

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

-and-

RUTH SCHAEFFER, EVELYN MINTY AND DIANE PINDER

Respondents

-and-

IAN SCOTT, DIRECTOR OF THE SPECIAL INVESTIGATIONS UNIT

Respondent

-and-

JULIAN FANTINO, COMMISSIONER OF THE ONTARIO PROVINCIAL POLICE

Respondent

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APPELLANTS' FACTUM

PART I: OVERVIEW AND FACTS

Overview of the Appellant's Position

1. In Ontario, the *Police Services Act*¹ (PSA) together with the *SIU Regulation*² provide a scheme by which independent investigations are conducted in cases where

¹ RSO 1990, c P-15 [PSA].

² *Conduct and Duties of Police Officers Respecting Investigations by the Special Investigations Unit*, O Reg 267/10 [SIU Regulation].

police conduct has resulted in death or serious injury.³ The *SIU Regulation* codifies the duties and rights of officers involved in matters under SIU investigation.

2. In interpreting the scope of the *SIU Regulation*, despite acknowledging the “enhanced right to counsel”⁴ extended to involved officers,⁵ the Court of Appeal for Ontario nevertheless erred in imposing restrictions on the right of involved officers to consult with counsel prior to the preparation of their notes. It is submitted that the *SIU Regulation* reflects legislative choices that are apparent from a review of its provisions respecting the segregation of officers during an SIU investigation, the right of involved officers to consult counsel and their duties with respect to the timely completion of notes. Notwithstanding the Legislature’s awareness that involved officers routinely consult with counsel prior to preparing their notes, the government has chosen not to impose any restrictions on that practice. The Legislature recognized that the fundamental right to consult counsel could continue to be extended to officers prior to the preparation of their notes without fear that the independence and integrity of their notes will be compromised.

3. The Court of Appeal erred in failing to appreciate that the Legislature’s concerns for preserving the independence and integrity of officers’ accounts of events were fully addressed in the segregation rules in the *SIU Regulation*. In order to achieve this objective, the Legislature chose to restrict involved officers from communicating with other officers involved in the incident, but not to restrict their ability to consult counsel.

³ *PSA*, s 113(5).

⁴ Reasons of the Court of Appeal for Ontario (15 November 2011) at para 33, *Appellants’ Record*, vol I, tab 5 at 60.

⁵ *SIU Regulation*, s 7(1).

History of the Case

4. The Appellants are Ontario Provincial Police officers who were involved in two separate incidents in which armed assailants were fatally shot. These two incidents were investigated by the Special Investigations Unit (“SIU”), which has a statutory mandate to investigate incidents involving the use of police force in Ontario resulting in death or serious injury.

5. The Respondents, Ruth Schaeffer, Evelyn Minty and Diane Pinder, who are family members of the two deceased, brought an application in the Superior Court of Ontario seeking declaratory relief. They sought an order interpreting the *PSA* and the *SIU Regulation*. One of the central concerns raised by the Respondents related to “joint retainers” in which “subject officers”⁶ and “witness officers”⁷ were advised by the same lawyer.

6. The original application by the Respondents Schaeffer, Minty and Pinder was brought against the Appellants and additional parties, namely, Julian Fantino, then Commissioner of the Ontario Provincial Police, Ian Scott, Director of the Special Investigations Unit and Her Majesty the Queen in Right of Ontario (Ministry of Community Safety and Correctional Services).

7. The application was not determined on its merits as the application judge allowed a motion to strike the application, finding that the applicants (now the Respondents

⁶ A police officer whose conduct appears, in the opinion of the SIU director, to have caused the death or serious injury under investigation.

⁷ A police officer who, in the opinion of the SIU director, is involved in the incident under investigation but is not a subject officer.

Schaeffer, Minty and Pinder) lacked standing to bring the application and that the matter was moot.

8. The Respondents Schaeffer, Minty and Pinder appealed to the Court of Appeal for Ontario. The Court of Appeal granted intervener status to the following interveners: Ontario Association of Chiefs of Police, Canadian Civil Liberties Association, Andrew McKay, Police Association of Ontario, Criminal Lawyers' Association and the Urban Alliance on Race Relations.

9. The appeal was heard by the Court of Appeal together with a motion by the Appellants to quash the appeal on the basis that the Respondents Schaeffer, Minty and Pinder (then the appellants) lacked standing to bring the application, that the issues were non-justiciable, that the issues had been rendered moot by changes to the *SIU Regulation*, and that the Court lacked jurisdiction to entertain an appeal in the absence of an initial determination of the merits.

10. The Court of Appeal dismissed the motion to quash. Although the Court determined that the issue of joint retainers had been rendered moot by recent amendments to the *SIU Regulation*, the Court concluded that the amendments did “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.”⁸

⁸ Reasons of the Court of Appeal for Ontario (15 November 2011) at paras 45-47, *Appellants' Record*, vol I, tab 5 at 64-65.

Judgment of the Court of Appeal for Ontario

11. The Court of Appeal allowed the appeal and granted a declaration in the following terms:⁹

The *Police Services Act*, R.S.O. 1990, c. P.15, s. 113(9) and *Conduct and Duties of Police Officers Respecting Investigations by the S.I.U.*, O. Reg. 267/10, do not permit:

- (i) police officers involved in an SIU investigation to have a lawyer vet their notes or to assist them in the preparation of their notes; or
- (ii) supervising officers, as a matter of course, to authorize subject and witness officers to refrain from preparing their notes to permit consultation with counsel and regardless of the expiry of the officer's shift.

but do permit:

- (iii) police officers to obtain legal advice as to the nature of their rights and duties with respect to SIU investigations, provided obtaining that advice does not delay the completion of their notes before the end of their tour of duty.

The Contextual Facts

12. As the issues relating to standing, justiciability and mootness are not being raised as issues on this appeal, the facts can be briefly summarized, and are primarily derived directly from the decision of the Court of Appeal.

(i) The Minty investigation

13. On June 22, 2009, the Appellant, Constable Graham Seguin, responded to a call concerning an alleged assault committed by Douglas Minty, a 59 year old developmentally disabled man. When Minty approached Seguin holding a knife, the officer ordered him to drop his weapon. Minty refused to comply and continued to

⁹ Reasons of the Court of Appeal for Ontario (15 November 2011) at para 86, *Appellants' Record*, vol I, tab 5 at 79-80.

approach Seguin armed with the knife. Seguin fired five shots at Minty. Minty died shortly thereafter.

14. Seguin's senior officer later advised him and other officers who had attended the scene that they should make no further notes until after they had spoken to legal counsel and that Ontario Provincial Police ("OPP") procedure required them to complete their notes before the end of their shift.

15. When the SIU arrived, Seguin was designated as a subject officer and the others were designated as witness officers. Andrew McKay, a lawyer frequently consulted by the police in relation to SIU investigations, acted as counsel for all of the officers.¹⁰

16. At the conclusion of his investigation, SIU Director Ian Scott was satisfied that there were no reasonable grounds to believe that Seguin had committed a criminal offence in relation to the death of Minty. In his report to the Attorney General, Director Scott indicated that he would address certain concerns and apparent breaches of the *SIU Regulation* with the OPP Commissioner, including that the senior officer had instructed all witness officers not to write their notes until after they had spoken to counsel.¹¹

(ii) The Schaeffer investigation

17. On June 24, 2009, the Appellants, Constable Kris Wood and Acting Sergeant Pullbrook, were investigating a boat theft at Pickle Lake. They encountered Levi

¹⁰ Dennis O'Neill the lead SIU investigator on the Schaeffer incident, testified that it was then common for one lawyer to represent all officers involved in an incident, including both subject and witness officers. He said this occurs "in most cases" and agreed that the practice was "widespread". Transcript of the Examination of Dennis B. O'Neill (15 April 2010) at 94, ll. 2-15, 102, ll. 8-15, *Appellants' Record*, vol II, tab 18 at 422, 430.

