

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)**

BETWEEN:

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

Applicants/Cross-Respondents
(Respondents)

- and -

RUTH SCHAEFFER, EVELYN MINTY AND DIANE PINDER

Respondents/Cross-Respondents
(Appellants)

-and-

IAN SCOTT, DIRECTOR OF THE SPECIAL INVESTIGATIONS UNIT

Respondent/Cross-Applicant
(Respondent)

-and-

JULIAN FANTINO, COMMISSIONER OF THE ONTARIO PROVINCIAL POLICE

Respondent/Cross-Respondent
(Respondent)

**MEMORANDUM OF ARGUMENT
IN RESPONSE TO APPLICATION FOR LEAVE TO APPEAL
AND IN SUPPORT OF APPLICATION FOR LEAVE TO CROSS APPEAL**
(Pursuant to Rules 25, 27 and 29 of the *Rules of the Supreme Court of Canada*)

PART I - OVERVIEW AND FACTS

A. Overview

1. The Respondent, the Director of the Special Investigations Unit (“SIU”) agrees with the Applicant that this case raises issues of national and public importance and does not oppose the leave application. The SIU disagrees, however, with the Applicants’ contention that the statutory scheme governing SIU investigations permits officers involved in the investigation to have an unrestricted right to counsel. The SIU also disagrees with the Court of Appeal’s compromise of allowing officers to consult with counsel on a limited range of issues before completing their police notes. The SIU seeks to vary the Court of Appeal’s order, and has brought an Application for Leave to Cross Appeal to enable this Court to consider whether *any* contact with counsel prior to the completion of an officer’s notes is permissible under the legislation. As the issues raised in both leave applications represent two sides of the same interpretive coin, the SIU has filed a single memorandum of argument to avoid duplication.

2. It is a serious and tragic event when an agent of the state, empowered to use deadly force, takes someone’s life or causes serious injury to them. These incidents must be investigated thoroughly, transparently, and with impartiality. The SIU is Canada’s first fully civilian police oversight agency mandated with this task.

3. A number of public inquiries and task forces have revealed serious problems in the way that some police services have investigated such incidents.¹ These failures have undermined the public’s confidence in police-led investigations into fellow police. This mistrust serves neither the public interest in seeing officers who commit criminal acts come to justice, nor the interests of the vast majority of officers who commit no wrong-doing and who deserve a publicly accepted finding to that effect.

¹ For example, see Race Relations Policing Task Force, *The Report of the Race Relations and Policing Task Force* (Toronto: Race Relations and Policing Task Force, 1989), at 146-150 (Chair: Clare Lewis) [*Race Relations and Policing Report*]; Braidwood Commission on the Death of Robert Dziekanski, *Why? – The Robert Dziekanski Tragedy* (Vancouver: Braidwood Commission on the Death of Robert Dziekanski, 2010), at 360-361 (Commissioner: Thomas R. Braidwood, Q.C.) [*Braidwood Report*]; Taman Inquiry into the Investigation and Prosecution of Derek Harvey-Zenk, *Report of the Taman Inquiry* (Library and Archives Canada, 2008) (Commissioner: Hon. Roger Salhany, Q.C.) [*Taman Inquiry*]; Inquiry into the Death of Frank Paul, *Cold And Alone – Interim Report* (British Columbia: The Davies Commission, 2008) at 210-216 (Commissioner: William H. Davies, Q.C.) [*Davies Report*].

4. This case raises questions of the appropriate balance between a police officer's public duty as a peace officer to create independent and contemporaneous notes, and their private interest in seeking legal advice to protect themselves or their colleagues.

5. What this case is not about are the rights of accused police officers in the criminal justice process. All police officers, whether or not involved in an SIU investigation, have a public law duty to complete contemporaneous and independent notes. However, the notes of officers who have been identified by the SIU as having potentially caused an injury or death that is under investigation ("subject officers"), may not be used in any way by the SIU. Only witness officers, who face no threat of criminal sanction, must provide their notes to the SIU.²

6. The Court of Appeal below recognized that in the context of an SIU investigation, the act of seeking legal advice is "geared to the officer's own self-interest, or the interest of fellow-officers" and can be in tension with the officer's "overriding public duty", which includes proper note-taking and cooperation with the SIU.³ The Court analysed the regulation that governs SIU investigations, *Conduct and Duties of Police Officers Respecting Investigations by the Special Investigations Unit*, (the "SIU Regulation") and determined that while the regulation provides officers with an entitlement to counsel, its requirement that officers "complete in full the notes on the incident in accordance with his or her duty" prior to the completion of his or her shift⁴ is inconsistent with the notion that officers should be entitled to have counsel assist them in the preparation of their notes.⁵

7. Notwithstanding this finding, the Court of Appeal determined that officers should not be precluded from any and all contact with counsel prior to making their notes. The Court stated:

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.⁶

² *Conduct and Duties of Police Officers Respecting Investigations by the Special Investigations Unit*, O. Reg. 267/10, s. 9 ["SIU Regulation"].

³ *Schaeffer v. Wood*, 2011 ONCA 716 at para. 72, *Applicant's Application Record*, Tab 5 ["Schaeffer"].

⁴ *SIU Regulation*, *supra*, s. 9.

⁵ *Schaeffer*, *supra* at paras. 66, 75.

⁶ *Ibid.* at paras. 79, 81.

The Court then provided a non-exhaustive list of issues that officers could discuss with counsel:

- 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.⁷

8. The SIU submits that the Court of Appeal correctly identified the conflict between an officer's public duty and his or her self-interest, and correctly interpreted the regulatory scheme insofar as it determined that a "lawyer's involvement [with note preparation or review] undermines the fundamental nature and purpose of a police officer's notes."⁸

9. However, it is the SIU's position that the Court of Appeal's compromise permitting limited consultation with counsel prior to the completion of police notes is unworkable and is incompatible with an officer's public duty to complete independent, impartial and accurate notes. The SIU submits that the very process of the lawyer-client interview risks tainting the officer's memory and consequently, the independence of the notes. Therefore, the statutory scheme, properly interpreted, precludes consultation with counsel prior to the completion of the notes.

10. In the alternative, the SIU will argue that the Court of Appeal was correct in limiting the scope of consultation with counsel to a discussion of the officer's rights and obligations during an SIU investigation but the Court should clarify that *any* discussion of the incident is inappropriate until the officer has had an opportunity to complete his or her notes.

⁷ *Ibid.* at para. 81.

⁸ *Ibid.* at para. 73.

