

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/Cross-Respondents

-and-

RUTH SCHAEFFER, EVELYN MINTY AND DIANE PINDER

Respondents/Cross-Appellants

-and-

IAN SCOTT, DIRECTOR OF THE SPECIAL INVESTIGATIONS UNIT

Respondent/Cross-Appellant

-and-

JULIAN FANTINO, COMMISSIONER OF THE ONTARIO PROVINCIAL POLICE

Respondent

**FACTA OF THE RESPONDENT FAMILIES/APPELLANT FAMILIES ON
CROSS-APPEAL**

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“Plus ça change”:

I understand fully the tremendous sense of conflict police officers must feel when they are required to provide potential evidence against a fellow officer, but the brutal truth is that police officers have an obligation to uphold the law which must supersede any sense of loyalty they may have to one of their own who may have committed a criminal act.

***Odhavji Estate v. Woodhouse*, [1998] O.J. No. 5426 at para. 36 (Day J).**

In cases where officers do stay on duty and remain physically segregated, the SIU has sometimes encountered one lawyer acting for multiple witness officers and, surprisingly, even including subject officers. Given the ethical obligation of disclosure of a lawyer to his or her client, this practice can undermine the purpose of segregating the officers and clearly needs review.

Adams, Report to the Attorney General (Second), February 26, 2003, at pg. 44.

This practice [of retaining the same lawyer] raises ethical issues, particularly in light of the officers' duty not to communicate with other involved officers until the SIU interviews have concluded. While recognizing that legal representation can be costly to police associations, and to services that have committed to pay their members' legal costs, I believe that the utmost care should be taken to foster the integrity of the investigative process. This includes avoiding any potential for witness information to be tainted or tailored, intentionally or otherwise. The practice of the same lawyer representing various officers involved in an incident should be prohibited.

Report of the Ombudsman of Ontario, September 2008.

Are we into an area where the police officers are “coached” and could it be considered therefore the notes are not truly the officer's notes?

Director Scott, SIU Report to the Attorney General on the Death of Levi Schaeffer, September 24, 2009.

If the practice of allowing all witness officers to be represented by the same counsel is allowed to continue, one way of further minimizing the risk of advertent or inadvertent transfer of information through counsel would be to ensure that officers are required to complete their notes relating to incidents under SIU investigation before they consult counsel.

Report of the Ombudsman of Ontario, December, 2011

PART I: OVERVIEW AND FACTS

A. Overview

1. “Keeping two sets of books” is a universal hallmark of deception. This case begs the question as to whether we turn a “blind eye” where an investigation involves police use of lethal force on a member of the public. It is not in dispute that a “widespread” police practice has developed where, as a means of involving counsel, police officers maintain two sets of books:

the first being a purportedly privileged draft set of notes kept outside of the police memobook; and then after the involvement of their lawyer, a second final set is created which appears in the officer's memobook. The Appellant police officers (as represented by the Ontario police union) defend these practices by linking a witness officer's statutory entitlement to counsel with the practice of maintaining two sets of notes. The Respondents, the Schaeffer and Minty Families (the "Families"), lost their family members, both mentally disabled men, in the course of unrelated police shootings. The record in this case includes these Families' uncontested affidavit evidence citing the various police practices in issue and attesting to the Families' reality that, as a consequence of these practices, they will never be able to trust the police actions that led to the deaths.¹ This lack of confidence is neither surprising nor unreasonable. Keeping two sets of books creates a perception of deception and is simply indefensible.

2. As there are no material facts in dispute about these police practices, the Families initiated these proceedings by way of application under Rule 14.05 of the Ontario Rules with a view to obtaining Court guidance on, among other things, the propriety of these note taking procedures.² In addition to the involved police officers, the Families named in the application the Director of the Special Investigations Unit, Ian Scott, as a party who could assist the proceedings.³

3. On a daily basis, Courts across this country do their business on the premise that police notes can be trusted as the earliest contemporaneous record of a criminal investigation. The context for "maintaining two sets of books" in this case is the investigation of police use of lethal

¹ See Affidavits of Ruth Schaeffer sworn November 27, 2009 and Diane Pinder sworn November 27, 2009 at Tab 12 of the Appellants' Record

² The original application was broader in scope in order to address another related police practice of subject and witness officers retaining the same lawyer. In the course of the hearing of this application in the lower courts, a regulatory amendment was introduced prohibiting the practice of the same lawyer representing subject and witness officers. Currently, joint retainers continue within the designations, so that the same lawyer will jointly act for subject officers and another lawyer will jointly act for witness officers. see. section 7(3) of *S.I.U. Regulation*

³ Rule 5.03(1) of the *Ontario Rules of Civil Procedure*: "Every person whose presence is necessary to enable the court to adjudicate effectively and completely on the issues in a proceeding shall be joined as a party to the proceedings."

force on members of the public, an environment where public perceptions and confidence in the administration of justice are of vital importance. This case represents the final step in Ontario's long evolution toward creating an effective independent investigation into police conduct that leads to death or serious injury. This Honourable Court is asked to interpret the *Police Services Act*⁴ and the *SIU Regulation*⁵ to determine whether an officer is entitled to favour personal interest over public duty. The Appellants police officers seek to ensure that officers are entitled to seek the assistance of counsel in completing their notes. While there is no suggestion that it is the practice of police officers to consult with legal counsel before preparing their notes in non-S.I.U. investigations, the Appellants argue that the criminal, civil and professional jeopardy that could arise requires a departure from the norm. The Appellants argument concedes that the private interest of the officer should be favoured over the integrity of the S.I.U. investigation.

4. The Families' position is that a police officer has a public duty, enshrined in section 9(1) of the *S.I.U. Regulations*, to prepare independent and contemporaneous notes. The Families respectfully submit that a lawyer's involvement in the note taking process completely undermines this public duty. In recognition of this reality, the Court of Appeal correctly balanced the statutory right to counsel with public duties an officer owes and held that an officer's statutory right to consult with counsel was limited to receiving generic legal advice about the rights and obligations of an officer during an S.I.U. investigation prior to the completion of notes. The Families fully support the approach of the Court of Appeal in the case at bar and submit that this instance of limiting access to counsel for a brief period represents a principled approach that is relied upon by courts and lawmakers in other contexts. As set out in

⁴ *Police Services Act*, R.S.O. 1990, c. P. 15, sections 113 ("*Act*")

⁵ *Ontario Regulation 267/10*, Conduct and Duties of Police Officers Respecting Investigations By the Special investigations Unit ("*SIU Regulations*")

paragraph 83 to 89 below, there are numerous examples in the administration of justice where objectives such as the protection of evidence from the contamination of legal advice and the preservation of evidence have been relied upon to justify restrictions on access to lawyers.

5. As held by the Court of Appeal, a lawyer providing professional and competent advice to an officer would undoubtedly affect the independence of an officer's notes. In the Schaeffer investigation, the subject officer made the following notation in his memobook note: "OPPA lawyer Andy McKay - Provided details on incident. Advised not to allow photos in uniform but to turn over uniform as requested. Further told to prepare notes for counsel to be provided to McKay."⁶ Once notes of the incident were vetted by counsel, the subject officer made the following notation in his memobook: "Met with Andy McKay at [Mr. McKay's residence]. Provided my notes to counsel. Told notes are excellent and to complete notebook."⁷

6. Lest there be any doubt about the impact a lawyer can have on the "independent" account of the client, witness officer Pullbrook's notes in the Schaeffer investigation stand as a stark reminder of the significance of counsel intervention. Schedule "A" to this factum, entitled the "Difference Maker", demonstrates the difference of notes taken without a lawyer's assistance and those taken with a lawyer's assistance.

7. In addition to the obvious influence a lawyer's advice can have on a police officer's notes (why else would the lawyer be involved?), the harm created by counsel's injection in the note taking process is further exacerbated by virtue of the joint retainers that routinely occur when the mandate of the S.I.U is invoked. Despite recent amendments to the *S.I.U. Regulations* prohibiting subject and witness officers retaining the same counsel, the amendments do not

⁶ P.C. Wood's Notes, Tab 19H of the Appellant's Record.

⁷ P.C. Wood's Notes, Tab 19H of the Appellant's Record.

expressly prohibit lawyers jointly representing witness officers as one group while another lawyer jointly acts for subject officers as another group.

8. Indeed, in the case at bar, the retainers taken on by Mr. McKay in the Minty shooting stand as an example of how far a single lawyer's representation can extend (see Schedule "B" entitled "A Joint Venture"). In these joint retainer situations, lawyers are obligated to share information between clients by virtue of the operation of Rule 2.04(6)⁸ of the *Rules of Professional Conduct*, known as the "duty of candour". With this obligation in mind, one can easily envisage a situation where a lawyer, acting properly within his or her duty to jointly represented clients, provides a witness officer with information or observations collected by another witness officer. Thus the goal intended to be accomplished by the statutory requirement of police witness segregation is frustrated.⁹

9. It should be noted that even if the operation of the duty of candour were somehow capable of being suspended or waived,(for which there is no legal authority), it remains problematic for even the most ethical of lawyers who, armed with information from one or more witness officers' account(s), would then be providing legal advice on the contents of the notes of another witness officer(s). As found by the Court of Appeal, the dangers of contamination of accounts is so manifest at the pre-note preparation stage, that it is essential that officers simply prepare their notes on their own without the input of counsel beyond generic guidance on their general duties. Notably, this is also the position advanced by the Commissioner of the O.P.P.

⁸ Rule 2.04(6) :

Except as provided in subrule (8.2), where a lawyer accepts employment from more than one client in a matter or transaction, the lawyer shall advise the clients that

(a) the lawyer has been asked to act for both or all of them,

(b) no information received in connection with the matter from one can be treated as confidential so far as any of the others are concerned, and

(c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

⁹ s. 6 of the *S.I.U. Regulations*

10. At paragraph 21 of their factum, the Appellants highlight a telling reality to this case. Despite all of the concerns emanating in and outside of Court in respect of these Appellants' Officers' first set of draft notes, (including the SIU, the Ombudsman's Report and the public media attention over the last four years), the Officers have yet to disclose these notes to permit comparison between the two versions. The Appellants' factum (par. 21) relies instead on an assurance given by Counsel McKay (who represented both the Subject and Witness Officers) that there are "no significant differences" between Pullbrook's two sets of notes. The "Difference Maker" at Schedule "A" certainly makes any reasonable observer, including the Families, wonder about the definition of "significant".

B. Statement of Facts

1. Procedural History

11. The Families are the respective families of Douglas Minty and Levi Schaeffer, two mentally disabled men who died as a result of two unrelated Ontario Provincial Police ("O.P.P.") shootings on June 22 and 24, 2009. As a result of the police role in the deaths, the Special Investigations Unit ("S.I.U.") commenced investigations that led to the Applicant Officers being designated as subject and witness officers.¹⁰ In both a report to the Attorney General and in a public statement, the Director of the S.I.U., Ian Scott, raised concerns about his investigations being undermined by the officers' reliance on jointly retained counsel and their maintenance of multiple sets of notes.¹¹

¹⁰ Subject and witness officer designations are made pursuant to the *Police Services Act*, R.S.O. 1990, c. P.15 [Act] and *Conduct & Duties of Police Officers Respecting Investigations by the S.I.U.*, Ontario Regulation 673/98 [S.I.U. Regulations]; S.I.U. Report to the Attorney General re: Death of Douglas Minty, Tab 19C of the Appellant's Record; S.I.U. Report to the Attorney General re: Death of Levi Schaeffer, Tab 19A of the Appellant's Record.

¹¹ Director Scott's S.I.U. Report to the Attorney General on the Death of Levi Schaeffer, September 25, 2009, Tab 19C of the Appellant's Record; Director Scott's Press Release re: Schaeffer Investigation, September 28, 2009, Tab 12A of the Appellant's Record

12. It has been over 11 years since the Honourable George Adams first took issue with the practice of officers consulting with counsel prior to preparing their notes.¹² Yet still the practice continues. The lead investigator in the Schaeffer Investigation, Dennis O’Neill, testified that this practice is widespread and “occurs in most S.I.U. investigations.”¹³ The injection of counsel into the note-taking process is actively encouraged by lawyers for police associations. In fact, a prominent Ontario police lawyer wrote the following in a column he authored for a Hamilton Police Association Newsletter:

I was tempted to have a pencil manufactured with the slogan “shut the F up” embossed on it so that when police officers began to write their notes, they would pause and first give me or their association a call. I think I may still do it. The first few hours of an S.I.U. investigation are the most important. They decide the future of your career. They may even decide your liberty.¹⁴

13. In light of the systemic issues raised by the death investigations, the Families commenced proceedings in the Ontario Superior Court of Justice seeking declaratory relief on the legality of the officers’ actions as described by the Director of the S.I.U. With no material facts in dispute, the Families moved under rule 14.05(3)(h) for an interpretation of statutory instruments to determine, amongst other things, whether police officers in Ontario were permitted to engage in the following conduct:

- i. subject and witness officers sharing the same lawyer, where such lawyer is prohibited by the *Rules of Professional Conduct* from keeping information confidential as between his clients (a full list of officers that shared the same counsel in both S.I.U. investigations is detailed in Schedule “B” to this memorandum: “A Joint Venture”);¹⁵
- ii. officers each keeping two sets of notes: a draft outside their memobooks prepared for lawyer feedback (which is never produced) and then a second set of notes which appears inside their memobooks once the jointly retained lawyer has approved the notes¹⁶; and

¹² Honourable George Adams, 1998 Consultation Report to the Attorney General and Solicitor General Concerning Police Cooperation with the Special Investigations Unit, Tab 14F of the Appellant’s Record

¹³ Transcript of the Examination of Denis O’Neill, April 15, 2010, Tab 18 of the Appellant’s Record

¹⁴ Clewley article in Hamilton Police Association Magazine, Tab 12B of the Appellant’s Record

¹⁵ Rule 2.04(6) of the *Rules of Professional Conduct*: ...where a lawyer accepts employment from more than one client in a matter or transaction, the lawyer shall advise the clients that (a) the lawyer has been asked to act for both or all of them, (b) no information received in connection with the matter from one can be treated as confidential so far as any of the others are concerned; a list of all witness and subject officers represented by Mr. McKay in the Schaeffer and Minty Investigation are detailed in Schedule “B” to this memorandum: “A Joint Venture”

¹⁶ Officer Wood prepared a “confidential” draft of his notes outside of his memo book for Counsel McKay who then vetted the notes. The following entry appears in the memo book version of his notes: “Told [by counsel McKay] notes are excellent and to complete notebook” (Handwritten notes of P.C. Wood’s, Tab 9 of the Families’ Response Record)

iii. the lawyers and the Police Association representatives being notified and attending on scene before the S.I.U. is notified (permitting, in the Minty case, a passage of time sufficient to result in the O.P.P. transporting and debriefing the two key civilian witnesses).¹⁷

14. At first instance, the Application was dismissed by Low J. of the Ontario Superior Court on the basis that it raised issues that were moot, non-justiciable and that the Families did not have private or public interest standing necessary to commence the Application.¹⁸ The Families appealed the Application judge's decision to the Court of Appeal for Ontario.