¹¹ Ian Scott, Report of the Director of the Special Investigations Unit to the Attorney General Re: Douglas Minty Investigation (14 October 2009) at 26-27, *Appellants' Record*, vol III, tab 20B at 661-662.

Schaeffer, a 32 year old man diagnosed with schizoaffective disorder, panic disorder and anti-social personality disorder, who was camping in the area. Schaeffer was armed with a knife when Wood and Pullbrook attempted to arrest him. An altercation ensued in which Constable Wood fired his gun twice at Schaeffer, killing him.

18. Wood and Pullbrook were advised by their senior officer not to speak to each other about the incident, to contact their legal counsel and to delay making their notebook entries until they had consulted with counsel.

19. Approximately five hours after the shooting, Wood consulted his lawyer, Andrew McKay, by telephone. McKay asked Wood to prepare “notes to counsel”¹² for him to review. Subsequently, after travelling to Pickle Lake, McKay reviewed those notes to counsel. According to Wood’s police notes, McKay advised Wood that his notes to counsel were “excellent and to complete notebook.”¹³ Wood then completed his police notes, two days after the incident.

20. Pullbrook consulted with McKay by telephone approximately six hours after the incident. McKay advised him not to complete his notebook but to provide McKay with notes to counsel of the incident. After receiving legal advice from McKay on the notes prepared for counsel to review, Pullbrook also completed his notebook two days after the incident.

21. Wood and Pullbrook maintained confidentiality of their written communications with their lawyer on grounds of solicitor-client privilege. However, McKay advised the

¹² Handwritten notes of P/C Kris Wood (26 June 2009), *Appellants’ Record*, vol III, tab 19H at 600.

¹³ *Ibid.*

SIU that “that there were no significant differences in the confidential notes that were provided to counsel and the notes that were presented to the [SIU] investigators”.¹⁴

22. SIU Director Scott concluded there were no reasonable grounds to believe that Wood had committed a criminal offence. However, in his report to the Attorney General, Scott expressed concerns over the manner in which Wood and Pullbrook had completed their notes. Director Scott expressed his views as follows:

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.¹⁵

The Legislative Framework

23. Pursuant to section 113 of the *PSA*, the SIU is mandated to investigate incidents where police conduct has resulted in serious injury or death. The SIU Director reports the results of investigations to the Attorney General. Where reasonable grounds exist, the

¹⁴ The Court of Appeal judgment mistakenly attributes this comment to the Appellant Pullbrook. The comment was actually made by Mr. McKay to the lead SIU investigator, Dennis O’Neill, during the interview of Pullbrook. O’Neill stated that he did not ask for a copy of the notes to counsel as he viewed them as solicitor client privileged. Additionally, he said he believed Mr. McKay’s representation that there were no significant differences between the notes to counsel and the notes provided to the SIU. See Reasons of the Court of Appeal for Ontario (15 November 2011) at para 19, *Appellants’ Record*, vol I, tab 5 at 53; 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 515; Transcript of the Examination of Denis O’Neill (7 December 2009) at 10-11, *Appellants’ Record*, vol II, tab 16 at 267-268; Transcript of the Examination of Denis O’Neill (15 April 15 2010) at 79-85, *Appellants’ Record*, vol II, tab 18 at 407-413.

¹⁵ 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. It should be noted that the joint retainer issue raised in this report was addressed in the August 2011 amendments to the *SIU Regulation* while the right to fully consult counsel remained unchanged. See *SIU Regulation* s 7(3).

Director will lay an information against the officer(s) and refer the matter to the Crown Attorney for prosecution. Pursuant to section 113(9) of the *PSA*, police officers are required to “cooperate fully” with the SIU.

24. The *SIU Regulation* defines the rights and obligations of police officers in the context of SIU investigations. The practice of police officers obtaining advice from counsel is not new. The practice was well established and well known to the government long before the most recent amendments to the *SIU Regulation*. The issue was first addressed by the Honourable George Adams, Q.C. in a 1998 report prepared for the Attorney General and the Solicitor General.¹⁶ In response to the report, the government enacted the original *SIU Regulation* which incorporated many of the recommendations of Justice Adams.¹⁷ After the *SIU Regulation* was implemented, Justice Adams prepared a second report in 2003 in which he specifically addressed the issue of officers obtaining advice before completion of their notes:

The SIU reported that there have been some occasions where officers once designated have failed to complete their notes promptly after an incident in compliance with their duty as a result of alleged stress. In some cases, officers have received legal advice to refrain from completing their notes until they have consulted with their lawyers. This is very problematic.¹⁸

25. In 2008, the Ombudsman for Ontario, Andre Marin, who had previously served as Director of the SIU, released a report entitled *Oversight Unseen: Investigation into the Special Investigations Unit’s Operational Effectiveness and Credibility*, in which he

¹⁶ Ontario, *Consultation Report of the Honourable George W. Adams, Q.C. to the Attorney General and Solicitor General Concerning Police Cooperation with the Special Investigations Unit* (Toronto: Ministry of the Attorney General, 1998) at 35-36, *Appellants’ Book of Authorities*, tab 29.

¹⁷ O Reg 673/98.

¹⁸ Ontario, *Review Report on the Special Investigation Unit Reforms Prepared for the Attorney General for Ontario by The Honourable George W. Adams, Q.C.*, (Toronto: Ministry of the Attorney General, 2003) at 55, *Appellants’ Record*, vol II, tab 14G at 173.

highlighted a number of concerns respecting segregation and the preparation of notes. He reported, *inter alia*, that “[a] number of SIU investigators told us officers routinely make their notes after consulting with counsel.”¹⁹

26. Prior to enacting the most recent amendments to the *SIU Regulation*, the Ontario government received the report of the Honourable Patrick J. LeSage, Q.C. to the Attorney General for Ontario. Justice LeSage had been asked to review issues among various police organizations and the SIU and to advise the Attorney General on potential resolutions to these issues, which included the right to counsel and note taking. Justice LeSage made a number of recommendations for amendments to the *SIU Regulation* relating to segregation, right to counsel, and officers’ notes.²⁰ In relation to segregation, he recommended adding the words “directly or indirectly” to the requirement that involved officers not communicate with any other involved officer concerning the incident. In relation to the right to counsel, he recommended that witness officers not be represented by the same legal counsel as subject officers. In relation to officers’ notes, he recommended that officer notes “shall be completed by the end of the officer’s tour of duty, except where excused by the chief of police”. These recommendations were fully implemented through amendments to the *SIU Regulation*.²¹

¹⁹ Andre Marin, *Oversight Unseen: Investigation into the Special Investigations Unit’s Operational Effectiveness and Credibility* (Toronto: Ombudsman, Ontario, 2008) at 58-59, *Appellants’ Record*, vol II, tab 14D at 155-156.

²⁰ 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.

²¹ *SIU Regulation*, ss 6(2), 7(3), 9(5).

27. The government chose to implement the recommendations of Justice LeSage in relation to segregation, right to consult counsel and the duty to make notes, but made no further changes to the established balance between effective civilian oversight and the rights of involved officers. This reflected a legislative choice not to interfere with the practice of officers consulting with counsel in the preparation of their notes.

28. The relevant provisions of the current *SIU Regulation* are reproduced below, with the amendments based on the LeSage recommendations highlighted in italics:

Segregation of police officers involved in incident

6. (1) The chief of police shall, to the extent that it is practicable, segregate all the police officers involved in the incident from each other until after the SIU has completed its interviews. O. Reg. 267/10, s. 6 (1).

(2) A police officer involved in the incident shall not communicate *directly or indirectly* with any other police officer involved in the incident concerning their involvement in the incident until after the SIU has completed its interviews. O. Reg. 267/10, s. 6 (2); O. Reg. 283/11, s. 1.

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.

Interview of witness officers

8. (1) Subject to subsections (2) and (5) and section 10, immediately upon receiving a request for an interview by the SIU, and no later than 24 hours after the request if there are appropriate grounds for delay, a witness officer shall meet with the SIU and answer all its questions. O. Reg. 267/10, s. 8 (1).

