COURT OF APPEAL FOR ONTARIO

CITATION: Rukavina v. Ottawa (Police Services Board), 2020 ONCA 533
DATE: 20200826
DOCKET: C67247

Watt, Trotter and Fairburn JJ.A.

BETWEEN

Martin Rukavina, Heather Rukavina, Joshua Rukavina, and Mitchell Rukavina and Benjamin Rukavina by his Litigation Guardian Heather Rukavina

Plaintiffs (Appellants)

and

Ottawa Police Services Board, Charles Bordeleau, Jeffrey Kilcollins, Michael Belanger, Larry McNally, Christopher Rheaume, John Doe, and Jane Doe

Defendants (Respondents)

Jonathan Lisus, Christopher Grisdale, and Zain Naqi, for the appellants

Kirk Boggs and Naida Marotta, for the respondents

Heard: in writing

On appeal from the order of Justice Pierre E. Roger of the Superior Court of Justice, dated June 27, 2019.

Fairburn J.A.:

Overview

[1] Martin Rukavina, a former police officer with the Ottawa Police Service, sued three police officers with whom he worked, a superior officer, the then Chief of Police, and the Ottawa Police Services Board. Although Mr. Rukavina's wife and

children join him in the action and on appeal, I will refer to Mr. Rukavina as the appellant throughout these reasons.

[2] A few months after the appellant was appointed to the position of Acting Staff Sergeant in charge of the tactical unit, he commanded a training exercise involving a hostage-taking scenario where an explosive device, referred to as a “hydro cut”, was used. The detonation created a fireball that resulted in injuries to paramedics and two police officers. Some of the injuries were serious in nature.

[3] The Special Investigations Unit (“SIU”) was notified of the incident and an investigation ensued. Numerous interviews took place and, ultimately, the appellant was charged with criminal negligence causing bodily harm and breach of a legal duty to use reasonable care while having an explosive substance under his care and control: ss. 221 and 80 of the *Criminal Code*, R.S.C., 1985, c. C-46. Crown counsel later stayed those charges because, contrary to what some of the respondents allegedly told the SIU investigators, the hydro cut had been operated in accordance with the long-standing practice of the Ottawa Police Service.

[4] The appellant sued the respondents for, among other things, malicious prosecution and misfeasance in public office. He claimed that the respondents knowingly and maliciously conspired together to provide false information to the SIU and to suppress relevant information, all of which led to: (a) the criminal charges being laid; and (b) a delay in those charges being stayed by Crown

counsel. The officers are said to have abused their positions as public officials when they deceived the SIU.

[5] The respondents brought a motion under r. 21 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, to dismiss the claim for want of jurisdiction.[1] The motion judge concluded that the essential character of the appellant's claim was "workplace centered" and, therefore, it was governed under the exclusive jurisdiction of the collective agreement by which he was bound and the disciplinary regime under the *Police Services Act*, R.S.O. 1990, c. P.15 ("*PSA*"). Accordingly, the motion was granted and the claim was dismissed.

[6] The issue on appeal is whether the motion judge erred in determining that the essential character of the appellant's claim is one that is governed exclusively by the collective agreement and the *PSA*, thereby ousting the jurisdiction of the court.

[7] For the reasons that follow, I would allow the appeal on the basis that the motion judge erred in how he arrived at the conclusion that this was a "workplace centred" action. In my view, the motion judge misconstrued the essential character

---

[1] The order under appeal was made pursuant to r. 21.01(3)(c) of the *Rules of Civil Procedure*, which was the provision cited by the moving party in their factum in the court below. However, given that this was a motion contesting jurisdiction, the order should have been made pursuant to r. 21.01(3)(a) of the *Rules of Civil Procedure.*

of the claim. When properly construed, the essential character of the claim falls outside the reach of the collective agreement[2] and the *PSA.*

The Factual Backdrop on Appeal: Statement of Claim and Proposed Amended Statement of Claim

[8] I start by addressing the factual underpinnings for the allegations said to support the appellant's claim.

[9] The appellant filed a draft amended statement of claim as an appendix to his factum in this court. He asks that in addition to allowing the appeal and reinstating the claim, this court also grant leave to amend the statement of claim in accordance with that draft. The appellant contends that this court should grant that remedy because the motion judge erred by failing to grant leave to amend and failing to provide reasons for refusing to do so. I disagree with the suggestion that the motion judge erred in this regard.