15. Prior to oral argument on the appeal below, the *S.I.U. Regulation* was amended on the recommendation of the Honourable Patrick J. LeSage who had been retained by the Attorney General to review certain issues concerning S.I.U. investigations. The amendments prohibited subject officers and witness officers from retaining the same legal counsel; prohibited officers from directly or indirectly communicating with each other during an S.I.U. investigation; and required officers to complete their notes by the end of their tour of duty, unless excused by the Chief of Police. Importantly, the amendments did not prohibit legal counsel from jointly representing multiple police officers within a particular class. For example, there is no prohibition on counsel representing multiple witness officers or multiple subject officers.

2. Judgment of the Court of Appeal

16. In its unanimous judgment, the Court of Appeal for Ontario (Justices Sharpe, Montgomery and Rouleau) first addressed the various procedural arguments raised by the police officers. This matter is now before this Honourable Court on its merits only, as the Appellant police officers have abandoned the procedural and/or jurisdictional arguments on standing, justiciability and mootness that were before the Courts below. Sharpe J.A., for the Court,

¹⁷ Notice of Application, Tab 6 of the Appellants Record

¹⁸ Reasons for Decision of J. Low, June 23, 2010, Tab 4 of the Appellants Record

overturned the Superior Court's rulings on standing and justiciability. The Court held that the issues raised were justiciable and that the Families qualified for public interest standing to commence the Application. The Court of Appeal also rejected a mootness argument advanced by the police officers.¹⁹ Specifically, the Court of Appeal held that the issue of whether police officers involved in S.I.U. investigations are entitled to obtain legal advice in the preparation of their notes was not rendered moot by an amendment to the *S.I.U. Regulation*, (which had been passed in the course of the proceedings), that dealt with a prohibition against joint retainers.²⁰

17. The Court of Appeal then addressed the merits of the Families' application. Relying on the standard rules of statutory interpretation, the Court of Appeal determined that the statutory purpose of the *Act* and the *S.I.U. Regulations* is to "ensure the independent and accountable investigation of the use of police force causing death or serious injury and to foster public confidence in such investigations and in the integrity of the police".²¹ The Court below held that the statute should be interpreted in a manner that "enhances public confidence and trust in the administration of justice".²²

18. With the statute's purpose in mind, the Court of Appeal balanced an officer's section 7(1) statutory right to counsel with the section 9 obligation to prepare notes in accordance with an officer's duty. Noting that *Charter* section 10(b) right to counsel was not applicable to the S.I.U. investigation, the Court of Appeal determined that section 7(1) provides an officer with a right to consult that would not normally be enjoyed during an S.I.U. investigation.²³ The Court went on to determine that section 7(1) also provides enhanced rights to counsel not enjoyed by ordinary

¹⁹ Court of Appeal's reasons for decision, Tab 5 of the Appellant's Record at paras. 37, 43, 58

²⁰ *Ibid.*, at paras. 47

²¹ *Ibid.*, at para. 59

²² *Ibid.*, at para. 58

²³ *Ibid.*, at para. 62

citizens who do not have the entitlement to counsel during an interview or interrogation.²⁴

Contrary to the argument made by the Appellants before this Honourable Court, Sharpe J.A.'s reasoning demonstrates that the Court of Appeal was keenly aware of the procedural protections provided to police officers during an S.I.U. investigation and was mindful of this aspect when interpreting the entire legislative scheme.

19. The Court of Appeal noted that the right to consult with counsel is not without limits and the limits must be discerned with reference to the purpose of the entire legislative scheme.²⁵ In determining the limits of the right to counsel, the Court of Appeal held that section 9(1) of the *S.I.U. Regulations* requires officers to complete notes in accordance with their duty:

It is common ground on this appeal that the duty to create independent and contemporaneous notes of events that transpire during a police officer's ordinary duties is fundamental to the professional role of a police officer. In his Report of the Taman Inquiry (Library and Archives Canada, 2008) at p. 133, Commissioner Roger Salhany, Q.C. aptly described note-taking as "an integral part of a successful investigation and prosecution of an accused" and stated that "the preparation of accurate, detailed and comprehensive notes as soon as possible after an event has been investigated is the duty and responsibility of a competent investigator."²⁶

20. The Court of Appeal went on to hold that a lawyer's involvement in the preparation of an officer's notes would undermine the independence of the notes. The Court held that the independence of notes would be negatively impacted by a lawyer providing professional and competent advice to an officer:

Without imputing any impropriety to a lawyer asked to advise a police officer regarding note preparation or review, a lawyer's involvement undermines the fundamental nature and purpose of a police officer's notes. A lawyer would only be doing his or her job in providing the police officer with information as to the ingredients of an offence or possible legal defence. Such advice is likely to influence how the police officer writes his notes. Consequently, the notes would not be a straightforward record of the officer's independent recollection but would reflect the lawyer's legal advice. An officer eager to have a sound basis for a prosecution or a legally valid explanation for his or her own conduct would naturally emphasize and present the facts in accordance with the lawyer's advice.

In my view, the lawyer-induced refinements or qualifications that would almost certainly flow from lawyer involvement in the note-making process would undermine the very purpose of a police officer's notes, namely, to record the officer's independent and contemporaneous record of the incident. It follows that a police officer who

²⁴ *Ibid.*, at para. 63

²⁵ *Ibid.*, at para. 64

²⁵ *Ibid.*, at para. 65

²⁶ *Ibid.*, at paras 67

seeks legal advice in connection with the preparation of notes, other than with respect to the obligation to prepare notes, or who asks legal counsel to review or vet notes, fails to live up to this duty.²⁷

21. The Court of Appeal held that section 7(1) does permit an officer to consult with counsel prior to the completion of notes, but in order to ensure no conflict with section 9(1), that right to consult was limited to “basic legal advice as to the nature of his or her rights and obligations in connection with the incident and the SIU investigation”.²⁸ Further consultation about the incident itself was permitted after the completion of the notes and prior to an S.I.U. interview.

22. In granting the Application, the Court of Appeal made the following declarations:

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.²⁹

3. Douglas Minty Death Investigation

(i) Facts of the Shooting Death of Douglas Minty

23. On the evening of June 22, 2009, the subject officer, Police Constable Graham Seguin (“P.C. Seguin”), was dispatched to Evelyn Minty’s residence to investigate a reported altercation between a door-to-door salesman and Evelyn Minty’s son, Douglas Minty. Mr. Minty was fifty-nine years old and was developmentally disabled.³⁰

²⁷ *Ibid.*, at paras. 72-75

²⁸ *Ibid.*, at para. 81

²⁹ *Ibid.*, at para. 86

³⁰ Professional Standards Bureau Investigation Report, Tab 20C of the Appellant’s Record; S.I.U. Report to the Attorney General re: Death of Douglas Minty, Tab 20B of the Appellant’s Record.

24. Upon attending at Ms. Minty's residence, P.C. Seguin spoke to the salesman and his co-worker, who remained on the scene after the original altercation. The salesman advised P.C. Seguin of the altercation with Mr. Minty.³¹ P.C. Seguin approached Mr. Minty who was standing near the carport of the Minty residence. Mr. Minty began to approach P.C. Seguin. P.C. Seguin observed a knife in Mr. Minty's hand. P.C. Seguin ordered Mr. Minty to drop his weapon and withdrew his sidearm. Mr. Minty did not comply with the order and continued to approach P.C. Seguin. P.C. Seguin shot Mr. Minty five times. Mr. Minty collapsed and was later transported by Emergency Services to the Royal Victoria Hospital where he was pronounced dead at 9:40 p.m.³²

25. At 8:17 p.m., Police Constable Richard Boyd ("P.C. Boyd") arrived at the Minty residence and found P.C. Seguin performing CPR on Mr. Minty. At 8:23 p.m., Sergeant Michael Burton ("Sgt. Burton"), P.C. Seguin's superior officer, arrived to secure the scene. At that time, P.C. Seguin advised Sgt. Burton of the incident, thereby making Sgt. Burton a witness officer. The Professional Standards Bureau Investigation Report indicates that Sgt. Burton informed the officers that it is O.P.P. procedure that officers complete their memobook entries prior to reporting off-duty but also advised them not to prepare notes until speaking to counsel.³³

26. Sgt. Burton's notes indicate that on June 22, 2009, at 11:45 p.m. he spoke to Ontario Provincial Police Association ("O.P.P.A.") counsel Andrew McKay. At 7:20 a.m. on June 23, 2009, Sgt. Burton spoke to Mr. McKay a second time. Following this entry, Sgt. Burton's notes indicate: "Notes from 20:07, 22nd June 2009 to 08:00 23rd June were made at 19:30 on 23rd June

³¹ Professional Standards Bureau Investigation Report, Tab 20C of the Appellant's Record; S.I.U. Report to the Attorney General re: Death of Douglas Minty, Tab 20B of the Appellant's Record.

³² Professional Standards Bureau Investigation Report, Tab 20C of the Appellant's Record; S.I.U. Report to the Attorney General re: Death of Douglas Minty, Tab 20B of the Appellant's Record.

³³ Professional Standards Bureau Investigation Report, Tab 20C of the Appellant's Record; Notes of Sgt. Burton, Tab 20D of the Appellant's Record; Notes of Sgt. Amy Thompson, Tab 20L of the Appellant's Record.

based on original notes made at rear of notebook.”³⁴ Sgt. Burton failed to follow his own direction on O.P.P. note-taking policy.

27. At 8:42 p.m., Sergeant Amy Thompson (“Sgt. Thompson”) arrived and at 8:45 p.m. she seized P.C. Seguin’s use of force equipment. At 9:40 p.m., Sgt. Thompson escorted the salesman and his co-worker to the O.P.P. Huronia West Detachment. While driving, Sgt. Thompson obtained information from the two civilian witnesses that she later recorded in her memobook. At no time did Sgt. Thompson advise the witnesses that they should not provide statements until the S.I.U. had an opportunity to take their statements.³⁵

28. Despite the fact that the O.P.P. knew of the shooting as early as 8:17 p.m., the S.I.U. was not notified until 9:40 p.m. The O.P.P. delayed notification for approximately one hour and twenty three minutes. The O.P.P. media liaison officer was notified of the incident prior to the S.I.U. No explanation was provided for the late notification to the S.I.U. The S.I.U. lead investigator, Angela Mercer, admitted there was no reason why the S.I.U. was not immediately notified of the shooting and that “[the O.P.P.] should have called [the S.I.U.] right away.”³⁶

ii. “A Joint Venture”

29. As a result of the S.I.U. investigation, P.C. Seguin was designated as a subject officer on June 23, 2009. The following officers were designated as witness officers: Sgt. Burton (on June

³⁴ Notes of Sgt. Burton, Tab 20D of the Appellant’s Record

³⁵ Notes of Sgt. Amy Thompson, Tab 20L of the Appellant’s Record; Professional Standards Bureau Investigation Report, Tab 20C of the Appellant’s Record.

³⁶ Professional Standards Bureau Investigation Report, Tab 20C of the Appellant’s Record; S.I.U. Report to the Attorney General re: Death of Douglas Minty, Tab 20B of the Appellant’s Record; Transcript of the Examination of Angela Mercer, April 15, 2010, Tab 17 of the Appellant’s Record; Answers to Undertaking, Tab 2 of the Respondent Families’ Response Record

26, 2009); Constable Boyd (on June 26, 2009); Sgt. Thompson (on July 16, 2009); Constable Gwyn Seymour (on July 6, 2009); and Constable Kelly Daniels-Griffis (on July 6, 2009).³⁷

30. Mr. McKay acted as counsel for the subject officer P.C. Seguin and several witness officers including P.C. Seymour and P.C. Daniels-Griffis. On the day of the shooting, Mr. McKay also provided advice to Sgt. Burton with respect to the Minty Investigation.³⁸ A list of all officers represented by Mr. McKay in the Minty Investigation is detailed in Appendix “B” to this factum: “A Joint Venture”.³⁹

iii. S.I.U. Report to the Attorney General

31. On October 14, 2009, Director Scott provided the Attorney General with a report on the Minty shooting. In the report, the Director indicated there were no reasonable grounds to believe that P.C. Seguin committed a criminal offence in relation to the firearm death of Douglas Minty. In addition, the report indicated that Director Scott intended to address the (Ret.) Commissioner of the O.P.P., Julian Fantino, with respect to the following issues: (a) the delayed notification; (b) Sgt. Thompson taking the statement of the two “most material civilian witnesses”; and (c) Sgt. Burton instructing all witness officers not to write up their notes until they spoke to counsel, a counsel who had a professional duty to share information among his clients (an apparent breach of the duty to segregate).⁴⁰

³⁷ S.I.U. Report to the Attorney General re: Death of Douglas Minty, 20B of the Appellant’s Record.

³⁸ Transcript of the Examination of Angela Mercer, April 15, 2010, Tab 17 of Appellant’s Record.

³⁹ A list of all witness and subject officer represented by Mr. McKay in the Minty Investigation are detailed in Schedule “B” to this factum: “A Joint Venture”.

⁴⁰ S.I.U. Report to the Attorney General re: Death of Douglas Minty, Tab 20B of the Appellant’s Record.

