Court of Appeal File No.: C69467

**COURT OF APPEAL FOR ONTARIO**

BETWEEN:

KELLY LYNN DONOVAN

Plaintiff

(Appellant)

and

REGIONAL MUNICIPALITY OF WATERLOO POLICE SERVICES BOARD and BRYAN LARKIN

Defendants

(Respondents)

# APPELLANT'S FACTUM

Date: June 16, 2021

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BRYAN LARKIN

Respondents
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# FACTUM OF THE APPELLANT

## PART I – NATURE OF THE APPEAL

1. The Appellant is a former police officer, having worked for the Respondent Board from December, 2010, until June, 2017, and is self-represented in these matters.
2. The Appellant appeals an order made by the Honourable Justice Bielby dated April 19, 2021, in Brampton amending the order of the Honourable Justice Doi dated February 21, 2019, by dismissing her claim for lack of jurisdiction, pursuant to Rule 21.01(3)(a) and ordering her to pay the Respondent's costs fixed at $15,000.00 for the motion.

## PART II – OVERVIEW

3. The Appellant first appealed the order of Doi J on October 11, 2019.
4. On October 25, 2019, the Ontario Court of Appeal ruled in favour of the Appellant, set aside Doi J's order, and ordered the Respondents to pay the Appellant costs in both the lower court and the Court of Appeal.

*Donovan v. Waterloo Regional Police Services Board*, 2019 ONCA 845.
*Donovan v. Waterloo Regional Police Services Board*, 2019 ONSC 1212.

5. On February 23, 2021, the Respondents brought another motion, pursuant to Rules 21.01(3)(a) and 59.06(1) to have Doi J's order amended.
6. On April 19, 2021, the Honourable Justice Bielby allowed the Respondents' motion brought pursuant to Rules 21.01(3)(a) and 59.06(1) and dismissed the Appellant's claim for lack of jurisdiction.
7. On May 28, 2021, Bielby J ordered the Appellant to pay costs to the Respondents fixed at $15,000.00 for the motion.
8. The Appellant's appeal should be granted as Bielby J erred by:
    a. Allowing the Respondents Rule 21.01(3)(a) and 59.06(1) motion of Doi J's order;
    b. Deciding that court lacked jurisdiction of the Appellant's claim;
    c. Denying that the Respondents have acted in bad faith or contrary to public interest;
    d. Refusing to consider the Appellant's evidence and incorrectly stating the facts of the case;
    e. Reasonable apprehension of bias.

## PART III – SUMMART OF THE FACTS

### Appellant's Employment

9. In February, 2011, the Appellant was involved in a traumatic incident at the Ontario Police College while attending Basic Constable Training.

> Affidavit of Kelly Donovan sworn February 10, 2021, Appellant's Appeal Book and Compendium [ABCO], Tab 15 at para. 3. [Affidavit of Kelly Donovan].

10. Up until May, 2016, the Appellant was a well-respected and high performing member of the police service with no history of poor performance or misconduct. She had been promoted to use of force trainer in May, 2015.
11. On May 4, 2016, the Appellant made a disclosure to the Respondent Board of internal misfeasance. This disclosure was made in good faith regarding the Individual Respondent's selective

enforcement of domestic violence against members of the police service. At that time, the *Police Services Act, R.S.O. 1990, c. P.15*, section 58(2), ("*PSA*"), did not permit a police officer to make a complaint about their own police service. The Appellant believed this was a matter of public interest and that it was her duty to make the disclosure to the Board.

12. Following her disclosure, the Appellant faced a misconduct investigation initiated by the Individual Respondent, she was placed on administrative duties and ordered to cease communicating with members of the Respondent Board. In response to the retaliation she faced, the Appellant filed several complaints against the Respondents, including a complaint to the Human Rights Tribunal of Ontario ("HRTO"). The only reason for the misconduct investigation was the disclosure made by the Appellant to the Respondent Board.

13. In February, 2017, the Appellant began a medical leave of absence which was approved by the Workplace Safety and Insurance Board ("WSIB"), claim number 30505408. The Appellant began therapy for post-traumatic stress disorder ("PTSD"), resulting from the traumatic incident cited at paragraph 9. The Respondents' acknowledgement of the Appellant's injury was filed with WSIB in May, 2017.

> Affidavit of Kelly Donovan, ABCO, Tab 15, paras. 9 & 38.
> ABCO, Tab 16 and Tab 17.

14. In May, 2017, a $167,000,000 class action lawsuit, (CV-17-2346-00), was filed against the Respondent Board for systemic gender discrimination, sexual harassment and sexual assault. The Appellant was eligible to join the suit. The representative plaintiff in the class action lawsuit was Angie Rivers, a colleague of the Appellant's.

**Appellant's Resignation & Advocacy**

15. In June, 2017, the parties signed a resignation agreement, including mutual releases, and the Appellant's employment ended. The Appellant was precluded from joining the class action lawsuit cited above. This agreement terminated several ongoing processes, including the misconduct

investigation and multiple complaints the Appellant had filed against the Respondents. The Appellant withdrew her complaint to the HRTO. The Appellant had refused to sign a non-disclosure clause, therefore the agreement only contained a confidentiality provision relating to the contents and existence of the agreement itself.

> Affidavit of Kelly Donovan, ABCO, Tab 15, paras. 13 & 14.
> Affidavit of Laura Freitag sworn February 9, 2021, ABCO, Tab 18. [Affidavit of Laura Freitag].
> ABCO, Tab 19.

16. Since the Appellant voluntarily resigned, her WSIB claim would not replace her salary, but would continue to pay for her treatment and medication for her PTSD, until it was no longer required.

17. In July, 2017, the Appellant published a report about the retaliation police whistleblowers face when reporting wrongdoing within Ontario police services, and suggested ways that police service boards could improve governance over matters of public interest, such as internal abuses of power and discretionary enforcement of the law. The Appellant distributed her report by email to every police service board in Ontario, including the Respondent Board, as well as to Members of Provincial Parliament and the media. The Appellant was featured in multiple media outlets.

> Affidavit of Kelly Donovan, ABCO, Tab 15, paras. 16 & 17.

18. The Appellant started her own business, Fit4Duty – The Ethical Standard™ to provide consulting and safe workplace reporting programs to employers. The Appellant continued to receive therapy for PTSD funded by WSIB, and she advocated for statutory protections for police whistleblowers at the Ontario Legislature; which resulted in changes to the *Comprehensive Ontario Police Services Act*, 2019, S.O. 2019, c. 1 – Bill 68, "Part XI – Right to Report Misconduct" allowing police officers to report misconduct and providing them protection from reprisal.

19. As a result of the Appellant's advocacy, police whistleblowers in Ontario are at now, at least, recognized. As a result, the Appellant has attracted a following of citizens, media and advocacy groups who have an interest in improved accountability and transparency in policing.