B. Facts

11. The SIU agrees with the facts set out by the Applicant, and would add the following.
12. In the Minty investigation, SIU Director Ian Scott determined that the use of lethal force was not excessive in the circumstances, and was able to make this finding based on statements from civilians who witnessed the incident. However, he raised the following concern:

Sgt Burton instructed all witness officers not to write up their notes until they had spoke to counsel, a counsel who has a professional duty to share information among his clients. This would appear to be a prima facie breach of s. 6 of the same regulation.⁹

13. Director Scott also raised concerns about the delayed notification of the SIU. The Ontario Provincial Police Association (OPPA) was on scene, and a media representative was en route, before the SIU was even notified of the incident.¹⁰

14. In the investigation into the death of Mr. Schaeffer, Director Scott concluded that he could not form reasonable grounds that the subject officer committed a criminal offence. In the absence of independent information, he could not place sufficient reliance on the information provided by Cst Wood or A/Sgt Pullbrook to decide what probably happened.

15. He went on to observe that both subject officer Cst Wood and witness officer A/Sgt Pullbrook were advised to not write their notes until they had spoken to counsel, and to provide a first set of notes to the lawyer for review. Both officers completed their police notebook entries based on this first set of notes. Neither officer provided the SIU with the notes to counsel.

16. The Director of the SIU determined:

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 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

⁹ Excerpt of report from SIU Director Ian Scott to the Attorney General re: Douglas Minty Investigation, October 14, 2009, at 26-27, *SIU Application Record*, Tab 9 [*“SIU Report re: Minty”*].

¹⁰ *Ibid.*

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 informational base I can rely upon. Because I cannot conclude what probably happened, I cannot form reasonable grounds that the subject officer in the matter committed a criminal offence.¹¹

17. The Professional Standards Bureau of the OPP conducted two investigations of the Schaeffer incident.¹² The first report found the force used was proportional but also concluded that "WOOD and PULLBROOK failed to complete their notes as required and further made additional original notes that they have declined to provided[sic]."¹³

18. A subsequent Professional Standards Investigation was conducted to review the note-taking issue. This investigation concluded that the failure to provide the SIU with the notes prepared for the lawyer did not constitute misconduct under the *Police Services Act*, as these notes were covered by solicitor-client privilege.¹⁴

PARTS II AND III – ISSUES AND STATEMENT OF ARGUMENT

19. In the Application for Leave to Appeal and the SIU's Cross Appeal Application, the following questions are at issue:

- Does this matter raise issues of national and public importance?

Yes. The independence of police notes is integral to the ability of the SIU to conduct an effective, transparent investigation, which is matter of national and public importance.

¹¹ Excerpt of report from SIU Director Ian Scott to the Attorney General re: Levi Schaeffer Investigation, September 25, 2009, *Applicant's Application Record*, Tab 7. It should be noted that the SIU Regulation was modified in August 2011 to prohibit joint retainers between subject and witness officers.

¹² The nature of a professional standards investigation is fundamentally distinct from an SIU investigation. The SIU is responsible for the investigation and laying of charges related to criminal conduct by police officers. A professional standards investigation is directed toward both policy and discipline issues. From the individual officer's perspective, it could result only in potential employment consequences under Part V of the *Police Services Act*, R.S.O. 1990, c. P15 ["PSA"].

¹³ *Ibid.* at p. 15.

¹⁴ Excerpt of Professional Standards Bureau Investigation Report 2545009-0192, dated December 10, 2009, at p. 10, *SIU Application Record*, Tab 12.

- Did the Court of Appeal err in interpreting the requirement to prepare police notes “in accordance with his or her duty” as inconsistent with a right to obtain assistance from counsel in the preparation of such notes?

The Court properly concluded that an officer’s interest in consulting counsel about the preparation of notes is incompatible with their public duty to prepare independent notes.

- Did the Court of Appeal err in refusing to grant a declaration precluding any and all consultation with counsel prior to the completion of an officer’s police notes?

The Court of Appeal erred in failing to grant a declaration precluding any discussion with counsel prior to the completion of an officer’s notes. The protocol put in place by the Court is inconsistent with a purposive interpretation of the SIU regulations, and will not satisfy the concern of preventing contamination of police notes. Any lawyer-client interview which touches upon the events under investigation inevitably reshapes the officer’s recollection in a manner that is inconsistent with the officer’s public duty to create independent notes.

- Alternatively, did the Court of Appeal err in failing to expressly prohibit police officers from discussing any aspect of the incident in question with counsel prior to the completion of his or her notes?

The SIU’s alternative position is that the Court of Appeal failed to specify that any discussion with counsel about the incident risks contaminating the notes and thus is not permissible under the statutory scheme, even if some basic legal advice about an officer’s rights and duties is acceptable.

PART IV – SUBMISSIONS

(i) The Importance of Police Notes

20. The duty to create independent and contemporaneous notes of events that transpire during an officer’s shift is fundamental to the professional role of a police officer. Proper note-taking is essential to an officer’s exercise of his or her duty to lay charges and participate in prosecutions, as set out in s. 42(1)(e) of the *Police Services Act*.¹⁵ The OPP Orders confirm officers’ professional obligation to take “concise, comprehensive particulars of each occurrence” during

¹⁵*PSA, supra.*

an officer's tour of duty.¹⁶ Officer trainees at the Provincial Police Academy and the Ontario Police College are instructed in the nature of this duty.¹⁷

21. As police officers are key witnesses in criminal proceedings, police notes are often used to refresh the officer's memory during testimony and may become evidence in and of themselves when the officer is unavailable to give material evidence.¹⁸

22. The timeliness and independence of officer notes are fundamental to their reliability. Unless notes are drafted when an event is fresh in the officer's mind, there is a substantial risk that they will contain errors.¹⁹ The need for independence in officers' notes has been repeatedly stressed by the courts, who have consistently held that collaboration in their preparation is inappropriate.²⁰ Justice Molloy observed in *R. v. Green*:

There are important reasons for requiring that officers prepare their notes independently. The purpose of notes made by a police officer is to record the observations made by that officer ...

... 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.

... While it is inevitable and indeed necessary that the members of a police team confer with one another during the course of an investigation, it is nevertheless important that the integrity of each officer's personal observations be preserved as much as possible. One way to achieve that result is for each officer to separately record his own observations in his own notebook as soon as possible after the event...

... If the officers' notes do not reflect what is their own observations and what comes from

¹⁶ *Taman Inquiry* at 133; *R. v. Schertzer*, (2007) [2007] O.J. No. 3560 at para. 14 (Ont. S.C.J.); rev'd on other grounds (2009), 248 C.C.C. (3d) 270 (C.A.); *PSA*, *supra*, s. 42(1)(e); OPP Orders, June 2009 Revision at s. 2.50.3 ["OPP Orders 2009"], *SIU Application Record*, Tab 8.

¹⁷ Ontario Police College, *Basic Constable Training Program (Student Workbook—Evidence) 2008*, at 2, *SIU Application Record*, Tab 7 ["Police College Training Program Workbook"].

¹⁸ For example, due to the death of the officer. See e.g. *R. v. Oien*, 2006 ABPC 87.

¹⁹ *R. v. McKennon*, [2004] O.J. No. 5021 at paras. 23-25, 31, 32, 35 (S.C.J.) ["McKennon"]. See also Ontario Police College, *Basic Constable Training Program*, *supra* at 5, 11, 15-16.

