Court of Appeal File No. C69467

**COURT OF APPEAL FOR ONTARIO**

B E T W E E N :

KELLY LYNN DONOVAN

Plaintiff
(Appellant)

- and -

WATERLOO REGIONAL POLICE SERVICES BOARD
and BRYAN LARKIN

Defendants
(Respondents)

# FACTUM OF THE RESPONDENTS

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Plaintiff (Appellant)

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# FACTUM OF THE RESPONDENTS

## PART I - OVERVIEW

1. The 'exclusive jurisdiction model' established by the Supreme Court of Canada in *Weber* and repeatedly upheld by this Honourable Court – including in the police services sector – holds that disputes arising expressly or inferentially out of a collective agreement must proceed by way of binding arbitration under the grievance and arbitration provisions of the applicable collective agreement and statutory scheme. This appeal concerns whether the well-established legal framework governing dispute resolution in the unionized workplace is to be marginalized or eroded by allowing the civil courts to claim a sphere of concurrent jurisdiction with labour arbitrators and the Human Rights Tribunal of Ontario ("HRTO"). Similarly, by asking this Court to permit a claim of breach of a human rights settlement to proceed in the civil courts, the Appellant is effectively seeking to overturn the Supreme Court of Canada decision in *Bhadauria* and thwart the intention of the Legislature.

2. After the Appellant filed her original Statement of Claim back in 2018, the Respondents brought a motion to strike the claim on the basis that it disclosed no reasonable cause of action (the "Pleadings Issue") and/or to dismiss the claim on the basis that it was outside the court's jurisdiction (the "Jurisdiction Issue"). The Superior Court struck the claim on the basis of the former and declined to rule on the latter. When this Honourable Court overturned the motion judge's decision on the Pleadings Issue, the Respondents sought a ruling on the Jurisdiction Issue. This appeal further concerns the right of a litigant to obtain a ruling on the fundamental question of whether the court has jurisdiction to adjudicate the subject matter of the claim before it.

3. The Appellant, Kelly Donovan, was formerly employed as a Constable with the Organizational Respondent, the Waterloo Regional Police Services Board ("WRPSB"). Her employment ceased effective on or about June 25, 2017, pursuant to a settlement (the "Resignation Agreement") negotiated among the Appellant, the WRPSB, and the Appellant's bargaining agent, the Waterloo Regional Police Association ("WRPA").

4. In her Fresh Amended Statement of Claim (the "Claim"), the Appellant alleges that the Respondents:

> (a) breached the confidentiality and release provisions of the Resignation Agreement by: (i) Chief Larkin swearing an affidavit containing anonymized particulars of various human rights applications in support of a successful motion to dismiss a proposed class action; and (ii) filing an Intent to Object form in respect of the Appellant's Workplace Safety and Insurance Board ("WSIB") claim;
>
> (b) negligently enabled counsel for the putative class action plaintiffs to publish Chief Larkin's affidavit on a public website, contrary to the confidentiality

provisions of the Resignation Agreement; and

(c) committed misfeasance in public office by intentionally seeking to exacerbate the Appellant's post-traumatic stress disorder ("PTSD") and injure her through a wilful breach of the Resignation Agreement (*viz.* the anonymized particulars in Chief Larkin's affidavit).

5. All of the above allegations relate to the Appellant's unionized employment with the WRPSB and the terms under which that employment came to an end.

6. By decision dated April 19, 2021, Bielby J. held that he had the authority to determine the undecided Jurisdiction Issue and dismissed the Appellant's claim for lack of jurisdiction. Bielby J. held:

(a) the essential character of the dispute expressly and inferentially arises within the ambit of the parties' collective agreement such that a labour arbitrator has exclusive jurisdiction over the subject matter of the claim; and

(b) alternatively, as the claim concerns the enforcement of a human rights settlement, the subject matter of the claim falls within the core jurisdiction and specialized expertise of the HRTO, a venue where both parties have outstanding applications regarding alleged violations of the Resignation Agreement.

7. The Appellant is effectively asking this Court to declare that the courts have concurrent jurisdiction over matters that fall within the jurisdiction of an arbitrator (under the 'exclusive jurisdiction' model) or that fall within the jurisdiction of the HRTO to enforce human rights settlements. In either case, this Honourable Court would be acting contrary to the direction of the Supreme Court of Canada in *Weber* and *Bhadauria*.

Further, to uphold the Appellant's technical objections to the manner in which the issues before this Court have been litigated would deny the Respondents the right to a decision on a fundamental jurisdiction issue.

## PART II - STATEMENT OF FACTS

8. Except where otherwise noted herein, the Respondents do not agree with the Appellant's summary of facts.

### A. The Parties

9. The Organizational Respondent, the WRPSB, is an agency created under the *Police Services Act* ("*PSA*") that is responsible for the provision of police services to the Regional Municipality of Waterloo. It oversees the Waterloo Regional Police Service ("WRPS").

> *Police Services Act*, R.S.O. 1990, c. P.15 [*PSA*].
> Affidavit of Laura Freitag, Respondents' Compendium, Tab 2 at para. 2.

10. The Personal Respondent, Bryan Larkin, is the Chief of Police of the WRPS.

> Affidavit of Laura Freitag, Respondents' Compendium, Tab 2 at para. 3.

11. The Appellant commenced employment with the WRPS in or around 2010. She held the rank of Constable until her employment resignation. She was, at all times, represented in her employment by the WRPA and governed by the collective agreement entered into between the WRPSB and the WRPA for uniformed officers (the "Uniform Collective Agreement").

> Affidavit of Laura Freitag, Respondents' Compendium, Tab 2 at paras. 4-5.

12. The Uniform Collective Agreement provides for a grievance and arbitration

process. Article 23 of the Uniform Collective Agreement states that "all complaints or grievances shall be dealt with under the provisions of Article 42". Article 42 constitutes a comprehensive grievance and arbitration procedure.

Uniform Collective Agreement, Compendium of the Appellant, Tab 33.

13. If the member is dissatisfied with the decision of the Chief of Police with respect to a dispute that arises from the interpretation, application, or administration of the Uniform Collective Agreement, the dispute may be submitted for conciliation and/or arbitration in accordance with the *PSA* (see Article 42.02(f)(i) of the Uniform Collective Agreement).

14. In addition to the mandatory arbitration clause contained in the Uniform Collective Agreement, the *PSA* contains mandatory arbitration provisions at sections 123 and 124.

*PSA, supra*, sections 123 and 124.

## B. The Prior and Outstanding Litigation Between the Parties

### i. The Initial Human Rights Application and Settlement

15. On or about June 6, 2016, the Appellant filed an application with the HRTO against the WRPSB (the "2016 Application") alleging discrimination in employment on the grounds of sex and marital status contrary to the *Human Rights Code* (the "*Code*").

Affidavit of Laura Freitag, Respondents' Compendium, Tab 2 at para. 18.
Human Rights Application dated June 6, 2016, Respondents' Compendium, Tab 2F.
*Human Rights Code*, R.S.O. 1990, c H.19 [*Code*].

16. All matters among the Appellant, the WRPA and the WRPSB (including the Appellant's employment with, or the cessation of her employment with the WRPSB, the 2016 Application, and the potential disciplinary charges against the Appellant under the

*PSA*) were fully and finally resolved through the Resignation Agreement executed on or about June 8, 2017. In addition to being a member of the applicable WRPA bargaining unit, the Appellant was represented by independent legal counsel throughout the negotiation of the Resignation Agreement. The WRPSB and the Appellant executed mutual Releases and agreed, *inter alia*, to keep the terms and existence of the Resignation Agreement in absolute and strict confidence "[e]xcept where disclosure is required by law…".

> Affidavit of Laura Freitag, Respondents' Compendium, Tab 2 at paras. 19-22.
> Resignation Agreement, Respondents' Compendium, Tab 2G.

