of course, were shielded behind solicitor-client privilege, to the SIU. The public has no way of knowing what counsel's role was. The SIU Director, however, concluded that he had no information from which he could base his conclusion as to what happened in the death of Mr. Schaeffer as a result of counsel's involvement. Surely this is not the stuff out of which public confidence is built.

[52] It seems fitting to recall here that Sir Robert Peel, the father of modern policing, is credited with having said that "the police are the public and . . . the public are the police" (C. Reith, *The Blind Eye of History: a study of the origins of the present police era* (1975), at p. 163). The wisdom of this statement lies in its recognition that public trust in the police is, and always must be, of paramount concern. This concern requires that officers prepare their notes without the assistance of counsel. Consultations with counsel during the note-making stage are antithetical to the very purpose of the legislative scheme — and for that reason, they must be rejected.

(2) The Intended Scope of the Section 7(1) Entitlement to Counsel

[53] My conclusion that s. 7(1) has no application at the note-making stage is supported by the regulation's legislative history. When this history is considered, it is apparent that the provision was never meant to provide an entitlement to counsel at the note-making stage.

[54] Section 7(1) of the regulation flows from Mr. Adam's 1998 report. As such, the report provides cogent evidence of the intended scope of the s. 7(1) entitlement to consult counsel — an observation with which the Officers agree. Indeed, in oral argument, they stressed the fact that Mr. Adams had engaged in “literally . . . hundreds of consultations” with interested parties, including “virtually every police force”, and that the Attorney General, after reviewing the report, had “created the legislation based upon the framework suggested [by Mr. Adams] as a result of that consensus” (transcript, at pp. 6-7). Recommendation 11 of the Adams 1998 report dealt with the entitlement to counsel and read as follows:

The regulation should stipulate that an officer is entitled to representation by legal counsel and/or a police association, provided the availability of such advisors will not lead to an unwarranted delay. [p. 91]

[55] The discussion surrounding this recommendation centred on an officer's entitlement to have counsel at the SIU interview. As the report notes:

There was . . . broad agreement that an officer was entitled to legal and police association representation at SIU interviews, provided such representation did not result in unwarranted delay. [p. 90]

In contrast, there is no discussion of a role for counsel at the note-making stage, let alone a recommendation that officers should be entitled to consult with counsel when making their notes.

[56] In 2003, Mr. Adams released a second report, after having been appointed by the Attorney General to evaluate the implementation of his 1998 recommendations (*Review Report on the Special Investigations Unit Reforms* (2003) (“Adams 2003”). Mr. Adams commented specifically on the implementation of the recommendation that officers be entitled to representation by counsel:

This recommendation has been implemented in s. 7 of the Regulation. Every police officer is entitled to have legal counsel or an association representative present during his or her interview. The SIU Director has the power to waive this right, if waiting for representation would cause an unreasonable delay. [Emphasis added; p. 51.]

[57] Again, no role for counsel at the note-making stage was mentioned. Indeed, later in the report, Mr. Adams observed that some officers had been receiving legal advice “to refrain from completing their notes until they [had] consulted with their lawyers”. He described this practice as “very problematic” (p. 55).

[58] The interpretation of s. 7(1) proposed by the Officers fails to take account of this legislative history. As they themselves note, Mr. Adams’ 1998 report resulted

from a comprehensive process of consultation and analysis. Indeed, it is not an overstatement to say that his 25 recommendations *became* the regulation. Yet, in neither his 1998 report nor his 2003 report does Mr. Adams make mention of an entitlement to counsel at the note-making stage. I would have thought that if s. 7(1) was intended to permit such a contentious practice, it would have generated considerable discussion in Mr. Adams' comprehensive reports. The fact that no mention is made of it supports my opinion that s. 7(1) was never meant to provide an entitlement to counsel at the note-making stage.

[59] In so concluding, I have not ignored the Officers' argument regarding governmental inaction. In particular, they point out that, in the context of SIU investigations, the government has long been aware of the practice of officers consulting with counsel prior to preparing their notes. Mr. Adams observed the problem in his 2003 report, and Mr. LeSage certainly would have been aware of it when he made his recommendations in 2011, after this case had been decided by the Superior Court. Yet the government did nothing to curtail the practice, despite making other changes to the regulatory framework in 2010 and 2011. The Officers argue that it can be inferred from this that the government intended and still intends to permit this practice under the regulation (A.F., at para. 64).