**Alleged Breaches and Enforcement Actions**

20. In December, 2017, the Individual Respondent swore an Affidavit to defend the Respondent Board in the ongoing class action lawsuit, which was filed to public court record and included confidential details of the Appellant's resignation agreement. The Individual Respondent had no legal obligation to disclose the confidential details of the resignation agreement. This affidavit helped the Respondent Board have the class action lawsuit dismissed for lack of jurisdiction.

    Affidavit of Kelly Donovan, ABCO, Tab 15, paras. 22 – 27.
    ABCO, Tab 20.
    *Donovan v. Waterloo Regional Police Services Board*, 2019 ONSC 1212, para. 33.

21. On May 9, 2018, the Appellant filed her original Statement of Claim against the Respondents to enforce the resignation agreement.

    ABCO, Tab 14.

22. On June 7, 2018, the Respondents filed their first Notice of Motion to be heard on February 13, 2019, pursuant to Rules 21.01(1)(b), 21.01(3)(a) and 21.01(3)(d) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "*Rules*").

    ABCO, Tab 21.

23. On June 28, 2018, (50-days after the Appellant filed her claim), the Respondent Board filed an Application for Contravention of Settlement against the Appellant at the Human Rights Tribunal of Ontario ("HRTO"), forcing the Appellant to fight a two-front war, alleging she was in contravention of the resignation agreement for speaking publicly about her experiences working for the Respondent Board.

    Affidavit of Kelly Donovan, ABCO, Tab 15, paras. 30 – 32.
    ABCO, Tab 22.
    *Power Tax v. Millar, Dioguardi*, 2013 ONSC 135, para. 26.

24. On July 10, 2018, the Appellant made a submission to the HRTO advising of the ongoing parallel matter in Court, and asked for an order dismissing the Respondent Board's Application alleging it was filed in bad faith out of retaliation, and contrary to the *Statutory Powers and Procedures Act*,

R.S.O. 1990, c. S.22, section 4.6. The HRTO scheduled a hearing of the Respondent Board's Application for February 22, 2019, nine days after their motion to dismiss this action was to be heard.

Affidavit of Kelly Donovan, ABCO, Tab 15, para. 33.
ABCO, Tab 23.
ABCO, Tab 24.

25. On July 27, 2018, the Appellant also filed an Application for Contravention of Settlement against the Respondents so as to not be prejudiced at the February 22, 2019, hearing of the Respondent Board's Application.

ABCO, Tab 25.

26. The Appellant applied to the Superior Court of Justice in Toronto to have Respondent Board's proceeding dismissed pursuant to section 137.1 of the *Courts of Justice Act, R.S.O. 1990, c. C.43* ("*CJA*") (CV-18-00605386-0000). There is no term in the resignation agreement restricting the Appellant from speaking of her experiences working for the Respondents. The Honourable Justice Favreau ruled that an HRTO proceeding is not a proceeding for the purposes of *CJA* s. 137.1.

Affidavit of Kelly Donovan, ABCO, Tab 15, para. 49.
*Donovan v. (Waterloo) Police Services Board*, 2019 ONSC 818.
*CJA* s. 137.1.

27. In August, 2018, the Appellant was informed that the Respondent Board had appealed her WSIB claim number 30505408, despite the release contained in the resignation agreement.

Affidavit of Kelly Donovan, ABCO, Tab 15, para. 36 & 37.
ABCO, Tab 26 & Tab 27.

28. On January 16, 2019, the Appellant amended her claim on consent to include the second allegation of breach of contract, (the WSIB appeal).

ABCO, Tab 13.

29. On February 21, 2019, Doi J ruled in favour of the Respondents and dismissed the Appellant's claim.

*Donovan v. Waterloo Regional Police Services Board*, 2019 ONSC 1212.

**First Appeal**

30. On March 22, 2019, the Appellant filed her first Notice of Appeal of Doi J's ruling with the Ontario Court of Appeal, Appeal number C66718.

    ABCO, Tab 28.

31. On October 11, 2019, the parties argued the appeal before the Honourable panel at the Ontario Court of Appeal, and the Respondents did not raise an issue they believed to be outstanding following Doi J's Order.

32. The Appellant was successful on appeal and the Respondents were ordered to pay costs on both the motion and the appeal.

    *Donovan v. Waterloo Regional Police Services Board*, 2019 ONCA 845.
    *Donovan v. Waterloo Regional Police Services Board*, 2019 ONSC 1212.

33. On January 29, 2020, the Appellant amended her amended Statement of Claim, pursuant to the Order of the Court of Appeal.

    ABCO, Tab 12.

34. On February 18, 2020, the Respondents had not filed their Statement of Defence or Notice of Intent to Defend, as required under Rule 18.01.

**Post-Appeal Conduct by the Respondents**

35. On February 19, 2020, at 9:40 a.m., the Appellant sent an email to counsel for the Respondents advising that his clients were now considered to be in default and requested the document due.

    Affidavit of Kelly Donovan, ABCO, Tab 15, para. 64.
    ABCO, Tab 29.

36. Two hours later, on February 19, 2020, at 11:28 a.m., Respondents' counsel sent a letter to Doi J to seek direction on the appropriate next step in this proceeding as the Respondents believed their jurisdiction motion remained undecided. Both parties made lengthy submissions to Doi J on the issue. The Appellant's arguments centred on finality of litigation and that the lower court was *functus officio* since the Court of Appeal Order had been made.

ABCO, Tab 30.

37. On April 20, 2020, Doi J issued an endorsement advising the Respondents to bring a Rule 59.06(1) motion.

ABCO, Tab 7.

38. On April 27, 2020, the Appellant sent a letter to counsel for the Respondents outlining her position that their contemplated action, to bring a Rule 59.06(1) motion, could not succeed according to a recent decision at the Court of Appeal of Manitoba, whose Rule 59.06(1) is identical to that in *The Rules*. The Appellant suggested the parties consent to changes to Doi J's order to properly deal with the issue of jurisdiction without the unnecessary expense of another motion.

Affidavit of Kelly Donovan, ABCO, Tab 15, para. 67.
ABCO, Tab 31.
*Lantin et al v. Seven Oaks General Hospital*, 2019 MBCA 115, [*Lantin*].

39. On May 6, 2020, the Respondents responded to the Appellant's April 27th letter indicating that they believed *Lantin* is factually distinguishable from the instant proceeding, and that they would be bringing their jurisdiction motion on the basis of Rule 59.06(1).

Affidavit of Kelly Donovan, ABCO, Tab 15, para. 68.
ABCO, Tab 32.