### ii. The Proposed Class Action Against the WRPSB and the WRPA

17. On or about May 30, 2017, the WRPSB and the WRPA were named as defendants in a proposed class action lawsuit commenced by current and former employees of the WRPSB and their family members. The class action alleged that the WRPSB and the WRPA were liable for systemic gender-based discrimination and sexual harassment by members of the WRPS. The Appellant was not a putative class member of the class action. The class action was dismissed.

> Affidavit of Laura Freitag, Respondents' Compendium, Tab 2 at para. 23.
> *Rivers v. Waterloo Regional Police Services Board*, 2018 ONSC 4307 [*Rivers ONSC*], aff'd 2019 ONCA 267 [*Rivers ONCA*], leave to appeal to S.C.C. refused *Rivers et al. v. Waterloo Regional Police Services Board et al.*, 2019 CanLII 99448 (S.C.C.) [*Rivers SCC*], Respondents' Book of Authorities [Respondents' BOA], Tabs 1, 2, and 3 respectively.

18. Chief Larkin swore an affidavit in support of a dismissal motion in the class action lawsuit on or about December 21, 2017. Attached to Chief Larkin's affidavit was an anonymized chart with non-identifying particulars of human rights applications that were commenced by female employees of the WRPSB. The chart includes the following:

| NAME | GROUNDS FOR DISCRIMINATION | RESOLUTION |
|---|---|---|
| Female Constable | • Sex, including sexual harassment and pregnancy<br>• Marital status | SETTLED<br>• monetary settlement<br>• withdrawal of OHRT application<br>• voluntary resignation |

Affidavit of Laura Freitag, Respondents' Compendium, Tab 2 at paras. 24-25.
Affidavit of Chief Larkin, Respondents' Compendium, Tab 2H.

### iii. The Determination of the Appellant's Entitlement to Workers' Compensation Benefits

19. The Appellant commenced a medical leave of absence on or about February 27, 2017 and claimed that she suffered from PTSD as a result of an accident she had witnessed at the Ontario Police College in 2011. In or about April 2017, the Appellant submitted a claim for workers' compensation benefits to the WSIB.

Affidavit of Laura Freitag, Respondents' Compendium, Tab 2 at paras. 6-9.

20. In a decision dated July 12, 2017, a WSIB Case Manager allowed the Appellant's claim for healthcare benefits and loss of earnings benefits from February 27, 2017 to June 24, 2017 (the "Initial Entitlement Decision").

Affidavit of Laura Freitag, Respondents' Compendium, Tab 2 at para. 10.
WSIB Decision dated July 12, 2017, Respondents' Compendium, Tab 2B.

21. On or about January 11, 2018, the WRPSB filed an Intent to Object form (along with accompanying submissions) with the WSIB in order to gain access to the Appellant's WSIB claims file, as required by WSIB Procedures, and to satisfy itself as to the propriety of the decision granting initial entitlement under the statutory no fault scheme. The WSIB

re-affirmed the Initial Entitlement Decision on August 3, 2018, and subsequently released the Appellant's WSIB claims file to the WRPSB. Since then, the WRPSB has taken no steps to initiate any further WSIB review of the Initial Entitlement Decision.

> Affidavit of Laura Freitag, Respondents' Compendium, Tab 2 at paras. 11-13.
> WSIB Appeal Services Division Practice and Procedures, Respondents' Compendium, Tab 2C at pp. 4-5.
> Intent to Object Form, Respondents' Compendium, Tab 2D.
> WSIB Decision dated August 3, 2018, Respondents' Compendium, Tab 2E.

### iv. The Resignation Agreement Enforcement Applications Currently Before the HRTO

22. Since the Appellant's execution of the Resignation Agreement, the WRPSB alleges that the Appellant has perpetuated a false narrative regarding her employment and has engaged in ongoing violations of the Resignation Agreement. On or about June 28, 2018, the WRPSB filed an Application for Contravention of Settlement with the HRTO with respect to these alleged breaches.

> Affidavit of Laura Freitag, Respondents' Compendium, Tab 2 at para. 27.
> WRPSB Application for Contravention of Settlement, Respondents' Compendium, Tab 2I.

23. On or about July 27, 2018, the Appellant filed her own Application for Contravention of Settlement with the HRTO alleging a breach of the Resignation Agreement. Notably, the allegations in the Appellant's Application before the HRTO overlaps with and forms part of the Appellant's allegations in the instant Claim.

> Affidavit of Laura Freitag, Respondents' Compendium, Tab 2 at para. 29.
> Donovan Application for Contravention of Settlement, Respondents' Compendium, Tab 2K.

24. The two Applications for Contravention of Settlement are being processed together before the HRTO. The parties have already met with the HRTO for mediation and a case management conference. The Appellant and the Respondents are now awaiting

receipt of a Notice of Hearing from the HRTO for a full-day preliminary hearing.

> Affidavit of Laura Freitag, Respondents' Compendium, Tab 2 at paras. 39-40.

### v. The Appellant's Action Before this Court

25. The Appellant commenced the instant action in May 2018. Thereafter, the Appellant amended the original Statement of Claim (issued May 9, 2018) on or about January 16, 2019 (the "Amended Statement of Claim").

> Affidavit of Laura Freitag, Respondents' Compendium, Tab 2 at paras. 41, 43, 46 and 50. Statement of Claim, Amended Statement of Claim, Respondents' Compendium, Tabs 2T and 2V, respectively.

26. On February 13, 2019, the Respondents' motion pursuant to Rule 21.01(1)(b) (for an Order striking) and Rule 21.01(3)(a) (for an Order dismissing and/or staying) the Amended Statement of Claim was heard by Justice Doi.

27. The parties made submissions on all issues raised by the motion, including the Jurisdiction Issue under Rule 21.03(3)(a). The Court struck the Amended Statement of Claim in its entirety without leave to amend based on the Pleadings Issue alone. As the Pleadings Issue was sufficient to dispose of the motion, the Court did not decide the Jurisdiction Issue:

> The Defendants' motion to strike was also brought under Rules 21.01(3)(a) and 21.01(3)(d), respectively. For the reasons set out above, **I am satisfied that this motion is fairly and fully disposed of under Rule 21.01(1)(b) without the need for recourse to these other grounds**.
>
> [Emphasis added]
>
> *Donovan v. Waterloo Regional Police Services Board*, 2019 ONSC 1212, Appellant's Book of Authorities, Tab 2 [*Donovan ONSC*] at para. 40.

28. The Appellant appealed the Order arising from Doi J.'s decision. On October 25, 2019, this Court granted the Appellant's appeal, finding that it was **not** plain and obvious

that the Amended Statement of Claim disclosed no reasonable cause of action. In addition, this Court granted the Appellant leave to amend her claim against Chief Larkin to plead how his actions were allegedly tortious. The Honourable Court did not address, nor have before it, the Jurisdiction Issue.

> *Donovan v. Waterloo Regional Police Services Board*, 2019 ONCA 845, Appellant's Book of Authorities, Tab 1 [*Donovan ONCA*] and, in particular, at para. 20.
> Order of the Ontario Court of Appeal, Respondents' Compendium, Tab 3.

29. Over three months later, following this Court's ruling, the Appellant again amended her claim on January 29, 2020 (the "Amended Amended Statement of Claim") to allege misfeasance in public office by Chief Larkin.

> Amended Amended Statement of Claim, Respondents' Compendium, Tab 2Y.

30. As the Jurisdiction Issue remained undecided and the Appellant had now finally amended her claim, on February 19, 2020, the Respondents asked Doi J. for direction on the appropriate next step in the proceeding.

> Letter to Doi J., Respondents' Compendium, Tab 2Z.

