

CITATION: Schaeffer v. Wood, 2011 ONCA 716

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COURT OF APPEAL FOR ONTARIO

Sharpe, Armstrong and Rouleau JJ.A.

BETWEEN

Ruth Schaeffer, Evelyn Minty and Diane Pinder

Applicants (Appellants)

and

Police Constable Kris Wood, Acting Sergeant Mark Pullbrook,
Police Constable Graham Seguin, Julian Fantino, Commissioner of the
Ontario Provincial Police, Ian Scott, Director of the Special
Investigations Unit and Her Majesty the Queen in Right of Ontario
(Ministry of Community Safety and Correctional Services)

Respondents (Respondents)

Julian N. Falconer and Sunil S. Mathai, for the appellants

Marlys Edwardh and Jessica Orkin, for the Director of the Special Investigation Unit, Ian Scott

Ian Roland and Michael Fenrick, for Police Constable Chris Woods, Acting Sergeant Mark Pullbrook, Police Constable Graham Seguin

Christopher Diana, for Commissioner of the Ontario Provincial Police, Julian Fantino

Joseph J. Markson, for the intervener Ontario Association of Chiefs of Police

Wendy Wagner, for the intervener The Canadian Civil Liberties Association

David Humphrey, for the intervener Andrew McKay

David Butt, for the intervener Police Association of Ontario

Howard Krongold, for the intervener Criminal Lawyers' Association

Richard Macklin, for the intervener Urban Alliance on Race Relations

Heard: September 7 and 8, 2011

On appeal from the judgment of Justice W. Low, of the Superior Court of Justice dated June 23, 2010, with reasons reported at 2010 ONSC 3647.

Sharpe J.A.:

[1] The Special Investigations Unit (the "SIU") has a statutory mandate to conduct independent investigations into incidents involving the use of police force causing death or serious injury. This appeal arises from two separate fatal incidents involving the police. The applicants, family members of the two deceased, sought a declaratory judgment that, among other things, police officers who are involved in incidents attracting the attention of the SIU are not entitled to obtain legal assistance in the preparation of their notes regarding the incident.

[2] The application judge dismissed the application on the grounds that the applicants lacked standing to sue for declaratory relief and that the issues raised were moot and not justiciable. The appellants ask us to reverse that decision and to decide the application on its merits. The appellants' position is supported by the respondent, the Director of the SIU.

[3] The respondent police officers involved in the two incidents and the respondent Commissioner of the OPP argue that the application judge properly dismissed the application and that, in any event, subsequent amendments to the regulation governing SIU

investigations now render the appeal moot. They also argue that even if the application judge erred in dismissing the application on grounds of standing, justiciability and mootness, without a first instance judgment on the merits, this court lacks jurisdiction to rule on the substance of the application and that the matter should be returned to the Superior Court. The respondent officers also seek to appeal the application judge's costs order holding that although they were successful on the motion to strike the application, they should not be awarded costs.

[4] For the following reasons, I conclude that (i) the applicants have standing to sue; (ii) the issues raised are justiciable, not moot; and, (iii) it is appropriate for this court to rule on certain substantive issues. I would grant a declaration to the effect that police officers involved in an SIU investigation do not enjoy the right to have a lawyer vet their notes or to assist them in the preparation of their notes. Police officers do, however, have the right to obtain legal advice as to the nature of their rights and duties with respect to SIU investigations, provided that obtaining such advice does not impede the completion of their notes before the end of their tour of duty.

LEGISLATION

[5] I set out here, in summary form, the legislative framework for SIU investigations and attach as Appendix A the full text of the relevant legislation.

[6] The SIU and its mandate are established by the *Police Services Act* R.S.O. 1990, c. P.15, s. 113. 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. Under s. 113(5) of

the *PSA*, 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 information 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.”

[7] The Ontario *Conduct and Duties of Police Officers Respecting Investigations by the Special Investigations Unit*, O. Reg 267/10, as amended by O. Reg. 283/11 (“S.I.U. Regulation”), provides further guidance in the application of s. 113 of the *PSA*. According to s. 3 of the SIU Regulation, a chief of police is required to notify the SIU “immediately” of any incident involving his force “that may reasonably be considered to fall within the investigative mandate of the SIU.” The SIU is also “the lead investigator holding priority over any other police force in the investigation” (s. 5) and the chief of police is required to ensure that the scene of an incident is secured for the SIU investigators (s. 4).

[8] As the interpretation of the provisions relating to segregation of officers, right to counsel, interviews, note-making and the designation of subject and witness officers are central to this appeal, I set out those sections of the SIU Regulation in full here. I have italicized those provisions that were added subsequent to the two incidents giving rise to this appeal.

Segregation of police officers involved in incident

6. (1) The chief of police shall, to the extent that it is practicable, segregate all the police officers involved in the incident from each other until after the SIU has completed its interviews. O. Reg. 267/10, s. 6 (1).

(2) A police officer involved in the incident shall not communicate *directly or indirectly* with any other police officer involved in the incident concerning their involvement in the incident until after the SIU has completed its interviews. O. Reg. 267/10, s. 6 (2); O. Reg. 283/11, s. 1.

Right to counsel

7. (1) Subject to subsection (2), every police officer is entitled to consult with legal counsel or a representative of a police association and to have legal counsel or a representative of a police association present during his or her interview with the SIU. O. Reg. 267/10, s. 7 (1).

(2) Subsection (1) does not apply if, in the opinion of the SIU director, waiting for legal counsel or a representative of a police association would cause an unreasonable delay in the investigation. O. Reg. 267/10, s. 7 (2).

(3) *Witness officers may not be represented by the same legal counsel as subject officers.* O. Reg. 283/11, s. 2.

Interview of witness officers

8. (1) Subject to subsections (2) and (5) and section 10, immediately upon receiving a request for an interview by the SIU, and no later than 24 hours after the request if there are appropriate grounds for delay, a witness officer shall meet with the SIU and answer all its questions. O. Reg. 267/10, s. 8 (1).

(2) A request for an interview by the SIU must be made in person. O. Reg. 267/10, s. 8 (2).

(3) The SIU shall cause the interview to be recorded and shall give a copy of the record to the witness officer as soon as it is available. O. Reg. 267/10, s. 8 (3).

(4) The interview shall not be recorded by audiotape or videotape except with the consent of the witness officer. O. Reg. 267/10, s. 8 (4).

(5) The SIU director may request an interview take place beyond the time requirement as set out in subsection (1). O. Reg. 267/10, s. 8 (5).

Notes on incident

9. (1) A witness officer shall complete in full the notes on the incident in accordance with his or her duty and, subject to subsection (4) and section 10, shall provide the notes to the chief of police within 24 hours after a request for the notes is made by the SIU. O. Reg. 267/10, s. 9 (1).

