IN THE MATTER OF AN ARBITRATION

BETWEEN: TORONTO POLICE SERVICES BOARD

AND: TORONTO POLICE ASSOCIATION

AND IN THE MATTER OF THE BOARD'S GRIEVANCE CONCERNING TRACEY RUDBACK

SOLE ARBITRATOR O.B. SHIME, Q.C.

APPEARANCES:

MS. BETH SYMES	Counsel and others for the Association
MR. MICHAEL HINES	Counsel and others for the Board

Hearings were held in this matter
at Toronto on September 21, 2007. March 19, 2008, April 25th, 2008
and June 3rd, 2008

INTERIM AWARD

This is a pre-hearing procedural matter in which the grievor, the Toronto Police Services Board (the Board), seeks access and production (1) of the WSIB/WSIAT file created by R. Hainsworth, a representative of the Toronto Police Association, who represented Tracey Rudback, a former employee, before the WSIB and the WSIAT, and (2) to materials held by the Centre for Addiction and Mental Health (CAMH), a psychiatric facility, as to whether Ms. Rudback disclosed her academic pursuits to CAMH in the spring of 2003. The Board also seeks (3) production of, and Ms. Rudback's consent to disclose, all records and documents held by various academic institutions respecting her attendance in 2002 and 2003.

The facts leading up to this grievance are contained in a decision of the Workers Safety Board and Insurance Appeals Tribunal (WSIAT) dated April 2, 2007, which I shall briefly summarize for the purpose of this interim award. Tracey Rudback had been employed as a police officer with the Board and had been receiving WSIB benefits as the result of a decision of a claims adjudicator on April 2, 2001. In a letter dated September 4, 2001, the Board offered Ms. Rudback modified duties which she did not accept. On December 6, 2001, the claims adjudicator terminated Ms. Rudback's benefits as of December 10, 2001. Ms. Rudback then took courses at York University between January and April, 2002, and began Teachers' College in August or early September, 2002.

While attending Teacher's College, Ms. Rudback appealed the December, 2001, decision of the claims adjudicator and, in connection with her appeal, arrangements were

made for her to attend at CAMH. As a result of the report from CAMH, the claims adjudicator, by memo dated April 15, 2003, restored Ms. Rudback's benefits from December 11, 2001, and on-going. While her benefits were being reinstated, Ms. Rudback was completing her year at Teachers' College.

On September 30, 2003, in a telephone conversation with Ms. Rudback, the claims adjudicator learned that Ms. Rudback had been attending Teachers' College for the previous year and requested a further opinion from CAMH. After receiving a report from Dr. B. Dorion at CAMH, the claims adjudicator advised Ms. Rudback, in a decision dated November 4, 2003, that he had "inactivated" [her] loss of earnings benefit from December 11, 2001 and created a recoverable overpayment".

Ms. Rudback appealed the decision of the claims adjudicator, and in a decision dated January 26, 2005, an appeals resolution officer denied her appeal. Ms. Rudback filed a further appeal with the WSIAT. The WSIAT found that Ms. Rudback had not responded to the employer's offer of modified duties and therefore had "effectively eliminated a whole range of other employment options which could likely have been made available". The WSIAT upheld the decision to terminate Ms. Rudback's loss of earnings benefits in December, 2001, on the grounds that she was "partially impaired and refused suitable work which had been offered by the employer", and had chosen to pursue alternative employment in another field. Accordingly, Ms. Rudback's appeal to the WSIAT was dismissed.

Since the Board, under the scheme of the *Workers' Safety and Insurance Act* as a schedule 2 employer was required to make the payments to Ms. Rudback, the Board, after receiving the decision of the Appeals Resolution office, filed a grievance against Ms. Rudback to recover the overpayment it claims it made to her,. That claim is resisted by Ms. Rudback and it is the Board's grievance that gives rise to the pre-hearing production issues that have been raised in this motion.

