File No. 34621

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal for the Province of Ontario)

B E T W E E N :

POLICE CONSTABLE KRIS WOOD, ACTING SERGEANT MARK PULLBROOK, POLICE CONSTABLE GRAHAM SEGUIN

Appellants/Respondents on Cross-Appeal

-and-

RUTH SCHAEFFER, EVELYN MINTY AND DIANE PINDER

Respondents/Appellants on Cross-Appeal

-and-

IAN SCOTT, DIRECTOR OF THE SPECIAL INVESTIGATIONS UNIT

Respondent/Appellant on Cross-Appeal

-and-

JULIAN FANTINO, COMMISSIONER OF THE ONTARIO PROVINCIAL POLICE

Respondent

FACTUM ON CROSS-APPEAL OF POLICE CONSTABLE KRIS WOOD, ACTING SERGEANT MARK PULLBROOK, POLICE CONSTABLE GRAHAM SEGUIN ON CROSS-APPEALS OF IAN SCOTT, DIRECTOR OF THE SPECIAL INVESTIGATIONS UNIT AND RUTH SCHAEFFER, EVELYN MINTY AND DIANE PINDER

Brian H. Greenspan
David M. Humphrey
Jill D. Makepeace
Greenspan Humphrey Lavine
15 Bedford Road
Toronto, ON
M5R 2J7
Tel: (416) 868-1755
Fax: (416) 868-1990

Counsel for the Appellants/
Respondents on Cross-Appeal

Henry Brown, Q.C.
Gowling Lafleur Henderson
2600 - 160 Elgin Street
Ottawa, ON
K1P 1C3
Tel: (613) 233-1781
Fax: (613) 563-9869

Ottawa agent for the Appellants/
Respondents on Cross-Appeal

Julian N. Falconer
Falconer Charney LLP
8 Prince Arthur Avenue
Toronto, ON M5R 1A9
T (416) 964-3408
F (416) 329-8179
Counsel for the Respondents/Appellants on Cross-Appeal Ruth Schaeffer, Evelyn Minty and Diane Pinder

Brian A. Crane Q.C.
Gowling Lafleur Henderson
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3
T (613) 233-1781
F (613) 563-9869
Ottawa agent for the Respondents/ Appellants on Cross-Appeal Ruth Schaeffer, Evelyn Minty and Diane Pinder

Marlys Edward
Kelly Doctor
Daniel Sheppard
Sack Goldblatt Mitchell LLP
1100 – 20 Dundas Street West
Toronto, ON M5G 2G8
T (416) 597-9400
F (416) 597-0070
Counsel for the Respondent/Appellant on Cross-Appeal Ian Scott, Director of SIU

Eugene Meehan Q.C.
Supreme Advocacy LLP
100 – 397 Gladstone Avenue
Ottawa, ON K2P 0Y9
T (613) 695-8855
F (613) 695-8580
Ottawa Agent for the Respondent/ Appellant on Cross-Appeal Ian Scott, Director of SIU

Kenneth W. Hogg
Christopher Diana
Community Safety & Correctional Services
Legal Services
77 Grenville Street, 8th Floor
Toronto, ON M5S 1B3
T (416) 314-3513
F (416) 314-3518
Counsel for the Respondent Commissioner of the Ontario Provincial Police, Julian Fantino

Robert E. Houston Q.C.
Burke-Robertson
70 Gloucester Street
Ottawa, ON K2P 0A2
T (613) 233-4430
F (613) 233-4195
Ottawa agent for the Respondent Commissioner of the Ontario Provincial Police, Julian Fantino

Table of Contents

File No. 34621

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal for the Province of Ontario)

B E T W E E N:

POLICE CONSTABLE KRIS WOOD, ACTING SERGEANT MARK PULLBROOK, POLICE CONSTABLE GRAHAM SEGUIN

Appellants/Respondents on Cross-Appeal

-and-

RUTH SCHAEFFER, EVELYN MINTY AND DIANE PINDER

Respondents/Appellants on Cross-Appeal

-and-

IAN SCOTT, DIRECTOR OF THE SPECIAL INVESTIGATIONS UNIT

Respondent/Appellant on Cross-Appeal

-and-

JULIAN FANTINO, COMMISSIONER OF THE ONTARIO PROVINCIAL POLICE

Respondent

FACTUM ON CROSS-APPEAL OF POLICE CONSTABLE KRIS WOOD, ACTING SERGEANT MARK PULLBROOK, POLICE CONSTABLE GRAHAM SEGUIN ON CROSS-APPEALS OF IAN SCOTT, DIRECTOR OF THE SPECIAL INVESTIGATIONS UNIT AND RUTH SCHAEFFER, EVELYN MINTY AND DIANE PINDER

PART I: OVERVIEW AND FACTS

Overview

1. The Respondents on the cross-appeal, Officers Wood, Pullbrook and Seguin, maintain that when properly interpreted, the *SIU Regulation* permits counsel to provide meaningful advice to involved officers prior to the preparation of their police notes.