(2) Subject to subsection (4) and section 10, the chief of police shall provide copies of a witness officer's notes to the SIU upon request, and no later than 24 hours after the request. O. Reg. 267/10, s. 9 (2).

(3) A subject officer shall complete in full the notes on the incident in accordance with his or her duty, but no member of the police force shall provide copies of the notes at the request of the SIU. O. Reg. 267/10, s. 9 (3).

(4) The SIU director may allow the chief of police to provide copies of the notes beyond the time requirement set out in subsection (2). O. Reg. 267/10, s. 9 (4).

(5) *The notes made pursuant to subsections (1) and (3) shall be completed by the end of the officer's tour of duty, except where excused by the chief of police.* O. Reg. 283/11, s. 3.

[9] "Subject" and "witness" officers are defined in s. 1:

"subject officer" means a police officer whose conduct appears, in the opinion of the SIU director, to have caused the death or serious injury under investigation; ("agent impliqué")

"witness officer" means a police officer who, in the opinion of the SIU director, is involved in the incident under investigation but is not a subject officer. ("agent témoin") O. Reg. 267/10, s. 1 (1).

[10] In accordance with s. 11(1) of the SIU Regulation, subject to the SIU's lead role in investigating the incident, the chief of police is also to conduct an investigation "to review the policies of or services provided by the police force and the conduct of its police officers."

FACTS

The Minty investigation

[11] On June 22, 2009, the respondent, Constable Graham Seguin, responded to a call concerning an alleged assault committed by Douglas Minty, a 59 year old developmentally disabled man. Minty then approached Seguin holding a knife. Seguin ordered Minty to drop the knife. Minty did not comply and continued to approach Seguin. Seguin fired five shots at Minty and Minty died shortly thereafter.

[12] Sergeant Michael Burton, Seguin's senior officer, and two other officers soon arrived. Burton advised all of the officers that they could be designated as witness officers by the SIU, that they should make no further notes until after they had spoken to legal counsel and that Ontario Provincial Police ("OPP") procedure required them to complete their notes before the end of their shift.

[13] The SIU arrived one hour and 23 minutes after the shooting. Seguin was designated as the subject officer and the others, including Burton, were designated as witness officers. Andrew MacKay, a lawyer frequently consulted by the police in relation to SIU investigations, acted as counsel for all of the officers.

[14] SIU Director, Ian Scott, reported to the Attorney General on the Minty incident on October 14, 2009. Scott's report stated that there were no reasonable grounds to believe that Seguin had committed a criminal offence in relation to the death of Minty. He indicated, however, that he would address certain issues and apparent breaches of the SIU Regulation with the OPP Commissioner, namely: (1) the delayed notification to the SIU of the incident (contrary to s. 3 of the SIU Regulation); (2) that one of the OPP officers had taken statements from material civilian witnesses (contrary to s. 5 of the SIU Regulation); and, (3) that Burton had instructed all witness officers not to write their notes until after they spoke to counsel, a counsel who acted for all clients and had a professional duty to share information among his clients (contrary to s. 6 of the SIU Regulation, which requires witness officers to be segregated.)

The Schaeffer investigation

[15] On June 24, 2009, Constable Kris Wood and Acting Sergeant Pullbrook were investigating a boat theft at Pickle Lake. Levi Schaeffer, a 32 year old man diagnosed with schizoaffective disorder, panic disorder and anti-social personality disorder, was camping in the area. Schaeffer had a knife. Wood and Pullbrook attempted to arrest Schaeffer and an altercation ensued. Constable Wood fired his gun twice at Schaeffer, killing him.

[16] Wood and Pullbrook were advised by their senior officer not to speak to each other about the incident, to contact their legal counsel and to delay making their notebook entries until they had consulted with counsel.

[17] Approximately five hours after the shooting, Wood consulted his lawyer, Andrew McKay. McKay asked Wood to prepare notes for him to review. McKay reviewed those notes, and, according to the officer's notes, McKay advised Wood that they were "excellent and to complete notebook." Wood completed his notes two days after the incident.

[18] Pullbrook also consulted McKay, speaking to him by telephone approximately six hours after the incident. McKay advised him not to complete his notebook but to provide McKay with notes of the incident. After receiving legal advice from McKay on the notes prepared for counsel to review, Pullbrook completed his notebook on June 26, 2009, two days after the incident.

[19] Wood and Pullbrook declined to produce their written communications with their lawyer to the SIU on grounds of solicitor-client privilege. However, Pullbrook told the SIU that McKay advised "that there were not significant differences in the confidential notes that were provided to counsel and the notes that were presented to the [SIU] investigators".

[20] SIU Director Scott reported the result of the investigation to the Attorney General on September 25, 2009, stating that there were no reasonable grounds to believe that Wood had committed a criminal offence. However, Scott expressed serious concerns over the manner in which Wood and Pullbrook had completed their notes. He stated that he could not "place sufficient reliance on the information provided" by the two officers for the following reasons:

This note writing process flies in the face of the two main indicators of reliability of notes: independence and contemporaneity. The notes do not represent an independent recitation of the material events. The first drafts have been ‘approved’ by an OPPA [Ontario Provincial Police Association] lawyer who represented all of the involved officers in this matter, a lawyer who has a professional obligation to share information among his clients when jointly retained by them. Nor are the notes the most contemporaneous ones – they were not written as soon as practicable and the first drafts remain in the custody of their lawyer. I am denied the opportunity to compare the first draft with the final entries. Accordingly, the only version of the material events are association lawyer approved notes. Due to their lack of independence and contemporaneity, I cannot rely upon these notes nor A/Sgt Pullbrook’s interview based upon them for the truth of their contents.

I have a statutory responsibility to conduct independent investigations and decide whether a police officer probably committed a criminal offence. In this most serious case, I have no information base I can rely upon. Because I cannot conclude what probably happened, I cannot form reasonable grounds that the subject officer in this matter committed a criminal offence.

[21] The OPP conducted two internal investigations of the Schaeffer incident. Chief Superintendent Ken Smith, Bureau Commander for the Professional Standards Bureau, concluded that Constable Wood had used appropriate force in shooting Schaeffer. Smith observed that while s. 7 of the SIU Regulation recognizes that officers involved in an SIU investigation enjoy the right to counsel, that right “does not negate the member’s responsibility as stated in Police Orders to complete their notes in respect of on duty activities prior to the end of shift or as authorized by their supervisor.” Smith also observed that supervisors should not “direct members to contact legal counsel prior to making their required Duty book entries but to advise them of their legislated right to speak to counsel”

and that “[a]ppropriate opportunity should be provided for our members to complete this communication.”

[22] A second investigation concluded that Wood and Pullbrook did not complete their duty notes before the end of their shift as required by OPP policy, but that there was no breach of OPP policy in the officers’ refusal to provide their “counsel reviewed notes” on the ground that those notes were subject to solicitor-client privilege.

