

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

KELLY LYNN DONOVAN

Plaintiff  
(Responding Party)

- and -

WATERLOO REGIONAL POLICE SERVICES BOARD  
and BRYAN LARKIN

Defendants  
(Moving Party)

**FACTUM OF THE MOVING PARTY  
(returnable February 13, 2019)**

**PART I - INTRODUCTION**

1. This is a motion brought by the Defendants pursuant to Rules 21.01(1)(b), 21.01(3)(a), and 21.01(3)(d) of the *Rules of Civil Procedure* (the “*Rules*”) for an Order dismissing the Plaintiff’s action or, in the alternative, striking out the Statement of Claim on the following bases:

- (a) The Court has no jurisdiction over the subject matter of the action. The Plaintiff seeks damages for breach of contract and reinstatement on the basis that the Defendants breached an earlier human rights settlement (the “Resignation Agreement”) by: (i) swearing an affidavit in a class action lawsuit which included non-identifying particulars of various human rights applications; and (ii) filing an Intent to Object form in respect of a decision by the Workplace Safety and Insurance Board (the “WSIB”). The essential character of this dispute involves enforcement of a human rights settlement

falling within the core jurisdiction and specialized expertise of the Human Rights Tribunal of Ontario (the “Tribunal”). Any matters not within the core jurisdiction of the Tribunal fall within the exclusive jurisdiction of the binding arbitration processes established pursuant to the *Police Services Act* (“PSA”). To the extent the dispute concerns the review of a WSIB decision, it falls within the exclusive jurisdiction of the WSIB and/or the Workplace Safety and Insurance Appeals Tribunal (the “WSIAT”).

- (b) The action discloses no reasonable cause of action against one or both of the Defendants. First, as Chief Larkin’s affidavit was made in the course of a judicial proceeding, it is covered by absolute privilege and cannot give rise to a cause of action. Second, the Intent to Object form cannot be barred by the Release executed pursuant to the Resignation Agreement, as the WSIB’s review could not cause any loss to the Plaintiff or lead to any finding of liability owed by the Plaintiff to the Defendants. In any event, workplace parties cannot contract out of the *Workplace Safety and Insurance Act, 1997* (“WSIA”). Finally, the Plaintiff has not alleged any facts against Chief Larkin that would indicate an actionable wrong and/or separate identity or interest for which he could be personally liable.
- (c) The action is frivolous, vexatious and/or an abuse of process as against one or both of the Defendants. The action is clearly unmeritorious and raises the same allegations raised before the Tribunal.

*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 21.01(1)(b), 21.01(3)(a), and 21.01(3)(d) [Rules].

*Police Services Act*, R.S.O. 1990, c. P-15 [PSA].

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

## **PART II - THE FACTS**

### **A. The Parties**

2. The Organizational Defendant, the Waterloo Regional Police Services Board (“WRPSB”), is an agency created under the *Police Services Act* that is responsible for the provision of police services to the Regional Municipality of Waterloo. It oversees the Waterloo Regional Police Service (“WRPS”).

Affidavit of Laura J. Freitag sworn February 4, 2019, Motion Record of the Defendants/Moving Party, Tab 2 at para. 2 [Affidavit of Laura Freitag].

3. The Personal Defendant, Bryan Larkin, is the Chief of Police of the WRPS.

Affidavit of Laura Freitag, *supra*, at para. 3.

4. The Plaintiff commenced employment with the WRPSB in or around 2010. She held the rank of Constable until her employment resignation. She was, at all times, represented by the Waterloo Regional Police Association (the “WRPA”).

Affidavit of Laura Freitag, *supra*, at paras. 4-5.

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

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

5. On or about June 6, 2016, the Plaintiff filed an application with the Tribunal 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”).

*Human Rights Code*, R.S.O. 1990, c. H.19 [Code].  
Affidavit of Laura Freitag, *supra*, at para. 18 and Exhibit E.

6. All matters relating to the Plaintiff’s employment with the WRPSB (including, most critically, the 2016 Application and potential *PSA* charges against the Plaintiff) were fully and finally resolved through a Resignation Agreement

executed on or about June 8, 2017 by the Plaintiff, the WRPSB and the WRPA. The Plaintiff was represented by independent legal counsel throughout the negotiation of the Resignation Agreement. The WRPSB and the Plaintiff executed mutual Releases and agreed, *inter alia*, to keep the terms and existence of the Resignation Agreement in absolute and strict confidence “except where disclosure is required by law...”.