40. On August 31, 2020, the Respondents filed their Notice of Motion for an Order pursuant to Rule 21.01(3)(a), to be heard the week of February 22, 2021. This Notice of Motion was virtually identical to the Notice of Motion filed by the Respondents on June 7, 2018. See para. 22 above.

41. On December 9, 2020, the Appellant amended her claim once more, on consent, filing a fresh amended Statement of Claim (the "Claim").

ABCO, Tab 11.

42. On February 23, 2021, the Respondents' motion was heard in the Superior Court of Justice before Bielby J and reconvened on March 1, 2021, for the Respondents to make follow-up arguments.

43. On April 19, 2021, Bielby J released his ruling to amend Doi J's Order and dismiss the Appellant's Claim for lack of jurisdiction.

*Donovan v. WRPSB and Larkin*, 2021 ONSC 2885.

44. On May 28, 2021, Bielby J issued the Costs Endorsement awarding the Respondents $15,000.00 in costs on the motion.

    ABCO, Tab 10.

**Zoom "Bombing"**

45. At the February 23rd appearance, unknown individuals entered the video hearing and were able to share their screens and display offensive images.
46. The Appellant was ordered not to share the Zoom link with anyone for the March 1, 2021, hearing.
47. The Peel Regional Police Service initiated a criminal investigation, and to the best of the Appellant's knowledge, that investigation is still ongoing.

**PART IV – ISSUES AND THE LAW**

**The motion judge erred by:**

**Allowing the Respondents' motion**

48. Bielby J decided that no appeal could be taken by the Respondents on an undecided matter, and this is contradictory to the *Rules*. The Respondents had the opportunity to address an undecided issue, in the following three ways:
    a. File a Rule 59.06(1) motion following Doi J's 2019 Order and prior to the Appeal;
    b. File a cross-appeal seeking to set aside or vary the order appealed from, in accordance with Rule 61.07(1), of the *Rules*.
    c. File a Rule 59.06 motion to the Court of Appeal to either set aside or vary the Court of Appeal Order entered October 25, 2019, in accordance with Rule 61.16(6.1).

    The *Rules*, Rules 59.06(1), 61.07(1), & 61.16(6.1).
49. Had the Respondents filed a cross-appeal, the Court of Appeal had the power to explicitly draw inferences of fact from the evidence, or where some substantial wrong or miscarriage of justice

had occurred but it affected only part of an order, a new trial may have been ordered in respect of only that part of Doi J's order.

> *CJA, sections 134(4)(a) and s. 134(7)*.

50. The Respondents argued in writing before the Court of Appeal on October 11, 2019, at paragraph 41 of their Factum that "the Legislature enshrined the exclusive jurisdiction of the WSIB and the Workplace Safety and Insurance Appeals Tribunal ("WSIAT") over matters relating to workers' compensation insurance…"

51. The Court of Appeal ruled on the issue of jurisdiction at paragraph 15 of the October 25, 2019, Reasons:

> [15] And with respect to the motion judge's conclusion based on the privative clause in s. 118(4) of the WSIA, in our view it is not plain and obvious that the appellant's action in respect of the Release would contravene the WSIB's exclusive jurisdiction to determine matters set out in s. 118 of the WSIA and the privative clause contained in that section.
>
> *Donovan v. Waterloo Regional Police Services Board*, 2019 ONCA 845, para. 15.

52. The Appellant is forced to file another appeal with the Court of Appeal which has resulted in an abuse of process and a miscarriage of justice.

53. It is well established that *res judicata* provides for finality in litigation, especially in cases where a point, fundamental to the decision, taken or assumed by the parties and traversable, has not been traversed. The Respondents' right to re-examine the motion judge's decision must be set to rest.

> Thirdly, the same principle – namely, that of setting to rest rights of litigants – applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment, although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken. The same principle of setting parties' rights to rest applies and estoppel occurs…
>
> *Foster v. Reaume*, 1926 CanLII 416 (ON CA), p.1033.

54. Once the Court of Appeal made its ruling on October 25, 2019, Doi J became *functus officio* and the Order of the Court of Appeal became the *res judicata*.

> [30] Handley JA describes the legal effect of a successful appeal this way: "When an appellate court reverses the judgment below, the former decision, until then conclusive, is

> avoided *ab initio* and replaced by the appellate decision, which becomes the *res judicata* between the parties" (Handley at para 2.33).
>
> *Lantin et al v Seven Oaks General Hospital*, 2019 MBCA 115, para. 30.

55. Bielby J erred in amending a judgment, which had ceased to be in effect by operation of law.

> [31] The idea of two judgments existing at the same time for the same parties on the same cause of action is both illogical and contrary to the law. The correct statement of principle is set out as follows in WB Williston & RJ Rolls, *The Law of Civil Procedure* (Toronto: Butterworths, 1970), vol 2 at 1022: "More than one final judgment may be given in an action or proceeding if several causes of action or issues are decided at different times, but if there is only one cause of action only one judgment can be given."
>
> *Lantin*, para 31.

56. In accordance with the parallels drawn in *Lantin*, the slip rule was not available to the lower court as the judgment in effect had been given by the Ontario Court of Appeal having exercised its appellate jurisdiction under section 6(1) of the *CJA* to substitute its own judgment.

> *Lantin*, para. 34.
> *CJA*, section 6(1).

57. The motion judge erred by being persuaded that *Sun Oil Co. v. City of Hamilton and Veale*, 1961 CanLII 121 (ON CA) ["*Sun Oil*"], resembled the case at bar. *Sun Oil* was a case about whether Rule 611 of the Rules of Practice (as they were in the 1960's), enabled the challenge to a by-law. The case did not set a precedence entitling a party to be heard on a matter, or in some way determine that an appeal could not have been taken by the Respondents, as cited above at para. 48.

58. Other than the ruling by Bielby J in this matter, the last time the *Sun Oil* case was quoted in Ontario was 1984 in *Re Hotel Dieu Hospital and City of St. Catharines*, 1984 CanLII 1930 (ON SC), and that was also a case involving the interpretation of a zoning by-law. The Respondents could not direct Bielby J to any other case where a party has attempted to re-open a motion decision that has already been set aside by the Court of Appeal. It hasn't happened, because it is contrary to law.

59. Since there was no suggestion of fraud, and there was no new evidence that became available to the Respondents after the hearing of their original motion, finality concerns should have been given paramountcy.

> As Goudge J.A.'s comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice.
>
> *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 (CanLII), [2003] 3 SCR 77, para. 37.

**Deciding Court does not have jurisdiction of the Appellant's Claim**

60. The inherent jurisdiction of the Ontario Superior Court of Justice over the Appellant's claim has not been removed by legislation or by an arbitral agreement. The Appellant provided Bielby J with a very recent decision by the Court of Appeal, regarding a police officer suing a police chief for misfeasance in public office, and he erred by not deferring to the two-part test provided in the decision.