[10] The materials before this court are not entirely clear. It appears, though, that the appellant did not file a cross-motion seeking leave to amend in the court below and did not ask to amend the existing claim as part of his response to the

[2] Throughout these reasons, I will refer to a singular collective agreement for convenience. Although there were multiple iterations of the collective agreement that were operative during the relevant time period of this claim, the relevant provisions are identical in each iteration.

jurisdictional motion. The respondents submit that the amended claim has only been tendered for the first time on appeal.

[11] In these circumstances, it is unfair to suggest that the motion judge erred by failing to grant leave to amend the claim or to provide reasons for refusing to do so. Quite simply, the motion judge cannot be faulted for failing to do something he was not asked to do.

[12] At the same time, it is important to recall that leave to amend a claim should only be denied in the clearest of cases: *Tran v. University of Western Ontario*, 2015 ONCA 295, at para. 26; *Adelaide Capital Corp. v. Toronto Dominion Bank*, 2007 ONCA 456, at para. 6. The draft amendments placed before this court are the kinds of amendments that simply amplify and expand upon the themes that are already in the claim and flow directly from the pre-existing narrative.

[13] Indeed, I do not understand the respondents to be saying otherwise. The respondents acknowledge that the content of the proposed amendments placed before this court were generally reflected in the appellant's factum and oral submissions before the motion judge. The respondents also acknowledge that the motion judge considered the particulars that are now included in the amended statement of claim, but dismissed the claim in any event. As the motion judge said:

> [E]ven if the plaintiffs had pleaded all of what they allege in their factum and during submissions, all of this would be subject to allegations of misconduct against the

> officers involved and thereby subject to the *PSA* and applicable [collective agreement].

[14] Therefore, the respondents' position on appeal does not turn on the specific words pleaded in or omitted from the original statement of claim. Rather, their position turns on their central argument that "even a perfect pleading" would not change the result in this case.

[15] Accordingly, I will follow the motion judge's lead on taking the appellant's position at its highest, as reflected in the original statement of claim, his factum and submissions in that court, as well as in the proposed amended statement of claim.

The General Background and Allegations

[16] The facts set out in this decision are based on the appellant's pleadings. The Ottawa Police Tactical Unit was conducting a training exercise at an abandoned house in Kanata on June 14, 2014.

[17] The appellant was the tactical commander on scene when the hydro cut device exploded and caused the injuries. The hydro cut device had been filled with windshield washer fluid.

[18] As required under the *PSA* and its regulations, the SIU was notified about the incident a few days after it occurred: *PSA*, s. 113(5); *Conduct and Duties of Police Officers Respecting Investigations by the Special Investigations Unit*, O. Reg. 267/10, s. 3(1). A criminal investigation was launched.

[19] While the investigation was ongoing, three of the respondents who worked in the tactical unit sent a non-confidence letter to the appellant, which was then delivered to the appellant's superior officer. The letter purported to speak on behalf of the entire tactical unit. That letter made numerous allegedly false allegations about the appellant, including the suggestion that he was unfit to command the tactical unit. The letter failed to prompt the appellant's removal as Acting Staff Sergeant.

[20] The respondents in the tactical unit are alleged to have then put in place a "campaign" to improperly influence the SIU investigation by knowingly providing false information to investigators and by releasing confidential information to the media so that it could be published in the local and national news. The media repeatedly reported upon the allegations.

[21] In addition, the appellant claims that the respondent officers conspired together to knowingly provide "false evidence" to the investigators, including that: (a) the device causing the explosion had been filled with windshield washer fluid, when historically it had only been filled with water; (b) the Ottawa Police were trained only to fill the device with water; and (c) the use of windshield washer fluid was a departure from standard practice.

[22] These false allegations are said to have caused the SIU investigators to believe that the appellant was criminally responsible for the explosion that resulted in bodily harm. He was charged on July 23, 2015.

[23] After charges were laid, the appellant's superior officers – who are also respondents to this matter – are said to have acted in a way that continued to mislead the SIU regarding the Ottawa Police Service's prior practices and training standards relating to the use of windshield washer fluid in the preparation of hydro cut devices.