...

Notes on incident

9. (1) A witness officer shall complete in full the notes on the incident in accordance with his or her duty and, subject to subsection (4) and section 10, shall provide the notes to the chief of police within 24 hours after a request for the notes is made by the SIU. O. Reg. 267/10, s. 9 (1).

(2) Subject to subsection (4) and section 10, the chief of police shall provide copies of a witness officer's notes to the SIU upon request, and no later than 24 hours after the request. O. Reg. 267/10, s. 9 (2).

(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. O. Reg. 267/10, s. 9 (3).

(4) The SIU director may allow the chief of police to provide copies of the notes beyond the time requirement set out in subsection (2). O. Reg. 267/10, s. 9 (4).

(5) *The notes made pursuant to subsections (1) and (3) shall be completed by the end of the officer's tour of duty, except where excused by the chief of police.* O. Reg. 283/11, s. 3.

PART II: STATEMENT OF QUESTIONS IN ISSUE

29. It is the Appellant's position that the following questions are in issue in this application:

- Question 1: Did the Court of Appeal err by abrogating the right to meaningful consultation with counsel despite the absence of any express or necessarily implied legislative restriction on the right to counsel.
- Question 2: Did the Court of Appeal for Ontario err in circumscribing the scope and extent of a police officer's right to counsel by interpreting the requirement that notes be prepared "in accordance with his or her duty" as precluding meaningful legal advice in connection with the preparation of an officer's notes.
- Question 3: Did the Court of Appeal err in crafting an unworkable protocol which renders virtually any discussion by an officer with counsel an ethical and practical minefield.

PART III: STATEMENT OF ARGUMENT

QUESTION 1: THE COMMON LAW AND THE STATUTORY RIGHT TO COUNSEL PERMIT OFFICERS MEANINGFUL CONSULTATION WITH COUNSEL PRIOR TO THE PREPARATION OF THEIR NOTES

QUESTION 2: THE REQUIREMENT THAT NOTES BE PREPARED “IN ACCORDANCE WITH HIS OR HER DUTY” DOES NOT PRECLUDE MEANINGFUL LEGAL ADVICE IN CONNECTION WITH THE PREPARATION OF AN OFFICER’S NOTES

30. The Court of Appeal for Ontario observed that there are no factual issues in dispute and correctly concluded that “the issues are questions of pure law and statutory interpretation.”²²

31. As the determination of this issue turns on the interpretation of a statutory scheme, it is necessary to ascertain and give effect to the intention of the Legislature. It is the Legislature which has the difficult and delicate task of addressing the policy concerns which it decides to advance and to arrive at legislative choices. It is the role of the courts, consistent with ensuring that fundamental principles of justice are respected, to give effect to those legislative choices. In her authoritative treatise on the construction of statutes, Professor Sullivan stated the following:

Courts avoid political choice. The courts are reluctant to make what they consider to be political decisions, that is, decisions that involve the balancing of competing interests or the allocation of resources among competing needs. When a court is asked to apply a general term to new facts, it may decline to do so if this would involve the court in what seems to be a political choice.²³

²² Reasons of the Court of Appeal for Ontario (15 November 2011) at paras 52, 54, *Appellants’ Record*, vol I, tab 5 at 66, 67.

²³ Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham: LexisNexis Canada, 2008) at 156-158, *Appellants’ Book of Authorities*, tab 33 [Sullivan]. See also *Bishop v Stevens*, [1990] 2 SCR 467 at paras 30-33; *Harvard College v Canada (Commissioner of Patents)*, 2002 SCC 76 at para 155; *Bell Express Vu Limited Partnership v Rex*, 2002 SCC 42 at para 26.

The Legislative Scheme

32. The *PSA* and the *SIU Regulation* constitute a legislative scheme establishing the rights and responsibilities of police officers, chiefs of police and the SIU during their investigations. Those rights and responsibilities reflect the government's dual concerns with preserving a police officer's right to consult legal counsel so as to protect legitimate interests, while at the same time ensuring that police officers remain accountable to the public through civilian oversight.

33. The SIU's ability to investigate is assisted by a general statutory obligation that compels all police officers to cooperate fully in the conduct of an SIU investigation,²⁴ and the more specific obligations of officers set out in the *SIU Regulation*. The regulation draws a distinction between "subject" and "witness" officers and defines police officers' specific obligations to the SIU and to the chief of police. Subject officers are those who it appears have caused the death or serious injury that is under investigation. Witness officers are those who it appears have been involved in the incident, but who are not subject officers.²⁵ However, in the aftermath of an incident which merits invoking the SIU's mandate, it may be difficult to distinguish between witness and subject officers. Indeed, the timely involvement of counsel as authorized in the legislative scheme may assist the SIU investigators in a more accurate designation of witness and subject officers.

34. The legislative scheme distinguishes between the obligations of these two classes of officers. Witness officers must submit to an interview with the SIU²⁶ and, upon

²⁴ *PSA*, s 113(9).

²⁵ *SIU Regulation*, s 1(1).

²⁶ *SIU Regulation*, s 8.

request, the chief of police must provide the SIU with their completed notes.²⁷ Subject officers are exempted from these provisions, in recognition of the fact that persons who are under criminal investigation are entitled to the protection of the *Canadian Charter of Rights and Freedoms* (“*Charter*”) and should not be legally compelled to provide potentially incriminating statements. However, it may only become clear to the Director or his designate that a particular officer is a subject officer after he or she has submitted to a “witness officer” interview and has provided his or her notes in compliance with the regulation. The *SIU Regulation* provides that, in these circumstances, the newly designated subject officer's notes and any recordings of SIU interviews shall be returned to the officer and the chief of police.²⁸

35. All officers, both subject and witness, must submit their completed notes to the chief of police.²⁹ Pursuant to the *SIU Regulation*, the chief of police shall also investigate the incident, including an investigation into the involved officers' conduct. The chief of police must provide a report of the findings of his or her investigation to the police services board, which may be made public.³⁰ The report may also include findings that substantiate some or all of the misconduct of an involved officer. A finding of misconduct in such a report may lead to a discipline hearing³¹ and, ultimately, discipline sanctions pursuant to the *PSA* for either a witness or subject officer. The serious

²⁷ *SIU Regulation*, ss 9(1), 9(2).

²⁸ *SIU Regulation*, s 10(3).

²⁹ *SIU Regulation*, s 9.

³⁰ *SIU Regulation*, s 11(4). Pursuant to section 11(5) the Commissioner of the OPP shall prepare such a report and may provide it to the public.

³¹ *PSA*, s 76(9).

consequences that a police officer may face include suspension, demotion and dismissal.³²

Legislative Purpose

36. The Court of Appeal for Ontario correctly recognized that the *SIU Regulation* must be interpreted with regard to the underlying legislative purpose. The Court of Appeal erred, however, in adopting the overly narrow view of the legislative purpose advanced in the submission of the Director of the SIU:

The legislative purpose underlying the *PSA* and the *SIU Regulation* is clear and unequivocal: to maintain and foster public confidence in the rule of law and the administration of justice by ensuring that when police actions result in the death of or serious injury to civilians, they are subject to an independent, impartial and effective investigation the conclusions of which are accessible and transparent.³³

37. When one reads the *SIU Regulation* in its entirety, as a coherent scheme, it is apparent that this statement of the legislative purpose is unduly restricted and one dimensional. It is clear that the Legislature intended to achieve a fair and balanced process for the investigation of matters falling within the SIU mandate. The Legislature sought to fairly balance society's interest in independent and effective investigation with the need to accord fundamental rights and procedural fairness to witness and subject officers. If effective investigation was the exclusive, or even the primary, purpose of the *SIU Regulation*, the Legislature would have allowed the SIU access to all officer notes, including the notes of subject officers. It chose not to. The Legislature chose, instead, to ensure that a subject officer's right against compelled self-incrimination was protected by excluding the subject officer's notes from production in the SIU investigation.

³² *PSA*, s 85.