> The basic proposition applicable to r. 21.01(3)(a) can be stated fairly simply: either the Superior Court of Justice has jurisdiction over a claim or it does not. In deciding that issue, it must be remembered that the Superior Court of Justice, as a court of inherent jurisdiction, has jurisdiction over every conceivable claim unless (i) the claim does not disclose a reasonable cause of action or (ii) the jurisdiction has been removed by legislation or by an arbitral agreement: *TeleZone Inc. v. Canada (Attorney General)*, 2008 ONCA 892, 94 O.R. (3d) 19, at para. 92, aff'd 2010 SCC 62, [2010] 3 S.C.R. 585.
>
> *Skof v. Bordeleau*, 2020 ONCA 729, ("*Skof*") para. 8.

61. The Court of Appeal already ruled on whether or not the Appellant's claim discloses a reasonable cause of action.

> *Donovan v. Waterloo Regional Police Services Board*, 2019 ONCA 845

62. There is no legislation removing the inherent jurisdiction of the Ontario Superior Court of Justice. The Appellant is not a member of a police force, an employee of a police force or a member of an association for the purposes of the *PSA*. The law simply does not apply to a person who is no longer employed by a police force.

> **Definitions**
> **2** (1) In this Act,
>
> […]

> "association" means an association whose members belong to one police force and whose objects include the improvement of their working conditions and remuneration; ("association")
>
> […]
>
> "member of a police force" means an employee of the police force or a person who is appointed as a police officer under the *Interprovincial Policing Act, 2009*;
>
> *PSA*, section 2(1).

63. There is no arbitral agreement removing the inherent jurisdiction of the Ontario Superior Court of Justice. It is clear on a generous reading of the "2015 – 2019 Collective Agreement" between the Respondent Board and the Waterloo Regional Police Association ("Association") that there are no provisions which would oust the inherent jurisdiction of the Ontario Superior Court of Justice over the Appellant's claim. The relevant articles are as follows:

    a. Article 1 states; "The Board recognizes the Association as the sole collective bargaining agent for all Members of the Police Service for the Regional Municipality of Waterloo, save and except the Chief of Police, the Deputy Chiefs of Police and Members represented by the Senior Officers' Association."

    b. Article 10.07 pertains to retired members required to attend court on matters arising from the performance of their duties while an active member of the service.

    c. Article 37.02 states; "A Member shall be deemed to have broken service where: (a) the Member is discharged for just cause; (b) the Member voluntarily terminates their employment; …"

    d. Article 38 of the Collective Agreement contains recall rights for members who were laid off.

    e. Article 42 of the Collective Agreement entitled "Complaint and Grievance Procedure" states; "It is the mutual desire of the parties hereto that complaints of Members shall be addressed as quickly as possible." The Appellant is not a member.

    f. Article 42.05 of the Collective Agreement states; "This complaint and grievance procedure shall be subject to the provisions of the Police Services Act and Regulations thereto." The *PSA* does not apply to the Appellant, as cited in paragraph 62.

    ABCO, Tab 33.

64. The Appellant has no standing at the Ontario Police Arbitration Commission ("OPAC"), since she is not a member of a police force and therefore not a member of a bargaining unit for the purposes

of the *PSA*. If the Association failed to represent the Appellant, she would have no recourse against them because she has no standing at the OPAC.

> **Arbitrations**
> **2** (1) This section applies to,
>
> […]
>
> (c) arbitrations conducted under section 122 of the *Police Services Act*;
>
> *Public Sector Dispute Resolution Act*, 1997, S.O. 1997, c. 21, Sched. A

65. The factual dispute in this case centres on the Respondents' behaviour, their deliberate and unlawful conduct in December, 2017, and January, 2018, six-months after the Appellant resigned from her employment. This is not a labour dispute, and there is nothing in the WRPA collective agreement that would require the Appellant to pursue her Claim through arbitration for allegations post-resignation.

66. In the recent *Skof* case, quoted above at paragraph 60, this Honourable Court determined that since the Ottawa Police Service ("OPS") collective agreement did not apply to *Skof*, he was no longer subject to the collective agreement and could proceed with his claim for misfeasance in public office against the chief of police and police service.

> [15] The respondents attempt to avoid this result by contending that the "essential character" of the claim is one covered by the collective agreement. They seek to invoke the principles established in *Weber v. Ontario Hydro*, 1995 CanLII 108 (SCC), [1995] 2 S.C.R. 929, to bring the appellant's claim within the collective agreement.
> [16] I have already set out why the collective agreement does not have any application to this case, the principal reason being that the parties agreed that it would not. I would also note that McLachlin J. made it clear in *Weber*, at para. 67, that the "exclusive jurisdiction of the arbitrator is subject to the residual discretionary power of courts of inherent jurisdiction to grant remedies not possessed by the statutory tribunal".
>
> *Skof* paras. 15 & 16.

67. Like *Skof*, the Appellant and the Respondents had agreed that the collective agreement would no longer have any application. The resignation agreement itself explicitly states that the Appellant is

giving up any rights she once had as a member of the police force and as a member of the Association.

> "Donovan hereby confirms that she is freely and voluntarily resigning her employment with the Board effective on or about June 25, 2017. Donovan acknowledges and agrees that this employment resignation decision is irrevocable. Accordingly, without limiting the generality of the foregoing, the parties acknowledge and confirm that effective June 25, 2017, Donovan will cease to be an employee of the Board for any and all purposes at law whatsoever. Donovan further waives any and all seniority and recall rights she may have under the applicable Uniform Collective Agreement between the Board and the Association."

ABCO, Tab 19, paragraph 1.

68. The resignation agreement includes releases prohibiting the Appellant from filing any future proceeding against the WRPSB and the Association of any kind whatsoever relating to her employment:

> "Without limiting the generality of the foregoing, Donovan also undertakes and confirms, without time limitation, that she will not commence any future proceeding against the Board of any kind whatsoever (whether by way of human rights application, grievance, OCPC or OIPRD complaint under the Police services Act, or otherwise) that in any way relates to or arises out of the period prior to June 26, 2017."

ABCO, Tab 19, paras. 10 & 11.

69. Also like *Skof*, the Appellant is seeking remedy for misfeasance in public office, which is not within the jurisdiction of an arbitrator to grant. The *Skof* decision was recently appealed to the Supreme Court of Canada by Charles Bordeleau and OPS, and the application for leave to appeal was dismissed. This case is directly relevant, and should have been given deference.

*Charles Bordeleau, et al. v. Matthew Skof*, 2021 CanLII 42368 (SCC)

70. The motion judge erred in being persuaded that *Desgrosseillers v. North Bay General Hospital*, 2010 ONSC 142, was similar to the case at bar. In *Desgrosseillers*, the plaintiff signed a resignation agreement on April 25, 2007. In June, 2008, she attempted to hold her union accountable through the Ontario Labour Board, for allegedly failing to represent her adequately and properly with respect to her suspension and the termination of her employment.