[24] Over a year after the appellant had been criminally charged, Crown counsel stayed the charges, accepting on the record that the Ottawa Police Service had a long-standing settled practice of using windshield washer fluid to fill hydro cut devices. The appellant claims that the Ontario Provincial Police were ultimately called in to investigate the matter for "evidence manipulation and fraud". The appellant's pleadings provide no information as to whether that investigation has come to an end and, if so, the conclusions that were reached.

The Decision to Dismiss the Action

[25] The motion judge dismissed the action on the basis that its essential character is "workplace centred" and, therefore, falls within the ambit of the collective agreement and the *PSA*. As the motion judge put it:

> The essential character of this dispute is workplace centred and arises entirely from [the appellant's] employment with the Board, from workplace dynamics.
>
> …
>
> Here, the essential character is workplace centred; that tensions at work escalated to a systemic campaign orchestrated to cause the plaintiff damages, including that a false memo or false letter were provided to the SIU. However, the true nature of the dispute is expressly or implicitly contemplated by the [collective agreement] and the *Police Services Act.*

[26] This court has previously found that employers reporting employees to the police, thereby triggering police investigations and criminal charges, are matters falling outside of workplace disputes: *Piko v. Hudson's Bay Co.*, 41 O.R. (3d) 729 (C.A.)*; McNeil v. Brewers Retail Inc.*, 2008 ONCA 405, 66 C.C.E.L. (3d) 238. However, the motion judge concluded that those decisions could be distinguished from this case, arising as it does in a police setting.

[27] Ultimately, the motion judge concluded that the court's jurisdiction was ousted by both the collective agreement and the *PSA* and dismissed the claim.

Analysis

(i) Overview

[28] In my view, the motion judge erred in concluding that this was a "workplace centred" dispute that was governed solely by the collective agreement and the *PSA*. The nature of the appellant's claim involves conduct that fell outside the ambit of the collective agreement and the *PSA*. While the difficulties between the

appellant and respondents may well have their genesis in the workplace, and they may have had disputes in the workplace, by the time that an independent police investigation was underway, this was no longer a "workplace dispute". The alleged conduct that occurred after the involvement of the SIU did not fall within the scope of either the collective agreement or the *PSA*. Accordingly, the court has jurisdiction over the subject matter of the action.

(ii) Police Cases Do Not Involve Exclusive Jurisdiction

[29] The respondents defend the motion judge's decision on the basis of what they describe as an "exclusive jurisdiction model in police cases". They maintain that this court has made clear that disputes in the police context involving allegations of unfair treatment by the employer and misconduct by co-workers must be dealt with through a combination of grievances under collective agreements and discipline under the *PSA.* Together, the respondents suggest that police collective agreements and the *PSA* form a "complete code" for determination of these matters. Accordingly, the respondents say that there is no concurrent jurisdiction in the courts to deal with these disputes.

[30] While I accept that the combination of collective agreements and the *PSA* cover a wide array of disputes in the policing context, I do not accept the broad proposition that the court's jurisdiction is necessarily ousted just because the dispute involves the police.

[31] When it comes to collective agreements, a mandatory arbitration clause – such as in this case – will "generally confer exclusive jurisdiction on labour tribunals to deal with all disputes between the parties arising from the collective agreement": *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, at para. 67. There is no special "police rule". Like all other cases, the question is whether the dispute is, in its "essential character", one that "arises either expressly or inferentially out of the collective agreement": *Weber*, at paras. 67-68.

[32] The alleged facts underpinning the legal complaint, as opposed to its legal characterization, determine the dispute's essential character. The scope of the collective agreement then determines whether the essential character – that is, the true nature of the dispute – is cloaked in its terms: *Weber,* at paras. 49-52. Therefore, like all other contexts, to determine the essential character of a dispute within a policing context and whether it is covered by the collective agreement, the court first looks to the factual matrix within which the allegations rest: *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14, [2000] 1 S.C.R. 360, at para. 29.

[33] For the purposes of the *PSA,* Part V governs complaints and disciplinary proceedings for police officers. As this court has previously noted, it addresses how complaints are made and investigated, the procedural mechanism by which complaints are resolved, the nature of hearings and appeals, and the range of

outcomes available if misconduct is found: *Abbott v. Collins* (2003), 64 O.R. (3d) 789 (C.A.), at para. 17.

