

Case Name:

**Peel (Regional Municipality) Police v. Ontario (Director,
Special Investigations Unit)**

Between

**H.M. Metcalf in his capacity as Chief of the Peel Regional
Police, Applicant (Appellant), 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
(Respondents in Appeal)**

[2012] O.J. No. 2008

2012 ONCA 292

292 O.A.C. 103

110 O.R. (3d) 536

Docket: C53753

**Ontario Court of Appeal
Toronto, Ontario**

D.R. O'Connor A.C.J.O., J.I. Laskin and E.A. Cronk JJ.A.

Heard: December 13, 2011.

Judgment: May 7, 2012.

(88 paras.)

Criminal law -- Parole -- Appeals and judicial review -- Revocation or termination -- Appeal by Chaudhary from dismissal of his habeas corpus application dismissed -- Application judge declined to exercise jurisdiction in favour of a judicial review application before the Federal Court -- Appellant was convicted of murder -- He was released on full parole in 1998 -- His parole was revoked for failure to follow the conditions of his release -- The Superior Court should exercise its habeas corpus jurisdiction except in limited circumstances where route to challenge parole decision was by way of judicial review application in the Federal Court.

Statutes, Regulations and Rules Cited:

Corrections and Conditional Release Act, S.C. 1992, c. 20,

Professional responsibility -- Regulated occupations -- Administration -- Boards and tribunals -- Investigation -- Appeals -- Occupations -- Police officers -- Appeal by Chief of Peel Regional Police from judgment regarding jurisdiction of Special Investigations Unit (SIU) dismissed -- At issue was whether SIU had jurisdiction to investigate complaint that predated its creation and involved officers who had since retired -- Application judge properly ruled that s. 113(5) of Police Services Act granted jurisdiction -- No error in analysis or conclusion that procedural rights exception to presumption against retrospectivity of legislation was applicable and anchored SIU's investigative jurisdiction over subject complaint -- Police Services Act, ss. 113, 113(3), 113(5), 113(7), 113(9).

Statutory interpretation -- Statutes -- Operation of -- Retroactivity and retrospectivity -- Substantive or procedural -- Rebutting presumption -- Appeal by Chief of Peel Regional Police from judgment regarding jurisdiction of Special Investigations Unit (SIU) dismissed -- At issue was whether SIU had jurisdiction to investigate complaint that predated its creation and involved officers who had since retired -- Application judge properly ruled that s. 113(5) of Police Services Act granted jurisdiction -- No error in analysis or conclusion that procedural rights exception to presumption against retrospectivity of legislation was applicable and anchored SIU's investigative jurisdiction over subject complaint -- Police Services Act, ss. 113, 113(3), 113(5), 113(7), 113(9).

Appeal by the Chief of the Peel Regional Police (PRP) from the dismissal of an application for a declaration that the Special Investigations Unit (SIU) lacked jurisdiction. The SIU was a civilian agency created in 1990 and empowered to conduct independent investigations into police criminal conduct causing injury or death. Its role was controversial and resulted in difficult relations with police agencies. In 2010, the PRP received a complaint alleging a sexual assault by a police officer, witnessed by a second officer. The alleged assault occurred in 1981 or 1982 while the complainant was a minor. Both of the named officers had retired by the time of the complaint. The PRP challenged SIU's jurisdiction over the complaint on the basis that it had no authority to investigate conduct of retired officers or conduct that predated its creation in 1990. The PRP submitted that it was the appropriate agency to investigate the complaint. At issue was the scope of the SIU's investigative mandate pursuant to s. 113(5) of the Police Services Act. The judge ruled that the SIU had jurisdiction under s. 113(5) over former officers and that the Act applied retrospectively to afford jurisdiction for alleged criminal conduct prior to its creation in 1990. The PRP appealed.

HELD: Appeal dismissed. The application judge properly found that the language of s. 113(5), when read in its grammatical and ordinary sense, in the context of the entire legislative regime governing the SIU and the purpose of the Act, granted jurisdiction to investigate alleged criminal offences causing serious injuries and death committed by persons who were serving police officers at the time of the conduct at issue. The application judge did not err in the analysis and conclusion that s. 113(5) was procedural rather than substantive in nature and thus had retrospective application. The application judge properly found that neither a police officer nor a complainant had a substantive right as to who conducted the investigation of a complaint or the particular form of procedure for the investigation. The creation of the SIU did not alter the fact that police officers were already subject to external or public review of their conduct. The Act and Regulations did not interfere with the substantive rights of officers under investigation or impose any other obligations that did not

already apply to officers under investigation by operation of law. The application judge did not err in holding that the procedural rights exception to the presumption against the retrospectivity of legislation was applicable to anchor the SIU's investigative jurisdiction over the subject complaint.

Statutes, Regulations and Rules Cited:

Interpretation Act, R.S.O. 1990, c. I.11, s. 10

Legislation Act, 2006, S.O. 2006, c. 21, Schedule F, s. 64

Ontario Conduct and Duties of Police Officers Respecting Investigations by the Special Investigations Unit, Reg. 267/10, s. 1(1), s. 3, s. 5, s. 11(1), s. 11(2), s. 30(1)

Police Services Act, R.S.O. 1990, c. P.15, s. 2(1), s. 2(1), s. 76(1), s. 90(1), s. 113, s. 113(1), s. 113(2), s. 113(3), s. 113(3.1), s. 113(4), s. 113(5), s. 113(6), s. 113(7), s. 113(8), s. 113(9), s. 113(10)

Appeal From:

On appeal from the judgment of Justice A. Donald MacKenzie of the Superior Court of Justice, dated May 3, 2011, with reasons reported at 2011 ONSC 1292.

Counsel:

David Migicovsky, for the appellant.