Affidavit of Laura Freitag, *supra*, at paras. 14-22 and Exhibit F.

**ii. The Class Action Against the WRPSB**

7. On or about May 30, 2017, the WRPSB was named as one of the defendants in a class action lawsuit (subsequently dismissed by Madam Justice Baltman on July 13, 2018) commenced by current and former employees of the WRPS and their family members. The Plaintiff was not a class member of the class action.

Affidavit of Laura Freitag, *supra*, at para. 23.

8. Chief Larkin swore an affidavit in support of a dismissal motion in the class action lawsuit on or about December 21, 2017. Attached as Exhibit “F” to Chief Larkin’s affidavit was an anonymized chart with non-identifying particulars of human rights applications that were commenced by female WRPS employees in the period of 2012 to 2017. The chart includes, *inter alia*, the following:

NAME	GROUNDS FOR DISCRIMINATION	RESOLUTION
Female Constable	<ul style="list-style-type: none"><li>• Sex, including sexual harassment and pregnancy</li><li>• Marital status</li></ul>	SETTLED <ul style="list-style-type: none"><li>• monetary settlement</li><li>• withdrawal of OHRT application</li><li>• voluntary resignation</li></ul>

Affidavit of Laura Freitag, *supra*, at paras. 24-25 and Exhibit G.

**iii. The WRPSB's Enforcement Application**

9. On or about June 28, 2018, the WRPSB filed an Application for Contravention of Settlement with the Tribunal (the "WRPSB's Enforcement Application") alleging breaches of the Resignation Agreement by the Plaintiff. The WRPSB is seeking only such remedies as are necessary to ensure the Plaintiff's ongoing compliance with the terms of the Resignation Agreement.

Affidavit of Laura Freitag, *supra*, at para. 26 and Exhibit H.

10. The Plaintiff filed a Response to the WRPSB's Enforcement Application with the Tribunal on or about July 10, 2018. That Response did not, however, address the substantive allegations in the WRPSB's Enforcement Application. As a result, the WRPSB filed a Request for an Order During Proceedings ("RFOP") with the Tribunal on or about July 30, 2018, requesting that the Tribunal move to determine the issue of remedy.

Affidavit of Laura Freitag, *supra*, at paras. 27 and 29 and Exhibits I and K.

11. Pursuant to the Tribunal's Rules of Procedure and subsequently granted extensions, the Plaintiff was required to file submissions in response to the RFOP by September 28, 2018. The Plaintiff failed to do so.

Affidavit of Laura Freitag, *supra*, at paras. 30-32, 35-36 and 38 and Exhibits L and O.

12. The WRPSB's Enforcement Application is scheduled for hearing before the Tribunal on February 22, 2019, a date which was set back on August 3, 2018.

Affidavit of Laura Freitag, *supra*, at para. 33 and Exhibit M.

**iv. The Plaintiff's Enforcement Application**

13. On or about July 27, 2018, the Plaintiff filed her own Application for Contravention of Settlement with the Tribunal (the "Plaintiff's Enforcement

Application”) alleging a breach of the Resignation Agreement as a result of Chief Larkin’s affidavit in the class action lawsuit and seeking similar remedies as those in the instant action, including an order of reinstatement. Again, the Plaintiff has failed to comply with Tribunal directions issued in respect of the Plaintiff’s Enforcement Application.

Affidavit of Laura Freitag, *supra*, at paras. 28, 34-35 and 37-38 and Exhibits J, N, and P.

**v. The Plaintiff’s Civil Application**

14. Notwithstanding the Plaintiff’s ongoing failure to comply with Tribunal directions, the Plaintiff commenced an application against the WRPSB by filing a Notice of Application on or about September 18, 2018 (the “Application”).

Affidavit of Laura Freitag, *supra*, at paras 39-40 and Exhibits Q and R.

15. By decision dated February 1, 2019, Madam Justice Favreau dismissed the Application and concluded that the Court did not have jurisdiction to hear the Plaintiff’s proposed motion under section 137.1(3) of the *Courts of Justice Act* (“*CJA*”) to dismiss the WRPSB’s Enforcement Application before the Tribunal.