[34] The respondents rely on numerous authorities in support of the proposition that "this court has repeatedly acknowledged that the grievance and discipline scheme that applies to police officers in Ontario was intended to create a complete substantive and procedural code, leaving no gaps for residual jurisdiction in the courts." I do not read the authorities offered in the same way as the respondents.

[35] There is no doubt that in the policing context, collective agreements and the *PSA* will generally operate together to keep police-related disputes out of the court, given their robust grievance and disciplinary regimes. Nevertheless, I see no support for the proposition that, as a matter of law, the court's jurisdiction is necessarily ousted for the purposes of any dispute that may involve police officers.

[36] While the respondents point to numerous authorities said to support their sweeping proposition, I find that the authorities actually demonstrate the opposite. Those authorities do not approach the jurisdictional question by simply noting the application of a "complete code" in the policing context. Rather, the authorities demonstrate the need to consider the essential nature of the dispute and then reason to a jurisdictional conclusion. Although the conclusions reached in those authorities may well mirror the outcome the respondents desire in this case, the reasoning process must propel the decision toward that conclusion.

[37] For instance, in *Abbott*, which is relied on by the respondents, this court concluded that the essential nature of the dispute was related to "discipline including disguised discipline": *Abbott*, at paras. 33, 9, 25. Accordingly, the collective agreement and the *PSA* covered that dispute. It is within that context that this court commented that the collective agreement and the *PSA* created a "complete code relating to police discipline" and that "no gap" was left for the court (emphasis added): *Abbott,* at paras. 4, 27, 29, 33.

[38] I do not intend to review each authority relied on by the respondents in favour of the submission that there exists an "exclusive jurisdiction model in police cases", which ousts the jurisdiction of the courts. However, I make reference to a few of those decisions to demonstrate that they all involve true workplace-centred disputes.

[39] In *Heasman v. Durham Regional Police Services Board,* 204 O.A.C. 283 (C.A.), two detectives were removed from the major crimes unit and charged with disciplinary offences under the *PSA,* all arising from work they had done on a cold case. The officers sued, but the matter was considered "disciplinary" in nature and caught by the collective agreement and the *PSA.*

[40] Similarly, in *Richards v. Catney*, 2005 CanLII 8702 (Ont. S.C.), aff'd 206 O.A.C. 28 (C.A.), another case relied on by the respondents, the plaintiff Staff Sergeant sued her employer, claiming she was denied a promotion and then

transferred to a lesser position as retribution for a medical leave and that she was discriminated against on the basis of her sex. The claim was dismissed for want of jurisdiction because it was found to be about workplace discrimination and harassment. The court noted that "[t]he overarching context for the pleaded employer mistreatment is discrimination on account of sex and disability": *Richards,* at para. 34. I agree with the appellant that this is the *sine qua non* of a workplace dispute.

[41] In another case relied upon by the respondents, *DiNunzio v. City of Hamilton*, 2010 ONSC 3631, aff'd 2011 ONCA 65, leave to appeal refused, [2011] S.C.C.A. No. 110, a 9-1-1 operator said that she was unfairly blamed for a stabbing incident. She sued her employer for, among other things, emotional distress. The court found want of jurisdiction, concluding that, in substance, her claim was a "workplace" centred one. In particular, the motion judge found that there was "no allegation that the Board or its employees or agents took some action in respect of a third party outside of the workplace that caused [the plaintiff] harm": *DiNunzio,* at para. 25.

[42] These authorities do not support the respondents' position that there is a rule that, in the police environment, the combination of collective agreements and the *PSA* create complete codes for adjudicating all claims, leaving no redress for the court. Rather, they reflect a reasoning process that looks to the essential

character of the dispute and asks whether that dispute is covered by the respective collective agreement and the *PSA.*

[43] As I will now explain, this case is not like the ones cited by the respondents. It is neither a labour relations dispute nor a disciplinary matter. At its core, it involves allegations that point to the improper influence of a criminal investigation that took place entirely outside of the workplace. In my view, the Superior Court is the only place where the appellant's claim can be adjudicated.