[60] With respect, I do not agree. In this case, governmental inaction provides no meaningful insight into the intended scope of the s. 7(1) entitlement to counsel. It is only if we start from the position that s. 7(1) allows consultation with counsel at the

note-making stage that we can infer from governmental inaction that the government intended — and is content with — the current practice. If, however, we assume that s. 7(1) does not and never did permit consultation with counsel at the note-making stage, one can just as readily infer that the government has taken no action because none was needed. The government is not required to amend regulations to forbid practices that are already inconsistent with the legislative scheme. Viewed in this way, the Officers’ argument does not tip the scale one way or another.

(3) Avoiding a Conflict With The Duty to Make Notes

[61] My conclusion that s. 7(1) was never meant to provide an entitlement to consult with counsel at the note-making stage is reinforced when the duty to make notes, as recognized in s. 9, is considered. Consultation with counsel during the note-making process impinges on the ability of police officers to comply with that duty.

(a) *The Duty to Make Notes Generally*

[62] Section 9(1) and (3) of the regulation require witness and subject officers to “complete in full the notes on the incident in accordance with [their] duty”. The regulation does not define the duty to make notes. Nor does the Act, which provides a non-exhaustive list of the “duties of a police officer” in s. 42, including, for example, preserving the peace, laying charges and participating in prosecutions, and performing the lawful duties that the chief of police assigns.

[63] Although it is common ground among the parties that the duties of a police officer include a duty to make notes on the events that transpire during the officer's tour of duty, I recognize that neither side points to a definitive statement of this Court holding as much.³

[64] However, reports by experienced jurists have concluded that such a duty exists. For example, in their 1993 report to the Attorney General of Ontario on charge screening, disclosure, and resolution discussions, a committee made up of experienced counsel and police officers and led by the Honourable G. A. Martin, observed that:

[T]he duty to make careful notes pertaining to an investigation is an important part of the investigator's broader duty to ensure that those who commit crimes are held accountable for them.

...

[I]nadequate note-taking, while it can hamper the conduct of the defence, also risks hampering an investigation and/or a prosecution. In short, inadequate note-taking does a disservice to both an accused and the community, [which] is entitled to expect that innocent people will be acquitted and guilty people properly convicted. [Emphasis added.]

(Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions (1993) ("Martin Committee"), at pp. 151 and 153)

³ At least one lower court, however, has given the matter thoughtful consideration and arrived at that conclusion; see *R. v. Bailey*, 2005 ABPC 61, 49 Alta. L.R. (4th) 128, at para. 42. Other courts have simply stated that such a duty exists, without significant analysis; see, e.g., *R. v. Zack*, [1999] O.J. No. 5747 (QL) (Ct. J.), at para. 6; *R. v. Stewart*, 2012 ONCJ 298 (CanLII), at para. 28. I note that this Court also observed recently that "notes of how a search is conducted should . . . be kept, absent unusual or exigent circumstances" (*R. v. Vu*, 2013 SCC 60, at para. 70).

[65] In another instance, the Honourable R. E. Salhany considered the significance of police notes in the course of a public inquiry into a death caused by an off-duty officer. He explained the importance of notes in this way:

[Note-making] is not a burdensome task that police officers must reluctantly undertake because they were taught to do so at their police college. It is an integral part of a successful investigation and prosecution of an accused. It is as important as obtaining an incriminating statement, discovering incriminating exhibits or locating helpful witnesses. The preparation of accurate, detailed and comprehensive notes as soon as possible after an event has been investigated is the duty and responsibility of a competent investigator. [Emphasis added.]

(Report of the Taman Inquiry (2008), at p. 133)

[66] These conclusions, in my view, stand on firm ground. The importance of police notes to the criminal justice system is obvious. As Mr. Martin observed of properly-made notes:

The notes of an investigator are often the most immediate source of the evidence relevant to the commission of a crime. The notes may be closest to what the witness actually saw or experienced. As the earliest record created, they may be the most accurate. [p. 152]

[67] Against that background, I have little difficulty concluding that police officers do have a duty to prepare accurate, detailed, and comprehensive notes as soon as practicable after an investigation. Drawing on the remarks of Mr. Martin, such a duty to prepare notes is, at a minimum, implicit in an officer's duty to assist in

the laying of charges and in prosecutions — a duty that is explicitly recognized in s. 42(1)(e) of the Act.