31. In March 2020, the Appellant responded with submissions, asserting that: (1) the Respondents were estopped from raising the Jurisdiction Issue; (2) Doi J. was *functus officio*; and (3) the Respondents' attempt to "re-litigate" the Jurisdiction Issue was an abuse of process. The Respondents filed responding submissions with Doi J. on April 3, 2020.

> Donovan Submissions dated March 17, 2020, Respondents' Compendium, Tab 2AA.
> Respondents' Responding Submissions, Respondents' Compendium, Tab 2BB.

32. Doi J. then issued his Endorsement directing that the matter be returned as a new

motion under Rule 59.06(1) before another judge.

Doi J. Endorsement dated April 20, 2020, Respondents' Compendium, Tab 2CC.

33. The Appellant did not appeal Doi J.'s Endorsement. The Appellant did, however, amend her claim for a third time on November 23, 2020 (the "Fresh Amended Statement of Claim") to include new claims in tort (viz. misfeasance in public office and negligence) against the Respondents jointly and severally.

34. In accordance with Doi J.'s Endorsement, the Respondents filed a Notice of Motion regarding the Jurisdiction Issue pursuant to Rule 59.06(1), but also pursuant to Rule 21.01(3)(a). The Respondents' motion in respect of the Jurisdiction Issue was heard by Bielby J. over the course of two days on February 23 and March 1, 2021. Bielby J. rejected the Appellant's procedural objections, and accepted that the Jurisdiction Issue remained to be decided and was properly before him. Bielby J. also held that the Fresh Amended Statement of Claim was outside the Court's jurisdiction and the dispute ought to be decided in accordance with the binding arbitration processes established under the Uniform Collective Agreement and the *PSA*, and/or by the HRTO.

Decision of Bielby J., Compendium of the Appellant, Tab 4, at paras. 104-105.

## PART III - THE ISSUES AND LAW RAISED BY THE APPELLANT

### A. Standard of Review

35. Determinations of jurisdiction under Rule 21.01(3)(a) are legal determinations subject to a correctness standard of review.

*Hutton v. The Manufacturers Life Insurance Company (Manulife Financial),* 2019 ONCA 975, Respondents' BOA, Tab 4 at para 29.

36. As the technical or procedural challenges raised by the Appellant to the manner

in which the Jurisdiction Issue has come before the Court are questions of law, they are also subject to a correctness standard of review.

*Riding v. Nova Scotia (Attorney General),* 2009 NSCA 82, Respondents' BOA, Tab 5 at para 5.

## B. Bielby J. Correctly Found the Appellant's Claim Falls Outside the Court's Jurisdiction

### i. Governing Legal Principles

37. Where a dispute between parties arises expressly or inferentially out of a collective agreement, the claim must proceed by arbitration**. The courts have no jurisdiction over the dispute. This is the "exclusive jurisdiction model."** The Supreme Court of Canada has expressly rejected the existence of any concurrent jurisdiction between courts and arbitrators in respect of disputes that fall within the ambit of a collective agreement.

*Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, Appellant's Book of Authorities, Tab 14 at paras. 52-55 [*Weber*].

38. The courts have repeatedly applied the *Weber* doctrine in the police services sector, finding that the *PSA* and applicable collective agreement together provide a "complete and comprehensive scheme for police officers relating to their employment relationship". In *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners* ("*Regina*"), the Supreme Court of Canada confirmed that **courts could only have jurisdiction in policing if the dispute was governed by <u>neither</u> a collective agreement <u>nor</u> applicable police services legislation**. Accordingly, the courts have no jurisdiction to deal with any aspects of the employment relationship among individual police officers and their police services associations or police services boards.

*Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners,* 2000 SCC 14, Respondents' BOA, Tab 7 [Regina] at paras. 30-31.

*Renaud v. Town of Lasalle Police Association* (2006), 216 O.A.C. 1, Respondents' BOA, Tab 6 at para. 7.
*Abbott v. Collins* (2003), 64 O.R. (3d) 789 (C.A.), Respondents' BOA, Tab 8 at para. 27.

39. The exclusive jurisdiction model from *Weber* and *Regina* represents a critical policy choice aimed at promoting harmonious and robust industrial relations. Labour arbitrators (including those appointed under the *PSA* by the Ontario Police Arbitration Commission) are specialized administrative decision-makers with expertise in adjudicating workplace disputes and interpreting collective agreements. The protection of these expert decision-makers' exclusive jurisdiction ensures the fair and expeditious resolution of labour disputes.

*Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General),* 2007 NSCA 38, Respondents' BOA, Tab 9 [*Cherubini*] at para. 41.
See also *Rivers ONSC*, *supra*, Respondents' BOA, Tab 1 at para. 27, aff'd *Rivers ONCA*, *supra*, Respondents' BOA, Tab 2, leave to appeal to S.C.C. refused *Rivers SCC*, *supra*, Respondents' BOA, Tab 3.

### ii. Bielby J. Correctly found that the Essential Character of the Claim Arises Expressly or Inferentially out of the Uniform Collective Agreement

40. To determine the proper adjudicative forum for a dispute between an employer and a unionized employee, an adjudicator must define the essential character of the dispute and the ambit of the applicable collective agreement. In defining the essential character of a dispute, the issue is not whether the action, defined legally, is independent of the collective agreement but, rather, whether the dispute, regardless of its legal characterization, arises under the collective agreement.

*Weber*, *supra*, Appellant's Book of Authorities, Tab 14 at para. 43.

41. Moreover, in considering whether a dispute arises expressly or inferentially out of a collective agreement, one must take account of the fact that the substantive rights

arising from employment-related statutes (such as the *Code* and the *Workplace Safety and Insurance Act, 1997*) are implicitly included in all collective agreements.

> *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, Respondents' BOA, Tab 10 at para. 23.
> *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16.

42. In its essential character, the instant dispute concerns the enforcement of an agreement (i.e. the Resignation Agreement) **arising out of the Uniform Collective Agreement and the *PSA***. Adjudicators have recognized that "a collective agreement 'occupies the field' with respect to employment-related matters, whether or not the subject of an express provision in the agreement, unless the matter is expressly excluded from the scope of the agreement" [emphasis added]. Because the exercise of management rights sits at the core of a collective agreement, a dispute "need not have a specific collective agreement 'hook' in addition to a management rights clause, so long as it raises an issue that in its 'essential character' is factually and functionally connected to the operation of the agreement".

> *Bell Canada v. Unifor, Local 34-0*, 2016 CanLII 11573 (CA LA) (Surdykowski), Respondents' BOA, Tab 11 at para. 46. See also *Regina, supra*, Respondents' BOA, Tab 7 at para. 25.

43. Each of the Appellant's substantive allegations in the Claim fall within the ambit of the Uniform Collective Agreement as a result of both specific 'hooks' and the WRPSB's management rights clause:

> (a) Under Article 2.01, it is the exclusive function of the WRPSB to, *inter alia*, "maintain order, discipline and efficiency" in its workplace. The Respondents' actions in administering the Resignation Agreement, overseeing WSIB benefit administration, and responding to the employment-related proposed class action fall within this express management right. Fundamental to the functioning of all

collective agreements is the right of employees and unions (such as the Appellant and the WRPA) to challenge the exercise of management rights on the basis of arbitrariness, discrimination, or bad faith. The issue of whether the Respondents exercised their management rights improperly or in contravention of the Resignation Agreement, as alleged by the Appellant, therefore falls squarely within an arbitrator's exclusive jurisdiction.

(b) Article 20 expressly contemplates that WRPS officers who sustain injuries in the course of duty will file WSIB benefit claims and receive "top ups" to their full pay. The WRPSB's participation in the WSIB process, including its role in ensuring the proper administration of WSIB benefits, is therefore implicitly and functionally connected to the Uniform Collective Agreement.