Counsel, acting ethically and professionally, will not advise officers on what to say in their notes, but will provide valuable advice to the officers, and will benefit SIU investigations and the administration of justice, by ensuring that officers understand their obligations, in addition to their rights, and consequently prepare a full and accurate account of events addressing all relevant factual and legal issues.

2. As the Appellants on the main appeal, Officers Wood, Pullbrook and Seguin submit that the Court of Appeal erred in interpreting the *SIU Regulation* as prohibiting a police officer from seeking advice in connection with the preparation of his or her police notes. However, should this Honourable Court conclude the Court of Appeal was correct in so deciding, then the Officers Wood, Pullbrook and Seguin submit that the Court of Appeal was correct in concluding:

> There is nothing explicit or implicit in the *SIU Regulation* that would deny an 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.[1]

3. The concerns raised by the Appellant on the cross-appeal, Ian Scott, Director of the SIU ("SIU Director") regarding an officer's right to obtain basic legal advice from counsel are unfounded. If counsel are directed by this Honourable Court to refrain from discussing the facts of the incident with the involved officer, counsel can be trusted to honour that direction and their ethical obligations as officers of the court.

4. Any brief delay in the preparation of notes to allow for this limited consultation with counsel would in no way compromise the integrity or utility of an officer's notes. The limited consultation authorized by the Court of Appeal would necessarily be brief

---

[1] Reasons of the Court of Appeal for Ontario (15 November 2011) at para 33, *Appellants' Record,* vol I, tab 5 at 73.

and would ordinarily be facilitated promptly, often by advice over the telephone. In any event, as mandated by the most recent amendments to the *SIU Regulation*, all notes are to be completed by the end of the involved officer's shift, unless excused by the Chief of Police, ensuring that the notes are prepared while the officer's memory remains fresh.

5. Public confidence in the SIU investigation would not be adversely affected by allowing involved officers to receive basic advice on their obligations and rights. Reasonable and fair-minded members of the public will recognize and accept that counsel, as officers of the court, will respect any constraints imposed by law.

6. The fact that privilege would apply to this very limited consultation with counsel would not result in any miscarriage of justice as argued by the SIU Director. The fact that an officer is accorded the right to receive basic advice from counsel, along with the privilege that attaches to solicitor-client communications, cannot give rise to a miscarriage of justice. The SIU Director's submission ignores the fact that the *SIU Regulation* clearly contemplates that privilege may be asserted by officers as involved officers are accorded the right to consult counsel before an SIU interview and that such consultations would be subject to privilege. An assertion of privilege authorized by law does not give rise to a miscarriage of justice.

The Facts

7. Officers Wood, Pullbrook and Seguin rely on the facts set out in their Appellant's Factum on the appeal. As the Cross-Appellants, the SIU Director and Ruth Schaeffer, Evelyn Minty and Diane Pinter ("the Families") rely on the facts set out in their Respondent's Facta on the appeal. Officers Wood, Pullbrook and Seguin rely on the following additions and clarifications to those facts.

8. Officers Wood, Pullbrook and Seguin dispute the suggestion by the SIU Director and the Families that segregation was compromised because counsel advising the witness and subject officers in the Minty and Schaeffer investigations had a professional obligation to share information between them. In his Factum on the Appeal, the SIU Director cites his own reports to the Attorney General regarding the Minty and Schaeffer investigations in relation to the joint retainer issue.[2] The joint retainer issue is highly contentious. Officers Wood, Pullbrook and Seguin have always disputed the claim that counsel advising both witness and subject officers has a professional obligation to share information between them so as to compromise the segregation rules in section 6 of the *SIU Regulation.*

9. Gavin MacKenzie, a former Treasurer of the Law Society of Upper Canada, provided a legal opinion to the Police Association of Ontario dated November 27, 2009. Mr. MacKenzie's opinion explained how the Law Society's *Rules of Professional Conduct* respecting joint retainer and conflict of interest can be readily reconciled with the segregation requirements in section 6 of the *SIU Regulation.* Mr. MacKenzie stated:

> 4. If a joint retainer is permissible, how can the duty under the *Rules* to share client information be reconciled with section 6 of Regulations 673/98.
>
> It will be apparent from the foregoing analysis that a lawyer who is asked to represent multiple officers involved in an incident being investigated by the SIU concurrently (i) has a duty not to participate in or encourage a breach of section 6 of the Regulation – which requires that all officers involved in the incident be segregated and not communicate with one another until the SIU has completed its interviews – and (ii) has a duty to inform each officer that no information received in connection with the matter from one officer may be treated as confidential so far as any of the others are concerned.