4. Levi Schaeffer Death Investigation

i. Shooting Death of Levi Schaeffer

32. In or around March 2009, Levi Schaeffer, a thirty-year old man diagnosed with schizoaffective disorder, panic disorder and anti-social personality disorder, began a bike journey from Peterborough, Ontario to Pickle Lake, Ontario. Approximately two weeks prior to his death, Mr. Schaeffer began camping on a remote peninsula located in the Osnaburgh Lake area.⁴¹

33. On June 24, 2009 at approximately 12:30 p.m., Police Constable Kris Wood (“P.C. Wood”) and Acting Sergeant Mark Pullbrook (“A/Sgt. Pullbrook”) approached Mr. Schaeffer’s camp to investigate a report of a stolen boat. There was an interaction between Mr. Schaeffer and the officers which ended with the subject officer, P.C. Wood, discharging his firearm twice and killing Mr. Schaeffer. The only witnesses were P.C. Wood and A/Sgt. Pullbrook.⁴²

34. At approximately 1:30 p.m., Inspector Loree contacted Detective Sergeant Dayna Wellock (“D/Sgt. Wellock”) and requested that she attend to secure evidence and witnesses. At 1:48 p.m., D/Sgt. Wellock contacted Police Constable Graham (“P.C. Graham”) and requested that he advise P.C. Wood and A/Sgt. Pullbrook not to speak to each other about the incident; to contact counsel; and to prepare notes at the direction of counsel. P.C. Graham passed on D/Sgt. Wellock’s instructions to P.C. Wood.⁴³ At 4:50 p.m., D/Sgt. Wellock attended on the scene and spoke with A/Sgt. Pullbrook. She advised A/Sgt. Pullbrook not to discuss the incident but could not recall if she provided him with instructions regarding the completion of notes.⁴⁴

⁴¹ Affidavit of Ruth Schaeffer, Tab 12 of the Appellant’s Record, at para. 3.

⁴² S.I.U. Report to the Attorney General re: Death of Levi Schaeffer, Tab 19C of the Appellant’s Record; Professional Standards Bureau Investigation Report, November 30, 2009, Tab 19A of the Appellant’s Record; Professional Standards Bureau Investigation Report, December 10, 2009, Tab 19B of the Appellant’s Record.

⁴³ Professional Standards Bureau Investigation Report, November 30, 2009, Tab 19A of the Appellant’s Record; Professional Standards Bureau Investigation Report, December 10, 2009, Tab 19B of the Appellant’s Record.

⁴⁴ D/Sgt. Wellock’s Notes, Tab 3 of the Respondent Families’ Response Record; Professional Standards Bureau Investigation Report, November 30, 2009, Tab 19A of the Appellant’s Record; Professional Standards Bureau Investigation Report, December 10, 2009, Tab 19B of the Appellant’s Record.

35. At 5:12 p.m., P.C. Wood spoke to Mr. McKay (counsel) who advised him to prepare notes for counsel to review. P.C. Wood's notes, made two days after the shooting (June 26, 2009), state:

17:12 Spoke [with] OPPA lawyer Andy McKay - Provided details on incident. Advised not to allow photos in uniform but to turn over uniform as requested. Further told to prepare notes for counsel to be provided to McKay.⁴⁵

36. At approximately 6:10 p.m., A/Sgt. Pullbrook arrived at the Pickle Lake O.P.P. Detachment. At that time, Inspector Loree provided A/Sgt. Pullbrook with Mr. McKay's telephone number. A/Sgt. Pullbrook spoke to Mr. McKay who "advised me on the situation [and] not to draft any notes or talk to anyone about the incident."⁴⁶ At approximately 7:02 p.m., A/Sgt. Pullbrook advised Inspector Loree that his counsel had advised him "to go home and to not complete his notes for the evening." Inspector Loree did not order A/Sgt. Pullbrook to complete his notes.⁴⁷

37. At approximately 8:20 p.m., Inspector Loree attended at the residence of P.C. Wood and advised him of O.P.P. policy that officers are required to complete their notes before the end of their shift. Inspector Loree advised the Professional Standards Bureau that after this discussion, Inspector Loree understood P.C. Wood was declining to complete his notes based on the advice of his counsel. Inspector Loree did not order P.C. Wood to complete his notes.⁴⁸

38. Both A/Sgt. Pullbrook and P.C. Wood completed their O.P.P. memobook notes (a second set of notes) of the incident on June 26, 2009, after preparing an account for their jointly retained

⁴⁵ P.C. Wood's Notes, Tab 19H of the Appellant's Record.

⁴⁶ Notes of A/Sgt. Pullbrook, Tab 19F of Appellant's Record.

⁴⁷ Professional Standards Bureau Investigation Report, December 10, 2009, Tab 19B of the Appellant's Record.

⁴⁸ Professional Standards Bureau Investigation Report, December 10, 2009, Tab 19B of the Appellant's Record.

counsel to review (the original set of notes). Both officers refused to provide the original set of notes drafted for their counsel's review on the basis of solicitor-client privilege.⁴⁹

39. On June 26, 2009 at 9:00 a.m., P.C. Wood met with Mr. McKay at Mr. McKay's residence and provided his original notes for counsel to review. Mr. McKay advised P.C. Wood that his notes were "excellent". At 9:30 a.m., A/Sgt. Pullbrook also attended Mr. McKay's residence. The following notations were made in P.C. Wood's memobook:

Met with Andy McKay at [Mr. McKay's residence]. Provided my notes to counsel. Told notes are excellent and to complete notebook.
09:30 A/Sgt. Pullbrook attending also. Did not speak regarding incident or investigation.⁵⁰

40. On June 29, 2009, A/Sgt. Pullbrook was interviewed by S.I.U. investigators. A/Sgt. Pullbrook was accompanied by Mr. McKay. During the interview, Mr. McKay advised that "on his instruction, A/Sgt. Pullbrook made confidential notes to counsel after the incident that are privileged." Mr. McKay advised that there "were no significant differences in the confidential notes that were provided to counsel and the notes that were presented to the investigators".⁵¹ P.C. Wood refused to submit to an interview but provided his second version of notes, located in his memobook, to S.I.U. investigators.

ii. The "Difference Maker" – Before and After Notes

41. A review of A/Sgt. Pullbrook's notes demonstrates the markedly different note-taking practice that ensues when an officer is permitted to consult with counsel prior to preparing his or her memobook notes. Schedule "A" to herein factum, entitled "The Difference Maker", juxtaposes the witness officer's notes from the early stages of the Schaeffer matter, pre-shooting

⁴⁹ Professional Standards Bureau Investigation Report, November 30, 2009, Tab 19A of the Appellant's Record; Professional Standards Bureau Investigation Report, December 10, 2009, Tab 198B of the Appellant's Record; Transcript of the Examination of Denis O'Neill, April 15, 2010, at Tab 18.

⁵⁰ P.C. Wood's Notes, Tab 19H of the Appellant's Record.

⁵¹ S.I.U. Follow Up Report re: Witness Officer Interview of Acting Sergeant Mark Pullbrook, June 29, 2009, Tab 19D of the Appellant's Record.

and without consultation with counsel, with the same witness officer's notes on the day of the shooting following counsel intervention. The "before" set of notes reads like a conventional police officer's memobook notes. It is replete with times and short factual references consistent with a typical officer's training and the function and utility of police memobook notes.

42. On the other hand, the "after" set of notes reads like a legal narrative complete with legal terminology related to "self-defence" and assertions of lawful use of force. Conspicuously absent from this "after" set of notes are regular time entries and the short factual references that are typical of an independent set of police notes. Indeed, there are no time entries for the six hour period between 0800 and 1410 that represents the time period in which the police interaction and shooting of Levi Schaeffer occurred. **Witness officer Pullbrook's notes go on for some 21 pages without a single time entry related to the shooting death of Levi Schaeffer (See pgs. 419 to 440).**

43. On June 29, 2009, A/Sgt. Pullbrook was interviewed by S.I.U. investigators. A/Sgt. Pullbrook was accompanied by Mr. McKay. During the interview, Mr. McKay advised that "on his instruction, A/Sgt. Pullbrook made confidential notes to counsel after the incident that are privileged." Mr. McKay advised that there "were no significant differences in the confidential notes that were provided to counsel and the notes that were presented to the investigators". P.C. Wood refused to submit to an interview but provided his second set of notes, entered in his memobook, to S.I.U. investigators.

iii. Joint Venture

44. In addition to acting for the subject officer, Mr. McKay represented all witness officers interviewed by the S.I.U. A list of all officers represented by Mr. McKay in the Schaeffer Investigation is detailed in Appendix “B” to this factum: “A Joint Venture”.⁵²

iv. S.I.U. Report to the Attorney General

45. On September 25, 2009, the Director of the S.I.U. provided his report on the Schaeffer Investigation to the Attorney General. In his report, the Director noted that the manner in which P.C. Wood and A/Sgt. Pullbrook prepared their notes left him with “no information base I can rely upon.” Because of the conduct of the Appellant Officers, the Director advised the Attorney General that “[b]ecause I cannot conclude what probably happened, I cannot form reasonable grounds that the subject officer in this matter committed a criminal offence.”⁵³

5. Commissioner’s Response to Issues Identified by the S.I.U.

46. The record reflects that (Ret.) Commissioner Fantino took a dim view of Director Scott raising concerns about the O.P.P. officers’ conduct. In both the Schaeffer and Minty Investigations, the S.I.U. Director expressed, in writing, his concerns about the note-taking practices of the involved officers, the practice of joint retainers and delayed notification. In both cases, the S.I.U. Director received no adequate response from (Ret.) Commissioner Fantino.⁵⁴

⁵² A list of all officers represented by Mr. McKay in the Schaeffer Investigation is detailed in Schedule “C” to this factum: “A Joint Venture”; Transcript of the Examination of Denis O’Neill, April 15, 2010, Tab 18 of the Appellant’s Record; Report of Ian Scott to the Attorney General, September 25, 2009, Tab 19C of the Appellant’s Record.

⁵³ Report of Ian Scott to the Attorney General, September 25, 2009, Tab 19C of the Appellant’s Record.

⁵⁴ Letter to Commissioner Fantino from Director Scott, October 15, 2009, Tab 20E of the Appellant’s Record; Transcript of the Examination of Angela Mercer, April 15, 2010, Tab 17 of the Appellant’s Record; Letter from Director Scott to Commissioner Fantino, September 25, 2009, Tab 19G of the Appellant’s Record.

47. With respect to the Schaeffer Investigation, (Ret.) Commissioner Fantino twice wrote the S.I.U. Director indicating the Director had “no authority over how police notes are prepared”.⁵⁵

48. On October 15, 2009, Director Scott wrote (Ret.) Commissioner Fantino with respect to the issues he identified in the Minty Investigation. In the letter, Director Scott indicated that he would continue to document his concerns about co-operation with the S.I.U. despite (Ret.) Commissioner Fantino’s failure to address apparent breaches of the *Act* and the *S.I.U. Regulations*.⁵⁶

6. Commissioner’s Investigations into the Schaeffer and Minty shootings

49. Pursuant to s. 11 of the *S.I.U. Regulations*, the Commissioner is obligated to cause an investigation to be conducted into any incident with respect to which the S.I.U. has been notified. The purpose of the Commissioner’s investigation is to review the policies of the police force and the conduct of its police officers.⁵⁷

50. In the Minty Investigation, (Ret.) Commissioner Fantino initiated an investigation into several issues, including: [1] late notification of the S.I.U; [2] Sgt. Thompson taking statements from the two civilian witnesses; and [3] Sgt. Burton advising all officers not to prepare their notes until they spoke to legal counsel. The report found no evidence to establish any misconduct. The report did not address the failure of Sgt. Burton to complete his notes before the end of the shift, nor did the report speak to the propriety of the subject officer and his supervisor, also a witness officer, sharing legal advice.⁵⁸

⁵⁵ Letter from Commissioner Fantino to Director Scott, September 30, 2009, Tab 19G of the Appellant’s Record; Letter from Commissioner Fantino to Director Scott, November 2, 2009, Tab 19G of the Appellant’s Record.

⁵⁶ Letter to Commissioner Fantino from Director Scott, October 15, 2009, Tab 19G of the Appellant’s Record.

⁵⁷ See section 11(2) of the *S.I.U Regulations*.

⁵⁸ Professional Standards Bureau Investigation Report, Tab 20C of the Appellant’s Record.

51. In the Schaeffer Investigation, two reports were prepared by the Commissioner to address the issues raised by Director Scott. The first report purported to address the issue of the subject and witness officers jointly retaining counsel. Surprisingly, the report did not contain a conclusion with respect to the joint retainer issue and simply commented that there may have been misconduct by the witness officer in that he failed to prepare notes for the two shifts prior to the shooting. “Bureau Commander Comments” were appended to the report that clarified that s. 7 of the *S.I.U. Regulations* does not negate an officer’s responsibility to complete notes in respect of on-duty activities prior to the end of shift or as authorized by their supervisor. The “Bureau Commander Comments” confirm that it is not the role of legal counsel or O.P.P.A. representatives to direct members to remove themselves from duty, and that the role of supervisors should not be to direct members to contact legal counsel prior to making their required duty book entries.⁵⁹ Despite the “Bureau Commander Comments”, no *Police Services Act* charges were initiated against any of the officers for the apparent breaches of O.P.P. policy.

52. A second report purported to address the issue of the note-taking practices of P.C. Wood and A/Sgt. Pullbrook. The report concluded there was no breach of O.P.P. policy. The conclusion appears to be entirely based on a legal opinion obtained by the O.P.P.A. that indicates that notes prepared for Mr. McKay are subject to solicitor-client privilege and, as a result, are not producible.⁶⁰

PART II: FAMILIES’ POSITION ON QUESTIONS RAISED BY THE APPELLANTS

Questions 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?

⁵⁹ Professional Standards Bureau Investigation Report, November 30, 2009, Tab 19A of the Appellant’s Record.

⁶⁰ Professional Standards Bureau Investigation Report, December 10, 2009, Tab 19B of the Appellant’s Record; Opinion prepared by Gavin MacKenzie, Tab 20K of the Appellant’s Record.

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?

53. The Families respectfully submit that the Court of Appeal was correct in finding that counsel may only provide limited advice as to the nature of an officer's duties, rights and obligations in an S.I.U. investigation prior to an officer fulfilling their public duty to create independent and contemporaneous 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?

54. The Families respectfully submit that the Court of Appeal did not create an unworkable protocol. In the alternative, if this Honourable Court decides that the Court of Appeal ruling is unworkable, then the Families take the position, as reflected in their cross-appeal, that there should be no communication between counsel and an officer prior to the completion of an officer's notes. In the further alternative, the Families will take the position that if consultation beyond basic rights and obligations is permitted, then that consultation should only be permitted between a subject officer and counsel.

PART III – STATEMENT OF ARGUMENT

55. The Families respectfully submit that the Court of Appeal's decision correctly interpreted the relevant provisions of the *Act* and the *S.I.U. Regulations*. The Families submit that the Court of Appeal's ruling strikes the appropriate balance between protecting an officer's rights and giving effect to the overarching purpose of the legislation – "the preservation and promotion of

independence, accountability, and public confidence in S.I.U. investigations”⁶¹. Before responding to the Appellants’ arguments, it is necessary to review the systemic nature of the issues at play in the appeal and the legislative framework for S.I.U. investigations.

