Court File No. CV-18-00001938-0000

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 22, 2021)

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PART I - INTRODUCTION

1. The Defendants bring this motion under Rules 21.01(3)(a) and 59.06(1) for an Order dismissing or, alternatively, staying the Fresh Amended Statement of Claim (the "Claim") for being outside of this Court's jurisdiction.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rr. 21.01(3)(a) and 59.06(1) [*Rules*].

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

3. Before her resignation, the Plaintiff filed a benefits claim with the Workplace Safety and Insurance Board (the "WSIB") in respect of her post-traumatic stress disorder ("PTSD"). To date, her WSIB claim has remained active.

4. In the Claim, the Plaintiff alleges that the Defendants:

(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 ("ITO") form in respect of the Plaintiff's 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 Plaintiff's 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 Plaintiff's unionized employment with the WRPSB and the terms under which that employment came to an end. The essential character of the dispute sought to be put before this Court expressly and inferentially arises within the ambit of the Uniform Collective Agreement. Pursuant to long-settled law, an arbitrator appointed under the *Police Services Act* ("*PSA*") and the Uniform Collective Agreement, rather than the courts, has jurisdiction over the subject matter of the Claim.

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

6. Alternatively, as the Claim can be characterized as the enforcement of a human rights settlement, the subject matter of the Claim falls within the core jurisdiction and specialized expertise of the Human Rights Tribunal of Ontario (the "HRTO"). In settling all matters relating to the Plaintiff's employment, the Resignation Agreement settled a human rights claim filed against the WRPSB by the Plaintiff. Pursuant to long-settled law, the HRTO, rather than the courts, has jurisdiction over settlements under the *Human Rights Code* (the "*Code*").

Human Rights Code, R.S.O. 1990, c. H.19, s. 45.9 [*Code*].

7. In the further alternative, to the extent the Claim concerns the review of a WSIB decision and/or the alleged exacerbation of the Plaintiff's PTSD, this dispute is subject to the privative clauses of the *Workplace Safety and Insurance Act, 1997* ("*WSIA*") and falls within the jurisdiction of the WSIB and the Workplace Safety and Insurance Appeals Tribunal (the "WSIAT"), not the courts.

Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16, Sched. A, ss. 118 and 123 [*WSIA*].

8. For all of the above reasons, this Court lacks jurisdiction over the subject matter of the Claim.

PART II - THE FACTS

A. The Parties

9. The WRPSB is an agency created under the *PSA* 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 9, 2021, Motion Record of the Defendants/Moving Party, Tab 2 at para. 2 [Affidavit of Laura Freitag].

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

> Affidavit of Laura Freitag, *ibid*, at para 3.

11. The Plaintiff is a former WRPS Constable. She was employed with the WRPSB from 2010 until her employment resignation on or about June 25, 2017. She was, at all times, represented in her employment by the WRPA.

> Affidavit of Laura Freitag, *ibid*, at paras. 4-5 and 20.

12. In accordance with the *PSA*, the Uniform Collective Agreement was negotiated by the WRPSB and the WRPA for the purpose of defining and providing the remuneration, pensions, sick leaves, grievance procedures, and other working conditions for uniformed officers of the WRPS (save and except the Chief of Police, Deputy Chiefs of Police, and members of the Senior Officers' Association). The terms and conditions of the Plaintiff's employment were, at all times, governed by the Uniform Collective Agreement, with the 2015-2019 Uniform Collective Agreement being in effect when the Plaintiff resigned.

> Affidavit of Laura Freitag, *ibid*, at para. 5 and Exhibit A, Article 1.
> *PSA*, *supra*, ss. 119(3) and 126.

B. The Prior and Outstanding Litigation Between the Parties

i. The Initial Human Rights Application and the Plaintiff's Resignation

13. On or about June 6, 2016, the Plaintiff 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 *Code*.

> Affidavit of Laura Freitag, *supra*, at para. 18 and Exhibit F.