---

[2] See *Factum of the Respondent, Ian Scott, Director of the SIU on the Appeal* at para.10 and Ian Scott, Report of the Director of the Special Investigations Unit to the Attorney General Re: Douglas Minty Investigation (14 October 2009) at 27, *Appellants' Record,* vol III, tab 20B at 662; Ian Scott, Report of the Director of the Special Investigations Unit to the Attorney General Re: Levi Schaeffer Investigation (25 September 2009), *Appellants' Record,* vol III, tab 19C at 517; see also Law Society of Upper Canada, *Rules of Professional Conduct,* r. 2.04(6), *Book of Authorities of Ian Scott, Director of the SIU, Respondent on Appeal and Appellant on Cross Appeal,* vol III, tab 70.

> In my opinion the rules creating these duties should be interpreted in such a way that they are consistent with each other. These duties can readily be reconciled. A lawyer retained to act for multiple officers has a duty not to defeat the purpose of section 6 by serving as a conduit between segregated officers whom the lawyer represents. It would be a breach of the lawyer's duty not to participate in or encourage illegal conduct if the lawyer were to allow officers directly or indirectly to collaborate on their accounts of the incident in question. Nothing in rule 2.04 (6) either requires or permits the lawyer to do so. Rule 2.04 (6) says nothing about the timing of any disclosure to a client of confidential information acquired form another client. In my opinion, a lawyer retained to act for multiple officers has a duty not to disclose anything, confidential or otherwise, said to him by one segregated officer to any other segregated officer until the SIU has completed its interviews[3]. [Emphasis added]

10. As noted by the Court of Appeal, the *SIU Regulation* was amended prior to the hearing of the appeal. The amendments were made on the recommendation of the Honourable Patrick J. LeSage, following his review of certain issues concerning SIU investigations, "including the right to counsel and note taking"[4]. Section 7 of the *SIU Regulation* was amended to provide that "witness officers may not be represented by the same legal counsel as subject officers".[5] The LeSage Report also recommended that the Law Society of Upper Canada amend the Law Society's *Rules of Professional Conduct* to remind lawyers representing more than one officer in an SIU investigation of their duty not to undermine section 6 of the *SIU Regulation* by disclosing to one officer client anything said by another officer client involved in the incident.[6] The Court of Appeal concluded that the amendments to the *SIU Regulation* "render the issue of double retainer

---

[3] Letter from Gavin MacKenzie, Heenan Blaikie to Ronald Middel, PAO, dated November 27, 2009, *Appellants' Record*, vol. III, tab 20K at 732-733.

[4] Reasons of the Court of Appeal for Ontario (15 November 2011) at para 31, *Appellants' Record,* vol I, tab 5 at 58.

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

[6] The Honourable Patrick J. LeSage, Q.C., *Report Regarding SIU Issues to Attorney General of Ontario* (4 April 2011) at 2, *Appellants' Book of Authorities,* tab 32; Schedule A, Terms of Reference for the Report Regarding SIU Issues to Attorney General of Ontario, *Appellants' Book of Authorities,* tab 31. See also Reasons of the Court of Appeal for Ontario (15 November 2011) at paras.31-33, *Appellants' Record,* vol I, tab 5 at 58-60.

moot but they do not render moot the issue of whether police officers involved in SIU investigations are entitled to obtain legal advice in the preparation of their notes".[7]

11. In his Factum on the appeal, the SIU Director disputes the suggestion that the amendments to the *SIU Regulation* settled the joint retainer issue. The SIU Director asserts that "while the amendment no longer permits the same lawyer to represent both subject and witness officers, it does not expressly preclude a single lawyer from representing multiple officers within the same category, a practice that remains objectionable".[8] Despite this, the SIU Director concedes that this joint retainer issue remains in dispute, to be resolved in another case.[9] However, Officers Wood, Pullbrook and Seguin maintain that joint retainers were permissible at the relevant time and that the *SIU Regulation*, as amended, continues to allow joint retainers so long as no lawyer represents both a witness and subject officer. The logical inference is that the Legislature made the choice to accept the LeSage recommendations to preclude joint retainers involving both subject and witness officers, but to continue to allow multiple witness officers or subject officers to retain the same lawyer.