*Courts of Justice Act*, R.S.O. 1990, c. C.43 [*CJA*].  
Affidavit of Laura Freitag, *supra*, at para. 43 and Exhibit U.

**vi. The Determination of the Plaintiff’s Entitlement to Workers’ Compensation Benefits**

16. The Plaintiff commenced a medical leave of absence on or about February 27, 2017, and was later diagnosed with post-traumatic stress disorder (“PTSD”) as a result of an accident she had witnessed at the Ontario Police College in February 2011. On April 10, 2017, the Plaintiff submitted a claim for WSIB benefits.

Affidavit of Laura Freitag, *supra*, at paras. 6-9.

17. In a decision dated July 12, 2017, WSIB Case Manager Jane Drake granted the Plaintiff Initial Entitlement (Eligibility for Benefits) and allowed the claim for healthcare benefits and full loss of earnings (LOE) benefits from February 27, 2017 to June 24, 2017 (the “Initial Entitlement Decision”).

Affidavit of Laura Freitag, *supra*, at para. 10 and Exhibit B.

18. On or about January 11, 2018, the WRPSB filed an Intent to Object form (along with accompanying submissions) with the WSIB. Following its review of the claims file, the WSIB re-affirmed the Initial Entitlement Decision on August 3, 2018. Since then, the WRPSB has taken no steps to initiate any further WSIB reviews of the Initial Entitlement Decision.

Affidavit of Laura Freitag, *supra*, at paras. 11-13 and Exhibits C and D.

**vii. The Plaintiff’s Action Before this Court**

19. Originally commenced in May 2018 (the “Claim”) and amended on January 16, 2019 (the “Amended Claim”), the instant action is being maintained by the Plaintiff despite the fact that the WRPSB’s Enforcement Application and the Plaintiff’s Enforcement Application are already the Tribunal.

Affidavit of Laura Freitag, *supra*, at para. 44 and Exhibits V and W.

**PART III - ISSUES AND THE LAW**

**A. The Subject Matter of the Amended Claim is Outside of this Honourable Court’s Jurisdiction**

**i. The Tribunal Exercises Primary (if Not Exclusive) Jurisdiction Over the Enforcement of Human Rights Settlements**

20. Section 45.9(3) of the *Code* specifically confers upon the Tribunal the jurisdiction to address and remedy contraventions of human rights settlements.

The Tribunal’s remedial jurisdiction is broad and includes the power to “make any order that it considers appropriate to remedy the contravention”:

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)...

...

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.

*Code, supra*, ss. 45.9(3) and (8).

21. The same allegations are made in the Claim and the Plaintiff’s Enforcement Application. To the extent that the Amended Claim contains an additional allegation, the Plaintiff may seek to amend her Enforcement Application before the Tribunal to include this additional allegation.
22. Section 39 of the *Code* allows the Tribunal “to determine all questions of fact or law that arise in any application before it”. Accordingly, whether the WRPSB breached the Resignation Agreement (either through Chief Larkin’s affidavit or by requesting a WSIB review) is a matter that may be addressed by the Tribunal.

*Code, supra*, s. 39.

23. The enforcement of human rights settlements under the *Code* is recognized by the Tribunal as an integral part of achieving the high purposes of the *Code*:

**Respect for terms of settlement is not only a legally binding, contractual obligation, it also promotes essential Code values.** A contravention of settlement can undermine the administration of justice by discrediting the human rights system and generating wrong disincentives to negotiation. **The uncertainty created by a contravention of settlement potentially undermines the**



**substantive and procedural provisions of the Code.** An award of monetary compensation can help reflect both the private and public importance of complying with settlement terms.

[Emphasis added]

*Saunders v. Toronto Standard Condominium Corp. No. 1571*, 2010 HRTO 2516 at para. 51.

24. Since the 1981 decision of the Supreme Court of Canada in *Seneca College v. Bhadauria*, it has been trite law in Ontario that human rights claims, along with the enforcement of settlements in respect of such claims, should be pursued through the comprehensive enforcement regime set up under the *Code*:

In the present case, the enforcement scheme under *The Ontario Human Rights Code* ranges from administrative enforcement through complaint and settlement procedures to adjudicative or quasi-adjudicative enforcement by boards of inquiry...