14. All matters relating to the Plaintiff's employment with or the cessation of her employment with the WRPSB (including, most critically, the 2016 Application and potential disciplinary charges against the Plaintiff under the *PSA*) were fully and finally resolved through the Resignation Agreement executed on or about June 8, 2017. The Plaintiff was represented by independent legal counsel throughout the negotiation process. The WRPA, as the Plaintiff's bargaining agent, was a necessary party to the Resignation Agreement.

Affidavit of Laura Freitag, *ibid*, at paras. 14-22 and Exhibit G.

15. As a fundamental condition 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 "**[e]xcept where disclosure is required by law**…".

Affidavit of Laura Freitag, *ibid*, at paras. 21-22 and Exhibit G.

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

16. On or about May 30, 2017, the WRPSB and the WRPA were named as defendants in a proposed class action lawsuit (subsequently dismissed by Justice Baltman on July 13, 2018) commenced by current and former WRPSB employees 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 Plaintiff was not a putative class member of the class action.

Affidavit of Laura Freitag, ibid, at para. 23.
Rivers v. Waterloo (Regional Municipality) Police Services Board, 2018 ONSC 4307 [*Rivers ONSC*], aff'd *Rivers v. Waterloo Regional Police Services Board*, 2019 ONCA 267 [*Rivers ONCA*], leave to appeal to SCC refused *Rivers et al. v. Waterloo Regional Police Services Board et al.*, 2019 CanLII 99448 (S.C.C.) [*Rivers SCC*].

17. Chief Larkin swore an affidavit in support of a dismissal motion in the proposed class action 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 WRPSB employees in the period of 2012 to 2017 (the "Chart"). The Chart includes, *inter alia*, the following:

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

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

18. On or about January 15, 2018, Chief Larkin's affidavit was uploaded to a website created and managed by counsel for the putative class action plaintiffs. This online publication of Chief Larkin's affidavit was done without the Defendants' prior authorization or knowledge, and the Defendants had no involvement in nor control over the class action website. In fact, the Defendants only learned that Chief Larkin's affidavit had been published online on or about January 24, 2018, when a WRPSB employee notified the WRPSB's Human Resources team about the publication.

Affidavit of Laura Freitag, *ibid*, at para. 26.

iii. The Plaintiff's Claim for Statutory Workers' Compensation Benefits

19. The Plaintiff commenced a medical leave of absence from the WRPSB on or about February 27, 2017, and was later diagnosed with PTSD as a result of a shooting accident she had witnessed at the Ontario Police College in February 2011. On April 10, 2017, the Plaintiff submitted a claim for WSIB benefits relating to her PTSD.

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

20. In a July 12, 2017 decision, WSIB Case Manager Jane Drake granted Initial Entitlement (Eligibility for Benefits) and allowed the Plaintiff's claim for WSIB healthcare benefits and full loss of earnings benefits from February 27 to June 24, 2017, with an accident date of February 1, 2017 (the "Initial Entitlement Decision").

Affidavit of Laura Freitag, *ibid*, at paras. 9-10 and Exhibit B.

21. On or about January 11, 2018, the WRPSB filed an ITO form to initiate the WSIB's internal review of the Initial Entitlement Decision and to trigger the WRPSB's receipt of the claim file from the WSIB. Under established WSIB processes, an employer receives copies of a worker's claim file from the WSIB **only after** the employer has filed an ITO form. At the time of filing its ITO form, the WRPSB was unaware that the Plaintiff's PTSD and claim for statutory benefits were rooted in the February 2011 shooting accident. Rather, the WRPSB assumed that the Plaintiff's PTSD was connected to the more recent non-compensable events of 2016 and 2017 that led to potential *PSA* charges being brought against the Plaintiff, especially given the claim's accident date of February 1, 2017.

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

22. The WSIB affirmed the Initial Entitlement Decision on August 3, 2018, and, in accordance with its practice, released the claim file shortly thereafter. Following its receipt and review of the Plaintiff's WSIB claim file, the WRPSB learned that the Plaintiff's PTSD was connected to the February 2011 shooting accidence. Since then, the WRPSB has taken no further steps to review the Initial Entitlement Decision.

Affidavit of Laura Freitag, *ibid*, at paras. 11-13 and Exhibit E.

iv. The Settlement Enforcement Proceedings Currently Before the HRTO

23. On or about June 28, 2018, the WRPSB filed an Application for Contravention of Settlement at the HRTO alleging that the Plaintiff breached the Resignation Agreement.