12. In their statement of the facts, the Families assert that the notes of A/SGT. Pullbrook demonstrate markedly different note making after the officer had consulted with counsel. They assert that the "before" notes read like conventional police officer's memo book entries while the "after" notes read like a legal narrative, with legal terminology. The Families are correct in observing that the notes following the consultation with counsel are not confined to "the short factual references that are

---

[7] Reasons of the Court of Appeal for Ontario (15 November 2011) at para 46, *Appellants' Record,* vol I, tab 5 at 64-65.
[8] *Factum of the Respondent, Ian Scott, Director of the SIU on the Appeal* at para. 15.
[9] *Ibid* at para 75.

typical" in police notes. While the Families argue that this contrast in the notes suggests that the "after" notes are not "independent" police notes, Officers Wood, Pullbrook and Seguin submit that the added detail provided in an officer's notes following a consultation with counsel benefit the SIU, the Chief of Police, and the administration of justice. By providing detail beyond the usual short factual references, the notes enhance a proper understanding of the precise details of what was done by the involved officers and what justifications may or may not have existed for their conduct, including any use of force. Any "legal terminology" found in the notes is the type of terminology familiar to trained police officers.

PART II – STATEMENT OF THE QUESTIONS IN ISSUE

13. Officers Wood, Pullbrook and Seguin agree with the SIU Director's statement of the issue, namely: Did the Court of Appeal err in interpreting the *SIU Regulation* and the *PSA* in a manner that permits a limited form of consultation with counsel prior to a police officer completing their notes?

14. Officers Wood, Pullbrook and Seguin will also respond to the second issue stated by the Families, namely: If the *Act* and the *SIU 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

The Court of Appeal Correctly Concluded that the *SIU Regulation* Accords a Right to Basic Legal Advice.

15. Undoubtedly, policing can be a dangerous occupation. Officers risk their lives and safety in the discharge of their duties. The Court of Appeal aptly acknowledged that officers seeking advice from counsel find themselves "in the stressful situation of having been involved in an incident attracting the attention of the SIU". [10] The Court of Appeal correctly concluded that nothing explicit or implicit in the *SIU Regulation* would deny an officer, finding himself or herself in such stressful circumstances, the right to basic legal advice respecting the officer's rights and obligations.[11]

16. The Court of Appeal held that, while an officer who seeks advice in connection with the preparation of notes (including asking counsel to vet notes) fails to live up to the duty to create independent and contemporaneous notes, this does not apply to an officer simply seeking advice "with respect to the obligation to prepare notes"[12]

17. An officer seeking and receiving basic advice with respect to his rights and obligations, including his duty to make notes reflecting his full and honest recollection of the incident in his own words, advances the public interest as much as any personal interest.

---

[10] Reasons of the Court of Appeal for Ontario (15 November 2011) at para 81, *Appellants' Record,* vol I, tab 5 at 77.
[11] *Ibid.*
[12] *Ibid* at para. 74, *Appellants' Record,* vol I, tab 5 at 74-75.

A. Importance of Core Advice to an Officer Involved in a Critical Incident

18. Officers Wood, Pullbrook and Seguin acknowledge that note taking is part of the daily routine involved in police work and criminal investigations. In that context, police officers are well aware of how to draft standard police notes. What the SIU Director fails to acknowledge is that it is far from routine for an officer to find himself or herself involved as a subject officer or witness officer in an SIU investigation. Counsel advising such officers will ordinarily have experience and expertise in relation to SIU investigations, and will have familiarity with the precise rules respecting the making of notes and the distribution of those notes to the SIU and the Chief of Police.

19. The SIU Director correctly submits[13] that officers are expected to know and understand the rights of *suspects* and *witnesses* with whom they interact. That is true, because police officers receive training with respect to the rights of individuals under police investigation and are involved almost daily in advising individuals of their rights.[14] In contrast, nothing in the record suggests that officers receive special training with respect to their rights or obligations as witness or subject officers in an SIU investigation. While the basic advice authorized by the Court of Appeal may be largely formulaic, it is unrealistic to think that an officer attempting to come to grips with the enormity of a critical incident engaging the SIU mandate would be expected to fully comprehend his rights and obligations by simply being handed the type of card recommended by the SIU

---

[13] *Factum of the Respondent, Ian Scott, Director of the SIU on the Cross-Appeal* at para 15.