THE APPLICATION

[23] The application giving rise to this appeal was commenced in November 2009. The application requests declaratory relief requiring the court to interpret the legislation and regulation with respect to a list of issues involving the rights and duties of police officers involved in SIU investigations. For the purpose of this appeal, the key issues raised by the application are: does the legislation, expressly or impliedly, authorize or permit:

- the subject and witness officers to share the same lawyer who, under the Law Society’s Rules of Professional Conduct, is duty bound to share all relevant information as between his clients;
- the subject and witness officers to prepare and submit their notebook notes after having the notes reviewed by jointly retained counsel;
- the subject and witness officers to create two sets of police notes, a solicitor’s draft (never shared with the SIU) and a second draft which, after having been vetted by their lawyer, is provided to the SIU; and,

- supervising officers, as a matter of course, to authorize subject and witness officers to refrain from preparing their notes to permit consultation with counsel and regardless of the expiry of the officer`s shift.

[24] There can be little doubt that when the matter was before the application judge, the central issue was the propriety of joint retainers. However, it is also clear that the issue of officers having their notes vetted by a lawyer was also raised. While the application raised a number of other specific issues relating to particular aspects of the two investigations, the issues have been effectively narrowed to those I have indentified above.

DECISION OF THE APPLICATION JUDGE

[25] The respondent officers brought a motion to strike the application on the grounds that it was not justiciable and that the applicants lacked standing. The Master refused the respondents' request that the motion to strike the application be heard first and ordered that that motion be set down for hearing at the same time as the application itself. Accordingly, the parties went before the application judge with a complete record on the substantive issues raised. The application judge refused the applicants' request that she defer her decision on the motion to strike the application until after she had dealt with the substance of the application. She gave her ruling on the motion to strike without expressing any views as to the merits of the application.

[26] The application judge observed that the issues raised by the application had been the subject of lively debate involving the various interested parties and the subject of reports commissioned by the Attorney General. She reviewed the history of that debate including

the 2003 Report on the SIU prepared by the Honourable George Adams and the 2008 Report of Ombudsman André Marin. Both reports discussed and criticized the practice of witness and subject officers consulting the same lawyer prior to completing their notes.

[27] The application judge found, at para. 57, that “[t]he issue lies at the intersection of a number of values, interests and rights that are not easily balanced.” She considered the issue of the appropriate balance to be a matter for the legislature and concluded, at para. 61, that “it is not the function of this court to act as a policy maker of last resort.”

[28] The application judge also found that the applicants had neither private nor public interest standing to seek declaratory relief. With respect to private interest standing, she stated, at para. 67, that there was “no legal nexus between the applicants and the respondent officers” and that the applicants were simply “one group of citizens saying of another group of citizens: they have conducted themselves unlawfully, and we seek the court’s concurrence on that opinion.” With respect to public interest standing, she characterized the retention of counsel by police officers, at para. 86, as “the exercise of a private right” arising in the course of the officer’s employment that did not call into question the validity of a statute or the legality of administrative action. The application judge also held that there were several other effective ways to bring the issue before the courts, namely, an action for misfeasance of public office or a complaint against the lawyer retained by the officers for professional misconduct.

[29] The application judge also concluded, at para. 71, that “[t]he actions of the police officers are spent and the issues are moot. No practical interest and no legal interest of the applicants is engaged in the application.”

MOTION TO QUASH THE APPEAL

[30] The respondent officers moved, in advance of the date set for the oral hearing of this appeal, to quash the paragraph in the notice of appeal asking this court to grant the declaratory relief sought in the application. They argued that as an appellate court we lack jurisdiction to entertain that issue without a ruling from the Superior Court on the substance of the application. The panel that heard the motion to quash ruled that it should be deferred to the panel hearing the appeal and that the parties should come to the appeal ready to argue the merits: *Schaeffer v. Woods*, 2011 ONCA 116.

AMENDMENTS TO THE SIU REGULATION

[31] The SIU Regulation was amended after the application was struck and after this appeal was perfected, but before the oral hearing of the appeal. These amendments were made on the recommendation of the Honourable Patrick J. LeSage who had been retained by the Attorney General to review certain issues concerning SIU investigations involving “the conduct and duties of officers in SIU investigations, including the right to counsel and note-taking”. The LeSage review was not a public process and did not purport to engage in an in-depth review or analysis of the issues. It is aptly described in the factum of the SIU Director as a “facilitated consultation process”. LeSage was directed to conduct his review

as he saw fit, but on the basis that it was “understood between the parties that the focus will be on small, by-invitation sessions.”

[32] LeSage rendered a three-page report making a number of recommendations. The recommendations relevant to this appeal are as follows:

Right to Counsel

Section 7 of O.Reg. 267/10 is clear. All officers have the right to counsel.

My recommendation is that Regulation 267/10 be amended to provide as follows:

7.(1) Subject to subsection (2), every police officer is entitled to consult with legal counsel or a representative of a police association and to have legal counsel or a representative of a police association present during his or her interview with the SIU.

(i) Witness officers may not be represented by the same legal counsel as subject officers.

Officer's Notes

I recommend that section 9 of O.Reg. 267/10 be amended to add the following subsection:

9.(5) The notes made pursuant to subsections (1) and (3) shall be completed by the end of the officer's tour of duty, except where excused by the chief of police.

I also recommend that section 6 of O.Reg 267/10 be amended to read as follows:

6.(2) A police officer involved in the incident shall not communicate directly or indirectly with any other police officer involved in the incident concerning their involvement in the incident until after the SIU has completed its interviews.

[33] The SIU Regulation was amended in accordance with those recommendations. The LeSage report also recommended changes to the Law Society's Rules of Professional Conduct to state that lawyers representing more than one officer in an SIU investigation are reminded of their duty not to undermine s. 6 of the SIU Regulation by disclosing to one officer-client anything said by another involved in the incident.

[34] The respondent officers brought another motion to quash the appeal on the ground that the amendments to the SIU Regulation adopting the LeSage recommendations rendered the appeal moot. That motion was heard at the same time as the appeal itself.

ISSUES

[35] The issues to be decided may be summarized as follows:

1. Do the applicants have standing to bring the application?
2. Are the issues raised by the application justiciable?
3. Are the issues raised by the application moot?
4. If the applicants have standing and the appeal is justiciable and not moot, does this court have jurisdiction to decide the substantive issues?
5. Are officers entitled to the assistance of counsel in the preparation of their notes?
6. Cross-appeal as to costs

ANALYSIS

1. Do the applicants have standing to bring the application?

[36] While the applicants submit that they have both private and public interest standing to bring the application, I view the issue of public interest standing as dispositive and accordingly, need not consider private interest standing.

[37] It is common ground on this appeal that the discretionary recognition of public interest standing involves consideration of three aspects: (1) that there is a serious issue as to the invalidity of a statute or as to whether an administrative action exceeds the limits of statutory authority; (2) that the party seeking standing is directly affected or has a genuine interest in the issue; and, (3) that there is no other reasonable and effective manner to bring the issue before the courts. See *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607; *Borowski v. Canada (Minister of Justice)*, [1981] 2 S.C.R. 575.

