Court File No. C52414

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

RUTH SCHAEFFER, EVELYN MINTY and DIANE PINDER

Appellants (Applicants)

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)

APPLICATION UNDER Rule 14.05(3) of the *Rules of Civil Procedure*

NOTICE OF APPEAL

THE APPELLANTS, Ruth Schaeffer, Evelyn Minty and Diane Pinder, **APPEAL** to the Court of Appeal from the Judgment of Madam Justice W. Low, dated June 23, 2010, made at Superior Court of Justice, Toronto, Ontario.

THE APPELLANTS ASK that the judgment be set aside and relief be granted as follows:

1. That the appellants be granted standing to seek the relief sought in the application below;

2. That this Honourable Court grant the declaratory relief sought in the application below;

3. Costs in the appeal and the application below; and,

4. Such further and other relief as counsel may advise and this Honourable Court may permit.

THE GROUNDS OF APPEAL are as follows:

1. The Learned Application Judge erred in law in misapprehending the Court's role in upholding and fostering public confidence in police adherence to the Rule of Law;

2. The Application Judge erred in law in failing to advert to the detrimental impact on the administration of justice presented by key justice officials (police officers and lawyers) engaging in a course of conduct which would lead to police officer collusion (the jointly retained lawyer must share information amongst his clients) and the tainting of police officer notes (police officers create two sets of notes: one undisclosed set for their solicitor and a second "approved" set appears in their memobooks);

3. The Application Judge erred in her characterisation of the issue of the propriety of the joint retainer for subject and witness officers (in the context of the police use of lethal force which is being investigated by the Special Investigations Unit) as a private matter between the officers and their employer. The Court erred in failing to take into account the impact of the conduct of the officers and their lawyers on the public interest and the integrity of the administration of justice;

4. The Learned Application Judge erred in law in mischaracterising the relief claimed in the Application as seeking to ban all joint retainers amongst police officers. The Application sought no such relief and the appellants made no such argument. Instead, the appellants sought a statutory interpretation of the *Police Services Act Regulations* and the *Rules of Professional Conduct* to determine the legality of the practice of subject officers (who are under investigation) and witness officers retaining the same lawyer who is prohibited (pursuant to section 2.06(4) of the *Rules of Professional Conduct*) from keeping information confidential amongst his various clients;

5. The Application Judge erred in law in finding that there is no public interest dimension to counsel, in the course of an S.I.U. investigation, playing an active role in the preparation of a police officer's notes (re the undisclosed Solicitor Draft of his notes, Officer Wood writes: "Told [by Counsel] notes are excellent and to complete notebook"). The appellants sought a statutory interpretation of the *Police Services Act* Regulations and *The Rules of Professional Conduct* to determine whether a lawyer should be permitted to assist a witness officer in the preparation of his notes; including shielding the first draft of those notes from scrutiny on the basis of solicitor client privilege.

The Court erred in failing to appreciate the ramifications of this conduct for the public interest and the integrity of the administration of justice.

6. The Application Judge erred in her determination that the appellant families lack private law standing to bring a Rule 14.05 proceeding in respect of the misconduct of police officers in an S.I.U. investigation. The Application Judge failed to advert to binding precedent recognising the legal rights in issue. The Court's analysis that the appellant families possess no legal rights in this regard makes no reference to and is contrary to the Supreme Court of Canada's judgment in *Odhavji Estate v. Woodhouse* [2003] 3 S.C.R. 263 which expressly recognised causes of action in tort (misfeasance in public office and negligence) for similarly situated families in respect of the misconduct of police officers in an S.I.U. investigation.

7. The Application Judge erred in law in failing to recognize the factual and legal nexus between the conduct of the police officers, on the one hand, and the appellant families' entitlement to know the true circumstances of the shootings, on the other. The Application Judge erred in law in failing to advert to the detrimental impact police officer collusion and tainted police notes would inevitably have for the appellants' confidence (as well as the public's confidence) in the integrity and reliability of S.I.U. investigations into the police use of lethal force;

8. The Application Judge erred in her determination that the appellant families lack public interest standing to bring a Rule 14.05 proceeding in respect of the misconduct of police officers in an S.I.U. investigation. The Court failed to advert to the positions taken in the proceeding before her by the Director of the S.I.U., who sought similar relief including judicial guidance in respect of the conduct of the police officers in the S.I.U. investigations. Nor did the Application Judge allude in her reasons to the fact of the express support of the Director for the appellant families' standing on the public interest ground.