*Desgrosseillers*, para. 10.

71. After the Board dismissed the plaintiff's application, citing that she could not proceed due to the final settlement and release, she then filed a lawsuit. The decision for *Desgrosseillers*, states (at paragraph 13) that the particulars of the alleged breaches are not pleaded in her statement of claim. In the Appellant's Claim, the particulars of the alleged breaches are very clearly pleaded and do not relate to the interpretation, application or administration of the WRPA collective agreement.

72. Also relevant to distinguish *Desgrosseillers* from the case at bar, is that *Desgrosseillers'* former collective agreement contained a choice of forum clause explicitly assigning exclusive jurisdiction to an arbitrator over "all disputes" arising from the interpretation, application, administration or alleged violation of the collective agreement. No such clause exists in the WRPA collective agreement.

> *Desgrosseillers*, para 45.

73. The Appellant submits that her claim is not governed by either a collective agreement or applicable police service legislation, and as such, neither *Weber v. Ontario Hydro* 1995 CanLII 108 (SCC) , [1995] 2 SCR 929 ["*Weber*"], nor *St. Anne Nackawic Pulp and Paper v. CPU* 1986 CanLII 71 (SCC), [1986] 1 SCR 704 apply to this case.

74. In relying on the fact that "courts have repeatedly applied the Weber doctrine in the police services sector" the motion judge erred by not properly defining the "essential character" of the Appellant's claim.

> [52] In considering the dispute, the decision-maker must attempt to define its "essential character", to use the phrase of La Forest J.A. in *Energy & Chemical Workers Union, Local 691 v. Irving Oil Ltd.* (1983), 1983 CanLII 3072 (NB CA), 148 D.L.R. (3d) 398 (N.B.C.A.). The fact that the parties are employer and employee may not be determinative.
>
> *Weber*, para. 52.
> *Donovan v. WRPSB and Larkin*, 2021 ONSC 2885, para. 75.

75. The Appellant's claim does not arise solely from a breach of the *Human Rights Code*, R.S.O. 1990, c. H.19, and she can therefore proceed in the Ontario Superior Court of Justice.

> [4] I have also considered *Jaffer v. York University* 2010 ONCA 654 (CanLII), [2010] O.J. No. 4252 (C.A.), in which Karakatsanis J.A. (in speaking for the Court) at para. 44

> stated, "…whether or not a claim for breach of the duty to accommodate disabilities can proceed in the Superior Court depends upon whether or not the pleading discloses a reasonable cause of action that does not arise solely from a breach of the *Code*".
>
> *Anderson v. Tasco Distributors*, 2011 ONSC 269 (CanLII), para. 4.

76. Neither the OPAC nor the HRTO have the power to grant a remedy for misfeasance in public office.

**Deciding that the Respondents' behaviour did not amount to bad faith and they are acting in the public interest**

77. It was not until after the Respondents were unsuccessful at the Court of Appeal, the Appellant had amended her Claim in accordance with the Court of Appeal Order, and their prescribed timeframe to deliver a statement of defence or notice of intent to defend had come and gone, that they raised an alleged outstanding issue.

> …To lie in the weeds until the hearing of the application and assert such a right to stop the plan of arrangement is troubling indeed and not acting in good faith. Waiting and seeing how things are going in the litigation process before springing a new theory at the last moment is not to be encouraged.
>
> *Re: Mid-Bowline Group Corp*, 2016 ONSC 669 (CanLII), para. 59.
> *The Rules*, r. 18.01(1).

78. The Respondents are represented by experienced council and the Appellant is self-represented. The Respondents know the steps available to them to raise an allegedly undecided issue in Doi J's Order. The Respondents have acted deliberately and with little to no regard for the considerable economic and psychological burden to the Appellant, and the unnecessary expense to the public. The Defendants have not provided an excuse for failing to raise what they believed to be an undecided issue sooner.

79. The Appellant presented Bielby J with evidence to show the vigour with which the Respondent Board has pursued its collateral attack against the Appellant at the HRTO, in supplying over 755 pages to advance their unwarranted, retaliatory application for contravention of settlement against the Appellant, which was filed 50-days after the Appellant filed her claim. The Respondent's

claims could have been raised in this Honourable Court in the interest of efficiency. The resignation agreement does not contain a non-disclosure clause, yet the Respondent Board is alleging that it does. The Respondents have had the time and resources to file a defence in this matter.

> Affidavit of Kelly Donovan ABCO, Tab 15, at paras. 49 & 50.
> ABCO, Tab 34.

80. In considering all of the peripheral facts in this case, it is the Appellant's belief that the Respondents hope to starve her into submission and are acting in bad faith.

81. In concluding there was no bad faith on the part of the Respondents, the motion judge relied on submissions made by the Respondents that they did not know the Appellant's PTSD resulted from a training accident during her employment. The Appellant provided the motion judge with evidence to show that the Respondents knew, prior to her resignation that she was suffering from PTSD due to the 2011 training accident, see paragraph 13.

82. The Respondents have publicly admitted to understanding PTSD and the need for treatment, knowing about the PTSD presumption written into the *Workplace Safety and Insurance Act*, 1997, S.O. 1997, c. 16, Sched. A ("*WSIA*") and the prevalence of suicide among first responders suffering from PTSD. Despite this, the Respondents took deliberate and unlawful action against the Appellant by appealing her WSIB claim to eliminate her PTSD care, which would have obviously had a detrimental effect on her health.

> Affidavit of Kelly Donovan, ABCO, Tab 15, at paras. 41 – 43, 48, 50, 72, 75, 78, 80 – 91 & 94.
> ABCO, Tab 35, Tab 36, Tab 37, Tab 38 & Tab 39.
> *WSIA*, 1997, as amended, Sections 2(1), 13, 14

83. The Respondents are not acting in the public interest, or in accordance with their legislated mandates. As of September, 2020, the Respondents have spent over $386,068.97 of public funds on legal fees attributed to the vigorous litigation involving the parties. These fees have all been incurred after the Appellant's resignation.

> *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, s. 4(1).

Affidavit of Kelly Donovan, ABCO, Tab 15, at paras. 73 – 74.
ABCO, Tab 40.
*PSA*, sections 1, 31 & 41.

84. The Appellant attempted to prevent the unnecessary expense of the duplicate motion in her April 27, 2020, letter to the Respondents, see para. 38.