Affidavit of Laura Freitag, *ibid*, at para. 27 and Exhibit I.

24. On or about July 27, 2018, the Plaintiff filed her own Application for Contravention of Settlement with the HRTO alleging a breach of the Resignation Agreement as a result of Chief Larkin's affidavit in the proposed class action.

Affidavit of Laura Freitag, *ibid*, at para. 29 and Exhibit K.

25. 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 Applications for Contravention of Settlement are set to be scheduled for a full-day conference call hearing before the HRTO.

Affidavit of Laura Freitag, *ibid*, at paras. 39-40 and Exhibits R and S.

v. The Plaintiff's Action Before this Court

26. The Plaintiff commenced this action in May 2018. Thereafter, the Plaintiff amended the Claim on or about January 16, 2019; January 29, 2020; and December 3, 2020.

Affidavit of Laura Freitag, *ibid*, at paras. 41-50 and Exhibits T, V, Y, and DD.

27. The Plaintiff has continued to maintain this action even though the Parties' Applications for Contravention of Settlement are already being processed by the HRTO.

Affidavit of Laura Freitag, *ibid*, at paras. 40 and 45-50.

PART III - ISSUES AND THE LAW

28. The issue to be determined is: does this Court have jurisdiction to adjudicate the subject matter of the Claim?

A. The Plaintiff's Claim Falls Within an Arbitrator's Jurisdiction

i. Governing Legal Principles

29. In Ontario, labour relations are regulated by three sources of law. First, employment-related legislation regulates both unionized and non-unionized workplaces with respect to a variety of matters, including minimum employment standards, health and safety obligations, collective bargaining, and workers' compensation benefits. Certain employment sectors are also governed by specialized legislation, such as the *PSA* for the police services sector. Second, workplace parties may negotiate contractual terms and conditions of employment. In non-unionized workplaces, an individual employment contract may govern a particular employer-employee relationship; in a unionized workplace, the employer and the union bargain a collective agreement that governs a group of employees. Third, courts and administrative decision-makers may impose

obligations on the employment relationship by developing the common law in line with prevailing social values and/or the interpretation of relevant legislation and contracts.

30. The specific decision-maker who may hear a workplace dispute is determined by the nature of the employment relationship at issue. For unionized workplaces, the Supreme Court of Canada has held that "labour relations legislation provides a code governing all aspects of labour relations, and that it would offend the legislative scheme to permit the parties to a collective agreement, or the employees on whose behalf it was negotiated, to have recourse to the ordinary courts".

St. Anne Nackawic Pulp & Paper v. CPU, [1986] 1 S.C.R. 704 at pp. 718-719.

31. Based on this principle, 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. As held in *Weber v. Ontario Hydro* ("*Weber*"), 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."**

Weber v. Ontario Hydro, [1995] 2 S.C.R. 929 at paras. 52-55 [*Weber*].

32. To determine the proper adjudicative forum for a dispute between an employer and a unionized employee, one must define the essential character of the dispute and the ambit of the applicable collective agreement. Notably, 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, *ibid*, at para. 43.
See also *Rivers ONSC*, *supra*, at paras. 25-26, aff'd *Rivers ONCA*, *supra*, leave to appeal to SCC refused *Rivers SCC*, *supra*.

33. Moreover, in considering whether a dispute arises expressly or inferentially out of a collective agreement, one must account for the substantive rights arising from

employment-related statutes (such as the *Code* and the *WSIA*) that are implicitly included in all collective agreements.

> *Parry Sound (District) Social Services Administration Board v. OPSEU, Local 324*, 2003 SCC 42 at para. 23.

34. The courts have repeatedly applied the *Weber* doctrine in the police services sector, finding that the *PSA* and applicable collective agreements together provide a "complete and comprehensive scheme for police officers relating to their employment relationship". In fact, 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.

> *Renaud v. Town of Lasalle Police Association* (2006), 216 O.A.C. 1 (C.A.) at para. 7.
> *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14 at paras. 30-31 [*Regina*].
> See also *Abbott v. Collins* (2003), 64 O.R. (3d) 789 at para. 27.