[68] None of this, of course, comes as news to police officers. In this case, for example, OPP policy confirms the duty to make notes by requiring constables to record “concise, comprehensive particulars of each occurrence” during their tour of duty and to “make all original investigative notes . . . during an investigation or as soon as thereafter practicable” (OPP Order 2.50, Member Note Taking, SIU Record, at pp. 48-52). More generally, police manuals have long emphasized the importance of accurate, detailed, and comprehensive notes; see, e.g., R. E. Salhany, *The Police Manual of Arrest, Seizure & Interrogation* (7th ed. 1997), at pp. 270-78.

(b) *Consultation with Counsel and the Duty to Make Notes*

[69] The parties agree on the existence of the duty to make notes. Their dispute centers on whether consultation with counsel is consistent with that duty. Specifically, the issue is whether talking to a lawyer before preparing one’s notes impinges on the ability of police officers to prepare accurate, detailed, and comprehensive notes in accordance with their duty under s. 9 of the regulation.

[70] The SIU Director argues that consulting with counsel risks undermining the independence and timeliness of officer notes. The Officers’ response is that the regulation provides a complete answer to concerns about timeliness, and that consulting with counsel at the note-making stage does not interfere with the

independence of notes because counsel can be trusted to act with integrity and not impinge on the note-making process.

[71] With respect, I do not find the SIU Director's concerns decisive. The regulation has been amended to ensure that notes are completed in a timely fashion (see s. 9(5)). And as far as independence is concerned, although I acknowledge the possibility of some risk, I am not prepared to find that consultation with counsel would, in fact, undermine the *independence* of a witness or subject officer's account. Such a conclusion is inconsistent with the position of trust counsel rightly enjoy in our justice system.

[72] But that does not end the matter. In my view, the expansive right of consultation urged by the Officers remains problematic. To be precise, it creates a real risk that *the focus* of an officer's notes will shift away from his or her *public duty* under s. 9, *i.e.* making accurate, detailed, and comprehensive notes, and move toward his or her *private interest*, *i.e.* justifying what has taken place — the net effect being a failure to comply with the requirements of the s. 9 duty.

[73] The Officers, it must be recalled, contend that s. 7(1) creates a broad right to counsel. They argue that it provides "full consultation with counsel before notes are completed and the interview process is even engaged" (A.F., at para. 56 (emphasis added)). They further contend that the advice provided during the "full consultation" would cause the officer to "fully appreciate the importance of providing a comprehensive account which address[es] all factual and legal issues that would be

of interest to the SIU, to the officer's police service and to the public" (A.F., at para. 65 (emphasis added)) and lead to "enhanced" notes (transcript, at pp. 26-27 and 54).

[74] Manifestly, the "full consultation" envisioned by the Officers — geared towards creating a "comprehensive account" that addresses *all* of the "legal issues" of interest to the SIU — means that the private interests of the officer will be discussed. That is, the conversation will address the potential liability facing the officer and his colleagues and the possible justifications for what has occurred. The sort of advice one might expect to hear during this wide-ranging conversation is illustrated by an article in a police association newsletter written to police officers by a lawyer with significant experience in such cases:

Responding to SIU calls is not so much about what happened, but why it happened. It matters less that the suspect was punched, kicked or even shot than it does why. Note-making and report-drafting in the face of an SIU investigation are mostly about setting forth the reasons why you responded as you did.

The obvious needs to be said and said again: "He pointed the firearm at me and, fearing for my life and the life and safety of my fellow officers and members of the public, I fired at him several times."

You will note that I said several times. Most people who discharge their firearm at an armed suspect are unsure how many times they fired, and equally unsure whether or not to admit it. In a world of admit and explain, it is crucial that you allow yourself some margin of error in your account so that later the SIU does not begin to doubt your credibility/reliability. [Emphasis added.]

(G. Clewley, "Officers and the SIU" (2009), 4 *The Back-Up* 25)

[75] To be clear, there is nothing sinister about such discussions. Advising clients of their public duties *and their private interests* is the responsibility of competent counsel. As Sharpe J.A. observed, correctly in my view, “[a] lawyer would only be doing his or her job in providing the police officer with information as to the ingredients of an offence or possible legal defence” (para. 73).