1. Systemic Nature of the Issues

56. The issue of police officers obtaining legal advice for the preparation of their notes has been well-documented in various reports in Ontario. The issue was first addressed in 1998, when the Honourable George Adams, Q.C., prepared a report for the Attorney General and the Solicitor General detailing concerns with respect to police co-operation with the S.I.U. In 2003, Justice Adams prepared a second report after the *S.I.U. Regulations* were implemented, wherein he addressed the issue of officers’ notes being prepared after obtaining legal advice:

The S.I.U. 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. It has also been noted that there is a lack of consistency amongst police services on the requirement of the completion of notes at the end of each shift.⁶²

57. In 2008, the Ombudsman for Ontario echoed the concerns of Justice Adams in the first of his two reports on the S.I.U., noting that “[a] number of S.I.U. investigators told us officers routinely make their notes after consulting with counsel” and that it was “not uncommon for notes to appear days after they have been requested, and often not until the officer attends for an interview”. In the Ombudsman’s follow-up report, released in December, 2011, he concluded that “it was still common for officers to consult their police association or counsel prior to preparing their notes in S.I.U. incidents”.⁶³

⁶¹ *Ibid.*, at para. 76

⁶² The Honourable George W. Adams, Q.C., 2003, Review Report on the Special Investigations Unit Reforms prepared for the Attorney General of Ontario, February 26, 2003, Tab 14G of the Appellant’s Record.

⁶³ Ombudsman of Ontario, Investigation into the Ministry of the Attorney General’s Implementation of Recommendations concerning reform of the Special Investigations Unit, “Oversight Undetermined”, at Tab 51 of the SIU’s Book of Authorities

58. The Ombudsman's follow-up report also documented interference by the Attorney General with Director Scott's release of the S.I.U.'s statutorily mandated annual report. In November 2009, Director Scott had completed his annual report and was prepared to release it publically. Prior to releasing the report, Director Scott provided an advance copy to the Ontario Attorney General. The annual report as drafted addressed the widespread practice of officers obtaining legal assistance in the preparation of notes. Surprisingly, Director Scott was explicitly told by the Assistant Deputy Attorney General that he was not permitted to release his annual report. On May 2, 2011, and only after the contentious issues addressed in the annual report had been made public as a result of media attention to the herein Application and Justice LeSage's report, the Ministry gave Director Scott "permission" to release his 2009 annual report.⁶⁴

59. In addition to the reports detailed above, the widespread nature of the police practice of consulting legal counsel in the preparation of notes has been subject to judicial commentary. In *Foster v. Prince*⁶⁵, the plaintiffs were the mother and half-brother of a man who was shot and killed by a police officer after the mother called 9-1-1 because of the man's threatening behavior. The plaintiffs asserted that the death was caused by the negligence of the defendant officers who arrived in response to the call. As in the Schaeffer and Minty investigations, the officers involved in the shooting death created two sets of notes; one for the review of their legal counsel and a second prepared in their memobook notes. One officer did not prepare his memobook notes until a month after the incident. In an undertakings motion, one officer's note-taking process was described as follows:

In the case at bar we know there were two sets of notes. Constable Prince has described the process he followed. He advises that he prepared a **log of the events** of the day on his home computer and he sent that log by e-mail to Mr. Kinahan. Once he had received advice from counsel he prepared his formal notes. Those are the notes appearing in his notebook and which have now been produced. It is his evidence that he did not retain copies of the original log.

⁶⁴ *Ibid.*, at para. 159-174

⁶⁵ [2012] O.J. No. 89 (Master C.U.C. MacLeod)

Indeed his evidence is that he subsequently wiped the hard drive on the computer and no longer has that computer. Mr. Connolly asked him to check with Mr. Kinahan to see if Mr. Kinahan has the original e-mail and if so to produce what he describes as the real notes. The document exists but production has been refused on the basis of privilege.⁶⁶ (emphasis added)

In *Foster*, the Master held that the notes provided to counsel were producible and not subject to solicitor-client privilege.⁶⁷

2. Legal Framework of S.I.U. Investigations

60. Section 113 of the *Act* establishes the S.I.U.⁶⁸ Section 113(9) of the *Act* requires members of police forces to co-operate fully with the S.I.U. in the conduct of investigations.⁶⁹ Section 41(1)(b) of the *Act* requires the Commissioner to ensure that members of the police force carry out their duties in accordance with the *Act* and the *S.I.U. Regulations*.⁷⁰ The *S.I.U. Regulations*, passed pursuant to the *Act*, provide a non-exhaustive list of requirements that must be followed in any S.I.U. investigation (recent amendments are italicized):

(a)The chief of police shall notify the S.I.U. 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 S.I.U. (s. 3);

(b)The S.I.U. shall be the lead investigator and shall have priority over any police force in the investigation of the incident (s. 5);

(c)The chief of police shall segregate all the police officers involved in the incident from each other until after the S.I.U. has completed its interviews (s. 6(1));

(d)A police officer involved shall not communicate *directly or indirectly* with any other police officer involved in the incident concerning their involvement in the incident until after the S.I.U. has completed its interviews (s. 6(2));

(e)Every police officer is entitled to consult with legal counsel or a representative of the OPPA and to have legal counsel or a representative of the OPPA present during his or her interview with the S.I.U. (s. 7(1));

(f)*Witness officers may not be represented by the same legal counsel as subject officers* (s. 7(3))

(g)Immediately upon being requested to be interviewed by the S.I.U., and no later than 24 hours after the request where there are appropriate grounds for delay, a witness officer shall meet with the S.I.U. and answer all its questions (s. 8(1));

⁶⁶ *Ibid.*, at para. 34 and 35

⁶⁷ *Ibid.*, at para. 38

⁶⁸ Section 113(1) states: There shall be a special investigations unit of the Ministry of the Solicitor General. *Police Services Act*, R.S.O. 1990, c. P. 15.

⁶⁹ Section 113(5) to (9), *Police Services Act*, R.S.O. 1990, c. P. 15.

⁷⁰ Section 41(1)(b), *Police Services Act*, R.S.O. 1990, c. P. 15.

(h) A witness officer shall complete in full the notes on the incident in accordance with his or her duty and shall provide the notes to the chief of police within 24 hours after a request for the notes is made by the S.I.U. (s. 9(1)); and

(i) 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 S.I.U. (s. 9(3)).

(j) *A witness and subject officers notes shall be completed by the end of the officer's tour of duty, except where excused by the chief of police (s.9(5)).*

(k) If, after interviewing a witness officer, the S.I.U. re-designates the officer as a subject officer then as subject officer then the S.I.U. must give the re-designated officer all copies of the record of the interview and return the officer's notes to the chief of police. (s. 10(3)).

APPELLANTS' QUESTIONS 1 and 2

3. Legislative Intent of the *Act* and *S.I.U. Regulations*

(i) Principles of Statutory Interpretation

61. At paragraph 36 of their factum, the Appellants take the position that the Court of Appeal erred in narrowly defining the purpose of the legislative scheme as one-dimensional and did not recognize that the Legislature sought to create a balance between the public's right to an impartial and competent investigation and an officer's private interests. The Families respectfully submit that the Court of Appeal correctly defined the purpose of the legislative scheme and adequately balanced the procedural rights afforded to officers with the common law and statutory duty of an officer to prepare contemporaneous and independent notes.

62. The *Act* and the *S.I.U. Regulations* must be interpreted in accordance with the general rules of statutory interpretation: "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament".⁷¹ The principle of interpretation presumes a harmony, coherence, and consistency within an Act. In addition, s. 64 of the Ontario *Legislation Act, 2006*

⁷¹ *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339, at para. 9, citing E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87); *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, [2012] S.C.J. No. 34 at para. 71

deems all legislation to be remedial and accordingly shall receive “fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit”.⁷² It is through that the *Act* and the *S.I.U. Regulations* must be interpreted.

(ii) Purpose of Act and Regulations Defined in earlier jurisprudence

63. Ontario case law has determined that the purpose of the legislative scheme relating to S.I.U. investigations is to ensure the independent and accountable investigation of the use of police force causing death or serious injury and to foster public confidence in such investigations. Justice Mackenzie, in *Metcalf v. Scott*, held that the legislation governing S.I.U. investigations should be interpreted in a manner that "provides complainants with a mechanism for an impartial and independent review of complaints and thereby enhances public confidence and trust in the administration of justice."⁷³ Similarly, the Ontario Court of Appeal has previously held that the purpose of the *Act* as a whole was to “increase public confidence in the provision of police services, including the process of public complaints”.⁷⁴

64. The interpretation adopted by Ontario Courts is consistent with the evolution of the S.I.U. in Ontario. As detailed in the Director of the S.I.U.’s factum, the S.I.U. was established as a result of recommendations from the Race Relations and Policing Task Force. The Task Force

⁷² *Legislation Act, 2006* S.O. 2006, C. 21, Schedule F, s. 64

⁷³ *Metcalf v. Scott*, 2011 ONSC 1292 (S.C.J.), at para. 91

⁷⁴ *Ontario (Civilian Commission on Police Services) v. Browne*, (2001) 56 O.R. (3d) 673 (C.A.) at para. 67, SIU Auth., Tab 14.

report noted that the public's confidence had been compromised by a number of police shooting investigations conducted by the police.⁷⁵

65. Past jurisprudence and the historical evolution of the S.I.U. demonstrate that the Court of Appeal was correct in interpreting the purpose of the *Act* and *S.I.U. Regulations* as the fostering of public confidence that police-involved deaths or serious injuries are subject to independent, impartial and effective investigations. It is in this context, that the Court of Appeal correctly began the delicate balancing of an officer's right to consult with counsel with an officer's public law duties.

(iii) The Legislation Does not Detract from a Police Officers' Duties as a Public Office Holder

66. At paragraph 32 of their Factum, the Appellants argue that the *Act* and the *S.I.U. Regulations* were drafted in a manner that demonstrates the government's dual concerns with preserving a police officer's right to consult legal counsel so as to protect private interests, while at the same time ensuring that police officers remain accountable to the public through civilian oversight. The Families concede that the legislative scheme does create a balance between protecting an officer's interests and ensuring an oversight system that inspires public confidence. The legislative scheme as a whole demonstrates that the protection of an officer's private interests, however, does not come at the cost of their obligations as public office holders or at the cost of the integrity of the S.I.U. investigation.

67. It is trite law that police officers are public office holders.⁷⁶ Unlike other employees whose duties and responsibilities are governed by contract law, an officer's duties, powers and

⁷⁵ *Race Relations and Policing Report*, supra at 146-150, SIU Auth, Tab 65

⁷⁶ *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263; *Nicholson v. Haldimand-Norfolk Regional Police Commissioners*, [1979] 1 S.C.R. 311 at 319-321

obligations arise from statute and the common law.⁷⁷ As a result, an officer's duties and obligations are not merely owed to their employer; rather, an officer's duty is to the public they serve.⁷⁸

68. Pursuant to section 42 and 113(9) of the *Police Services Act*, police officers in Ontario have, amongst other things, the following powers and duties: (1) assisting victims of crime; (2) laying charges and participating in prosecutions; (3) powers and duties ascribed to a constable at common law; and (4) the duty to co-operate fully with the S.I.U. The public duty an officer owes to participate in prosecutions and lay charges requires them to create accurate and reliable notes.

69. The common law public duty to create independent and contemporaneous notes is fundamental to the professional role of a police officer. In his Report of the Taman Inquiry, Commissioner Roger Salhany, Q.C., described note-taking as "an integral part of a successful investigation and prosecution of an accused" and stated that "the preparation of accurate, detailed and comprehensive notes as soon as possible after an event has been investigated is the duty and responsibility of a competent investigator".⁷⁹

70. The importance of a police officer's notes to a criminal investigation, S.I.U. or otherwise, cannot be understated. Commissioner Salhany described the "preparation of accurate, detailed and comprehensive notes as soon as possible after an event has been investigated" as an "integral part of a successful investigation".⁸⁰

⁷⁷ *PSA*, ss. 42(1), (3)

⁷⁸ *Project 360 Investments Limited (Sound Emporium Nightclub) v. Toronto Police Services Board*, 2009 CanLII 36380 (ON SC) at para. 19; *Hill v Chief Constable of West Yorkshire*, [1988] 2 All ER 238

⁷⁹ *Report of the Taman Inquiry*, Commissioner Roger Salhany, Q.C. (Library and Archives Canada, 2008) at p. 133

⁸⁰ *Report of the Taman Inquiry*, Commissioner Roger Salhany, Q.C. (Library and Archives Canada, 2008) at p. 133

71. The two hallmarks of reliable notes are that they are prepared independently and contemporaneously to the event being described. The importance of preparing notes in a timely fashion is obvious – as time passes, a witness’ memory will fade.⁸¹ If police notes are to be used as an aid to recollect events, then they must be recorded in a timely fashion to ensure an accurate account. Ontario Courts have long recognized the importance of the timely preparation of notes.⁸² The timeliness of the preparation of notes will negatively impact the weight to be given to the notes and any testimony that relies on the notes as a memory aid.⁸³

72. The issue of contemporaneous note-taking by subject and witness officers has been identified and discussed in several reports:

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. It has also been noted that there is a lack of consistency amongst police services on the requirement of the completion of notes at the end of each shift.⁸⁴

The SIU has reminded its investigators to fully canvass the circumstances surrounding the making of notes by witness officers to ensure that there has been no improper influence. However, we learned that it is not uncommon for notes to appear days after they have been requested, and often not until the officer attends for an interview. There have been instances where notes have arrived with improper redactions. An August 23, 2005 Director’s report noted that pre-edited statements had been provided and that unedited copies should be requested. The SIU warned its investigators about this practice in June 2006, after it learned that an officer had removed several relevant comments made by a subject officer from the notes she gave to the SIU. The SIU should ensure that it inquires into and records information relating to the preparation of police notes, such as when and how they were prepared, whether any aids to preparation were used, whether the officer discussed information concerning the incident, whether the notes were edited, and if so, why.⁸⁵

73. The second hallmark of reliable notes is that they are prepared independently. The importance of independent note-taking is to ensure that notes only reflect the individual observations and activities of the writer. When notes are not prepared independently, it creates a

⁸¹ *R v. Rahey*, [1987], 1 S.C.R. 588, at 622-623

⁸² *R. v. McKennon*, [2004] O.J. No. 5021 at para. 23; *R. v. White* (2003), 176 C.C.C. (3d) 1 (Ont. C.A.), at paras. 11-12, 25, SIU Auth., Tab 40; *R. v. Truscott* (2007), 225 C.C.C. (3d) 321 (Ont. C.A.), at paras. 325, 335-336, SIU Auth., Tab 39; *R. v. Thorington*, [2012] O.J. No. 5052 (C.J.), at para. 66, SIU Auth., Tab 37

⁸³ *R. v. Persaud*, [2011] O.J. No. 3312 at para. 12

⁸⁴ *Review Report on the Special Investigations Unit Reforms prepared for the Attorney General of Ontario*, The Honourable George W. Adams, Q.C., 2003, February 26, 2003,

⁸⁵ *Investigation into the Special Investigations Unit’s operational effectiveness and credibility “Oversight Unseen”*, Ombudsman of Ontario

concern that the writer is recording another person's observations or refining their notes, consciously or unconsciously, by another person's influence.⁸⁶

74. In *R. v. Green*, Justice Molloy identified the problems that arise when an officer's notes are not prepared independently:

There are important reasons for requiring that officers prepare their notes independently. The purpose of notes made by a police officer is to record the observations made by that officer. The notes themselves are not admissible as evidence for the truth of their contents. An officer with relevant evidence to offer may testify at trial as to the act or observations made by him or her. However, that officer is not permitted to testify as to the information received from other officers for the purpose of proving their truth. Such evidence is hearsay and inadmissible.