35. 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 ("OPAC")) are specialized administrative decision-makers with exceptional expertise in adjudicating workplace disputes and interpreting collective agreements. In the context of long-standing employer-union relationships governed by sector-specific labour legislation, the protection of these expert decision-makers' exclusive jurisdiction ensures the fair and expeditious resolution of labour disputes:

> Collective agreement grievance arbitration is at the centre of an "...all-embracing legislative program for the establishment and furtherance of labour relations in the interest of the community at large..." Labour relations legislation "...provides a code governing all aspects of labour relations..." **<u>A significant objective of this comprehensive scheme is to minimize, if not eliminate entirely, the involvement of the courts as first instance decision-makers with respect to workplace disputes.</u>**

> "[I]t would offend the legislative scheme to permit the parties to a collective agreement ... to have recourse to the ordinary courts which are in the circumstances a duplicative forum to which the legislature has not assigned these tasks." McLachlin, J. (as she then was) in *Weber* underlined this point at para. 46 when she noted that **permitting concurrent court actions whenever it can be said that the cause of action stands independent of the collective agreement undermines the goal of collective bargaining labour relations of resolving disputes quickly and economically with a minimum of disruption to the parties and the economy.**
>
> [Emphasis added; citations omitted]
>
> *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)*, 2007 NSCA 38 at para. 41. See also *Rivers ONSC*, *supra*, at para. 27, aff'd *Rivers ONCA*, *supra*, leave to appeal to SCC refused *Rivers SCC*, *supra*.

36. The benefits of having workplace disputes resolved in a single forum has been found to outweigh any lesser expertise that labour arbitrators may have over general common law claims. As remarked by the Supreme Court of Canada in *Weber*, the process of judicial review safeguards the correctness of arbitral decisions.

> *Weber*, *supra*, at para. 55.
> In Ontario, the decisions of labour arbitrators are subject to review by the Divisional Court; see *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, s. 6.

ii. The Essential Character of the Claim Arises Expressly or Inferentially out of the Uniform Collective Agreement

37. The alleged breaches of the Resignation Agreement and the alleged torts must be determined by an arbitrator, rather than this Court. The factual context of the disputes in the Claim establish that their essential character concerns subject matter governed by the Uniform Collective Agreement and/or the *PSA*.

(a) The Essential Character of the Dispute Is the Interpretation and Application of an Agreement in Respect of Unionized Employment

38. The factual context of the dispute is: (i) identifying the terms negotiated by the WRPSB, the Plaintiff, and the WRPA in respect of the Plaintiff's resignation from her bargaining unit position; and (ii) ascertaining whether the Defendants abided by the terms of such resignation. Notably, except where the *PSA* provides otherwise (such as, for example, in Part V of the statute), the WRPA has exclusive representation rights in respect

of all employees covered by the Uniform Collective Agreement. In its essential character, therefore, this dispute concerns the enforcement of an agreement (i.e. the Resignation Agreement) **arising out of the Uniform Collective Agreement and the *PSA***. Put another way, the characterization of this dispute as simply a claim for breach of contract, as asserted by the Plaintiff, does not result in the Court having jurisdiction over what is fundamentally a dispute arising out of unionized employment.

Desgrosseillers v. North Bay General Hospital, 2010 ONSC 142 at paras. 49-52.

39. The framing of part of the Claim as a dispute in tort or as against an individual personally does not circumvent exclusive arbitral jurisdiction. The Court of Appeal for Ontario has repeatedly 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]". Accordingly, on the basis of *Weber* and *Regina*, 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. v. Ottawa (City) (2006), 80 O.R. (3d) 161 (C.A.) at para. 15.
See e.g., *Heasman v. Durham Regional Police Services Board* (2005), 204 O.A.C. 283; *Toronto Police Association v. Toronto Police Services Board*, 2007 ONCA 742; and *George v. Anishinabek Police Service*, 2014 ONCA 581 [*George*].

