CITATION: Metcalf v. Scott, 2011 ONSC 1292
COURT FILE NO.: CV-10-3744-00
DATE: 20110503

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: H.M METCALF IN HIS CAPACITY AS CHIEF OF THE PEEL REGIONAL POLICE

Applicant

- and -

IAN SCOTT, DIRECTOR OF THE SPECIAL INVESTIGATIONS UNIT, and HER MAJESTY THE QUEEN, IN RIGHT OF ONTARIO (MINISTRY OF COMMUNITY SAFETY AND CORRECTIONAL SERVICES

Respondents

BEFORE: MacKENZIE J.

COUNSEL: D. Migicovsky and L. Bordeleau, for the Applicant

P.C. Wardle and D. Gallo, for the Respondents

H.G. Black, for Intervenor Peel Regional Police Association

D. Butt, for Intervenor, Police Association of Ontario

S. Dewart, for Intervenors, African Canadian Legal Clinic, Canadian Civil Liberties Association, The Metro Toronto Chinese and South-East Asian Legal Clinic, and The South-Asian Legal Clinic of Ontario

E N D O R S E M E N T

INTRODUCTION

The Parties

[1] The applicant, H.M. Metcalf, is the Chief of Peel Regional Police (the applicant).

[2] The respondent Ian Scott is the Director of the Special Investigations Unit (SIU); and the respondent Her Majesty the Queen in Right of Ontario is represented by the Ministry of Community Safety and Correctional Services.

[3] The following have status as interveners (*amicus curiae*) pursuant to my consent order of December 2010:

(1) Peel Regional Police Association;
(2) African Canadian Legal Clinic;
(3) Canadian Civil Liberties Association;
(4) The Metro Toronto Chinese and South-East Asian Legal Clinic; and
(5) The South-Asian Legal Clinic of Ontario

(hereinafter referred to collectively as the Intervenors and/or individually as the Intervenor, as the case may be).

The Nature of the Proceeding

[4] By application dated October 8, 2010, the applicant pursuant to Rule 14.05(d)(g) and (h) of the *Rules of Civil Procedure* seeks the following declaratory relief:

(a) That the SIU has no jurisdiction under s.113 of the *Police Services Act*, R.S.O. 1990, c. P. 15, (herein after the *Act*) to investigate circumstances surrounding an injury to a third party from a serious criminal offence allegedly committed by a former police officer; and

(b) That the SIU has no jurisdiction to conduct an investigation into the circumstances surrounding an injury to a third party from a serious criminal offence alleged to have occurred prior to 1990.

In addition, the applicant seeks injunctive relief, both interim and permanent, restraining the SIU from continuing to carry out the investigation of a complaint in the circumstances as set out above in paragraphs (a) and (b).

[5] The relief sought by the applicant arises out of a dispute between the applicant and the SIU as to the power and authority of the SIU to investigate the alleged criminal misconduct of a retired Peel Regional Police officer. The dispute between the parties on the jurisdictional issue arises out of the fact that the alleged criminal misconduct took place prior to the subject police officer's retirement but the complaint raising such alleged criminal misconduct was only made subsequent to the police officer's retirement.

[6] The SIU contests the relief that is being sought by the applicant on the basis that the interpretation of the relevant section of the *Act* put forward by the applicant is unfounded in law.

BACKGROUND

[7] There is no question between the parties as to the chronology of certain events giving rise to the issues herein. It is common ground as follows:

(1) On or about June 26, 2010, Peel Regional Police received a complaint by e-mail from a female who alleged that she had

been sexually assaulted by a police officer with the Peel Regional Police;

(2) The complainant stated that the alleged sexual assault or assaults occurred either in 1981 or 1982;

(3) The alleged perpetrator of the sexual assault or assaults was at all material times a police officer but retired as a police officer in May 2009, just over one year before the complaint was made; and

(4) In 1990, the SIU was created pursuant to s. 113 of the *Act*.

[8] Peel Regional Police notified the SIU of the allegations on or about June 28, 2010, pursuant to the requirements of s. 3 of Ontario Regulation 267/10 (O. Reg. 267/10), passed under the *Act*.

[9] The SIU then in furtherance of its role under s. 113(5) of the *Act* began an investigation into the allegations. In the months of July and August 2010, the Peel Regional Police and the SIU corresponded at length on the issue of the jurisdiction or authority of either the Peel Regional Police or the SIU to investigate the allegations and the complaint.

[10] By letter dated August 12, 2010, the SIU directed the applicant to cease investigating the allegations in the complaint on the basis that the SIU had jurisdiction over the subject-matter of the complaint. By letter dated August 17, 2010, the applicant took issue with the SIU's claim that it had jurisdiction to investigate a complaint against a former police officer. In due course, as noted

above, the applicant commenced this application by Notice of Application dated October 8, 2010.

[11] In October 2010, following the issuance and service of the above notice of application, an investigator with the SIU, Mr. J. Coruzzi, communicated with the complainant. One of the issues in the communication was whether the complainant would cooperate with an investigation by the Peel Regional Police or any other police service into the allegations relating to her complaint. The complainant by e-mail dated October 22, 2010, indicated that she did not wish to have the Peel Police Service or any other police service investigate her complaint.

[12] I describe the communications between the applicant and the SIU and between the complainant and the SIU's investigator (Mr. Coruzzi) solely for narrative purposes. There is no question that the issue in this application, viz., the nature and extent of the SIU's jurisdiction and authority to investigate complaints against former police officers pursuant to its mandate under s. 113(5) of the *Act*, is not disposed of nor influenced by the desire of a complainant or by the positions of the contending parties, either a police service or a statutory agency such as the SIU. The issue will be determined in accordance with the appropriate principles of statutory interpretation.