...

For the foregoing reasons, I would hold that **not only does the Code foreclose any civil action based directly upon a breach thereof but it also excludes any common law action based on an invocation of the public policy expressed in the Code. The Code itself has laid out the procedures for vindication of that public policy,** procedures which the plaintiff respondent did not see fit to use.

[Emphasis added]

*Seneca College v. Bhadauria*, [1981] 2 S.C.R. 181 at pp. 194-195.

See also *Honda v. Keays*, 2008 SCC 39 at para. 65.

25. The one exception to this established principle arises under section 46.1 of the *Code* (enacted in 2008). This provision allows a plaintiff to directly advance a breach of the *Code* before the courts, but only where such alleged infringement of Part I of the *Code* is ‘piggy-backed’ to a separate, independent civil action (thereby allowing the entire dispute to be adjudicated in one forum):

46(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**.

[Emphasis added]

*Code, supra*, s. 46.1.

26. Given the reference to infringements under Part I in section 46.1 of the *Code*, the Legislature clearly intended the Tribunal to have jurisdiction over the enforcement of settlements: section 45.9 appears in Part IV of the *Code*.

**ii. Alternatively, Alleged Contraventions of the Resignation Agreement Must Proceed Before an Arbitrator**

27. Alternatively, the Plaintiff's allegations of a breach of the Resignation Agreement are matters that must be determined by an arbitrator, rather than this Honourable Court. The WRPA, a signatory to the Resignation Agreement along with the Plaintiff and the WRPSB, has exclusive representation rights in respect of its members (including the Plaintiff) for all terms and conditions of employment. In pith and substance, the Resignation Agreement arises out of the settlement of the 2016 Application. Nonetheless, to the extent that the Resignation Agreement is, itself, the product of a negotiated resolution of all outstanding employment matters between not just the Plaintiff and the WRPSB, but also the WRPA, means that 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.

*Globe and Mail (The) and CEP, Local 87-M, Re* (2012), 225 L.A.C. (4th) 321 (Davie).

28. More broadly, the essential character of the instant dispute is a matter that arises expressly or inferentially out of the collective agreement between the WRPA and the WRPSB precisely because the Resignation Agreement is, itself, an agreement relating to the terms and conditions of employment of a member in respect of whom the WRPA has exclusive representation rights. The courts do not have jurisdiction to deal with any aspects of the employment relationship between individual police officers and their police associations or municipal police services boards.

*Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 at paras. 43 and 67.

*Rivers v. Waterloo (Regional Municipality) Police Services Board*, 2018 ONSC 4307 at paras. 25-26.

*PSA, supra*, ss. 123(1) and 126.

29. The courts have repeatedly applied the doctrine from *Weber v. Ontario Hydro* in the police sector, finding that the *PSA*, together with applicable collective agreements, provide a “complete and comprehensive scheme for police officers relating to their employment relationship”.

*Renaud v. Town of Lasalle Police Association* (2006), 216 O.A.C. 1 (C.A.) at para. 7.

30. In *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, the Supreme Court of Canada confirmed that courts could only have jurisdiction in policing if the dispute was governed by neither a collective agreement nor applicable police services legislation.

*Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14 at p. 376.

31. The fact that the Plaintiff is seeking an order of reinstatement to the WRPSB as a remedy for an alleged breach of the Resignation Agreement underscores that the instant dispute ought to proceed before the Tribunal or a labour arbitrator: the Court does not have the power to order reinstatement.

**iii. Matters Relating to Workers' Compensation Claims in Ontario are Within the Exclusive Jurisdiction of the WSIB and WSIAT**

32. Under Canadian workers' compensation legislation, including the *WSIA*, employees surrender their right to sue employers for workplace injuries in exchange for a 'no-fault' insured compensation scheme. The principles underlying this historic trade-off were first articulated by the Honourable Sir William Ralph Meredith in 1913 (the "Meredith principles"). One of the central to the Meredith principles has been that courts ought not intervene in matters of workers' compensation:

In my judgment the furthest the Legislature should go in allowing the intervention of the courts should be to provide that the Lieutenant-Governor in Council may state a case for the opinion of a Division Court of the Appellate Division of the Supreme Court of Ontario, if any question of law of general importance arises and he deems it expedient it should be settled by a decision of a Divisional Court...