40. In any event, the Plaintiff's tort claims of negligence and misfeasance in public office are inextricably linked to workplace matters. Again, the essential character of the Claim is whether the Defendants complied with the terms of the Plaintiff's resignation from unionized employment. The alleged disclosures of confidential information pertain to the Defendants' work-related conduct in managing the WRPSB's workplace, participating in litigation commenced by current and former WRPSB employees, and administering the Plaintiff's employment cessation pursuant to the Resignation Agreement. The determination of the Plaintiff's tort claims will necessarily require the decision-maker to interpret the Resignation Agreement and ascertain whether the Defendants owed a duty of

care to the Plaintiff 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 any tort claims arising from such unionized employment.

Beaulieu v. University of Alberta, 2014 ABCA 137 at paras. 42-47.

(b) The Plaintiff's Claim Falls Entirely Within the Ambit of the Uniform Collective Agreement

41. The ambit of a collective agreement is extremely broad. 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". 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 which 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) at para. 46 [*Bell Canada*]. See also *Regina, supra*, at para. 25.

42. In the Claim before this Court, each of the substantive allegations, even when viewed individually, is covered by 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 Defendants' 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 Plaintiff and the WRPA) to challenge the exercise of management rights on the basis of

arbitrariness, discrimination, or bad faith. The issue of whether the Defendants exercised their management rights improperly or in contravention of the Resignation Agreement, as alleged by the Plaintiff, 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 ("OCPC") for determination.

Affidavit of Laura Freitag, *supra*, at Exhibit A, Articles 2, 20, 23, and 42.
Bell Canada, *supra*, at para. 46.

43. 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 Plaintiff's employment, including the 2016 Application and the potential *PSA* charges against the Plaintiff. The courts have long recognized that labour arbitrators have significant

experience and expertise in adjudicating and interpreting employment-related resignation and termination agreements arising out of unionized employment.

> Affidavit of Laura Freitag, *supra*, at Exhibit A, Article 2.
> *PSA*, *supra*, ss. 123(1) and 126.
> *Wong v. The Globe and Mail Inc.*, 2014 ONSC 6372 (Div. Ct.) at para. 16 [*Wong 2014*].

44. Moreover, the WRPA's exclusive representation rights in respect of its members (including the Plaintiff) 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 Plaintiff 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 Plaintiff 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.

> *Globe and Mail (The) and CEP, Local 87-M, Re* (2012), 225 L.A.C. (4th) 321 (Davie) at paras. 44-46, aff'd *Wong v. The Globe & Mail*, 2013 ONSC 2993 (Div. Ct.) at paras. 32-33, additional reasons at *Wong 2014*, *supra*.
> *George*, *supra*, at paras. 42-43.

iii. The Processes Under the *PSA* Further Confirm that the Plaintiff's Allegations Should Be Resolved Through Binding Arbitration

45. Taken together, the Uniform Collective Agreement and the comprehensive dispute resolution processes of the *PSA* clearly establish that binding arbitration is the preferable and proper forum for adjudicating the Claim.

> Affidavit of Laura Freitag, *supra*, at Exhibit A.
> *PSA*, *supra*.

46. Any "difference…concerning an agreement" among the parties to the Resignation Agreement may be determined in accordance with the *PSA*'s process for resolving labour disputes. This process is commenced by the filing of an application with the OPAC. Thereafter, the OPAC appoints a conciliation officer to mediate or reduce the issues in

dispute. Within 14 days of appointment, the conciliation officer must report to the Ministry of the Solicitor General about whether or not the dispute has been settled.

> *PSA*, *supra*, s. 123. A corresponding regime is proposed in the *Comprehensive Ontario Police Services Act, 2019*, S.O. 2019, c. 1, Sched. 1, s. 228 [*COPS Act*].

47. If a dispute cannot be resolved at conciliation, it may be referred to binding arbitration under section 124 of the *PSA*. An arbitration board — consisting of one or more arbitrators specializing in police labour relations — is appointed to hear the dispute and deliver a decision within a reasonable timeframe. There is nothing in the *PSA* that limits the remedial authority of an arbitration board appointed under section 124.

> *PSA*, *supra*, s. 124. See also *COPS Act*, *supra*, s. 229.