9. The Application Judge erred in law in her determination that there is no public interest dimension to proceedings that attracted interventions by the Ontario Association of Chiefs of Police and the Police Association of Ontario; both of whom filed materials which cited the serious ramifications of the issues raised by the appellant families for police officers across the Province of Ontario;

10. The Application Judge erred in law in denying the appellants access to the Rule 14.05(3) process in circumstances where, by all accounts, there are no material facts in dispute and there is no other convenient or appropriate forum to adjudicate the legality of the widespread practices of the police officers and their lawyers. The Court failed to take into account that the impugned conduct is "of a recurring nature but of a brief duration" and therefore is not easily amenable to review (*Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R.

342 at para.36). The Application Judge erred in giving no weight to the widespread nature of the impugned conduct and the potential impact of such conduct on the reputation of the administration of justice.

11. The Application Judge erred in law in determining the jurisdiction and standing issues raised below without the benefit of full argument on the merits of the Application;

12. The Application Judge erred in law in failing to apply the appropriate principles that govern applications under Rule 14.05(3) of the *Rules of Civil Procedure* and in failing to apply the appropriate principles that govern the rights of applicants to declaratory relief;

13. Such further and other grounds as counsel may advise and this Honourable Court permits.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

1. Sections 5, 6(1)(b), 7(1) and 134(1)(a) and (c) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43;

2. The judgment appealed from is a final order; and,

3. Leave to appeal is not required.

DATE: July 19, 2010

Falconer Charney LLP
Barristers-at-law
8 Prince Arthur Avenue
Toronto, Ontario,
M5R 1A9

Julian N. Falconer (LSUC #29465R)
Sunil S. Mathai (LSUC #49616O)

Tel: (416) 964-3408
Fax: (416) 929-8179
Lawyers for the Appellants

TO: **Paliare Roland Rosenberg Rothstein LLP**
250 University Avenue, Suite 501
Toronto, ON M5H 3E5

Ian Roland/Robert Centa

Tel: (416) 646-4319
Fax: (416) 646-4301
Lawyers for the Respondents, Kris Wood, Acting Sergeant Mark Pullbrook, Police Constable Graham Seguin

AND TO: **Marlys Edwardh**
Barristers Professional Corporation
1100-20 Dundas Street West
Toronto, ON M5G 2G8

Tel: (416) 597-9400
Fax: (416) 597-0070

Lawyers for the Director of the Special Investigation Unit, Ian Scott

AND TO: **Community Safety & Correctional Service**
77 Grenville St
Legal Services, 8th Floor
Toronto, ON M5S 1B3

Christopher Diana

Tel: (416) 314-3513
Fax: (416) 314-3518
Lawyers for the Commissioner of the Ontario Provincial Police, Julian Fantino

AND TO: **Crown Law Office – Civil**
720 Bay Street, 8th Floor
Toronto, ON M5G 2K1

Tel: (416) 326-4102
Fax: (416) 326-4181
Lawyers for Her Majesty The Queen in Right of Ontario

AND TO: This Honourable Court

RUTH SCHAEFFER ET AL
Appellants (Applicants)

-and- POLICE CONSTABLE KRIS WOOD ET AL
Respondents (Respondents)

Court File No:

COURT OF APPEAL FOR ONTARIO

Proceedings Commenced in Toronto

NOTICE OF APPEAL

FALCONER CHARNEY LLP
Barristers-at-Law
8 Prince Arthur Avenue
Toronto, Ontario
M5R 1A9

Julian N. Falconer (L.S.U.C.#29465R)
Sunil S. Mathai (L.S.U.C. #49616O)

Tel: (416) 964-3408
Fax: (416) 929-8179

Lawyers for the Appellants