[76] But therein lies the risk to the fulfilment of the officer’s duty. The purpose of notes is not to explain or justify the facts, but simply to set them out. Indeed, until human ingenuity develops a technology that can record sights, sounds, smells, and touch, an officer’s notes are effectively the next best thing. In this regard, I note that the OPP Basic Constable Workbook instructs officers that:

Your notes are made from independent recollection and are your link to the past. They are there to assist you to gather the facts and details and to properly record events, observations and performances experienced during general duty functions and investigations [I]t is your responsibility to maintain an up-to-date record of what you have done, seen, heard, smelled, or touched during your tour of duty.

(Ontario Police College, *Basic Constable Training Program — Student Workbook* (2008), at p. 2) (SIU Record, at p. 7))

[77] Without imputing any ill will on the part of officers who seek legal advice or the lawyers who provide it, it would only be natural for officers to listen to the good advice of counsel, and it would not be surprising for the notes they prepare *after* this consultation to reflect that advice. But this creates a real risk that the focus of an

officer's notes will shift — perhaps overtly, perhaps more subtly — away from the rather mechanical recantation of *what* occurred (which is required by their duty) toward a more sophisticated explanation for *why* the incident occurred (which detracts from that duty).

[78] This risk is not merely theoretical. The notes of Acting Sgt. Pullbrook serve as an example of this subtle shift toward *justifying* conduct. The record contains his notes from the day of the shooting (prepared with the assistance of counsel; A.R., vol. III, at pp. 537-64) and his notes from the two previous days (prepared without assistance; A.R. vol. III, at pp. 532-37). The notes made before the day of the shooting recite what the officer saw and did, and make repeated references to the time at which the events occurred. In other words, they reflect in form and substance the type of notes that police officers are taught to make from their very first days of basic-training.⁴

[79] By contrast, the notes from the day of the shooting contain no time references between 8 a.m. and 2 p.m. — spanning the time between when Acting Sgt. Pullbrook began his shift and when paramedics arrived on the peninsula after the shooting. The notes also display a particular concern with justifying why the officers first took physical control of Mr. Schaeffer — before he became resistant and brandished a knife — and invoke legal terminology to that end.

⁴ Apart from SIU investigations, there is no evidence in the record to suggest that police officers seek the advice of counsel before preparing their notes in other contexts. This is unsurprising. Officers know how to prepare their notes in accordance with their duty.

[80] In short, Acting Sgt. Pullbrook's notes read like a prepared statement designed, at least in part, to justify his and his partner's conduct, unlike a set of police notes that simply record the events in a straightforward fashion. And while I would not suggest there is anything inaccurate or dishonest in the notes as a result of counsel's participation, an officer's notes are not meant to provide a "lawyer-enhanced" justification for what has occurred. They are simply meant to record an event, so that others — like the SIU Director — can rely on them to determine *what* happened. In this case, that is what the SIU Director was unable to do.

(4) Conclusion on the Interpretation of Section 7(1)

[81] As I noted at the outset, the ambit of s. 7(1) must be interpreted harmoniously with the regulatory scheme. Here, we are asked to pick between two possible interpretations of s. 7(1) of the regulation — one that reads the provision as allowing consultation with counsel at the note-making stage, and one that does not. As I have just explained, interpreting s. 7(1) as allowing this consultation is inconsistent with the purpose of the legislative scheme, runs contrary to the legislative intent behind the provision, and creates a real risk that officers will fail to meet their obligation under s. 9 of the regulation to make notes in accordance with their duty. Reading s. 7(1) as providing a more limited entitlement to counsel that does not apply at the note-making stage, however, avoids all three of these difficulties. Under this interpretation, the provision is in harmony with the purpose of the legislative scheme, the intent behind the provision, and the s. 9 duty to make

notes. This is precisely what the modern approach to statutory interpretation demands. As a result, this interpretation must be accepted.

E. The Cross-Appeal

[82] The Court of Appeal concluded that, while s. 7(1) of the regulation does not entitle officers to the assistance of counsel in the preparation of their notes, it does entitle them to “basic legal advice” about the nature of their rights and obligations under the Act and the regulation before they complete their notes. That basic advice could include informing officers that they are required to complete their notes prior to the end of their tour of duty unless excused by the police chief, and that their notes will be submitted to the Chief of Police (para. 81).

[83] With respect, I disagree with this aspect of the Court of Appeal’s reasons. In my view, the legislative history shows that s. 7(1) was not meant to create an entitlement to counsel before an officer has completed his or her notes. Without in any way impugning the integrity of counsel or police officers, even the perfunctory consultation contemplated by the Court of Appeal is liable to cause an “appearances problem” similar to the one I have already identified. Because the initial consultation is privileged, the public will have no way of knowing what was discussed. As a result, the same threat to public confidence exists, even if on a somewhat diminished scale.