(iii) Misconstruing the "Essential Character" of the Claim for Purposes of the Collective Agreement

[44] There is no dispute that the collective agreement in this case applies to all employees of the Ottawa Police Service. Under the collective agreement, the Board is granted the exclusive right to "maintain order, discipline and efficiency" and to "hire, discharge, direct, classify, transfer, promote, demote or suspend or otherwise discipline any employee": Article 2.01. In doing so, the Board must treat all employees fairly and without discrimination: Article 2.02.

[45] Article 24 of the collective agreement sets out the grievance procedure that applies when a "difference of opinion arises between a member or the [police] Association or both, and the Board, as to the meaning or application of a provision of this [collective agreement]". Article 24(h) says that the grievance procedure may ultimately lead to arbitration that is "final and binding on both parties to the

[collective agreement] as well as upon the employee or employees involved in the dispute."

[46] Whether this clause covers the appellant's dispute must be answered with reference to the central nature of the dispute, the goal being to determine its "essential character". As noted in *Regina Police Assn.,* at para. 25, this requires looking to the "facts surrounding the dispute between the parties, and not on the basis of how the legal issues may be framed". The ultimate goal is to determine whether, based on all of the alleged facts, the essential character of the dispute is covered by the collective agreement. In essence, does the dispute arise, explicitly or implicitly from the "interpretation, application, administration or violation of the collective agreement": *Regina Police Assn.*, at para. 25.

[47] In my view, the motion judge erred in failing to approach the matter in accordance with that legal framework. Although he stated the correct legal test, he ultimately erred by looking to the legal characterization of the dispute to define its essential character. This is an extricable legal error reviewable on the standard of correctness.

[48] Rather than considering the facts underlying the allegations, the motion judge made the following broad statements about what he perceived to be the "true nature of the dispute":

- whether the [appellant] was treated unfairly by his fellow officers and suffered damages;
- whether wrongful actions of fellow officers caused him damages; or
- whether wrongful actions of fellow officers included a conspiracy, deceit, negligence and malicious prosecution that caused him damages.

[49] None of these statements grapple with the alleged facts surrounding the dispute and whether they were impliedly or explicitly governed by the collective agreement. These statements are nothing more than general descriptions of the legal nature of the claim and the fact that damages were being sought.

[50] The “essential character” of the claim rested, not in these broad legal characterizations, but in the facts alleged. That factual matrix involves the following allegations:

(a) officers having knowingly and intentionally provided false and misleading information to investigators in the context of a serious criminal investigation resulting in serious criminal charges;

(b) officers having knowingly and intentionally released false information to the media in an effort to pressure criminal investigators to lay charges in an ongoing criminal investigation; and

(c) superior officers having knowingly and intentionally provided false and misleading information during the course of ongoing criminal proceedings that prolonged those proceedings.

[51] These are not allegations of unfair workplace treatment. The factual matrix at play here is clearly distinguishable from the facts in *Abbott* and the other decisions relied on by the respondent. In *Abbott*, for instance, the parties agreed that the conduct at issue related to discipline or disguised discipline: *Abbott*, at paras. 6, 9, 25. The court then examined the ambit of the collective agreement and the *PSA*, concluding that discipline was incorporated into the collective agreement as a management right. Accordingly, the collective agreement and the *PSA* "form a complete code governing all discipline for the OPP. There is no gap which would give the Superior Court jurisdiction to hear the matter as a civil cause of action, the essential nature of which matter is discipline including disguised discipline" (emphasis added): *Abbott*, at para. 33.

[52] The facts relating to Mr. Rukavina are notably different. Mr. Rukavina is not alleging that he was unfairly disciplined by his employer. Rather, he is alleging that he was wrongfully charged with criminal offences after his fellow officers lied to the SIU and that his superior officers acted in a manner that continued to mislead the SIU. The allegations do not pertain to discipline. At their highest, these are allegations of criminal activity, knowingly and intentionally misleading a criminal investigation.

[53] That being the essential character of the claim, the question became whether it fell within the exclusive jurisdiction of the collective agreement. It did not.

[54] The motion judge erred when he rejected two prior decisions of this court, finding that by reporting employees to the police, the employer jettisoned the matters outside the catch frame of the collective agreement.

