

Court of Appeal File No.: C66718
Court File No.: CV-18-00001938-0000

COURT OF APPEAL FOR ONTARIO

BETWEEN:

KELLY LYNN DONOVAN

Plaintiff
(Appellant)

and

REGIONAL MUNICIPALITY OF WATERLOO POLICE SERVICES BOARD and
BRYAN LARKIN

Defendants
(Respondents)

FACTUM OF APPELLANT

Date: April 23, 2019

Kelly Donovan, self-represented
11 Daniel Place
Brantford, Ontario N3R 1K6
Tel: 519-209-5721
Email: kelly@fit4duty.ca

TO **FILION WAKELY THORUP ANGELETTI LLP**
Bay Adelaide Centre
333 Bay Street, Suite 2500, Box 44
Toronto, Ontario
M5H 2R2

Donald Jarvis (LSUC #28483C)
Tel: (416)408-5516
Email: DJarvis@filion.on.ca

Lawyers for the Defendants (Respondents) the Regional Municipality of
Waterloo Police Services Board and Bryan Larkin.

Table of Contents

PART I – THE PARTIES	3
PART II – OVERVIEW.....	3
PART III – SUMMARY OF FACTS	6
A. Leading Up to Legal Action.....	6
B. The Appellant’s Legal Action in This Case.....	11
C. Respondents’ Departure from Procedural Fairness	13
D. Appellant’s Application to Dismiss GAG Proceeding.....	15
PART IV - ISSUES AND LAW PERTAINING TO APPEAL.....	16
A. Contractual Release Precluding Appeal to WSIB	16
i. Fleming v. Massey, 2016 ONCA 70.....	17
ii. O. C. D. S. B. v. The Ontario Secondary School Teachers’ Federation, 2006 CanLII 20231.....	18
iii. Rodrigues v. Ontario (Workplace Safety and Insurance Appeals Tribunal), 2008 ONCA 719	18
iv. 2016 ONWSIAT 51	19
B. Affidavit Covered by Absolute Privilege	19
i. Sable Offshore Energy Inc. v. Ameron International Corp, 2013 SCC 37	19
ii. Doe v. Doe D, 2018 ONSC 18	20
C. Actions of Respondents Amounting to Bad Faith.....	21
i. Power Tax Corporation v. Millar et al., 2013 ONSC 135	21
ii. Baker v. Canada (Minister of Citizenship & Immigration), 1999, 2 S.C.R. 817	21
PART V – ORDER REQUESTED.....	22
APPELLANT’S DECLARATION	23
SCHEDULE A.....	24
SCHEDULE B.....	25

PART I – THE PARTIES

1. The Appellant in this case is a former police officer who had been employed by the Respondent Board from 2010 until 2017.
2. The Appellant is a single mother to three children and resides in the City of Brantford. The Appellant cannot afford a lawyer, and is not eligible for legal aid because she owns her own home which has been listed for sale since December, 2018. The Appellant applied for a fee waiver to this Honourable Court and was denied.
3. The Individual Respondent is currently employed as chief of police for the Respondent Board.
4. The Respondent Board is responsible for the effective management of the police service, hires the chief of police and is responsible for monitoring his performance.
5. The Respondent Board is vicariously liable for the conduct of the Individual Respondent.

PART II – OVERVIEW¹

6. This case has resulted from conduct by the Respondents following the Appellant's resignation from employment for the Respondent Board.
7. The Respondents have not filed a counter-claim or filed a statement of defence in this matter.
8. In May, 2016, there were two ways to report misconduct of a police officer working for the Respondent Board. Those were:

¹ All references to the evidence refer the reader to the Appellant's Compendium [AC], such as AC TAB 1.

- a. Filing a complaint with the Office of Independent Police Review Director (“OIPRD”); and
 - b. Filing a complaint to the police service directly.
9. The legislation governing the OIPRD, the [*Police Services Act, R.S.O. 1990, c. P.15*](#)², allows members of the public to make complaints about the conduct of a police officer, but prohibits a member of a police force from making a complaint, if that police force is the subject of the complaint, subsection 58(2).
10. The Respondent Board’s internal policy on complaints only defined a “member of the public” to be a complainant, there was no mechanism for an officer to file an internal complaint of misconduct.
11. In Ontario, employees are only protected against reprisal for reporting wrongdoing in the following three statutes:
- c. [*Public Service of Ontario Act, 2006, S.O. 2006, c. 35, Sched. A*](#), s. 139(1)³;
 - d. [*Public Servants Disclosure Protection Act \(S.C. 2005, c. 46\)*](#), s. 19.1(1)⁴;
- and
- e. [*Securities Act, R.S.O. 1990, c. S.5*](#), s. 121.5(1)⁵.
12. In May, 2016, there was no protection for municipal police officers who reported internal wrongdoing in Ontario.
13. On May 4, 2016, the Appellant made an unprotected disclosure of wrongdoing to the Respondent Board by way of lawful delegation.

