

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 SEQUIN**

Appellants/Respondents on Cross-Appeal
(Respondents)

-and-

RUTH SCHAEFFER, EVELYN MINTY AND DIANE PINDER

Respondents/Appellants on Cross-Appeal
(Appellants)

-and-

IAN SCOTT, DIRECTOR OF THE SPECIAL INVESTIGATIONS UNIT

Respondent/Appellant on Cross-Appeal
(Respondent)

-and-

JULIAN FANTINO, COMMISSIONER OF THE ONTARIO PROVINCIAL POLICE

Respondent
(Respondent)

**FACTA OF IAN SCOTT, DIRECTOR OF THE SIU
RESPONDENT ON APPEAL and APPELLANT ON CROSS-APPEAL
(Pursuant to Rules 42 and 43 of the *Rules of the Supreme Court of Canada*)**

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FACTUM OF THE APPELLANT ON CROSS-APPEAL

PART I - OVERVIEW AND FACTS

A. Overview

1. It is the Cross-Appellant, Ian Scott Director of the Special Investigation Unit (“SIU”)’s position that the Court of Appeal erred by interpreting the regulation on *Conduct and Duties of Police Officers Respecting Investigations by the Special Investigations Unit*,¹ [the “*SIU Regulation*” or the “*Regulation*”] and s. 113(9) of the *Police Services Act*,² [“*PSA*”] in a manner that permits a limited form of consultation between a police officer who is involved in an SIU investigation and legal counsel before the officer makes his or her police notes. Properly interpreted, the *SIU Regulation* does not permit any consultation with a lawyer prior to the completion of the officer’s notes.

2. The Court of Appeal below determined that, “The use of legal counsel to advise or assist in the preparation of notes would be inconsistent with the purpose of police notes and with the duty imposed on police officers to prepare them.”³ However, it also found that, “There is nothing explicit or implicit in the *SIU Regulation* that would deny a police officer [...] 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.”⁴ The Court went on to say that:

The officer is entitled to legal advice on matters such as the following:

- he or she is required to complete notes of the incident prior to the end of his or her tour of duty unless excused by the chief of police;
- the lawyer cannot advise the officer what to include in the notes other than that they should provide a full and honest record of the officer’s recollection of the incident in the officer’s own words
- the notes are to be submitted to the Chief of Police;

¹ O. Reg 267/10 [the “*SIU Regulation*”].

² R.S.O. 1990, c. P.15 [the “*PSA*”].

³ Reasons of the Court of Appeal for Ontario, dated November 15, 2011, at para 71 [“*Court of Appeal Reasons*”], **Appellants’ Record** [“**A.R.**”], Vol I, Tab 5 at 73.

⁴ *Court of Appeal Reasons, supra*, at para. 81, **A.R.**, Vol. I, Tab 5, at 77.

- if the officer is a subject officer, the Chief of Police will not pass the notes on to the SIU;
- if the officer is a witness officer, the Chief of Police will pass the notes on to the SIU;
- the officer will be required to answer questions from the SIU investigators; the officer will be entitled to consult counsel prior to the SIU interview and to have counsel present during the interview.⁵

3. The SIU submits that the Court of Appeal's reasons clearly contemplate legal advice going beyond the six bulleted points, but that the dividing line between the permissible and the impermissible is not clearly defined. The core of the permitted communications is simply unnecessary, as this information can be imparted effectively through other means. Anything beyond that core risks sliding into the substance of the incident and harming the integrity of an officer's notes.

4. Furthermore, the wait to speak to counsel inevitably delays note-taking, reducing the accuracy of notes and undermining the ability of the SIU to achieve its mandate. Under ideal circumstances this delay will be short, but circumstances are rarely ideal. Hours of delay may arise due to the time of day (or night), the unavailability of counsel, or the need to find and retain multiple lawyers to represent the various officers.⁶

5. Consultation between counsel and officers prior to the completion of notes also undermines public confidence in the SIU investigation. The public has no way of knowing whether counsel has influenced the content of the notes or has consciously or unconsciously transmitted information between officers.

6. Finally, consultation with counsel prior to the creation of notes gives rise to a privilege that, in the context of subsequent criminal proceedings, may result in a miscarriage of justice.