(c) Article 23 provides that "all complaints or grievances" shall be processed in accordance with the comprehensive dispute resolution procedures under Article 42. Under Article 42.02, complaints relating to the dismissal of an employee may be submitted to the Deputy Chief and/or the Chief of Police for investigation and determination. If the Chief of Police's decision is dissatisfactory to the WRPA (or, practically speaking, the complainant), the matter may be submitted for conciliation and/or arbitration under Part VIII of the *PSA* or referred to the Ontario Civilian Police Commission for determination.

Uniform Collective Agreement, Compendium of the Appellant, Tab 33, Articles 2, 20, 23, and 42.

44. Even apart from these clear 'hooks', the Claim falls under the ambit of the Uniform Collective Agreement precisely because the Resignation Agreement is, in and of itself, an agreement relating to the terms and conditions of employment of a uniform employee in respect of whom the WRPA has exclusive representation rights. In pith and

substance, the Resignation Agreement arises out of the settlement of all matters relating to the Appellant's employment, including the 2016 Application and potential *PSA* charges against the Appellant. The courts have long recognized that labour arbitrators have significant experience and expertise in adjudicating and interpreting resignation and termination agreements arising out of unionized employment.

> Uniform Collective Agreement, Compendium of the Appellant, Tab 33, Article 2.
> *PSA*, *supra*, ss. 123(1) and 126.
> *Wong v. The Globe and Mail Inc.*, 2014 ONSC 6372 (Div. Ct.), Respondents' BOA, Tab 12 [*Wong 2014*] at para. 16.

45. It does not matter how a plaintiff characterizes their claims. Jurisdiction does not hinge on "labels" and "the semantics of the debate". Rather, the "essential character" of the dispute is determinative.

> *Coleman v. Demers*, 2007 CanLII 7526 (Ont. Sup. Ct.), Respondents' BOA, Tab 13 at para. 22. See also *Regina*, *supra*, Respondents' BOA, Tab 7 at para. 25, and *Cherubini, supra*, Respondents' BOA, Tab 9 at para. 70.

46. The framing of part of the Claim as a dispute in tort or as against an individual personally or as a claim of misfeasance does not circumvent exclusive arbitral jurisdiction. This Court has held that "regardless of the legal characterization of the dispute, where the dispute arises out of the collective agreement, it must be arbitrated and that **parties cannot avoid arbitration simply by pleading a common law tort** [emphasis added]". Courts have repeatedly declined jurisdiction over tort claims — including claims of negligence and misfeasance in public office — that arise from a collective agreement.

> *K.A. et al. v. The City of Ottawa et al.* (2006), 80 O.R. (3d) 161 (C.A.), Respondents' BOA, Tab 14 at para. 15. See e.g., *Heasman v. Durham Regional Police Services Board* (2005), 204 O.A.C. 283, Respondents' BOA, Tab 15 at paras. 5, 13-14; *Toronto Police Association v. Toronto Police Services Board*, 2007 ONCA 742, Respondents' BOA, Tab 16 at paras. 16-17; and *George v. Anishinabek Police Service*, 2014 ONCA 581, Respondents' BOA, Tab 17 at paras. 28-29 [*George*].

47. In any event, the Appellant's tort claims of negligence and misfeasance in public office are inextricably linked to workplace matters – namely, whether the Respondents complied with the terms of the Appellant's resignation from unionized employment. The alleged disclosures of confidential information pertain to the Respondents' work-related conduct in managing the WRPSB's workplace, participating in litigation commenced by current and former WRPSB employees, and administering the Appellant's employment cessation pursuant to the Resignation Agreement. The determination of the Appellant's tort claims will necessarily require the decision-maker to interpret the Resignation Agreement and ascertain whether the Respondents owed a duty of care to the Appellant and/or engaged in deliberate unlawful conduct while exercising a public function. Arbitrators have the expertise and exclusive authority to interpret contractual terms that govern unionized employees and to resolve tort claims arising from such unionized employment.

*Beaulieu v. University of Alberta*, 2014 ABCA 137, Respondents' BOA, Tab 18 at paras. 43-47.

48. Contrary to the Appellant's assertion, the fact that the events in dispute took place after her resignation is not determinative. The WRPA's exclusive representation rights in respect of its members (including the Appellant) for all terms and conditions of their employment (including the Resignation Agreement) are not time limited. These rights continue to exist and survive notwithstanding the fact that the Appellant is no longer an employee of the WRPSB or a member of the WRPA's bargaining unit. Because the Resignation Agreement is the product of a negotiated resolution of all outstanding employment matters between not just the Appellant and the WRPSB, but also the WRPA, the enforcement of the Resignation Agreement must be treated in the same manner as the

enforcement of any agreement made by a union on behalf of one of its members.

> *The Globe and Mail v. Communications, Energy and Paperworkers Union of Canada, Local 87-M*, 2012 CanLII 51448 (Ont. LA) (Davie), Respondents' BOA, Tab 19 at pp. 18-19, aff'd *Wong v. The Globe & Mail*, 2013 ONSC 2993 (Div. Ct.), Respondents' BOA, Tab 20 at paras. 32-33, additional reasons at *Wong 2014*, *supra*, Respondents' BOA, Tab 12.
> *George*, *supra*, Respondents' BOA, Tab 17 at paras. 42-43.

49. The decision in *Skof v. Bordeleau* ("*Skof*") relied upon by the Appellant is based on unique factual circumstances that are readily distinguishable from the instant case. In *Skof,* the collective agreement expressly excluded the appellant from the terms of the collective agreement while he held the position of Association President. No such removal of representation rights exists under the Uniform Collective Agreement. Rather, the WRPA had exclusive representation rights in respect to the Appellant, and (as outlined above) continues to hold such representation rights for any issues arising out of the Resignation Agreement. Moreover, in *Skof,* the essential character of the claim before the Court was the disciplinary action taken by the chief of police within the meaning of Part V of the *PSA* – a statutory complaint and discipline system outside the scope of grievance rights under a collective agreement.

> *Skof v. Bordeleau*, 2020 ONCA 729, Appellant's Book of Authorities, Tab 11 at paras. 10, 14, 17, and 18.

50. In contrast to *Skof,* the decision in *Desgrosseillers v. North Bay General Hospital* ("*Desgrosseillers*") is on 'all fours' with the situation of the Appellant and is dispositive of the Appellant's assertion that, merely because her employment has ended, the 'exclusive jurisdiction model' proclaimed by the Supreme Court of Canada no longer has force or effect. *Desgrosseillers* concerned an action brought by a former bargaining unit employee alleging breach of a settlement agreement executed after the termination of the plaintiff's employment. The Court found that the essential character of the dispute

involved the circumstances of the former employee's employment cessation, the settlement, and the alleged breach of the settlement, all of which were matters within a labour arbitrator's exclusive jurisdiction. The Appellant argues that Bielby J. erred in relying on *Desgrosseillers* because the particulars of the disputed conduct were not set out in the decision. Respectfully, how the settlement was breached is irrelevant to the Court's conclusion that breach of a settlement relating to the employment cessation of a bargaining unit employee is a matter arising out of the collective agreement.

> *Desgrosseillers v. North Bay General Hospital*, 2010 ONSC 142, Appellant's Book of Authorities, Tab 13, at paras. 49-52.

51. The Appellant further asserts that, unlike in *Desgrosseillers*, the Uniform Collective Agreement does not assign exclusive jurisdiction to an arbitrator. This assertion is incorrect and ignores that Article 23.01 of the Uniform Collective Agreement expressly directs that "[a]ll complaints or grievances shall be dealt with under the provisions of Article 42 of this Agreement." Article 42, in turn, provides for arbitration in accordance with the *PSA*.

52. Taken together, the Uniform Collective Agreement and the comprehensive dispute resolution processes of the *PSA* mandate that binding arbitration is the proper forum for adjudicating the Claim and confers exclusive jurisdiction upon an arbitrator.