² BOA Tab 1, pp. 41.

³ BOA Tab 2, pp. 106.

⁴ BOA Tab 3, pp. 126.

⁵ BOA Tab 4, pp. 185.

14. The wrongdoing the Appellant reported to the board involved misconduct by officers working in the professional standards branch, domestic violence branch, and senior leadership.⁶
15. The nature of the Appellant's disclosure is articulated very differently by both the Appellant and the Respondents.
16. The Appellant considered her delegation to be a disclosure of wrongdoing of other police officers working for the Respondent Board, made to the Respondent Board as they are the independent governing body for the police service.
17. The Respondent Board considered the Appellants delegation to be a public criticism and reference to confidential information and wrongfully claims that the Appellant required the Individual Respondent's approval, as police chief, before making her delegation to the Respondent Board.
18. Following the Appellant's disclosure, she faced discipline, a unilateral change in her employment and was ordered by the Individual Respondent to cease communicating with members of the Respondent Board.⁷
19. A series of complaints and investigations took place between May 9, 2016, and June 8, 2017, initiated by both the Appellant and the Respondents.⁸
20. On June 8, 2017, the Appellant agreed to the terms of a resignation presented by the Respondent Board, to resign from her employment effective June 25, 2017.
21. In May, 2018, the Appellant filed a statement of claim against the Respondents for breach of contract.

⁶ Freitag Affidavit, *AC TAB 11*, at ¶3, pp. 66.

⁷ Freitag Affidavit, *AC TAB 11*, at ¶¶4-5, pp. 66.

⁸ Freitag Affidavit, *AC TAB 11*, at ¶¶6-9, pp. 68.

22. In June, 2018, the Respondents filed a motion to dismiss the Appellant's claim, scheduled for February 13, 2019.
23. In July, 2018, the Respondent Board filed a contravention of settlement application against the Appellant at the Human Rights Tribunal of Ontario ("HRTO").
24. From July, 2018, until February, 2019, the Appellant has had to fight a two-front war.
25. On February 21, 2019, Justice Doi released his reasons to dismiss the Appellant's claim with costs payable to the Respondents, the dismissal of the Appellant's claim is now before the Honourable Court of Appeal.

PART III – SUMMARY OF FACTS

A. Leading Up to Legal Action

26. In December, 2010, the Appellant accepted the position of police constable with the Respondent Board. From the date of her hiring, the Appellant was a contributing member to the police service, was regularly recognized for her contributions and had won awards.
27. In February, 2011, while a recruit at the Ontario Police College, the Appellant was in direct proximity to an accidental discharge that critically wounded another recruit. The Respondent Board's seconded officer to the College was made aware of the incident by the Appellant. This critical incident was the catalyst for the Appellant's mental injury.
28. In June, 2017, the Appellant resigned from her employment from the Respondent Board following a complex series of events.

29. On May 4, 2016, the Appellant made a delegation to the board to disclose wrongdoing from within the police service, at that time, there was no procedural or legislative mechanism for the Appellant to disclose internal wrongdoing.
30. On May 9, 2016, the Appellant was served a Directive of the Individual Respondent ordering her to not continue working as a Use of Force Instructor, but rather she was relegated to administrative duties. This Directive also ordered the Appellant to not appear before the Respondent Board again without the Individual Respondent's permission, and she was placed under investigation for 6 allegations of misconduct.
31. On May 9, 2016, the Appellant emailed members of the independent Respondent Board to inform them of the reprisal she was facing.
32. On May 31, 2016, the Appellant was served a second Chief's Directive, by the Individual Respondent, ordering her to have no communication directly or indirectly with members of the Respondent Board and she was placed under investigation for an additional 2 charges of misconduct.
33. Between June, 2016, and May, 2017, the Appellant filed a Workplace Harassment Complaint, an HRTO complaint, a complaint to the Ontario Civilian Police Commission ("OCPC") and the OIPRD against the Respondents.
34. During the period from May, 2016, to June, 2017, the Respondent Board did not serve the Appellant with a Notice of Hearing, contrary to subsection 83(17) of the [*Police Services Act, R.S.O. 1990, c. P.15*](#)⁹, requiring the Respondent Board to do so within six months of the Notice of Investigation being served.