[84] A loss of public trust would seem a high price to pay for an initial consultation that, in my view, achieves no tangible benefit. Counsel cannot discuss the facts surrounding the incident in any meaningful sense, if at all; nor can there be any discussion about the legal issues that flow from the facts. Under the Court of Appeal's model, counsel is limited to providing officers with basic information about their rights and obligations under the legislative scheme. This information can easily be conveyed in ways that do not generate any appearance problem. It can and should be included as part of every officer's training. If there is some need to refresh officers as to their responsibilities after an event triggering an SIU investigation, this refresher can be provided by a ranking officer or a generic card kept in an officer's notebook.

[85] In the end, the basic legal advice contemplated by the Court of Appeal is essentially meaningless — and anything that might be meaningful sends counsel into a minefield. In this regard, I agree with the Officers that the court's proposal is unhelpful:

The officer is unable to ascertain what questions can properly be addressed to counsel and counsel is required to navigate through an obstacle course and provide little, if any, practical assistance to his client. The permissible advice is, in effect, no advice at all. The Court of Appeal for Ontario has relegated the role of counsel to a recitation of the most basic legislative requirements rather than providing meaningful legal assistance. [Emphasis added; A.F., at para. 72.]

[86] In reaching the conclusion that officers are not permitted to consult with counsel before they have completed their notes, I acknowledge the fact that officers

who have been involved in a traumatic incident may well feel the need to speak to someone before they complete their notes. While the regulation prevents such officers from consulting with counsel, it does not prevent them from speaking to doctors, mental health professionals, or uninvolved senior police officers before they write their notes. Moreover, the regulation empowers the chief of police to allow such officers more time to complete their notes (see s. 9(5)).

[87] I should also be clear about the scope of my conclusion. Once officers have completed their notes and filed them with the chief of police, they are free to consult with counsel. This would include consultation both before and after the interview with the SIU. Consulting with counsel at that stage is consistent with the plain wording of s. 7(1) of the regulation and does not derogate from an officer's duty or from the purpose of the legislative scheme.

VII. Disposition

[88] For these reasons, I agree with the Court of Appeal that police officers, under the Act and the regulation, are not permitted to have the assistance of counsel in the preparation of their notes.⁵ However, in my respectful view, the Court of

⁵ It must be noted that s. 7(1) provides an entitlement to consult with both counsel and "police association" representatives. The arguments before this Court centred on the entitlement to counsel. Virtually no mention was made of the role of police association representatives, and the order of the Court of Appeal does not address this issue. In the absence of any record or arguments with respect to the representatives, I would thus confine my conclusion to the entitlement to counsel. It is clear, however, that, to the extent that the role of police association representatives approximates that of counsel, my conclusion would apply to them with equal force.

Appeal erred in finding that police officers are entitled to receive basic legal advice as to the nature of their rights and duties prior to completing their notes.

[89] I would therefore dismiss the appeal and allow the cross-appeal and grant a declaration pursuant to Rule 14.05(3) of the *Rules of Civil Procedure* in the following terms:

The *Police Services Act*, R.S.O. 1990, c. P.15, s. 113(9), and the regulation regarding *Conduct and Duties of Police Officers Respecting Investigations by the Special Investigations Unit*, O. Reg. 267/10, prohibit subject and witness officers from consulting with counsel until the officers have completed their police notes and filed them with the chief of police.

[90] The motion to strike brought by the SIU Director is granted. I would award costs to the Families on the appeal and cross-appeal, but would make no other order as to costs.

The reasons of LeBel, Fish and Cromwell JJ. were delivered by

LEBEL AND CROMWELL JJ. —

[91] We have had the benefit of reading Justice Moldaver's reasons. We do not agree that the wording of the legislation alone fully resolves the issues in this case. However, we agree with our colleague that it is inconsistent with a police

officer's duty to complete his or her notes to seek legal advice which would influence the contents of those notes. On that basis, we agree that the appeal should be dismissed. However, we disagree with Justice Moldaver's proposed disposition of the cross-appeal. As we see it, it is not inconsistent with the officer's duty or with the legislation to have access to legal advice about the limited matters contemplated by the Court of Appeal. We would therefore dismiss the cross-appeal.