(1) PRODUCTION OF ASSOCIATION FILES

The Board seeks access to the WSIB/SWIAT file created by Ray Hainsworth, a representative of the Toronto Police Association (the Association), who represented Ms. Rudback before the WSIB and WSIAT. The Board acknowledges that communications between Ms. Rudback and Mr. Hainsworth and the file created by Mr. Hainsworth with respect to his representation of Ms. Rudback are privileged, but maintains that any privilege was waived as a result of an opening statement made by Ms. Symes, who appeared as Counsel for the Association and Ms. Rudback, at the commencement of these proceedings. At that time, Ms. Symes stated that the Association had no knowledge of Ms. Rudback's activities which are now in issue. Subsequently, the Board agreed not to proceed against the Association, but it continues to proceed against Ms. Rudback. There is no disagreement that the privilege, in issue, concerns Ms. Rudback.

In the world of collective bargaining, union members and employers are often represented by non-lawyers in the workplace who advise on such matters as, work rules, the language of the collective agreement, disciplinary and termination issues. These

persons, union stewards or officers, and human relations personnel also represent the union, bargaining unit employees and the employer at both grievance meetings and also arbitration hearings. The role of these persons in the workplace is akin to the normal activities of lawyers who advise members of the public. Since these persons perform similar services to that of a lawyer, it has generally be considered in the interests of arbitral justice to protect communications with these lay persons in much the same way as persons are protected by both solicitor and client privilege and litigation privilege. For the purposes of this award, it is not necessary to distinguish between solicitor and client privilege and litigation privilege. See eg. *Blank v. Canada* (Minister of Justice, [2006], 22 S.C.R. 319;

Notwithstanding that privilege exists, it may be waived. Mr. Hines asserts that, in her opening remarks, Ms. Symes stated that Mr. Hainsworth had no knowledge of Ms. Rudback's educational activities, thereby waiving any privilege that existed as a result of communications between Ms. Rudback and Mr. Hainsworth. Or, to put it another way, according to Mr. Hines, statements made about a lack of communication to Mr. Hainsworth opened up the totality of communications between Ms. Rudback and Mr. Hainsworth and that Counsel for Ms. Rudback cannot cherry pick what she will or will not reveal.

In *S. K. Processors Ltd. v. Campbell Ave. Hiring Producers Ltd.* [1983] B.C. S. No. 1499 (B.C.S.C.); [1983] W. W. R. 72, McLachlin, J. (as she then was) stated as follows:

> "waiver of privilege is ordinarily established where it is shown that the possessor of the privilege (i) knows of the evidence of the privilege and (2) voluntarily evinces an intention to waive that privilege. However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require. Thus waiver of privilege as to part of a communication, will be held to be waiver as to the entire communication".

She further stated:

> "In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive the privilege at least to a limited extent. The law then says that in fairness and consistency, it must be entirely waived."

At the outset of these proceedings, Ms. Symes appeared as Counsel to both the Association and Ms. Rudback. In her opening statement, she made representations on behalf of both parties. The statement in issue was made on behalf of the Association, which is no longer a party. The objective evidence does not demonstrate an implied intention by Ms. Rudback to waive her privilege; inadvertent statements by Counsel made on behalf of the Association, which is no longer a party, do not objectively demonstrate a voluntary or implied intention by Ms. Rudback to waive her privilege. *T.T.C. v. A.T.U, Local 113* [2004], O.L.A.A. No. 578 (S. Tacon). Accordingly, the Board's request for production of Mr. Hainsworth's files is denied.