An officer's notes perform a valuable function at trial. It is usually many months, sometimes years, from the time of an occurrence to the time that the officer is called upon to testify at trial. Without the assistance of notes to refresh his or her memory, the evidence of the officer at trial would inevitably be sketchy at best. 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.

Police witnesses are not different from other witnesses. While it is inevitable and indeed necessary that the members of a police team confer with one another during the course of an investigation, it is nevertheless important that the integrity of each officer's personal observations be preserved as much as possible. One way to achieve that result is for each officer to separately record his own observations in his own notebook as soon as possible after the event. To the extent that the officer obtains information about other 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.⁸⁷

75. At paragraph 55 of its factum, the Appellants seek to limit the scope of Justice Molloy's decision in *Green* by suggesting that it relates solely to the ills that occur when an officer prepares notes in collaboration with other officers. This argument misses the point of Justice Molloy's warning. The point of independently prepared notes is to preserve an officer's independent recollection of events. The need to preserve an officer's independent recollection is made even more imperative by the current legislative scheme that permits counsel to jointly represent classes of officers in an investigation.

⁸⁶ *R. v. Holden* (2001) 159 C.C.C. (3d) 180 (Ont. C.A.), at paras. 53-60, 103, SIU Auth., Tab 25; *R. v. Smierciak*; 1946), 87 C.C.C. 175 (Ont. C.A.), at 177, SIU Auth., Tab 36; *R. v. Gordon*, [2002] O.J. No. 932 (S.C.), at paras. 70-71, SIU Auth., Tab 23

⁸⁷ *R. v. Green*, [1998] O.J. No. 3598 at paras. 18-22

76. Pursuant to rule 2.04(6) of the *Ontario Law Society Rules of Professional Conduct*, lawyers engaged in a joint representation have a duty of candour to their jointly represented clients which requires them to share all information as between clients. A lawyer representing witness officers or jointly representing subject officers has a duty to share information with his or her clients. A lawyer, acting professionally and competently, will have to share information obtained from one officer client with another officer client. There is real risk that an officer's notes may become contaminated by the observations of another officer. Requiring officers to complete their notes before they consult with counsel on the facts of the incident will ensure that their notes are limited to their own personal observations.

77. The requirements of contemporaneity and independence is reflected both in legislation, police officer training, and policies of police forces. Recognizing the importance of independent note-taking, the *S.I.U. Regulations* require the Chief to segregate officers involved in an S.I.U. investigation.⁸⁸ Similarly, the police training manual instructs officers to complete their notes independently.⁸⁹

78. Recognizing the importance of completing notes in a timely manner, the *S.I.U. Regulations* require officers to prepare their notes in accordance with their duty and prior to the completion of their tour of duty, unless excused by the Chief.⁹⁰ Similarly, police policies require notes to be completed prior to the conclusion of the officer's tour of duty, or as approved by a supervisor.⁹¹

⁸⁸ *S.I.U. Regulations*, section 6(1)

⁸⁹ Police Training Workbook, *supra*, at 2, SIU Rec., Tab 2, at 7.

⁹⁰ *S.I.U. Regulations*, section 9(5)

⁹¹ O.P.P. Police Orders, March 2010, Tab 4 SIU Record

79. An officer's public duty to prepare independent and contemporaneous notes does not change in the context of an S.I.U. investigation. Officers have a duty to co-operate fully with the S.I.U. and have a duty to investigate and prosecute criminal conduct. At the end of the day, an S.I.U. investigation is simply a criminal investigation. As a result, the notes prepared and produced to an S.I.U. investigation must be prepared in a manner that ensures that they are free from anything that would render their reliability suspect. Not only will the notes be used for the purposes of the S.I.U. investigation, but in cases where death has not occurred, the notes will often be used in the criminal prosecution of a civilian.

(iv) The Section 7(1) right to counsel must be read in context of the purpose of the legislative scheme

80. At paragraphs 55 to 60 of their factum, the Appellants attempt to isolate section 7(1) of the *S.I.U. Regulations* and argue that the only limitation on an officer's right to counsel is temporal. If an officer takes too long to obtain a lawyer then the right to counsel may be lost in favour of the integrity of the investigation. The Appellants correctly argue that section 7(1) provides officers with two rights – the right to consult with counsel **and** the right to have counsel present during the interview process. While the statute permits officers in an S.I.U. investigation to consult with counsel, the nature of that consultation, which is not spelled out in the legislation, must be interpreted in manner that is consistent with the entire legislative scheme. Permitting consultation that would undermine an officer's duty to prepare independent and contemporaneous notes, as required by section 9 of the *S.I.U. Regulations*, would undermine the legislative scheme and allow the right to consult with counsel to trump other provisions in the *Act*.

81. At paragraph 55 of their factum, the Appellants argue that section 7(1) of the *S.I.U. Regulations* merely codifies an officer's right to common law right to consult with counsel. The Families respectfully submit that the *Act* and *S.I.U. Regulations* do not codify an officers' existing common law right to consult counsel. The Families respectfully submit that the Court of Appeal was correct in holding that, absent the *S.I.U. Regulations*, there would be no basis to conclude that officers have a right to consult counsel. The *Charter* right to counsel and the common law right to counsel are engaged only in a detention or arrest situation. There is no suggestion that an officer involved in an S.I.U. investigation is either detained or arrested.

82. Furthermore, the fact that the legislation may provide officers with rights *vis-à-vis* counsel that are not recognized by the *Charter* or the common law, (i.e. the right to have counsel attend an interview), demonstrates that the legislation was not intended to codify common law rights or *Charter* rights. Rather, the right to consult counsel in an S.I.U investigation is a creature of statute that must be interpreted in a manner that is internally coherent with the other rights and obligations set out in the *Act* and the *S.I.U. Regulations*.

83. The Appellants argue that the only limitation to an officer's statutory right to consult with counsel is set out in section 7(2) of the *S.I.U. Regulations*. Absent additional explicit limitations, the Appellants argue that the Court should not imply any further limitations. With respect, this argument would place the right to consult with counsel in a higher position over the obligation to prepare notes in accordance with an officer's duty.

84. Sections 9(1) and 9(3) of the *S.I.U. Regulations* requires subject and witness officers to prepare their notes of an incident "in accordance with his or her duty". The public duty to prepare notes "in accordance with his or her duty" incorporates the requirement that the officers

prepare independent and contemporaneous notes of an incident. As detailed above, this public duty has been recognized in common law⁹² and in O.P.P. internal policies⁹³. Further, section 9(5) of the *S.I.U. Regulations* requires the notes to be completed by the end of the tour of duty, except where excused by the Chief of Police.

85. The section 7(1) right to consult counsel must be interpreted in a manner that is consistent with an officer's duty to prepare independent and contemporaneous notes pursuant to section 9(1), (3) and (5). In this manner, section 9(1), (3) and (5) create an implicit limitation on the statutory right to consult counsel. Put another way, the statutory right to consult counsel cannot derogate from the requirement that an officer prepare notes in "accordance with his or her duty" and "prior to the completion of their tour of duty".

86. An officer obtaining legal advice from counsel prior to the preparation his or her notes will inevitably create "lawyer refined" notes which "would undermine the very purpose of a police officer's notes, namely, to record the officer's independent and contemporaneous record of the incident"⁹⁴. Respectfully, this Honourable Court should not interpret section 7(1) of the *S.I.U. Regulations* in a manner that permits notes to be created in a manner inconsistent with section 9(1), (3) and (5) of the *S.I.U. Regulations*.

87. The Court of Appeal's interpretation correctly recognizes that neither section 7 nor section 9 should trump each other. Rather, the Court of Appeals interpretation ensures that the

⁹² *R. v. Green*, [1998] O.J. No. 3598 at para. 19,20,22,23,45 (O.C.J. (Gen. Div.); *Police Complaints Commissioner v. Kerr & Wright* (1997), 96 O.A.C. 284 at para. 12; *R. v. Schertzer*, (2007) 161 C.R.R. (2d) 367 at para. 4 (Ont. S.C.J.); rev'd on other grounds (2009), 248 C.C.C. (3d) 270 (C.A.); *R. v. Mattis*, (1998) 20 C.R. (5th) 932 at para. 21-23; *R. v. Barret*, (1993) 82 C.C.C. (3d) 266 at para. 17; rev'd on other grounds [1995] 1 S.C.R. 752; *R. v. Flores*, [1994] O.J. No. 3124

⁹³ see also OPP Orders confirm officers' professional obligation to take "concise, comprehensive particulars of each occurrence" during an officer's tour of duty: Ontario Provincial Police Orders, June 2009 Revision, at s. 2.50.3. Police officers are trained that their "[n]otes must contain your independent recollections providing an accurate and complete account of police observations and activities" and that "entries are to be made during or as close to the investigation as possible": Ontario Police College, Basic Constable Training Program (Student Workbook -- Evidence) 2008, at pp. 2, 8, Tab 2 of the Families' Response Record

⁹⁴ Reasons of the Court of Appeal for Ontario, Tab 5 of the Appellant's Record, para. 74.

integrity of an officer's notes are preserved while permitting basic legal advice prior to the completion of notes and more fulsome advice after the completion of notes. In this manner, the right to fully consult with counsel is not eliminated, but simply delayed.

4. Limits on the right to consult with counsel

88. At paragraph 61 of its factum, the Appellants argue that only in the rarest cases does the common law or *Charter* right to counsel get delayed. A review of various situations where the limit on the right to counsel is permitted demonstrates that the right to consultation with counsel can be delayed with a view to preserving the integrity of evidence and protecting the administration of justice.

89. This Court's jurisprudence recognizes implicit limitations on the right to counsel even in the *Charter* context. In *R. v. Orbanski* and *R. v. Elias*, a majority of this Honourable Court held that the *Charter* right to counsel upon detention and arrest can be limited "by necessary implication from the operating requirements of the governing provincialprovisions"⁹⁵. In *Orbanski*, the limitation on the constitutional right to counsel was justified, pursuant to section 1 of the *Charter*, on the basis that the objective of preventing impaired driving was an important goal and that the evidence obtained from a roadside breathalyzer test could not be used to incriminate the accused.

90. While there are no *Charter* rights at issue in this matter, the majority's analysis in *Orbanski* is of assistance in determining the appropriate approach to interpreting sections 7 and 9 of the of *S.I.U. Regulations*. Limitations on the statutory right to counsel are justifiable for the following reasons: (1) the limitations are consistent with the goal of the legislation – the

⁹⁵ *R. v. Orbanski; R. v. Elias*, 2005 SCC 37 at par. 32

preservation and promotion of independence, accountability, and public confidence in the investigation of police use of deadly force; (2) the limitation on the right to counsel is time limited (once notes are prepared, then officers may obtain full legal advice from counsel); (3) there is no criminal jeopardy for witness officers (the only officers compelled to produce their notes and submit to an interview); and (4) a subject officer's notes cannot be used in a prosecution of the subject officer.

91. The Families respectfully submit that the Court of Appeal's decision to limit the nature of the advice that can be provided before the completion of notes creates the necessary consistency within the legislative scheme. Furthermore, limiting section 7(1) in the manner proscribed by the Court of Appeal is consonant with the purpose of the legislation – the preservation and promotion of independence, accountability, and public confidence in the investigation of police use of deadly force.

92. Similarly, the courts have recognized that police authorities may delay fulfilling the implementation component of a detainee's right to counsel based on concerns for officer safety or the loss or destruction of evidence. Delays as long as 24 hours have been justified in extreme cases where concerns regarding the destruction of evidence are combined with serious officer safety considerations.⁹⁶ In general, this Honourable Court has regarded officer safety and the need to prevent the loss/destruction of evidence as "exigent circumstances" which may justify the temporary suspension of *Charter* rights.⁹⁷

⁹⁶ *R. v. Strachan* (1988), 46 C.C.C. (3d) 479 at 493-4 (S.C.C.); *R. v. Learning* 2010 ONSC 3816 at paras. 73-75 ; *R. v. Schultz* (1991), 67 C.C.C. (3d) 360 (B.C.C.A.); *R. v. Kiloh* (2003), 57 W.C.B. (2d) 528 (B.C.S.C.); distinguished in: *R. v. Patterson* (2006), 206 C.C.C. (3d) 70 at 82 (B.C.C.A.)

⁹⁷ *R. v. Genest* (1989), 45 C.C.C. (3d) 385 at 407-9 (S.C.C.); *R. v. Feeney* (1997), 115 C.C.C. (3d) 129 at 155-6 (S.C.C.); *R. v. Grant* (1993), 84 C.C.C. (3d) 173 at 188-9 (S.C.C.)

93. There are also temporal and contextual limits on access to counsel outside of the criminal/ *Charter* context. Rule 4.04 of the *Rules of Professional Conduct* imposes strict limits on counsel's ability to consult with her own client during trial or discovery proceedings. During the examination in chief of her own client, counsel is prohibited from discussing matters with her client that have already been covered in testimony (Rule 4.04(a)). This prohibition extends to the period following examination in chief and before cross-examination (Rule 4.04(c)), and the period between the completion of cross-examination and the commencement of re-examination (Rule 4.04(e)). Counsel is barred absolutely from discussing her client's testimony or "any issue in the proceeding" with her client (Rule 4.04(d)). These professional ethical requirements, while not rules of court, have been given judicial recognition.⁹⁸ The policy underlying the Rules is to preserve the integrity of evidence and to maintain public confidence in the administration of justice.