³³ Reasons of the Court of Appeal for Ontario (15 November 2011) at para 58, *Appellants' Record*, vol I, tab 5 at 68-69.

38. Professor Sullivan noted that the purpose of legislation can often be inferred from the legislative scheme. She explained:

Inferences about purpose are often drawn from analyzing the structure or scheme embodied in an Act. In carrying out this analysis the court, in effect, retraces the steps of the Legislative drafter, examining the relationship among provisions to surmise the overall plan. It attempts to discover why each provision was included and the contribution each makes towards implementing the legislature's goals. It looks at the way provisions are grouped under headings or divided into parts to discover a common theme or rationale.³⁴

39. In many instances, the purpose of an enactment can be inferred from the text alone. This is illustrated by the approach which was adopted by Justice McLachlin (as she then was) in *Regina v. Garofoli* where she considered the various sections of Part IV.1 of the *Criminal Code* to ascertain the legislative purpose. She determined from reviewing the provisions that one purpose of the legislation was protection of privacy while a second purpose was the protection of the administration of justice. She concluded that the legislative purpose accommodated “the public interest in securing the prosecution and conviction of the guilty” but also recognized “the importance of fairness to the accused”.³⁵

40. The legislative choice to balance society's interest in effective SIU investigations with the protection of the rights of officers subject to investigation mirrors the balance found in the criminal law generally. Criminal law provisions regarding the investigation of serious crimes are moderated by the common law, statutory and *Charter* rights of those under investigation or prosecution. For example, the criminal law affords everyone the right to remain silent in the face of an investigation, unless a statute expressly compels a statement. In those rare circumstances, the rights of the individual are

³⁴ Sullivan at 276-277.

³⁵ *Regina v Garofoli* (1990), 60 CCC (3d) 161 at 202 (SCC). See also Sullivan at 275-276.

protected as the compelled statement cannot be used as part of the prosecution case against the individual who was required to make it.³⁶ It is apparent that a similar fair and balanced approach was a fundamental objective of the Legislature in enacting the *SIU Regulation*.

41. The objective of the administration of criminal justice, as reflected in the legislation, is to ensure compatibility between effective enforcement and the protection of the rights of those who find themselves under investigation and prosecution.

Legislative Context

42. The express right of a police officer to consult counsel has been recognized by the legislature in the context of investigations by both the SIU and the chief of police, investigations that could lead to serious criminal or disciplinary consequences for the involved officers.

43. Analogous to the right to retain and instruct counsel contained in the *Charter*, the purpose behind this express right is to afford police officers with the opportunity to protect their legitimate interests in the face of serious state sanctions to which they may be subject. Unlike ordinary citizens, police officers are tasked by society with the obligation to place themselves in situations of conflict. There is no dispute that the life of each of the Appellant police officers was placed in jeopardy as a result of the execution of his duties as a police officer. The obligations of a police officer expose officers to the risk of serious physical and psychological harm.

³⁶ See for example, *Regina v White*, [1999] 2 SCR 417 at para. 67. See also *Regina v Nedelcu*, 2012 SCC 59.

44. In the face of a criminal investigation, an ordinary citizen who is either a witness or a potential accused may exercise their right to remain silent.³⁷ However, a police officer does not enjoy that same right. Unlike ordinary citizens, police are under a legal obligation to provide an account of an incident by completing notes and reporting on incidents that occur in the course of their duty as police officers.³⁸

45. The community has assigned police officers the responsibility of responding to violent and dangerous situations in which they may be required to use force. It is therefore appropriate that when they are called upon to account for their actions, they are afforded protections designed to preserve and protect their legal interests. It is in this context that the government has reinforced a police officer's right to consult counsel in the serious situations in which the mandate of the SIU has been triggered.

46. In interpreting the *SIU Regulation* by reference to legislative context, the Court of Appeal failed to appreciate the entirety of the legislative scheme by its focus on the right to counsel conferred by section 7(1) in conjunction with the duty to make notes in accordance with section 9. Although the Court of Appeal observed that the right to counsel did not stand in isolation and that its precise meaning must be discerned with reference to other provisions of the *SIU Regulation*, it failed to address or to properly consider the critical aspect of segregation dictated by section 6 in its appreciation of the legislative scheme.³⁹

³⁷ *Rothman v The Queen*, [1981] 1 SCR 640 at 683; *Regina v Singh*, 2007 SCC 48 at paras 27-28.

³⁸ *SIU Regulation*, s 9.

³⁹ Reasons of the Court of Appeal for Ontario (15 November 2011) at para 65, *Appellants' Record*, vol I, tab 5 at 71.

47. In section 6, the Legislature clearly addressed the restrictions on communication which should be imposed on officers involved in the incident under investigation in order to preserve the integrity of officers' notes and interviews. It is section 6 that protects the independence of the accounts memorialized by involved officers in their notes and in interviews. Section 9 prescribes when notes are to be made and to whom they are given. The Legislature chose only to prohibit officers from communicating directly or indirectly with other police officers involved in the incident concerning their involvement in the incident until after SIU interviews have been completed. Had the Legislature intended that involved officers be prohibited from communication with others concerning the event, including first responders, trauma counsellors or legal counsel, it would have done so expressly.

48. The dual legislative objectives of effective investigation and protection of the fundamental rights of those investigated are established in the legislation by creating the following building blocks:

- (i) Segregation of officers to ensure the independence of their recollection and the integrity of their notes and interviews;
- (ii) The right to counsel to ensure the preservation of officers' rights; and
- (iii) The timely completion of officers' notes and interviews, and rules respecting their transmission.

(i) Segregation of police officers involved in incident

49. As noted, the Court of Appeal failed to place in its proper legislative context, the express provisions of section 6 of the *SIU Regulation* which codify the restrictions on a subject or witness officer's right to communicate with others about their involvement in the incident.

50. It is apparent that the Legislature recognized the concern that the integrity and independence of an officer's notes might be compromised by communications with others. The Legislature chose to fully address those concerns by enacting the segregation rules in section 6. Section 6(1) imposes a duty on chiefs of police to segregate all involved officers from each other, to the extent that it is practicable, until the completion of the SIU interviews. Section 6(2) prohibits officers involved in the incident from communicating directly or indirectly with any other officer involved in the incident concerning their involvement in the incident, until completion of the SIU interviews. The rationale underlying this segregation rule is found in the common law and is codified in section 6.

51. It is submitted that the common law recognizes that the integrity and independence of an officer's notes is maintained by segregating the officer from discussions with other witnesses to the event. There has never been a suggestion at common law that an officer's access to and consultation with counsel would compromise the independence and integrity of the officer's account of events, nor that the officer be "segregated" from the advice of counsel.

52. The only case cited by the Court of Appeal in support of "segregating" involved officers from the advice of counsel is the case of *Regina v. Green*, which is readily distinguishable. In *Green*, the trial judge was critical of the fact that the two officers involved in a drug investigation had not only collaborated in the preparation of their notes, but "agreed upon the exact wording of all of their conversations with the accused." The trial judge observed:

If the officer's notes are prepared without any indication of which is the officer's independent recollection and which is somebody else's recollection, there is every likelihood that that officer at trial will be "refreshing" his or her own memory with observations made by someone else. In effect, the officer will be giving hearsay evidence as if it was his or her own recollection rather than the observations of somebody else written into the notes without attribution.⁴⁰

53. The legitimate concern expressed in cases like *Green, supra* is that the independence and reliability of the notes of an officer involved in an incident, or in an investigation, may be compromised by the officer speaking with another *witness* to those same events. There is no authority, however, to suggest that speaking with counsel will compromise the independence and reliability of an officer's notes. Counsel is not a witness and will not be providing the officer with anyone else's account or recollection of events. Presumably this distinction was considered by the Legislature in choosing to segregate officers from each other, but not from counsel.