*Ontario, Legislative Assembly, Final report on laws relating to the liability of employers to make compensation to their employees for injuries received in the course of their employment which are in force in other countries, and as to how far such laws are found to work satisfactorily* (1913) (Hon. Sir W. R. Meredith) at p. 13.

33. In sections 118(1) and 123(1) of the *WSIA*, the Legislature has enshrined the exclusive jurisdiction of the WSIB and the WSIAT over matters relating to workers' compensation insurance. Moreover, sections 118(4) and 123(5) of the *WSIA* expressly state that this exclusive jurisdiction shall not 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**'.

*WSIA, supra*, ss. 118(1), 118(4), 123(1) and 123(5).

34. By alleging that the WRPSB's filing of an Intent to Object form is a breach of the Resignation Agreement, the Plaintiff is seeking to use the Court to restrain a WSIB process contrary to the *WSIA*. Whatever WSIB benefits the Plaintiff is entitled to is within the exclusive jurisdiction of the WSIB and/or the WSIAT. Thus, any concern regarding the propriety of the WRPSB's filing of an Intent to Object form must be raised before the WSIB, not this Honourable Court.

**B. The Claim Discloses No Reasonable Cause of Action Against the Defendants**

35. The test for determining if a pleading should be struck pursuant to Rule 21.01(1)(b) is whether "assuming that the facts as stated in the statement of claim can be proved, [it is] "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action".

*Hunt v. Carey Canada Inc.*, [1990] 2 SCR 959 at p. 980.

36. To support a claim of breach of contract, a plaintiff must prove the existence of: (1) a contract with the defendant; and (2) an act that contravenes the contract.

*Mars Canada Inc. v. Bemco Cash & Carry Inc.*, 2018 ONCA 239 at para 32.

37. The Plaintiff has failed to establish the requisite elements of, or plead any facts that would support, a claim for remedies against the Defendants.

**i. Chief Larkin's Affidavit Cannot Form the Basis for a Cause of Action**

38. It is trite law that statements made in the course of a judicial or quasi-judicial proceeding, including statements in "all pleadings and other documents brought

into existence for the purpose of the proceedings”, are covered by absolute privilege and cannot create a cause of action.

*Fabian v. Margulies* (1985), 53 O.R. (2d) 380 (CA) at para. 9, citing *Lincoln v. Daniels*, [1962] 1 Q.B. 237 (Eng CA).

See also *Dooley v. C.N. Weber Ltd. et. al.* (1994), 19 O.R. (3d) 779 (Ont. Ct. (Gen. Div.)) [*Dooley*].

39. As stated in the seminal case of *Dooley v. C.N. Weber Ltd et. al.*, a claim shall fail to disclose a reasonable cause of action if the claim is based upon statements subject to absolute privilege. To allow such a claim to continue before the courts amounts to an abuse of process:

However, I conclude, after considering submissions of counsel and the relevant jurisprudence, that **an absolute privilege attaches to the pleadings and they may not form the basis for a cause of action, even for abuse of process.** The development of this privilege has been consistent and without exception, applying in England, Canada and other common law jurisdictions to judges, witnesses, counsel and litigants. **The privilege extends to statements made in court, the evidence of witnesses, to submissions, to addresses, to statements in court by counsel, to pleadings (as in this case) and perhaps even to statements made to investigators in the preparation of a prosecution.**

...

...It matters not whether the action is framed in libel or slander, in defamation, intentional infliction of mental suffering, intentional interference with economic interest, or abuse of process. **To the extent that any action is based upon statements in a pleading, the claim will disclose no reasonable cause of action. Otherwise expressed, the action has no reasonable chance of success in law, and to permit it to continue would constitute an abuse of the process of the court.**

[Emphasis added]

*Dooley, supra*, at pp. 5 and 8.

40. This Honourable Court has also held that statements in a defendant's sworn affidavit arising from a proceeding are protected by absolute privilege and, as a result, cannot be used to support a subsequent cause of action.