[38] In my view, the application judge erred in law in her assessment of the application of this three-part test to the facts of this case. First, the application judge erred in characterizing the issue of whether police officers involved in an SIU investigation have the right to the assistance of counsel in the preparation of their notes as purely a matter of a private right arising in the course of the officer's employment. The definition and exercise of rights and duties of police officers involved in such investigations have significant consequences for the public at large. The definition and content of those rights and duties turns on the interpretation of legislation. The appellants' argue that the practice of vetting notes of an incident with counsel rests on the assertion that such practice is contrary to the legislation.

By extending the scope of public interest standing to non-constitutional challenges to the legality of administrative authority, the Supreme Court prevented “the immunization of legislation or public acts from any challenge” *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, at para. 36. That purpose is met in this case by allowing the appellants to advance their claim for declaratory relief.

[39] Second, the appellants present a strong case that they are directly affected by, and have genuine interest in, the issues raised by the application. The appellants are family members of the individuals whose deaths were investigated and the conduct of which they complain was found by the Director of the SIU to undermine the integrity of the investigation. The appellants have suffered immeasurable losses and to be told that their losses cannot be fully investigated because of the very conduct they seek to challenge, is sufficient to demonstrate that they are directly affected by, and have a genuine interest in, the issue.

[40] Third, it is simply not the case that an action for misfeasance of public office or a complaint to the Law Society constitute other reasonable and effective manners to bring the issue before the courts. The tort of misfeasance of public office is difficult to establish and requires proof of deliberate wrongdoing. It is far from certain that the issue of statutory interpretation the appellants seek to have resolved would be reached in such an action. Moreover, the contention that police officers are not entitled to legal assistance in the preparation of their notes does not necessarily engage the Law Society’s Rules of Professional Conduct. Even if it did, the route to the courts via judicial review would be

problematic, to say the least, as the appellants would not be parties to the Law Society proceedings.

[41] While a determination as to standing involves the exercise of discretion, the errors of law made by the application judge are sufficient to justify appellate intervention. I would set aside the ruling that the appellants lack public interest standing and hold that public interest standing is made out in this case.

2. Are the issues raised by the application justiciable?

[42] In my view, the application judge erred in concluding that the issues raised by the application were not justiciable. The matter of SIU investigations has certainly been contentious, hotly debated and the subject of numerous reviews, reports and policy debates. However, the legislative process has engaged those issues and a legislated regime to govern SIU investigations has now been established. The applicants simply ask for the court's interpretation of what the legislation does, and does not, allow in the context of a specific factual record emerging from two SIU investigations.

[43] The fact that the legal regime the court is being asked to interpret was shaped by policy considerations and the need to balance competing interests, does not, and cannot, preclude the court from exercising its customary role of interpreting the legal instruments that the legislature has provided. The SIU Regulation provides a legal framework for the exercise of the court's adjudicative authority. This authority cannot be ousted by virtue of the fact that policy debates about SIU investigations continue. Where policy issues provide "the context for, rather than the substance of, the questions before the Court", the matter is

justiciable: *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698 at para. 10.

As Le Dain J. stated in *Finlay* at para. 33, “where there is an issue which is appropriate for judicial determination the courts should not decline to determine it on the ground that because of its policy context or implications it is better left for review and determination by the legislative or executive branches of government.”

3. Are the issues raised by the application moot?

[44] I do not agree with the application judge’s conclusion that “the actions of the police officers are spent and the issues are moot” and that “[n]o practical interest and no legal interest of the applicants is engaged in the application”. A case is moot “if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties”: *Borowski* at p. 353. Even if the case is moot, the court has discretion to entertain it in certain circumstances.

[45] The application judge’s conclusion appears to have been largely driven by her approach to justiciability and standing. The legality of the conduct of the police involved in SIU investigations remains a live issue and, because I have concluded that the appellants have public interest standing to raise that issue, the case is not moot.

[46] The respondent officers and Commissioner submit that the amendments to the SIU Regulation following the LeSage Report also render the appeal moot. In my view, the amendments do render the issue of double retainer moot but they do not render moot the issue of whether police officers involved in SIU investigations are entitled to obtain legal

advice in the preparation of their notes. The SIU Regulation, as amended, plainly does not answer that question.

[47] The issue of double retainer was the central issue when the application was brought and while it is now off the table, I do not agree that that renders the entire appeal moot. Contrary to the submission of the respondents, the application squarely raised the issue of whether police officers involved in SIU investigations are entitled to legal advice in connection with the preparation of their notes. As that issue remains a live one, I would not dismiss this appeal on the grounds that it is moot.

4. Does this court have jurisdiction to decide the substantive issues?

[48] In my view, this court has, and should exercise, the jurisdiction to decide the application on the merits. The respondent officers and Commissioner submit that even if the appellants have standing and the issues are neither moot nor not justiciable, this court lacks jurisdiction because the application judge declined to consider the case on the merits and struck the application without making any substantive ruling. There is therefore no “final order of a judge of the Superior Court of Justice” on the issues the appellant raise as is necessary to satisfy the jurisdictional requirement of the *Courts of Justice Act*, R.S.O., c. C.43, s. 6(1)(b).

[49] The appellants, supported by the respondent Director of the SIU, rely on the *Courts of Justice Act*, s. 134(1):

134.(1) Unless otherwise provided, a court to which an appeal is taken may,

- (a) make any order or decision that ought to or could have been made by the court or tribunal appealed from;
- (b) order a new trial;
- (c) make any other order or decision that is considered just.

[50] In my view, the broad language of s. 134(1) permits us to deal with the substantive issues raised by the application in the particular circumstances of this case. We have jurisdiction to make any order that the application judge “ought to or could have” made and we are directed to make any “order or decision that is considered just.”

[51] Ordinarily, despite this broad language, this court will be reluctant to make any order concerning a matter that has not been the subject of an order from the tribunal appealed from. In particular, this court is ill-equipped to make factual findings without the benefit of a full record and findings from the tribunal.

[52] However, as I have already noted, when the application judge decided the motion to strike the application, the substantial record for the application itself was complete. There was an order that the motion to strike be heard at the same time as that set for the hearing of the application itself. Had she not struck the application, the application judge would have immediately proceeded to deal with the substance of the matter. There are no factual issues in dispute before this court. This is not a case where *viva voce* evidence is required or where there are issues of credibility to resolve. The issues are questions of pure law and statutory interpretation. Given the history and highly contentious nature of the issues, returning this

case to the Superior Court would almost certainly not end the matter. A further appeal to this court seems virtually inevitable.