²⁰ *Taman Inquiry*, *supra* at 137; *R. v. Green*, [1998] O.J. No. 3598 at paras. 19-20, 22-23, 45 (Ct. Jus. (Gen. Div.)) ["Green"]; *R. v. Barrett*, [1993] O.J. No. 1317 at para. 17 (Ont. C.A.), *per* Arbour J.A. (as she then was); rev'd on other grounds [1995] 1 S.C.R. 752; *R. v. McKennon*, *supra* at para. 35. See also *Police College Training Program Workbook*, *supra* at 4-5.

others, the judge or jury ... will be unaware that they are not receiving ... independent evidence...²¹

23. Furthermore, officers' notes are relied upon by Crown Attorneys to take charge screening positions, and to fulfill their *Stinchcombe* disclosure requirements.²² Defence counsel depend on reliable notes in advising accused persons about pleas and the conduct of their defence.

24. Officer notes are central to the effective prosecution of cases. In recognition of the key role notes play in the proper administration of criminal justice, the OPP Orders clearly indicate that an officer's notebook "is the property of the OPP", rather than any individual officer.²³

25. In the context of an SIU investigation, police notes serve a number of purposes. Obviously are a starting point for the SIU interviews and are central to other steps in the investigation. As in other criminal investigations, the notes of witness officers serve to memorialize the officer's recollection of the events for future use in a variety of legal proceedings.²⁴ The notes also preserve the independence of the recollection. SIU investigations often are, by their very nature, high profile events. Witness officers risk being bombarded with questions, details and possibly misinformation from a variety of external sources, including their colleagues, the media, their family, and even medical professionals assisting them with psychological trauma they may have experienced. While speaking to legal counsel would provide no assistance to police in dealing with these pressures, the contemporaneous completion of notes independent from external influences preserves the integrity of the officer's memory.

26. It is important to emphasize that the *SIU Regulation* has been carefully drafted to strike a balance between the truth-seeking function of the SIU and an officer's right to be protected against self-incrimination. The Regulation draws a clear distinction between "subject" and "witness" officers. A subject officer is a police officer "whose conduct appears, in the opinion of

²¹ *Green, supra* at paras. 19-20, 22-23.

²² *R. v. Stinchcombe*, [1991] 3 S.C.R. 326; *Taman Inquiry, supra* at 135.

²³ Notebooks are retained at the services' Records Service Centre for a period of 20 years: see *OPP Orders 2009, supra* at 35; *OPP Orders, March 2010 Revision* at 2.50.1, at 53, *SIU Application Record*, Tab 13. The fact that police notes are the property of the police service and not the officer is also reflected in the *SIU Regulation*. Where an officer's designation changes from witness to subject, the officer's notes are returned to the chief of police, not the officer. This can be contrasted to the record of the interview, which is returned to the officer: *SIU Regulation, supra*, s. 10(3)(b) and (c).

²⁴ These may include criminal, civil, and disciplinary proceedings as well as inquests and public inquiries.

the SIU director” to have caused the death or serious injury that is under investigation” (s.1(1)). Before the SIU requests an interview with an officer or a copy of his or her notes, the SIU must designate the officer as a subject or as a witness (s.10(1)).

27. The SIU is only entitled to obtain the notes of witness officers (s.10(1)), and only witness officers can be compelled to meet with the SIU and answer its questions (s.8(1)). If at any point, the SIU believes that a witness officer is to be considered a subject officer, the SIU must return the notes to the chief of police and any records of an interview with the officer to the officer (s.10(3)). Subject officers are therefore protected from self-incrimination in a manner that is far more robust than a suspect in a criminal investigation.

(ii) The Role of the SIU in the Administration of Justice

28. The SIU’s role is to maintain and foster public confidence in the rule of law and the administration of justice by ensuring that police actions that result in death or serious injury are subject to an independent, impartial, and effective investigation, and that the conclusions of these investigations are accessible and transparent. By law, the SIU is comprised entirely of civilian investigators,²⁵ and its director is a civilian with no policing background.²⁶

29. The SIU was first created in 1990, as a result of a recommendation from the 1989 Report of the Race Relation and Policing Task Force.²⁷ This Task Force explored a variety of issues surrounding policing and racialized communities after the deaths of Lester Donaldson and Michael Wade Lawson, two black men who were shot by on-duty officers.²⁸ The Task Force noted the following concerns:

When a police shooting results in a fatality, an investigation into the incident is critical to ensure that the law and policy on the use of deadly force is not only complied with, but so seen by the public. In the past it has been usual for the police force responsible for the shooting to conduct an investigation into the individual officer’s conduct. However, handling these occurrences in this manner has caused considerable public concern. Repeatedly during the course of the Task Force hearings, presenters made the point that such procedures are clearly no longer acceptable. The public perception, understandably, is that these investigations lack objectivity in that they amount to the police investigating the police...

²⁵ It should be noted that some investigators are former police officers.

²⁶ *PSA, supra*, s. 113(3).

²⁷ *Race Relations and Policing Report, supra* at 146-150.

²⁸ *Ibid.* at 146-150.

A post-shooting investigation conducted by police will inevitably lead to a serious deterioration in the public confidence...²⁹

30. The SIU plays an important role in the maintenance of the rule of law. It ensures that police officers are held accountable when they engage in conduct that results in death or serious injury. This helps to ensure that the state-sanctioned use of force is not abused.

31. It also serves to maintain the state's guarantee under s.7 of the *Canadian Charter of Rights and Freedoms* not to deprive anyone of life, liberty, and security of the person except in accordance with the principles of fundamental justice. This most basic constitutional guarantee is a crucial lens through which the relevant regulations must be examined.

32. The fundamental guarantee to life enshrined in s.7 of the *Charter* is paralleled by Article 2 of the *European Convention on Human Rights*, which provides that the right to life shall be protected by law. The European Court of Human Rights has repeatedly considered the implications of this right for the delivery of policing services, and held that Article 2:

[R]equires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force. The essential purpose of such an investigation is to secure the effective implementation of the domestic laws safeguarding the right to life, and in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility.³⁰

33. To operationalize this principle, the Council of Europe system has articulated five principles of effective investigation: independence; adequacy, promptness, public scrutiny and victim involvement.³¹ These are the same principles that animate the SIU regime and inform its mandate.

34. The SIU's investigation and conclusions must be accessible, transparent and convincing so that the public can be assured that force is being used appropriately by the state, and where it is not, the perpetrators will be held accountable. This is particularly critical where police actions

²⁹ *Ibid.* at 146-147.

³⁰ *Nachova v. Bulgaria* (Application nos. 43577/98 and 43579/98), Judgment 6 July 2005 (E.Ct.H.R. (Grand Chamber)).