7. Because the *SIU Regulation* cannot be reasonably read to provide a right to counsel that is both of negligible value and prejudicial to the proper administration of justice, it follows that

⁵ *Court of Appeal Reasons, supra*, at para. 81, A.R., Vol. I, Tab 5, at 77-78.

⁶ Particularly if the same lawyer cannot represent all the witness officers and each officer requires separate counsel. For a discussion of this problem, see paras. 73-75 of the SIU Appeal Factum.

the Court of Appeal erred in permitting a limited form of consultation with counsel prior to the completion of their notes.

B. Facts

8. The SIU relies upon the facts set out in its factum on the appeal.

PART II - ISSUES

9. 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?

PART III - STATEMENT OF ARGUMENT

A. The Court of Appeal was Largely Correct

10. The Court of Appeal was correct in determining that the “use of legal counsel to advise or assist in the preparation of notes would be inconsistent with the purpose of police notes and with the duty imposed on police officers to prepare them.”⁷

11. As the Court noted, seeking the advice of legal counsel is meant to advance one’s self-interest or the interest of one’s fellow officers.⁸ Lawyer involvement in the note-taking process would undermine the officer’s duty to create notes that are both contemporaneous and independent,⁹ a public duty that takes precedence over the officer’s own private interests.¹⁰

12. Where the Court of Appeal erred, was that despite the conflict between the officer’s private interests, and the officer’s public duty to create independent and contemporaneous notes, it found that s. 7(1) of the *SIU Regulation* conferred upon officers a limited right to consult with counsel “to obtain legal advice as to the nature of their rights and duties with respect to SIU

⁷ *Court of Appeal Reasons, supra*, at para. 71, A.R., Vol. I, Tab 5, at 73.

⁸ *Court of Appeal Reasons, supra*, at para. 72, A.R., Vol. I, Tab 5, at 73-74.

⁹ *Court of Appeal Reasons, supra*, at paras. 74-75, A.R., Vol. I, Tab 5, at 74-75.

¹⁰ *Court of Appeal Reasons, supra*, at para. 72, A.R., Vol. I, Tab 5, at 73-74.

investigations, provided obtaining that advice does not delay the completion of their notes before the end of their tour of duty.”¹¹ In the SIU’s submission, this compromise is highly problematic.

B. The Core of the Permitted Advice is Unnecessary

13. Police officers do not need a lawyer to tell them that they “should provide a full and honest record of the officer’s recollection of the incident in the officer’s own words.”¹²

14. Officers receive extensive training on how to complete their notes.¹³ It is a task that they do every day, in relation to every investigation they are a part of. They are well aware of how to draft clear, concise notes that reflect their observations and recollection of the event. The police have far greater expertise than lawyers on how to complete accurate police notes.

15. Likewise, a lawyer is not needed to inform officers of their rights and responsibilities during an SIU investigation. All OPP officers, for example, are provided with detailed orders outlining their responsibilities in an SIU investigation.¹⁴ Police officers should know and understand their rights and duties in an SIU investigation, just as they are expected to know and understand the rights of suspects and witnesses they interact with, and the lawful limits of their authority. These are not unsophisticated actors who are unfamiliar with the investigative process.

16. To the extent that a lawyer restricts himself to the six bullet points listed in paragraph 81 of the Court of Appeal’s reasons, the advice that he provides is formulaic in the extreme. This information could easily be imparted through other means, such as training, newsletters, seminars, or even cards to be placed in an officer’s notebook. For example, a card that could fit into an officer’s notebook might read as follows:

¹¹ *Court of Appeal Reasons, supra*, at paras. 62-63, 86, A.R., Vol. I, Tab 5, at 70-71, 79-80.

¹² *Court of Appeal Reasons, supra*, at para. 81, A.R., Vol. I, Tab 5, at 78.

¹³ *Ontario Police College, Basic Constable Training Program – Student Workbook – Evidence (2008)* [“*Police Training Workbook*”], SIU Rec., Tab 2.

¹⁴ Ontario Provincial Police Orders, March 2010 Revision, at 2.5.24 [“*OPP Orders*”], SIU Rec., Tab 4, at 40-47.

If you are involved in an incident for which the SIU has been or may be called:

You are under a duty to complete your notes. Your notes should be a detailed and accurate account of the incident in your own words and to the best of your recollection. Complete your notes in accordance with your training.