### iii. Bielby J. Correctly found that the Appellant's Allegations Fall Within the HRTO's Overlapping Jurisdiction to Enforce Human Rights Settlements

53. Though the Supreme Court of Canada has explicitly rejected any concurrent jurisdiction in the courts over claims subject to binding labour arbitration, there is overlapping jurisdiction between labour arbitrators and the HRTO where a complainant

alleges violations of the *Code*. In the result, the Appellant's allegations of non-compliance with the Resignation Agreement (which is, in part, a human rights settlement) may also be determined by the HRTO.

> *Code*, *supra*, s. 45.1.
> See also *Melville v. Toronto (City)*, 2012 HRTO 22, Respondents' BOA, Tab 21 at paras. 8-11.

54. Section 45.9 of the *Code* expressly confers jurisdiction on the HRTO to address contraventions of human rights settlements and "make any order that it considers appropriate to remedy the contravention". This settlement enforcement power of the HRTO is recognized as an integral part of achieving the purposes of the *Code*.

> *Code*, *supra*, ss. 45.9(3) and (8).
> *Saunders v. Toronto Standard Condominium Corp. No. 1571*, 2010 HRTO 2516, Respondents' BOA, Tab 22 at para. 51.

55. Since the Supreme Court of Canada's decision in *Seneca College v. Bhadauria,* it is trite law in Ontario that human rights claims, along with the enforcement of settlements in respect of such claims, must be pursued through the comprehensive enforcement scheme under the *Code*, rather than in the courts.

> *Seneca College v. Bhadauria*, [1981] 2 S.C.R. 181, Respondents' BOA, Tab 23 at pp. 194-195. See also *Honda Canada Inc. v. Keays*, 2008 SCC 39, Respondents' BOA, Tab 24 at paras. 63-65.

56. The one statutory exception, arising under section 46.1 (enacted in 2008), is where the alleged breach of Part I of the *Code* is 'piggy-backed' to a separate, independent civil action:

> 46.1(1) If, in a civil proceeding in a court, the court finds that a party to the proceeding has infringed a right under Part I of another party to the proceeding, the court may make either of the following orders, or both:
>
> > 1. An order directing the party who infringed the right to pay monetary compensation…

> 2. An order directing the party who infringed the right to make restitution to the party whose right was infringed…
>
> (2) Subsection (1) does not permit a person to commence an action based solely on an infringement of a right under Part I.

*Code*, *supra*, s. 46.1.

57. Section 46.1 unequivocally references only infringements "under Part I" of the *Code*. As the Appellant has alleged a breach of what is, in part, a human rights settlement (i.e. a Part IV right), rather than an infringement of her rights under Part I of the *Code*, Section 46.1 cannot be used to bring this Claim within the Court's jurisdiction.

58. Moreover, as the Appellant's allegations all relate to employment matters within the ambit of the Uniform Collective Agreement, there is no independent actionable claim on which the Appellant can piggy-back her allegations of a breach of a human rights settlement.

59. Notably, the *Code* also allows the HRTO "to determine all questions of fact or law that arise in any application before it." It follows, therefore, that the Appellant's allegations against the Respondents are matters that may be addressed by the HRTO.

*Code*, *supra*, s. 39.

60. To allow the Appellant to proceed with the Claim would be duplicative and result in an unnecessary expenditure of limited judicial resources, contrary to sections 71 and 138 of the *Courts of Justice Act* and Rule 1.04(1). The allegations in the Appellant's Application for Contravention of Settlement already overlap with (or could be amended to include) the allegations in the Claim. Moreover, the determination of all outstanding issues arising from the Resignation Agreement, including the WRPSB's own allegations against the Appellant, in a single proceeding is likely to be more expeditious and cost-effective

for all parties.

> *Courts of Justice Act*, R.S.O. 1990, c. C.43, ss. 71 and 138.
> *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 [*Rules*], s. 1.04(1).

## C. The Alleged Procedural Defects cannot Confer Jurisdiction on the Court

61. As set out in Section D below, Bielby J. correctly determined that the Jurisdiction Issue was properly before him and that the Appellant's assertions were without merit. Moreover, even if there was some procedural error or defect (which is strictly denied), as the court lacks jurisdiction over the Claim, it is not open to the court to assume jurisdiction on the basis of waiver or attornment. Put simply, parties cannot confer jurisdiction upon the court when the court lacks such jurisdiction at law.

> *Transalta Utilities Corporation v. Young Estate*, 1997 ABCA 349, Respondents' BOA, Tab 25, at paras. 42-43.
> *Brillon v. General Dynamics Land Systems – Canada*, 2018 ONSC 7442, Respondents' BOA, Tab 26 at para. 17.

## D. In any Event, Bielby J. Correctly Determined that he had Authority to Determine the Jurisdiction Issue

62. The Appellant asserts that Bielby J. did not have authority to rule on the Jurisdiction Issue because: (1) the Court of Appeal had already ruled on the issue in the course of its decision on the Pleadings Issue; (2) the Respondents should have raised the Jurisdiction Issue in a cross-appeal to the Court of Appeal during the Appellant's appeal of the Doi J. Order regarding the Pleadings issue; and/or (3) the Respondents ought to have filed a Rule 59.06(1) motion in respect of the Pleadings Issue decisions of Doi J. and/or the Court of Appeal.

### i. Prior to Bielby J.'s Decision, No Court Had Rendered a Decision on the Respondents' Jurisdiction Motion

63. The question decided by Doi J. (i.e. the Pleadings Issue) was **entirely different**

than the question put before Bielby J. (i.e. the Jurisdiction Issue). Doi J. specifically determined that it was not necessary to determine the Jurisdiction Issue as the Amended Statement of Claim could be struck on the basis of the Pleadings Issue alone.

64. Contrary to the Appellant's assertion, this Court did not rule upon the Jurisdiction Issue when it overturned and vacated the Order of Doi J. on the Pleadings Issue.

65. The Appellant's contention that this Court's statement at paragraph 15 of its decision, regarding the privative clause in the *Workplace Safety and Insurance Act, 1997*, amounts to a ruling on the Jurisdiction Issue ignores the context of that statement. Clearly, the statement was made solely to support the conclusion that the Amended Statement of Claim could not be struck under Rule 21.01(1)(b); it was not a finding in respect of the Jurisdiction Issue.

> *Donovan ONCA, supra,* Appellant's Book of Authorities, Tab 1 at para. 15.

66. Indeed, at least insofar as the Jurisdiction Issue was concerned, absent some kind of ruling or order by Doi J., there was nothing upon which this Honourable Court could adjudicate or discharge its appellate function.

> *Sun Oil Co. v. City of Hamilton and Veale*, [1961] O.R. 209 (C.A.)**,** Appellant's Book of Authorities, Tab 8 [*Sun Oil*] at p. 6.

67. As such, the Jurisdiction Issue remained a live issue open to be determined by the lower court. The *Sun Oil Co. v. City of Hamilton and Veale* decision is directly on point. In that case, the respondent brought a motion for an order of *mandamus* directing the appellants to issue permits for the execution and operation of certain gasoline service stations. Before this motion was heard, the respondent served further notice that it would move for a declaration that the by-law in question did not apply for the purposes of

licensing and regulating gasoline service stations. The motions Judge granted the second declaration sought and, as a result, no disposition was made in respect of the *mandamus* motion. At appeal, the motion Judge was found to have erred in his interpretation of the by-law and the respondent, *inter alia*, attempted to raise its alternative argument that the appellants' refusal to issue necessary licenses was an improper exercise of discretion. However, the Court of Appeal expressly held that the issue was still live and open for the respondent to pursue before the lower court:

> This is a matter we assume was argued before Mr. Justice Stewart. **However, he did not decide it; the order he made does not determine it; and it is still open to the respondent to pursue**. In the circumstances no appeal was taken or could be taken upon this part of the case and this Court has no original jurisdiction which would empower it to decide it.
>
> [Emphasis added]

*Sun Oil, ibid,* at p. 6.
See also *Celebija v. Cooperators* (1994), 47 A.C.W.S. (3d) 837 (Ont. Ct. (Gen. Div.)), Respondents' BOA, Tab 27, at para. 8.