[14] See for example Ontario Police College, Basic Constable Training Program – Student Workbook – evidence (2008), *Record of the Respondent Ian Scott, Director of the SIU,* tab 2 at 13, wherein police trainees are taught to "ensure that a current copy of the *Rights to Counsel* card and *Caution* cards are included for use throughout the shift. It is good practice to leave these cards permanently attached and stored with the notebook at all times." This student workbook offers no specific training with respect to note taking rules and requirements in the context of an SIU investigation.

Director.[15] There is no substitute for an involved officer having *direct* communication with counsel, by phone or in person, which allows the lawyer to explain the officer's rights and obligations and to answer the natural questions the officer may have.

B. The Core Advice Raises No Significant Risk of Memory Tainting

20. The Court of Appeal was very much alive to the SIU Director's concerns respecting memory tainting as a result of a consultation with counsel prior to the preparation of the officer's notes. Nevertheless, the Court was satisfied that a limited consultation with counsel prior to the completion of notes is permissible and appropriate. The Court noted:

> As both counsel for the respondent officers and counsel for the Criminal Lawyer's Association submitted, lawyers have an ethical obligation to advise clients in accordance with the law. I have confidence in the ethical standards of the legal profession and I am confident that a lawyer called upon to give the type of advice I have outlined in these reasons would not misuse or abuse the opportunity by providing improper assistance with regard to the content of the officer's notes.[16]

21. In response to Director Scott's concern that even the most scrupulous officer or lawyer may not know where the boundaries lie,[17] the solution is not to bar critical core advice to officers but for this Honourable Court to clarify the contours for such advice.

22. To the extent that clarification of the boundaries of such advice is necessary, this Honourable Court may wish to establish that, if there is to be any discussion regarding the incident prior to the preparation of the notes, the lawyer should only ask non-leading questions in order to determine the nature of the incident, whether the officer is properly

---

[15] *Factum of the Respondent, Ian Scott, Director of the SIU on the Cross-Appeal* at para 16.
[16] Reasons of the Court of Appeal for Ontario (15 November 2011) at para 83, *Appellants' Record,* vol I, tab 5 at 78-79.
[17] *Factum of the Respondent, Ian Scott, Director of the SIU on the Cross-Appeal* at para 19.

to be viewed as a witness officer or a subject officer, and to provide core advice appropriate to the officer's proper designation. The SIU Director's desire for a "bright line indication of what is permissible"[18] should not be used as a justification for denying officers their entitlement to receive core legal advice on their rights and obligations.

C. Delay Will be Minimal and Will Not Compromise Integrity of Officer Notes

23. The Court of Appeal correctly recognized that the basic advice authorized by the Court can be readily and quickly provided by telephone. In addition, the Court emphasized that if legal counsel is not available to provide the advice promptly, officers must nevertheless complete their notes prior to the end of their tour of duty and that an extension cannot be granted for the purpose of the officer receiving legal advice.[19] Given this new requirement, there will be no need in the future for officers to prepare notes to counsel after the completion of their shift in order to brief counsel who is travelling to a remote location to advise the officer. [20]

24. Even allowing for the possibility that the completion of an officer's notes may be delayed by hours, this is no basis for concluding that the quality of the officer's notes will be compromised. The essential quality of an officer's notes is maintained by ensuring that the notes are made when the officer's memory of the events is still fresh. Equally, the officer's mind must be sufficiently clear and calm so as to allow a full, accurate, and properly sequenced recollection of the critical events. Even a delay of some hours will not compromise the notes of an officer involved in a critical incident. Indeed, some delay

---

[18] *Ibid* at para. 22.
[19] Reasons of the Court of Appeal for Ontario (15 November 2011) at para 82, *Appellants' Record,* vol I, tab 5 at 78.
[20] See Letter from Gavin MacKenzie, Heenan Blaikie to Ronald Middel, PAO, dated November 27, 2009, *Appellants' Record*, vol. III, tab 20K at 728-729.

may enhance the quality of the notes as the officer is provided time to calm and compose himself, and to review the event in his own mind before attempting to definitively memorialize it in his notes.

25. The SIU Director submits that important details such as the exact words spoken by a suspect, officer or witness are easily lost if notes are only made hours after an incident.[21] However, an officer is not required to make *complete* notes immediately after receiving a particular piece of precise information such as a license number, a telephone number, or a relevant comment. Rather, an officer is entitled to make a quick note of the precise information in the officer's notebook or even on a scrap piece of paper. It is permissible to later re-write the information from the rough notes into the officer's complete police notes. Pursuant to standing orders and basic training, police officers are directed to keep the original notes and state where they are being stored.[22]

D. Prosecutions are Not Undermined by Allowing Officers Access to Basic Legal Advice

26. The Court of Appeal correctly rejected the SIU Director's submission that because solicitor-client privilege will shield the legal advice given to officers, officers should be denied any consultation with a lawyer until after their notes have been completed.[23] Criminal prosecutions of citizens arising out of incidents where there was also an SIU investigation would not be compromised simply because involved officers may have received legal advice from counsel prior to completion of their police notes.

