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

IN THE MATTER OF an Application by Ruth Schaeffer, Evelyn Minty and Diane Pinder for a declaratory judgment that, among other things, police officers who are involved in incidents attracting the attention of the Special Investigations Unit are not entitled to obtain legal assistance in the preparation of their notes regarding the incident;

AND IN THE MATTER OF an Application for Leave to Appeal from the judgment of the Court of Appeal for the Province of Ontario dated November 15, 2011;

BETWEEN:

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

Applicants

-and-

RUTH SCHAEFFER, EVELYN MINTY AND DIANE PINDER

Respondents

-and-

IAN SCOTT, DIRECTOR OF THE SPECIAL INVESTIGATIONS UNIT

Respondent

APPLICANTS' MEMORANDUM OF ARGUMENT

PART I: STATEMENT OF THE FACTS

History of the Case

Overview

1. The Applicants 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.

2. The Respondents, who are family members of the two deceased, brought an application in the Superior Court of Ontario seeking declaratory relief. The Respondents sought an order interpreting the *Police Services Act,* R.S.O. 1990, c. P. 15 and the related regulations, *Conduct and Duties of Police Officers Respecting Investigations by the S.I.U.,* O. Reg. 267/10 ["*SIU Regulations*"]. One of the central concerns raised by the Respondents related to "joint retainers" in which "subject officers"[1] and "witness officers"[2] had the same lawyer.

3. The original application by the Respondents was brought against the Applicants and additional parties, namely, Julian Fantino, 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).

4. The application was not decided on its merits because the application judge allowed a motion to strike the application, finding that the applicants (now the Respondents) lacked standing to bring the application and that the matter was moot.

5. The Respondents appealed to the Court of Appeal for Ontario. The Court of Appeal granted intervenor status to the following intervenors: Ontario Association of Chiefs of Police, Canadian Civil Liberties Association, Andrew McKay, Police

[1] A police officer whose conduct appears, in the opinion of the SIU director, to have caused the death or serious injury under investigation.
[2] A police officer who, in the opinion of the SIU director, is involved in the incident under investigation but is not a subject officer.

Association of Ontario, Criminal Lawyers' Association and the Urban Alliance on Race Relations.

6. The appeal was heard by the Court of Appeal together with a motion by the Applicants to quash the appeal on the basis that the appellants lacked standing to bring the application, that the issues were non-justiciable, that the issues had been rendered moot by changes in the *SIU Regulations*, and that the Court lacked jurisdiction to entertain an appeal in the absence of an initial determination of the merits.

7. The Court of Appeal dismissed the motion to quash. Although the Court concluded that the issue of joint retainers had been rendered moot by recent amendments to the *SIU Regulations*, 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."

Reasons of the Court of Appeal for Ontario dated November 15, 2011, paras. 45-47

Judgment of the Court of Appeal for Ontario

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

> 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.

Reasons of the Court of Appeal for Ontario dated November 15, 2011, para. 86

The Contextual Facts

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

The Minty investigation

10. On June 22, 2009, the Applicant, 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 the weapon. Minty refused to comply and continued to approach Seguin armed with the knife. Seguin fired five shots at Minty. Minty died shortly thereafter.

11. 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.

12. 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.

13. 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 Regulations* 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.

The Schaeffer investigation

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

15. 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.

16. Approximately five hours after the shooting, Wood consulted his lawyer, Andrew McKay, by telephone. McKay asked Wood to prepare notes 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." Wood completed his police notes two days after the incident.

17. 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 of the incident. After receiving legal advice from McKay on the notes prepared for counsel to review, Pullbrook completed his notebook on June 26, 2009.

18. Wood and Pullbrook maintained confidentiality of their written communications with their lawyer on grounds of solicitor-client privilege. However, McKay advised the 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".[3]

19. 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. In particular, he raised concerns about the independence of the notes (on the theory that they were "approved" by a lawyer who represented all of the involved officers) and the lack of contemporaneity (given that the notes were not completed as soon as practicable).

The Legislative Framework

20. Pursuant to the *Police Services Act,* R.S.O. 1990, c. P. 15, s. 113, the SIU is mandated to investigate incidents where police conduct has resulted in serious injury or

[3] The Court of Appeal judgment mistakenly attributes this comment to the Applicant 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 dated November 15, 2011, para. 19, Report of the Special Investigations Unit to the Attorney General Respecting the Death of Levi Schaeffer dated September 25, 2009, *Application Record,* tab 7; Examination of Denis B. O'Neill, December 7, 2009, pp. 10-11 *Application Record,* tab 8; Examination of Denis B. O'Neill, April 15, 2010, p. 79– p. 85, *Application Record,* tab 9.

death. The SIU Director reports the results of investigations to the Attorney General. Where reasonable grounds exist, the 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 *Act,* police officers are required to "cooperate fully" with the SIU.