### ii. The Doctrine of *Res Judicata* Does Not Bar a Ruling on the Jurisdiction Issue

68. *Res judicata* prevents parties from pursuing matters adjudged. The absence of any decision on the Jurisdiction Issue is necessarily fatal to the Appellant's claim of *res judicata* (also known as "issue estoppel").

*R. v. Duhamel*, [1984] 2 S.C.R. 555, Respondents' BOA, Tab 28 at pp. 561-562.
*Danyluk v. Ainsworth Technologies Inc*., 2001 SCC 44, Respondents' BOA, Tab 29 at para. 25.

### iii. The Respondents were not required to Cross-Appeal or file a Slip Motion

69. Absent an order on the Jurisdiction Issue, it was not open to the Respondents to cross-appeal Doi J.'s decision as alleged by the Appellant. An appeal lies from the order or judgment of the court, not the reasons for them. It is the direction of the Court, and not

the supporting reasons for judgment, that comprise the appealable order.

> *Canadian Express Ltd. v. Blair* (1991), 6 O.R. (3d) 212 (Div. Ct.), Respondents' BOA, Tab 30 at pp. 5-6.
> *Ross v. Canada Trust Company*, 2021 ONCA 161, Respondents' BOA, Tab 31 at para. 53.
> *Courts of Justice Act*, *supra*, s. 6.

70. Only two appealable 'orders' arose from the decision of Doi J., neither of which the Respondents sought to appeal: (1) that the Amended Statement of Claim be struck under Rule 21.01(1)(b) without leave to amend; and (2) that the Appellant pay $5,500.00 in costs to the Respondents.

> *Donovan ONSC*, *supra*, Appellant's Book of Authorities, Tab 2 at paras. 39-41.
> Order of Doi J. dated March 20, 2019, Compendium of the Appellant, Tab 8.

71. Nor can it be said that Doi J. committed any reviewable error – which ought to have been the subject of a cross-appeal by the Respondents – when Doi J. declined to rule upon the Jurisdiction Issue. When deciding a matter in a party's favour, the court is not obliged to consider the party's alternative arguments and commits no reviewable error in declining to rule upon those alternative arguments. Indeed, deciding only those issues necessary for the disposition of a dispute fosters judicial economy.

> *Ross v. Canada Trust Company*, *supra*, Respondents' BOA, Tab 31 at para 54.
> *Palechuk v. Fahrlander*, 2006 ABCA 242, Respondents' BOA, Tab 32 at paras. 40-41, leave to appeal to S.C.C. refused 2007 CanLII 11277 (S.C.C.), Respondents' BOA, Tab 33.
> *Piller v. Assn. of Ontario Land Surveyors* (2002), 160 O.A.C. 333, Respondents' BOA, Tab 34, at para. 12.

72. Further, contrary to the assertion of the Appellant, it was not incumbent on the Respondents to bring a motion under Rule 59.06(1) following either Doi J.'s 2019 Order or this Honourable Court's decision on the Pleadings Issue.

73. Rule 59.06(1) is designed to amend judgments containing a slip or errors which are clerical, mathematical, or due to "misadventure or oversight". In short, the Rule is

designed to correct errors in memorializing the court's reasons into a formal order or judgment. In this case, as neither Doi J. nor this Honourable Court issued an order on the Jurisdiction Issue, there was no order requiring correction by the Respondents in accordance with Rule 59.06.

> *Millwright Regional Council of Ontario Pension Trust Fund (Trustees of) v. Celestica Inc.*, 2013 ONSC 1502, Respondents' BOA, Tab 35, at para 30.

### iv. Doi J. Was Not *Functus Officio* in Respect of the Jurisdiction Issue and Bielby J. did Not Amend a Judgment that had Ceased to be in Effect

74. The Appellant asserts that Doi J. and/or the lower court were *functus officio*. This contention is predicated on the Appellant's erroneous belief that the Jurisdiction Issue was decided by Doi J. and/or this Honourable Court. As no such decision was rendered by Doi J. or this Court, then neither Doi J. nor the lower court is *functus officio* in respect of the Jurisdiction Issue.

75. The Appellant relies upon the *Lantin* decision of the Manitoba Court of Appeal to challenge the Respondents' entitlement to a ruling on the Jurisdiction Issue. While not binding on Ontario courts, the *Lantin* decision is factually distinguishable from the matter before this Court. *Lantin* stands for the proposition that a trial judge's order is not operative after it has been overturned and replaced by an order of the appellate court, and that a trial judge's order and an appellate judge's order in respect of the same subject matter cannot simultaneously be in effect. On the other hand, *Lantin* does not preclude multiple final judgments relating to <u>different issues</u>. The Manitoba Court of Appeal expressly recognized that "[m]ore than one final judgment may be given in an action or proceeding if several

causes of action or issues are decided at different times".

> *Lantin v. Seven Oaks General Hospital*, 2019 MBCA 115, Appellant's Book of Authorities, Tab 5 at para. 31.
> Letter from the Defendants dated May 6, 2020, Compendium of the Appellant, Tab 32.

76. Simply put, following this Court's decision on the Pleadings Issue, it was always open to Doi J. to issue a decision on the Jurisdiction Issue pursuant to Rule 21.01(3)(a).

77. In any event, as Doi J. ultimately directed that the Jurisdiction Issue be argued before another judge, his reference to Rule 59.06(1) was unnecessary to that direction. Even if Rule 59.06(1)(a) was not the correct mechanism for adjudicating the Jurisdiction Issue, the Respondents brought a new motion before Bielby J. under both Rule 21.01(3)(a) and Rule 59.06. That the Respondents would be proceeding by way of both Rules (or by any others deemed applicable) was brought to the Appellant's attention no later than May 6, 2020.

> Letter from the Defendants dated May 6, 2020, Compendium of the Appellant, Tab 32.

78. What is more, given that the Appellant amended her original Statement of Claim two more times after this Court's decision in respect of the Pleadings Issue, a Rule 21.01(3)(a) motion was always open to the Respondents. Bielby J.'s decision constitutes a ruling on the Jurisdiction Issue in respect of the Fresh Amended Statement of Claim – a pleading that was not even served on the Respondents until December 9, 2020.

> Affidavit of Laura Freitag, Respondents' Compendium, Tab 2 at para. 50.

## E. The Respondents' Jurisdiction Issue Motion Does Not Amount to an Abuse of Process.

79. The Appellant's bald allegation that the Respondents are engaging in an abuse of process and bad faith litigation is, with respect, wholly without merit. That jurisdiction

issues ought to be decided early in a proceeding is trite law.

> *TeleZone Inc. v. Canada (Attorney General)*, 2008 ONCA 892, Respondents' BOA, Tab 36 at paras. 108-109. See also *Rules, supra*, s. 1.04(1).

80. Until this Court's ruling on October 25, 2019, the Amended Statement of Claim had been found to disclose no reasonable cause of action. As such, there was no requirement for the Respondents to seek a determination of the proper forum for the Appellant's claims. Moreover, the Appellant has been aware since June 7, 2018 – when the Respondents served their first Notice of Motion in respect of this proceeding – that the Respondents would be seeking a ruling on the Jurisdiction Issue. As previously noted, subsequent to this Court's ruling on the Pleadings Issue, the Appellant amended her claim two more times. In all of the circumstances, Bielby J. correctly concluded that the Respondents' behaviour could not be characterized as "lying in the weeds".

