

FACTUM OF THE FAMILIES ON THE CROSS-APPEAL

PART I – OVERVIEW AND FACTS

A. Overview

1. The Cross-Appellant Families' ("the Families") primary position is that the main appeal should be dismissed. The Families respectfully submit that the Court of Appeal's decision clearly delineates what is permissible and impermissible with respect to the scope of appropriate advice by counsel. The Families submit that the Court of Appeal's decision unambiguously prohibits counsel and an officer from discussing the incident giving rise to the S.I.U. investigation and restricts the advice that can be provided to an officer's generic rights and obligations pursuant to the *Police Services Act* and *S.I.U. Regulations*. This is the preferred model of communication between counsel and an officer involved in an S.I.U. investigation. For the sake of clarity, the Families will discuss the various approaches to the issue of consultation with counsel as different "models" of access. The Court of Appeal's approach, supported by the Families, is identified in these submissions as "Model 1".

2. With respect to the herein cross-appeal, if this Honourable Court finds that the Court of Appeal's approach (ie. Model 1) is "unworkable", then the Families submit as an alternative model that all communication between counsel and an officer be deferred until the completion of an officer's notes ("Model 2"). Model 2 is advanced because the alternative approach of unlimited access to counsel advanced by the Police Appellants represents the "worst of all worlds" where it will become impossible to have any faith in the notes of police officers who are involved in S.I.U. investigations. Model 2 flows from the "all or nothing" position of the

Appellant Police Officers who reject as unworkable any limits on the participation of counsel in the preparation of police notes.

3. Finally, and in the further alternative, a third Model of access to counsel is proposed (“Model 3”) in the event that this Honourable Court is of the view that Subject Officers (as opposed to Witness Officers) involved in an S.I.U. investigation must enjoy full and unlimited access to a lawyer prior to the preparation of their notes. Model 3 ensures that this enhanced concern for the particular jeopardy of Subject Officers does not spill over into an overly broad right of access to counsel for witness officers who face no real jeopardy and need no enhanced protections. Model 3 ensures that the notes that S.I.U. receives (as only the notes of witness officers are provided) remain independent and free from even the perception of outside influence.

B. Facts

4. For the purpose of this cross-appeal, the Families rely on the facts as detailed in paragraphs 11 to 52 of their factum on the main appeal.

C. Court of Appeal’s Decision

5. At paragraph 81 of the decision, the Court of Appeal outlined the limits on counsel’s advice prior to an officer completing his or her notes:

81 Second, while relief in those terms was addressed during oral argument, I am not persuaded that relief in such broad terms would be justified. There is nothing explicit or implicit in the SIU Regulation that would deny a police officer who finds himself or herself in the stressful situation of having been involved in an incident attracting the attention of the SIU the right to some basic legal advice as to the nature of his or her rights and obligations in connection with the incident and the SIU investigation. The officer is entitled to legal advice on matters such as 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.

82 Advice of this nature can readily and quickly be given and received by telephone. However, if legal counsel is not available to advise the officer, the officer must complete the notes prior to the end of his or her tour of duty as required by s. 9(5) and that period cannot be extended for the purpose of getting legal advice: *R. v. Thomsen*; *R. v. Orbanski*; *R. v. Elias*.¹

6. In his cross-appeal, Director Scott is concerned that the Court of Appeal's non-exhaustive delineation of permissible legal advice might allow communication regarding the specific incident under S.I.U. investigation. The family submits that even though the Court of Appeal did not attempt to exhaustively prescribe the legal advice available to officers, the Court was clear in proscribing any communication whatsoever about the incident itself. This is clear from the limiting language found in paragraph preceding the six bullet points outlining the "basic legal advice as to the nature of his or her rights and obligations in connection with the incident and the SIU investigation". Indeed the bullet point examples are all related to "basic legal

¹ Court of Appeal reasons for decision, at paras. 81-82

advice” on their “rights and obligations” and do not require discussion about the facts leading to the incident.

PART II: ISSUES ON THIS CROSS-APPEAL

Issue 1: If the Court of Appeal erred in creating an unworkable situation, should this Honourable Court adopt a model that permits communication only after the completion of an officer’s notes?

Issue 2: If the *Act* and *S.I.U. Regulations* do permit more than basic legal advice prior to the completion of an officer’s notes, should this Honourable Court adopt a model that only permits a subject officer to obtain legal advice prior to the completion of his or her notes?

PART III: STATEMENT OF ARGUMENT

1. Model 2: No advice for any officer prior to the completion of notes

7. The Respondent Officers concede that it would be improper for counsel “to suggest what the officer should say in his notes”.² They seek a model of communication that permits counsel to ask questions of an officer with a view to focusing his or her attention on relevant facts. The Director’s factum on the cross-appeal details a number of concerns with respect to this model, all of which the Families adopt. In addition to those arguments, the Families respectfully submit that the harm of permitting this model of communication is exacerbated by the reality that the *S.I.U. Regulations* permit counsel to jointly represent an unlimited number of officers within either the subject or witness category.

² Appellants Factum on the main appeal, para. 71

(i) The revolving door of witness officers

8. All of the parties to this appeal concede that the *S.I.U. Regulations* permit counsel to jointly represent multiple officers from either the witness or subject class of officers. In the Families' factum on the main appeal, it is argued that once counsel obtains information relating to an incident from his or her client, then that counsel, acting professionally and in accordance with his or her duty of candour, would be mandated to share information received from each client police officer with each of his or her other client police officers. Not only could this affect the independence of an officer's notes, but it would also put each officer in jeopardy of communicating "indirectly" with each other officer. Indirect communication between officers involved in an S.I.U. investigation is prohibited by s. 6(2) of the *S.I.U. Regulations*. The Families argue that the harm caused by allowing this communication to occur militates in favour of the limitations detailed by the Court of Appeal.