The Regulation to the Police Services Act and OPP Police Orders requires you to complete your notes before the end of your shift, unless you are excused from doing so. You may not delay writing your notes beyond the end of your shift solely because you wish to speak to legal counsel. If you do not complete your notes before the end of your shift, you should do so as soon as possible thereafter.

If you are a Witness Officer, a copy of your notes will be given to the SIU and you will be required to attend an SIU interview. Once your notes are completed, you are permitted to consult with counsel and you are permitted to have legal counsel with you during the interview. Subject Officers do not have to provide their notes to the SIU and are not required to attend an interview, but may if they wish.

17. The SIU takes the position that the core of the advice permitted by the Court of Appeal's reasons is nothing more than a recitation of the requirements of the *Police Services Act*, the *SIU Regulation* and the rules of the particular police force regarding SIU investigations and note-taking. This advice is of negligible value to involved officers, who are already expected to be familiar with these topics in detail.

C. Memory Tainting

18. Competent defence counsel would understandably seek to provide their client with legal advice that has some value. The Court of Appeal, in permitting advice on “matters such as” the six bullet points listed in the decision¹⁵ contemplated that other issues could be discussed. However, the scope of this additional advice is unclear. Prior to enumerating the list of approved topics, the Court of Appeal indicated that officers have the right to obtain legal advice about “nature of his or her rights and obligations *in connection with the incident* and the SIU investigation”¹⁶ which arguably authorizes some discussion about the incident itself.

19. The Appellants rightly point out that competent defence counsel would wish to assist their clients by giving advice on matters relevant to the interests of police officers involved in an SIU investigation, and that this would require interviewing their client.¹⁷ The SIU disagrees that such a discussion should occur before police notes are written, but agrees that the overwhelming majority of defence counsel would seek to act ethically and stay within permissible bounds as set out by the Court of Appeal.¹⁸ But even the most scrupulous officer or lawyer may not know where the boundaries lie.

20. It would be very easy for counsel to slip into a discussion of the substance of the event, which is problematic due to the risk that this will restructure and taint the officer’s memory. Consider the following example – a lawyer receives a call from a witness officer, and after telling the officer to write a “full and honest record of the incident”, the officer asks the question, “But what if I made a mistake?” The lawyer responds, “What do you mean?”, at which point the officer describes the incident, explaining that the victim reached for something that the officer thought was a weapon, but turned out to be his wallet. It is unclear from the Court of Appeal reasons whether the lawyer would be entitled to probe the officer by asking questions like “What did you think you saw at the time” or “Why did you think it was a gun?” These questions are problematic because they draw the officer’s attention to facts important to the constituent elements of the defence of mistake and may alter the structure of the notes to reflect this

¹⁵ *Court of Appeal Reasons, supra*, at para. 81, A.R., Vol. I, Tab 5, at 77.

¹⁶ *Court of Appeal Reasons, supra*, at para. 81[Emphasis added], A.R., Vol. I, Tab 5, at 77-78.

¹⁷ Appellants’ Factum, para. 71.

¹⁸ *Court of Appeal Reasons, supra*, at para. 83, A.R., Vol. I, Tab 5, at 79.

narrative, instead of the facts as they were perceived by the officer at the time. Although the Court of Appeal's reasons make it clear that counsel may not provide the officer with the ingredients of a particular offence or defence,¹⁹ it is unclear whether the lawyer is permitted to ask questions that may inadvertently convey this information.

21. The second question asked by the hypothetical lawyer is also problematic – as it suggests the existence of a gun (rather than a weapon) which may influence the way the officer later recalls or describes what he saw. As set out in paras. 95 to 96 of the SIU's factum on the appeal, the very process of recounting an incident, especially in response to questioning, can affect one's subsequent recollection.²⁰ Counsel may need to ask clarification questions and if the questions are not carefully phrased, they may subconsciously influence the officer's perception of the event. Where counsel represents multiple officers, or where counsel has obtained information from non-witnesses (members of the media, police association representatives, or the SIU liaison officer, for example) information may be unconsciously transferred by the lawyer through their questioning or even through an off-hand remark made to put the client at ease.