⁹ BOA Tab 1, pp. 61.

35. There has never been any evidence presented by the Respondents that the Appellant committed any misconduct while working as a police constable.
36. In April, 2017, the Appellant became too ill to work and filed a claim with the Workplace Safety and Insurance Board (“WSIB”), claim no. 30505408. At that time, the claim included income replacement and treatment for her post-traumatic stress disorder (“PTSD”).
37. In June, 2017, the Appellant resigned from employment with the Respondent Board which brought an end to the multiple ongoing proceedings between the parties including the protracted disciplinary investigation and several complaints made by the Appellant about the Respondents, to the OCPC, the OIPRD and the HRTO.
38. The Appellant’s resignation terminated multiple ongoing processes.
39. The Appellant agreed to withdraw her HRTO complaint, and all other outstanding complaints against the Defendant, and the Defendant agreed to cease their disciplinary investigation.
40. The Appellant required the Respondents sign a mutual release ensuring there would be no future proceedings filed against one another for issues arising prior to June 25, 2017, and there would be no appeal of the Appellant’s WSIB claim, which allowed her continued care by a psychologist for her post-traumatic stress disorder (“PTSD”) following her resignation.
41. On June 8, 2017, both the Appellant and the Defendant signed the resignation agreement¹⁰ (furthermore referred to as the “resignation agreement”) that

¹⁰ Freitag Affidavit, *AC TAB 12*, pp. 71.

contained a confidentiality clause pertaining to the existence and contents of the agreement only, but did not contain a general non-disclosure clause. The Appellant was adamant that she would not resign from her employment if she was prohibited from speaking about her experiences working for the Respondent Board.

42. Both the Appellant and Defendant signed mutual releases to not file any new proceedings or appeals for matters arising prior to the Appellant's resignation. The Appellant believes that the intention of the resignation agreement was to prevent her from joining the \$167M class action lawsuit that was filed one month before the date of her resignation, (against the Respondent Board on behalf of all current and former female members of the police service in Brampton Court, court file number CV-17-2346-00), or file any new proceedings against the Respondents for such things as wrongful dismissal.
43. Since resigning, the Appellant has campaigned for greater accountability and transparency in Canadian policing, as well as whistleblower protection for municipal police officers in Ontario, even publishing a book about her research into the topics.
44. The Appellant spoke twice at the Ontario Legislature, when Bill 175, the Safer Ontario Act, was debated in February and March, 2018. The Appellant believes that all of the information she has published and spoken about are matters of public interest, the Appellant did not publish any false information or accusations, and the Appellant frequently receives accolades from members of the community to support her efforts to improve the ethicality of policing in Canada.

45. The Appellant has sold copies of her book to police service board members and is currently working with one Ontario police service as a consultant.
46. The Appellant has become something of a public figure and expert on policing legislation and internal corrupt practices and has been called on by local media to provide interviews on current issues. The Appellant believes her ongoing advocacy has aggravated and angered the Defendant, despite the Appellant merely exposing matters in the public interest. The purpose of the Appellant's advocacy is to draw attention to the need for better governance in Ontario police services.
47. The Appellant started a consulting business when she resigned to try to earn enough of an income to support her three children. Since December, 2017, the stress the Defendant has caused the Appellant has prevented her from fulfilling the activities necessary to build her business.
48. In December, 2017, and in support of his defence in the class action lawsuit, Waterloo Regional Police chief Bryan Larkin referred to the Appellant in a sworn affidavit and disclosed details of the resignation agreement. This affidavit became a public document throughout those proceedings.¹¹
49. The Appellant believes the affidavit is a breach of the terms of the resignation agreement signed by the Defendant, since the individual Respondent used "non-identifying information" about the Appellant that is sufficient to identify her as the only "Female Constable" who voluntarily resigned in the past five years.