*Gray Investigations Inc. v. Mitchell* (2007), 157 A.C.W.S. (3d) 704 (Ont. Sup. Ct.) at paras. 17-20.

See also *Web Offset Publications Ltd. v. Vickery* (1999), 43 O.R. (3d) 802 (CA) at p. 3.

41. In short, to the extent that the Amended Claim is based upon Chief Larkin's affidavit in the class action lawsuit, there is no reasonable cause of action. The Amended Claim is predicated upon a document subject to absolute privilege and, accordingly, to permit the action to proceed amounts to an abuse of process.

42. In addition, and in any event, no reasonable cause of action arises on the face of Chief Larkin's affidavit. Put simply, it is plain and obvious that the WRPSB did not breach the confidentiality provisions of the Resignation Agreement:

- (a) Chief Larkin's affidavit did not contain any identifying information relating to the Plaintiff. Any reference to the Plaintiff or the 2016 Application was completely anonymized, and there was no indication as to the time when the settlement took place; and
- (b) The Plaintiff's bald assertion in paragraph 16 of the Amended Claim that Chief Larkin's affidavit "contained sufficient information for the plaintiff to be identified" is wholly speculative and remote at law.

43. In the further alternative, and in any event, Chief Larkin's affidavit was "required by law" and, therefore, excluded from the scope of the confidentiality provisions set out in the Resignation Agreement. The content of Chief Larkin's affidavit was directly responsive to the issues raised in the class action lawsuit, which

specifically alleged systemic and institutional gender-based discrimination and harassment. The WRPSB had a legal obligation to provide the Court with a full factual record to allow the Court to render a decision in the class action lawsuit.

**ii. The Release Executed by the WRPSB Does Not Preclude Participation in WSIB Processes**

44. The goal of a legal release is to “liberate a party once and for all from any liability or obligation **to another party** arising out of specific circumstances”.

*Gregory v. KPMG LLP*, 2012 BCSC 1387 at para. 19.

45. Because the WSIB’s review of the Initial Entitlement Decision could not lead to any finding of liability or obligation owed by the Plaintiff to the WRPSB, the filing of an Intent to Object form did not contravene the WRPSB’s Release of the Plaintiff or amount to a “proceeding against Donovan” contrary to paragraph 11 of the Resignation Agreement. Moreover, the WRPSB is a Schedule 2 employer under the *WSIA* and, therefore, acts as a self-insurer for the full costs of all claims and benefits awarded by the WSIB in respect of its employees. In such circumstances, and given the non-adversarial nature of Ontario’s workers’ compensation scheme, it is wholly proper for the WRPSB to ensure that the WSIB is granting benefits appropriately.

*WSIA, supra*, s.85(1).

O Reg 175/98, Schedule 2.

WSIB, *Policy 11-01-02: Decision-Making*, at p. 2.

*Decision No. 2157/09*, 2014 ONWSIAT 938 at para. 21.

46. Notably, even if the WSIB had overturned the Initial Entitlement Decision as a result of the WRPSB’s Intent to Object form, the Plaintiff would not have suffered any losses. Absent acts of fraud or misrepresentation, the WSIB will not



pursue recovery of benefits from a worker if it reverses a previous decision that granted the worker entitlement to benefits.

WSIB, *Policy 18-01-04: Recovery of Benefit-Related Debts*, at pp. 1, 3-4.  
*Decision No. 1658/02*, 2002 ONWSIAT 2718 at para. 20.

47. In the alternative, and in any event, the Release cannot constitute a waiver of the WRPSB's rights under the *WSIA*. As held by the Ontario Court of Appeal in *Fleming v. Massey*, workplace parties cannot contract out of their rights and obligations under workers' compensation legislation:

I recognize that the courts should exercise extreme caution in interfering with the freedom to contract on the grounds of public policy. Considering the sweeping overriding of the common law made by workers' compensation legislation and the broad protection it is designed to provide to workers in the public interest, **it would be contrary to public policy to allow employers and workers to contract out of its regime, absent some contrary legislative indication.**

[Emphasis added]

*Fleming v. Massey*, 2016 ONCA 70 at para. 34.  
See also *WSIA*, *supra*, s.16.