[92] We rely on the facts as set out by Justice Moldaver in his reasons.

I. Section 7(1) Does Not Restrict the Liberty to Consult with Counsel

[93] Justice Moldaver is of the view that s. 7(1) of the *Conduct and Duties of Police Officers Respecting Investigations by the Special Investigations Unit* regulation, O. Reg. 267/10, is a comprehensive code regarding a police officer's entitlement to counsel and that "the scope of [the] entitlement to counsel . . . flows from a regulatory provision" (para. 29).

[94] Respectfully, we do not agree. The starting point for the analysis and for interpreting the legislation is that a police officer, in common with everyone else, is free to get legal advice provided that doing so is not prohibited by law or contrary to the police officer's other responsibilities and duties. Viewed in this light and interpreted in its full context, the regulation cannot be viewed as a comprehensive code and therefore does not mandate the result proposed by Justice Moldaver. Everyone is at liberty to consult counsel whenever they wish unless doing so is

precluded by lawful authority or inconsistent with their duty. Section 7(1) is simply a confirmation of the entitlement to counsel of police officers at the interview stage of a Special Investigations Unit (“SIU”) investigation.

[95] The regulation was designed to clarify the rights of officers, their duties, and the processes of the SIU. It is not a comprehensive code that determines the scope of the right to counsel during an SIU investigation or excludes any other consultation with counsel or police association representative. When freedoms are restricted under the regulation, the restrictions are expressed clearly, either by the regulation’s express words or by reason of inconsistency with its purpose.

[96] The enactment of the regulation was necessary in light of uncertainty with respect to the rights and duties of police officers and processes of the SIU following its inception in 1990 (see *Consultation Report Concerning Police Cooperation with the Special Investigations Unit* (1998) (“Adams Report 1998”), at pp. 13 and 22-24). As noted by Justice Moldaver, the SIU operated for years in the absence of the regulation intended to guide the conduct of police officers *vis-à-vis* SIU investigations. Prior to the enactment of the regulation, however, police officers did not operate in a lawless vacuum. Although the regulation created some legal distinctions that did not exist beforehand, the rights and duties of police officers were merely reiterated more precisely and clarified in the regulation. The *Police Services Act*, R.S.O. 1990, c. P.15, (as well as the common law) already provided for the rights

and duties of police officers. This is confirmed in the 1998 Adams Report. In this report, the Honourable George Adams stated:

With respect to the cooperation police officers are expected to provide to an SIU investigation, the Act says only:

113(9) Members of police forces shall cooperate fully with the members of the unit in the conduct of investigations.

There are no other references in the statute or in the regulations to the conduct of SIU investigations. However, the express duties of police officers in the Act and the regulations are cast in sufficiently general terms so that a failure to cooperate with the SIU is a breach of a duty. Nevertheless, the generality of s. 113(9) and its potential relationship with the *Canadian Charter of Rights and Freedoms* have proven fertile ground for dispute and confusion over what precisely is expected of police officers and chiefs of police by this subsection. [Emphasis added; footnote omitted; p. 13.]

[97] Such a clarification of existing rights and duties, however, cannot be an exhaustive code. The provisions of the regulation on their own do not have the requisite comprehensiveness to qualify as complete codes. To characterize the provisions of the regulation as a “complete code” undermines the importance of the rights, duties and liberties of police officers and disregards the complexity of the legal environment that grounds and defines them. For example, s. 9 of the regulation provides for officers’ duty to complete notes, but leaves the whole content of this duty left to be spelled out elsewhere. To view s. 9 as an exhaustive framework of the duty to write notes would be to leave officers with insufficient guidance. Surely this provision on its own cannot be interpreted as a comprehensive code or a part of a complete code.

[98] Section 7(1) is similarly bare. It is inconsistent to say on one hand that s. 7(1) of the regulation comprehensively sets out an officer's entitlement to counsel, yet on the other hand leave open the question as to whether a police officer who has completed his or her notes is entitled to consult counsel before (or after) his or her interview and the appropriate extent of such consultation; the reasons of our colleague do not answer this question. Leaving such a basic question unanswered in s. 7(1) conflicts with the very nature of a comprehensive, exhaustive framework. Such basic questions must in fact be answered by examining the rights and duties of police officers in light of the common law and the overarching purpose of the Act; examining s. 7(1) on its own does not suffice.