48. In short, the dispute resolution provisions of the *PSA* establish that the Legislature intended disputes in the police services sector to be resolved outside of the courts. Indeed, both this Court and the Court of Appeal for Ontario recently held that **there is no jurisdictional "gap" between the Uniform Collective Agreement and the *PSA* that would permit employment-related matters to proceed in the civil courts.**

> *Rivers ONSC*, *supra*, at para. 35, aff'd *Rivers ONCA*, *supra*, at paras. 3-5, leave to appeal to SCC refused *Rivers SCC*, *supra*.

49. There are sound policy reasons for the existing legal framework: if the Court was to assume jurisdiction in this case, it would open the Court to dealing with all forms of disputes arising from the cessation of unionized employment, marginalize the labour arbitration system, and foster delay in the resolution of labour disputes.

B. Alternatively, the Plaintiff's Allegations Fall Within the HRTO's Overlapping Jurisdiction to Enforce Human Rights Settlements

50. 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 Plaintiff'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 at paras. 7-12.

51. Section 45.9 of the *Code* expressly confers jurisdiction upon 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:*

> **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]

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

52. 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 the courts:

> 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 paras. 63-65.

53. 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) 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.

54. Section 46.1 unequivocally references only infringements "under Part I" of the *Code*. Clearly, therefore, the Legislature intended the HRTO to exercise primary jurisdiction over the enforcement of human rights settlements: section 45.9 appears in Part IV of the *Code*. As the Plaintiff has alleged a breach of what is, in part, a human rights settlement (a Part IV right), rather than an infringement of her rights under Part I of the *Code*, section 46.1 of the *Code* cannot be used to bring this Claim within the Court's jurisdiction.

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

56. 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 Plaintiff's allegations against the Defendants are matters that may be addressed by the HRTO.

Code, *supra*, s. 39.

57. To allow the Plaintiff 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 Plaintiff's Application

for Contravention of Settlement already overlap with (or could be amended to include) the allegations in the Claim. Moreover, it would be far more expeditious and cost-effective to resolve all outstanding issues arising from the Resignation Agreement, including the WRPSB's own allegations against the Plaintiff, in one proceeding.

> *Courts of Justice Act*, R.S.O. 1990, c. C.43, ss. 71 and 138.
> *Rules*, r. 1.04(1).

C. The Filing of an ITO Form by the WRPSB Does Not Fall Within the Jurisdiction of the Court

58. First and foremost, the Plaintiff alleges that the mere filing of an ITO form by the WRPSB in respect of the Plaintiff's WSIB claim amounts to a breach of the Resignation Agreement. Framed in this way, for all of the reasons outlined above, the matter falls within the jurisdiction of a labour arbitrator or the HRTO, and not the courts. To the extent that any other adjudicative bodies have jurisdiction, the subject matter of the allegations falls within the jurisdiction of the WSIB and the WSIAT.

59. 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 Sir William Ralph Meredith in 1913 (the "Meredith principles").

60. One of the central Meredith principles is 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.

61. 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).

62. The WRPSB is a Schedule 2 employer under the *WSIA* and, therefore, acts as a self-insurer for the full costs of all WSIB benefits awarded to its employees. Precisely because the WRPSB initially assumed that the Plaintiff's WSIB claim related to the potential *PSA* charges against the Plaintiff, and given the non-adversarial nature of Ontario's workers' compensation scheme, it was wholly proper and responsible for the WRPSB to file the ITO form to obtain a copy of the Plaintiff's WSIB claim file and ensure that the benefits granted to the Plaintiff were appropriate.

WSIA, *supra*, ss. 68, 85(1).
O. Reg. 175/98, Schedule 2, s. 9.
Affidavit of Laura Freitag, *supra*, at para. 11 and Exhibits C and D.

63. By alleging that the WRPSB's filing of an ITO form is a breach of the Resignation Agreement, the Plaintiff is seeking to use the Court to restrain a WSIB process contrary to sections 118 and 123 of the *WSIA*. Whether and to what extent the Plaintiff is entitled to WSIB benefits falls within the exclusive jurisdiction of the WSIB and/or the WSIAT.