[53] In my view, in these circumstances, the conditions specified by s. 134(1) have been met and we should exercise our discretion to deal with the substance of the application. Plainly, the application judge “could have” made the order the appellants seek. Moreover, the practical considerations of avoiding unnecessary delay and cost strongly favour resolution in this court on this appeal. We have a complete record, there are no outstanding factual issues and we have had the benefit of full argument. In my view, it is “just” to deal with the substance of the cases now.

5. Are officers entitled to the assistance of counsel in the preparation of their notes?

[54] The central issue for us to decide on the merits is the interpretation of two key provisions in the SIU Regulation relating to the preparation of the notes by officers involved in incidents attracting SIU investigations and the right to counsel that is accorded to such officers.

[55] The specific relief sought in the Notice of Application on this issue, is a declaration interpreting s. 113(9) of the *PSA* and the SIU Regulation to determine whether the legislation expressly or impliedly authorizes: (1) “[t]he subject and witness officers creating two sets of police notes: a solicitor’s draft (never shared with the S.I.U.) and a second draft which, having been vetted by their lawyer, is provided to the S.I.U.,” and, (2) “supervising O.P.P. officers, as a matter of course...to authorize involved officers (both subject and

witness officers) to refrain from preparing their notes to permit consultation with counsel and regardless of the expiry of the police officer's shift".

[56] The appellants and the respondent Director of the SIU, supported by three interveners, the Criminal Lawyers Association, the Canadian Civil Liberties Association and the Urban Alliance for Race Relations, submit that to comply with their duty under s. 9 of the SIU Regulation, officers must prepare their notes immediately and prior to any consultation with counsel. The respondent officers, also supported by three interveners, Andrew McKay, the Ontario Association of Chiefs of Police and the Police Association of Ontario, submit that s. 7 of the SIU Regulation gives the officers the right to consult counsel in connection with the preparation of their notes, as occurred in the two cases that give rise to this appeal.

[57] The respondent Commissioner of the OPP takes a nuanced position. In para. 47 of his factum, the Commissioner submits that s. 7(1) entitles officers to consult counsel prior to making their notes but agrees with the appellants and Director of the SIU that notes should be independent and contemporaneous. The Commissioner insists that the notes be "completed in accordance with policy", that "[o]fficers should not collaborate in their notes" and "[c]ounsel should neither be vetting notes, nor amending, varying or suggesting changes to notes. There should be only one set of notes."

Legislative purpose

[58] The purpose of the statutory and regulatory provisions relating to SIU investigations is to ensure the independent and accountable investigation of the use of police force causing

death or serious injury and to foster public confidence in such investigations and in the integrity of the police. I agree with the observation of MacKenzie J. in *Metcalf v. Scott*, 2011 ONSC 1292 (S.C.J.) at para. 91, that the legislation governing SIU investigations should be interpreted in a manner that “provides complainants with a mechanism for an impartial and independent review of complaints and thereby enhances public confidence and trust in the administration of justice.” As the Director of the SIU puts it in his factum, at para. 64:

The legislative purpose underlying the *PSA* 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.

Legislative context

[59] With this legislative purpose in mind, I turn to consider the right to counsel conferred by s. 7(1) and the duty to create notes imposed by s. 9 in the light of the purpose and context of the legislative scheme.

[60] The Director of the SIU relies upon the frequently quoted passage from Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, ON: LexisNexis, 2008) at p. 223 for the well-established proposition that the proper approach to statutory interpretation is contextual and purposive, an approach that is informed by the presumption of coherence. Sullivan elaborates stating:

It is presumed the provisions of legislation are meant to work together, both logically and teleologically, as parts of a

functioning whole. The parts are presumed to fit together logically to form a rational, internally consistent framework; and because the framework has a purpose, the parts are also presumed to work together dynamically, each contributing something toward accomplishing the intended goal. This presumption is the basis for analyzing legislative schemes, which is often the most persuasive form of analysis. The presumption of coherence is also expressed as a presumption against internal conflict. It is presumed that the body of legislation enacted by a legislature does not contain contradictions or inconsistencies, that each provision is capable of operating without coming into conflict with any other.

The right to counsel

[61] By conferring upon police officers the right “to consult with legal counsel” in connection with SIU investigations, s. 7(1) significantly enhances the rights of both witness and subject officers beyond the rights enjoyed by ordinary citizens in relation to police investigations.

[62] The right to retain and instruct counsel conferred by s. 10(b) of the *Canadian Charter of Rights and Freedoms* arises upon arrest or detention. While witness and subject officers are segregated pursuant to s. 6 of the SIU Regulation pending interview by SIU investigators, segregation amounts to neither arrest nor detention. But for s. 7(1), police officers would enjoy no specific statutory right to consult counsel in connection with an SIU investigation.

[63] Moreover, by providing that witness and subject officers are entitled “to have legal counsel or a representative of a police association present during his or her interview with the SIU”, s. 7(1) also confers a right not accorded to ordinary citizens who do not enjoy the

right to have counsel present when interviewed or interrogated by the police: see *R. v. Sinclair*, 2010 SCC 35, [2010] 2 S.C.R. 310. Undoubtedly, police officers are accorded this enhanced right to counsel because, unlike the ordinary citizen in the ordinary situation, police officers do not enjoy the right to silence in the face of an SIU investigation. They instead have a statutory obligation to cooperate in the SIU investigation, to prepare their notes and to submit to an SIU interview.

[64] The *right* to counsel conferred by s. 7(1), however, cannot be absolute or without limit. Even the constitutional right to counsel conferred by s. 10(b) of the *Canadian Charter of Rights and Freedoms* is subject to reasonable limitation which need not be explicitly stated in legislation. The right to counsel may be limited by implication, either from the terms of legislation or by virtue of its practical application: see, for example, *R. v. Thomsen* [1988] 1 S.C.R. 640 which held that a law providing for a roadside breathalyser test and requiring that the sample be provided forthwith implicitly limits the right to counsel; see also *R. v. Orbanski*; *R. v. Elias*, 2005 SCC 37, [2005] 2 S.C.R. 3 at para. 52.

[65] The s. 7(1) right to counsel does not stand in isolation. Its precise meaning must be discerned with reference to the other provisions of the SIU Regulation dealing with SIU investigations and a view to achieving a harmonious and coherent interpretation of the entire scheme.

Police officers' duty to make notes

[66] Section 9 reinforces the duty of officers “to complete in full the notes on the incident *in accordance with his or her duty*” [emphasis added]. Applying the contextual and

purposive approach that is informed by the presumption of coherence, I conclude that it would be wrong to interpret s. 7(1) in a manner that would undermine or contradict, the duty imposed by s. 9.

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

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

[69] Reliable independent and contemporaneous police officer notes are central to the integrity of the administration of criminal justice. Police officers' notes provide the basis for laying charges and they provide Crown Attorneys with a record upon which to base

decisions regarding the prosecution of the case. Furthermore, in the post-*Stinchcombe* era of mandatory Crown disclosure, police notes provide the accused and his or her counsel with vital information to inform decisions as to how to plead and how to conduct of the defence.