[55] In *Piko*, the employer told the police about a suspected fraud by an employee. Criminal charges were laid and later withdrawn. The employee sued the employer for malicious prosecution. While the employer successfully sought to have the claim dismissed for want of jurisdiction, that decision was overturned on appeal, on the basis that the "essential character" of the claim was not covered by the collective agreement because the employer had gone "outside the collective bargaining regime when it resorted to the criminal process": *Piko*, at para. 17.

[56] In *McNeil*, the employer reported the employee to the police for allegedly defrauding the employer. While the employer had both inculpatory and exculpatory evidence in its possession, it only provided the inculpatory evidence to the police. The employee was convicted, which was later set aside on appeal on the basis that the employer had withheld the exculpatory evidence. Relying on *Piko*, this court found that this dispute did not arise from the employer's application or

administration of the collective agreement, but from one that "centred on the employer's resort to the criminal process": *McNeil*, at para. 37.

[57] The motion judge attempted to distinguish *Piko* and *McNeil* from this case. He erred in doing so.

[58] First, he found that, unlike *Piko* and *McNeil*, the dispute in this case arises "out of a police environment". That is so, but for the reasons already given, it does not answer whether the essential nature of the claim is outside of the collective agreement.

[59] Second, the motion judge found that, unlike *Piko* and *McNeil,* the collective agreement in this case was "quite broad" and the appellant could proceed "by grievance alleging that he was not treated fairly". Referring to the duty of fairness under the collective agreement does not assist in resolving whether the "essential character" of the claim falls within the collective agreement or not. Indeed, *McNeil* recognizes this fact.

[60] The appellant employer in *McNeil* attempted to distinguish *Piko* on the basis that the collective agreement in *McNeil* contained a clause requiring the employer to treat employees in a fair, non-arbitrary and non-discriminatory manner. This court rejected that argument*,* reinforcing the idea that, although a collective agreement might impose a duty of fairness upon an employer, whether a dispute has to be arbitrated depends on its essential character: "It is not enough that the

subject matter of the criminal process and malicious prosecution action could conceivably be relevant in a workplace dispute": *McNeil,* at para. 37. While the appellant's claim may well raise fairness concerns, once the subject matter was taken to the criminal court, its essential character was no longer a labour relations dispute.

[61] Third, the motion judge relied on the fact that, unlike *Piko* and *McNeil*, the police employer in this case did not voluntarily instigate the criminal investigation; instead, there was an obligation under the *PSA* to report the matter to the SIU and the respondents were under an obligation to cooperate in that investigation. Respectfully, this is a distinction without a difference.

[62] Under s. 3(1) of the *Conduct and Duties of Police Officers Respecting Investigations by the Special Investigations Unit* regulations*,* a chief of police is required to notify the SIU "immediately of an incident involving one or more of his or her police officers that may reasonably be considered to fall within the investigative mandate of the SIU, as set out in subsection 113(5) of the [*PSA*]*"*. Section 113(5) of the *PSA* grants the director of the SIU the ability to "cause investigations to be conducted into the circumstances of serious injuries and deaths that may have resulted from criminal offences committed by police officers." Therefore, the parties do not dispute the fact that the SIU had to be notified of the incident at the root of this case, particularly given that it resulted in "serious

injuries". Nor do they dispute that the officers had to cooperate in that investigation: *PSA*, s. 113(9).

[63] The essential character of this claim, though, does not rest on the fact that the employer reported the matter to the SIU or the fact that the respondents cooperated in the context of the investigation. The core of this claim rests on allegations that the respondents allegedly misled a criminal investigation and put unwarranted pressure on that investigation, all resulting in a wrongful, malicious criminal prosecution.

[64] While it may be that the very genesis of the dispute in this matter was workplace centred, taking the claim at its highest, once the SIU was involved, this was a matter taking place completely outside of the workplace. Indeed, the whole point of the SIU is to create an independent policing agency that exists to police the police. As noted in *Schaeffer v. Woods,* 2013 SCC 71, [2013] 3 S.C.R. 1053, at para. 3, "the SIU plays a vital role in ensuring our society remains fair and just and that everyone is treated equally before and under the law." Later in the *Woods* decision, at para. 44, the court reinforced this point: "In establishing the SIU, the legislature intended to create an independent and transparent investigative body for the purpose of maintaining public confidence in the police and the justice system as a whole."