II. The Appropriate Interpretation of Section 7(1) of the Regulation and a Police Officer's Freedom to Consult Counsel

[99] Given that our approach is to emphasize a starting point of liberty and to acknowledge that s. 7(1) of the regulation on its own is not a comprehensive code, our interpretation of the scope of s. 7(1) differs from that of Justice Moldaver. Under the modern approach to legal interpretation, the words of s. 7(1) are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament (R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008); *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at p. 41.)

[100] Section 7(1) reads as follows:

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.

[101] The plain wording of s. 7(1) is declaratory and affirmative in nature rather than prohibitive. Further, the provision is conjunctive — it grants the right to consult with legal counsel *and* the right to have legal counsel present during an SIU interview. This wording does not oust the rights that police officers would otherwise enjoy as ordinary citizens. This wording also confirms that the regulation's purpose is to clarify, and not to expand or remove, rights and duties.

[102] Another principle of modern legal interpretation is that provisions of a statute or a regulation must be read in context and in harmony with other provisions of the statute or regulation. Thus, we acknowledge the importance of the relationship between a police officer's duty to write notes about an incident and his or her entitlement to consult counsel. It is clear that police officers have a duty to make notes in an independent, timely and comprehensive manner. But the question is whether, under a correct interpretation, the existence and execution of this duty necessarily excludes any form of legal consultation prior to the drafting of the notes.

[103] The potential tension between the right to consult and the duty of the officer to write complete and independent notes can be resolved by simply drawing a line to determine how and when the right to consult with counsel should not be exercised. In our view, the reasons of Sharpe J.A. in the Court of Appeal drew the

line at the right place (2011 ONCA 716, 107 O.R. (3d) 721). We agree with him that police officers should not be allowed to consult about the drafting of the notes themselves where such consultation affects the independence of notes. The contents and drafting of the notes should not be discussed with counsel. The drafting should not be directed or reviewed by counsel. The notes must remain the result of a police officer's independent account of the events. However, eliminating any form of consultation before the drafting of the notes is an entirely different matter. Such an overly cautious approach takes no account of the basic freedoms that police officers share with other members of society. Everyone is entitled to seek the advice of a lawyer. This freedom also reflects the importance of the societal role of lawyers in a country governed by the rule of law. Lawyers represent people, communicate legal information and give advice. The execution of these functions contributes to the maintenance of the rule of law. Indeed, these functions are deemed so important that they are often protected by strong privileges of confidentiality that are linked to our basic values and constitutional rights. With this in mind, the freedom to consult with counsel should not be eliminated merely through a narrow reading of the regulation in the absence of clear legislative intent. This narrow interpretation also reflects an unjustified mistrust of lawyers. It cannot be assumed that lawyers will advise their clients to break the law and fail to discharge their duties to the public and to justice itself.

[104] Interpreting s. 7(1) of the regulation purposively requires that we give effect to police officers' freedom to consult counsel and at the same time consider the

importance of the SIU's mandate to enhance public confidence in the police. The content of a police officer's notes cannot vary in accordance with his or her personal legal interests. To that effect, legal counsel must be cognizant of an imperative ethical boundary — they cannot place their clients' interests ahead of their duty to the public and the advice they provide must be confined within this boundary. It cannot be assumed that they will not be faithful to their ethical duties or that they will recommend that police officers disregard their obligations. Lawyers will know that they cannot give advice on the style or content of the notes. They will be mindful of the proper scope of their advice.

III. The Appropriate Scope of Legal Consultation

[105] Sharpe J.A.'s reasons properly define the appropriate scope of legal consultation prior to the drafting of the notes of the police officer. His approach acknowledges that police officers have a duty to write independent and comprehensive notes in a timely manner *and* that brief and basic legal consultation does not necessarily interfere with that duty.

[106] Justice Moldaver suggests:

A reasonable member of the public would naturally question whether counsel's assistance at the note-making stage is sought by officers to help them fulfill their duties as police officers, or if it is instead sought, in their

self-interest, to protect themselves and their colleagues from the potential liability of an adverse SIU investigation. [para. 50]