[70] The police officer's notes are also used to assist the officer in testifying at trial. When used for that purpose, it is vitally important to the reliability and integrity of the officer's evidence that the notes used record the officer's own independent recollection. In *R. v. Green*, [1998] O.J. No. 3598 (O.C.J. (Gen. Div.) at para. 20, Malloy J. stated:

An officer's notes perform a valuable function at trial. It is usually many months, sometimes years, from the time of an occurrence to the time that the officer is called upon to testify at trial. Without the assistance of notes to refresh his or her memory, the evidence of the officer at trial would inevitably be sketchy at best. If the officer's notes are prepared without any indication of which is the officer's independent recollection and which is somebody else's recollection, there is every likelihood that that officer at trial will be "refreshing" his or her own memory with observations made by someone else. In effect, the officer will be giving hearsay evidence as if it was his or her own recollection rather than the observations of somebody else written into the notes without attribution.

[71] There is no suggestion that it is the practice of police officers to consult with legal counsel before preparing their notes in non-SIU investigations. That is hardly surprising. The use of legal counsel to advise or assist in the preparation of notes would be inconsistent with the purpose of police notes and with the duty imposed on police officers to prepare them.

[72] I agree with the submission of the Criminal Lawyers Association that the problem posed by a police officer seeking legal assistance before preparing his or her notes is not that

the lawyer would do anything improper. Instead, the concern is that seeking legal advice is geared to the officer's own self-interest, or the interests of fellow officers, rather than the officer's overriding public duty. Police officers are public office holders who have "a general duty to prevent and investigate crime [that is] recognized at common law and given statutory force" by the *PSA* in s. 42: *R. v. Simpson* (1993), 12 O.R. (3d) 182 (Ont. C.A.), at p. 489. Note-taking is a core element of that public duty. Focusing on the officer's private interests rather than the interest of the SIU investigation is inconsistent with the officer's public duty.

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

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

contemporaneous record of the incident. It follows that a police officer who seeks legal advice in connection with the preparation of notes, other than with respect to the obligation to prepare notes, or who asks legal counsel to review or vet notes. fails to live up to this duty.

[75] Furthermore, s. 9(5) requires an officer to complete his or her notes “by the end of the officer’s tour of duty, except where excused by the chief of police.” This provision was introduced as a result of the LeSage Report, but before its introduction, it was OPP policy that officers complete their notes prior to the end of their shift. An officer is duty-bound to complete the notes immediately and while the officer is still on the same tour of duty that led to the incident giving rise to the SIU investigation. This duty is, therefore, inconsistent with the proposition that the police officer is entitled to await the arrival of counsel and to obtain the assistance of counsel in the preparation of the notes.

[76] Holding that the s. 7(1) right to counsel does not operate to permit officers to obtain legal assistance in the preparation of notes also gives effect to the overarching purpose of the legislation – the preservation and promotion of independence, accountability, and public confidence in the investigation of police use of deadly force. Limiting the reach of s. 7(1) in this way achieves a coherent and harmonious interpretation of the entire regulation, thereby striking an appropriate balance between the right to counsel and the duty to make independent and contemporaneous notes.

[77] Interpreting s. 7(1) to require officers to complete their notes without the assistance of counsel certainly does not denude s. 7(1) of meaning. As I have already noted, the right to

consult counsel prior to being interviewed by the SIU and the right to have counsel present during the SIU interview represents a significant enhancement of the rights the officers would otherwise enjoy. Thus, the interpretation I have offered assures that the SIU investigators will have the same reliable record of the incident that is available in any investigation, but at the same time, that the officers will have the benefit of legal counsel before and during the SIU interview. Moreover, as I will explain below, it is my view that an officer is also entitled to obtain some legal advice prior to making his or her notes provided that advice can be obtained without delay and subject to the limitation that the advice not relate to the content of the notes the officer is required to prepare.

[78] Finally, this interpretation is consistent with the balance of rights and interests reflected by provisions in the SIU Regulation that protect the rights of subject officers. The *PSA* and the SIU Regulation require the police officer to cooperate with the SIU and, in return, the police officer is afforded certain rights and protections required to give effect to the right against self-incrimination. Section 9(3) provides that the subject officer's notes are not to be provided to the SIU. If an officer originally designated as a witness officer becomes a subject officer, that officer's notes must be returned by the SIU to the chief of police and the record of the officer's SIU interview returned to the officer in accordance with s. 10(3) of the SIU Regulation. Moreover, it is accepted by the Attorney General that the notes and interviews of subject officers are involuntary statements that may not be used to incriminate the subject officer. This protection extends to derivative use immunity to preclude the use of any evidence that would not be found but for the notes or interviews:

Ontario, *Review report on the Special Investigations Unit reforms prepared for the Attorney General by the Honourable George W. Adams, Q.C.* (Toronto: Ministry of the Attorney General, 2003), at p. 49, 54.

Does the legislative scheme preclude any consultation with a lawyer prior to the completion of the officer's notes?

[79] I would not, however, grant a declaration absolutely precluding *any and all* consultation with a lawyer prior to the officer making his notes. For the following reasons, I would grant a declaration in terms that are quite similar to the position taken by the Commissioner of the OPP.

[80] First, the Notice of Application asks for a declaration that officers not be permitted to have a lawyer review or vet their notes and that the SIU Regulation does not permit a supervising officer to authorize officers to refrain from preparing their notes until after the expiry of the police officer's shift to permit consultation with counsel. The Notice of Application does not ask for a declaration precluding an officer from any consultation with a lawyer prior to the completion of the officer's notes.

[81] Second, while relief in those terms was addressed during oral argument, I am not persuaded that relief in such broad terms would be justified. There is nothing explicit or implicit in the SIU Regulation that would deny a police officer who finds himself or herself in the stressful situation of having been involved in an incident attracting the attention of the SIU the right to some basic legal advice as to the nature of his or her rights and obligations

in connection with the incident and the SIU investigation. The officer is entitled to legal advice on matters such as the following:

- he or she is required to complete notes of the incident prior to the end of his or her tour of duty unless excused by the chief of police;
- the lawyer cannot advise the officer what to include in the notes other than that they should provide a full and honest record of the officer's recollection of the incident in the officer's own words
- the notes are to be submitted to the Chief of Police;
- if the officer is a subject officer, the Chief of Police will not pass the notes on to the SIU;
- if the officer is a witness officer, the Chief of Police will pass the notes on to the SIU;
- the officer will be required to answer questions from the SIU investigators; the officer will be entitled to consult counsel prior to the SIU interview and to have counsel present during the interview.