21. The *SIU Regulations* define the rights and obligations of police officers in the context of SIU investigations. After the application, but before the hearing of the appeal, the Ontario government received a report and recommendations from the Honourable Patrick J. LeSage, who had been retained to review "the conduct and duties of officers in SIU investigations, including the right to counsel and note-taking." LeSage made a number of recommendations: one to prevent witness officers from being represented by the same counsel as subject officers; another requiring that officers complete their notes by the end of the officers' tour of duty, except where excused by the chief of police; and a third making it clear that the segregation of involved officers required that they not communicate "directly or indirectly" with each other until after SIU interviews have been completed.

> Patrick LeSage, "Report regarding SIU issues" (11 April, 2011), online: Ministry of the Attorney General < http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/siu_report/report.pdf >
> Reasons of the Court of Appeal for Ontario dated November 15, 2011, paras. 31-33

22. The relevant *SIU Regulations* 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

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

Question 1: Did the Court of Appeal for Ontario err by circumscribing the scope and extent of a police officer's right to counsel by adopting an unprecedented interpretation of the requirement that notes be prepared "in accordance with his or her duty" as prohibiting meaningful legal advice in connection with the preparation of their notes.

Question 2: Did the Court of Appeal for Ontario err by virtually eliminating the presumptive common law right to consult with counsel despite the absence of any express or necessarily implied legislative restriction on the right to counsel.

Question 3: Did the Court of Appeal for Ontario err in crafting an unworkable protocol which renders virtually any discussion by an officer with counsel an ethical and practical minefield and which fails to recognize an officer's right to procedural fairness, having regard to potential exposure to criminal or disciplinary prosecution.

PART III: STATEMENT OF ARGUMENT

Questions 1 & 2: The common law and statutory right to counsel permits officers to consult with counsel prior to the preparation of their notes

24. As noted by the application judge, the *SIU Regulations* do not create a statutory right to counsel that would otherwise not exist. Rather, the *SIU Regulations* codify and expand 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.

Schaeffer et al. v. Wood et al., [2010] O.J. No. 2770 at para. 78 (Sup. Ct.)

25. At common law some limits on the right to consult with counsel have been recognized. For example, 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. Section 7(1) of the *SIU Regulations* extends the common law right to counsel by expressly providing that an officer does have 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 Regulations.*

Regina v. Sinclair (2010), 259 C.C.C. (3d) 443 at paras. 33-42, 65 (S.C.C.)

26. The *SIU Regulations* only provide for a single, narrow limitation on an officer's right to counsel. Section 7(2) of the *SIU Regulations* states that the right to counsel does not apply if, in the opinion of the Director, waiting for legal counsel would cause unreasonable delay in the investigation. This limitation on the right to counsel is consistent with the narrow restriction on the right to counsel in cases decided under 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, then the police can proceed with their interview. The Legislature must have intended that the *SIU Regulations* would codify this delay-related common law limit on the right to counsel. Had the Legislature

intended to impose other restrictions or limits on an officer's basic right to consult with counsel, it would have done so expressly.

Regina v. Sinclair, supra
Regina v. Manninen (1987), 34 C.C.C. (3d) 385 (S.C.C.)

27. It is apparent that the Legislature made an informed decision to afford officers an otherwise unrestricted right to consult with counsel. Significantly, the Legislature addressed the concern that the independence of an officer's account of events might be compromised by communication with others. The Legislature chose to address this concern through the segregation rule, which provides that all officers involved in the incident shall be segregated and "shall not communicate directly or indirectly with any other police officer involved in the incident." Significantly, the Legislature refrained from imposing any limits on consultation with counsel by officers involved in the incident. Having specifically legislated very limited restrictions on the right to counsel and the right of communication by segregated officers, it is apparent that the Legislature chose not to restrict the right of segregated officers to consult with counsel for any purpose.

28. It is submitted that there is no authority for the proposition that an officer's consultation with counsel prior to the preparation of his notes will compromise the independence of those notes. The only case cited by the Court in support of this proposition was *Regina v. Green, infra,* which is readily distinguishable. In *Green,* as in other cases, 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

85

observed: "to the extent that the officer obtains information about another officer's observations before doing her notes, her memory may become tainted with the observation of others and both her notes and her own evidence may be rendered less reliable."

> *Regina v. Green*, [1998] O.J. No.3598 at paras. 16, 22 (Gen. Div)
> Reasons of the Court of Appeal for Ontario dated November 15, 2011, para. 70

29. 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. Presumably this distinction was considered by the Legislature in choosing to segregate officers from each other, but not from counsel.