Peter C. Wardle and Danielle Gallo, for the respondent Ian Scott.

Harry G. Black, Q.C., for the intervener, the Peel Regional Police Association.

David Butt, for the intervener, the Police Association of Ontario.

Sean Dewart and Tim Gleason, for the interveners, the Canadian Civil Liberties Association *et al.*

The judgment of the Court was delivered by

1 E.A. CRONK J.A.:-- In the late 1980s, several fatal police shootings in Ontario gave rise to considerable public concern regarding the impartiality and transparency of police investigations into the use of deadly force by police officers. The ensuing government response led to the creation in 1990 of the Special Investigations Unit (the SIU), a civilian agency whose director is empowered under Part VII of the *Police Services Act*, R.S.O. 1990, c. P.15 (the Act) to conduct independent investigations into serious injuries and deaths that may have resulted from criminal offences committed by police officers.

2 From the outset, the role of the SIU has been controversial, resulting in uneasy, and often hostile, relations between some police agencies and the SIU. The dispute in this case, which arises from allegations of serious historical wrongdoing by a former police officer, is an example of persisting tensions between these groups.

3 As I will explain, the dispute between the parties concerns the scope of the SIU's investigative mandate under s. 113(5) of the Act. That provision reads:

The director [of the SIU] 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 death that may have resulted from criminal offences committed by police officers.

I. Facts

(1) Jurisdictional Question

4 On June 26, 2010, the Peel Regional Police (the PRP), received a complaint from a member of the public who alleged that she had been sexually assaulted by a member of the PRP. The complainant also claimed that a second PRP officer witnessed or knew of the assaults, some of which were said to have taken place while the complainant, then a minor, was being transported into custody by the police. It later emerged that the alleged assaults took place in 1981 or 1982 and that both the alleged perpetrator and the alleged police witness had retired from the PRP by the time of the complaint.

5 On receipt of the complaint, the PRP notified the SIU, as required under s. 3 of the Ontario *Conduct and Duties of Police Officers Respecting Investigations by the Special Investigations Unit*, Reg. 267/10, as amended by O. Reg. 283/11, enacted pursuant to the Act (the SIU Regulation).

6 When the SIU commenced an investigation into the complainant's allegations, the PRP challenged the SIU's jurisdiction over the complaint. It asserted that the SIU had no authority to investigate alleged criminal offences committed by police officers: (1) who had resigned or retired by the time of the complaint; and (2) prior to the creation of the SIU in 1990. As a result, the PRP maintained that it was the appropriate agency to investigate the complaint.

7 The respondent Ian Scott, the Director of the SIU, disagreed.¹ He asserted his investigative jurisdiction over the complaint by reason of s. 113(5) of the Act and directed the PRP to cease its investigation. The PRP declined to do so.

8 When the parties failed to resolve their competing jurisdictional claims, the Chief of the PRP, the appellant H.M. Metcalf, applied to the Superior Court of Justice for declaratory and related injunctive relief regarding the SIU's authority concerning the complaint. In his notice of application, he sought declarations that the director of the SIU has no jurisdiction: (1) "pursuant to s. 113(5) of the [Act], [to conduct an investigation] into the circumstances surrounding an injury to a third party from an alleged criminal offence committed by a former police officer"; and (2) "to conduct an investigation into the circumstances surrounding an injury to a third party from a criminal offence alleged to have occurred prior to 1990".

9 The Peel Regional Police Association and the Police Association of Ontario intervened in support of the PRP's jurisdictional claim.² Various legal clinics and the Canadian Civil Liberties Association also intervened; however, they supported the SIU's position that it has jurisdiction over the complaint.

(2) Application Judge's Decision

10 The application judge held that the SIU has jurisdiction under s. 113(5) of the Act to investigate alleged criminal offences committed by persons who were serving police officers at the time of the alleged offences. He also held that the Act applies retrospectively to afford the SIU jurisdiction to investigate alleged criminal offences committed by police officers prior to the creation of the SIU in 1990.

11 With respect to the SIU's jurisdiction over complaints involving former police officers, the application judge held, at para. 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.

12 The application judge recognized that the issue whether the SIU has jurisdiction to investigate alleged pre-1990 criminal offences committed by police officers engages the question of the retrospective application of s. 113(5) of the Act. He expressly adverted to the well-established presumption against the retrospective application of legislation. He held, however, that two exceptions to the presumption - the "procedural rights exception" and the "public protection exception" - apply in this case to afford the SIU jurisdiction over the complaint.

13 More specifically, the application judge held that s. 113(5) of the Act affects only procedural, rather than substantive, rights of police officers whose alleged conduct is the subject of a proposed investigation by the SIU. He additionally held that the Act is designed to provide a public benefit - independent oversight of police conduct - without any corresponding detriment for police officers whose conduct is the subject of an investigation under s. 113(5). As a result, in his view, both the procedural rights and the public protection exceptions to the presumption against the retrospectivity of legislation apply to furnish the SIU with authority to investigate the complaint.

14 The application judge expressed his overall conclusion, at para. 110, in this fashion:

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 [*sic*] or displaced by the procedural rights and public protection exceptions to the presumption.

15 Accordingly, by judgment dated May 3, 2011, the application judge dismissed the application and awarded costs to the SIU in the amount of \$25,000.

16 The PRP appeals both aspects of the application judge's ruling.

II. Legislative Framework

17 Section 113 of the Act and the SIU Regulation provide the legislative framework governing SIU investigations and the conduct and duties of police officers in respect of SIU investigations. The full text of s. 113 is set out in Appendix A. In addition, s. 2(1) of the Act contains the following pertinent definitions:

"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*;

...