[82] Advice of this nature can readily and quickly be given and received by telephone. However, if legal counsel is not available to advise the officer, the officer must complete the notes prior to the end of his or her tour of duty as required by s. 9(5) and that period cannot be extended for the purpose of getting legal advice: *R. v. Thomsen*; *R. v. Orbanski*; *R. v. Elias*.

[83] I reject the submission that because solicitor-client privilege will shield from the court's view the legal advice given to officers, we should not permit any consultation with a lawyer until after the notes have been completed. As both counsel for the respondent officers and counsel for the Criminal Lawyers Association submitted, lawyers have an ethical obligation to advise clients in accordance with the law. I have confidence in the ethical standards of the legal profession and I am confident that a lawyer called upon to give the type of advice I have outlined in these reasons would not misuse or abuse the opportunity by providing improper assistance with regard to the content of the officer's notes.

6. Cross-appeal as to costs

[84] As I would allow the appeal and set aside the order striking the application, it is not necessary for me to deal with the cross-appeal as to costs.

DISPOSITION

[85] I would dismiss the motion to quash or dismiss the appeal on grounds of mootness, allow the appeal from the order striking the application, and grant a declaration pursuant to Rule 14.05(3) of the *Rules of Civil Procedure* in the following terms:

[86] The *Police Services Act*, R.S.O. 1990, c. P.15, s. 113(9) and Conduct and Duties of Police Officers Respecting Investigations by the S.I.U. O. Reg. 267/10, do not permit:

- (i) police officers involved in an SIU investigation to have a lawyer vet their notes or to assist them in the preparation of their notes; or

(ii) supervising officers, as a matter of course, to authorize subject and witness officers to refrain from preparing their notes to permit consultation with counsel and regardless of the expiry of the officer`s shift.

but do permit:

(iii) police officers to obtain legal advice as to the nature of their rights and duties with respect to SIU investigations, provided obtaining that advice does not delay the completion of their notes before the end of their tour of duty.

COSTS

[87] The appellants are entitled to their costs against the respondent officers fixed at \$100,000 inclusive of disbursements and applicable taxes for all proceedings in this court and in the Superior Court.

“Robert J. Sharpe J.A.”

“I agree R.P. Armstrong J.A.”

“I agree Paul Rouleau J.A.”

RELEASED: November 15, 2011

APPENDIX A

Police Services Act, R.S.O. 1990, CHAPTER P.15

PART VII SPECIAL INVESTIGATIONS

Special investigations unit

113. (1) There shall be a special investigations unit of the Ministry of the Solicitor General. R.S.O. 1990, c. P.15, s. 113 (1).

Composition

(2) The unit shall consist of a director appointed by the Lieutenant Governor in Council on the recommendation of the Solicitor General and investigators appointed under Part III of the *Public Service of Ontario Act, 2006*. R.S.O. 1990, c. P.15, s. 113 (2); 2006, c. 35, Sched. C, s. 111 (4).

Idem

(3) A person who is a police officer or former police officer shall not be appointed as director, and persons who are police officers shall not be appointed as investigators. R.S.O. 1990, c. P.15, s. 113 (3).

Acting director

(3.1) The director may designate a person, other than a police officer or former police officer, as acting director to exercise the powers and perform the duties of the director if the director is absent or unable to act. 2009, c. 33, Sched. 2, s. 60 (3).

Peace officers

(4) The director, acting director and investigators are peace officers. R.S.O. 1990, c. P.15, s. 113 (4); 2009, c. 33, Sched. 2, s. 60 (4).

Investigations

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

Restriction

(6) An investigator shall not participate in an investigation that relates to members of a police force of which he or she was a member. R.S.O. 1990, c. P.15, s. 113 (6).

Charges

(7) If there are reasonable grounds to do so in his or her opinion, the director shall cause informations to be laid against police officers in connection with the matters investigated and shall refer them to the Crown Attorney for prosecution. R.S.O. 1990, c. P.15, s. 113 (7).

Report

(8) The director shall report the results of investigations to the Attorney General. R.S.O. 1990, c. P.15, s. 113 (8).

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. R.S.O. 1990, c. P.15, s. 113 (9).

Co-operation of appointing officials

(10) Appointing officials shall co-operate fully with the members of the unit in the conduct of investigations. 2009, c. 30, s. 60.

Conduct and Duties of Police Officers Respecting Investigations by the Special Investigations, O. Reg. 237/95

Definitions and interpretation

1. (1) In this Regulation,

"SIU" means the special investigations unit established under section 113 of the Act; ("UES")

"subject officer" means a police officer whose conduct appears, in the opinion of the SIU director, to have caused the death or serious injury under investigation; ("agent impliqué")

"witness officer" means a police officer who, in the opinion of the SIU director, is involved in the incident under investigation but is not a subject officer. ("agent témoin") O. Reg. 267/10, s. 1 (1).

(2) The SIU director may designate an SIU investigator to act in his or her place and to have all the powers and duties of the SIU director under this Regulation and, if the SIU director appoints a designate, any reference to the SIU director in this Regulation, excluding this subsection, means the SIU director or his or her designate. O. Reg. 267/10, s. 1 (2).

(3) For the purposes of this Regulation, a person appointed as a police officer under the *Interprovincial Policing Act, 2009* is deemed to be,

(a) if the person was so appointed by a member of the Ontario Provincial Police, a member of that police force;

(b) if the person was so appointed by a member of a municipal police force, a member of that police force; or

(c) if the person was so appointed by a member of a board, a member of the municipal police force for which the board is responsible. O. Reg. 267/10, s. 1 (3).

(4) A police officer appointed under the *Interprovincial Policing Act, 2009* shall comply with all directions given to him or her for the purposes of this Regulation by the chief of police of the police force of which the officer is deemed to be a member or by the designate of that chief of police appointed under subsection 2 (1). O. Reg. 267/10, s. 1 (4).

Designate of chief of police

2. (1) The chief of police may designate a member of the police force who is not a subject officer or witness officer in the incident to act in the place of the chief of police and to have all the powers and duties of the chief of police in any matter respecting an incident under investigation by the SIU. O. Reg. 267/10, s. 2 (1).

(2) If the chief of police appoints a designate under subsection (1), any reference to the chief of police in this Regulation, excluding this section, means the chief of police or his or her designate. O. Reg. 267/10, s. 2 (2).

(3) The person appointed under subsection (1) must be a senior officer. O. Reg. 267/10, s. 2 (3).

Notice to SIU

3. A chief of police shall notify the SIU immediately of an incident involving one or more of his or her police officers that may reasonably be considered to fall within the investigative mandate of the SIU, as set out in subsection 113 (5) of the Act. O. Reg. 267/10, s. 3.

Securing scene of incident

4. The chief of police shall ensure that, pending the SIU taking charge of the scene of the incident, the police force secures the scene in a manner consistent with all standing orders, policies and usual practice of the police force for serious incidents. O. Reg. 267/10, s. 4.