22. Without a bright line indication of what is permissible, it is inevitable that competent and ethical counsel will engage in discussions that may taint the officer's recounting of the events. There may be situations where it is difficult, if not impossible, to separate a discussion about an officer's rights and obligations from a discussion of the facts of the incident. In many important ways, the former is contingent on the latter. If the door is open to discussions on anything more than a mere recitation of the *SIU Regulation*, the risk of influencing and tainting an officer's memory of events remains.

¹⁹ *Court of Appeal Reasons, supra*, at para. 73, **A.R., Vol. 1, Tab 5, at 74.**

²⁰ The Inquiry Regarding Thomas Sophonow, *The Investigation, Prosecution and Consideration of Entitlement to Compensation* (Winnipeg: 2001)(Commissioner: The Hon. Peter deC. Cory), at 28, **SIU Auth., Tab X**; Bennett L. Gershman, *Witness Coaching by Prosecutors* (2001-2002) 23 *Cardozo L. Rev.* 829 at 840, **SIU Auth., Tab 52**; Jeremy A. Blumenthal, *Law and Social Science in the Twenty-First Century* (2002-2003) 12 *S. Cal. Interdisciplinary L.J.* 1 at 16-17, **SIU Auth., Tab 61.**

D. Delay

23. The practice of allowing witness officers to contact counsel prior to the completion of the notes, even if contact is for the purpose of discussing the limited range of issues set out by the Court of Appeal, will almost inevitably cause delay in the completion of those notes.

24. The Court of Appeal suggested that delay would not be an issue because the legal advice could be given over the phone.²¹ However, there is nothing in the *Regulation* that requires this, and an officer could reasonably insist upon meeting face-to-face. In remote areas, there may be no cell phone coverage to permit telephone consultation.

25. Whether consultation occurs face to face or over the telephone, it may take time to locate or contact legal counsel, particularly where multiple lawyers are required.²² The lawyer who is retained may not be immediately available, either due to previous commitments or because he or she is speaking to other witness officers. Counsel may also require time to inform themselves about the basic facts surrounding the incident (including obtaining information about whether their client is or is likely to be designated as a witness or subject officer) so that they can discharge their duties professionally. No matter how consultation with counsel is implemented, some delay – potentially hours of delay – is inherent.²³

26. The Court of Appeal also suggested that any problems with delay due to the unavailability of counsel have been cured by the requirement that notes be completed by the end of the officer's tour of duty except where excused by the Chief of police.²⁴

²¹ *Court of Appeal Reasons, supra*, at para. 82, **A.R., Vol. I, Tab 5, at 78.**

²² At a minimum, two lawyers will need to be retained as a single lawyer cannot represent subject and witness officers. More lawyers may be needed if there is a potential conflict between multiple officers within the same category. It may not be possible for a single lawyer to represent multiple officers within the same category without breaching the requirements of the joint retainer rule (Rule 2.04(6) of the *Rules of Professional Conduct*) and the segregation principle under s. 6(2) of the *SIU Regulation: Law Society of Upper Canada, "Information for Lawyers – Acting for Police Officers in Ontario Special Investigation Unit ("SIU") Investigations"*, **App. Auth., Tab 28.**

²³ Consider that in the Schaeffer matter, consultation with counsel resulted in notes being prepared two days after the incident under investigation: André Marin, *Oversight Undermined: Investigation into the Ministry of the Attorney General's Implementation of Recommendations Concerning Reform of the Special Investigations Unit* (Toronto: Ombudsman of Ontario, 2011), at para. 62, **SIU Auth., Tab 51**; *Court of Appeal Reasons, supra*, at paras. 17-18, **A.R., Vol. I, Tab 5, at 53.**

²⁴ *Court of Appeal Reasons, supra*, at para. 82, **A.R., Vol. I, Tab 5, at 78.**

27. However, it would be an error to read s. 9(5) of the *SIU Regulation* as a basis for allowing officers to deviate from their normal note-taking practice, which is to make notes “during an investigation or as soon thereafter as practicable”.²⁵ Section 9(5) was not meant to build delay into the process of note-taking; rather it is an outer-limit meant to curb the problem of delayed note-taking in the context of an SIU investigation.

28. The reason for the “as soon as practicable” requirement is self-evident: accuracy is likely to be diminished as time passes. Normal police notes contain precise details such as the exact time, often to the minute, that an incident occurred, or the exact words spoken by suspects, officers and witnesses. These important details are easily lost if notes are taken hours after an incident, even if still within the timeframe of the officer’s tour of duty.