³¹ Council of Europe, Commissioner for Human Rights, *Opinion of the Commissioner for Human Rights Concerning Independent and Effective Determination of Complaints Against the Police* (12 March 2009) at 7-8. See also *Ramsahi and Others v. The Netherlands* (Application no. 52391/99), Judgment 15 May 2007 (E.Ct.H.R. (Grand Chamber)).

are called into question because the incident involves harm to a member of a racialized community or a person who is mentally ill. The public needs to understand exactly what happened. Justice must not only be done, it must be seen to be done.

35. The ability of the SIU to achieve this goal has been the subject of continuing public concern.³² In 2007, the Ontario Ombudsman launched a systemic investigation into the SIU's operational effectiveness after receiving complaints from members of the public. The Ombudsman's resultant report, *Oversight Unseen* raised concerns that officers were routinely preparing their police notes after consulting with counsel. The Ombudsman observed that when the same lawyer represents multiple officers, the practice raises "ethical issues particularly in light of the officers' duty not to communicate with other involved officers until the SIU interviews have concluded."³³ The Ombudsman further noted that "the utmost care should be taken to foster the integrity of the investigative process. This includes any potential for witness information to be tainted or tailored, intentionally or otherwise."³⁴

36. In December 2011, the Ombudsman issued a supplementary report setting out the results of its investigation into the Ministry of the Attorney General's implementation of recommendations made in *Oversight Unseen*. This report, which post-dated the Court of Appeal's judgment, reiterated the concern about the independence of police note-taking.³⁵ It is in the public interest for this Court to resolve the controversy surrounding police contact with counsel prior to the completion of their notes.

37. This case also raises issues of national importance, as other provinces adopt civilian police oversight regimes. British Columbia recently passed legislation to establish an Independent Investigations Office to investigate incidents resulting in death or serious harm by

³² There have been a number of reports over the years analysing the effectiveness of the SIU. See e.g. 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) [the "Adams Report"]. This report found the practice of officers refraining from writing their notes until consulting with counsel "very problematic" (p. 55).

³³ André Marin, *Oversight Unseen: Investigation into the Special Investigations Unit's Operational Effectiveness and Credibility* (Toronto: Ombudsman Ontario, 2008) at 58-59 ["*Oversight Unseen*"].

³⁴ *Oversight Unseen*, *supra* at 59.

³⁵ André Marin, *Oversight Undermined: Investigation into the Minister of the Attorney General's Implementation of Recommendations Concerning Reform of the Special Investigations Unit* (Toronto: Ombudsman Ontario, 2011) at 33 ["*Oversight Undermined*"].

police officers.³⁶ This civilian-led office was established as a result of recommendations made in the Braidwood and Davies Inquiries,³⁷ which expressly recommended adopting the SIU model.

38. Likewise, Quebec has recently introduced Bill 46, which aims to establish an independent civilian office to observe and report on police investigations of serious incidents involving other police services.³⁸ This Bill has been criticized by the Ombudsman of Quebec, who has advocated that the province adopt a model similar to the SIU.³⁹

39. The Serious Incident Response Teams in Nova Scotia and Alberta represent other models of civilian-led offices tasked to investigate serious incidents of use of force by police. A public inquiry in Manitoba has also recommended the creation of a civilian investigative institution, which resulted in the passage of legislation in 2009.⁴⁰

40. Although there are different legislative regimes under consideration across the country, the principles developed in this case regarding contact between officers and counsel prior to the completion of police notes, will undoubtedly influence the evolving models of police oversight.

(iii) The Common Law Right to Counsel is not at issue in an SIU Investigation

41. The SIU disagrees with the Applicants' assertion that the issue in this case is whether the *SIU Regulation* ousts a presumptive common law right to counsel. The Applicant has pointed to no authority that supports the proposition that there is a free-standing common law right to consultation with counsel at any time or in any context.

42. Of course, every person has the freedom to contact counsel if and when finances and circumstances permit. However, numerous authorities have stated that there is "no absolute right

³⁶ *Police (Independent Investigations Office) Amendment Act, 2011*, S.B.C. 2011, c. 8, which introduced Part 7.1 to the *Police Act*, R.S.B.C. 1996, c. 367.

³⁷ *Davies Report*, *supra* at 218-241; *Braidwood Report*, *supra* at 413-424.

³⁸ *Bill 46 – An Act Respecting Independent Police Investigations*, 39th Leg., 2d Sess. (2 December 2011).

³⁹ Le Protecteur du Citoyen, *Mémoire du Protecteur du Citoyen Présenté à la Commission des Institutions dans le Cadre des Consultations Particulières sur le Projet de loi N° 46 – Loi Concernant les Enquêtes Policières Indépendantes* (27 février 2012) at 15.

⁴⁰ *Taman Inquiry*, *supra* at 82-83; *Police Services Act*, S.M. 2009, c. 32. Note that Part 7 of the Act, which creates the Independent Investigations Unit, is not yet in force.

to counsel”.⁴¹ The *right* to counsel has been developed in a very limited set of circumstances: namely under the *Canadian Bill of Rights* and the *Charter* in circumstances where an individual has been arrested or detained by the police,⁴² or in other contexts where counsel is *necessary* to enable a person to participate in a proceeding that stands to affect an important interest.⁴³

43. Neither of these circumstances exist at the preliminary stages of the SIU investigation. The Court of Appeal affirmed that officers who are subject to an SIU investigation are not detained.⁴⁴ Procedural rights are not engaged either at the note writing stage. Any procedural rights that may exist would be connected to the fairness of a proceeding; namely the attendance of witness officers at a compelled interview.⁴⁵ These rights are fully protected by s. 7 of the *SIU Regulation*. Moreover, access to counsel is not required to protect officers against self-incrimination. The *SIU Regulation* recognizes and gives full effect – even exceeds – the requirements arising from the constitutional right against self-incrimination. The Regulation contemplates the use and derivative use immunities against self-incrimination that are reflected in ss. 7, 11(c) and 13 of the *Charter*, and no independent right to counsel arises by virtue of those constitutional protections. A Directive from the Attorney General to Crown prosecutors, applicable to prosecutions instituted by the SIU, also ensures that subject officers’ “notebook accounts and any evidence that would not have been found but for their notebook accounts will not be used to incriminate the officers in any subsequent criminal proceeding.”⁴⁶

44. Therefore, the issue in this case is not whether the statute overrides a presumptive right to counsel, but rather whether *SIU Regulation*, properly interpreted, provides for an entitlement to counsel that can be exercised prior to an officer completing his or her police notes.

⁴¹ See e.g. *Gochanour v. Alberta (Solicitor General)*, [1990] A.J. No. 348 (AB QB) at paras. 17, 19 [“*Gochanour*”]; *R. v. Robinson*, 1989 ABCA 267 at para. 88; *Soles v. Baker*, [1998] S.J. No. 379 (SK QB) at para. 11 [“*Soles*”].

⁴² *Canadian Bill of Rights*, S.C. 1960, c. 44, s. 2(c)(ii); *R. v. Brownridge*, [1972] S.C.R. 926; *Canadian Charter of Rights and Freedoms*, s. 10(b).