APPELLANTS' QUESTION 3

5. Limited advice prior to the preparation of notes is workable

94. The Families respectfully submit that reasonable limitations on the scope of legal advice given prior to the preparation of notes does not create an unworkable scheme, as argued by the Appellants at paragraph 69 of their factum. Police officers prepare their notes in accordance with their common law and statutory duty every day without counsel's intervention.

95. An officer's notes are prepared in the course of his or her public duties. The notes are intended to be used for the prosecution of crime and can be used by a police force to determine

⁹⁸ *Iroquois Falls Power Corp. v. Jacobs Canada Inc.* (2006), 83 O.R. (3d) 438 (Ont. Master); *McLeod et al. v. Canadian Newspapers Co Ltd. et al* (1987), 58 O.R. (2d) 721 (Ont. Master); *R. v. Fullerton*, [1997] O.J. No. 1484 (O.C.J.); *Scavuzzo v. Canada*, 2004 TCC 806; *413528 Ontario Ltd. v. 951 Wilson Avenue Inc.* (1989) 71 O.R. (2d) 40 (Ont. Master)

issues of discipline. The requirement that an officer prepare his or her notes in accordance with the common law and statute does not change because there is an S.I.U. investigation. An S.I.U. investigation simply adds an additional use to the notes – for a civilian oversight investigation. An additional use to the notes, without the potential that such notes will be used for self-incrimination in criminal proceedings, should not radically change the manner in which an officer's notes are prepared. A witness officer is not subject to any criminal jeopardy. A subject officer's notes cannot be used to incriminate the officer⁹⁹. The existence of an S.I.U. investigation should not affect a subject officers' notebook preparation.

96. The Appellants argue that the Court of Appeal's decision creates an unworkable scheme because it prohibits a lawyer from obtaining information regarding the incident prior to giving permissible advice to the officer. The Appellants argue that counsel must obtain information regarding the nature of the incident in order to advise an officer of their duties in an S.I.U. investigation. The Appellants' argument fails to appreciate that the most important advice a lawyer can provide to an officer, prior to the officer's completion of notes, is that they must "provide a full and honest record of the officer's recollection of the incident in the officer's own words"¹⁰⁰. This advice is not dependent on whether an officer is later designated by the S.I.U. as a subject or witness officer.

97. The advice regarding an officer's obligations, pursuant to the *S.I.U. Regulations*, can be easily relayed to an officer with an explanation as to how the legislative scheme works for either

⁹⁹ Section 9(3) provides that the subject officer's notes are not to be provided to the SIU. If an officer originally designated as a witness officer becomes a subject officer, that officer's notes must be returned by the SIU to the chief of police and the record of the officer's SIU interview returned to the officer in accordance with s. 10(3) of the SIU Regulation. Moreover, it is accepted by the Attorney General that the notes and interviews of subject officers are involuntary statements that may not be used to incriminate the subject officer. This protection extends to derivative use immunity to preclude the use of any evidence that would not be discovered but for the notes or interviews: Ontario, Review report on the Special Investigations Unit reforms prepared for the Attorney General by the Honourable George W. Adams, Q.C. (Toronto: Ministry of the Attorney General, 2003), at p. 49, 54.

¹⁰⁰ Reasons of the Court of Appeal for Ontario, Tab 5 of the Appellant's Record.

a subject or witness officer. The nature of the advice permitted prior to the preparation of notes is sufficiently generic that it does not require counsel to obtain the facts relating to the incident.

98. The Court of Appeal's decision provides a simple mechanism to allow for limited and appropriate legal advice prior to an officer completing his or her notes: "as to the **nature of his or her rights and obligations in connection with the incident and the SIU investigation**". The six bullet point examples provided by the Court of Appeal at paragraph 81 of its decision demonstrates that the permissible advice does not relate to advice regarding the incident itself. Put simply, a lawyer does not need to obtain the facts of an incident prior to advising an officer of the generic advice permitted by the Court of Appeal.

99. Once an officer's notes are completed, the officer may obtain full legal advice and have counsel prepare and assist him or her during an S.I.U. interview. The Court of Appeal's decision does not create an "unworkable" scheme as the advice that can be provided is simple and is not dependant on obtaining the facts of the incident. When an officer needs assistance the most, in preparation for and attending an S.I.U. interview, the officer is afforded the enhanced statutory right to more fulsome consultations.

PART IV- COSTS

100. The Families seeks its costs on the leave to appeal and the main appeal.

PART V- ORDER SOUGHT

101. The Families respectfully request an order dismissing the Appellants appeal.

DATED at Toronto, this 25th day of February, 2013

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PART VI - AUTHORITIES CITED

DESCRIPTION	CITED AT PARA.
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<i>Hill v. Chief Constable of West Yorkshire</i> , [1989] A.C. 53 (H.L.)	60
<i>Nicholson v. Haldimand-Norfolk Regional Police Commissioners</i> , [1979] 1 S.C.R. 311	60
<i>Odhavji Estate v. Woodhouse</i> (2000), 194 D.L.R. (4 th) 577 (Ont. C.A.)	Preface, 60
<i>Ontario (Civilian Commission on Police Services) v. Browne</i> (2001) 56 O.R. (3d) 673 (C.A.)	56
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<i>Metcalf v. Scott</i> , 2011 ONSC 1292	56
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PART VII - LEGISLATION

<u><i>Police Services Act, R.S.O. 1990, c. P.15</i></u>	<u><i>Loi sur les services policiers, L.R.O. 1990, c. P.15</i></u>
Declaration of principles	Declaration de principes
1. Police services shall be provided throughout Ontario in accordance with the following principles:	1. Les services policiers sont offerts dans l'ensemble de l'Ontario conformément aux principes suivants :
1. The need to ensure the safety and security of all persons and property in Ontario.	1. Le besoin d'assurer la sécurité de toutes les personnes et de tous les biens en Ontario.
2. The importance of safeguarding the fundamental rights guaranteed by the Canadian Charter of Rights and Freedoms and the Human Rights Code.	2. L'importance de préserver les droits fondamentaux garantis par la Charte canadienne des droits et libertés et le Code des droits de la personne.
3. The need for co-operation between the providers of police services and the communities they serve.	3. Le besoin de coopération entre les personnes qui offrent les services policiers et les collectivités qu'elles desservent.
4. The importance of respect for victims of crime and understanding of their needs.	4. L'importance qu'il y a à respecter les victimes d'actes criminels et à comprendre leurs besoins.
5. The need for sensitivity to the pluralistic, multiracial and multicultural character of Ontario society.	5. Le besoin d'être sensible au caractère pluraliste, multiracial et multiculturel de la société ontarienne.
6. The need to ensure that police forces are representative of the communities they serve. R.S.O. 1990, c. P.15, s. 1.	6. Le besoin de veiller à ce que les corps de police représentent les collectivités qu'ils desservent. L.R.O. 1990, chap. P.15, art. 1.
1-1	[...]
Duties of police officer	Fonctions d'un agent de police
42. (1) The duties of a police officer include, (a) preserving the peace;	42. (1) L'agent de police a notamment pour fonctions : a) de préserver la paix;

<p>(b) preventing crimes and other offences and providing assistance and encouragement to other persons in their prevention;</p> <p>(c) assisting victims of crime;</p> <p>(d) apprehending criminals and other offenders and others who may lawfully be taken into custody;</p> <p>(e) laying charges and participating in prosecutions;</p> <p>(1) executing warrants that are to be executed by police officers and performing related duties;</p> <p>(g) performing the lawful duties that the chief of police assigns;</p> <p>(h) in the case of a municipal police force and in the case of an agreement under section 10 (agreement for provision of police services by O.P.P.), enforcing municipal by-laws;</p> <p>(i) completing the prescribed training. R.S.O. 1990, c. P.15, s. 42 (1); 1997, c. 8, s. 28.</p>	<p>b) de prévenir les actes criminels et autres infractions et d'apporter aide et encouragement aux autres personnes qui participent à leur prévention;</p> <p>c) d'aider les victimes d'actes criminels;</p> <p>d) d'apprehender les criminels et autres contrevenants ainsi que les autres personnes qui peuvent légalement être placées sous garde;</p> <p>e) de porter des accusations et de participer à des poursuites;</p> <p>f) d'exécuter les mandats qui doivent être exécutés par des agents de police et d'exercer des fonctions connexes;</p> <p>g) d'exercer les fonctions légitimes que le chef de police lui confie;</p> <p>h) dans le cas d'un corps de police municipal ou d'une entente conclue en vertu de l'article 10 (entente visant la prestation de services policiers par la Police provinciale), d'exécuter les règlements municipaux;</p> <p>i) de terminer la formation prescrite. L.R.O. 1990, chap. P.15, par. 42 (1); 1997, chap. 8, art. 28.</p> <p>[...]</p>
<p>Powers and duties of common law constable</p> <p>42 (3) A police officer has the powers and duties ascribed to a constable at common law. R.S.O. 1990, c. P.15, s. 42 (2, 3).</p>	<p>Pouvoirs et fonctions des constables en common law</p> <p>42 (3) Les agents de police possèdent les pouvoirs et fonctions qui sont attribués aux constables en common law. L.R.O. 1990, chap. P.15, par. 42 (2) et (3).</p>

<p>Special investigations unit</p> <p>113. (1) There shall be a special investigations unit of the Ministry of the Solicitor General. R.S.O. 1990, c. P.15, s. 113 (1).</p> <p>Composition</p> <p>(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. R.S.O. 1990, c. P.15, s. 113 (2); 2006, c. 35, Sched. C, s. 111 (4).</p> <p>Idem</p> <p>(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. R.S.O. 1990, c. P.15, s. 113 (3).</p> <p>Acting director</p> <p>(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. 2009, c. 33, Sched. 2, s. 60 (3).</p> <p>Peace officers</p> <p>(4) The director, acting director and investigators are peace officers. R.S.O. 1990, c. P.15, s. 113 (4); 2009, c. 33, Sched. 2, s. 60 (4).</p> <p>Investigations</p> <p>(5) The director may, on his or her own initiative, and shall, at the request of the Solicitor General or Attorney General, cause</p>	<p>Unite des enquetes speciales</p> <p>113. (1) Est constituee une unite des enquetes speciales qui releve du ministere du Solliciteur general. L.R.O. 1990, chap. P.15, par. 113 (1).</p> <p>Composition</p> <p>(2) L'unite se compose d'un directeur nomme par le lieutenant-gouverneur en conseil sur la recommandation du solliciteur general et d'enqueteurs nommes aux termes de la partie III de la Loi de 2006 sur la fonction publique de l'Ontario. L.R.O. 1990, chap. P.15, par. 113 (2); 2006, chap. 35, annexe C, par. 111 (4).</p> <p>Idem</p> <p>(3) Aucun agent de police ou ancien agent de police ne peut etre nomme directeur et aucun agent de police ne peut etre nomme enqueteur. L.R.O. 1990, chap. P.15, par. 113 (3).</p> <p>Directeur interimaire</p> <p>(3.1) Le directeur peut designer une personne, autre qu'un agent de police ou un ancien agent de police, a titre de directeur interimaire pour exercer ses pouvoirs et ses fonctions s'il s'absente ou a un empechement. 2009, chap. 33, annexe 2, par. 60 (3).</p> <p>Agents de la paix</p> <p>(4) Le directeur, le directeur interimaire et les enqueteurs sont des agents de la paix. L.R.O. 1990, chap. P.15, par. 113 (4); 2009, chap. 33, annexe 2, par. 60 (4).</p> <p>Enquetes</p> <p>(5) Le directeur peut, de son propre chef, et doit, a la demande du solliciteur general ou du <u>procureur general, faire mener des enquetes sur</u></p>
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<p>investigations to be conducted into the circumstances of serious injuries and deaths that may have resulted from criminal offences committed by police officers. R.S.O. 1990, c. P.15, s. 113 (5).</p> <p>Restriction</p> <p>(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. R.S.O. 1990, c. P.15, s. 113 (6).</p> <p>Charges</p> <p>(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. R.S.O. 1990, c. P.15, s. 113 (7).</p> <p>Report</p> <p>(8) The director shall report the results of investigations to the Attorney General. R.S.O. 1990, c. P.15, s. 113 (8).</p> <p>Co-operation of police forces</p> <p>(9) Members of police forces shall co-operate fully with the members of the unit in the conduct of investigations. R.S.O. 1990, c. P.15, s. 113 (9).</p> <p>Co-operation of appointing officials</p> <p>(10) Appointing officials shall co-operate fully with the members of the unit in the conduct of investigations. 2009, c. 30, s. 60.</p>	<p>les circonstances qui sont a l'origine de blessures graves et de deces pouvant etre imputables a des infractions criminelles de la part d'agents de police. L.R.O. 1990, chap. P.15, par. 113 (5).</p> <p>Restriction</p> <p>(6) Aucun enqueteur ne peut prendre part a une enquete qui concerne des membres d'un corps de police dont it a eta membre. L.R.O. 1990, chap. P.15, par. 113 (6).</p> <p>Denonciations</p> <p>(7) S'il estime qu'il existe des motifs raisonnables de le faire, le directeur fait déposer des denonciations contre les agents de police au sujet des questions visees par l'enquete et les renvoie au procureur de la Couronne pour qu'il engage une poursuite. L.R.O. 1990, chap. P.15, par. 113 (7).</p> <p>Rapport</p> <p>(8) Le directeur fait rapport des resultats des enquetes au procureur general. L.R.O. 1990, chap. P.15, par. 113 (8).</p> <p>Collaboration des corps de police</p> <p>(9) Les membres de corps de police collaborent entierement avec les membres de l'unite au cours des enquetes. L.R.O. 1990, chap. P.15, par. 113 (9).</p> <p>Collaboration des agents de nomination</p> <p>(10) Les agents de nomination collaborent entierement avec les membres de l'unite au cours des enquetes. 2009, chap. 30, art. 60.</p>
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**Conduct and Duties of Police Officers
Respecting Investigations by the Special
Investigations Unit, O. Reg. 267/10**

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 implique")

"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).

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.

**Conduite et obligations des agents de police
en ce qui concerne les enquêtes de l'unité
des enquêtes spéciales, Regl. de l'Ont.
267/10**

Definitions et interpretation

1. (1) Les définitions qui suivent s'appliquent au présent règlement.