[107] However, the standard for determining public confidence is a reasonable member of the community who is properly informed about “the philosophy of the legislative provisions, *Charter* values and the actual circumstances of the case” (*R. v. Hall*, 2002 SCC 64, [2002] 3 S.C.R. 309, at para. 41, quoting *R. v. Nguyen* (1997), 119 C.C.C. (3d) 269, at p. 274). If this is the standard, the member of the community would know that an officer’s notes cannot be used against him or her in the course of an investigation by the SIU. This is because of s. 9(3) of the regulation and the treatment the Attorney General affords to subject officers’ notes as involuntary statements that attract both use-immunity and derivative use-immunity. The risk of *self-interest* prevailing over an officer’s public duty is therefore slightly exaggerated. The concern relating to public confidence in the context of police completing their notes impartially relates to an apprehension that an officer may place his or her *colleague’s* interest over his or her public duty. More importantly, to be skeptical of the propriety of legal counsel’s advice in the presence of clear guidelines relating to the content of the advice set out for their benefit is not reasonable. This would undermine the trust we instill in lawyers as officers of the court.

[108] Legal consultation on the specific contents of an officer’s notes runs the risk of compromising an officer’s independent account of the facts. We agree with Sharpe J.A. that appropriate advice given to a police officer is the following:

- he or she is required to complete notes of the incident prior to the end of his or her tour of duty unless excused by the chief of police;
- the lawyer cannot advise the officer what to include in the notes other than that they should provide a full and honest record of the officer's recollection of the incident in the officer's own words;
- the notes are to be submitted to the chief of police;
- if the officer is a subject officer, the chief of police will not pass the notes on to the SIU;
- if the officer is a witness officer, the chief of police will pass the notes on to the SIU;
- the officer will be required to answer questions from the SIU investigators; the officer will be entitled to consult counsel prior to the SIU interview and to have counsel present during the interview.
[para. 81]

These elements outline the steps and procedures of an SIU investigation, and there is no harm in allowing police officers this kind of legal advice. Our colleague suggests that this advice achieves “no tangible benefit” (para. 84). While this brief, informative conversation might not be as meaningful as comprehensive legal advice on the relationship between an officer's notes and potential liability, it might help to remind an officer of his or her duties in the circumstances and put the officer at ease after having experienced a potentially traumatic incident. The utility of having some information about one's rights and obligations under the legislative scheme is clear.

[109] Indeed, our colleague recognizes the natural instinct officers would have to listen to the “good advice of counsel” (para. 77). We are in complete agreement. For this reason, with such limits outlined above, there are no reasonable grounds for

concern regarding an officer's reliance on legal counsel's advice. Further, there are no reasonable grounds for the public to suspect that counsel will not abide by these limits. Lawyers have duties towards both the public and the court. One of these duties is to encourage their clients to comply with the law. According to M. Orkin in *Legal Ethics* (2nd ed. 2011), at p. 16:

It follows that the lawyer should uphold the law; should not advise or assist the client in violating the law; . . . and should help to improve the administration of justice.

. . .

. . . Not only is a lawyer required affirmatively to uphold the law, but is also under a duty not to subvert the law.

This is not novel to our legal tradition. We expect and trust lawyers to act as ethical agents as part of our justice system. As Estey J. stated in *Irvine v. Canada (Restrictive Trade Practices Commission)*, [1987] 1 S.C.R. 181, at p. 211, citing *Halsbury's Laws of England* (4th ed. 1973), vol. 3, at para. 1137, with approval:

A barrister has a duty to his client fearlessly to raise every issue, advance every argument and ask every question, however distasteful, which he properly may and which he thinks will help his client's case, without regard to any unpleasant consequences to himself or any other person. In the interests of the administration of justice, however, a barrister has an overriding duty to the court, to the standards of his profession and to the public. Thus, he must not knowingly mislead the court; this duty prevails over that he owes to his client. [Emphasis added.]

[110] If the ethical duties of lawyers are fulfilled, which we trust them to be, there is no inconsistency with the provision of basic legal advice and the overarching

purpose of public oversight of police. As we said above, legal advice relating to the content of the notes, however, might run the risk of compromising the independence of an officer's recollection of the facts by shifting an officer's focus from what occurred to potential legal consequences under various scenarios. However, the reasons of the Court of Appeal properly addressed the scope of advice to which a police officer is entitled if he or she chooses to seek it in order to safeguard the independence of the drafting of notes. Only liberties that are expressly displaced or inconsistent with the purposes of the Act or a police officer's duties should be restricted. There is no need to completely eliminate a police officer's liberty to consult counsel.

[111] For these reasons, we would dismiss the appeal and the cross-appeal.

Appeal dismissed and cross-appeal allowed, LEBEL, FISH and CROMWELL JJ. dissenting on cross-appeal.

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