(2) PRODUCTION OF PERSONAL HEALTH INFORMATION

The Board seeks access to Ms. Rudback's personal health information resulting from her various attendances at CAMH and more particularly her attendance at CAMH in

accordance with the arrangements made by the claims adjudicator in connection with her appeal. Counsel for Ms. Rudback argues that since this is not a proceeding before a court, it is only the Divisional Court, pursuant to the *The Mental Health Act*, R.S.O., 1990, c. m. 7, and amendments thereto, which has the jurisdiction to determine whether disclosure should be made of any information in respect of a psychiatric patient. Counsel for the Board argues that the scheme of *The Mental Health Act* permits such disclosure and requests that disclosure be made subject to certain limitations. The relevant sections of *The Mental Health Act* are as follows:

> Personal health information
> 35. (1) In this section,
>
> "patient" includes former patient, out-patient, former out-patient and anyone who is or has been detained in a psychiatric facility. 2004, c. 3, Sched.. A, s. 90 (7).
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> Disclosure, etc., for purpose of detention or order
> (2) The officer in charge of a psychiatric facility may collect, use and disclose personal health information about a patient, with or without the patient's consent, for the purposes of,
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> (a) examining, assessing, observing or detaining the patient in accordance with this Act; or
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> (b) complying with Part XX.1 (Mental Disorder) of the Criminal Code (Canada) or an order or disposition made pursuant to that Part. 2004, c. 3, Sched. A, s. 90 (7).
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> Disclosure to Board
> (3) In a proceeding before the Board under this or any other Act in respect of a patient, the officer in charge shall, at the request of any party to the proceeding, disclose to the Board the patient's record of personal health information. 2004, c. 3, Sched. A, s. 90 (7).
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> Disclosure of record
> (4) The officer in charge may disclose or transmit a person's record of personal health information to or permit the examination of the record by,
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> (a) a physician who is considering issuing or renewing, or who has issued or renewed, a community treatment order under section 33.1;
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> (b) a physician appointed under subsection 33.5 (2);

(c) another person named in the person's community treatment plan as being involved in the person's treatment or care and supervision upon the written request of the physician or other named person; or

(d) a prescribed person who is providing advocacy services to patients in the prescribed circumstances. 2004, c. 3, Sched. A, s. 90 (7).

Substitute Decisions Act, 1992
(4.1) The officer in charge shall disclose or transmit a clinical record to, or permit the examination of a clinical record by, a person who is entitled to have access to the record under section 83 of the Substitute Decisions Act, 1992. 1992, c. 32, s. 20 (13); 1996, c. 2, s. 72 (12).

(4.2) Repealed: 1996, c. 2, s. 72 (13).

Disclosure pursuant to summons
(5) Subject to subsections (6) and (7), the officer in charge or a person designated in writing by the officer in charge shall disclose, transmit or permit the examination of a record of personal health information pursuant to a summons, order, direction, notice or similar requirement in respect of a matter in issue or that may be in issue in a court of competent jurisdiction or under any Act. R.S.O. 1990, c. M.7, s. 35 (5); 2004, c. 3, Sched. A, s. 90 (8).

Statement by attending physician
(6) Where the disclosure, transmittal or examination of a record of personal health information is required by a summons, order, direction, notice or similar requirement in respect of a matter in issue or that may be in issue in a court of competent jurisdiction or under any Act and the attending physician states in writing that he or she is of the opinion that the disclosure, transmittal or examination of the record of personal health information or of a specified part of the record of personal health information,

(a) is likely to result in harm to the treatment or recovery of the patient; or

(b) is likely to result in,

(i) injury to the mental condition of a third person, or

(ii) bodily harm to a third person,

no person shall comply with the requirement with respect to the record of personal health information or the part of the record of personal health information specified by the attending physician except under an order made by the court or body before which the matter is or may be in issue after a hearing from which the public is excluded and that is held on notice to the attending physician. R.S.O. 1990, c. M.7, s. 35 (6); 1992, c. 32, s. 20 (14); 2004, c. 3, Sched. A, s. 90 (8).

Matters to be considered by court or body
(7) On a hearing under subsection (6), the court or body shall consider whether or not the disclosure, transmittal or examination of the record of

personal health information or the part of the record of personal health information specified by the attending physician,

(a) is likely to result in harm to the treatment or recovery of the patient; or

(b) is likely to result in,

(i) injury to the mental condition of a third person, or

(ii) bodily harm to a third person,

and for the purpose the court or body may examine the record of personal health information, and, if satisfied that such a result is likely, the court or body shall not order the disclosure, transmittal or examination unless satisfied that to do so is essential in the interests of justice. R.S.O. 1990, c. M.7, s. 35 (7); 2004, c. 3, Sched. A, s. 90 (8).