48. The Release executed by the WRPSB shares the same language as the Release executed by the Plaintiff. The two Releases must, therefore, be interpreted in a consistent manner. Precisely because the Plaintiff's Release cannot result in a waiver of the Plaintiff's right to pursue WSIB entitlements (see section 16 of the *WSIA*), the WRPSB's Release cannot, of necessity, result in a waiver of the WRPSB's reciprocal statutory right to challenge entitlement decisions.

**C. The Claim Is Frivolous, Vexatious, and/or an Abuse of Process**

49. Any clearly unmeritorious action may qualify as frivolous, vexatious, or an abuse of process under Rule 21.01(3)(d). The Plaintiff's Amended Claim ought to be

characterized as frivolous, vexatious and/or an abuse of process precisely because of its lack of merit.

*Salasel v. Cuthbertson*, 2015 ONCA 115 at para. 8.

50. If a plaintiff engages in an abuse of process by commencing a civil action in respect of the same allegations made in a parallel administrative proceeding, “the abuse of process doctrine can apply not only to bar re-litigation of issues that were actually determined in the administrative process, but also to issues that could have been determined”.

*Aba-Alkhail v. University of Ottawa*, 2013 ONCA 633 at para. 12.

51. Admittedly, the Plaintiff’s Enforcement Application before the Tribunal was commenced after the Claim. Nonetheless, the Plaintiff has not withdrawn the Amended Claim despite commencing a similar proceeding before the Tribunal. By concurrently pursuing two parallel proceedings arising from the same allegations, the Plaintiff is proceeding in a manner that violates the principle of judicial economy and the need to avoid conflicting findings of fact. This amounts to an abuse of process.

**D. There Is No Proper Basis for the Plaintiff to Pursue Her Claim Against the Personal Defendant**

52. Officers and employees are protected from personal liability unless it can be shown that their actions are themselves tortious or exhibit a separate identity or interest from that of the company/employer so as to make the act or conduct complained of their own.

*Lussier v. Windsor-Essex Catholic District School Board* (1999), 47 C.C.E.L. (2d) 256 (Ont. Div. Ct.) at para. 17.

53. The Defendants submit that the Plaintiff has not alleged any facts against Chief Larkin that would indicate an actionable wrong and/or separate identity or interest for which he could be personally liable. In preparing and swearing his affidavit in the class action, Chief Larkin was acting within the scope of his employment duties as Chief of Police of the WRPS. Moreover, the WRPSB, and not Chief Larkin, was party to the Resignation Agreement and may be sued in its own name in respect to the Resignation Agreement.

See also *PSA, supra*, s. 30(1).

**E. Proceeding with the Amended Claim Would be an Unnecessary Expenditure of Limited Judicial Resources**

54. To allow the Plaintiff to proceed with this action is not only duplicative, but amounts to an unnecessary expenditure of limited judicial resources. While the WRPSB's Enforcement Application is currently scheduled to be heard before the Tribunal on February 22, 2019, given the commonalities between the parties' Enforcement Applications, they will likely be consolidated. Put simply, it would be far more expeditious and cost-effective for the parties to resolve all outstanding issues arising from the Resignation Agreement in one proceeding before the Tribunal.

55. The Defendants respectfully submit that to allow the Plaintiff's Amended Claim to proceed undermines the efficient administration of justice, contrary to sections 71 and 138 of the *Courts of Justice Act* and Rule 1.04(1) of the *Rules*.

*CJA, supra*, ss. 71 and 138.  
*Rules*, r. 1.04(1).

**PART IV - ORDER REQUESTED**

56. Based on the foregoing, the Defendants seek:
- (a) an Order dismissing the Plaintiff's action on the basis that this Honourable Court has no jurisdiction over the subject matter of the action;
  - (b) in the alternative, an Order striking out the Amended Claim, without leave to amend, for failing to disclose a reasonable cause of action against the Defendants;
  - (c) in the further alternative, an Order dismissing the Plaintiff's action on the basis that the action is frivolous, vexatious and/or an abuse of process;
  - (d) in the further alternative, an Order striking out the Claim as against the personally-named Defendant, without leave to amend, for disclosing no reasonable cause of action as against the personally-named Defendant and/or for being frivolous, vexatious and/or an abuse of process;
  - (e) in the further alternative, an Order extending the time limits to allow the Defendants to file a Statement of Defence;
  - (f) an order for costs of this hearing on a substantial indemnity basis fixed and payable to the Defendants within 30 days; and
  - (g) such further and other relief as counsel may advise and/or this Honourable Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of February, 2019.