64. To the extent that the Plaintiff's allegations relate to her compensable PTSD, the Claim is statute-barred. Under the *WSIA*, the Plaintiff relinquished all rights of action against the Defendants (i.e. her Schedule 2 employer and an executive officer thereof) in respect of her PTSD condition:

> 26(2) **Entitlement to benefits under the insurance plan is in lieu of all rights of action (statutory or otherwise) that a worker**, a worker's survivor or a worker's spouse, child or dependant **has or may have against the worker's employer or an executive officer of the**

> **employer for or by reason of an accident happening to the worker** or an occupational disease contracted by the worker **while in the employment of the employer.**
>
> 28(2) A worker employed by a Schedule 2 employer and the worker's survivors are **not entitled to commence an action against the following persons in respect of the worker's injury** or disease:
>
> 1. **The worker's Schedule 2 employer.**
>
> 2. **A director, executive officer or worker employed by the worker's Schedule 2 employer.**
>
> [Emphasis added]

WSIA, *supra*, ss. 26(2) and 28(2).

65. Moreover, even if the Defendants' alleged breaches of the Resignation Agreement worsened the Plaintiff's PTSD symptoms and impeded her medical recovery, the WSIB's adjudicative policies on recurrence address this specific type of injury claim. Again, the proper forum for the Plaintiff's claim is the WSIB and/or the WSIAT, not this Court.

WSIB, *Policy 15-02-05: Recurrences* (revised 1 February 2018).
WSIA, *supra*, ss. 118(1), 118(4), 123(1) and 123(5).

PART IV - ORDER REQUESTED

66. Based on the foregoing, the Defendants seek:

(a) an Order dismissing or, alternatively, staying the Claim, in whole or in part, on the basis that this Court has no jurisdiction over the subject matter of the Claim;

(b) in the further alternative, an Order extending the time limits to allow the Defendants to file a Statement of Defence;

(c) an order for costs of this hearing on a substantial indemnity basis fixed and payable to the Defendants within 30 days; and

(d) such further and other relief as counsel may advise and/or this Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of February, 2021.

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

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Rivers v. Waterloo (Regional Municipality) 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. *St. Anne Nackawic Pulp & Paper v. CPU*, [1986] 1 S.C.R. 704.
5. *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929.
6. *Parry Sound (District) Social Services Administration Board v. OPSEU, Local 324*, 2003 SCC 42.
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. *Abbott v. Collins* (2003), 64 O.R. (3d) 789.
10. *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)*, 2007 NSCA 38.
11. *Desgrosseillers v. North Bay General Hospital*, 2010 ONSC 142
12. *K.A. v. Ottawa (City)* (2006), 80 O.R. (3d) 161 (C.A.).
13. *Heasman v. Durham Regional Police Services Board* (2005), 204 O.A.C. 283.
14. *Toronto Police Association v. Toronto Police Services Board*, 2007 ONCA 742.
15. *George v. Anishinabek Police Service*, 2014 ONCA 581.
16. *Beaulieu v. University of Alberta*, 2014 ABCA 137.
17. *Bell Canada v. Unifor, Local 34-0*, 2016 CanLII 11573 (CA LA).
18. *Globe and Mail (The) and CEP, Local 87-M, Re* (2012), 225 L.A.C. (4th) 321 (Davie).
19. *Wong v. The Globe & Mail*, 2013 ONSC 2993 (Div. Ct.).
20. *Wong v. The Globe and Mail Inc.*, 2014 ONSC 6372 (Div. Ct.).
21. *Melville v. Toronto (City)*, 2012 HRTO 22.
22. *Saunders v. Toronto Standard Condominium Corp. No. 1571*, 2010 HRTO 2516.
23. *Seneca College v. Bhadauria*, [1981] 2 S.C.R. 181.
24. *Honda v. Keays*, 2008 SCC 39.
25. 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).
26. WSIB, *Policy 15-02-05: Recurrences* (revised 1 February 2018).

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 (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.

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.

Amending

59.06 (1) An order that contains an error arising from an accidental slip or omission or requires amendment in any particular on which the court did not adjudicate may be amended on a motion in the proceeding.