85. The Appellant asserts that the vigour with which the Respondents have responded to her claim is representative of "whistleblower retaliation" which is a concept widely understood on a global scale. Had the Appellant not previously exposed abuses of power within the police service, the Appellant believes the Respondents would have responded to her claim very differently. More than three years later, the Respondents continue to argue the proper venue for the Appellant's claim, without taking responsibility for their actions that led to the claim.

86. The Appellant is required to file a second appeal on matters that should have been raised by the Respondents in an earlier proceeding which has resulted in a miscarriage of justice.

87. The Appellant believes that the Respondents have used both this Honourable Court and the HRTO for the improper purpose to harass and oppress her because she was a police whistleblower and continues to advocate for better transparency and accountability in policing in Canada.

> In all of its applications, the primary focus of the doctrine of abuse of process is the integrity of the adjudicative functions of courts. Whether it serves to disentitle the Crown from proceeding because of undue delays (see *Blencoe*, *supra*), or whether it prevents a civil party from using the courts for an improper purpose (see *Hunter*, *supra*, and *Demeter*, *supra*), the focus is less on the interest of parties and more on the integrity of judicial decision making as a branch of the administration of justice.
>
> *Toronto (City) v. C.U.P.E., Local 79, 2003 SCC 63 (CanLII)*, [2003] 3 SCR 77, para. 43.

88. It is a matter of public interest that the Respondents, all public officers, deliberately engaged in unlawful conduct by failing to abide by the terms of the resignation agreement, instigated a retaliatory parallel proceeding and brought a vexatious motion raising issues which were *res judicata*; all at the public's expense.

> *Police Services Act*, R.S.O. 1990, c. P.15, O. Reg. 268/10: GENERAL, s. 1.
> *Re Lang Michener et al. and Fabian et al., (1987)* 1987 CanLII 172 (ON SC)

**Apprehension of Bias**

89. The "Zoom bombing" incident that occurred at the February 23, 2021, hearing was very upsetting to the Appellant. The sexually explicit and racist imagery disrupted the hearing and prolonged the Respondents' arguments, which had already been delayed due to technical difficulties by the Respondents. The incident left the Appellant with less time to make her oral arguments before the end of the day.

90. Following the hearing, CBC News published an article insinuating that it was the Appellant's fault that the disruption occurred because she had shared the public Zoom link with her followers.

91. The Appellant had distributed the link to the public hearing, along with a link to the "Zoom User Guide for Remote Hearings in the Ontario Court of Justice (August 2020)," to her followers and reminded them to pay close attention to section 4 of the document; "During the remote hearing." The User Guide makes it clear that permission from the court would have to be given to do things such as share screens. The Appellant believed that her followers would only be able to watch the public proceeding.

    ABCO, Tab 41.

92. When the Appellant was sent instructions for the March 1, 2021, hearing, there was a note that the link could not be shared with anyone. On March 3, 2021, an Endorsement was issued by Regional Senior Justice Ricchetti regarding the incident on February 23rd, and provided direction for the March 1st hearing. At paragraph 4, the Honourable Regional Senior Justice Ricchetti wrote:

    > (4) On February 24, 2021, it was brought to my attention that the Zoom details for Justice Bielby's courtroom used on February 23, 2021 had been disseminated by Twitter. Accordingly, I had very serious concerns that public dissemination of the Zoom details would once again result in disruption of the completion of the hearing by individuals joining the Zoom hearing.

    ABCO, Tab 6.

93. The Appellant submits that she was entitled to share the link to the public hearing and was in no way responsible for the conduct of unknown public participants who joined the hearing. Other than

the CBC News article published to the internet, the Appellant is unaware of how the motion judge or the Regional Senior Justice had knowledge of her having shared the link.

94. The Appellant later learned that a publication ban had been issued for the transcript of the February 23, 2021, hearing.

95. The Appellant believes that, despite pandemic restrictions, the principle of public participation in court proceedings is still very important. It is stated, in the "Consolidated Practice Direction Regarding Proceedings in the Court of Appeal During the Covid-19 Pandemic", at paragraph 76 that:

> "Parties to a hearing may share the Zoom link, webinar/meeting ID and password, and telephone numbers for the hearing with anyone who wishes to observe, unless the hearing is closed to the public in accordance with a statutory provision or a court order."

96. The Appellant believes that she was wrongfully blamed for the "Zoom bombing" incident, and that resulted in an apprehension of bias against her, due to Bielby J's decision in favour of the Respondents suggestive of a marked departure from established legal principles.

**Litigation Efficiency**

97. The Respondents have now had the Appellant's claim dismissed twice on the same preliminary motion where all relevant evidence has been put before the court. This is a straightforward, document-driven case in which the evidence is limited and not contentious. There is no evidence, not already before the Court, which will be available for trial.

> *Sweda Farms Ltd. v. Egg Farmers of Ontario*, 2014 ONSC 1200, para. 33.

98. The Respondents do not dispute the existence and content of the Individual Respondent's Affidavit filed in defence of the class action lawsuit, or the release signed by the Respondents in the resignation agreement.

> Affidavit of Laura Freitag, ABCO, Tab 18, paras 23 – 26.

99. The Respondents do not dispute that the Appellant's WSIB claim was in place prior to her resignation, and the evidence shows that they knew her PTSD resulted from a training accident in 2011 while working for the Respondent Board. Despite this, on January 11, 2018, the Respondent Board filed a "Notice to Object" form to the WSIB, which the WSIB considered an "appeal" of her claim for benefits.

> Affidavit of Kelly Donovan, ABCO, Tab 15, at paras. 36 – 39.
> ABCO, Tab 17, Tab 26, Tab 27.
> Affidavit of Laura Freitag, ABCO, Tab 18, paras. 6 – 12.

100. Bielby J failed to consider the significant disparity in resources between the parties in allowing the Respondents to unnecessarily prolong this litigation.

> *MacDonald v. Chicago Title Insurance Company of Canada*, 2015 ONCA 842, paragraph 88.

101. Bielby J erred by not converting the Respondents' motion into a motion for judgment as the best way to achieve the most just, most expeditious, and least expensive result, in accordance with Rule 37.13(2)(a), since the Respondents have indicated facts disclosing a defence to the action on the merits and the main issues in the Appellant's claim are fairly simple.

> [66] The Superior Court has the authority to construe the Rules of Civil Procedure liberally in order to achieve the most just, most expeditious, and least expensive result: R. 1.04(1); R. 37.13(1) and 37.13(2)(a); *Hryniak*. In my view this is the most just, expeditious, and proportionate result of this motion. For Kumon, it settles the main issue without the time and expense of a trial. For Ms. France it saves her the significant costs of a trial (including the costs of the opposing party) only to lose, but still recognizes that her claim has at least some validity in one area.
>
> *France v. Kumon*, 2014 ONSC 5890 (CanLII), para. 66.