¹¹ Freitag Affidavit, *AC TAB 13*, at ¶13, pp. 81.

50. The chart shows this “Female Constable” was paid a “monetary settlement,” and the Individual Respondent was not required by law to provide this level of detail which violated settlement privilege.
51. The Waterloo Regional Police Association (“WRPA”) filed a grievance against the Respondent Board on behalf of current female police officers whose privacy was breached as a result of this same affidavit sworn by the Individual Respondent.
52. The Appellant is no longer a member of the bargaining unit and is not privy to details of this ongoing grievance filed by the WRPA.
53. In January, 2018, the Respondent Board filed an appeal with the WSIB against the Appellant’s claim number 30505408. The Appellant’s claim for psychology benefits to treat her PTSD was approved prior to the date of her resignation.¹²
54. The appeal letter is signed by counsel for the Respondents, the same counsel who participated in the creation of the resignation agreement. The Appellant believes that this is an additional breach of the resignation agreement by the Respondents, since the Respondents had released the Appellant from any appeal.

B. The Appellant’s Legal Action in This Case

55. On May 8, 2018, the Appellant brought this action against the Respondents for one alleged breach of the resignation agreement¹³, later amended to include a second breach¹⁴, of which the Appellant was made aware in August, 2018.

¹² Freitag Affidavit, *AC TAB 11*, ¶1, pp. 66.

¹³ *AC TAB 10*, ¶16, pp. 63.

¹⁴ *AC TAB 5*, ¶20, pp. 37.

56. On May 29, 2018, the Respondents provided the Appellant with a letter indicating they would be filing a motion to dismiss the claim because they believed the HRTO had exclusive jurisdiction.
57. On June 7, 2018, the Defendants filed a Notice of Motion to dismiss the Appellant's claim, to be heard on February 13, 2019.¹⁵
58. On January 16, 2019, the Appellant filed an amended Statement of Claim¹⁶, on consent¹⁷, to include the second allegation of Breach of Contract by the Respondents, listed above at para. 53.
59. On January 16, 2019, the Appellant also filed a motion without notice for summary judgment on the basis of the WSIB appeal being a clear breach, on its face, of the resignation agreement. The Appellant was advised she would be notified of the decision to this motion by mail.
60. On February 7, 2019, the Appellant attended the Brampton courthouse to learn that the denial of her motion for summary judgment¹⁸ had been waiting for pick-up since January 18, 2019.
61. As proper notice was not provided to the Respondents, they did not consent to the Appellant filing the motion for summary judgement to be heard on February 13, 2019, alongside the Respondent's motion to dismiss the Appellant's claim.

¹⁵ *AC TAB 9.*

¹⁶ *AC TAB 5.*

¹⁷ *AC TAB 6.*

¹⁸ *AC TAB 8.*

C. Respondents' Departure from Procedural Fairness

62. On June 28, 2018, the Respondent Board filed a section 45.9 application against the Appellant at the Human Rights Tribunal of Ontario (“HRTO”) file number 2018-33237-S, alleging the Appellant had violated the terms of the same resignation agreement.¹⁹
63. The Respondent Board brought this proceeding against the Appellant prior to Courts deciding jurisdiction of the Appellant’s claim, which deprived the Appellant of her right to procedural fairness and the opportunity to properly bring her own claim against the Respondent Board to the HRTO following a jurisdictional decision by the Ontario Superior Court of Justice.
64. The Appellant did not agree to a non-disclosure clause when she resigned in July, 2017, yet the Respondent Board was alleging that all expressions the Appellant had made publicly about the Respondent Board had been a breach of her resignation agreement.
65. The HRTO application filed by the Respondent Board was done out of retaliation, is vexatious, an attempt to further harass the Appellant, deteriorate her mental health, increase her legal costs, and prevent her from operating her business which is her only source of income by burdening her with the task of defending herself in the HRTO proceeding and WSIB appeal. The Respondent Board seeks the following remedy at the HRTO:

¹⁹ *AC TAB 14*, ¶1, pp. 85.

- a. Significant damages, assessed with reference to the revenue generated by the Appellant through her expressions used to generate work for her business;
- b. Cease to make any further expression about the Respondents;
- c. Redact allegations against the Respondents from the Appellant's book;
- d. Remove from the public domain any other allegations the Appellant has made against the Respondents.