"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;

18 Sections 113(1) to (4) of the Act establish the SIU and provide for its administrative framework. Section 113(5) confers investigative powers on the director of the SIU and his or her delegates. Section 113(6) restricts the class of SIU investigators who may participate in an SIU investigation. Finally, ss. 113(7) to (10) impose certain duties on the director and his or her delegates - including the duty to cause informations to be laid against police officers in certain circumstances (s.113(7)) - and corresponding duties on members of police forces and appointed officials concerning the conduct of SIU investigations.

19 Recently, in *Schaeffer v. Ontario (Provincial Police)*, 2011 ONCA 716, 107 O.R. (3d) 721, at para. 6, leave to appeal sought, [2012] S.C.C.A. No. 6, Sharpe J.A. of this court provided this succinct overview of the statutory scheme regarding the SIU:

The SIU consists of a director, who cannot be a police officer or a former police officer, and investigators, who cannot be current police officers [ss. 113(2) to (3.1)]. Under s. 113(5) of the [Act], the director is empowered to "cause investigations to be conducted into the circumstances of serious injuries and deaths that may have resulted from criminal offences committed by police officers." The director has, under s. 113(8), the duty to report the results of investigations to the Attorney General and to lay informations against police officers if there are reasonable grounds to do so, and to refer them to the Crown Attorney for prosecution under s. 113(7). Police officers are also directed by s. 113(9) to "co-operate fully with the members of the [SIU] in the conduct of investigations."

20 As Sharpe J.A. also noted in *Schaeffer*, at para. 7, the SIU Regulation "provides further guidance in the application of s. 113 of the [Act]". Under s. 1(1) of the SIU Regulation, a "subject officer" is defined as "a police officer whose conduct appears, in the opinion of the SIU director, to have caused the death or serious injury under investigation". A "witness officer" is defined, in turn, as "a police officer who, in the opinion of the SIU director, is involved in the incident under investigation but is not a subject officer".

21 I will refer to other relevant provisions of the SIU Regulation in the context of the issues to which they relate. At this point, however, I note that s. 3 of the SIU Regulation requires a chief of police to notify the SIU "immediately" of an incident involving his police officers that "may reasonably be considered to fall within the investigative mandate of the SIU". Under s. 5, the SIU is "the lead investigator" in the investigation of an incident and has "priority over any police force in the investigation". Nonetheless, a chief of police is required to also cause an investigation to be conducted "forthwith" into any incident of which the SIU is notified, subject to "the SIU's lead role in investigating the incident", for the purpose of reviewing "the policies of or services provided by the police force and the conduct of its police officers" (ss. 11(1) and (2)).

III. Issues

22 Two issues are raised in this appeal:

- (1) Does the SIU have jurisdiction under s. 113(5) of the Act to investigate an alleged criminal offence committed by a police officer where the officer was a serving police officer at the time of the alleged offence, but had resigned or retired by the time of the complaint of wrongdoing?
- (2) Does the SIU have jurisdiction under s. 113(5) of the Act to investigate an alleged criminal offence committed by a police officer where the alleged offence occurred prior to the creation of the SIU in 1990?

IV. Analysis

(A) SIU's Jurisdiction to Investigate Alleged Criminal Offences Committed by Former Police Officers

23 The PRP argues that the SIU's investigative jurisdiction under s. 113 of the Act is confined to investigations of alleged criminal offences causing serious injuries and death committed by persons who were serving police officers *at the time of the investigation*. The PRP contends that s. 113(5) contemplates SIU investigations of the actions of "police officers" in certain circumstances and that a former police officer is not a "police officer" for the purpose of Part VII of the Act.

24 The application judge rejected this argument, holding that the language of s. 113(5), when read in its grammatical and ordinary sense, in the context of the entire legislative regime governing the SIU and the purpose of the Act, grants the SIU jurisdiction to investigate alleged criminal offences causing serious injuries and death committed by persons who were serving police officers *at the time of the conduct at issue*. He stated, at para. 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.

25 For the following reasons, I agree with the application judge's interpretation of the ambit of s. 113(5) of the Act.

(1) Principles of Statutory Interpretation

26 The modern Canadian approach to statutory interpretation requires that the words of legislation 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": E.A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, as cited in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26. Under this approach, textual considerations must be read in concert with legislative intent and established legal norms. In addition, context plays a critical role in the interpretive pro-

cess: *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248, at para. 34 (*Re s. 83.28*); *Bell ExpressVu*, at para. 27. Under the requisite contextual analysis, the law presumes that constituent elements of a legislative scheme are meant to work together logically and teleologically, each contributing to the achievement of the legislature's goal. This "presumption of coherence", sometimes called the "presumption against internal conflict", seeks to avoid contradictions or inconsistencies among parts of the same body of legislation: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed., (LexisNexis Canada Inc: 2008), at p. 223.

27 In Ontario, the legislature has provided additional guidance regarding the construction of legislation. Section 10 of the former *Interpretation Act*, R.S.O. 1990, c. I. 11 directed that every statute is deemed to be remedial and is to 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". Section 64 of the *Legislation Act, 2006*, S.O. 2006, c. 21, Schedule F, directs a similar interpretive approach to legislation, "as best ensures the attainment of [the legislation's] objects".

(2) Interpretation of Section 113(5)

28 The PRP attacks the application judge's interpretation of s. 113(5) of the Act on several grounds. It argues, principally, that his construction of s. 113(5) is contrary to the plain language of that provision and, further, to the scheme and purpose of the legislative regime governing the SIU. I will address these arguments in turn.

Language of Section 113(5)

29 The application judge reviewed in detail the events leading to the creation of the SIU, the history of Part VII of the Act and the SIU Regulation, and the parties' positions concerning the SIU's statutory mandate. He was also alert to the applicable principles of statutory interpretation, described above. Against this backdrop, he commenced his analysis by considering the plain meaning of the words of s. 113(5). In approaching this task, he was mindful that the words used in s. 113(5) must be read in context and in accordance with their grammatical and ordinary sense.