## PART V - ORDER REQUESTED

102. Based on the foregoing, the Appellant seeks:

a. An Order that Bielby J's Order be set aside, and the Respondents' motion be converted into a motion for judgment in favour of the Appellant, in accordance with Rule 37.13(2)(a);

b. In the alternative, a declaratory judgment in favour of Appellant and that a trial be directed on the question of damages, in accordance with Rule 37.13(2)(b);

c. An Order that Bielby J's Costs Endorsement dated May 28, 2021, be set aside and a judgment be granted to the Appellant for costs both in this court and in the court below; and

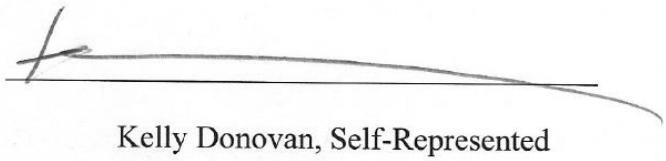
d. Such further and other relief as this Honourable Court deems just.

**APPELLANT'S DECLARATION**

103. An order under subrule 61.09(2) is not required.

104. The Appellant estimates she will require 1 ½ hours to present her oral argument.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of June, 2021.



Kelly Donovan, Self-Represented

## SCHEDULE A – LIST OF AUTHORITIES

* Listed in order of their appearance in the Factum.

1. *Donovan v. Waterloo Regional Police Services Board*, 2019 ONCA 845.
2. *Donovan v. Waterloo Regional Police Services Board*, 2019 ONSC 1212.
3. *Power Tax v. Millar, Dioguardi*, 2013 ONSC 135.
4. *Donovan v. (Waterloo) Police Services Board*, 2019 ONSC 818.
5. *Lantin et al v. Seven Oaks General Hospital*, 2019 MBCA 115.
6. *Donovan v. WRPSB and Larkin*, 2021 ONSC 2885.
7. *Foster v. Reaume*, 1926 CanLII 416 (ON CA).
8. *Sun Oil Co. v. City of Hamilton and Veale*, 1961 CanLII 121
9. *Re Hotel Dieu Hospital and City of St. Catharines*, 1984 CanLII 1930 (ON SC).
10. *Toronto (City) v. C.U.P.E., Local 79, 2003 SCC 63 (CanLII)*, [2003] 3 SCR 77.
11. *Skof v. Bordeleau*, 2020 ONCA 729.
12. *Charles Bordeleau, et al. v. Matthew Skof*, 2021 CanLII 42368 (SCC)
13. *Desgrosseillers v. North Bay General Hospital*, 2010 ONSC 142.
14. *Weber v. Ontario Hydro* 1995 CanLII 108 (SCC) , [1995] 2 SCR 929.
15. *St. Anne Nackawic Pulp and Paper v. CPU* 1986 CanLII 71 (SCC), [1986] 1 SCR 704.
16. *Anderson v. Tasco Distributors*, 2011 ONSC 269 (CanLII).
17. *Re: Mid-Bowline Group Corp*, 2016 ONSC 669 (CanLII).
18. *Re Lang Michener et al. and Fabian et al., (1987)* 1987 CanLII 172 (ON SC).
19. *Sweda Farms Ltd. v. Egg Farmers of Ontario*, 2014 ONSC 1200.
20. *MacDonald v. Chicago Title Insurance Company of Canada*, 2015 ONCA 842.
21. *France v. Kumon*, 2014 ONSC 5890 (CanLII).

## SCHEDULE B – RELEVANT STATUTES

* Listed in order of their appearance in the Factum.

*Police Services Act, R.S.O. 1990, c. P.15*, section 58(2)

**Complaint may be made to Independent Police Review Director**
**58.** (1) Any member of the public may make a complaint under this Part to the Independent Police Review Director about,
(a) the policies of or services provided by a police force; or
(b) the conduct of a police officer. 2007, c. 5, s. 10.
**Prohibition**
(2) Despite subsection (1), the following persons cannot make a complaint to the Independent Police Review Director:
1. The Solicitor General.
2. An employee in the office of the Independent Police Review Director.
3. A member or employee of the Commission.
**4. A member or auxiliary member of a police force, if that police force or another member of that police force is the subject of the complaint.**
5. Repealed: 2009, c. 33, Sched. 2, s. 60 (1).
6. A member or employee of a board, if the board is responsible for the police force that is, or a member of which is, the subject of the complaint.
7. A person selected by the council of a municipality to advise another municipality's board under subsection 6.1 (2), if the board is responsible for the police force that is, or a member of which is, the subject of the complaint.
8. A delegate to a community policing advisory committee established under subsection 5.1 (4), if the community policing advisory committee advises the detachment commander of the Ontario Provincial Police detachment that is, or a member of which is, the subject of the complaint. 2007, c. 5, s. 10; 2009, c. 33, Sched. 2, s. 60 (1). **[emphasis added]**

*Comprehensive Ontario Police Services Act*, 2019, S.O. 2019, c. 1 – Bill 68, "Part XI – Right to Report Misconduct"

**Disclosure procedures**
**Chief of police**
**183** (1) Every chief of police shall establish written procedures regarding the disclosure of misconduct that is alleged to have been engaged in by members of its police service, other than by the chief of police or deputy chief of police.
**Police service board**
(2) Every police service board shall establish written procedures regarding the disclosure of misconduct that is alleged to have been engaged in by the chief of police or deputy chief of police of the police service.
**Minister**
(3) The Minister shall establish written procedures regarding the disclosure of misconduct that is alleged to have been engaged in by the Commissioner or a deputy Commissioner.
**Special constable employers**
(4) Every special constable employer shall establish written procedures regarding the disclosure of misconduct that is alleged to have been engaged in by a special constable employed by the employer.
**Contents of procedures**

(5) Without limiting the generality of subsections (1), (2), (3) and (4), the procedures under those subsections shall,
(a) address how a member or former member of the police service, or an employee or former employee of the special constable employer, may make disclosures of misconduct, including giving directions as to the persons to whom disclosures may be made;
(b) establish procedures to protect the identities of persons involved in the disclosure process, including persons who make disclosures, witnesses and persons alleged to be responsible for misconduct; and
(c) provide for exceptions to be made to procedures described in clause (b) where the interests of fairness require that a person's identity be disclosed to one or more persons.

**Members of police service to be informed**

(6) Every chief of police shall ensure that members of the police service are familiar with the procedures referred to in subsection (1), (2) or (3), as applicable, and the protections from reprisals for disclosing misconduct.

*Statutory Powers and Procedures Act*, R.S.O. 1990, c. S.22, section 4.6

**Dismissal of proceeding without hearing**

**4.6** (1) Subject to subsections (5) and (6), a tribunal may dismiss a proceeding without a hearing if,
(a) the proceeding is frivolous, vexatious or is commenced in bad faith;
(b) the proceeding relates to matters that are outside the jurisdiction of the tribunal; or
(c) some aspect of the statutory requirements for bringing the proceeding has not been met.