66. It is the Appellant's position that the HRTO proceeding filed by the Respondent Board is a "gag" proceeding and a collateral attack, in that the Respondent Board is strategically using litigation as a means of unduly limiting expression by the Appellant on matters of public interest and forcing the Appellant to fight a two-front war.

67. On July 30, 2018, the Respondent Board filed a Request for an Order During Procedure with the HRTO to dismiss the Appellants objections to their proceeding. In it, the Respondent Board acknowledges that a proceeding in Court was commenced by the Appellant, although the Respondent Board alleged this to be a "completely separate and independent breach of the settlement."²⁰

68. On August 3, 2018, the HRTO sent the Appellant a Notice of Hearing for the Respondent Board's HRTO proceeding. The date of the hearing was set for February 22, 2019.²¹

²⁰ Freitag Affidavit, *AC TAB 17*, at ¶7, pp. 99.

²¹ Freitag Affidavit, *AC TAB 18*, pp. 101.

D. Appellant's Application to Dismiss GAG Proceeding

69. On September 18, 2018, the Appellant filed an Application at Ontario Superior Court of Justice, (CV-18-00605386-0000²²), to have the HRTO application filed by the Respondent Board dismissed, pursuant to section 137.1 of the *Courts of Justice Act, R.S.O. 1990, C. C.43*.²³

70. On September 21, 2018, the Appellant amended Application CV-18-00605386-000.²⁴

71. On January 10, 2019, the Parties appeared before Madam Justice Favreau where it was decided that *Courts of Justice Act*, section 137.1 does not apply to Tribunal matters. In her decision, *Donovan v. (Waterloo) Police Services Board, 2019 ONSC 818*²⁵, Madam Justice Favreau states at para. 55:

- a. “While I have found that this Court does not have the authority to dismiss the Board’s application to the Human Rights Tribunal, there is no doubt that Ms. Donovan raises legitimate concerns about whether the Board’s application is a justified effort to prevent her from speaking out about her experience as a police officer with the Board. In the circumstances, in my view, while she has been unsuccessful, Ms. Donovan’s application to this Court was not frivolous or unreasonable.”

72. The HRTO proceeding filed by the Respondent Board is a collateral attack against the Appellant, as opposed to filing a counter-claim or statement of defence, the Respondent Board chose to apply to dismiss the Appellant’s action and file against

²² AC TAB 15, pp. 90.

²³ BOA Tab 5, pp. 189.

²⁴ AC TAB 16, pp. 94.

²⁵ BOA Tab 6, pp. 203.

the Appellant in another legal venue, one which is exempt from Ontario's anti-SLAPP laws.

PART IV - ISSUES AND LAW PERTAINING TO APPEAL

A. Contractual Release Precluding Appeal to WSIB

73. Justice Doi erred in finding that the release executed in the resignation agreement did not preclude the Respondent Board from participating in the WSIB appeal.²⁶

74. The Appellant had alleged in the amended statement of claim, that by filing the WSIB appeal, the Respondent Board had breached the release which states:

f. "THE REGIONAL MUNICIPALITY OF WATERLOO POLICE SERVICES BOARD, in consideration of the terms and conditions set out in the attached Resignation Agreement dated June 8, 2017, does hereby release and forever discharge KELLY DONOVAN ("DONOVAN") from any and all actions, causes of action, complaints, applications, appeals, requests covenants, contracts, claims, grievances, under any terms of employment, whether express or implied, and demands whatsoever, whether arising at common law, by contract..."²⁷

75. Justice Doi stated, at paragraph 20, that it seemed at least arguable that the above stated term would capture the Respondent Board's WSIB appeal, however, Justice Doi relied on a decision by Justice Juriansz to preclude it.

²⁶ AC TAB 3, at ¶16, pp. 15.

²⁷ Freitag Affidavit, AC TAB 12, pp. 79.

i. [Fleming v. Massey, 2016 ONCA 70](#)²⁸

76. This case dealt with an employer who had his employee sign a release from liability should the worker become injured on the job, in general terms.

77. In this case, Justices Juriansz, Feldman and Brown relied on section 16 of the [Workplace Safety and Insurance Act, S.O. 1997, CHAPTER 16](#)²⁹ (“WSIA”) in their decision.