30 The application judge concluded that there is a clear temporal connection between the alleged criminal offences that the SIU is authorized to investigate by reason of s. 113(5), and the status of the alleged perpetrator of the offence. He reasoned, at para. 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. [Emphasis in original.]

31 I agree. The grammatical and ordinary sense of the words used in s. 113(5) indicates that the SIU's investigative authority relates to the conduct of persons who were police officers at the time an alleged criminal offence was committed. For convenience, I again set out the operative words of s. 113(5):

The director may ... cause investigations to be conducted into the circumstances of serious injuries and deaths that may have resulted *from criminal offences committed by police officers*. [Emphasis added.]

32 This language strongly suggests that the SIU's investigative jurisdiction is triggered if an alleged criminal offence that may have caused serious injuries and death is committed by a person who, at the time of the commission of the offence, was a serving police officer. The operative phrase in s. 113(5) is "committed by police officers". I agree with the SIU and supporting interveners' submission that the noun "police officers" in this phrase is the direct object of the verb "committed". The object does not modify the verb temporally. Rather, the verb is modified by reference to the suspect's status at the time of the offence. Thus, the temporal focus of s. 113(5) is the time of the conduct said to constitute a criminal offence. It follows that the person whose alleged criminal conduct may be investigated is a person who, at the time of the alleged conduct, was a serving police officer. Nothing in the language of s. 113(5) suggests that the SIU's investigative jurisdiction depends on the employment status of the involved police officer at the time of the investigation.

Purpose of Part VII of the Act and the SIU Regulation

33 The application judge concluded, at para. 91:

[R]eading 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.

Again, I agree.

34 This approach to the interpretation of the legislation governing SIU investigations was cited with approval by Sharpe J.A., writing for a unanimous court, in *Schaeffer*, at para. 58. In addition, Sharpe J.A. stated, at para. 58, that the purpose of the legislative regime relating to SIU investigations is "to ensure the independent and accountable investigation of the use of police force causing death or serious injury" and, as well, "to foster confidence in such investigations and in the integrity of the police". He subsequently reiterated, at para. 76:

[T]he overarching purpose of the legislation [is] the preservation and promotion of independence, account-ability, and public confidence in the investigation of police use of deadly force.

35 Justice Sharpe, at para. 58, also accepted the following description of the purpose underlying Part VII the Act and the SIU Regulation, set out by the SIU in its factum in *Schaeffer*:

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

36 I also endorse and adopt this description of the legislative aim of Part VII of the Act and the SIU Regulation. It fully accords with the overall purpose of the Act as described by this court in *Ontario (Civilian Commission on Police Services) v. Browne* (2001), 56 O.R. (3d) 673. As noted in *Browne*, at para. 66, the purpose of the Act is declared in a series of principles set out in s. 1. These include:

Police services shall be provided throughout Ontario in accordance with the following principles:

1. The need to ensure the safety and security of all persons and property in Ontario.
2. The importance of safeguarding the fundamental rights guaranteed by the *Canadian Charter of Rights and Freedoms* and the *Human Rights Code*.
- ...
4. The importance of respect for victims of crime and understanding of their needs.
5. The need for sensitivity to the pluralistic, multiracial and multicultural character of Ontario society.

37 In this context, *Browne* holds, at para. 67: "The legislative purpose [of the Act] is demonstrably to increase public confidence in the provision of police services, including the processing of public complaints."

38 This interpretation of the purpose of Part VII of the Act and the SIU Regulation is also consistent with the history of the legislative scheme governing the SIU, as revealed in the numerous task force reports, studies and reviews that precipitated the creation of the SIU or thereafter examined its mandate and relationship with police agencies in Ontario.

39 I note, especially, that Part VII of the Act was the legislated response to recommendations made by Clare Lewis in the *Ontario Report of the Race Relations and Policing Task Force, 1989*, established in the aftermath of two fatal police shootings in 1988. That report, at pp. 146 to 147, documented public concern that police investigations into fatal police shootings lacked objectivity since they amounted to "the police investigating the police". I think it self-evident, as the SIU submits, that the Task Force's use of the phrase "the police investigating the police" refers to police investigating police conduct.

40 The Task Force concluded, at pp. 147 to 148, that internal police investigations of such incidents no longer satisfied public demand for impartiality and the maintenance of public confidence in police investigations. It therefore recommended, and the Ontario government subsequently accepted, that the process for investigating police shootings must involve independent civilian oversight. The creation of the SIU soon followed.

Absence of Express Reference to "Former Officers"

41 The PRP argues, in effect, that the SIU's investigative mandate can only extend to the conduct of former police officers by express language. In support of this argument, the PRP points out that neither the definition of "police officer" under s. 2, set out above, nor s. 113(5) of the Act ex-

pressly refer to "former police officers", while other provisions of the Act do differentiate between serving police officers and former police officers. The PRP submits that as several provisions of the Act draw this distinction, and s. 113(5) does not, the legislature did not intend that s. 113(5) authorize SIU investigations of alleged crimes involving police officers who resign or retire before any complaint of wrongdoing. This interpretive conclusion, the PRP says, is buttressed by the provisions of the SIU Regulation which, it maintains, apply only if a "subject officer" refers to a person who is a serving police officer at the time of the initiation of an SIU investigation.

42 In my opinion, there are several critical flaws in this argument.

43 It is true that some provisions of the Act specifically refer to "police officers" in contrast to "former police officers": see ss. 26.1(2) and 94(1) of the Act. In fact, this distinction is drawn in some parts of s. 113 itself. Section 113(3) states:

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. [Emphasis added.]

See also ss. 113(3.1).