81. The Appellant suggests that she is being put to "unnecessary expense" and, accuses the Respondents of hoping to "starve her into submission". There is no factual basis for these allegations. As noted by Bielby J., the Respondents and the Appellant both bore the burden of having to reargue the Jurisdiction Issue.

82. In any event, at no time did the Appellant seek to appeal Doi J.'s Endorsement in respect of the Jurisdiction Issue. Having failed to do so, the Appellant is estopped from advancing the current procedural objections.

> *Diamond v. The Western Realty Co.*, [1924] S.C.R. 308, Respondents' BOA, Tab 37 at pp. 315-316.

**F. No Reasonable Apprehension of Bias**

83. The Appellant's allegation of reasonable apprehension of bias against Bielby J. is baldy asserted and wholly without merit.

84. The Appellant relies solely upon the judicial order of Regional Senior Justice Ricchetti of the Brampton Superior Court of Justice. This order prohibited the dissemination of the March 1, 2021 Zoom details due to the previous "zoom bombing" at the first hearing date. This order was not issued by Bielby J. and cannot form the basis for an allegation of a reasonable apprehension of bias against Bielby J.

Ricchetti J.'s Order, Compendium of the Appellant, Tab 6.

85. Further, contrary to the assertions of the Appellant, there is no suggestion in Ricchetti J.'s order that the Appellant was to blame for dissemination of the Zoom details for the February 23, 2021 motion hearing date, nor did the order prohibit the general public from attending the March 1, 2021 motion hearing date.

86. No informed person, viewing the matter realistically and practically and having thought the matter through, would think that Bielby J. consciously or unconsciously would not decide the matter fairly.

*R. v. S. (R.D.),* [1997] 3 S.C.R. 484, Respondents' BOA, Tab 38 at para 31.

**PART IV - ORDER REQUESTED**

87. Based on the foregoing, the Respondents respectfully request that the Appeal be dismissed with costs of this Appeal granted to the Respondents on a substantial indemnity basis and made payable within 30 days.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of August, 2021.

Donald B. Jarvis & Clifton Yiu
**Filion Wakely Thorup Angeletti LLP**
Lawyers for the Defendants (Respondents)

## CERTIFICATE

I, Donald B. Jarvis, counsel for the Respondents, certify that:

1. An order under Rule 61.09(2) (original record and exhibits) is not required; and
2. Time assigned in accordance with the Court's Notice of Hearing dated July 23, 2021 or, if permitted by the Court, approximately 45 minutes to one hour will be required for the Respondents' oral argument, not including reply.

Dated at Toronto, Ontario this 12th day of August, 2021.

Donald B. Jarvis
**Filion Wakely Thorup Angeletti LLP**
Lawyers for the Defendants (Respondents)

**SCHEDULE "A"**
**LIST OF AUTHORITIES**

1. *Rivers v. Waterloo Regional Police Services Board*, 2018 ONSC 4307
2. *Rivers v. Waterloo Regional Police Services Board*, 2019 ONCA 267
3. *Rivers et al. v. Waterloo Regional Police Services Board et al.*, 2019 CanLII 99448 (S.C.C.)
4. *Donovan v. Waterloo Regional Police Services Board*, 2019 ONSC 1212
5. *Donovan v. Waterloo Regional Police Services Board*, 2019 ONCA 845
6. *Hutton v. The Manufacturers Life Insurance Company (Manulife Financial)*, 2019 ONCA 975
7. *Riding v. Nova Scotia (Attorney General)*, 2009 NSCA 82
8. *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929
9. *Renaud v. Town of Lasalle Police Association* (2006), 216 O.A.C. 1
10. *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14
11. *Abbott v. Collins* (2003), 64 O.R. (3d) 789 (C.A.)
12. *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)*, 2007 NSCA 38
13. *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42
14. *Bell Canada v. Unifor, Local 34-0*, 2016 CanLII 11573 (CA LA)
15. *Wong v. The Globe and Mail Inc*., 2014 ONSC 6372 (Div. Ct.)
16. *Coleman v. Demers*, 2007 CanLII 7526 (Ont. Sup. Ct.)
17. *K.A. et al. v. The City of Ottawa et al.* (2006), 80 O.R. (3d) 161 (C.A.)
18. *Heasman v. Durham Regional Police Services Board* (2005), 204 O.A.C. 283
19. *Toronto Police Association v. Toronto Police Services Board*, 2007 ONCA 742
20. *George v. Anishinabek Police Service*, 2014 ONCA 581
21. *Beaulieu v. University of Alberta*, 2014 ABCA 137
22. *The Globe and Mail v. Communications, Energy and Paperworkers Union of Canada, Local 87-M*, 2012 CanLII 51448 (Ont. LA) (Davie)
23. *Wong v. The Globe & Mail*, 2013 ONSC 2993 (Div. Ct.)
24. *Skof v. Bordeleau*, 2020 ONCA 729
25. *Desgrosseillers v. North Bay General Hospital*, 2010 ONSC 142

26. *Melville v. Toronto (City)*, 2012 HRTO 22
27. *Saunders v. Toronto Standard Condominium Corp. No. 1571,* 2010 HRTO 2516
28. *Seneca College v. Bhadauria,* [1981] 2 S.C.R. 181
29. *Honda Canada Inc. v. Keays,* 2008 SCC 39
30. *Transalta Utilities Corporation v. Young Estate,* 1997 ABCA 349
31. *Brillon v. General Dynamics Land Systems - Canada,* 2018 ONSC 7442
32. *Celebija v. Cooperators* (1994), 47 A.C.W.S. (3d) 837 (Ont. Ct. (Gen. Div.))
33. *R. v. Duhamel,* [1984] 2 S.C.R. 555
34. *Danyluk v. Ainsworth Technologies Inc.,* 2001 SCC 44
35. *Canadian Express Ltd. v. Blair* (1991), 6 O.R. (3d) 212 (Div. Ct.)
36. *Ross v. Canada Trust Company,* 2021 ONCA 161
37. *Palechuk v. Fahrlander,* 2006 ABCA 242
38. *Palechuk v. Fahrlander,* 2007 CanLII 11277 (S.C.C.)
39. *Piller v. Assn. of Ontario Land Surveyors* (2002), 160 O.A.C. 333
40. *Millwright Regional Council of Ontario Pension Trust Fund (Trustees of) v. Celestica Inc.,* 2013 ONSC 1502
41. *Lantin v. Seven Oaks General Hospital*, 2019 MBCA 115
42. *TeleZone Inc. v. Canada (Attorney General),* 2008 ONCA 892
43. *Diamond v. The Western Realty Co.,* [1924] S.C.R. 308
44. *R. v. S. (R.D.),* [1997] 3 S.C.R. 484

## SCHEDULE "B"
## RELEVANT STATUTES

***Rules of Civil Procedure*, R.R.O. 1990, Reg. 194**

**General Principle**

**1.04** (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

**RULE 21 – DETERMINATION OF AN ISSUE BEFORE TRIAL**

**Where Available**

***To Any Part on a Question of Law***

**21.01** (1) A party may move before a judge,

…

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly.

(2) No evidence is admissible on a motion,

…

(b) under clause (1) (b).

**RULE 57 – COSTS OF PROCEEDINGS**

**Costs of a Motion**

***Contested Motion***

**57.03** (1) On the hearing of a contested motion, unless the court is satisfied that a different order would be more just, the court shall,

(a) fix the costs of the motion and order them to be paid within 30 days; or

(b) in an exceptional case, refer the costs of the motion for assessment under Rule 58 and order them to be paid within 30 days after assessment.

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

**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,

(i) an order referred to in clause 19 (1) (a) or (a.1), or

(ii) an order from which an appeal lies to the Divisional Court under another Act;

(c) a certificate of assessment of costs issued in a proceeding in the Court of Appeal, on an issue in respect of which an objection was served under the rules of court;

(d) an order made under section 137.1.