SIU as lead investigator

5. The SIU shall be the lead investigator in the investigation of the incident and shall have priority over any police force in the investigation. O. Reg. 267/10, s. 5.

Segregation of police officers involved in incident

6. (1) The chief of police shall, to the extent that it is practicable, segregate all the police officers involved in the incident from each other until after the SIU has completed its interviews. O. Reg. 267/10, s. 6 (1).

(2) A police officer involved in the incident shall not communicate directly or indirectly with any other police officer involved in the incident concerning their involvement in the incident until after the SIU has completed its interviews. O. Reg. 267/10, s. 6 (2); O. Reg. 283/11, s. 1.

Right to counsel

7. (1) Subject to subsection (2), every police officer is entitled to consult with legal counsel or a representative of a police association and to have legal counsel or a representative of a police association present during his or her interview with the SIU. O. Reg. 267/10, s. 7 (1).

(2) Subsection (1) does not apply if, in the opinion of the SIU director, waiting for legal counsel or a representative of a police association would cause an unreasonable delay in the investigation. O. Reg. 267/10, s. 7 (2).

(3) Witness officers may not be represented by the same legal counsel as subject officers. O. Reg. 283/11, s. 2.

Interview of witness officers

8. (1) Subject to subsections (2) and (5) and section 10, immediately upon receiving a request for an interview by the SIU, and no later than 24 hours after the request if there are appropriate grounds for delay, a witness officer shall meet with the SIU and answer all its questions. O. Reg. 267/10, s. 8 (1).

(2) A request for an interview by the SIU must be made in person. O. Reg. 267/10, s. 8 (2).

(3) The SIU shall cause the interview to be recorded and shall give a copy of the record to the witness officer as soon as it is available. O. Reg. 267/10, s. 8 (3).

(4) The interview shall not be recorded by audiotape or videotape except with the consent of the witness officer. O. Reg. 267/10, s. 8 (4).

(5) The SIU director may request an interview take place beyond the time requirement as set out in subsection (1). O. Reg. 267/10, s. 8 (5).

Notes on incident

9. (1) A witness officer shall complete in full the notes on the incident in accordance with his or her duty and, subject to subsection (4) and section 10, shall provide the notes to the chief of police within 24 hours after a request for the notes is made by the SIU. O. Reg. 267/10, s. 9 (1).

(2) Subject to subsection (4) and section 10, the chief of police shall provide copies of a witness officer's notes to the SIU upon request, and no later than 24 hours after the request. O. Reg. 267/10, s. 9 (2).

(3) A subject officer shall complete in full the notes on the incident in accordance with his or her duty, but no member of the police force shall provide copies of the notes at the request of the SIU. O. Reg. 267/10, s. 9 (3).

(4) The SIU director may allow the chief of police to provide copies of the notes beyond the time requirement set out in subsection (2). O. Reg. 267/10, s. 9 (4).

(5) The notes made pursuant to subsections (1) and (3) shall be completed by the end of the officer's tour of duty, except where excused by the chief of police. O. Reg. 283/11, s. 3.

Notice of whether subject officer or witness officer

10. (1) The SIU shall, before requesting an interview with a police officer or before requesting a copy of his or her notes on the incident, advise the chief of police and the officer in writing whether the officer is considered to be a subject officer or a witness officer. O. Reg. 267/10, s. 10 (1).

(2) The SIU shall advise the chief of police and the police officer in writing if, at any time after first advising them that the officer is considered to be a subject officer or a witness officer, the SIU director decides that an officer formerly considered to be a subject officer is now considered to be a witness officer or an officer formerly considered to be a witness officer is now considered to be a subject officer. O. Reg. 267/10, s. 10 (2).

(3) If, after interviewing a police officer who was considered to be a witness officer when the interview was requested or after obtaining a copy of the notes of a police officer who was considered to be a witness officer when the notes were requested, the SIU director decides that the police officer is a subject officer, the SIU shall,

- (a) advise the chief of police and the officer in writing that the officer is now considered to be a subject officer;
- (b) give the police officer the original and all copies of the record of the interview; and
- (c) give the chief of police the original and all copies of the police officer's notes. O. Reg. 267/10, s. 10 (3).

(4) The chief of police shall keep the original and all copies of the police officer's notes received under clause (3) (c) for use in his or her investigation under section 11. O. Reg. 267/10, s. 10 (4).

Investigation caused by chief of police

11. (1) The chief of police shall also cause an investigation to be conducted forthwith into any incident with respect to which the SIU has been notified, subject to the SIU's lead role in investigating the incident. O. Reg. 267/10, s. 11 (1).

(2) The purpose of the chief of police's investigation is to review the policies of or services provided by the police force and the conduct of its police officers. O. Reg. 267/10, s. 11 (2).

(3) All members of the police force shall co-operate fully with the chief of police's investigation. O. Reg. 267/10, s. 11 (3).

(4) The chief of police of a municipal police force shall report his or her findings and any action taken or recommended to be taken to the board within 30 days after the SIU director advises the chief of police that he or she has reported the results of the SIU's investigation to the Attorney General, and the board may make the chief of police's report available to the public. O. Reg. 267/10, s. 11 (4).

(5) The Commissioner of the Ontario Provincial Police shall prepare a report of his or her findings and any action taken within 30 days after the SIU director advises the Commissioner that he or she has reported the results of the SIU's investigation to the Attorney General, and the Commissioner may make the report available to the public. O. Reg. 267/10, s. 11 (5).

Disclosure of information

12. (1) The police force may disclose to any person the fact that the SIU director has been notified of an incident and is conducting an investigation into it. O. Reg. 267/10, s. 12 (1).

(2) The police force and members of a police force shall not, during the course of an investigation by the SIU into an incident, disclose to any person any information with respect to the incident or the investigation,

(a) except as permitted by this Regulation;

(b) except that a police officer appointed under the *Interprovincial Policing Act, 2009* may disclose the information to his or her extra-provincial commander during the course of the investigation; or

(c) except that the chief of police of the police force of which a police officer appointed under the *Interprovincial Policing Act, 2009* is deemed to be a member may disclose the information during the course of the investigation to,

(i) the extra-provincial commander of the officer, or

(ii) an appointing official as defined in that Act if the chief of police is not such an official and the investigation relates to the officer. O. Reg. 267/10, s. 12 (2).

Public statements

13. The SIU shall not, during the course of an investigation by the SIU, make any public statement about the investigation unless the statement is aimed at preserving the integrity of the investigation. O. Reg. 267/10, s. 13.

Non-application of this Regulation

14. A chief of police or police officer shall not be required to comply with a provision of this Regulation if, in the opinion of the SIU director, compliance is not possible for reasons beyond the chief of police's or police officer's control. O. Reg. 267/10, s. 14.

15. Omitted (revokes other Regulations). O. Reg. 267/10, s. 15.

16. Omitted (provides for coming into force of provisions of this Regulation). O. Reg. 267/10, s. 16.