---

[21] *Factum of the Respondent, Ian Scott, Director of the SIU on the Cross-Appeal* at para 28.
[22] Ontario Police College, Basic Constable Training Program – Student Workbook – evidence (2008), *Record of the Respondent Ian Scott, Director of the SIU,* tab 2 at 17; Ontario Provincial Police Orders, March 2010 Revision, *Record of the Respondent Ian Scott, Director of the SIU,* tab 4 at 50.
[23] Reasons of the Court of Appeal for Ontario (15 November 2011) at para 83, *Appellants' Record,* vol I, tab 5 at 78-79.

An officer would quite properly disclose in his notes[24] and in his testimony that he had spoken to counsel prior to the completion of his notes. The officer would be entitled to maintain privilege over the legal advice received from counsel.[25] The existence and assertion of this privilege, where the client "seeks lawful legal advice" [26], would not have the result of "stymieing the truth-seeking function of the trial" as claimed by the SIU Director[27].

27. It is not unusual for critical prosecution witnesses, including police agents and alleged victims, to have spoken with counsel prior to providing their initial account of events to the police. On cross-examination regarding the circumstances leading up to their initial statement to the police, these crucial Crown witnesses could be cross-examined on the fact that they consulted with counsel. However, they would be perfectly entitled to maintain privilege over the content of their consultation with counsel. A police officer who consults with counsel prior to complying with the statutory compulsion to provide an account of events in his police notes should be entitled to no less protection over his consultation with counsel.

28. The SIU Director submits that the very existence of the lawyer interview prior to completion of the notes cannot be reconciled with the *SIU Regulation*.[28] With respect, this submission ignores the fact that the *SIU Regulation* indisputably provides that

---

[24] For example, P.C. Wood made repeated and transparent references in his notes, as did other involved officers, to his consultations with counsel before completing his memo book notes. Handwritten Notes of P.C. Kris Wood, dated June 22/23, 2009, *Appellant's Record*, vol III, tab 19H at 597, 600.

[25] *Regina v McClure*, [2001] 1 SCR 445 at paras 34-37, *Book of Authorities of Ian Scott, Director of the SIU, Respondent on Appeal and Appellant on Cross Appeal*, vol I, tab 27. See also Letter from Gavin MacKenzie, Heenan Blaikie to Ronald Middel, PAO, dated November 27, 2009, *Appellants' Record*, vol. III, tab 20K at 729.

[26] *Regina v McClure*, [2001] 1 SCR 445 at paras 36-37, *Book of Authorities of Ian Scott, Director of the SIU, Respondent on Appeal and Appellant on Cross Appeal*, vol I, tab 27.

[27] *Factum of the Respondent, Ian Scott, Director of the SIU on the Cross-Appeal* at para. 33.

[28] *Factum of the Respondent, Ian Scott, Director of the SIU on the Cross-Appeal* at para. 35.

involved officers can consult with counsel prior to participating in an SIU interview. In those interviews the SIU investigators flush out critical details of the incident under investigation.[29] Clearly, the *SIU Regulation* does contemplate that involved officers are entitled to consult with counsel prior to critical SIU interviews and that such consultations would be protected by the solicitor-client privilege that ordinarily attaches. No miscarriage of justice arises, either in substance or appearance, from this legally authorized assertion of privilege.

E. Public Confidence Will Not be Compromised

29. The SIU Director argues that the privilege attaching to even basic advice provided to an officer constitutes a "wall of secrecy" that "naturally attracts public suspicion".[30] The SIU Director further argues that a consultation with counsel prior to preparation of the notes "introduces a reason for the public to question the subsequent account of the officer, *even if that distrust is factually misplaced*" (Emphasis added).[31]

30. The SIU Director's concern about "public perception" aligns with the concern of legislators and the courts to maintain public confidence in the administration of justice. For example, this Honourable Court has recognized that Parliament's purpose in enacting the bail provisions found in section 515(10)(c) of the *Criminal Code* was to "maintain public confidence in the bail system and the justice system as a whole."[32] Public confidence is measured by the standard of a "reasonable member of the community". The reasonable person is one properly informed about "the philosophy of the legislative