Return of clinical record to officer in charge
(8) Where a clinical record is required pursuant to subsection (5) or (6), the clerk of the court or body in which the clinical record is admitted in evidence or, if not so admitted, the person to whom the clinical record is transmitted shall return the clinical record to the officer in charge forthwith after the determination of the matter in issue in respect of which the clinical record was required. R.S.O. 1990, c. M.7, s. 35 (8).

(8.1) Repealed: 2004, c. 3, Sched. A, s. 90 (9).

Disclosure in proceeding
(9) No person shall disclose in a proceeding in any court or before any body any information in respect of a patient obtained in the course of assessing or treating the patient, or in the course of assisting in his or her assessment or treatment, or in the course of employment in the psychiatric facility, except,

(a) where the patient is mentally capable within the meaning of the *Personal Health Information Protection Act, 2004*, with the patient's consent;

(b) where the patient is not mentally capable, with the consent of the patient's substitute decision-maker within the meaning of the *Personal Health Information Protection Act, 2004*; or

(c) where the court or, in the case of a proceeding not before a court, the Divisional Court determines, after a hearing from which the public is excluded and that is held on notice to the patient or, if the patient is not mentally capable, the patient's substitute decision-maker referred to in clause (b), that the disclosure is essential in the interests of justice. 2004, c. 3, Sched. A, s. 90 (10).

Both parties made extensive submissions as to the meaning and effect of the relevant sections of *The Mental Health Act* and also submitted a number of cases which

each claimed to support their respective positions. I shall attempt to summarize their submissions as follows. Ms. Symes, on behalf of Ms. Rudback, argued since this was "a proceeding not before a court", within the meaning of section 35(9), that the Board was required to apply to the Divisional Court for the production order sought in order to have that Court determine whether "disclosure is essential in the interests of justice". Ms. Symes maintained it was for the Divisional Court to balance the competing interests of patient privacy and the interests of justice, and *The Mental Health Act* specifically precludes a board of arbitration from making that determination.

Mr. Hines, for the Board, submitted that section 35(5) requires the disclosure, transmittal or examination of a record of personal health information "pursuant to a Summons, Order, Direction, Notice or similar requirement in respect of a matter in issue or that may be in issue in a court of competent jurisdiction under any Act" and there is no requirement to go to the Divisional Court for a pre-hearing production order. He argued that section 35(9) refers to a "proceeding in any court or before any body", while there is no such reference in section 35(5) and, accordingly, section 35(5) was capable of standing on its own thereby applying to pre-trial matters only, and there is no overriding impact of section 35(9) on pre-hearing issues. Moreover, Mr. Hines argued, the privacy interests of Ms. Rudback are capable of being protected by a limited order permitting Counsel alone to have access to the record of personal health information.

The submissions of the parties points out what appears to be a patent contradiction in the legislation. On one hand, section 35(5) permits disclosure of a patient's health

record in specified legal circumstances, subject only to sections 35(6) and (7), which are provisions that deal with the situation where there is a specific objection by the attending physicians. There is no objection in this case by the attending physician and, accordingly, sections 35(6) and (7) need not be considered here. On the other hand, section 35(9) prohibits disclosure in proceedings before a court or any other body and only permits such disclosure where a court, or the Divisional Court in the case of a proceeding not before a court, determines after a hearing in which the public is excluded that disclosure is essential in the interests of justice.

The Mental Health Act was amended in 2004, however there were a number of relevant cases decided before the amendments, which were referred to by both Counsel in this matter. I note that the predecessor Act refers to clinical records, whereas the current Act refers to "a record of personal health information". Also, section 35(2) of the Act was repealed. That section which is referred to in the cases provided as follows:

> 35(2) Except as provided in this section and section 36, no person shall disclose, transmit or examine a clinical record.