44 However, the references to "former police officers" relied on by the PRP are necessary given the particular temporal focus of the legislative provisions at issue and the mischief at which they are directed. As I will explain, the same cannot be said of s. 113(5).

45 Section 113(3) illustrates this point. This provision is phrased in the present tense. It provides that a person "who *is* a police officer or former police officer" cannot be appointed as director of the SIU and persons "who *are* police officers" cannot be appointed as SIU investigators (emphasis added). Plainly, therefore, the prohibitions in s. 113(3) are concerned with the current status of the officer in question.

46 This is understandable since the object of s. 113(3) is to avoid the actual or apparent conflict of interest that would arise if the director of the SIU is also a serving or former police officer or if an SIU investigator is also a serving police officer. That the legislature intended to protect against such conflicts of interest is reinforced by s. 113(6) of the Act, which prohibits an SIU investigator from participating in an SIU investigation relating to members of a police force of which he or she was previously a member.

47 In my view, the aim of these provisions, in accordance with the purpose of the Act generally and s. 113 in particular, is to constrain the SIU's investigative powers under s. 113(5) to the extent necessary to prevent actual or perceived conflicts of interest in the investigation of serious police wrongdoing. To conclude otherwise would be to sanction, in effect, "the police investigating the police", thereby defeating the legislative purpose of Part VII of the Act.

48 Section 113 seeks to ensure that the SIU's power of investigation under s. 113(5) is not exercised by persons - the director and SIU investigators - who have the very conflict of interest that would exist here if the PRP were viewed as the agency vested with lead responsibility for investigating the conduct of one of its former members. This is the type of conflict of interest that Part VII of the Act specifically seeks to avoid. It follows that the express inclusion of the phrase "former police officer" in s. 113(3) is necessary to achieve the legislature's objective.

49 In contrast, s. 113(5) is cast in both the past and present tenses. Specific mention of "former police officers" is therefore not required to achieve its intended legislative purpose since the temporal focus of the provision is on the officer's status at the time of his or her alleged wrongdoing, not at the time of the disclosure or investigation of that wrongdoing.

50 I do not regard the provisions of the SIU Regulation as undercutting this conclusion. Unlike some other regulations under the Act,³ the SIU Regulation does not expressly distinguish between serving and former police officers. Nonetheless, on a fair reading of the SIU Regulation, I accept that many of the obligations imposed by it can only have effect when applied to serving police officers, rather than persons who were once police officers but who, by reason of retirement or resignation, are civilians at the time of an SIU investigation.⁴

51 That said, the provisions of the SIU Regulation must be understood in the context of the mischief at which they are aimed. The SIU Regulation is concerned with the potential for delay, disruption, collusion and, generally, the attempted frustration of an SIU investigation by police officers. To meet this potential mischief, the legislature designed particular regulatory measures in the form of specified duties and obligations attaching to serving chiefs of police and police officers regarding SIU investigations.

52 Once again, the relevant legislative history is instructive. The SIU Regulation and its predecessor were enacted in 1999 in the aftermath of various reviews of police oversight in Ontario in the 1990s, including that of the SIU.⁵ These reviews highlighted, in essence, police officers' refusal to co-operate with the SIU. Since the root causes of this on-going opposition to the SIU's role were systemic in nature and did not implicate the conduct or attitudes of former police officers in respect of the SIU, no need for regulatory controls concerning former police officers was identified. The recommendations for reform made in these reviews led to the promulgation of the SIU Regulation.

53 Thus, the events that fuelled the introduction of the SIU Regulation confirm its focus on the SIU-related obligations of persons who, at the time of a complaint of serious police wrongdoing, are positioned to provide notice to the SIU of the incident and to produce or protect evidence potentially relevant to an SIU investigation of the incident - in other words, serving chiefs of police or police officers.

54 The enforcement provisions of O. Reg. 268/10 further support the conclusion that the SIU Regulation itself is not directed at former police officers. By operation of s. 30(1) of O. Reg. 268/10 and s. 2(1)(c)(ii) of the *Code of Conduct* annexed to it, non-compliance with the SIU Regulation by any chief of police or other police officer constitutes misconduct and, hence, a disciplinary offence for the purpose of the complaints and disciplinary processes set out in Part V of the Act. Continued membership in a police force is a necessary pre-condition to the imposition of disciplinary sanctions under Part V. See for example, ss. 76(1) and 90(1) of the Act.

55 I note one additional difficulty with the PRP's suggested interpretation of the SIU's statutory mandate. As the application judge aptly observed, under the PRP's urged interpretation of s. 113(5), an ongoing SIU criminal investigation could be ground to a halt by the simple act of the resignation or retirement or the discharge of the police officer whose alleged conduct is the subject of the investigation. Bluntly put, this would mean that the SIU's investigative jurisdiction would be subject to the unilateral and potentially capricious control of the affected police force and the suspect officer. This would undermine the precise purpose of Part VII and the Act as a whole including, especially, public confidence in the integrity of investigations into alleged serious police wrongdoing. In my

view, this interpretive result should not be countenanced absent a clear indication of such intention by the legislature.

Interplay Between Sections 113(5) and (7)

56 The PRP also argues that an interpretation of s. 113(5) that affords the SIU investigative jurisdiction over the conduct of former police officers creates a conflict with s. 113(7) of the Act. The latter provision states:

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.

57 The PRP submits that, on a plain reading of s. 113(7), the person against whom an information may be laid "must" be a serving police officer at the time the information is laid. Otherwise, it contends, the words "against police officers" in s. 113(7) would be superfluous. I disagree.

58 The application judge considered, and rejected, this argument. He reasoned in part, at para. 87, that the reference to "police officers" in s. 113(7) logically refers to police officers whose conduct is subject to investigation under s. 113(5).