**Goals**

**71** The administration of the courts shall be carried on so as to,

(a) maintain the independence of the judiciary as a separate branch of government;

(b) recognize the respective roles and responsibilities of the Attorney General and the judiciary in the administration of justice;

(c) encourage public access to the courts and public confidence in the administration of justice;

(d) further the provision of high-quality services to the public; and

(e) promote the efficient use of public resources.

**Multiplicity of proceedings**

**138** As far as possible, multiplicity of legal proceedings shall be avoided.

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

**No waiver of entitlement**

**16** 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.

**"Trade" of municipal corporations, etc.**

**68** The exercise by the following entities of their powers and the performance of their duties shall be deemed to be their trade or business for the purposes of the insurance plan:

1. A municipal corporation.
2. A public utilities commission or any other commission or any board (other than a hospital board) that manages a work or service owned by or operated for a municipal corporation.
3. A public library board.
4. The board of trustees of a police village.
5. A school board.

**Payments by Schedule 2 employers**

**85** (1) The Board shall determine the total payments to be paid by all Schedule 2 employers with respect to each year to defray their fair share (as determined by the Board) of the expenses of the Board and the cost of administering this Act and such other costs as are directed under any Act to be paid by the Board.

**Jurisdiction**

**118** (1) The Board has exclusive jurisdiction to examine, hear and decide all matters and questions arising under this Act, except where this Act provides otherwise.

**Finality of decision**

(3) An action or decision of the Board under this Act is final and is not open to question or review in a court.

**Same**

(4) No proceeding by or before the Board shall be restrained by injunction, prohibition or other process or procedure in a court or be removed by application for judicial review or otherwise into a court.

**Jurisdiction**

**123** (1) The Appeals Tribunal has exclusive jurisdiction to hear and decide,

(a) all appeals from final decisions of the Board with respect to entitlement to health care, return to work, labour market re-entry and entitlement to other benefits under the insurance plan;

(b) all appeals from final decisions of the Board with respect to transfer of costs, an employer's classification under the insurance plan and the amount of the premiums and penalties payable by a Schedule 1 employer and the amounts and penalties payable by a Schedule 2 employer; and

(c) such other matters as are assigned to the Appeals Tribunal under this Act.

…

**Finality of decision**

(4) An action or decision of the Appeals Tribunal under this Act is final and is not open to question or review in a court.

**Same**

(5) No proceeding by or before the Appeals Tribunal shall be restrained by injunction, prohibition or other process or procedure in a court or be removed by application for judicial review or otherwise into a court.

## O. Reg. 175/98: General

SCHEDULE 2
INDUSTRIES THE EMPLOYERS IN WHICH ARE INDIVIDUALLY LIABLE TO PAY BENEFITS UNDER THE INSURANCE PLAN

1. Any trade or business within the meaning of section 68 of the Act.

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

**Board may contract, sue and be sued**

**30** (1) A board may contract, sue and be sued in its own name.

**Dispute, appointment of conciliation officer**

**123** (1) The Solicitor General shall appoint a conciliation officer, at a party's request, if a difference arises between the parties concerning an agreement or an arbitrator's decision or award made under this Part, or if it is alleged that an agreement or award has been violated.

**Duty of conciliation officer**

**123** (2) The conciliation officer shall confer with the parties and endeavour to resolve the dispute and shall, within fourteen days after being appointed, make a written report of the results to the Solicitor General.

**Extension of time**

**123** (3) The fourteen-day period may be extended if the parties agree or if the Solicitor General extends it on the advice of the conciliation officer that the dispute may be resolved within a reasonable time if the period is extended.

**Report**

**123** (4) When the conciliation officer reports to the Solicitor General that the dispute has been resolved or that it cannot be resolved by conciliation, the Solicitor General shall promptly inform the parties of the report.

**No arbitration during conciliation**

**123** (5) Neither party shall give a notice referring the dispute to arbitration until the Solicitor General has informed the parties of the conciliation officer's report.

**Arbitration after conciliation fails**

**124** (1) If the conciliation officer reports that the dispute cannot be resolved by conciliation, either party may give the Solicitor General and the other party a written notice referring the dispute to arbitration.

**Idem**

**124** (2) The procedure provided by subsection (1) is available in addition to any grievance or arbitration procedure provided by the agreement, decision or award.

**Composition of arbitration board**

**124** (3) The following rules apply to the composition of the arbitration board:

1. The parties shall determine whether it shall consist of one person or of three persons. If they are unable to agree on this matter, or if they agree that the arbitration board shall consist of three persons but one of the parties then fails to appoint a person in accordance with the agreement, the arbitration board shall consist of one person.

2. If the arbitration board is to consist of one person, the parties shall appoint him or her jointly. If they are unable to agree on a joint appointment, the person shall be appointed by the Solicitor General.

3. If the arbitration board is to consist of three persons, the parties shall each appoint one person and shall jointly appoint a chair. If they are unable to agree on a joint appointment, the chair shall be appointed by the Solicitor General.

**Time for arbitration**

**124** (4) The arbitration board shall commence the arbitration within thirty days after being appointed, in the case of a one-person board, or within thirty days after the appointment of the chair, in the case of a three-person board, and shall deliver a decision within a reasonable time.

**Filing of decision**

**124** (5) The arbitration board shall promptly file a copy of its decision with the Arbitration Commission.

**Costs and expenses**

**124** (6) The following rules apply with respect to the costs and expenses of the arbitration:

1. The Arbitration Commission shall pay the fees of any person the Solicitor General appoints to the arbitration board.

2. Each party shall pay its own costs incurred in the arbitration, including the fees of any person it appoints to the arbitration board.

3. The parties shall share equally the costs and expenses for matters shared in common, including the fees of any person whom they jointly appoint to the arbitration board.

**Enforcement**

**124** (7) After the day that is thirty days after the delivery of the decision or after the day that the decision provides for compliance, whichever is later, the arbitration board may, of its own motion, and shall, at a party's request, file a copy of the decision, in the prescribed form, with the Superior Court of Justice.

**Idem**

**124** (8) The decision shall be entered in the same way as a judgment of the Superior Court of Justice and may be enforced as such.

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

**Powers of Tribunal**

**39** The Tribunal has the jurisdiction to exercise the powers conferred on it by or under this Act and to determine all questions of fact or law that arise in any application before it.

**Dismissal in accordance with rules**

**45.1** The Tribunal may dismiss an application, in whole or in part, in accordance with its rules if the Tribunal is of the opinion that another proceeding has appropriately dealt with the substance of the application.

**Application where contravention**

**45.9** (3) If a settlement of an application made under section 34 or 35 is agreed to in writing and signed by the parties, a party who believes that another party has contravened the settlement may make an application to the Tribunal for an order under subsection (8),

(a) within six months after the contravention to which the application relates; or

(b) if there was a series of contraventions, within six months after the last contravention in the series.

**Order**

**45.9** (8) If, on an application under subsection (3), the Tribunal determines that a party has contravened the settlement, the Tribunal may make any order that it considers appropriate to remedy the contravention.

**Civil remedy**

**46.1** (1) If, in a civil proceeding in a court, the court finds that a party to the proceeding has infringed a right under Part I of another party to the proceeding, the court may make either of the following orders, or both:

1. An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.

2. An order directing the party who infringed the right to make restitution to the party whose right was infringed, other than through monetary compensation, for loss arising out of the infringement, including restitution for injury to dignity, feelings and self-respect.

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| **KELLY LYNN DONOVAN**<br>Plaintiff (Appellant) | and | **WATERLOO REGIONAL POLICE SERVICES BOARD and BRYAN LARKIN**<br>Defendants (Respondents) | **CA No. C69467** |

**COURT OF APPEAL FOR ONTARIO**

Proceeding commenced at TORONTO

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