General Principle

(2) A party who seeks to,

(a) have an order set aside or varied on the ground of fraud or of facts arising or discovered after it was made;

(b) suspend the operation of an order;

(c) carry an order into operation; or

(d) obtain other relief than that originally awarded,

may make a motion in the proceeding for the relief claimed.

***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.

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 action for benefits

26 (1) No action lies to obtain benefits under the insurance plan, but all claims for benefits shall be heard and determined by the Board.

Benefits in lieu of rights of action

(2) Entitlement to benefits under the insurance plan is in lieu of all rights of action (statutory or otherwise) that a worker, a worker's survivor or a worker's spouse, child or dependant has or may have against the worker's employer or an executive officer of the employer for or by reason of an accident happening to the worker or an occupational disease contracted by the worker while in the employment of the employer.

28 (2) A worker employed by a Schedule 2 employer and the worker's survivors are not entitled to commence an action against the following persons in respect of the worker's injury or disease:

1. The worker's Schedule 2 employer.

2. A director, executive officer or worker employed by the worker's Schedule 2 employer.

"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

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.

119 (3) The parties shall bargain in good faith and make every reasonable effort to come to an agreement dealing with the remuneration, pensions, sick leave credit gratuities and grievance procedures of the members of the police force and, subject to section 126, their working conditions.

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

(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

(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

(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

(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

(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

(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

(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

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

Costs and expenses

(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

(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

(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.

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.

***Comprehensive Ontario Police Services Act, 2019*, S.O. 2019, c. 1, Sched. 1**

Dispute, appointment of conciliation officer

228 (1) The Commission Chair 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.

Appointment of seized arbitrator

(2) If an arbitrator is seized of the matter to which the dispute relates, the Commission Chair may instead appoint that arbitrator to decide the matter, and subsections 229 (2) and (4) to (8) apply with necessary modifications as if the arbitrator were a one-person arbitration board.

Duty of conciliation officer

(3) The conciliation officer shall confer with the parties and endeavour to resolve the dispute and shall, within 14 days after being appointed, make a written report of the results to the Commission Chair.

Extension of time

(4) The 14-day period may be extended if the parties agree or if the Commission Chair 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

(5) When the conciliation officer reports to the Commission Chair that the dispute has been resolved or that it cannot be resolved by conciliation, the Commission Chair shall promptly inform the parties of the report.

No arbitration during conciliation

(6) Neither party shall give a notice referring the dispute to arbitration until the Commission Chair has informed the parties of the conciliation officer's report.

Competency as a witness

(7) A conciliation officer appointed under subsection (1) is not a competent or compellable witness before a court or tribunal respecting any information or material furnished to or received by him or her while being involved in an endeavour under this section to resolve a dispute.

Arbitration after conciliation fails

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

Same

(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

(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 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 Commission Chair.

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 Commission Chair.

Time for arbitration

(4) The arbitration board shall commence the arbitration within 30 days after being appointed, in the case of a one-person board, or within 30 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

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

Costs and expenses

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

1. The Arbitration and Adjudication Commission shall pay the fees and any prescribed types of expenses of any person the Commission Chair 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

(7) After the day that is 30 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 form approved by the Minister, with the Superior Court of Justice.

Same

(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.

***Judicial Review Procedure Act*, R.S.O. 1990, c. J.1**

Application to Divisional Court

6 (1) Subject to subsection (2), an application for judicial review shall be made to the Divisional Court.

Application to judge of Superior Court of Justice

(2) An application for judicial review may be made to the Superior Court of Justice with leave of a judge thereof, which may be granted at the hearing of the application, where it is made to appear to the judge that the case is one of urgency and that the delay required for an application to the Divisional Court is likely to involve a failure of justice.

Transfer to Divisional Court

(3) Where a judge refuses leave for an application under subsection (2), he or she may order that the application be transferred to the Divisional Court.

Appeal to Court of Appeal

(4) An appeal lies to the Court of Appeal, with leave of the Court of Appeal, from a final order of the Superior Court of Justice disposing of an application for judicial review pursuant to leave granted under subsection (2).

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 22, 2021)

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