THE ISSUE

[13] As previously stated, the fundamental question in this application is whether the SIU has jurisdiction and authority under s. 113(5) of the *Act* to investigate alleged misconduct involving serious crimes committed by former police officers, while they were serving.

[14] The first question to be addressed is whether the words “police officers” used in s. 113(5) include a police officer who is a former police officer at the time of the complaint and subsequent investigation, by virtue of the police officer in question having retired from his/her position as a police officer.

[15] A further question arises that is peculiar to the circumstances of this case. The SIU came into existence under the *Act* in 1990. The alleged criminal offence took place in either 1981 or 1982 (the precise year at this point is irrelevant). In either event, the alleged criminal offence took place prior to the coming into existence of the SIU. This fact raises the question of retrospectivity of the *Act*.

ANALYSIS

Legislative History

[16] It is important for purposes of determining the aim and objective of the *Act* to set out in some detail its antecedents. Prior to the 1980s, serious injuries or deaths involving allegations of police misconduct were investigated by the police themselves. After a series of reviews relating to police oversight and investigations of misconduct in Ontario, civilian oversight of public complaints

was established (Ontario, Ombudsman Ontario, *Oversight Unseen: Investigation into the Special Investigations Unit's operational effectiveness and credibility* (2009) (the "*Marin Report"*)).

[17] In 1988, two fatal shootings by police led to the creation of the Race Relations and Policing Task Force (*The Report of the Race Relations and Policing Task Force,* Toronto). The Task Force report was followed by the introduction of a Bill that on passage became the *Police Services Act*, R.S.O. 1990, c. P. 15. As previously noted, this *Act* created the SIU.

[18] In the 1990s there occurred further reviews of the system of police oversight in Ontario, including that of the SIU. More than one of these reviews cited the lack of police co-operation as a fundamental problem affecting the SIU's performance (*Consultation report of the Honourable George W. Adams Q.C. to the Attorney General and the Solicitor General concerning police cooperation with the Special Investigations Unit ("Adams Report"))*.

[19] In response to the *Adams Report*, the government enacted regulations setting out the conduct and duties of police officers involved in SIU investigations: *Marin Report* at para. 33. The regulation in question, O. Reg. 673/989, has since been replaced by O. Reg. 267/10, which is entitled "Conduct and Duties of Police Officers respecting investigations by the Special Investigations Unit" (the Regulations).

Statutory Framework

[20] The *Act* sets out the responsibility for police services and governance, governs the conduct of police officers, sets out procedures for complaints and disciplinary proceedings, establishes the SIU and deals with labour relations and pension plans. In s. 2, the *Act* defines "police officer" as a "chief of police or any other police officer, including a person who is appointed a police officer under the inter-provincial *Policing Act*, 2009, but not a special constable, a First Nations Constable, a municipal law enforcement officer or an auxiliary member of a police force".

[21] As previously noted, the SIU is established in s. 113 of the *Act*.

[22] Section 113 provides:

> There shall be a Special Investigations Unit of the Ministry of the Solicitor General.

[23] Section 113(2) provides:

> The Unit shall consist of a director appointed by the Lieutenant General in Council on the recommendation of the Solicitor General and investigators appointed under Part III of the *Public Service of Ontario Act*, 2006.

[24] Section 113(3) provides:

> 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.

[25] Section 113(5) provides:

> The Director may, on his or her own initiative, and shall, at the request of the Solicitor General or Attorney General, cause investigations to be conducted into the circumstances of serious injuries and deaths that may have resulted from criminal offences committed by police officers. R.S.O. 1990, c. P. 15, s. 113(5).

[26] The jurisdiction of the SIU to take further action on the results of its investigation order s. 113(5) is set out in s. 113(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.
> (The full text of ss. 2 and 113 of the *Act* are set out in Schedule 'A' to this Endorsement).

The Principles of Statutory Interpretation

[27] Section 10 of the *Interpretation Act*, R.S.O. 1990, c. I. 11, provides as follows:

> Every Act shall be deemed to be remedial whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such 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.

[28] The modern principle of statutory interpretation has been enunciated in various cases, notably *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, and *R.*

v. McIntosh, [1995] 1 S.C.R. 686. See also the more recent case, *Conservative Fund Canada v. Canada (Chief Electoral Officer)*, 2010 ONCA 882.

[29] A summary statement of the modern approach is found at para. 26 in *McIntosh*:

> There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretation, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is the outcome is reasonable and just.

[30] In *Conservative Fund Canada*, the Ontario Court of Appeal further distilled the modern approach, at para. 68 in the following words:

> According to the well known case of *Rizzo & Rizzo Shoes Ltd.* [cited above], the analysis must focus on the words of the relevant statutory provisions read in their entire context and in their grammatical and ordinary sense and interpreted harmoniously with the scheme and the object of the legislation and with Parliament's intention.

[31] In *Bell ExpressVu Ltd. Partnership v. Rex,* [2002] S.C.C. 42, the Supreme Court of Canada described the contextual approach at para. 27 as follows:

> The preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute: ...“words, like people, take their colour from their surroundings”.

The Positions of the Parties

The Applicant

[32] As a preliminary matter, the applicant moved to strike certain paragraphs in an affidavit proffered by the respondent which purports to speak to the purpose of the *Act.* The affidavit in question was sworn on November 9, 2010, by Joseph Martino, a lawyer who is a SIU staff member. Mr. Martino’s affidavit contained certain paragraphs which, according to the applicant, purported to opine as to the legislative purpose of the *Act*. The applicant objects to such opinion in Mr. Martino’s affidavit and submits the court should in effect strike the same by paying no attention to any opinion(s) as to legislative purpose contained in his affidavit. The paragraphs in question are numbers 25, 26 and 27 and are set out hereunder for ready reference:

> 25. Obviously, it would frustrate an SIU investigation if the resignation or retirement of a serving officer prevented that investigation from ever taking place, or halted it after it had begun.
>
> 26. Moreover, in my view it would be contrary to the public policy rationale for setting up the SIU to begin with as described in paragraph 7 of this Affidavit, if municipal or provincial police forces were required to investigate such cases.
>
> 27. Finally, it would also be disruptive, and difficult to explain to a complainant or the family of a deceased person, for the SIU to hand over an ongoing investigation to a police force.