⁴³ See e.g. *Gochanour*, *supra* at paras. 17, 19; *R. v. Rowbotham*, [1988] O.J. No. 271 (Ont. CA); (*Re Parrish*, [1993] 2 FC 60 [“*Parrish*”]; *Soles supra*. at para. 11

⁴⁴ *Schaeffer*, *supra* at para. 62.

⁴⁵ *Parrish*, *supra*.

⁴⁶ *Adams Report*, *supra* at 49-50, 54; *Schaeffer*, *supra* at para. 78.

45. The modern approach to statutory interpretation requires a contextual, textual and purposive analysis.⁴⁷ As set out above, the history behind the creation of the SIU makes it clear that the purpose behind the *SIU Regulation* was to cure the mischief thought to occur by permitting police to investigate themselves, and to promote independence, accountability, and public confidence in the investigation of police use of force.⁴⁸ Although the Regulation contains protections in favour of the officer's interests, this is clearly a secondary feature of the scheme.

46. The Regulation contains a number of mechanisms to protect the integrity of the evidence collected by the SIU. First, officers are required to be segregated to the extent practicable, until the SIU has completed its interviews (s.6(1)). Second, officers are prohibited from communicating with one another both directly and indirectly (s.6(2)). Third, subject and witness officers are not permitted to share legal counsel (s.7(3)).⁴⁹ Each of these provisions demonstrates an overriding concern that officer's notes and statements must be independent, and evidence must be protected from contamination until the SIU has completed its interviews. Insofar as contact with counsel risks contaminating an officer's memory prior to it being memorialized in notes, it is contrary to the overriding purpose of the statutory scheme.

47. In addition, the regulatory scheme makes it clear that the requirements of the SIU investigation may take priority over the officers' entitlement to counsel. Section 7(2) exemplifies this, as it states that an officer's access to counsel may be abrogated if it would cause "an unreasonable delay in the investigation."

48. Further, the entitlement to counsel within the regulation is connected with the interview and is not necessarily triggered at the outset of the investigation. Section 7 states:

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.

⁴⁷ *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at 41; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 at para. 26.

⁴⁸ This purposive approach was recently adopted in *Metcalf v. Scott* 2011 ONSC 1292 at para. 57, 90-91 (S.C.J.) which concluded that the SIU has jurisdiction over retired police officers. An appeal in this matter has been heard and judgement is reserved.

⁴⁹ The prohibition against indirect communication between officers and the prohibition on joint retainers between subject and witness officers were added to the *SIU Regulation* in August 2011.

This section does not grant an entitlement to counsel as soon as an SIU investigation is launched. Rather, it is connected to the interview and preparation for the interview. It provides a right to an officer who, as a condition of their employment, is required to attend an interview or face disciplinary consequences,⁵⁰ and is similar to the rights provided to unionized employees under a collective agreement to have association representation at employment-related meetings.

49. Finally, any contact with counsel is inconsistent with an officer's obligations under s. 9 of the *Regulation* to "complete in full the notes on the incident in accordance with [their] duty". Notes are to be completed by the end of the officer's shift, "except where excused by the chief of police."

50. The notes officers are required to prepare in relation to an incident investigated by the SIU are no different than those which must be prepared in relation to any event that occurs during their shift. The SIU submits that if s.7 is construed, as it is required to be, as part of a functioning whole, it cannot be understood as providing a right to involve counsel prior to the preparation of officers' notes.

51. This purposive interpretation of s.7 also best gives effect to the overarching objectives of the legislation, which, as noted above, is to preserve and promote independence, accountability, and public confidence in the investigation of police use of deadly force. The scope of the right to counsel in s.7 of the *Regulation* must be informed by the vital significance of the independent oversight and investigative function of the SIU, both for the proper administration of justice and for public confidence in policing itself. As set out below, consultation with counsel on the events that form the subject of an SIU investigation can inadvertently influence the content of police notes, even where counsel makes no express suggestion as to their content. It can also undermine public confidence in the integrity of the notes, and thus the integrity and reliability of SIU investigations, eroding the legislation's overarching public accountability rationale. This risk of undermining public confidence is highlighted by the fact that all communications take place under the shroud of solicitor-client privilege and cannot be reviewed by investigators or courts.

⁵⁰ *SIU Regulation, supra*, s. 8(1), *Code of Conduct*, O. Reg. 268/10, Sch., s. 2(1)(a)(x).

52. Properly interpreted, in the context of the regulatory scheme and in accordance with the intention of the legislature, s.7 of the Regulation does not authorize police officers to consult with counsel prior to the completion of their notes.

(iv) The Incompatibility of Consultation with Counsel Prior to the Completion of Police Notes

53. The Court of Appeal correctly identified the potential for a conflict between an officer's public duty to create independent and contemporaneous notes, and his or her self-interest (or interest in protecting his or her colleagues) in the context of an SIU investigation.⁵¹ Although the Court attempted to balance these interests by allowing contact with counsel but making it subject to the limitation that the advice not relate to the content of the notes, the protocol is unworkable, and more importantly, fails to give effect to the overarching purposes of the SIU regime.

54. First, the Court of Appeal's reasons do not prevent a lawyer from conducting an interview that may indirectly reshape the officer's memory and affect the content and therefore, the independence of the notes. Nothing in the Court's order or reasons prohibits counsel from conducting an interview about the events in question prior to providing the sanctioned information to officers. Such interviewing would be expected as part of the process of giving legal advice. It is also the very conduct that would inevitably shape an officer's recollection.

55. Although the Court of Appeal's reasons make it clear that the notes of an officer may be unduly influenced if the officer seeks advice about the constituent elements of an offence or a defence,⁵² nothing expressly prevents counsel from posing a series of questions that may unintentionally communicate to the officer this information. Questions like "Did he have a weapon?"; "Who was he moving towards?"; "Were you afraid that anyone would be imminently harmed?"; "Was there a less lethal alternative?", serve to inform the witness officer of the constituent elements of a defence while still strictly adhering to the limits prescribed by the Court of Appeal. This is not to impute any improper purpose to a lawyer who poses these questions; rather these are precisely the questions that any competent counsel would ask so that they might provide effective representation to their client as the SIU process unfolds.

⁵¹ *Schaeffer, supra* at para. 72.

⁵² *Schaeffer, supra* at para. 73.

56. The lawyer's questions impose a narrative structure on the recollection that may not be reflective of how the officer recalls experiencing the events. The officer may then organize his or her notes in a manner that reflects this narrative. Not only does this impact the independence of the notes, it also results in the officer creating notes that have been influenced by the legal consultation. Even if the notes are factually a truthful reflection of the events that occurred, they may lack the appearance of truthfulness if they are structured in line with a legal argument. This serves to undermine the credibility of the officer and the public's perception of the integrity of the investigation.