---

[29] *SIU Regulation* s 7(1).
[30] *Factum of the Respondent, Ian Scott, Director of the SIU on the Cross-Appeal* at para. 36.
[31] *Ibid* at para. 39.
[32] *Regina v Hall*, 2002 SCC 64 at para 41, *Book of Authorities of Respondents Wood, Pullbrook and Seguin on Cross-Appeal*, tab 1.

provisions, *Charter* values and the actual circumstances of the case".[33] While it is important to maintain public confidence in the administration of justice, focus should be on legitimate concerns in the minds of reasonable and informed members of the community, not the "excitable and irrational citizen".[34] No consideration should be given to misplaced distrust.

Cross-Appeal of the Families: The "Revolving Door of Witness Officers"

31. In their Factum on the Cross-Appeal, the Families argue that if a lawyer is permitted to represent multiple officers within a single class (i.e. multiple witness officers), there is a risk that the lawyer would unintentionally ask questions of his client that are influenced by what he has heard from an earlier witness officer or officers.[35] They submit that a lawyer cannot "segregate the information he or she receives from multiple witness or subject officers" so as to avoid inadvertently compromising the officer's account of events in his or her notes. It is submitted that this position ignores and is an affront to the long-standing recognition by our Courts that lawyers can be trusted to fully comply with legal requirements that they not taint witnesses by conveying, intentionally or otherwise, information received from other witnesses.

32. This point is best illustrated in the context of witness exclusion orders at trial. As submitted in the Factum on the Appeal of Officers Wood, Pullbrook and Seguin, our law recognizes that lawyers can be trusted to hear the evidence of witnesses in court and then interview and prepare subsequent witnesses to testify to the very same issues, without

---

[33] *Ibid.*
[34] *Regina v White*, 2006 ABCA 65 at para 18, *Book of Authorities of Respondents Wood, Pullbrook and Seguin on Cross-Appeal*, tab 2.
[35] *Factum of the Respondent Families on the Cross-Appeal* at paras. 8-14.

fear that the lawyer will violate the witness "sequestration" order[36]. Witness tainting is not a concern in that context. In the same way, lawyers can be trusted to fully comply with the segregation rules under the SIU regulation by speaking to multiple witness officers without tainting their accounts, either as reflected in their notes or in their interviews with the SIU investigators. As stated in *Regina v O'Callaghan*:

> Surely, honest counsel may consult with a sequestered or excluded witness. Mere "suspicion of impropriety, even though it may not exist" is not enough to interfere with the right of an officer of the court to confer "in a proper manner" with witnesses even though subject to an exclusion order.[37]

The Families' Proposed Model 3

33. The Families in their Factum on the Cross-Appeal submit that the jeopardy of a witness officer in an SIU investigation is no different than the jeopardy an officer faces in every situation that requires an officer to prepare notes. This submission ignores the fact that in every instance where the mandate of the SIU is invoked, the *SIU Regulation* requires that the Chief of Police investigate the incident, including the conduct of subject and witness officers. The Chief will prepare a report on the incident and a finding of misconduct in such a report may lead to a discipline hearing and the imposition of sanctions pursuant to the *PSA* for either a witness or subject officer.[38]

34. While the Families acknowledge that a witness officer may also face criminal jeopardy if they are re-designated as subject officers, the Families fail to recognize the inadequacy of the protections afforded in those circumstances. Although the SIU would be required to return the officer's notes on re-designation, the officer's notes might still

---

[36] *Factum of Officers Wood, Pullbrook and Seguin on Appeal* at para 68.
[37] *Regina v O'Callaghan* (1982), 65 CCC (2d) 459 at 465 (Ont H Ct J), *Book of Authorities of Appellants Wood, Pullbrook and Seguin on Appeal,* tab 18.
[38] *SIU Regulation*, s.11(4) and *Police Services Act,* RSO 1990, c P-15, s 76(9).

have a significant impact on the officer's jeopardy. In the event of a criminal trial of the officer, the notes might be subject to production to the Crown as notes used by the officer to refresh his memory prior to giving evidence.[39] The officer could then be cross-examined by the Crown on any alleged inconsistency. It is beneficial that lawyers with experience in such matters will properly advise officers to prepare very detailed notes of the encounter in order to answer allegations of inconsistency between the notes and the officer's testimony in court, or allegations of recent fabrication.