[33] The applicant also objected to para. 38 in the Martino Affidavit. This paragraph contains a statement of information and belief by the lead investigator in the case, Mr. Jack Coruzzi, as to the complainant's views on having a police force investigate her complaint. However, this concern has been alleviated by the affidavit sworn November 30, 2010, by Mr. Coruzzi which was filed prior to the hearing of the application.

[34] The applicant's objections to paras. 25, 26 and 27 of the Martino Affidavit are well-founded. The opinions therein will have no bearing on the disposition of the issue therein.

[35] The position of the applicant is that the words of subsection (5) of s.113 must be given their plain meaning; specifically, it is submitted that the words "police officers" in subsection (5) cannot include former police officers. In support of this position, reference is made to other sections in the *Act* and Regulations thereunder which refer to former police officers.

[36] In support of his submissions, the applicant alludes to various sections of the *Act* and the regulations thereunder:

(1) The applicant notes the definition of police officer in s. 2 of the *Act* and points out that such definition does not include a former police officer. For ready reference, s. 2 is repeated here:

> In this *Act*,

> "police officer" means the Chief of Police or any other police officer, including a person who is appointed as a police officer under the *Inter-Provincial Policing Act*, *2009* but does not include a Special Constable, a First Nations Constable, Municipal Law Enforcement Officer or a former member of a police force;

(2) The applicant submits that where the Legislature intended to make provisions of the *Act* apply to <u>former</u> police officers, specific language was used. Reference is made to:

> s. 26.1(2)
> A person who is a police officer or former police officer shall not be appointed as Independent Police Review Director.
>
> s. 94(1)
> A Chief of Police may delegate the following powers and duties to a police officer or a former police officer the rank of Inspector or higher.
> ...
> s. 113(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.

[37] The applicant further refers to s. 7(4) and (5) of O. Reg. 554/91 which provide as follows:

> s. 7(4)
> A former municipal police officer who resigns in accordance with subsection (1) and later ceases to be an elected political representative is entitled, upon application to be appointed to any vacant position on the police force for which he or she is qualified under s. 43 of the Act; and
>
> s. 7(5)
> Subsection (4) applies only if the former police officer,
>
> (a) ceases to be an elected political representative [within five years after resigning as a police officer, if elected in federal or provincial context and three years etc., if elected in municipal context.]

[38] Finally, the applicant refers to O. Reg. 267/10 which sets out the powers of the SIU in relation to its investigative jurisdiction pursuant to s. 113(5), in particular ss. 6 – 10, both inclusive. The applicant's point is simply that nowhere in these sections that describe the processes for investigating police officers who are the subject of a complaint is there any reference to "former" police officer.

[39] The gist of the applicant's argument on this particular point is that a statutory body or tribunal which is given authority over the members of a professional organization does not have authority over former members, unless the enabling legislation so provides and that there are strong policy reasons why such powers should not be implied. The applicant cites numerous authorities dealing with the disciplinary cases in support of this argument.

[40] The applicant relies on *Colvin v. Canada (RCMP)*, [1993] 2 S.C. 351, affirmed (1999) 3 S.C. 563 (SCA); leave to appeal refused by S.C.C. In *Colvin*, the Federal Court dealt with the powers of a statutory commission which only had powers to make recommendations with respect to complaints against a member of the RCMP. The court held that the authority of the commission did not extend to investigating a complaint about the conduct of a person who retired or ceased to be a member of the RCMP prior to initiation of the complaint. In affirming this ruling, the Federal Court of Appeal stated that the definition of "member" in the

enabling legislation in *Colvin* did not stipulate that "member" included a former member and that "to argue that a complaint can be directed at the conduct of a former member is to argue against the plain meaning of the very words used by Parliament" (para. 40).

[41] The applicant also relies on the case of *Holder v. Ontario Provincial Police*, a decision of the Ontario Civilian Commission on Police Services (O.C.C.P.S.) dated May 31, 2002, [2002] 3 O.P.R. 157 (O.C.C.P.S.). *Holder* involved a sergeant in the OPP who had retired but who was seeking to appeal what he alleged was a constructive dismissal. The Commission stated at p. 158:

> The Commission does not have jurisdiction to deal with persons who are not members of a Police Service...

[42] In another case cited by the applicant, *Cole v. Ray and Ontario Provincial Police*, another decision of O.C.C.P.S. delivered December 4, 2006, (unreported, aff'd Div. Crt., Nov. 14, 2008) the Commission stated at p. 4:

> The Commission is a creature of statute and can neither imply nor expand its jurisdiction. Nor can the Commission reopen a matter that has already been adjudicated. In this case, David Ray, by virtue of his retirement from the OPP in October of 2006, is no longer a peace officer as defined in the legislation...It is the status of the parties at the time of the hearing of the appeal that is relevant, not their status on the date the decision appeal from was rendered.

[43] The applicant further contends that s. 113 of the *Act* does not operate retrospectively and accordingly, the SIU does not have jurisdiction over incidents alleged to have occurred before its creation in 1990.