30. Thus, the *SIU Regulations* essentially codify the common law right to counsel. To the extent that the right to counsel is any different for witness and subject officers in SIU investigations than it is for detainees in criminal investigations, it appears that law enforcement officers have been afforded a more expansive right to counsel. This was apparently deemed to be a fair counter-balance to the fact that both subject and witness officers must prepare notes respecting the incident and that witness officers are compelled to produce their notes and to answer questions in an interview with the SIU. Officers do not enjoy the right to silence enjoyed by citizens under criminal investigation.

31. The Court of Appeal for Ontario erred in reading in an implied restriction to the right to counsel, despite the plain and unambiguous language of the *SIU Regulations*

which reflect a legislative choice not to restrict a designated officer's right to consult with counsel concerning the preparation of their notes.

The Flawed Premise of the Court of Appeal

32. The Court of Appeal for Ontario erred in presupposing that the involvement of counsel would compromise, rather than enhance, the integrity and reliability of the notes. Advice from counsel, it is submitted, would more likely ensure that officers fully appreciate the importance of providing a full account addressing all of the factual and legal elements that would be of interest to the SIU, the officer's own police service and to the public. Consultation with counsel enhances the note-making process by providing officers the opportunity to be reminded by counsel of the importance of recording a complete account that addresses all relevant factual and legal issues.

33. The central theme of the judgment of the Court of Appeal is that counsel's involvement would influence and thereby taint the accounts recorded in the police notes. This flawed premise assumes that the advice lawyers provide to police officers will inevitably distort the officer's public responsibility in favour of his private interest. It ignores the obligation of lawyers to act competently, with integrity, and at all times within the law. It 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.
>
> *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at para. 55

34. Courts have long recognized that lawyers 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", to "not pervert the law to favour or prejudice anyone", to "improve the administration of justice" and to "champion the rule of law."

> *Fortin v. Chretien*, [2001] 2 S.C.R. 500 at para 49
> Law Society of Upper Canada, *Barristers and Solicitors' Oath*, By-Law 4, s. 21(1)

35. In other contexts lawyers are trusted by our courts to ensure that there is no tainting of witness accounts. For example, concerns regarding tainting have been addressed in the context of witness 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 given by other witnesses. The trial judge was concerned that counsel might taint one witness' account by inadvertently communicating to one 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, 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.
>
> *Regina v. O'Callaghan* (1982), 65 C.C.C. (2d) 459 at para. 16 (Ont. H.C.J.)

Reading in restrictions on the right to counsel

36. As a general proposition, the state can only limit an individual's right to counsel by reference to an express statutory provision or by "necessary implication" from statutory provisions. With respect, the Court of Appeal erred in approaching this important exercise in statutory interpretation on the premise that the right to counsel exists only if "expressly or impliedly authorized by the legislation." Where, as here, the legislation expressly confers a robust right to counsel, subject to very limited time-related restrictions, there was no basis for the Court to read in any further restrictions.

Regina v. Elias (2005), 196 C.C.C. (3d) 481 at paras. 33-39 (S.C.C.)
Regina v. Thomsen (1988), 40 C.C.C. (3d) 411 at 653 (S.C.C.)
Canada (Attorney General) v. Mavi, [2011] 2 S.C.R. 504 at para. 39.
Reasons of the Court of Appeal for Ontario dated November 15, 2011, paras. 23, 55

37. Only in the rarest of circumstances could there 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 on the right to counsel has been upheld by this Honourable Court on the basis that implementation of the right to counsel at the roadside is incompatible with performance of these roadside screening measures given the time sensitive nature of breath testing procedures. Additionally, the results of the roadside testing 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.

Regina v. Elias, supra at paras. 40-48, 52-58
Regina v. Thomsen, supra
Regina v. Milne (1996), 107 C.C.C. (3d) 118 at 128-131 (Ont. C.A.)

38. In the case of officers wishing to consult with counsel prior to the preparation of their duty notes, such justifications for denying access to counsel are absent. First, an officer's recollection of events will not disappear from his memory in the way that alcohol will be immediately, inexorably and permanently eliminated from a driver's body. Second, 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. The Chief then provides those notes to the SIU upon request. Witness officers must also submit to an interview with the SIU. Officers may be subject to a discipline hearing under the *Police Services Act*, and may face sanctions as serious as suspension, demotion and dismissal. There is no express 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.