57. Second, memory experts have noted that the very act of questioning and recounting an event can alter the recollection of a witness. In the Inquiry Regarding Thomas Sophonow, memory expert Elizabeth Loftus testified that memory can be irreparably contaminated by the manner that questions are posed. For example:

If the question is put in the form: "How fast were the cars going when they smashed into each other", it may elicit a different response than the question: "How fast were the cars going when they hit each other."⁵³

58. Other memory experts confirm this conclusion. In the British Psychological Society Research Board's (the "Research Board") *Guidelines on Memory and the Law*, the Research Board points out that memory can be affected by an interviewer who has a preconceived notion of the events that they seek to confirm. The Board notes that "leading questions are where the interviewer accidentally or otherwise suggests certain details to the witness that are later incorporated into their recollections."⁵⁴ This can be particularly troublesome in the SIU context where a lawyer represents more than one witness officer. If a lawyer has spoken to one of the witness officers, he or she may contaminate the evidence of subsequent witness officers by posing leading questions that seek to confirm information that counsel has obtained.

59. Even where an interviewer has no such pre-conceived notions, a witness's memory can be influenced by the "interviewer's questioning style, the content of the questions and the verbal

⁵³ The Inquiry Regarding Thomas Sophonow, *The Investigation, Prosecution and Consideration of Entitlement to Compensation* (Winnipeg: The Inquiry Regarding Thomas Sophonow, 2001) at 28 (Commissioner: The Hon. Peter Cory) ["*Sophonow Report*"].

⁵⁴ British Psychological Society Research Board, *Guidelines on Memory and the Law: Recommendations from the Scientific Study of Human Memory* (Leicester: The British Psychological Society, revised 2010) at 29 ["*Research Board Guidelines*"].

and non-verbal feedback received.” Subtle feedback from the interviewer can influence the way that memories are recalled. The Research Board notes that:

The interviewer may ‘shift’ the witness’s reporting of unwanted but perhaps accurate answers, to untrue or distorted ones by ... negative feedback which can ... implicitly (e.g. via the interviewer’s demeanour or use of repeated questions which may imply to the witness that their first answer was wrong.⁵⁵

60. The very act of repeated questioning can increase witness confidence.⁵⁶ This is problematic because, as was noted in the Sophonow Inquiry, while a high degree of witness confidence tends to make their recollections appear more reliable to others, there is in fact almost no relationship between confidence and accuracy in memories.⁵⁷

61. Drawing upon the existing body of knowledge about memory, Commissioner Cory recommended that line ups be conducted under double blind conditions in order to reduce subtle, unconscious transfers of information that influences a witness’s recollection.⁵⁸

62. The concerns that led Commissioner Cory to make his recommendations exist with equal force in the SIU investigative context. Like the police officer administering a photo array, counsel cannot be expected to have expertise in the science of memory creation and retrieval sufficient to guard against unconscious influencing of officers. Unless there is absolutely no discussion of the incident between counsel and the officer about the incident, some degree of memory reshaping is inevitable. This concern was also recognized by the Ontario Ombudsman in his recent report.⁵⁹

63. Once the recollection has been tainted, it will be memorialized in the notes.⁶⁰ Given that any such conversation is protected by solicitor client privilege, it is impossible to assess whether the lawyer and the officer discussed the events at all. This lack of transparency contributes to the very mischief that the SIU system is meant to cure: the lack of public confidence in the investigation into police use of force.

⁵⁵ *Ibid.* at 29.

⁵⁶ *Ibid.* at 28.

⁵⁷ *Sophonow Report, supra* at 28, 33-34.

⁵⁸ *Ibid.* at 27-33.

⁵⁹ *Oversight Undermined, supra* at 25.

⁶⁰ *Taman Report, supra* at 137.

64. In permitting officers involved in an SIU investigation to speak with counsel prior to the completion of their notes, the Court of Appeal has sanctioned an investigative process that, in practice, is inconsistent with the purpose of the SIU regime.

65. As the Ontario Ombudsman has noted, police association lawyers often arrive on scene before the SIU,⁶¹ and in some cases, even before it has even been contacted.⁶² Until the SIU has notice of an incident and gathers sufficient information to form an opinion on the events in question, police officers are neither subjects nor witnesses.⁶³ As such, s. 7(3) of the *SIU Regulation*, which prohibits joint retainers between subject and witness officers, cannot be given effect. At a minimum, counsel who arrives on scene prior to the SIU could begin to interview one or more officers in order to form a view of how various officers might be designated. Nothing in the Court of Appeal judgement prohibits counsel from speaking with all present officers prior to the arrival by the SIU.

66. To permit such contact is fundamentally inconsistent with the *SIU Regulation's* provisions respecting segregation,⁶⁴ as it would permit the conscious or unconscious transfer of information between officers indirectly through interviewing counsel. For the same reason, it is inconsistent with the public law duty of police officers to make independent notes. In the initial absence of designation by the SIU, the only mechanism to preserve both the duty of segregation and the duty of contemporaneous and independent note taking is to prohibit contact with counsel until such time as the officer's notes are completed.

67. The scheme articulated by the Court of Appeal is also unnecessary. If the advice is merely limited to the six bulleted points listed in paragraph 81 of the decision, then it is not truly legal advice that is being provided but rather legal information. This information can and should be provided through formal police training, information circulars or other devices. Furthermore, a properly trained police officer will have no need for a lawyer to advise him or her on the legal obligations surrounding note taking. They are already trained to take notes that contain their

⁶¹ *Oversight Unseen, supra* at 39; *Oversight Undermined, supra* at 32.

⁶² *SIU Report re: Minty, supra* at 26.

⁶³ *SIU Regulation, supra*, ss. 1(1) and (2).

⁶⁴ *SIU Regulation, supra*, s. 6. While the designation of subject and witness officers is contingent on the SIU Director forming an opinion on their role in a given incident, the duty to segregate arises upon the Chief of Police notifying the SIU Director of the incident.

“independent recollections providing an accurate and complete account of police observations and activities.”⁶⁵ They have a professional obligation to take “concise, comprehensive particulars of each occurrence” during their shift.⁶⁶

68. Although the Notice of Application did not seek a declaration that officers could not consult counsel prior to the completion of their notes, it did seek guidance on whether the *SIU Regulation* permitted police officers “to refrain from preparing their notes to permit consultation with counsel”.⁶⁷ The issue was raised expressly in the SIU’s factum before Low J., and was addressed to varying degrees by a number of the parties before the Court of Appeal.⁶⁸ As it was the Court of Appeal who first ruled on the merits of the application, no party would suffer prejudice from this Court considering the issue, nor would the Court be deprived of the record necessary to decide the issue.

PART V – ORDER SOUGHT

69. The SIU requests that the Application for Leave to Appeal and the Application for Leave to Cross-Appeal be granted. The SIU is not seeking its costs and asks this Court to order that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of March, 2012 by

Marlys Edwardh (LSUC # 5939K)
 Kelly Doctor (LSUC # 54885A)
SACK GOLDBLATT MITCHELL LLP
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Applicant, Ian Scott, Director of the
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⁶⁵ *Police College Training Program Workbook* at 2; *Schaeffer, supra* at para. 68.