[44] The applicant notes the presumption against retrospectivity in legislation; namely, that legislation does not operate retrospectively unless it is concerned only with matters of procedure. In order to determine whether the legislation is procedural or substantive in nature, the question to be addressed is whether the legislation only affects procedure.

[45] In support of this proposition, the applicant cites *Re Royal Canadian Mounted Police Act (Canada)*, 1990 Carswell Nat 122 (the *RCMP Act* Reference). There, the Federal Court of Appeal held that the legislation which created an independent public review body to deal with complaints against members of the RCMP was not purely procedural and was therefore not exempt from the presumption of retrospectivity. In sum, the Federal Court of Appeal in the *RCMP Act* Reference concluded that the Commission established under the *Act* did not have authority to inquire into complaints against officers of the RCMP where the facts giving rise to the complaint occurred prior to the coming into force of the legislation.

[46] The applicant submits that the legislative scheme in s. 113 of the *Act* and O. Reg. 267/10 is more than procedural legislation, it also is substantive in that it

affects the substantive rights of complainants as well as members of Peel Regional Police against whom complaints have been made.

[47] The applicant recognizes a further exception to the presumption of retrospectivity, viz. cases in which the purpose of the legislation is protection of the public. However, the applicant submits that this exception has been narrowly interpreted as applying only in cases where the legislation is aimed at protecting the public by removing persons from positions in which the public could be harmed in the future. The purpose of s. 113 is to have the SIU investigate whether a police officer has committed a criminal offence and should be prosecuted. The applicant points out that s. 113 does not seek to regulate the future actions of the police officer who has been the subject of an investigation and cause that police officer to lose his or her ability to carry out his policing duties.

[48] In applying these principles to the present case, the applicant submits that even if the *Act*, which came into force in 1990, was interpreted as giving jurisdiction or authority to the SIU to investigate an alleged criminal offence committed by a <u>former</u> police officer, it does not vest jurisdiction in the SIU to investigate a former police officer relating to an alleged criminal offence in 1981 or 1982, approximately 9 to 10 years <u>before</u> the SIU was created under the *Act*.

[49] In sum, the applicant's position is twofold: (1) on the proper statutory interpretation of the investigative powers of the SIU under s. 113(5), having regard to the purpose of the statute and the provisions of the statute which as a whole, no jurisdiction is conferred upon the SIU to investigate alleged criminal misconduct of a police officer who is not a police officer at the time of investigation; and (2) the SIU has no jurisdiction to investigate the alleged criminal misconduct of a police officer that occurred nine to ten years before the SIU's existence since such interpretation offends the presumption against retrospectivity of legislation.

[50] The intervenor Police Association of Ontario (P.A.O.) supports the applicant's position but raises an interesting argument on the issue of statutory interpretation. The P.A.O. contends that in reference to the interpretation of s. 113(5), the most compelling principle to be applied here is the implied exclusion rule: *expressio unius est exclusio alterius*.

[51] What the P.A.O. is saying here is that the reference in s. 113(5) to "police officer" in describing the SIU's investigative jurisdiction under s. 113(5) when compared with the references in other sections of the *Act* to "former police officer" is a basis for inferring that a reference to a "former police officer" in s. 113(5) was deliberately excluded. Counsel for the P.A.O. contends the fact that the term "former police officer" is used in some provisions of the *Act* but not

others must be interpreted as an intentional act and accordingly, the term “former police officer” should not be read into s. 113(5).

[52] By way of example, counsel refers to s. 113(3) of the *Act* which provides as follows:

> A person who is a police officer or former police officer shall not be appointed as director [of the SIU] and persons who are police officers shall not be appointed as investigators.

Counsel submits that the distinction between police officers and former police officers shows that the distinction in s. 113(3) of the *Act* has a practical consequence, namely, a police officer cannot be an SIU investigator but a former police officer can.

[53] Counsel continues the argument by indicating that for purposes of s. 113(5), the distinction between a former police officer and a police officer, i.e. currently serving, “plays havoc with the foundational animating principle of [the *Act*] that the police cannot investigate themselves.” (para. 9, Factum of P.A.O.).

[54] Counsel points out that it is not in dispute that approximately half of the investigators of the SIU are former police officers and that the SIU relies upon the investigative experience the investigators have obtained by virtue of long careers as police officers. Counsel contends that if the SIU in this matter is asserting that there is no practical distinction between police officers and former police officers,

the SIU itself is engaged and complicit in a comprehensive abandonment of the animating principle that “police cannot investigate themselves” (para. 11, Factum of P.A.O.).

[55] Counsel then relies on the argument that the former police officers hired by the SIU as investigators are “civilians” and thus “independent” of the police. Counsel asserts the fact that former police officers are civilians and independent of the police leads to the rational conclusion that there is no need to distort subtle maxims of statutory interpretation so that the SIU can assert investigative jurisdiction over former police officers when there is no express provision in the *Act* for such jurisdiction. See para. 15, Factum of P.A.O.

[56] The gist of the P.A.O.’s position on the issue of statutory interpretation here is that in the absence of any express provision for the jurisdiction of the SIU over former police officers under s. 113(5), the intention of the legislature is to be derived from a plain reading of the statute and accordingly the principle of implied exclusion (above) stands unopposed. In the words of the P.A.O., “other interpretations stand unsupported” para. 17, Factum of P.A.O.).

The SIU

[57] I turn first to the position of the SIU on the issue of statutory interpretation. Counsel sets out the legislative purpose of the *Act* as follows:

(1) The purpose of the Legislature in enacting Part VII containing s. 113 is to promote public confidence in the impartiality of the police.

(2) The manner in which this legislative purpose is achieved is a creation of a public agency, that is, the SIU, in which is vested criminal investigatory powers relating to alleged police misconduct.