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Donald B. Jarvis  
Cassandra Ma  
**Filion Wakely Thorup Angeletti LLP**  
Lawyers for the Defendants/Moving Party

**SCHEDULE “A”  
LIST OF AUTHORITIES**

1. *Saunders v. Toronto Standard Condominium Corp. No. 1571*, 2010 HRTO 2516.
2. *Seneca College v. Bhadauria*, [1981] 2 S.C.R. 181.
3. *Honda v. Keays*, 2008 SCC 39.
4. *Globe and Mail (The) and CEP, Local 87-M, Re* (2012), 225 L.A.C. (4th) 321 (Davie).
5. *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929.
6. *Rivers v. Waterloo (Regional Municipality) Police Services Board*, 2018 ONSC 4307.
7. *Renaud v. Town of Lasalle Police Association* (2006), 216 O.A.C. 1 (C.A.).
8. *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14.
9. Ontario, Legislative Assembly, *Final report on laws relating to the liability of employers to make compensation to their employees for injuries received in the course of their employment which are in force in other countries, and as to how far such laws are found to work satisfactorily* (1913) (Hon. Sir W. R. Meredith).
10. *Hunt v. Carey Canada Inc.*, [1990] 2 SCR 959.
11. *Mars Canada Inc. v. Bemco Cash & Carry Inc.*, 2018 ONCA 239.
12. *Fabian v. Margulies* (1985), 53 O.R. (2d) 380 (CA).
13. *Dooley v. C.N. Weber Ltd. et. al.* (1994), 19 O.R. (3d) 779.
14. *Gray Investigations Inc. v. Mitchell* (2007), 157 A.C.W.S. (3d) 704 (Ont. Sup. Ct.).
15. *Web Offset Publications Ltd. v. Vickery* (1999), 43. O.R. (3d) 802 (CA).
16. *Gregory v. KPMG LLP*, 2012 BCSC 1387.
17. WSIB, *Policy 11-01-02: Decision-Making*.
18. *Decision No. 2157/09*, 2014 ONWSIAT 938.
19. WSIB, *Policy 18-01-04: Recovery of Benefit-Related Debts*.
20. *Decision No. 1658/02*, 2002 ONWSIAT 2718.
21. *Fleming v. Massey*, 2016 ONCA 70.
22. *Salasel v. Cuthbertson*, 2015 ONCA 115.
23. *Aba-Alkhail v. University of Ottawa*, 2013 ONCA 633.
24. *Lussier v. Windsor-Essex Catholic District School Board* (1999), 47 C.C.E.L. (2d) 256 (Ont. Div. Ct.).

**SCHEDULE “B”  
RELEVANT STATUTES**

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

**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.

**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.

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.

...

(3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,

- (a) the court has no jurisdiction over the subject matter of the action;

...

- (d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court,

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

**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.

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

**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.

**Settlements**

**45.9** (1) If a settlement of an application made under section 34 or 35 is agreed to in writing and signed by the parties, the settlement is binding on the parties.

...

**Application where contravention**

(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**

(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.

**Same**

(2) Subsection (1) does not permit a person to commence an action based solely on an infringement of a right under Part I.

**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.

**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

9. Any employment by or under the Crown in right of Ontario and any employment by a permanent board or commission appointed by the Crown in right of Ontario.

### **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.

**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.

**126** Agreements and awards made under this Part do not affect the working conditions of the members of the police force in so far as those working conditions are determined by sections 42 to 49, subsection 50 (3), Part V (except as provided in subsections 66 (13) and 76 (14)) and Part VII of this Act and by the regulations.

KELLY LYNN DONOVAN  
Plaintiff/Responding Party

and

WATERLOO REGIONAL POLICE  
SERVICES BOARD and BRYAN LARKIN  
Defendants/Moving Party

Court File No: CV-18-00001938-0000

***ONTARIO***  
**SUPERIOR COURT OF JUSTICE**

Proceeding commenced at BRAMPTON

**FACTUM OF THE MOVING PARTY**  
**(returnable February 13, 2019)**

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