*Courts of Justice Act*, R.S.O. 1990, c. C.43

**Dismissal of proceeding that limits debate**

**Purposes**

**137.1** (1) The purposes of this section and sections 137.2 to 137.5 are,
(a) to encourage individuals to express themselves on matters of public interest;
(b) to promote broad participation in debates on matters of public interest;
(c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and
(d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action. 2015, c. 23, s. 3.

**Order to dismiss**

(3) On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest. 2015, c. 23, s. 3.

**Powers on appeal**

**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. R.S.O. 1990, c. C.43, s. 134 (1).

**Interim orders**

(2) On motion, a court to which a motion for leave to appeal is made or to which an appeal is taken may make any interim order that is considered just to prevent prejudice to a party pending the appeal. 1999, c. 12, Sched. B, s. 4 (3).

**Power to quash**

(3) On motion, a court to which an appeal is taken may, in a proper case, quash the appeal.
**Determination of fact**
(4) Unless otherwise provided, a court to which an appeal is taken may, in a proper case,
(a) draw inferences of fact from the evidence, except that no inference shall be drawn that is inconsistent with a finding that has not been set aside;
**Same**
(7) Where some substantial wrong or miscarriage of justice has occurred but it affects only part of an order or decision or some of the parties, a new trial may be ordered in respect of only that part or those parties. R.S.O. 1990, c. C.43, s. 134 (7); 1994, c. 12, s. 46 (2).

**Court of Appeal jurisdiction**
**6** (1) An appeal lies to the Court of Appeal from,
(a) an order of the Divisional Court, on a question that is not a question of fact alone, with leave of the Court of Appeal as provided in the rules of court;
(b) a final order of a judge of the Superior Court of Justice, except an order referred to in clause 19 (1) (a) or an order from which an appeal lies to the Divisional Court under another Act;

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

**Definitions**
**2 (1) In this Act,**
"association" means an association whose members belong to one police force and whose objects include the improvement of their working conditions and remuneration; ("association")
[…]
"member of a police force" means an employee of the police force or a person who is appointed as a police officer under the *Interprovincial Policing Act, 2009*;

*Public Sector Dispute Resolution Act*, 1997, S.O. 1997, c. 21, Sched. A

**Arbitrations**
**2** (1) This section applies to,
[…]
(c) arbitrations conducted under section 122 of the *Police Services Act*;

*Human Rights Code*, R.S.O. 1990, c. H.19

*Workplace Safety and Insurance Act*, 1997, S.O. 1997, c. 16, Sched. A

**Posttraumatic stress disorder, first responders and other workers**
**Definitions**
**14 (1) In this section,**
[…]
"police officer" means a chief of police, any other police officer or a First Nations Constable, but does not include a person who is appointed as a police officer under the *Interprovincial Policing Act, 2009*, a special constable, a municipal law enforcement officer or an auxiliary member of a police force; ("agent de police")
**Entitlement to benefits**
(3) Subject to subsection (7), a worker is entitled to benefits under the insurance plan for posttraumatic stress disorder arising out of and in the course of the worker's employment if,

(a) the worker,
(i) is a worker listed in subsection (2),
(ii) was a worker listed in paragraphs 1 to 12 of subsection (2) for at least one day on or after April 6, 2014, or
(iii) was a worker listed in paragraphs 13 to 18 of subsection (2) for at least one day on or after the day the *Plan for Care and Opportunity Act (Budget Measures), 2018* receives Royal Assent;
(b) the worker is or was diagnosed with posttraumatic stress disorder by a psychiatrist or psychologist; and
(c) for a worker who,
(i) is a worker listed in paragraphs 1 to 12 of subsection (2) at the time of filing a claim, the diagnosis is made on or after April 6, 2014,
(ii) ceases to be a worker listed in paragraphs 1 to 12 of subsection (2) on or after April 6, 2016, the diagnosis is made on or after April 6, 2014 but no later than 24 months after the day on which the worker ceases to be a listed worker,
(iii) ceased to be a worker listed in paragraphs 1 to 12 of subsection (2) after April 6, 2014 but before April 6, 2016, the diagnosis is made on or after April 6, 2014 but no later than April 6, 2018, or
(iv) ceases to be a worker listed in paragraphs 13 to 18 of subsection (2) on or after the day the *Plan for Care and Opportunity Act (Budget Measures), 2018* receives Royal Assent, the diagnosis is made no later than 24 months after the day on which the worker ceases to be a listed worker. 2018, c. 8, Sched. 37, s. 1 (6).
(4) Repealed: 2018, c. 8, Sched. 37, s. 1 (6).
**Same**
(5) The worker is entitled to benefits under the insurance plan as if the posttraumatic stress disorder were a personal injury. 2016, c. 4, s. 2.
**Presumption re: course of employment**
(6) For the purposes of subsection (3), the posttraumatic stress disorder is presumed to have arisen out of and in the course of the worker's employment, unless the contrary is shown. 2016, c. 4, s. 2.

*Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56

**Right of access**
**4** (1) Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,
(a) the record or the part of the record falls within one of the exemptions under sections 6 to 15; or
(b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

*Police Services Act*, R.S.O. 1990, c. P.15, O. Reg. 268/10: GENERAL

**OATHS AND AFFIRMATIONS**
**Member of the board**
**1.** The oath or affirmation of office to be taken by a member of the board shall be in one of the following forms set out in the English or French version of this section**:**
I solemnly swear (affirm) that I will be loyal to Her Majesty the Queen and to Canada, and that I will uphold the Constitution of Canada and that I will, to the best of my ability, discharge my duties as a member of the (*insert name of municipality*) Police Services Board faithfully, impartially and according to the *Police Services Act*, any other Act, and any regulation, rule or by-law.
So help me God. (*Omit this line in an affirmation*.)
**Police officer, etc.**

**2.** The oath or affirmation of office to be taken by a police officer, special constable or First Nations Constable shall be in one of the following forms set out in the English or French version of this section:
I solemnly swear (affirm) that I will be loyal to Her Majesty the Queen and to Canada, and that I will uphold the Constitution of Canada and that I will, to the best of my ability, preserve the peace, prevent offences and discharge my other duties as (*insert name of office*) faithfully, impartially and according to law.
So help me God. (*Omit this line in an affirmation*.)

Court file no. C69467

**KELLY LYNN DONOVAN**

Plaintiff (Appellant)

**v.** **REGIONAL MUNICIPALITY OF WATERLOO POLICE SERVICES BOARD, and BRYAN LARKIN**

Defendants (Respondents)

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# COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT BRAMPTON

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# APPELLANT'S FACTUM

June 16, 2021

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