⁶⁶ *Schaeffer, supra* at para. 68; *OPP Orders 2009, supra* at s. 2.50.3.

⁶⁷ Notice of Application, para. 2(B), *SIU Application Record*, Tab 10.

⁶⁸ *Appellant’s Factum*, at para. 117; *Factum of the Respondents Wood, Pullbrook and Seguin*, at paras. 85, 110-115; *Factum of the Respondent, Director of the Special Investigations Unit*, at para. 70; *Factum of the Respondent, Commissioner of the OPP*, at para. 47; *Factum of the Intervener the Canadian Civil Liberties Association*, at paras. 29-34; *Factum of the Intervener Ontario Association of Chiefs of Police*, at paras. 38, 41, 44-48; *Factum of the Intervener Police Association of Ontario*, at para. 12; *Factum of the Intervener Andrew McKay*, at paras. 24-26; *Factum of the Intervener Criminal Lawyers’ Association*, at paras. 20-28, *SIU Application Record*, Tabs 14-22.

PART VI – TABLE OF AUTHORITIES

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21.	André Marin, <i>Oversight Undermined: Investigation into the Minister of the Attorney General's Implementation of Recommendations Concerning Reform of the Special Investigations Unit</i> (Toronto: Ombudsman Ontario, 2011)	36, 62, 65
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23.	Braidwood Commission on the Death of Robert Dziekanski, <i>Why? – The Robert Dziekanski Tragedy</i> (Vancouver: Braidwood Commission on the Death of Robert Dziekanski, 2010) (Commissioner: Thomas R. Braidwood, Q.C.)	3, 37
24.	British Psychological Society Research Board, <i>Guidelines on Memory and the Law: Recommendations from the Scientific Study of Human Memory</i> (Leicester: The British Psychological Society, revised 2010)	58, 59, 60
25.	Council of Europe, Commissioner for Human Rights, Opinion of the Commissioner for Human Rights Concerning Independent and Effective Determination of Complaints Against the Police (12 March 2009)	33
26.	Inquiry into the Death of Frank Paul, <i>Cold And Alone – Interim Report</i> (British Columbia: The Davies Commission, 2008) (Commissioner: William H. Davies, Q.C.)	3, 37
27.	Le Protecteur du Citoyen, Mémoire du Protecteur du Citoyen Présenté à la Commission des Institutions dans le Cadre des Consultations Particulières sur le Projet de loi N° 46 – Loi Concernant les Enquêtes Policières Indépendantes (27 février 2012).	38

28.	Ontario, Race Relations and Policing Task Force, <i>The Report of the Race Relations and Policing Task Force</i> (Toronto: Race Relations and Policing Task Force, 1989) (Chair: Clare Lewis)	3, 29
29.	Ontario, <i>Review Report on the Special investigations Unit Reforms Prepared for the Attorney General by the Honourable George W. Adams, Q.C.</i> (Toronto: Ministry of the Attorney General, 2003)	35, 43
30.	Taman Inquiry into the Investigation and Prosecution of Derek Harvey-Zenk, <i>Report of the Taman Inquiry</i> (Library and Archives Canada, 2008) (Commissioner: Hon. Roger Salhany, Q.C.)	3, 20, 22, 23, 39, 63
31.	The Inquiry Regarding Thomas Sophonow, <i>The Investigation, Prosecution and Consideration of Entitlement to Compensation</i> (Winnipeg: The Inquiry Regarding Thomas Sophonow, 2001) at 28 (Commissioner: The Hon. Peter. Cory)	57, 60, 61

PART VII – RELEVANT LEGISLATIVE PROVISIONS

<p><i>Police Services Act, R.S.O. 1990, c. P.15</i></p> <p>Duties of police officer 42. (1) The duties of a police officer include,...</p> <p>(e) laying charges and participating in prosecutions;</p>	<p><i>Loi sur les services policiers, L.R.O. 1990, c. P.15</i></p> <p>Fonctions d'un agent de police 42. (1) L'agent de police a notamment pour fonctions :...</p> <p>e) de porter des accusations et de participer à des poursuites;</p>
<p><i>Code of Conduct, O. Reg. 268/10, Sch.</i></p> <p>2. (1) Any chief of police or other police officer commits misconduct if he or she engages in,</p> <p>(a) Discreditable Conduct, in that he or she,...</p> <p>(x) contravenes any provision of the Act or the regulations, or</p>	<p><i>Code de conduite, Règl. de l'Ont. 268/10, Ann.</i></p> <p>2. (1) Tout chef de police ou autre agent de police commet un acte d'inconduite s'il agit d'une manière qui constitue ou cause, selon le cas:</p> <p>a) une conduite déshonorante, du fait que, selon le cas:...</p> <p>(x) il contrevient à une disposition de la Loi ou des règlements,</p>
<p><i>Conduct and Duties of Police Officers Respecting Investigations by the Special Investigations Unit, O. Reg. 267/10</i></p> <p>Definitions and interpretation</p> <p>1. (1) In this Regulation,</p> <p>“SIU” means the special investigations unit established under section 113 of the Act; (“UES”)</p> <p>“subject officer” means a police officer whose conduct appears, in the opinion of the SIU director, to have caused the death or serious</p>	<p><i>Conduite et obligations des agents de police en ce qui concerne les enquêtes de l'unité des enquêtes spéciales, Règl. de l'Ont. 267/10</i></p> <p>Définitions et interprétation</p> <p>1. (1) Les définitions qui suivent s'appliquent au présent règlement.</p> <p>«agent impliqué» Agent de police dont la conduite semble, de l'avis du directeur de l'UES, avoir causé le décès ou les blessures graves qui font l'objet d'une enquête. («subject officer»)</p>