Conduct and Duties of Police Officers Respecting Investigations by the Special Investigations Unit, O. Reg. 267/10, amended to O. Reg. 283/11, ss. 8, 9(1), 9(2), 11

Police Services Act, R.S.O. 1990, c. P-15, ss. 76(9), 85

Question 3: The creation of an unworkable protocol

39. The decision of the Court of Appeal represents an unprecedented and unworkable intrusion into the solicitor-client relationship. Although the Court of Appeal recognized 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 restricted any advice that 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." The judgment suggests that any discussion between the lawyer and the officer about the incident under investigation would compromise the independence of the officer's version set out in the officer's notes, and would therefore be impermissible.

Reasons of the Court of Appeal for Ontario dated November 15, 2011, paras. 73-74, 81

40. 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 advice, a lawyer must first ascertain whether he is dealing with a witness or subject officer.[4] This necessarily requires that the lawyer ask some questions about the incident and the officer's involvement, which would appear to venture into the area of advice and discussions prohibited by the decision of the Court of Appeal. It should be left to counsel, guided by existing legal and ethical obligations, to conduct the discussions in a way that facilitates the officer's preparation of notes so as to present a complete and accurate account that addresses the relevant factual and legal elements.

41. 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 the obstacle course and provide little, if any, practical assistance to his client.

---

[4] 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.

The permissible advice is, in effect, no advice at all. Counsel's role has been relegated to reciting the most basic legislative requirements rather than providing meaningful legal assistance.

Conclusion: Issues of National Importance

42. It is respectfully submitted that these questions are questions of law alone arising from the Court of Appeal's interpretation of the statutory scheme governing the right to counsel in the context of SIU investigations.

Canada (Attorney General) v. Mossop, [1993] 1 S.C.R. 554 at paras. 25, 44

43. Moreover, these questions raise issues of national importance as the decision of the Court of Appeal for Ontario dramatically and fundamentally alters practices in Ontario, and renders the note-taking rules in Ontario inconsistent with rules and practices elsewhere in Canada. This is a novel, unprecedented deviation from the practice of officers being able to speak to counsel and for counsel to provide advice in respect of the preparation of their notes.

44. Quite remarkably, the decision of the Court of Appeal also appears to impose a general bar to officers consulting with counsel prior to the preparation of their notes, even in non-SIU investigations. The practical and totally unrealistic effect of such a restriction would be that officers engaged in traditional criminal investigations could not receive advice from counsel, even Crown counsel, prior to the completion of their notes. This could preclude officers from engaging in perfectly proper consultations with Crown counsel about such issues as the manner in which sensitive information should be dealt with in their police notes.

Reasons of the Court of Appeal for Ontario dated November 15, 2011, paras. 71, 73

PART IV: COSTS

45. The Applicants do not seek a costs order with respect to the application for leave to appeal, but should leave be granted, reserve the right to address the issue of costs on the appeal.

PART V: ORDER SOUGHT

46. It is respectfully requested that leave to appeal be granted.

DATED at Toronto, this 13th day of January, 2012.

BRIAN H. GREENSPAN
Counsel for the Applicant

JILL D. MAKEPEACE
Counsel for the Applicant

PART VI: AUTHORITIES CITED

Authority Cited	Paragraph
Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143	33
Canada (Attorney General) v. Mavi, [2011] 2 S.C.R. 504	36
Canada (Attorney General) v. Mossop, [1993] 1 S.C.R. 554	43
Fortin v. Chretien, [2001] 2 S.C.R. 500	34
Regina v. Elias (2005), 196 C.C.C. (3d) 481 (S.C.C.)	36-37
Regina v. Green, [1998] O.J. No.3598 (Gen. Div)	28
Regina v. Manninen (1987), 34 C.C.C. (3d) 385 (S.C.C.)	26
Regina v. Milne (1996), 107 C.C.C. (3d) 118 (Ont. C.A.)	37
Regina v. O'Callaghan (1982), 65 C.C.C. (2d) 459 (Ont. H.C.J.)	35
Regina v. Sinclair (2010), 259 C.C.C. (3d) 443 (S.C.C.)	25-26
Regina v. Thomsen (1988), 40 C.C.C. (3d) 411 (S.C.C.)	36-37
Schaeffer et al. v. Wood et al., [2010] O.J. No. 2770 (Sup. Ct.)	24

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.

***Conduct and Duties of Police Officers Respecting Investigations by the Special Investigations Unit*, O. Reg. 267/10, amended to O. Reg. 283/11**

...

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.

(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.

...

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.

(2) A request for an interview by the SIU must be made in person.

(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.

(4) The interview shall not be recorded by audiotape or videotape except with the consent of the witness officer.

(5) The SIU director may request an interview take place beyond the time requirement as set out in subsection (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.

(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.

(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.

(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).

(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.

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.