29. The “as soon as practicable” requirement is also one of common sense. It is not expected that note-making take precedence over matters like officer or public safety or medical emergencies. However, in the context of an SIU investigation, the wait for a lawyer builds in a period of delay that does not exist in any other context, and is not justified by the officer’s other duties to the public.

E. Undermining Prosecutions

30. The *PSA* imposes on officers a duty to “lay charges and participate in prosecutions”.²⁶ The requirement to create notes in accordance with an officer’s duty under s. 9 of the *SIU Regulation* includes an obligation to make notes that could be used and relied upon in a subsequent prosecution. However, consulting counsel prior to the completion of the notes gives rise to a privilege referable only to the officer’s private interests that may operate to undermine his ability to assist in the prosecution of accused persons.

31. Consider a hypothetical situation similar in some respects to the facts in *R v. Tran*²⁷: A person becomes aware he is a suspect in a serious criminal investigation, and on the advice of counsel surrenders to police. He subsequently emerges with serious injuries, claiming that the

²⁵ *OPP Orders, supra*, at 2.50.3, **SIU Rec., Tab 4, at 50.**

²⁶ *PSA, supra*, s. 42(1)(e).

²⁷ *R v. Tran* (2010), 257 C.C.C. (3d) 18 (Ont. C.A.), at paras. 51-68, 101, **SIU Auth, Tab 38.**

police attempted to beat a confession out of him. The police say that he slipped and fell. The injured civilian is charged, and the SIU is called in. Prior to completing their notes, the officers consult counsel, and then prepare notes that corroborate their version of events.²⁸

32. At trial, the accused seeks a stay of proceedings on the basis that a breach of his *Charter* rights occurred, and a *voir dire* is held. Defence counsel may seek to impeach the credibility of the officers, putting it to them that they had colluded to avoid liability, and fabricated their notebook entries. As part of this process, counsel would necessarily ask whether the officers had discussed the incident with anyone prior to completing their notes. On learning that they had spoken with a lawyer, defence counsel would inevitably seek to explore what they were told, but the officers may refuse to answer, claiming privilege.

33. What would be left is an allegation of serious police misconduct coupled with a refusal to answer relevant questions on the basis of a privilege referable to the witness not *qua* public official, but rather private citizen seeking to protect his own legal interests. This might lead to a negative inference by the trier of fact. It certainly would frustrate the prosecution to some extent, and would completely undermine the defence's ability to test the *viva voce* evidence of the officer, thereby stymieing the truth-seeking function of the trial. Notwithstanding the officer's public duty, the privilege claim could not be pierced.²⁹

34. One need not go so far as this hypothetical to see the problems that privilege surrounding an officer's notebook would cause. It is common for counsel to examine officers about the circumstances surrounding the taking of their notes, including who they have spoken to prior to completing them, and what was discussed. If an officer refuses to waive privilege over the discussion with their lawyer, this would cut off an otherwise appropriate and relevant avenue for the defence to explore. It would also create a very uncomfortable trial dynamic, in which the police officer fails to fulfill her public duties on the basis of her personal interest. This would neither enhance public confidence in the justice system, nor further the officer's duty to participate in prosecutions.

²⁸ Note that there is no indication in *Tran* of what consultation, if any, the involved officers had with counsel within the context of the SIU investigation.

²⁹ *R. v. McClure*, [2001] 1 S.C.R. 445, at paras. 34-35, 46-61, **SIU Auth.**, **Tab 27**.

35. To create a notebook in this way would be to violate the officer's duties as enshrined in s. 9 of the *SIU Regulation*. The very existence of a lawyer interview prior to the completion of the notes seriously complicates the ability of any justice system participant to rely on the notes. This simply cannot be reconciled with the purposes of the *SIU Regulation*.

F. Public Perception

36. A further problem created by the Court of Appeal's ruling is that it undermines the transparency of the SIU investigation. The wall of secrecy put up by the solicitor-client relationship regarding the content of the conversation between an officer and legal counsel is impenetrable, and naturally attracts public suspicion. Absent a waiver of privilege, no one can demonstrate that the lawyer has not acted as a conduit of information between the multiple officers or provided advice on the contents of notes.