78. Section 16 of the *WSIA*, states:

g. “An agreement between a worker and his or her employer to waive or to forego any benefit to which the **worker or his or her survivors** are or may become entitled under the insurance plan is void.” **[emphasis added]**

79. Clearly, the wording of section 16 protects the rights of the worker or his or her survivors only, and not the employer.

80. Justice Doi erred in finding that section 16, and references made by Justice Juriansz to it, were meant to preserve the right of the Respondent Board to appeal the Appellant’s WSIB claim and potentially strip her of the benefits she was entitled to under the *WSIA*.

81. Justice Doi erred in finding that conduct of the Respondent Board did not amount to bad faith or malice when the Respondent Board signed the mutual release on June 8, 2017, believing there was a statutory provision allowing them to appeal the Appellant’s WSIB claim and subsequently filing the appeal, contrary to their contractual obligations in the resignation agreement.

²⁸ BOA Tab 8, pp. 248.

²⁹ BOA Tab 7, pp. 224.

ii. [O. C. D. S. B. v. The Ontario Secondary School Teachers' Federation, 2006 CanLII 20231](#)

82. Arbitrator Albertyn, in applying section 16 of the *WSIA*, stated that there is no waiver of benefits by the employee, and therefore no breach of s. 16³⁰.

83. Justice Doi erred in finding that the Respondent Board was a “workplace party” for the purposes of section 16 of the *WSIA*.³¹

84. Justice Doi erred in finding that the amended statement of claim was a claim for benefits under the *WSIA*, and therefore in violation of section 118(4) of the *WSIA*.³²

iii. [Rodrigues v. Ontario \(Workplace Safety and Insurance Appeals Tribunal\), 2008 ONCA 719](#)

85. This matter dealt with what constituted “earnings” for the purposes of providing loss of earnings benefits to an injured worker.³³

86. To suggest, as did Justice Doi at paragraph 25³⁴, that this case bares any semblance to the Appellant’s matter before the Honourable Court of Appeal is incorrect.

87. In filing her amended statement of claim, the Appellant did not attempt to interfere with the exclusive authority of the *WSIB* to review matters of workplace safety and insurance.³⁵

³⁰ BOA Tab 9, at ¶30, pp. 270.

³¹ *AC TAB 3*, at ¶21, pp. 17.

³² *AC TAB 3*, at ¶25, pp. 18.

³³ BOA Tab 10, at ¶¶1-3, pp. 281.

³⁴ *AC TAB 3*, ¶25, pp. 18.

³⁵ BOA Tab 10, at ¶22, pp. 288.

iv. 2016 ONWSIAT 51

88. G. Dee, Vice-Chair for the Workplace Safety and Insurance Appeals Tribunal, stated in decision no. 1896/15 on page 13 that “As a worker the plaintiff cannot forgo his right to workers’ compensation benefits under the WSIA.”³⁶
89. Once again, in this decision, it is made clear that section 16 of the WSIA applies to the rights of workers, not the right of an employer to appeal a WSIB decision.

B. Affidavit Covered by Absolute Privilege

90. Justice Doi erred in finding that the Individual Respondent’s affidavit was covered by absolute privilege and failed to recognize competing privileges, such as settlement privilege.³⁷

i. Sable Offshore Energy Inc. v. Ameron International Corp, 2013 SCC 37

91. Justices McLachlin, LeBel, Abella, Cromwell, Moldaver, Karakatsanis, and Wager wrote at paragraph 12:
- h. “Settlement privilege promotes settlements. As the weight of the jurisprudence confirms, it is a class privilege. As with other class privileges, while there is a *prima facie* presumption of inadmissibility, exceptions will be found “when the justice of the case requires it”...”³⁸
92. Justice Doi erred in finding that the Individual Respondent requesting the Human Resources Division of Waterloo Regional Police Service prepare a chart of HRTO

³⁶ BOA Tab 11, pp. 322.

³⁷ AC TAB 3, at ¶34, pp. 22.