54. This limited restriction, preventing discussion with other witnesses, but not non-witnesses, is consistent with the legislative objective: a fair and balanced process for the investigation of matters falling within the SIU mandate that respects fundamental rights and accords procedural fairness to witness and subject officers. The legislature has made a clear choice to segregate officers only from other witnesses, not from non-witnesses, including counsel. This conclusion is consistent with the *expressio unius est exclusio alterius maxim*: "to express one thing is to exclude another." When a provision specifically mentions one category of persons (involved officers) but is silent with respect to other categories (counsel), it is presumed that the silence is deliberate and reflects an intention to exclude the categories not mentioned. This interpretive approach has also

⁴⁰ *Regina v Green*, [1998] OJ no 3598 (QL) at paras 16, 20 (Gen Div); Reasons of the Court of Appeal for Ontario (15 November 2011) at para 70, *Appellants' Record*, vol I, tab 5 at 73.

been described as “implied exclusion”. As succinctly stated by Justice Laskin on behalf of the Ontario Court of Appeal in *University Health Network v Ontario*: “Legislative exclusion can be implied when an express reference is expected but absent”.⁴¹

(ii) The Right to Counsel

55. As noted by the application judge, the *SIU Regulation* does not create a statutory right to counsel that would otherwise not exist.⁴² Rather, the *SIU Regulation* codifies and expands upon an officer’s common law right to consult counsel. Designated police officers, like ordinary citizens, have a presumptive right to consult with counsel as, and when, they see fit. This is particularly so when an officer, or a citizen, is the subject of an investigation that could result in criminal or disciplinary prosecution. The presumptive right to consult with counsel must apply with added vigour in the context of SIU investigations where there is a statutory compulsion to cooperate with the investigating authorities and to provide an account of events in the form of police notes. The right to obtain effective legal advice has been recognized as an important component of access to justice.⁴³

56. It is clear from the wording of section 7(1) that the Legislature intended to create an expansive right to consult with legal counsel, including full consultation with counsel before notes are completed and the interview process is even engaged. The section provides that “every officer is entitled to consult with legal counsel or a representative of the association *and* to have legal counsel or a representative of the association present

⁴¹ *University Health Network v Ontario (Minister of Finance)* (2001), 208 DLR (4th) 459 at para 31 (CA). See also Sullivan at 243-249.

⁴² Reasons of the Honourable Madam Justice Low (23 June 2010) at para 78, *Appellants’ Record*, vol I, tab 4 at 42.

⁴³ *General Accident Assurance Co. v Chrusz* (1999), 45 OR (3d) 321 at para 92 (CA).

during his or her interview with the SIU”. The use of the conjunctive “and” indicates that this right has two distinct components:

- (a) A general right to consult with legal counsel consistent with the presumptive common law right to consult counsel at all times; and
- (b) The added right, not found at common law, to have legal counsel present during an SIU interview.

57. At common law some limits on the right to consult with counsel have been recognized. In criminal investigations, persons who have been arrested are not entitled to have counsel present during the police interview. Additionally, once a detainee has consulted with counsel, the detainee is only allowed a further consultation with counsel in limited circumstances, such as where there has been a change in the detainee’s jeopardy.⁴⁴ Section 7(1) of the *SIU Regulation* extends the common law right to counsel by expressly providing that an officer has the right to have counsel present during the interview by the SIU. This right is expressly extended to witness officers participating in compelled interviews pursuant to section 8(1) of the *SIU Regulation*.

58. The only limitations expressed in the *SIU Regulation* on an officer’s right to consult counsel are temporal restrictions. These limitations on the right to counsel are consistent with the narrow restrictions articulated in the jurisprudence relating to section 10(b) of the *Charter*. Courts have held that police investigators must “hold off” questioning a detainee until he has had a reasonable opportunity to consult counsel. However, if there is delay by reason of the detainee failing to exercise reasonable diligence in his efforts to consult counsel, the police can then proceed with the

⁴⁴ *Regina v Sinclair*, 2010 SCC 35 at paras. 33-42, 65 (SCC) [*Sinclair*].

interview.⁴⁵ The Legislature clearly intended that the *SIU Regulation* would codify this common law temporal limit on the right to consult counsel by providing that an officer's right to consult counsel does not apply if the SIU Director is of the opinion that waiting for counsel would unreasonably delay the investigation.⁴⁶ In the recent amendments, an additional temporal limit was imposed requiring that officers complete their notes before the end of their tour of duty, unless excused by the chief of police.⁴⁷ Again, although directly addressing the issue of right to counsel by prohibiting witness officers from retaining the same counsel as subject officers,⁴⁸ the Legislature refrained from placing any limitation on the nature or scope of consultation with counsel. Had the Legislature intended to impose other restrictions or limits on an officer's fundamental right to consult with counsel, it would have done so expressly.

59. The Court of Appeal recognized that section 7(1) "significantly enhances the rights of both witness and subject officers beyond the rights enjoyed by ordinary citizens in relation to police investigations."⁴⁹ The Court of Appeal further recognized that in providing witness and subject officers a right "to have legal counsel or a representative of the police association present during his or her interview with the SIU", section 7(1) conferred a right not enjoyed by ordinary citizens, who have no right to have counsel present when interrogated by the police. The Court of Appeal concluded: "Undoubtedly, police officers are accorded this enhanced right to counsel because, unlike the ordinary

⁴⁵ See *Sinclair and Regina v. Manninen*, [1987] 1 SCR 1233 at paras 22-24.

⁴⁶ *SIU Regulation*, s 7(2).

⁴⁷ *SIU Regulation*, s 9(5).

⁴⁸ *SIU Regulation*, s 7(3).

⁴⁹ Reasons of the Court of Appeal for Ontario (15 November 2011) at para 61, *Appellants' Record*, vol I, tab 5 at 70.

citizen in the ordinary situation, police officers do not enjoy the right to silence in the face of an SIU investigation.”⁵⁰

60. It is apparent that the Legislature made an informed decision to afford officers an otherwise unrestricted right to consult with counsel. It is submitted that limits on this enhanced statutory right to counsel should only be imposed if such a limit is “expressly provided for by statute or regulation, or results by necessary implication from the terms of a statute or regulation or from its operating requirements... [or] ... from the application of a common law rule.”⁵¹ Ordinarily, in order to adversely affect an individual’s rights the Legislature must do so expressly. A court must be slow to presume “oversight or inarticulate intentions” of the Legislature when the rights of the citizen are involved.⁵²

61. It is only in the rarest of circumstances that there could be a legal justification for denying anyone the right to consult with a lawyer when that person faces a legal compulsion to cooperate with the investigating authorities. When a motorist is detained at the roadside, the police are entitled to demand a roadside breath test without affording the driver an opportunity to consult with counsel. This restriction has been upheld by this Honourable Court on the basis that implementation of the right to counsel at the roadside is incompatible with the performance of roadside screening measures given the time sensitive nature of breath testing procedures. Real evidence would be eliminated from the suspect with every passing minute. Additionally, the results of roadside testing

⁵⁰ Reasons of the Court of Appeal for Ontario (15 November 2011) at para 63, *Appellants’ Record*, vol I, tab 5 at 70-71.

⁵¹ *Regina v Therens*, [1985] 1 SCR 613 at para. 60. See also *Regina v Elias*; *Regina v Orbanski*, 2005 SCC 37 at para 36 [*Orbanski*]; *Regina v Thomsen*, [1988] 1 SCR 640 at para 15 [*Thomsen*]; *Canada (Attorney General) v Mavi*, 2011 SCC 30 at para 39.