(3) Section 113(5) which creates the investigatory powers can only refer to alleged misconduct by police officers occurring in the past. Therefore, the only appropriate and sensible interpretation of the term "police officer" therein is an individual who was a police officer at the time of the alleged misconduct, and not at the time of the investigation of such alleged misconduct.

(4) The context has to yield to the language and purpose of the *Act*.

[58] The SIU's essential position on the proper interpretation of s. 113(5) is as follows: on the plain meaning of the words "police officer" therein, s. 113(5) of the *Act* confers jurisdiction on the SIU to investigate alleged criminal misconduct by persons who were serving police officers at the time of the conduct. In essence, the temporal focus of s. 113(5) is the time of the conduct, and not the time of the investigation of the conduct.

[59] Counsel further submits the status of the police office whether active, retired or resigned at the time of the investigation is simply irrelevant and cannot operate to deprive the SIU of its jurisdiction.

[60] On the use of “former police officer” in some sections, the SIU submits that as the words “police officer” in s. 113(5) must refer to the individual’s status at the time of the conduct being investigated, it was unnecessary for the legislature to include the words “former police officer” in s. 113(5). In this situation, the implied exclusion rule cannot apply.

[61] On the retrospectivity argument, the SIU’s position is that the *Act* simply transfers responsibility for the investigation of certain alleged criminal acts from one organization to another and accordingly it is purely procedural in nature. In that event, legislation affecting procedural rights operates from the date of its enactment, notwithstanding that the impact of such legislation may be retroactive or retrospective. In the result, counsel contends that the enabling legislation of the SIU (the *Act*) permits it to investigate events occurring in the past.

[62] Counsel for the SIU submits the modern approach to the interpretation of statutes is a contextual one involving the consideration of the ordinary or plain meaning of the words of the statute together with the object and purpose of such statute, whether the statute is of a criminal or non-criminal nature.

[63] Counsel contends that when conducting a contextual analysis, the interpretation of the reviewing court is informed by a series of factors including, among other things, the principle of interpreting legislation harmoniously in a manner which avoids anomalous or absurd results. Further, that there is a legal

presumption of coherence that is applicable in respect of the various elements of any legislative scheme. Counsel refers to various reports commissioned by the Ontario government and the resulting legislative history (previously noted) which support the position that a purposive interpretation of Part VII of the *Act* validates the SIU's interpretation that s. 113(5) includes alleged criminal offences committed by serving police officers, irrespective of the time of complaint and/or investigation of such alleged criminal offences.

[64] Counsel notes comments recorded in Ontario Hansard, December 20, 1989, wherein the then Attorney-General, in introducing the *Act*, (Bill 107), observed that the legislation was based in part on the work of the Task Force (1989): the Report of the Race Relations and Policing Task Force – Ontario (the 1989 Task Force).

[65] Following the passage of the *Act* in 1990 establishing the SIU, an additional report was prepared in 1998 by Mr. G.W. Adams, a former judge of this court (the 1998 *Adams Report*). The 1998 *Adams Report* made recommendations intended to improve relations between the SIU, the police forces in Ontario and the public at large. Many of the recommendations in the 1998 *Adams Report* were implemented by Ontario Regulation 673/98 which came into force January 1, 1999 (subsequently replaced by Ontario Regulation 267/10). Subsequently, Mr. Adams was appointed by the Attorney-General to

conduct a review aimed at evaluating the implementation of the recommendations contained in the 1998 *Adams Report*. In the result, a report reviewing and evaluating the implementations was issued on February 26, 2003 (the 2003 *Adams Report*).

[66] Counsel refers to the observations of Mr. C. Lewis in the 1989 Task Force report that "the public perception, understandably, is that these investigations (into shootings by police resulting in death) lack objectivity in that they amount to the police investigating the police". In the recommendation following this observation, the Task Force recommended [Recommendation #36] that "the Solicitor General create an investigative team to investigate police shootings in Ontario. That team should be comprised of homicide investigators chosen from various forces other than the force involved in the shooting...". As previously noted, the legislature acted upon the 1989 Task Force report and in 1990, the SIU was created to discharge this function, among others.

[67] The SIU contends that the concerns addressed by the *Act* respecting the objectivity of the police in investigating alleged police misconduct are not lessened by the resignation or retirement of a police officer alleged to have committed such misconduct while he or she was a police officer. Counsel contends that the public would have little confidence that a police investigation of

such an individual's conduct while he or she was a police officer would be sufficiently thorough and unbiased.

[68] Counsel argues that the applicant's interpretation of Part VII, i.e. s. 113(5), of the *Act* is not consistent with the above legislative purpose. In this regard, counsel suggests that such interpretation could lead to the following results:

(1) A police officer subject to investigation by the SIU could frustrate the jurisdiction of the SIU by simply resigning or retiring either before or during an investigation.

> Under the applicant's interpretation, the investigation would then have to be transferred to a police force.

(2) A police officer who has been investigated by the SIU could retire or resign after the investigation was complete but before the laying of an Information by the Director or the referral of the matter to the Crown Attorney for prosecution.

> Under the applicant's interpretation, the resignation or retirement of a police officer even at this late stage would prevent any further steps being taken by the Director to lay charges. The matter would then have to be handed over to a police force which would have to determine whether to reinvestigate from the outset or rely upon investigative work done by the SIU.
>
> [See para. 62 of Respondent's Factum]

[69] Counsel submits that both the above scenarios would defeat the *Act's* legislative purpose: that is, to ensure that such investigations and any decisions

flowing from them are not undertaken by serving officers due to their perceived lack of objectivity in reviewing police conduct and particularly the use of force by the police. In addition, counsel contends that both these scenarios would compromise the ethics, efficiency and integrity of the investigation; for example, transferring an active investigation from one agency to another would invariably be disruptive and result in duplication of work. It would also erode the confidentiality of the investigative process. As well, such a transfer of an active investigation could potentially result in the loss of evidence due to delay and such a result should not be imputed to the Legislature absent clear and cogent language.