[65] There should be no mistake about what the SIU investigation was about. It was not a workplace-related matter. Indeed, it was the antithesis of a workplace-related matter. It was an independent criminal investigation that the appellant alleges resulted in serious criminal charges because the criminal investigators were intentionally misled.

[66] In my view, it was an error to focus so heavily on *Piko* and *McNeil* in an effort to distinguish them. While the motion judge was right that there are some distinguishing features between this case and those, they are features that do not impact the result. Like *Piko* and *McNeil,* the essential nature of the claim in this case was not workplace related. Despite the breadth of the collective agreement, it simply did not extend to the alleged conduct of the respondents in the criminal investigation.

(iv) The Error in Respect of the *Police Services Act*

[67] Article 24(a) of the collective agreement says that those "matters of discipline" and any other matters regulated by the *PSA* and its regulations shall be dealt with as prescribed by the *PSA.*

[68] The motion judge's reasons respecting the application of the *PSA* are thin. He noted that Part V of the *PSA* provides for "an entire process to deal with complaints, disciplinary proceedings and allegations of misconduct." He also commented that if the claim related to "alleged misconduct of fellow officers … an

available remedy was a complaint under the disciplinary process provided by the [*PSA*].” In my view, even if the *PSA* were applicable in the context of the underlying complaint, it would not impact upon the court’s jurisdiction.

[69] The *PSA* sets up a comprehensive scheme for adjudicating allegations about misconduct by police officers. There are essentially two streams by which a complaint can proceed under Part V of the Act.

[70] First, under s. 58(1), a member of the public may make a complaint about the conduct of a police officer, engaging the jurisdiction of the Office of the Independent Police Review Director (“OIPRD”). Section 58(2)(4) specifically excludes members and auxiliary members of police services from making complaints “if that police force or another member of that police force is the subject of the complaint.” Therefore, the appellant would be precluded from making a complaint to the OIPRD.

[71] Second, under s. 76(1) of the *PSA,* a police chief may make a complaint, causing an investigation into the officer’s “conduct”. This is an “internal complaint” also under Part V of the *PSA*. While the respondents acknowledge that the appellant is not a police chief and, therefore, cannot unilaterally initiate an internal complaint, they argue that, at a minimum, he could have asked his chief (also a respondent to the civil action) to initiate the complaint against the fellow officers.

[72] I see no reason why, even if the *PSA* could be applied, it would preclude the appellant's claim. This is unlike a collective agreement where the jurisdiction of the court is ousted by a complete arbitration clause. In contrast, there is nothing about a matter being dealt with under the *PSA* that would or should oust a private claim. Indeed, as noted in *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263*,* at para. 31:

> [T]he mere fact that the alleged misconduct also constitutes a breach of statute is insufficient to exempt the officer from civil liability. Just as a public officer who breaches a statute might be liable for negligence, so too might a public officer who breaches a statute be liable for misfeasance in a public office.

[73] In this case, there was a criminal investigation. That investigation resulted in the appellant being charged with serious criminal offences. And the appellant stood charged, before a criminal court, for over a year before the Crown determined that a stay of proceedings was in order.

[74] At a minimum, for the appellant, once the SIU became involved and a criminal investigation started, this became a private and not a workplace matter. While the *PSA* may well have been invoked if the chief had decided to make a complaint, the fact remains that like *Woodhouse,* the private wrong would go without a remedy if the *PSA* precluded a private action.

[75] Accordingly, his claim is not restricted by the disciplinary procedures in Part V of the *PSA*.

Conclusion

[76] I would allow the appeal and restore the claim. I would dismiss the application for leave to issue the proposed amended statement of claim, an application made for the first time on appeal. The appellant may pursue that remedy elsewhere if he chooses to do so.

[77] The appellant is entitled to costs of the appeal in the amount of $10,000, inclusive of disbursements and taxes. I would also order that the costs order from the motion below be reversed, so that the appellant be awarded costs in the amount of $22,000 all inclusive for the underlying motion.

Released: JW August 26, 2020

"Fairburn J.A."

"Wayne Gascon J.A."

"I agree. K.M. Weiler J.A."