⁵² *Morguard Properties Ltd. v City of Winnipeg*, [1983] 2 SCR 493 at 509; *Crystalline Investments Ltd. v Domgroup Ltd.*, 2004 SCC 3 at para 43.

cannot be used as direct evidence to incriminate a driver, but only as a basis to support a demand that the driver attend at the station for further testing.⁵³

62. In the case of officers who wish to consult with counsel prior to the preparation of their notes, similar justifications for denying access to counsel are absent. An officer's recollection of events will not be eliminated from his memory in the way that alcohol will be immediately, inexorably and permanently eliminated from a driver's body. Furthermore, there is no blanket protection against an officer's notes being used as evidence against the officer in future proceedings. Witness and subject officers are required to prepare full notes of the incident. Witness officers must provide their notes to the chief of police.⁵⁴ The chief of police then provides those notes to the SIU upon request.⁵⁵ Witness officers must also submit to an interview with the SIU.⁵⁶ Officers may be subject to a discipline hearing under the *Police Services Act*, and may face sanctions as serious as suspension, demotion and dismissal.⁵⁷ There is no protection against officer notes, or an SIU interview, being used in evidence against the officer in a hearing under the *Police Services Act*, at an inquest or in civil proceedings. Although a subject officer's notes would not be transmitted to the SIU for investigative purposes, nevertheless, should the officer be charged and testify at his trial, the notes may be

⁵³ See *Orbanski* at paras 40-48, 52-58; *Thomsen* at para 19; *Regina v Milne* (1996), 107 CCC (3d) 118 at 128-131 (Ont CA).

⁵⁴ *SIU Regulation*, s 9(1).

⁵⁵ *SIU Regulation*, s 9(2).

⁵⁶ *SIU Regulation*, s 8.

⁵⁷ *PSA*, ss 76(9), 85; *SIU Regulation*, s 11.

subject to production by the officer as a basis upon which his or her memory had been refreshed.⁵⁸

(iii) The Timely Completion of Notes

63. The duty to make notes as set out in section 9 relates to when notes are to be made and to whom the notes will be provided. To the extent that section 9(1) speaks of an officer making notes “in accordance with his or her duty” it is merely a reference to the duty recognized at common law as codified in section 6. As stated, the duty is to make notes independently of other witnesses, not counsel. Nothing in section 9 expressly or by necessary implication restricts an officer’s right to consult counsel.

The Legislative Evolution

64. It is submitted that the evolution of the legislation may assist in the interpretation of its provisions. Comparing prior enactments with new provisions may cast light on the intention of the Legislature. In this case, it is apparent that the government was aware of the practice of involved officers consulting with counsel prior to the preparation of their notes and the concerns of the SIU respecting this practice. Nevertheless, the Legislature chose not to curtail the practice despite making other amendments to the provisions respecting segregation, right to counsel and the preparation of notes. It is to be inferred that the practice is permitted under the current legislative scheme and that the Legislature chose not to prohibit it in the recent amendments.⁵⁹

⁵⁸ *Regina v Mugford* (1990), 58 CCC (3d) 172 at 177-178 (Nfld CA). This may be the case notwithstanding the Attorney General’s Directive dated December 23, 1998 (the “Harnick Directive”) which directs Crown counsel in SIU prosecutions to refrain from *adducing* notes or statements by subject officers that were compelled during an SIU investigation. Referred to in *Regina v Calleja, Bowman and Coniglione* (30 November 2010), Barrie 09-6354, 11-0705 (Ont Ct J).

⁵⁹ See Sullivan at 577-579 and *Regina v Ulybel Enterprises Ltd.*, 2001 SCC 56 at para 33.

The Flawed Premise of the Court of Appeal

65. It is submitted that there was no evidentiary foundation nor principled basis for the assumption by the Court of Appeal for Ontario that the involvement of counsel would compromise, rather than enhance, the integrity and reliability of an officer's notes. In fact, it is submitted that advice from counsel would more likely ensure that an officer would fully appreciate the importance of providing a comprehensive account which addressed all factual and legal issues that would be of interest to the SIU, to the officer's police service and to the public. Consultation with counsel enhances the note making process by providing an officer the opportunity to be reminded by counsel of the importance of memorializing a complete and accurate account of the events which led to the investigation.

66. The central theme of the judgment of the Court of Appeal is that the involvement of counsel would negatively influence the accounts recorded in police notes. This flawed premise assumes that the advice lawyers provide to officers will inevitably distort an officer's public responsibility in favour of his private interest. This dicta disregards the obligation of lawyers to act competently, with integrity, and at all times within the law. The position of the Court ignores the special position that lawyers occupy in the administration of justice. In *Andrews v. Law Society of British Columbia*, Justice McIntyre emphasized the reliance of the justice system on the legal profession and the competent discharge of its duties to its clients, the courts and society:

It is incontestable that the legal profession plays a very significant -- in fact, a fundamentally important -- role in the administration of justice, both in the criminal and the civil law. I would not attempt to answer the question arising from the judgments below as to whether the function of the profession may be termed judicial or quasi-judicial, but I would observe that in the absence of an independent legal profession, skilled and qualified to play its part in the

administration of justice and the judicial process, the whole legal system would be in a parlous state.⁶⁰

67. Courts have long recognized, and the basic tenets of the legal profession dictate that counsel are more than mere advocates for their clients. They are officers of the court. Lawyers are bound by the *Rules of Professional Conduct* and the Barrister's Oath to conduct themselves with "honesty and integrity"; "not [to] pervert the law to favour or prejudice anyone"; to "improve the administration of justice" and to "champion the rule of law."⁶¹

68. The notion that meaningful consultation with counsel might compromise or taint the integrity of witness accounts is not only counterintuitive, it is inconsistent with the position of trust which counsel enjoy and courts have acknowledged. For example, concerns regarding witness tainting are routinely addressed by exclusion orders at trial. In the case of *R. v. O'Callaghan*, the trial judge made an unusual order directing that the Crown and defence counsel not communicate with any witness who was expected to testify at trial, as counsel would be privy to the evidence already provided by other witnesses. The trial judge was concerned that counsel might taint a witness' account by inadvertently communicating to a witness evidence that had been previously given by another. In overturning that order, the reviewing Justice made the following observations:

Although nothing should sanction any indirect method of conveying to the prospective witnesses information as to testimony already given, the rationale behind orders for "sequestration" (Wigmore's term) of witnesses is to prevent the possibilities of abuse by unscrupulous persons. Surely, honest counsel may consult with a sequestered or excluded witness. Mere "suspicion of impropriety,

⁶⁰ *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at para 55.

⁶¹ *Fortin v Chretien*, 2001 SCC 45 at para 49. See also Ontario, Law Society of Upper Canada, *Barristers and Solicitors' Oath*, by-law 4, s 21(1).

even though it may not exist" is not enough to interfere with the right of an officer of the court to confer "in a proper manner" with witnesses even though subject to an exclusion order. To decide otherwise would belie centuries of tradition of an independent and professional bar.⁶²

QUESTION 3: THE CREATION OF AN UNWORKABLE PROTOCOL

69. The judgment of the Court of Appeal creates an unprecedented and unworkable intrusion into the solicitor-client relationship. Although the Court of Appeal acknowledged that officers are entitled to some basic legal advice as to the nature of their rights and obligations in connection with the incident and the SIU investigation, the Court narrowly circumscribed the advice which could be offered relating to the preparation of the officer's notes. The Court held that "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."⁶³ The judgment suggests that any discussion between the lawyer and the officer concerning the incident under investigation would compromise the independence of the officer's version, and would therefore be impermissible.

70. Such a constraint is entirely unworkable. It results in a clash between the permissible sphere of advice relating to the officer's rights and obligations, and the apparently impermissible sphere of advice involving any discussion about the events and how they should be recorded in the notes. For example, in order to provide any meaningful consultation, a lawyer must first ascertain whether he is dealing with a

⁶² *Regina v O'Callaghan* (1982), 65 CCC (2d) 459 at 465 (Ont H Ct J).

⁶³ Reasons of the Court of Appeal for Ontario (15 November 2011) at paras 73-74, 81, *Appellants' Record*, vol I, tab 5 at 74-75, 77-78.

witness or subject officer.⁶⁴ This precondition to providing any worthwhile advice requires that the lawyer ask basic factual questions about the incident and the officer's involvement. Eliciting this essential information would appear to violate the restricted role of counsel established by the decision of the Court of Appeal. It is submitted that counsel have a professional responsibility, guided by existing legal and ethical obligations, to conduct discussions with their client in a manner that facilitates the officer's preparation of notes so as to record a complete and accurate account.