37. The entire SIU process is built around the notion that justice must not only be done, it must be seen to be done. For example, it is an express requirement that the SIU director or his or her designate cannot be a police officer or a former police officer.³⁰ Likewise, SIU investigators cannot be police officers (although they may be former police officers)³¹ and they are not permitted to investigate incidents that involve their former police force.³² These requirements are in place not only to reduce the possibility of an actual conflict of interest, but also to remove any doubt from the public's mind about the loyalties of SIU staff.

38. Likewise, the *SIU Regulation* does not just prohibit officers to directly or indirectly communicate between each other,³³ it also requires the Chief of police to segregate the officers.³⁴ The first prohibition prevents the harm of collusion between officers, but the second goes the extra step of assuring the public that such collaboration has been made physically impossible.

39. The entire SIU regime is therefore founded upon mechanisms meant to assure the public that the risk of collusion, bias, and undue influence has been minimized and that the

³⁰ *PSA, supra*, s. 133(3), (3.1).

³¹ *PSA, supra*, s. 113(3).

³² *PSA, supra*, s. 113(6).

³³ *SIU Regulation, supra*, s. 6(2).

³⁴ *SIU Regulation, supra*, s. 6(1).

independence of the investigators and the witnesses has been maintained. Allowing counsel to meet with the officer before their independent account of the event is reduced to writing introduces a reason for the public to question the subsequent account of the officer, even if that distrust is factually misplaced. This problem is only compounded if counsel may be jointly retained by multiple officers within a single category.

G. Conclusion

40. The purpose of the SIU regime is clear: to maintain and foster public confidence in the rule of law by ensuring that, where police officers cause death or serious personal injury, they are subject to an independent, impartial, effective and transparent investigation. The *SIU Regulation* was intended to further this important goal.

41. The Court of Appeal's interpretation of the Regulation is simply not consistent with this purpose. It provides for a form of consultation that raises serious concerns about the integrity of the SIU process, in exchange for a form of legal advice that provides next to no value to the officers involved.

42. The Legislature could have enacted a self-defeating *SIU Regulation* if it so wished, but surely it did not. In providing for any form of consultation with counsel prior to the completion of an officer's notes, the Court of Appeal erred.

PART IV - SUBMISSIONS RESPECTING COSTS

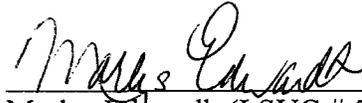
43. The SIU is not seeking its costs and asks that no costs be awarded against it.

PART V - ORDER REQUESTED

44. The SIU requests an order allowing the cross-appeal, and varying the order of the Court of Appeal to declare that 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 Special Investigations Unit*, O. Reg. 267/10, as amended, prohibit any consultation between officer involved in an SIU investigation and legal counsel until the officer has completed his or her police notes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

At Toronto, this 1st day of February, 2013.



Marlys Edwardh (LSUC # 5939K)

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PART VI - AUTHORITIES CITED

Description	Cited at Para.
Jurisprudence	
<i>R. v. McClure</i> , [2001] 1 S.C.R. 445	33
<i>R. v. Tran</i> (2010), 257 C.C.C. (3d) 18 (Ont. C.A.)	31
Secondary Sources	
André Marin, <i>Oversight Undermined: Investigation into the Ministry of the Attorney General's Implementation of Recommendations Concerning Reform of the Special Investigations Unit</i> (Toronto: Ombudsman of Ontario, 2011)	25
Bennett L. Gershman, <i>Witness Coaching by Prosecutors</i> (2001-2002) 23 <i>Cardozo L. Rev.</i> 829	21
Jeremy A. Blumenthal, <i>Law and Social Science in the Twenty-First Century</i> (2002-2003) 12 <i>S. Cal. Interdisciplinary L.J.</i> 1	21
Law Society of Upper Canada, "Information for Lawyers – Acting for Police Officers in Ontario Special Investigation Unit ("SIU") Investigations"	25
Law Society of Upper Canada, <i>Rules of Professional Conduct</i> , Rule 2.04	25
The Inquiry Regarding Thomas Sophonow, <i>The Investigation, Prosecution and Consideration of Entitlement to Compensation</i> (Winnipeg: 2001)(Commissioner: The Hon. Peter deC. Cory)	21

PART VII - LEGISLATION

See Part VII of the SIU Appeal Factum.