9. If, however, the duty of candour does not require the sharing of information amongst client policed officers through the jointly retained lawyer, there is still the risk that communication between counsel and an officer prior to the completion of notes could affect how that individual officer's notes are prepared.

10. A composite hypothetical drawn from the Schaeffer and Minty investigations helps demonstrate this point. In the Schaeffer investigation, the lawyer involved rented a house near the incident and met with both involved officers. Officer Woods' notes detail this meeting:

17:12 Spoke [with] OPPA lawyer Andy McKay – Provided details on incident. Advised not to allow photos in uniform but to turn over uniform as requested. Further told to prepare notes for counsel to be provided to McKay.³

11. In the Minty investigation, the lawyer involved represented and was consulted by the subject officer and five witness officers.⁴

12. If a lawyer retained to represent two or more witness officers meets with all the officers in one house and segregates them in separate rooms in circumstances where none of the officers have yet prepared notes, it is inconceivable that (even when acting in good faith) counsel would not be influenced by what each preceding officer(s) has said to him as he proceeds through the interview process with successive officers.

13. In this hypothetical, the lawyer meets with witness officer #1 and obtains information relating to the incident and asks the questions that the Respondent Officers argue are permissible. After obtaining this information, the lawyer then meets with witness officer #2 and repeats the process. Even if counsel is not required to share information between witness officers, it is inevitable that the lawyer would unintentionally ask questions of his client that are influenced by witness officer #1's account. The further the lawyer proceeds with his interviews of witness officers #3, #4 and #5, the harder it would be for the lawyer to compartmentalize the information received from each client, and ensure that aspects of his respective clients' accounts do not influence his communications with his successive clients.

14. The interpretation sought by the Respondent Officers forces lawyers into a position that is simply untenable. A lawyer cannot segregate the information he or she receives from multiple witness or subject officers such that the lawyer can ensure that he or she does not inadvertently

³ P.C. Wood's Notes, Tab 19H of the Appellant's Record.

⁴ See Appendix B to Families' factum on the main appeal.

affect the manner in which an officer prepares his or her first account of an incident (i.e. their notes).

15. The harm that can occur when a lawyer is permitted to speak to an officer about an incident prior to the preparation of notes far outweighs the benefits of permitting limited advice. As such, the Families respectfully submit that, if this Honourable Court finds that the Court of Appeal's decision creates an "unworkable protocol", then it should adopt Model 2.

2. Model 3: The only person in possible jeopardy is the Subject Officer

16. The Respondent Officers submit that in the course of an S.I.U. investigation, an officer should be entitled to the advice of a lawyer on the "extent, scope and detail of the account required" in preparing notes.⁵ The Respondent Officers argue that non-leading questions asked by counsel would elicit "a complete account and draw the officer's attention to particularly relevant facts and circumstances that should be fully memorialized in an officer's written account".⁶ The Respondent Officers take this position despite the fact that officers are already trained to create "complete, accurate and thorough notes".⁷ The Families submit that officers should not require additional assistance from counsel to do that which they have been trained to do and normally do on a day to day basis.

17. There is no suggestion from any party on this appeal that officers routinely require the advice of lawyers on the "extent, scope and detail of the account required" in preparing notes for non-S.I.U. investigations.⁸ To the contrary, it appears that the Respondent Officers suggest that a different practice is required for S.I.U. investigations because an officer is placed in criminal,

⁵ Appellants' factum on main appeal at para. 71

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⁷ Basic Constable Training Program, Student Workbook, 2008, Tab 2 of the S.I.U. Responding Record

⁸ Reasons of the Court of Appeal at para. 43

civil, and professional jeopardy. Civil and professional jeopardy arises in every situation that requires an officer to prepare notes. As such, civil or professional jeopardy is not, in and of itself, a reason to depart from the normal practice. The criminal jeopardy that is unique to an S.I.U. investigation is particular to the subject officer. A witness officer is in no such jeopardy and, as a result, should not be relieved from complying with the normal practice of preparing notes without counsel's assistance.

18. There are rare cases where an officer is originally designated as a witness officer and subsequently re-designated as a subject officer. In those rare cases, there are protections afforded to the re-designated officer to ensure that his or her notes and witness statement provided to the S.I.U. cannot be used against him or her in a criminal prosecution. Section 10(3) of the *S.I.U. Regulation* requires the SIU director, upon reclassification from a witness officer to a subject officer to: (a) advise the chief of police and the officer in writing that the officer is now considered to be a subject officer; (b) give the police officer the original and all copies of the record of the interview; and (c) give the chief of police the original and all copies of the police officer's notes.⁹

19. In light of the protections afforded by section 10(3), the witness officer in an S.I.U. investigation is in no different position than any officer performing his duties in any non-S.I.U. criminal investigation. As such, a witness officer should never be entitled to communicate with counsel prior to the completion of his notes. If this Honourable Court believes that the jeopardy caused by an S.I.U. investigation requires an officer to have access to full advice prior to creating his or her notes, then this generous right should only be provided to the officer who is possibly in jeopardy – the subject officer.

⁹ Section 10(3) of the *S.I.U. Regulations*

PART IV- COSTS

20. The Families seeks its costs on the cross- appeal.

PART V- ORDER SOUGHT

21. If this Honourable Court grants the main appeal, then the Families respectfully request an order granting the herein cross-appeal.

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PART VI - AUTHORITIES CITED

N/A

PART VII – LEGISLATION

The Families Rely on Part VII of the Main Appeal Factum.