59 This holding is unassailable. Section 113(7) authorizes the SIU to lay informations "against police officers" in connection with "*the matters investigated*" (emphasis added). The use of the phrase "the matters investigated" establishes a clear link between the investigations conducted by the SIU under s. 113(5) and the SIU's duty under s. 113(7) to lay informations based on the results of its investigations.

60 I recognize that this connection between ss. 113(7) and (5) of the Act is not dispositive - it does not resolve the question of the meaning of "police officers" in both provisions. However, there is nothing that grammatically or textually requires the term "police officers" in s. 113(7) to be interpreted more narrowly than the same phrase as it appears in s. 113(5), so as to exclude the possibility of laying an information under s. 113(7) against a former police officer in a proper case. Indeed, a contrary conclusion would offend the interpretive principle of the presumption of coherence, described above. Under that presumption, Part VII of the Act must be read as a whole and in a manner that seeks to avoid inconsistencies or contradictions between its constituent provisions: see Sullivan, *supra*, at p. 223. In *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616, at p. 676, Dickson J. (as he then was) put the proposition this way:

We must give the sections a reasonable construction and try to make sense and not nonsense, of the words. We should pay Parliament the respect of not assuming readily that it has enacted legislative inconsistencies or absurdities.

61 I see no operational conflict between ss. 113(5) and (7) on the interpretation of those provisions that I favour. On the contrary, I regard them as complementary. The inclusion of the words "against police officers" in s. 113(7) simply ensures that the SIU's duty under s. 113(7) does not apply to non-police officers, that is, to persons who are not and have never been police officers. Properly read, s. 113(7) contemplates that, where reasonable grounds exist to do so, informations shall be laid by the director of the SIU, and then referred to the Crown Attorney for prosecution, against those persons who were serving police officers at the time of the commission of the alleged criminal offences investigated by the SIU.

62 This is the logical law enforcement outcome of a criminal investigation under s. 113(5) that yields evidence of criminal wrongdoing. It is also consistent with s. 113(8) of the Act, which requires the director of the SIU to report the results of SIU investigations to the Attorney General. For criminal law enforcement purposes, it matters not whether the alleged crime was committed by a serving or a former police officer.

Professional Responsibility Authorities

63 In support of the construction of s. 113(5) for which it contends, the PRP also relies on various professional responsibility cases, in which statutory or voluntary disciplinary or oversight bodies have been held to have no jurisdiction to investigate or regulate the conduct of former members of the profession or group at issue, absent specific provision for such jurisdiction in their enabling statutes.

64 These authorities do not assist the PRP in this case. In each of the cited cases, the jurisdiction of the relevant statutory body related to its "membership", thus importing a requirement of current membership status to anchor investigative or regulatory jurisdiction. In *Maurice v. Priel*, [1989] 1 S.C.R. 1023, for example, it was held that the disciplinary jurisdiction of the Law Society of Saskatchewan did not extend to a judge, whose conduct while a practising solicitor was impugned, because: (1) the Law Society's disciplinary powers applied only to "members of the society"; (2) the membership consisted of barristers and solicitors (and persons admitted to the society as students); and, (3) by operation of law, the person in question was not a barrister and solicitor while serving as a judge.

65 Similarly, in *Colvin v. Canada (Royal Canadian Mounted Police - RCMP)*, [1994] 3 F.C. 562, leave to appeal refused, [1994] S.C.C.A. No. 387, the Federal Court of Appeal held that the RCMP Public Complaints Commission had no jurisdiction to entertain a public complaint concerning the alleged conduct of a person who had retired from the RCMP before the initiation of the complaint. Under the relevant legislation: (1) complaints could be made regarding the conduct of "members" of the RCMP; (2) the statutory definition of "member" expressly *excluded* persons who had been dismissed or discharged from the RCMP (that is, former members); and (3) the entirety of the public complaints process under the relevant statute contemplated that, at the time of a conduct complaint, the Commissioner of the RCMP was in a position of authority over the person whose conduct was complained of. These provisions necessarily meant that the RCMP Public Complaints Commission had no investigative jurisdiction concerning the conduct of former members of the RCMP. Further, the RCMP Commissioner - who played a vital role under the statutory public complaints scheme - had no authority over, and no legal or enforceable duty concerning, a person who had ceased to be a member of the RCMP. Thus, the particular oversight scheme in question, coupled with the applicable statutory definition of "membership", restricted the investigative jurisdiction of the RCMP Public Complaints Commission.

66 These and similar authorities cited by the PRP illustrate that the scope of statutory investigative or regulatory jurisdiction is legislation-specific, depending in each instance on the language of the jurisdiction-conferring statute, when construed in accordance with the applicable principles of statutory construction.

67 Examples abound of various professional responsibility statutes that expressly confer jurisdiction on disciplinary or regulatory bodies over former members of the profession or association at issue.⁶ These statutes are concerned with the investigative jurisdiction of disciplinary or regulatory

bodies, not with jurisdiction to conduct criminal investigations. Consequently, unlike Part VII of the Act, they provide expressly for jurisdiction over former members, since such jurisdiction is grounded on the membership status of the person whose conduct is to be investigated or subject to regulation. Further, professional responsibility statutes have specific and distinct objects, as well as mechanisms for achieving them. In the end, they provide little interpretive guidance outside the investigative or regulatory domain to which they relate.

68 In this case, unlike the provisions of the applicable statute in *Colvin*, nothing in the definitions of "police officer" or "member of a police force" under s. 2 of the Act, or any provision of the Act that specifically adverts to "former police officers", answers the question of when a police officer who is alleged to have committed a criminal offence must be a serving police officer to trigger the SIU's jurisdiction under s. 113(5). Under the Act, it is not a question whether such an offence will be investigated but, rather, which investigative body has lead jurisdiction to do so. All interpretive roads, therefore, lead back to the words and purpose of s. 113(5), the scheme of Part VII, and the purpose of Part VII and the Act as a whole, as I have discussed.