«agent implique» Agent de police dont la conduite semble, de l'avis du directeur de l'UES, avoir causé le décès ou les blessures graves qui font l'objet d'une enquête. («subject officer»)

«agent témoin» Agent de police qui, de l'avis du directeur de l'UES, est en cause dans l'incident qui fait l'objet d'une enquête, mais qui n'est pas un agent implique. («witness officer»)

«UES» L'unité des enquêtes spéciales constituée en application de l'article 113 de la Loi. («SIU») Regl. de l'Ont. 267/10, par. 1 (1).

(2) Le directeur de l'UES peut désigner un enquêteur de l'UES pour agir à sa place et exercer les pouvoirs et fonctions que lui attribue le présent règlement et, s'il désigne un remplaçant, toute mention du directeur de l'UES dans le présent règlement, sauf le présent paragraphe, s'entend du directeur de l'UES ou de son remplaçant désigné. Regl. de l'Ont. 267/10, par. 1 (2).

Avis à l'UES

3. Le chef de police avise immédiatement l'UES d'un incident mettant en cause un ou plusieurs de ses agents de police qui peut raisonnablement être considéré comme relevant du mandat d'enquête de l'UES, tel qu'il est énoncé au paragraphe 113 (5) de la Loi. Regl. de l'Ont. 267/10, art. 3.

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

Isolement des agents de police en cause dans l'incident

6. (1) Le chef de police isole les uns des autres, autant qu'il est matériellement possible de le faire, les agents de police en cause dans l'incident tant que l'UES n'a pas terminé ses entrevues. Regl. de l'Ont. 267/10, par. 6 (1).

(2) Un agent de police en cause dans l'incident ne doit pas communiquer, directement ou indirectement, avec un autre agent de police en cause dans l'incident au sujet de leur participation à l'incident tant que l'UES n'a pas terminé ses entrevues. Regl. de l'Ont. 267/10, par. 6 (2); Regl. de l'Ont. 283/11, art. 1.

Droit à un avocat

7. (1) Sous réserve du paragraphe (2), l'agent de police a le droit de consulter un avocat ou un représentant d'une association de policiers et a droit à la présence d'un avocat ou d'un représentant d'une telle association pendant son entrevue avec l'UES. Regl. de l'Ont. 267/10, par. 7 (1).

(2) Le paragraphe (1) ne s'applique pas si, de l'avis du directeur de l'UES, le fait d'attendre un avocat ou un représentant d'une association de policiers retarderait l'enquête de façon déraisonnable. Regl. de l'Ont. 267/10, par. 7 (2).

(3) Les agents témoins ne peuvent pas être représentés par le même avocat que les agents qui font l'objet d'une enquête. Regl. de l'Ont. 283/11, art. 2.

Entrevue des agents témoins

8. (1) Sous réserve des paragraphes (2) et (5) et de l'article 10, l'agent témoin rencontre l'UES et répond à toutes ses questions des qu'il reçoit une demande d'entrevue de celle-ci

appropriate grounds for delay, a witness officer shall meet with the SIU and answer all its questions. 0. Reg. 267/10, s. 8 (1).

(2) A request for an interview by the SIU must be made in person. 0. 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. 0. 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. 0. 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). 0. 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. 0. 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. 0. 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. 0. Reg. 267/10, s. 9 (3).

et au plus tard 24 heures après la demande s'il existe des motifs valables de retarder l'entrevue. Regl. de l'Ont. 267/10, par. 8 (1).

(2) L'UES doit présenter la demande d'entrevue en personne. Regl. de l'Ont. 267/10, par. 8 (2).

(3) L'UES fait enregistrer l'entrevue et en donne une copie à l'agent témoin dès que celle-ci est disponible. Regl. de l'Ont. 267/10, par. 8 (3).

(4) L'entrevue ne doit pas être enregistrée sur bande sonore ou bande vidéo sans le consentement de l'agent témoin. Regl. de l'Ont. 267/10, par. 8 (4).

(5) Le directeur de l'UES peut demander qu'une entrevue ait lieu après le délai fixe au paragraphe (1). Regl. de l'Ont. 267/10, par. 8 (5).

Notes sur l'incident

9. (1) L'agent témoin rédige des notes complètes sur l'incident conformément à son obligation et, sous réserve du paragraphe (4) et de l'article 10, les fournit au chef de police au plus tard 24 heures après que l'UES en a fait la demande. Regl. de l'Ont. 267/10, par. 9 (1).

(2) Sous réserve du paragraphe (4) et de l'article 10, le chef de police fournit des copies des notes d'un agent témoin à l'UES à sa demande, au plus tard 24 heures après la demande. Regl. de l'Ont. 267/10, par. 9 (2).

(3) L'agent impliqué rédige des notes complètes sur l'incident conformément à son obligation, mais aucun membre du corps de police ne doit en fournir des copies à la demande de l'UES. Regl. de l'Ont. 267/10, par. 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). 0. 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. 0. 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. 0. 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. 0. 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

(4) Le directeur de l'UES peut autoriser le chef de police a fournir des copies des notes apres le alai fixe au paragraphe (2). Regl. de l'Ont. 267/10, par. 9 (4).

(5) Les notes prises en vertu des paragraphes (1) et (3) doivent etre terminees a la fin de la periode de service de l'agent, sous reserve d'une autorisation contraire du chef de police. Regl. de l'Ont. 283/11, art. 3.

Avis informant du statut d'agent implique ou d'agent temoin

10. (1) Avant de demander une entrevue avec un agent de police ou avant de demander une copie de ses notes sur l'incident, l'UES avise par ecrit le chef de police et l'agent de police du fait que ce dernier est considers comme un agent implique ou un agent temoin. Regl. de l'Ont. 267/10, par. 10 (1).

(2) L'UES avise par ecrit le chef de police et l'agent de police si, a un moment quelconque apres les avoir d'abord avises du fait que l'agent de police est considers comme un agent implique ou un agent temoin, le directeur de l'UES decide que l'agent qui etait considers comme un agent implique est desormais considers comme un agent temoin ou que l'agent qui etait considers comme un agent temoin est desormais considers comme un agent implique. Regl. de l'Ont. 267/10, par. 10 (2).

(3) Si, apres avoir fait passer une entrevue a un agent de police qui etait considers comme un agent temoin lorsque l'entrevue a ete demand& ou apres avoir obtenu une copie des notes d'un agent de police qui etait considers comme un agent temoin lorsque les notes ont ete demandees, le directeur de l'UES decide que l'agent de police est un agent implique, l'UES :

a) avise par ecrit le chef de police et l'agent de

<p>writing that the officer is now considered to be a subject officer;</p> <p>(b) give the police officer the original and all copies of the record of the interview; and</p> <p>(c) give the chief of police the original and all copies of the police officer's notes. O. Reg. 267/10, s. 10 (3).</p> <p>(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).</p>	<p>police du fait que ce dernier est désormais considérés comme un agent impliqué;</p> <p>b) remet à l'agent de police l'original et toutes les copies de l'enregistrement de l'entrevue;</p> <p>c) remet au chef de police l'original et toutes les copies des notes de l'agent de police. Regl. de l'Ont. 267/10, par. 10 (3).</p> <p>(4) Le chef de police conserve l'original et toutes les copies des notes de l'agent de police reçues en application de l'article (3) c) pour utilisation dans son enquête visée à l'article 11. Regl. de l' Ont. 267/10, par. 10 (4).</p>
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Schedule "A"

"The Difference Maker"

Extracts from Witness Officer Pullbrook's Notes Re: Schaeffer Investigation

Before Counsel Vetting	After Counsel Vetting
<p style="text-align: right;">410</p> <p style="text-align: center;">(D)</p> <p>22 Jun 2009 Monday 0800 - 1600 Weather - sunny in oceans Pickle Lake Detachment 0752 RFD - A/Detachment Commander duties</p> <p>for assistance received message from Kerwin in regards to Mr. Macken who has information in regards to a boat which was stolen from a private's pier Sawchuk given message to follow up with NARS officer Sawchuk advising that we were contacted during 2021 in regards to stolen bo motor or boat Cawbik stating that he also contacted WGA who advised they were</p>	<p style="text-align: right;">418</p> <p>RFD- A/ Detachment commander duties</p> <p>advised duties 1600 RFD 23 Jun 2009 24 Jun 2009 Wednesday 0800 - 1600 Weather - sunny, warm Pickle Lake Detach 0745 RFD A/Detach Commander duties PC Wood, PC Darphini on-duty * Late Entry - 26 Jun 09 1112hrs. As per instructions from counsel notes are written on the</p> <p>RFD A/Detachment commander duty PC Wood, PC Darphini on-duty *Late entry- 26 June 09 1112hrs. As per instructions from counsel notes are written on the</p>

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(E)
 aware of the incident and was currently investigating the matter. NAPS advised that OPP can assist if required. NAPS advising that boat has been located by the owners and OPP assistance may be required to locate it in the area of Rat Rapids (Oz Lake). NAPS to recontact in the matter.

1988 WCH at residence
 1951 10-8-21001
 NPS On scene detachment

1500 Received call from Mich board about Currie Co in regards to incident involving stolen boat and motor. Working to know the details of the incident. Advised Currie the incident was followed up by OPP & results concluded that NAPS are currently investigating. Currie advised that a male party not known to the victim is a possible suspect in the theft. Complaint. Currie & I

WCH at residence
 10-8-21001
 On scene detachment
 Resume detachment commander duties

419

above late entry (S)
 Date and times for all events that occurred on the 29 June 2007

1900 Commenced shift ← Commenced shift

21001 - 02-509
 attempt to locate a smaller vessel and continue investigation regarding stolen boat and motor reported to NAPS in Mich. at approximately 0900hrs I spoke with PC Wood and advised him of the incident involving

the stolen vessel. Further advised that I had made attempts to locate the property and my possible parties involved as the previous day but was unsuccessful in reaching the location due to shallow water and a rocky river. I advised PC Wood that information was minimal but a possible subject who was seen purchasing fuel a few days ago with boat motor equipment may be involved in this.

412

(3)
 that she received info that this might suspect attended Pat's Auto in Pickle Lake to purchase gas. Male believed to be in possession of boat equipment belonging to stolen reported boat and motor.

Cowan further states that owner of boat "John" has located his boat in a lake near the Port George area. Cowan states that owner of boat was positive that the boat was

was to approach the site of the boat as he was afraid for his safety. Cowan states that the owner "John" was too afraid to approach the suspect as he felt the suspect may hurt him & further believed the male may have mental issues.

Cowan states that it required off assistance for this matter. Further advised that when boat suspect was located she does not want this male party

420

(6)
 incident. I further advised PC Wood that the owner of this boat canvassed Benabough Lake and located his boat at a point at least not far from the Cedar Shore launch. I advised PC Wood that the owner was sure the boat that he observed belonged to him but he was too afraid to retrieve it as someone had a camp set up at this location and he was too afraid to approach this person

as he did not know if this person had guns or not. I further advised PC Wood that there was no factual information to support any involvement of firearms but just to be aware of the complainant's statements. I further advised that I had a well drawn out map from the complainant and a 2nd drawn out map from the complainant's relative. I asked PC Wood if we could use his fisher boat to attend this

413

(4)

on his reserve
Cousin advised that a
friend of the boat
owner Brian Mishkin
is currently available to
assist police in the
location of boat

I advised Cousin that
we will assist if NAPS
requires off assistance
I advised Cousin that
I will be immediately
in contact w/ NAPS for
any updates

1526 I contacted NAPS
Officer Amanda Paul &
discussed boat

I offered off assistance
including Marine Boat
PC Paul updated on
plan conversation from
Cousin Group PC Paul
to get back to me if
assistance required

1537 Recontacted PC Paul &
advised that off was
required I advised
PC Paul that we would
attend & I will meet
them at their NAPS
detachment

PC Sawchuk prepared
prepared police vessel
for incident

421

(7)

as the police boat
was too large and
could not be used due
to the low water levels
at the Cedar Shore
launch

PC Wood agreed to use
his boat

I further advised PC Wood
the necessity to attend
this location to not only
make attempts to retrieve
this property but to
check out any parties
who were culpable at
this location and may
need assistance I
advised that the

information I had
was given to me on
Monday (7/27/09) and
that I had received
no further info from
that time

Shortly thereafter I
spoke with NAPS officer
Amanda Paul and advised
her we would be attending
Cedar Shore launch to
launch PC Wood's vessel
I requested to PC Paul
if she could make
arrangements for the
comp to meet us at
Cedar Shore launch I
further inquired to

94

414

(2)
1558 Unable to get police
boat to start and
weather becoming very
windy.
Advised PC Paul that

422

PC Paul if she had
any further information
when she retailed
unfortunately she did
not. PC Paul then just
reiterated that
the camp was able
to locate his boat
but was too afraid
to retrieve it.

I then advised PC
Dauphinais of my intentions
to assist NAPS and that
PC Wood would be
accompanying me to
the location on Onabough
Lake. I advised PC
Dauphinais to stay at

the detachment and
finish up any paperwork
that was required.

I further advised PC
Dauphinais that now
emergency calls would
be held and that an
officer would be
contacted not being and
called in to the detachment
if any emergency calls
should arise.

I directed PC Wood to
contact TBCC and advise
of our situation and to
call out an officer for
any emergency calls.

I further advised PC

1558 Unable to get police
 boat to start in
 weather bad and very
 windy
 Advised PC Paul that
 we were unable to get
 the main boat
 started and that
 we will make attempts
 the following day PC
 Paul was advised to
 contact the camp
 of their investigation
 and provide results

1625 RFD
 [Signature]

03 JUN 2009

Late Tuesday
 Entry 0800-1600

25 JUN 09
 2306 hrs
 Weather - sunny, no
 Pickle Lake Detach

0745 RFD
 0800 Emails etc
 A/Detach Camrade
 duties

0815 spoke w/ PC Sawchuk
 who advised that pol
 vessel was operations
 advised Sawchuk the
 I will be taking
 vessel out with PC
 Getrenice. PC
 Sawchuk advised
 w/ a detail man

415

423

9

Wood to work in support
 of our situation and
 intentions to search
 for both the boat
 and any possible persons
 at this location that
 may require assistance
 PC advised Wood
 contacted TBCC and
 made their aware
 Myself & PC Wood
 then left the detachment
 & attended our residence
 to gather further police
 equipment for the
 incident (hat, sunglasses
 sweater)
 PC Wood attended his

residence with vehicle
 02-509 and attached
 his personal vessel to
 the police cruiser
 PC Wood then picked me
 up at my residence &
 we proceeded to the
 Cedar Shore launch
 We arrived at the launch
 at approx 1130 hrs
 Within minutes myself
 & PC Wood were able to
 launch his vessel into
 Osawatimish Lake. The
 camp, John Spady, was
 present & glad when
 we arrived at the launch
 He was advised to stay

Spoke briefly with PC Paul at detach. (9) advised PC Paul that we were using police vessel to locate & take boat out water. PC Paul advised she would contact PC Coons at their detachment and have the owner of the boat meet us at Cedar River launch.