³⁸ BOA Tab 12, at ¶12, pp. 333.

complaints filed by female employees in the last five years³⁹ to defend the Respondent Board in the class action lawsuit required the Individual Respondent to breach settlement privilege.

ii. [Doe v. Doe D, 2018 ONSC 18](#)

93. One of the plaintiffs in this case, YM, submitted that the police defendant could not claim absolute privilege because the officer did not have a duty to make the statement.⁴⁰

94. Justice Pollak stated at paragraph 14:

- i. "...and for the reasons given by the Court of Appeal in the Amato case, I find that this is an area of unsettled law because of the possible application of two conflicting privileges, which should not be decided on a Rule 21 motion."⁴¹

95. Justice Doi erred in finding bad faith in the actions of the Individual Respondent by claiming to have used "non-identifying information" in his affidavit, yet he states in paragraph 33:

- j. "However, given that the pool of female complainants is fairly small and features only four members, with one member apparently named given her known role as a representative plaintiff in the class action, it is unclear to me just how anonymous the remaining three complainants actually are to those with some knowledge of the police service."⁴²

³⁹ Freitag Affidavit, *AC TAB 13*, at ¶13, pp. 81.

⁴⁰ BOA Tab 13, at ¶5, pp. 344.

⁴¹ BOA Tab 13, at ¶14, pp. 345.

⁴² *AC TAB 3*, ¶33, pp. 21.

C. Actions of Respondents Amounting to Bad Faith

96. Justice Doi erred in finding that the actions of the Respondents did not amount to bad faith, as stated in paragraphs 66, 72, and 81.

i. Power Tax Corporation v. Millar et al., 2013 ONSC 135

97. In *Power Tax Corporation v. Millar*, 2013 ONSC 135, the defendant Ms. Millar brought an application before the HRTO. Subsequently, Power Tax brought an application to Court. Justice Goldstein ruled in favour of Ms. Millar and called the application by Power Tax an abuse of process. Power Tax's application was permanently stayed.

98. At paragraph 16, Justice Goldstein, by quoting Justice McLachlin, wrote:

- k. "...abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair place and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice."⁴³

ii. Baker v. Canada (Minister of Citizenship & Immigration), 1999, 2 S.C.R. 817

99. Justices L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Bastarache and Binnie succinctly described procedural fairness in the following way, at paragraph 22:

⁴³ BOA Tab 14, ¶16, pp. 354.

“I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.”⁴⁴

100. The Appellant’s claim contains two basic breaches of the resignation agreement. The second breach is a clear breach of the release signed by the Respondents. On this basis alone, the Appellant’s claim should not have been dismissed as public officers, such as the Respondents, must be held to a higher standard of compliance to legal agreements signed in good faith or be held accountable.

PART V – ORDER REQUESTED

101. That the Order of Justice Doi dated March 20, 2019, be set aside and a judgement be granted to the Appellant for:

- l. the relief sought in the statement of claim against the Respondent Board.
- m. Amounts to be determined by this Court; and

102. That the cost endorsement of Justice Doi dated March 20, 2019⁴⁵, be set aside and a judgment be granted to the Appellant for:

- n. Costs both in this court and in the court below.

⁴⁴ BOA Tab 15, at ¶22, pp. 388.

⁴⁵ AC TAB 4, pp. 27.

APPELLANT'S DECLARATION

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

104. The Appellant estimates she will require 1.5 hours to present her oral argument.

SCHEDULE A

List of Authorities:

[Donovan v. \(Waterloo\) Police Services Board, 2019 ONSC 818](#)

[Fleming v. Massey, 2016 ONCA 70](#)

[O. C. D. S. B. v. The Ontario Secondary School Teachers' Federation, 2006 CanLII](#)

[20231](#)

[Rodrigues v. Ontario \(Workplace Safety and Insurance Appeals Tribunal\), 2008 ONCA](#)

[719](#)

[2016 ONWSIAT 51](#)

[Sable Offshore Energy Inc. v. Ameron International Corp, 2013 SCC 37](#)

[Doe v. Doe D, 2018 ONSC 18](#)

[Power Tax Corporation v. Millar et al., 2013 ONSC 135](#)

[Baker v. Canada \(Minister of Citizenship & Immigration\), 1999, 2 S.C.R. 817](#)

SCHEDULE B

Relevant statutes:

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

Public Service of Ontario Act, 2006, S.O. 2006, c. 35, Sched. A

Public Servants Disclosure Protection Act (S.C. 2005, c. 46)

Securities Act, R.S.O. 1990, c. S.5

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

Workplace Safety and Insurance Act, S.O. 1997, CHAPTER 16

April 23, 2019

Kelly Lynn Donovan, self-represented

11 Daniel Place

Brantford, Ontario

N3R 1K6

Tel.: 519-209-5721

Email: kelly@fit4duty.ca