[70] In essence, the SIU submits the fact that a police officer who is the subject of a complaint was at the time of the complaint not a serving police officer is irrelevant to the advancement of the legislative purpose noted above.

[71] In dealing with the applicant's argument respecting references to the words "former police officer" in other sections of the *Act*, the SIU submits the use of "former" in other sections of the *Act* is necessary in that it specifies that an individual who was formerly a police officer may or may not be appointed or delegated to the duties as set out in those sections. Counsel submits that in each of sections, 26.1(2), 94(1), and 113(3) of the *Act*, the reference to a "former" police officer is necessary as the temporal focus therein must be on the time of

the delegation or appointment; likewise with respect to O. Reg. 554/91, s. 7(4) and (5).

[72] To the applicant's argument that under s. 113(7), the SIU does not have a legislative authority to have an information laid against a former police officer, and that such authority lies only with respect to a serving police officer, the SIU responds that s. 113(7) cannot be read in isolation, it must be read in light of s. 113(5) on the following basis.

[73] First, the words "matters investigated" in s. 113(7) are clearly intended to describe the same matters which are the subject of s. 113(5). In effect, the SIU contends that s. 113(7) simply describes a sub-set of the matters investigated: that is, those which lead to a charge or charges being laid. In addition, the "police officer" referred to in s. 113(7) must logically be the same "police officer" who is the subject of the investigation pursuant to s. 113(5): in other words, a police officer who was a serving police officer at the time of the conduct. The fact that a police officer who may have since the time of the conduct retired or resigned does not, pursuant to s. 113(7), insulate him or her from being the subject of an information being laid by the Director of the SIU.

[74] The applicant relies on the fact that O. Reg. 267/10 sets out the powers of the SIU in relation to "police officers" rather than "former police officers" to support his position. Counsel for the SIU responds that it is not surprising that O.

Reg. 257/10 does not address co-operation by former police officers with an ongoing SIU investigation: as none of the systemic problems described in the *Adams Task Force* report applied to retired or resigned police officers, there was no reason to design any regulations concerning them. In the result, the sections of O. Reg. 267/10 do not refer to a "former police officer."

[75] The intervener P.A.O. has, in support of the applicant's position, argued that the SIU's interpretation of s. 113(5) takes away procedural protections granted to Subject and Witness Officers under O. Reg. 267/10. Counsel for the SIU points out that under O. Reg. 267/10, Subject Officers are under no obligation either to provide their notes to the SIU or to submit to an interview and that retired or resigned Subject Officers have no similar obligation. In the result, the SIU contends this argument of the P.A.O. has no validity.

[76] Counsel for the SIU submits that the cases involving disciplinary bodies cited by the applicant with respect to the jurisdictional aspects over former police officers are irrelevant to the jurisdictional issues involving the SIU over former police officers. In support, counsel argues as follows. The primary reason for any limitation in a disciplinary body's jurisdiction over a former member of the discipline in question is that disciplinary proceedings are directed towards the member's status as a member. Once a member resigns or retires, there is no public interest in seeking to discipline a former member. In contrast, the SIU has

no disciplinary powers but only criminal investigatory powers to be exercised in relation to alleged criminal misconduct. In short, the jurisdiction of the SIU under s. 113 of the *Act* is not directed towards the police officer's status as a police officer and whether that status should continue. The investigation undertaken by the SIU in relation to an allegation of misconduct by a police officer has no direct consequences for the status of the person investigated as a police officer.

[77] In dealing with retrospectivity issues, the SIU acknowledges that legislation is not intended to apply retrospectively in the absence of express words used by the legislator. However, this principle is subject to two exceptions, one being where the legislation in question is purely procedural and the second being where the legislation in question is aimed at protection of the public.

[78] The SIU contends that s. 113 of the *Act* is procedural in nature. Such legislation operates immediately on persons governed by the legislation because no one has a vested right in the continuation of a prior procedure.

[79] The SIU submits that Part VII containing s. 113 of the *Act* establishes an alternate process for the investigation of alleged criminal conduct by serving police officers. Its application to alleged criminal conduct that occurred prior to Part VII coming into force (1990) does not affect any substantive rights of serving police officers and does not result in a retroactive application of the law. The SIU

contends that the criminality of any alleged misconduct is still determined by reference to the same laws, the only difference is in the investigative body. On this basis, the SIU submits that Part VII, including s. 113, is procedural in nature and applies immediately.

[80] The SIU further contends that the *Act* is not at odds with the presumption against retrospectivity inasmuch as the purpose of the legislation is to protect the public interest and there is no concomitant detriment to persons such as police officers.

[81] In response to the applicant's position that s. 113 negates or takes away any substantive rights of Subject Officers, the SIU emphasizes (as previously noted) that Subject Officers are under no obligation to provide a statement to the investigators nor submit to an interview by them. Nor do the SIU investigators have the right to request or obtain subject officers' notes. In addition, the *Act* does not afford complainants any additional rights with respect to any ongoing or resulting prosecution.

[82] In sum, the position of the SIU is that Part VII of the *Act* provides for an independent agency to carry out investigations into alleged criminal misconduct by police officers and that such provisions were enacted in response to public concerns respecting potential or actual bias in such investigations.

Applying the Principles of Statutory Interpretation Herein

[83] I am persuaded that the words of s. 113(5), when read in their grammatical and ordinary meanings and examined in the context of the section, the *Act* and the Regulations and interpreted harmoniously with the purpose of the *Act*, grant the SIU jurisdiction to investigate alleged criminal offences causing serious injury or death committed by serving police officers who have, since the time of the alleged criminal offences, resigned or retired. This reading of the *Act* is consistent with the legislative text and promotes or advances the Legislature's intention of vesting independent and transparent oversight of police officer's conduct in the public interest.