<p>injury under investigation; (“agent impliqué”)</p> <p>“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).</p> <p>(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).</p>	<p>«agent témoin» Agent de police qui, de l’avis du directeur de l’UES, est en cause dans l’incident qui fait l’objet d’une enquête, mais qui n’est pas un agent impliqué. («witness officer»)</p> <p>«UES» L’unité des enquêtes spéciales constituée en application de l’article 113 de la Loi. («SIU») Règl. de l’Ont. 267/10, par. 1 (1).</p> <p>(2) Le directeur de l’UES peut désigner un enquêteur de l’UES pour agir à sa place et exercer les pouvoirs et fonctions que lui attribue le présent règlement et, s’il désigne un remplaçant, toute mention du directeur de l’UES dans le présent règlement, sauf le présent paragraphe, s’entend du directeur de l’UES ou de son remplaçant désigné. Règl. de l’Ont. 267/10, par. 1 (2).</p>
<p>Notice to SIU</p> <p>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.</p>	<p>Avis à l’UES</p> <p>3. Le chef de police avise immédiatement l’UES d’un incident mettant en cause un ou plusieurs de ses agents de police qui peut raisonnablement être considéré comme relevant du mandat d’enquête de l’UES, tel qu’il est énoncé au paragraphe 113 (5) de la Loi. Règl. de l’Ont. 267/10, art. 3.</p>
<p>Segregation of police officers involved in incident</p> <p>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).</p> <p>(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.</p>	<p>Isolement des agents de police en cause dans l’incident</p> <p>6. (1) Le chef de police isole les uns des autres, autant qu’il est matériellement possible de le faire, les agents de police en cause dans l’incident tant que l’UES n’a pas terminé ses entrevues. Règl. de l’Ont. 267/10, par. 6 (1).</p> <p>(2) Un agent de police en cause dans l’incident ne doit pas communiquer, directement ou indirectement, avec un autre agent de police en cause dans l’incident au sujet de leur participation à l’incident tant que l’UES n’a pas terminé ses entrevues. Règl. de l’Ont. 267/10, par. 6 (2); Règl. de l’Ont. 283/11, art.</p>

<p>Right to counsel</p> <p>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).</p> <p>(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).</p> <p>(3) Witness officers may not be represented by the same legal counsel as subject officers. O. Reg. 283/11, s. 2.</p> <p>Interview of witness officers</p> <p>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).</p> <p>(2) A request for an interview by the SIU must be made in person. O. Reg. 267/10, s. 8 (2).</p> <p>(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).</p> <p>(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).</p>	<p>1.</p> <p>Droit à un avocat</p> <p>7. (1) Sous réserve du paragraphe (2), l'agent de police a le droit de consulter un avocat ou un représentant d'une association de policiers et a droit à la présence d'un avocat ou d'un représentant d'une telle association pendant son entrevue avec l'UES. Règl. de l'Ont. 267/10, par. 7 (1).</p> <p>(2) Le paragraphe (1) ne s'applique pas si, de l'avis du directeur de l'UES, le fait d'attendre un avocat ou un représentant d'une association de policiers retarderait l'enquête de façon déraisonnable. Règl. de l'Ont. 267/10, par. 7 (2).</p> <p>(3) Les agents témoins ne peuvent pas être représentés par le même avocat que les agents qui font l'objet d'une enquête. Règl. de l'Ont. 283/11, art. 2.</p> <p>Entrevue des agents témoins</p> <p>8. (1) Sous réserve des paragraphes (2) et (5) et de l'article 10, l'agent témoin rencontre l'UES et répond à toutes ses questions dès qu'il reçoit une demande d'entrevue de celle-ci et au plus tard 24 heures après la demande s'il existe des motifs valables de retarder l'entrevue. Règl. de l'Ont. 267/10, par. 8 (1).</p> <p>(2) L'UES doit présenter la demande d'entrevue en personne. Règl. de l'Ont. 267/10, par. 8 (2).</p> <p>(3) L'UES fait enregistrer l'entrevue et en donne une copie à l'agent témoin dès que celle-ci est disponible. Règl. de l'Ont. 267/10, par. 8 (3).</p> <p>(4) L'entrevue ne doit pas être enregistrée sur bande sonore ou bande vidéo sans le consentement de l'agent témoin. Règl. de</p>
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<p>(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).</p>	<p>l'Ont. 267/10, par. 8 (4).</p> <p>(5) Le directeur de l'UES peut demander qu'une entrevue ait lieu après le délai fixé au paragraphe (1). Règl. de l'Ont. 267/10, par. 8 (5).</p>
<p>Notes on incident</p>	<p>Notes sur l'incident</p>
<p>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).</p>	<p>9. (1) L'agent témoin rédige des notes complètes sur l'incident conformément à son obligation et, sous réserve du paragraphe (4) et de l'article 10, les fournit au chef de police au plus tard 24 heures après que l'UES en a fait la demande. Règl. de l'Ont. 267/10, par. 9 (1).</p>
<p>(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).</p>	<p>(2) Sous réserve du paragraphe (4) et de l'article 10, le chef de police fournit des copies des notes d'un agent témoin à l'UES à sa demande, au plus tard 24 heures après la demande. Règl. de l'Ont. 267/10, par. 9 (2).</p>
<p>(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).</p>	<p>(3) L'agent impliqué rédige des notes complètes sur l'incident conformément à son obligation, mais aucun membre du corps de police ne doit en fournir des copies à la demande de l'UES. Règl. de l'Ont. 267/10, par. 9 (3).</p>
<p>(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).</p>	<p>(4) Le directeur de l'UES peut autoriser le chef de police à fournir des copies des notes après le délai fixé au paragraphe (2). Règl. de l'Ont. 267/10, par. 9 (4).</p>
<p>(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.</p>	<p>(5) Les notes prises en vertu des paragraphes (1) et (3) doivent être terminées à la fin de la période de service de l'agent, sous réserve d'une autorisation contraire du chef de police. Règl. de l'Ont. 283/11, art. 3.</p>
<p>Notice of whether subject officer or witness officer</p>	<p>Avis informant du statut d'agent impliqué ou d'agent témoin</p>
<p>10. (1) The SIU shall, before requesting an interview with a police officer or before</p>	<p>10. (1) Avant de demander une entrevue avec un agent de police ou avant de demander une</p>

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).

copie de ses notes sur l'incident, l'UES avise par écrit le chef de police et l'agent de police du fait que ce dernier est considéré comme un agent impliqué ou un agent témoin. Règl. de l'Ont. 267/10, par. 10 (1).

(2) L'UES avise par écrit le chef de police et l'agent de police si, à un moment quelconque après les avoir d'abord avisés du fait que l'agent de police est considéré comme un agent impliqué ou un agent témoin, le directeur de l'UES décide que l'agent qui était considéré comme un agent impliqué est désormais considéré comme un agent témoin ou que l'agent qui était considéré comme un agent témoin est désormais considéré comme un agent impliqué. Règl. de l'Ont. 267/10, par. 10 (2).

(3) Si, après avoir fait passer une entrevue à un agent de police qui était considéré comme un agent témoin lorsque l'entrevue a été demandée ou après avoir obtenu une copie des notes d'un agent de police qui était considéré comme un agent témoin lorsque les notes ont été demandées, le directeur de l'UES décide que l'agent de police est un agent impliqué, l'UES :

a) avise par écrit le chef de police et l'agent de police du fait que ce dernier est désormais considéré comme un agent impliqué;

b) remet à l'agent de police l'original et toutes les copies de l'enregistrement de l'entrevue;

c) remet au chef de police l'original et toutes les copies des notes de l'agent de police. Règl. de l'Ont. 267/10, par. 10 (3).

(4) Le chef de police conserve l'original et toutes les copies des notes de l'agent de police reçues en application de l'alinéa (3) c) pour utilisation dans son enquête visée à l'article 11. Règl. de l'Ont. 267/10, par. 10 (4).