Absence of Prejudice

69 I make one final observation. In my view, it is telling that the PRP could point to no public policy reason why the SIU's investigative jurisdiction should be narrowly interpreted so as to prevent SIU investigations of alleged serious wrongdoing by former police officers. Nor has the PRP adduced any evidence of prejudice to a former police officer whose conduct is the subject of an SIU investigation. I again emphasize that under the scheme of s. 113, it is not a question *whether* but, rather, *by whom* alleged serious wrongdoing by police officers will be investigated.

(3) Conclusion

70 In light of all these factors, I conclude that an interpretation of s. 113(5) of the Act that affords the SIU jurisdiction to investigate alleged criminal acts committed by persons who were serving police officers at the time of the acts in question is consistent with the language of s. 113(5). Further, it is an interpretation that is harmonious with and advances the intent of the legislature and the scheme and object of Part VII of the Act and the Act as a whole.

(B) SIU's Jurisdiction to Investigate Alleged Pre-1990 Criminal Offences Committed by Police Officers

71 The PRP argues that the procedural rights and public protection exceptions to the presumption against the retrospective application of legislation do not apply to the legislative regime applicable to the SIU. Consequently, the PRP submits, the SIU has no jurisdiction to investigate an alleged pre-1990 criminal offence committed by a police officer. I would not accede to this argument.

72 I begin with the procedural rights exception to the presumption against the retrospectivity of legislation. At common law, procedural legislation is presumed to apply immediately, to both pending and future facts. As Sullivan, *supra*, discusses at p. 696, this "presumption of immediate application" has been characterized, variously, in these terms: (1) there is no vested right in procedure; (2) the effect of a procedural change is deemed beneficial for all; (3) procedural provisions are an exception to the presumption against retrospectivity; and (4) procedural provisions are ordinarily intended to have an immediate effect. Sullivan also notes, at p. 696, the following early formulation of the rule in *Wright v. Hale* (1860), 6 H. & N. 227, at p. 232:

[W]here the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions, whether commenced before or after the passing of the Act.

73 Canadian courts have recognized that the determination of whether a legislative provision is "purely" procedural requires examination of the substance of the provision and its practical impact on the parties. In *Martin v. Perrie*, [1986] 1 S.C.R. 41, at p. 48, the Supreme Court of Canada cited with approval *Yew Bon Tew v. Kenderaan Bas Mara*, [1983] 1 A.C. 533 (P.C.), at p. 562 for the principle that the substance of a provision, rather than the label assigned to it, is controlling of whether it is procedural in nature. The central question is whether the provision, if applied retrospectively, would impair existing rights and obligations. If so, the provision is not purely procedural and cannot be given retrospective effect.

74 *Martin* also confirms that the intention of the legislature to interfere with vested rights and obligations must be express. The Supreme Court explained, at pp. 49 to 50, citing *Spooner Oils Ltd. v. Turner Valley Gas Conservation*, [1933] S.C.R. 629, at p. 638:

A legislative enactment is not to be read as prejudicially affecting accrued rights, or "an existing status" ... unless the language in which it is expressed requires such a construction ... the underlying assumption being that, when Parliament intends prejudicially to affect such rights or such a status, it declares its intention expressly, unless, at all events, that intention is plainly manifested by unavoidable inference. [Citations omitted.]

75 More recently, in *Re s. 83.28, supra*, the Supreme Court of Canada considered whether s. 83.28 of the *Criminal Code* (the *Code*), introduced as a result of the enactment of the *Anti-terrorism Act*, S.C. 2001, c. 41, applied retrospectively. Section 83.28 authorized the obtaining, on *ex parte* application, of an order for a judicial investigative hearing concerning suspected terrorism offences.⁷ The issue was whether s. 83.28 applied in circumstances where the terrorism offences at issue were committed before the *Anti-terrorism Act* came into force.

76 In *Re s. 83.28*, the majority cautions, at para. 56, that an assessment whether a provision is or is not procedural must be determined in the circumstances of each case. Further, "for a provision to be regarded as procedural, it must be exclusively so" [citations omitted]. The majority concluded, at paras. 56 and 60 to 61, that s. 83.28 of the *Code* was purely procedural in nature since it merely provided: "a mechanism for the gathering of information and evidence in the ongoing investigation of past, present and future offences" and "outline[d] the process by which judicial investigative hearings are to be carried out."

77 The issue in this case, therefore, is whether s. 113(5) of the Act is procedural, rather than substantive, in nature and effect. In holding that s. 113(5) affects procedural and not substantive rights of police officers whose conduct is the subject of a proposed SIU investigation, the application judge reasoned, at para. 98, that: (1) neither the police officer in question nor a complainant have "a substantive right as to who conducts an investigation into any complaint"; and (2) the obligations imposed by the SIU Regulation on witness officers and chiefs of police (there being no compulsory obligations imposed thereunder on "subject officers") were procedural in nature.

78 For four reasons, I agree with the application judge's analysis and conclusion. First, I accept that, by its terms, s. 113(5) has retrospective effect. As the application judge stated, at para. 95, s. 113(5) attaches consequences (investigations by the SIU rather than by the police) to events (the conduct giving rise to the alleged criminal offence) that occurred before the creation of the SIU in 1990. The presumption against the retrospectivity of legislation is therefore engaged. The question is whether the presumption is displaced by the procedural rights exception.

79 Second, both before and after the creation of the SIU, alleged criminal acts by police officers were subject to criminal investigation. The effect of the SIU legislative regime is to transfer *lead* responsibility for those investigations in limited circumstances (where the alleged offences may have caused serious injuries and death) from one organization (the involved police force) to another (the SIU).