I further inquired with PC Paul the details of the descriptions of the

suspect(s). She stated she had no further info. I further asked PC Paul if there was any factual info in regards to firearms being involved in this occurrence. She stated that there was no evidence to support it. Myself and PC Coons, attempted the NAPI detachment when we were met by PC Coons and the camp John Spide. Spide provided us

BE

around if he could in the case that we locate his vessel. Prior to entering the waterway PC Wood was requested to contact dispatch & advise them we would be heading out onto the water and would notify the comm center upon return.

Myself and PC Wood then proceeded on the lake using our PFD's in a NW direction. We followed our path with the use of both the

hand written maps provided by the complainant & with the use of GPS. I estimate that we were in the boat for approximately 20 mins when we arrived at the abouant headlands to the location of the boat & camp.

Both myself & PC Wood believed we saw a vessel located in the first bay over through the channel. We thought we observed a green coloured object within a grassy section of

97

(10)

417

(3)

with a map of where the vessel was located.

We attempted to launch the police vessel at the Cedar Street launch but after inspection I decided not to launch due to the low level of water.

We then continued onto a 2nd launch located just south of the St. Pat Rapids church.

We launched the boat but had to

return after a short distance as the water was too shallow and way rocky.

We then returned to the boat and returned to the NAPS detachment for relay information.

We then returned to the OPP detachment and entered the police boat

prior to hearing the NAPS detachment.

PC Coon advised he was going to seek further orders in town if so advised.

425

(11)

land within the bay. We then directed the vessel to this point of land. Once closer we both observed that the object was a plastic green with seats.

We further inspected the point of land which had an old wooden building & which appeared to be older pieces of garbage lying about. In total contrast to this area we announced our presence by stating

"police" when we got no response.

After a quick inspection of the area we found no evidence to the fact of any person's camping or residing at this location.

Myself & PC Wood then returned to the vessel, continued north to the marked location that was on the map provided by the comp.

We continued around the point at the bay along side of the land. After continuing

418

(4)

boat to use out.
would be in contact
in the OPV if
successful.

1247 Crest
 1320 10-8
 1330 attempt to re-activate
 secret code to use
 RMS.
 - If again attempted
 not successful in
 gain my secret code
 re-activated the
 use.
 - unable to access RMS
 - go through crown
 prints, vacations
 requests and other
 admin duties
 1800 ROD

"Attempt to re-activate"

426

(12)

a party for a few more
minutes PL Wood
pointed out a male
party who was walking
on a north-south point of
land. I then observed
this male also.

We were approximately
60-70 ft from the
shore of this land.
The male party was
walking around the
perimeter of land. I
observed the male to
be white with long
dark hair & a beard.
He appeared to be in
the age group of

30-40 yrs.
 We directed our
 vessel to the point of
 the land and did not
 observe any vessel.
 The stolen vessel bears
 a grass cover style boat
 with a 8.0 hp Mercruiser
 motor (black in color).
 I observed on the upper
 portion of the land
 a fully set up tent which
 was yellow in color.
 I advised PL Wood
 that according to the
 map drawn by the
 camp that this was
 the location the camp

stated he observed (13)
 his boat to be at
 Myself + PC Wood
 observed the vessel
 onto is have in attempts
 to speak with the
 male party we both had
 observed. We docked
 the boat + walked
 ashore. The shoreline
 was rocky with weeds.
 As we made our way
 up through the weeds
 the male party walked
 down from the upper
 portion of the point
 and just stared at us.
 We immediately

announced our presence
 by stating to the male
 we were OPP officers.
 We're the police. After
 we announced that we
 were the police the
 male began to walk
 up to the upper portion
 of the point of land.
 We immediately
 followed the male to
 the top portion of
 the point of land.
 I first asked the male
 how he was doing
 At this point the male
 was about 10 ft from
 me. He responded to

10-1-12 (H)
me what do you want
I am not counsel I am
counseling you can't do
anything about it
Myself & PC Wood were
now about 2 ft from
the male and began a
conversation with him
The male posture demeanor
was immediately
displaying aggression &
irritability with us
his face was wider &
sharp & I noticed that
his eyes glared at both
myself & PC Wood.
I then explained to
the male that we were

15

investigating a stolen
boat with a motor
attached to it, and
also to make sure that
everybody was ok as
we heard someone was
camping at this area
He stated to me that
he was five or seven
miles about away
stolen boats. The male
was still acting irritated
with us & used a louder
ship tone PC Wood
then asked the male
his name & some other
questions. I quickly
searched visually the

(Ho) 430

Shoreline. From a boat
and I did not observe
any vessels. I did
however observe the
following:

I observed a yellow tent
which was fully pitched
a fratch smoking fire
with a log pan
contained which
appeared to be cooking
fish a 6-8 inch
hunting knife located
near the log pan
containing fish
Several containers
were also located near
the fishing pan

I then returned to
the location of PC
Wood & the male
PC Wood was having
a conversation with him

I observed the following
from the male
He appeared to be
male white, approx. 5'10"
with brown hair & a brown
beard. He was wearing a
red shirt with black
pants and had light
coloured shoes.

I asked the male what
was his name. He stated
his name and that he
was from the

2

(17)

Peterborough area. I then asked the male how it was he located this spot to camp when he responded he walked through the bush to get here. I then asked the male how long he had been here camping. He stated he had been here for a couple of days. I asked him how long he had walked through the bush for. He stated he didn't know. I asked the male if he was alone. He said yes.

I noticed that the male's responses to me were again abrupt and he continued to show a state of irritability (loud and sharp tone). I then explained to the male that the owner of this stolen boat was at this location only a few days ago and observed the boat to be docked on shore at this location. I again asked the male if he knew the whereabouts of the boat & if he did in fact?

432

(B)
 take it. At this point
 the male ignored my
 question & began to
 walk towards his tent
 which was approx. 16 ft
 from our location. PC
 Wood immediately told
 the male to stop & come
 back to us. The male
 continued to walk
 slowly towards the
 direction of his tent
 ignoring PC Wood's
 request to come back
 to our location.
 At this point we
 followed the male &
 physically took control

PC Wood was holding the male's right arm + I held his left arm. The male was placed in investigative detention for primarily safety reason to check him for any weapons. Secondary he was placed in investigative detention for being a possible subject of the reported stolen boat.

→ of his arms. PC Wood
 was holding the male's
 right arm & I held
 his left arm. The
 male was placed in
 investigative detention
 for primarily safety reason
 to check him for any
 weapons. Secondary he
 was placed in
 investigative detention
 for being a possible
 subject of the
 reported stolen boat.
 The male's initial
 demeanor towards us was
 aggressive, loud, & sharp
 tone. His arms to

For safety reasons and the above facts he was placed in investigative detention.
 When myself + PC Wood initially put our hands on the male's arms he started to puff out his chest + then became actively resistant with us by trying to pull his arms away from our grip. Within a few seconds the male put his right hand into his right side jean pant pocket. PC Wood demanded several times to the male to take his hand out of his pocket when the male refused these requests and continued to struggle with us

(19) 433

some of our questions didn't seem fruitful this lack of answers to how the camp's boat was observed at this location & he knew nothing about it required further investigation.

→ For safety reasons and the above facts he was placed in investigative detention.

When myself + PC Wood initially put our hands on the male's arms he started to puff out his chest & then became

→ actively resistant with us by trying to pull his arms away from our grip. Within a few seconds the male put his right hand into his right side jean pant pocket. PC Wood demanded several times to the male to take his hand out of his pocket when the male refused these requests and continued to struggle with us.

Myself + PC Wood then attempted to ground the male but 5.

(20)

434

we were not able to do so.

The male then took his right hand out of his right pocket.

At this point I observed the male had a knife in his hand.

Both myself & PC Wood observed the knife & let go of the male's arms. We were still in close

range, approx 4ft, as we let go the male took his left arm and opened up the blade from the handle of the knife.

The knife blade was silver in colour & was about 4 inches in length. The handle of the knife was black in colour and also about 4 inches in length.

The male very quickly opened up the blade and wielded it once directly towards both myself & PC Wood at a waist side level.

Myself & PC Wood immediately created distance from the male & moved quickly towards the rear of the point.

While moving towards the rear of the point of land I removed my firearm from my holster + immediately issued the police challenge "Police, don't move, drop the knife"

(21) 43

of land
 → While moving towards the rear of the point of land I removed my firearm from my holster & immediately issued the police challenge "Police, Don't Move Drop the knife" Myself & PC Wood were fairly close together as I could see that he had also drawn his firearm and issued the police challenge. From my initial police challenge the male was approx. 20ft

From my location, he held the knife in his right hand & started to slowly take steps in our direction. I told the male as loud as I could to drop the knife, drop the knife, police don't move, get on the ground. Do it now. The male ignored every command and continued to walk slowly towards us. After taking a few steps towards us he shifted his footing &

(27)

to his left for a few feet & then moved back quickly a couple of steps, bent down behind himself & picked up a white circular container which looked to be approx. 5-6 inches in length. The male party got up to his feet & held the white container in his left hand & was continuing to hold the knife in his right hand. The male stood at his location for a

second & adjusted his grip on the white bottle.

The way the male positioned the white container in his hand I believed it to be pepper spray or something to that effect.

AFTER the male adjusted his grip he looked directly at us & began to walk slowly towards us holding the knife & bottle forward away from his body. I continued to yell at the male.

(103) 437

to stop & get on the ground & to drop the knife. I was approx 5-6 feet apart from PC Wood & could also hear him yell. The male was approx. 18-20' in front of us & continued to move forward ignoring all of our commands. PC Wood was on my right side.

As the male continued towards us myself & PC Wood moved backwards to create space from the male.

As the male walked towards us the gap between me & the male was approx. 15-18 ft. The male continued towards us not listening to my commands to drop the knife & get on the ground. To provide more space I moved approx. 12-15 ft to my left. I observed that PC Wood also moved backwds to his right close to the bush line. The male continued to walk straight & slow.

(R.H.) 438

into the direction
of PC Wood. I
continued to yell at
the male to drop
the knife & get down.
I also could hear
PC Wood yelling
at the male & could
hear the fear in his
voice. The male was
approx. 15 ft from the
right side of my
location. I again
continued to yell at
him to drop the knife.
The male continued to
walk in PC Wood's
direction holding out

the knife & white
containers.
At this point I
then could only see
the males back &
right side view. I
continued to hold my
firearm pointed at
the back side of
the males body.
I could not see PC
Wood but could hear
him yelling at the
male. I began to
take a couple of
steps forward keeping
the distance between
me and the male. 10

(25) 439

at approx. 15 ft.
 After 1-2 steps I
 then heard 2 separate
 gun shots directly
 after one another.
 I observed the male
 to fall backwards &
 then onto his back.
 I quickly ran over
 to the male & rolled
 him onto his chest
 & handcuffed him
 to the rear. I then
 immediately rolled
 him back onto his
 back side, face
 facing upwards.
 PC Wood approached me

I asked me if I was
 ok. I said I was ok
 and not hurt. I asked
 PC Wood the same
 & he said he was ok
 & not injured. I
 quickly ordered PC
 Wood to call TRCC
 for medical assistance
 for the male and to
 notify Sgt Wellorke
 & Sgt Schmidt of
 the incident. PC Wood
 could not get my signal
 with the radio. I then
 ordered him to take
 the bait & get an
 ambulance. PC Wood

(R/L)

440

left immediately
 when I then
 performed CPR on
 the male while
 conducting CPR. I
 observed the male's
 skin to be very grey
 in colour, he did not
 move any part of his
 body. His eyes were
 fully open & eye lids
 did not move. I could
 not locate a pulse &
 his chest was not rising.

"Pickle Lake EMS"

1410 Pickle Lake EMS
 attended in PC Samchuk
 at approx 1420 hrs I
 assisted EMS with

CPR After 2025
 I was no longer
 required for CPR.
 I spoke with PC
 Samchuk who was
 protecting the scene
 & advised him to assist
 with EMS if required.
 I also advised PC
 Samchuk that until
 more officers arrive
 that the scene was
 his to protect. I
 further advised PC
 Samchuk of the
 location of the
 knife & white bottle
 cabinet. I later

12

(27) 441

observed to be being
sprayed, and to be
sure to preserve
their locations.
I then left the
scene.

I came back up to
the scene only briefly
to check on FMS II.
2 PC Saws by what
they stated they were
fine.

I again left the
scene and stayed on
the rocks by the
water until rescue
assistance arrived.

Sgt Schmidt drove me

1709 Sgt Schmidt drove me

back by boat from
the scene.

1740 rescue at Cedar

Shore Landing

1810 rescue detachment

→ provided my clothing
& kit to IDENT officers.
spoke with counsel
Andy McKay who
advised me on the
situation & to not
draft any notes or
talk to anyone about
the incident.

On scene detachment

- Provided my clothing + kit to IDENT officers
- Spoke with counsel Andy McKay who advised me on the situation & not to draft any notes or talk to anyone about the incident

1930

ROD
[Signature]

SCHEDULE “B”: SCHEDULE OF COUNSEL REPRESENTATION

“A Joint Venture”

Schaeffer Investigation – Subject and Witness Officers

Investigator O’Neill confirmed that all witness officers interviewed by the S.I.U. were represented by Andrew McKay. Mr. McKay also represented the subject officer, Constable Wood. The S.I.U. interviewed the following witness officers:

Witness Officer – Acting Staff Sergeant Nathan Schmidt...represented by Andrew McKay.

Witness Officer – Acting Sergeant Mark Pullbrook...represented by Andrew McKay.

Witness Officer – Police Constable Caleb Sawchuk...represented by Andrew McKay.

Witness Officer – Detective Sergeant Danya Wellock...represented by Andrew McKay.

Minty Investigation – Subject and Witness Officers

Subject Officer – Police Constable Graham Seguin...represented by Andrew McKay.

Witness Officer – Police Constable Richard Boyd...represented by Andrew McKay.

Witness Officer – Sergeant Michael Burton... represented by Andrew McKay on the night of the shooting but represented by separate counsel when submitting to an S.I.U. interview

Witness Officer – Constable Gwyn Seymour ...represented by Andrew McKay.

Witness Officer – Constable Kelly Daniels-Griffis ...represented by Andrew McKay.