[84] In sum, the words of s. 113(5) give the SIU jurisdiction over the investigation of alleged criminal misconduct causing serious injury or death by serving police officers who have since retired or resigned prior to the time of the complaint or the investigation into such complaint.

[85] The following are the bases for the above conclusions.

[86] The syntactical structure of subsection (5) of s. 113 indicates that the words "police officers" are referable to the words "criminal offences": that is, the subsection describes criminal offences committed by police officers. It is not syntactically sound to read the words "police officers" as relating to investigations. In other words, subsection (5) does not describe investigations

into police officers but rather investigations into criminal offences committed by police officers.

[87] The temporal aspects, i.e. the status of the police officer at the time of the conduct, is reinforced by the references in subsection (7) of s. 113. On a plain reading of subsection (7), the reference to “police officers” therein logically refers to the police officers who were the subject of the investigations under subsection (5); in other words, the police officers who were subject of the investigations were serving police officers at the time of the conduct constituting the alleged offences.

[88] The duty created under subsection (7) on the Director to cause informations to be laid against police officers, if there are reasonable grounds to do so, cannot be fairly characterized as restricting the power of investigation conferred in subsection (5). It is a logical consequence of the power of investigation contained in subsection (5). It must also be noted that subsection (7) is not the only or singular source of authority for SIU to lay charges since the *Criminal Code* provides that anyone who believes on reasonable grounds that an offence under the *Code* has been committed may swear out an information and thereby initiate the prosecution process.

[89] As noted, the position of the SIU is that it would be absurd for subsection (5) to have the words “former police officer” contained therein; such words would

grant the SIU jurisdiction over alleged criminal offences committed by civilians, i.e. a police officer who is no longer a serving police officer.

[90] To interpret s. 113(5) of the *Act* as restricting the jurisdiction of the SIU to situations where the police officer who is the subject of a complaint is still a serving police officer at the time of the complaint or any subsequent investigation would allow police officers to escape civilian oversight of complaints by members of the public by simply resigning or retiring from the police service. This situation would lead to an absurd result and would thereby contravene a basic canon of statutory interpretation - namely, that legislation should not be interpreted or construed so as to allow for a result that is contrary to the purpose of the legislation in question.

[91] On the contrary, reading the *Act* as conferring on the SIU authority and jurisdiction to investigate serious police misconduct leads to a result that is fair and in furtherance of the purpose of the *Act*. Such a reading of the *Act* 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.

Retrospectivity

[92] It is appropriate here to distinguish between retrospective and retroactive statutes. A statute can be described as being retroactive where it

operates as of a time prior to its enactment.[1] Put differently, a retroactive statute creates a fiction by reaching into the past and declaring that the law or rights of the parties at an earlier date are to be taken as something other than what they actually had been.

[93] In contrast, a retrospective statute operates only for the future but it does look backward in that it attaches new consequences for the future to an event that took place before the statute was enacted.

[94] In comparing the two classes of statute, it may be said that while retroactive statutes modify all the legal consequences of past facts, retrospective statutes only modify their future legal effects.

[95] In this case, the issue is the retrospectivity of s. 113(5). Section 113(5) has retrospective effect since it attaches consequences (an investigation by the SIU into alleged criminal offences instead of investigation by the police) to an event (the conduct giving rise to the alleged criminal offence) that took place before the enactment and coming into force of the *Act*.

[96] Both parties acknowledge that there is a presumption against the retrospective application of legislation.

[1] Elmer Driedger, "Statutes: Retroactive Retrospective Reflections" (1978) 56 *Canadian Bar Review* 264 at p. 268.

[97] There are two exceptions to the presumption against retrospectivity: the first of these exceptions is when the rights affected are procedural and not substantive; the second exception is that of public protection.

[98] Turning to the first exception, I am persuaded that s. 113(5) affects procedural rights and not substantive rights of police officers who are the subject of the investigation under subsection (5). Neither the police officer in question nor the complainant in question have a substantive right as to who conducts an investigation into any complaint. While the regulations under the *Act* compel witness officers (not Subject Officers) to meet with the SIU investigators and stipulate that the Chief of Police will provide the notes of witness officers to the SIU investigators and prevent police officers from disclosing information about incidents or investigations therein, these matters are procedural rather than substantive.

[99] On the question of distinguishing between substantive and procedural rights, reference has been made to the case *Re Royal Canadian Mounted Police Act (Canada)*, [1991] 1 F.C. 529. In this case, the Federal Court of Appeal held that amendments to the legislation establishing the Public Complaints Commission of the RCMP and the public complaints process were not procedural and therefore could not be applied retrospectively. The court noted at para. 59

that “What is legislated is clearly not just a manner of scrutiny, but the very existence of public scrutiny for the first time”: (emphasis added).

[100] When the *Act* establishing the SIU is contrasted to the RCMP legislation, it is obvious that the *Act* is nowhere near as comprehensive as the RCMP legislation establishing the Complaints Commission and its processes. In the latter instance, the legislation “provides for subpoenas, oral testimony with cross-examination, arguments by counsel and a report by the Committee” (para. 59).

[101] Under the *Act* and the Regulations, the obligations imposed on the police are clearly not as extensive as the obligations previously described on members of the RCMP in the context of the complaint process. The minimal nature of the obligations under the *Act* and Regulations are usefully contrasted with the process under the *RCMP* legislation; the scrutiny of investigation under s. 113(5) does not include, as does the scrutiny under the legislated RCMP complaint process, the prosecutorial process described above. There is no prosecutorial, even quasi-prosecutorial, emphasis under the *Act*; that aspect is left to the Crown Attorney pursuant to s. 113(7) of the *Act*.