80 Moreover, Part VII of the Act does not expose police officers in Ontario, for the first time, to external or public review of their conduct. As the PRP emphasizes for its own purposes, a multi-layered scheme of police oversight, encompassing both internal and external review processes, exists in Ontario. This did not change with the establishment of the SIU. Rather, to paraphrase the words of the Supreme Court in *Re s. 83.28*, above-quoted, s. 113(5) of the Act simply provides a different, alternative mechanism for the gathering of information and evidence in investigations of alleged criminal offences said to involve police officers. No police officer has a vested right in a particular form of procedure for the investigation of his or her alleged criminal conduct.

81 Third, I am persuaded that neither the Act nor the SIU Regulation interferes with the substantive rights of police officers whose conduct is proposed to be investigated by the SIU.

82 The Act and the SIU Regulation do not impose any duties or obligations on "subject officers" that do not already apply to them by operation of law in police-conducted investigations of alleged criminal offences. I note, in particular, that while s. 113(9) of the Act requires a police officer whose conduct is being investigated by the SIU to co-operate fully, an investigating police force is authorized under the police *Code of Conduct*, appended to O. Reg. 268/10, to require co-operation and to obtain a statement from a police officer during an investigation. The *Code of Conduct* also imposes obligations on police officers regarding note-taking and co-operation with investigators.

83 Accordingly, many of the provisions of the SIU legislative regime, said by the PRP to infringe a police officer's rights, mirror a subject officer's existing rights and obligations in a police-conducted criminal investigation. Unlike witness officers, subject officers have no obligation under the SIU Regulation to meet with the SIU, to answer SIU investigators' questions or to produce their notes on the incident under investigation at the request of the SIU: see SIU Regulation, ss. 8 and 9. In fact, read as a whole, the SIU Regulation reveals a nuanced legislative approach that is designed to protect against any abrogation of a subject officer's right against self-incrimination, avoiding, for example, the compulsory provision of inculpatory information by a subject officer.

84 Finally, the PRP relies heavily on the decision of the Federal Court of Appeal in *Royal Canadian Mounted Police Act (Can.) Re*, [1991] 1 F.C. 529, leave to appeal refused, [1991] S.C.C.A. No. 57 (*Re RCMP*), in support of its argument that the SIU legislative regime affects the substantive rights of involved police officers.

85 In my view, this reliance is misplaced. I see no parallel between the decision in *Re RCMP* and the retrospectivity issue before this court. As the application judge stated, at paras. 100 to 101, the public complaints process under scrutiny in *Re RCMP* was fundamentally different, and more

onerous and comprehensive, than the SIU investigative process envisaged by the Act and the SIU Regulation.

86 Furthermore, unlike this case, the oversight process at issue in *Re RCMP* represented an inaugural scheme for public review - by civilians - of the conduct of members of the RCMP. As I have explained, neither the establishment nor the investigative mandate of the SIU occasioned such a sea change in review of police conduct in Ontario. Police officers whose conduct is subject to investigation by the SIU continue to enjoy all the rights and protections previously available to them at law in a police-conducted criminal investigation. In addition, the criminality of the acts in question continues to be determined by reference to the same laws and legal norms as apply in such investigations. The only difference, as the SIU stresses, is the identity of the investigating body.

87 I therefore conclude that the application judge did not err in holding that the procedural rights exception to the presumption against the retrospectivity of legislation applies in this case. In light of this conclusion, it is unnecessary to address his additional finding that the public protection exception to the presumption also applies to anchor the SIU's investigative jurisdiction over the complaint.

V. Disposition

88 For the reasons given, I would dismiss the appeal. I would award the respondent SIU Director his costs of the appeal, fixed as agreed by counsel in the amount of \$11,500, inclusive of disbursements and all applicable taxes. As also agreed by the parties, I would award no costs against or in favour of any intervener.

E.A. CRONK J.A.

D.R. O'CONNOR A.C.J.O.:-- I agree.

J.I. LASKIN J.A.:-- I agree.

* * * * *

Appendix A

PART VII

SPECIAL INVESTIGATIONS

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*. R.S.O. 1990, c. P. 15, s. 113(2).

(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.

(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.

cp/lne/qlacx/qlhcs/qlced

1 I refer to the SIU and its director, collectively, as the SIU in these reasons.

2 I refer to the Chief of the PRP and the PRP and supporting interveners, collectively, as the PRP in these reasons.

3 For example, former O. Reg. 554/91, "*Political Activities of Municipal Police Officers*", expressly provided for former municipal police officers, who once held elected office, to re-apply for appointment to a police force in certain circumstances: ss. 7(4) and (5). Virtually identical language now appears in s. 17(4) of O. Reg. 268/10.

4 Section 6(1) of the SIU Regulation, for example, obliges a chief of police to segregate "all the police officers involved in the incident" from each other, while s. 6(2) prohibits "a police officer involved in the incident" from communicating with other police officers concerning their involvement in the incident, until the completion of SIU interviews. These and other provisions of the SIU Regulation can only be enforced effectively as against serving police officers.

5 See for example, *Consultation Report of the Honourable George W. Adams, Q.C. to the Attorney General and Solicitor General Concerning Police Cooperation with the Special Investigations Unit*, (Hon. George W. Adams, Q.C., May 14, 1998).

6 For example, the *Veterinarians Act*, R.S.O. 1990, c. V.3, s. 24(1); the *Registered Insurance Brokers Act*, R.S.O. 1990, c. R. 19, s. 24(2); the *Chartered Accountants Act, 2010*, S.O. 2010, c. 6, s. 19(1); the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18, Sch. 2, s. 14.

7 Pursuant to s. 83.32 of the Code, s. 83.28 ceased to apply as of March 1, 2007.

---- End of Request ----

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