71. It is an illusion to suggest that an officer had been afforded the right to counsel if the lawyer must merely advise the officer to "provide a full and honest record of the officer's recollection of the incident in his own words." The officer would be deprived of advice as to the extent, scope and detail of the account required. It is unlikely that the officer would have had prior experience with SIU investigations, while the lawyer will usually have experience and expertise. The lawyer would appreciate that it benefits the officer, and incidentally benefits the SIU, the chief of police and ultimately the public to ensure that the officer has produced comprehensive notes which address all relevant factual and legal issues. While it would be clearly improper for the lawyer to suggest what the officer should say in his notes,⁶⁵ it would be entirely proper for the lawyer to ask non-leading questions to elicit a complete account and draw the officer's attention to

⁶⁴ This has become particularly important now that a lawyer can no longer advise both a witness and subject officer, but may continue to act for multiple officers within a single category: *SIU Regulation*, s 7(3). See also Law Society of Upper Canada "Information for Lawyers - Acting for Police Officers in Ontario Special Investigations Unit ("SIU") Investigations" (6 November 2012); Letter from Gavin MacKenzie, Heenan Blaikie, to Roland Middel, Police Association Ontario, dated November 27, 2009, *Appellants' Record*, vol III, tab 20K at 724-736.

⁶⁵ In his interview with the SIU, A/Sgt Pullbrook made it clear that, although he spoke to Mr. McKay before he made his duty notes, "his counsel did not direct him what to say in his notes." SIU Follow Up Report re: Witness Officer Interview of Acting Sergeant Mark Pullbrook (29 June 2009), *Appellants' Record*, vol III, tab 19D at 520.

particularly relevant facts and circumstances that should be fully memorialized in the officer's written account. It would be appropriate, and to the benefit of the officer and the investigators, for the lawyer to ensure that relevant topics are canvassed in the notes, such as:

- (i) The size of the person with whom the officer was dealing.
- (ii) How was the person acting?
- (iii) What was the distance between the officer and the person?
- (iv) Did that distance change during the encounter?
- (v) Did the person make any threats, by words or by gesture?
- (vi) What threats were made?
- (vii) Did the person have a weapon? If so, what did they do with it?
- (viii) Did the officer feel at risk? If so, how?
- (ix) Did the officer use force? If so, what force was used?
- (x) Did the officer feel that the use of could have been avoided?
- (xi) Did the officer feel that less force or alternative force could have been used?

72. The protocol proposed by the Court of Appeal for Ontario undermines the solicitor-client relationship and confuses rather than clarifies the most fundamental communication essential in the circumstances. 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.

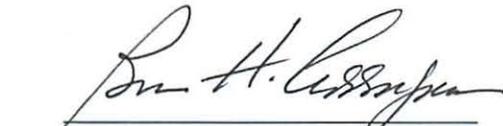
PART IV: COSTS

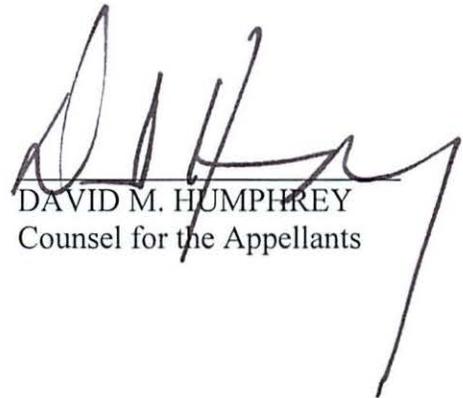
73. The Appellants did not seek a costs order with respect to the application for leave to appeal nor are they seeking costs on this appeal, and they ask that no costs be awarded against them. However, the Appellants seek the recovery of costs in the amount of \$100,000 ordered against them by the Ontario Court of Appeal.

PART V: ORDER SOUGHT

74. It is respectfully requested that the appeal be allowed and that the declaration of the Court of Appeal for Ontario be set aside. In addition, the Appellants seek the recovery of costs in the amount of \$100,000 ordered against them by the Ontario Court of Appeal.

DATED at Toronto, this 19th day of November, 2012.


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PART VI: AUTHORITIES CITED

| <u>Authority Cited</u> | <u>Paragraph</u> |
|---|-------------------------|
| Jurisprudence | |
| <i>Andrews v Law Society of British Columbia</i> , [1989] 1 SCR 143 | 66 |
| <i>Bell Express Vu Limited Partnership v Rex</i> , 2002 SCC 42 | 31 |
| <i>Bishop v Stevens</i> , [1990] 2 SCR 467 | 31 |
| <i>Canada (Attorney General) v Mavi</i> , 2011 SCC 30 | 60 |
| <i>Crystalline Investments Ltd. v Domgroup Ltd.</i> , 2004 SCC 3 | 60 |
| <i>Fortin v Chretien</i> , 2001 SCC 45 | 67 |
| <i>General Accident Assurance Co. v Chrusz</i> (1999), 45 OR (3d) 321 (CA) | 55 |
| <i>Harvard College v Canada (Commissioner of Patents)</i> , 2002 SCC 76 | 31 |
| <i>Morguard Properties Ltd. v City of Winnipeg</i> , [1983] 2 SCR 493 | 60 |
| <i>Regina v Calleja, Bowman and Coniglione</i> (30 November 2010), Barrie 09-6354, 11-0705 (Ont Ct J) | 62 |
| <i>Regina v Elias; Regina v Orbanski</i> , 2005 SCC 37 | 60, 61 |
| <i>Regina v Garofoli</i> , [1990] 2 SCR 1421 | 39 |
| <i>Regina v Green</i> , [1998] OJ no 3598 (QL) (Gen Div) | 52 |
| <i>Regina v. Manninen</i> , [1987] 1 SCR 1233 | 58 |
| <i>Regina v Milne</i> (1996), 107 CCC (3d) 118 (Ont CA) | 61 |
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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).

...

Powers at conclusion of hearing by chief of police, board or Commission

85. (1) Subject to subsection (4), the chief of police may, under subsection 84 (1),

- (a) dismiss the police officer from the police force;
- (b) direct that the police officer be dismissed in seven days unless he or she resigns before that time;
- (c) demote the police officer, specifying the manner and period of the demotion;
- (d) suspend the police officer without pay for a period not exceeding 30 days or 240 hours, as the case may be;
- (e) direct that the police officer forfeit not more than three days or 24 hours pay, as the case may be;
- (f) direct that the police officer forfeit not more than 20 days or 160 hours off, as the case may be; or
- (g) impose on the police officer any combination of penalties described in clauses (c), (d), (e) and (f).

Same

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

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

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

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

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

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

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

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

Same

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

Notice needed

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

Calculation of penalties

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

Same

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

Additional powers

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

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

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

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

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

Notice of decision

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

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

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

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

Employment record

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

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

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

Restriction on employment

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

Special investigations unit

113. (1) There shall be a special investigations unit of the Ministry of the Solicitor General.

Composition

(2) The unit shall consist of a director appointed by the Lieutenant Governor in Council on the recommendation of the Solicitor General and investigators appointed under Part III of the Public Service of Ontario Act, 2006.

Idem

(3) A person who is a police officer or former police officer shall not be appointed as director, and persons who are police officers shall not be appointed as investigators.

Acting director

(3.1) The director may designate a person, other than a police officer or former police officer, as acting director to exercise the powers and perform the duties of the director if the director is absent or unable to act.

Peace officers

(4) The director, acting director and investigators are peace officers.

Investigations

(5) The director may, on his or her own initiative, and shall, at the request of the Solicitor General or Attorney General, cause investigations to be conducted into the circumstances of serious injuries and deaths that may have resulted from criminal offences committed by police officers.

Restriction

(6) An investigator shall not participate in an investigation that relates to members of a police force of which he or she was a member.

Charges

(7) If there are reasonable grounds to do so in his or her opinion, the director shall cause informations to be laid against police officers in connection with the matters investigated and shall refer them to the Crown Attorney for prosecution.