[102] The second exception is public protection. The public protection exception is usefully outlined by Driedger (previously cited) in the following terms:

> The three kinds of retrospective statutes are described as follows:

> 1. Those that attach benevolent consequences to a prior event – the presumption against retrospective application does not apply to these;
>
> 2. Those that attach prejudicial consequences – a new obligation, duty or disability to a prior event – the presumption against retrospective application does apply; and
>
> 3. Those that impose a penalty on a person described by reference to a prior event but the penalty is not a consequence of the event – the presumption against retrospective application does not apply. [page 271]

[103] In brief, under the RCMP complaint process, substantive rights were altered or affected by the legislation including the right of a complainant to status as a party plus the obligations and burdens previously outlined on the officers who were the subject of complaints by the public. In this situation, the complainants as well as police officers being investigated by the SIU have the same rights and protections that would be provided in the ordinary or normal course of a regular police investigation of alleged criminal misconduct.

[104] The basic principle creating the exception of protection of the public to the presumption against retrospectivity was established in *Brosseau v. Alberta Securities Commission*, [1989] S.C.J. No. 15. In that case, the legislation in issue permitted the respondent to hold hearings and order persons involved in the trading of securities to cease trading based on the conduct of such persons. The issue arose whether these provisions applied to conduct that had occurred prior to the provisions in question coming into force. In holding that the provisions did apply, the Supreme Court held:

> The provisions in question are designed to disqualify from trading in securities those whom the Commission finds to have committed acts which call into question their business integrity. This is a measure designed to protect the public and it is in keeping with the general regulatory rule of the Commission. Since the amendment at issue here is designed to protect the public, the presumption against the retrospective effect of statutes is effectively rebutted.

[105] In *Re RCMP*, above, the Federal Court of Appeal distinguished *Brosseau* in the following terms:

> This is a world removed from the legislation allowed to function retrospectively in *Brosseau*. Nor does it qualify for any broader meaning of the third category, viz., that it created only benefits and imposed no obligations. As already observed, the *Act* imposes disabilities and obligations on a new group... (para. 63).

[106] In *Re RCMP*, the court was not willing to allow for retrospective application of legislation that imposes disabilities and obligations on a group in addition to providing for a public benefit.

[107] In the case at bar, the *Act* provides a public benefit, i.e. independent oversight of police conduct, without any corresponding detriment for officers whose conduct is being investigated by the SIU.

[108] As previously stated, police officers who are investigated do not have any greater obligations placed on them by the SIU investigators and have the same rights and protections that would be provided in the normal course of a regular police investigation of alleged misconduct.

[109] I accept the position of the SIU that the jurisprudence relied upon by the applicant relating to the protection of the public exception is distinguishable on the basis that the legislation either failed to provide a public benefit or imposed a corresponding detriment on a class of individuals.

CONCLUSION

[110] For the above reasons, I am persuaded that the words “police officers” in s. 113(5) must be interpreted as referring to police officers at the time of the alleged misconduct and that the presumption against the retrospectivity of the *Act* is unrebutted or displaced by the procedural rights and public protection exceptions to the presumption.

DISPOSITION

[111] The application is dismissed. In accordance with the consent order granting leave to the interveners on both sides of the question, no costs are exigible on behalf of or against the several interveners.

[112] If the applicant and the SIU are unable to agree on costs herein, I will entertain written submissions, not exceeding 8 pages exclusive of supporting materials, according to the following schedule:

(3) by the SIU within 21 days of the date of this endorsement;

(4) responding submissions by the applicant within 14 days of its receipt of the SIU’s submissions; and

(5) reply, if any, by the SIU within 7 days of its receipt of the applicant’s responding submissions.

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MacKENZIE J.

DATE: May 3, 2011

SCHEDULE ‘A’

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

2. In this Act,

"member of a police force" means an employee of the police force or a person who is appointed as a police officer under the Interprovincial Policing Act, 2009; ("membre d'un corps de police")

"police officer" means a chief of police or any other police officer, including a person who is appointed as a police officer under the Interprovincial Policing Act, 2009, but does not include a special constable, a First Nations Constable, a municipal law enforcement officer or an auxiliary member of a police force; ("agent de police")

. . .

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

(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.

(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.

(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.

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

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

(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.

(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.

(8) The director shall report the results of investigations to the Attorney General.
Co-operation of police forces

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

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

CITATION: Metcalf v. Scott, 2011 ONSC 1292
COURT FILE NO.: CV-10-3744-00
DATE: 20110503

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: H.M METCALF IN HIS CAPACITY AS CHIEF OF THE PEEL REGIONAL POLICE

Applicant

- and -

IAN SCOTT, DIRECTOR OF THE SPECIAL INVESTIGATIONS UNIT, and HER MAJESTY THE QUEEN, IN RIGHT OF ONTARIO (MINISTRY OF COMMUNITY SAFETY AND CORRECTIONAL SERVICES

Respondents

BEFORE: MacKENZIE J.

COUNSEL: D. Migicovsky and L. Bordeleau, for the Applicant

P.C. Wardle and D. Gallo, for the Respondents

H.G. Black, for Intervenor Peel Regional Police Association

D. Butt, for Intervenor, Police Association of Ontario

S. Dewart, for Intervenors, African Canadian Legal Clinic, Canadian Civil Liberties Association, The Metro Toronto Chinese and South-East Asian Legal Clinic, and The South-Asian Legal Clinic of Ontario

ENDORSEMENT

MacKENZIE J.

DATE: May 3, 2011