35. Witness officers, who may become subject officers, should not be deprived of the right to consult counsel prior to the preparation of their notes simply by reason of their designation by the SIU. Doing so would create two classes of subject officers: those with the right to consult counsel because they have been initially designated as subject officers and those who are denied that basic right because of an initial designation by the SIU that turns out to be wrong. This issue underscores the importance of all officers having a right to consult counsel prior to the preparation of their notes, if for no reason other than to allow counsel to ascertain the general nature of their involvement in the incident and to determine whether they should be classified as subject or witness officers.

[39] See *Factum of Officers Wood, Pullbrook and Seguin on Appeal* at para. 61 and authorities cited therein.

PART IV: COSTS

36. The Respondents, Officers Wood, Pullbrook and Seguin, do not seek costs on this Cross-Appeal and they ask that no costs be awarded against them.

PART V: ORDER SOUGHT

37. It is respectfully requested that the Cross-Appeal be dismissed.

Dated at Toronto, this 7th day of March, 2013.

Brian H. Greenspan

David M. Humphrey

Jill D. Makepeace

PART VI: AUTHORITIES CITED

Authority Cited	Paragraph
Jurisprudence	
Regina v Hall, 2001 SCC 64	30
Regina v McClure, [2001] 1 SCR 445	26
Regina v O'Callaghan (1982), 65 CCC (3d) 459 (Ont H Ct J)	32
Regina v White, 2006 ABCA 65	30

PART VII: RELEVANT LEGISLATIVE PROVISIONS

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

...

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

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

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

Investigation assigned to another police force
(4) A municipal chief of police may, with the approval of the board and on written notice to the Commission, ask the chief of police of another police force to cause the complaint to be investigated and to report, in writing, back to him or her at the expense of the police force to which the complaint relates.

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

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

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

(a) shall decide which of the chiefs of police whose police officer is a subject of the complaint shall cause the complaint to be investigated and report in writing back to the other chief or chiefs of police; or

(b) shall ask another chief of police to cause the complaint to be investigated and to report back in writing to the chiefs of police.

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

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

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

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

Disposition without a hearing
(12) If an informal resolution of the matter is attempted but not achieved, the following rules apply:

1. The chief of police shall provide the police officer with reasonable information concerning the matter and shall give him or her an opportunity to reply, orally or in writing.

2. Subject to paragraph 3, the chief of police may impose on the police officer a penalty described in clause 85 (1) (d), (e) or (f) or any combination thereof and may take any other action described in subsection 85 (7) and may cause an entry concerning the matter, the penalty imposed or action taken and the police officer's reply to be made in his or her employment record.

3. If the police officer refuses to accept the penalty imposed or action taken, the chief of police shall not impose a penalty or take any other action or cause any

entry to be made in the police officer's employment record, but shall hold a hearing under subsection (9).

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

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

...

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

ONTARIO REGULATION 267/10
CONDUCT AND DUTIES OF POLICE OFFICERS RESPECTING INVESTIGATIONS BY THE SPECIAL INVESTIGATIONS UNIT

...

Right to counsel

7. (1) Subject to subsection (2), every police officer is entitled to consult with legal counsel or a representative of a police association and to have legal counsel or a representative of a police association present during his or her interview with the SIU. O. Reg. 267/10, s. 7 (1).

(2) Subsection (1) does not apply if, in the opinion of the SIU director, waiting for legal counsel or a representative of a police association would cause an unreasonable delay in the investigation. O. Reg. 267/10, s. 7 (2).

(3) Witness officers may not be represented by the same legal counsel as subject officers. O. Reg. 283/11, s. 2.

...

Investigation caused by chief of police

11. (1) The chief of police shall also cause an investigation to be conducted forthwith into any incident with respect to which the SIU has been notified, subject to the SIU's lead role in investigating the incident. O. Reg. 267/10, s. 11 (1).

(2) The purpose of the chief of police's investigation is to review the policies of or services provided by the police force and the conduct of its police officers. O. Reg. 267/10, s. 11 (2).

(3) All members of the police force shall co-operate fully with the chief of police's investigation. O. Reg. 267/10, s. 11 (3).

(4) The chief of police of a municipal police force shall report his or her findings and any action taken or recommended to be taken to the board within 30 days after the SIU director advises the chief of police that he or she has reported the results of the SIU's investigation to the Attorney General, and the board may make the chief of police's report available to the public. O. Reg. 267/10, s. 11 (4).

(5) The Commissioner of the Ontario Provincial Police shall prepare a report of his or her findings and any action taken within 30 days after the SIU director advises the Commissioner that he or she has reported the results of the SIU's investigation to the Attorney General, and the Commissioner may make the report available to the public. O. Reg. 267/10, s. 11 (5).