Report

(8) The director shall report the results of investigations to the Attorney General.

Co-operation of police forces

(9) Members of police forces shall co-operate fully with the members of the unit in the conduct of investigations.

Co-operation of appointing officials

(10) Appointing officials shall co-operate fully with the members of the unit in the conduct of investigations.

Police Services Act

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

Definitions and interpretation

1. (1) In this Regulation,

“SIU” means the special investigations unit established under section 113 of the Act; (“UES”)

“subject officer” means a police officer whose conduct appears, in the opinion of the SIU director, to have caused the death or serious injury under investigation; (“agent impliqué”)

“witness officer” means a police officer who, in the opinion of the SIU director, is involved in the incident under investigation but is not a subject officer. (“agent témoin”) O. Reg. 267/10, s. 1 (1).

(2) The SIU director may designate an SIU investigator to act in his or her place and to have all the powers and duties of the SIU director under this Regulation and, if the SIU director appoints a designate, any reference to the SIU director in this Regulation, excluding this subsection, means the SIU director or his or her designate. O. Reg. 267/10, s. 1 (2).

(3) For the purposes of this Regulation, a person appointed as a police officer under the *Interprovincial Policing Act, 2009* is deemed to be,

- (a) if the person was so appointed by a member of the Ontario Provincial Police, a member of that police force;
- (b) if the person was so appointed by a member of a municipal police force, a member of that police force; or
- (c) if the person was so appointed by a member of a board, a member of the municipal police force for which the board is responsible. O. Reg. 267/10, s. 1 (3).

(4) A police officer appointed under the *Interprovincial Policing Act, 2009* shall comply with all directions given to him or her for the purposes of this Regulation by the chief of police of the police force of which the officer is deemed to be a member or by the designate of that chief of police appointed under subsection 2 (1). O. Reg. 267/10, s. 1 (4).

Designate of chief of police

2. (1) The chief of police may designate a member of the police force who is not a subject officer or witness officer in the incident to act in the place of the chief of police and to have all the powers and duties of the chief of police in any matter respecting an incident under investigation by the SIU. O. Reg. 267/10, s. 2 (1).

(2) If the chief of police appoints a designate under subsection (1), any reference to the chief of police in this Regulation, excluding this section, means the chief of police or his or her designate. O. Reg. 267/10, s. 2 (2).

(3) The person appointed under subsection (1) must be a senior officer. O. Reg. 267/10, s. 2 (3).

Notice to SIU

3. A chief of police shall notify the SIU immediately of an incident involving one or more of his or her police officers that may reasonably be considered to fall within the investigative mandate of the SIU, as set out in subsection 113 (5) of the Act. O. Reg. 267/10, s. 3.

Securing scene of incident

4. The chief of police shall ensure that, pending the SIU taking charge of the scene of the incident, the police force secures the scene in a manner consistent with all standing orders, policies and usual practice of the police force for serious incidents. O. Reg. 267/10, s. 4.

SIU as lead investigator

5. The SIU shall be the lead investigator in the investigation of the incident and shall have priority over any police force in the investigation. O. Reg. 267/10, s. 5.

Segregation of police officers involved in incident

6. (1) The chief of police shall, to the extent that it is practicable, segregate all the police officers involved in the incident from each other until after the SIU has completed its interviews. O. Reg. 267/10, s. 6 (1).

(2) A police officer involved in the incident shall not communicate directly or indirectly with any other police officer involved in the incident concerning their involvement in the incident until after the SIU has completed its interviews. O. Reg. 267/10, s. 6 (2); O. Reg. 283/11, s. 1.

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.

Interview of witness officers

8. (1) Subject to subsections (2) and (5) and section 10, immediately upon receiving a request for an interview by the SIU, and no later than 24 hours after the request if there are appropriate grounds for delay, a witness officer shall meet with the SIU and answer all its questions. O. Reg. 267/10, s. 8 (1).

(2) A request for an interview by the SIU must be made in person. O. Reg. 267/10, s. 8 (2).

(3) The SIU shall cause the interview to be recorded and shall give a copy of the record to the witness officer as soon as it is available. O. Reg. 267/10, s. 8 (3).

(4) The interview shall not be recorded by audiotape or videotape except with the consent of the witness officer. O. Reg. 267/10, s. 8 (4).

(5) The SIU director may request an interview take place beyond the time requirement as set out in subsection (1). O. Reg. 267/10, s. 8 (5).

Notes on incident

9. (1) A witness officer shall complete in full the notes on the incident in accordance with his or her duty and, subject to subsection (4) and section 10, shall provide the notes to the chief of police within 24 hours after a request for the notes is made by the SIU. O. Reg. 267/10, s. 9 (1).

(2) Subject to subsection (4) and section 10, the chief of police shall provide copies of a witness officer's notes to the SIU upon request, and no later than 24 hours after the request. O. Reg. 267/10, s. 9 (2).

(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. O. Reg. 267/10, s. 9 (3).

(4) The SIU director may allow the chief of police to provide copies of the notes beyond the time requirement set out in subsection (2). O. Reg. 267/10, s. 9 (4).

(5) The notes made pursuant to subsections (1) and (3) shall be completed by the end of the officer's tour of duty, except where excused by the chief of police. O. Reg. 283/11, s. 3.

Notice of whether subject officer or witness officer

10. (1) The SIU shall, before requesting an interview with a police officer or before requesting a copy of his or her notes on the incident, advise the chief of police and the officer in writing whether the officer is considered to be a subject officer or a witness officer. O. Reg. 267/10, s. 10 (1).

(2) The SIU shall advise the chief of police and the police officer in writing if, at any time after first advising them that the officer is considered to be a subject officer or a witness officer, the SIU director decides that an officer formerly considered to be a subject officer is now considered to be a witness officer or an officer formerly considered to be a witness officer is now considered to be a subject officer. O. Reg. 267/10, s. 10 (2).

(3) If, after interviewing a police officer who was considered to be a witness officer when the interview was requested or after obtaining a copy of the notes of a police officer who was considered to be a witness officer when the notes were requested, the SIU director decides that the police officer is a subject officer, the SIU shall,

- (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.
- O. Reg. 267/10, s. 10 (3).

(4) The chief of police shall keep the original and all copies of the police officer's notes received under clause (3) (c) for use in his or her investigation under section 11. O. Reg. 267/10, s. 10 (4).

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).

Disclosure of information

12. (1) The police force may disclose to any person the fact that the SIU director has been notified of an incident and is conducting an investigation into it. O. Reg. 267/10, s. 12 (1).

(2) The police force and members of a police force shall not, during the course of an investigation by the SIU into an incident, disclose to any person any information with respect to the incident or the investigation,

- (a) except as permitted by this Regulation;
- (b) except that a police officer appointed under the *Interprovincial Policing Act, 2009* may disclose the information to his or her extra-provincial commander during the course of the investigation; or
- (c) except that the chief of police of the police force of which a police officer appointed under the *Interprovincial Policing Act, 2009* is deemed to be a member may disclose the information during the course of the investigation to,
 - (i) the extra-provincial commander of the officer, or
 - (ii) an appointing official as defined in that Act if the chief of police is not such an official and the investigation relates to the officer. O. Reg. 267/10, s. 12 (2).

Public statements

13. The SIU shall not, during the course of an investigation by the SIU, make any public statement about the investigation unless the statement is aimed at preserving the integrity of the investigation. O. Reg. 267/10, s. 13.

Non-application of this Regulation

14. A chief of police or police officer shall not be required to comply with a provision of this Regulation if, in the opinion of the SIU director, compliance is not

possible for reasons beyond the chief of police's or police officer's control. O. Reg. 267/10, s. 14.

15. OMITTED (REVOKES OTHER REGULATIONS). O. Reg. 267/10, s. 15.

16. OMITTED (PROVIDES FOR COMING INTO FORCE OF PROVISIONS OF THIS REGULATION). O. Reg. 267/10, s. 16.

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

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

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