I now turn to the cases referred to by both Counsel. The leading case is *Regina v. Coon*, (1992), 74 C.C.C. (3rd), 146, (Gen. Div.). In that case, the accused had subpoenaed the clinical records of the complainant and Then, J., was required to determine the standard the applicant was required to meet under *The Mental Health Act* before the psychiatric records would be ordered produced. Then, J., referring to the relevant considerations and competing interests between the right to privacy and the interests of justice, stated:

> "In the context of a criminal trial, it seems to me that reading s. 29 of *The Mental Health Act* as a whole, the intent of the legislation in respect of the production information pertinent to the mental health of a patient was to attempt to strike a balance between the right of the accused to make full answer and defence with the right of the patient to privacy and confidentiality by requiring the court to determine whether it was in the interests of justice to order disclosure. That intent is manifest to the standard requiring disclosure and "when essential in the public interest"

Then, J. determined as follows:

> "in circumstances where there is no challenge by the attending physician to the disclosure of the clinical record of a patient in a psychiatric facility as contemplated by s. 29(5) [now s. 35(5)] of *The Mental Health Act* or in circumstances where the challenge has been unsuccessful, the disclosure of those records is governed by s. 29(9)(c)[now s. 35(9)(c)] of *The Mental Health Act* such that disclosure will also be made only if the disclosure is essential in the interests of justice."

Thus, Then, J. concluded that section 29(5) was subject to section 29(9)(c).

The relationship between the different provisions of *The Mental Health Act* was also considered in *Everingham v. Ontario*, (1992) 7 O.R (3rd), 291, 88 D.C.R. (4th) 464 (Gen. Div.) and *R. v. LePage*, [1994] O. J. No. 2126, 23 C.R.R. (2d) 81 (Gen. Div.). Both of those cases suggested that section 35(9) does not apply to pre-trial production of clinical records and are therefore distinguishable from *R. V. Coon* supra. That distinction was confirmed by Cullity, J. in *Ahmed v. Stefaniu et al*, (2005), 72 O.R. (3d) 590 at page 598, where referring to Everingham and LePage, he stated:

> "However, while Then J. did not draw any distinction between pre-trial examination and disclosure in evidence, there are indications in the reasons of Borins, J.[in Everingham] that he would interpret section 35(9) as prohibiting only the latter. At page 473 of his reasons he stated that the section "clearly relates to testimonial disclosure before a court, which would include disclosure by affidavit as well as viva voce testimony. In a

subsequent passage, at page 474, that follows immediately after the passage I have quoted above, he concluded:

> "Therefore, Dr. Jones, while he may have been entitled to examine the records where compliance with ss.(5) and (6) has taken place, must still face the supervisory role of the court required by ss. (9)(c)".

In LePage, at para 14, Howden, J. also doubted whether section 35(9)(c) applied to a pre-trial examination of records that, on the facts before him, had been transmitted to the court pursuant to section 35(5). He stated:

> ' "I am not satisfied that subsec. (9)(c) is properly used for this purpose. It is really addressing disclosure by a witness of information (documentary or otherwise) obtained in the course of assessment or employment at a psychiatric facility and not pre-trial access by other parties to records already in the court's possession." '

I note further, that Borins, J. in *Everingham v. Ontario*, supra, also stated that:

> ' "...**counsel for the respondents has misunderstood the purpose of s. 35(5) as a production mechanism** and has overlooked or misinterpreted the effect of subs. (6) and subs. (9) in respect of the documents produced. I am also mindful of the submissions of Ms. Price that the applicants having, in a sense, placed their medical histories in issue cannot object to the production of their clinical records. There may be merit to this submission, but it is more properly addressed when the hearings required by subss.. (6) and (9) take place, if indeed, they do take place". '
>
> *(emphasis added)*

Cullity, J. also stated at p. 604 and 605:

> "The conclusion just reached is sufficient to dispose of the motion to the extent that the defendants seek production for all purposes reasonably necessary in the conduct of the litigation. **However, there remains the possibility that section 35(9)(c) applies only to disclosure in court and that its prohibition does not extend to pre-trial production for inspection**. As I have indicated, there is some support for this proposition in the previous decisions although it may not be consistent with the reasoning of Then, J. in Coon. If the proposition is correct, it appears to me that pre-trial inspection might not be excluded by section 35(2), if I am prepared to make an order pursuant to rule 30.10, or confirm the order made on October 16, 2002, so that there would, arguably, be an obligation

> to permit examination of the records by virtue of the provisions of section 35(5) of the MHA.
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> Although I believe Mr. Balka was correct in his submission that the test under the rule is less stringent than that in section 35(9), it requires a finding that the medical records will be "relevant to a material issue in the action".
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> *(emphasis added)*

Cullity, J. also stated that "judicial interpretation of section 35 has not been entirely consistent in all material respects".

I now turn to consider the statutory provisions. It is clear that as an arbitrator I do not have jurisdiction to consider whether the material required is "essential in the interests of justice"; section 35(9) requires that determination be made by the Divisional Court. Further, based on the cases, should the Board seek to examine or cross-examine about any personal health information in the course of this arbitration proceeding where viva voce testimony is tendered, a prior order would be required from the Divisional Court. My jurisdiction, under the cases, is confined to determining whether an order for production may be made pursuant to section 35(5) standing alone, to require Tracey Rudback to produce, for review or examination by Counsel for the Board, her personal health information at CAMH.

The 2004 amendments to the Act repealed the former section 35(2) which prohibited the disclosure of clinical records with certain exceptions. The former section 35(2) is referred to in the earlier Court decisions and obviously influenced those decisions. Currently, sections 35(2) to section 35(5) contain provisions permitting the disclosure of personal health information in certain specific circumstances. Rather than

the prohibitive tenor of the legislation which existed before the amendments, there is now a more permissive tenor to the legislation which permits disclosure in certain specified circumstances.

Under section 35(5) where records are "turned over", to use a neutral term, they cannot help but be disclosed, whether to an officer of the court or to the opposing party seeking production, thereby violating the privacy interest of the protected person. Section 35(5) is made subject to s. 35(6) and (7) but is not made subject to s. 35(9). The explicit mention of sections 35(6) and (7) in section 35(5), and the failure to mention s. 35(9) suggests that s. 35(9) has no application to section 35(5) and only applies, as both Borins, J. and Howden, J. suggest, to testimony in court and not to pre-trial production.

Also, the language of section 35(5) differs from section 35(9)(c) with respect to the use or context where disclosure may or may not be made. Section 35(5) compels disclosure in response to a summons, order, direction, notice or similar requirement in respect of a matter in issue or that may be in issue. The scope and context for disclosure is both unconditional and considerably broader than the scope and context of section 35(9)(c) which appears to limit disclosure where a matter is in court or where a proceeding is not before a court. A careful reading of both sections suggests that parties are entitled to obtain disclosure of personal health information for the purpose of dealing with the issues in the matter or the issues that may arise, but are restricted from using that information in court, or in a proceeding not before a court, unless there

is a prior determination that such disclosure is essential in the interests of justice. There is some sense in allowing a party to examine records in advance of a proceeding to properly prepare its case. However, both the Court and the Divisional Court are given a discretion to weight the privacy interest of a patient against the interests of justice where the personal health information of a patient is tendered in public proceedings.

In my view, the difference in language in the two sections permits records of personal health information to be disclosed for the purposes of pre-trial production, with respect to the matters in issue and, I determine, as did the courts in Everingham and Lepage, that section 35(9) does not apply to pre-hearing matters and, more particularly, to a request for production of personal health information, and that a board of arbitration has jurisdiction to order pre-trial production of personal health information, subject to determining its relevancy. I now turn to consider that issue.

The decision of the WSIAT indicated that in December, 2001, the Board offered Ms. Rudback modified duties based on the advice of a claims adjudicator. However, Ms. Rudback did not attempt the offered modified duties, nor did she report to the location where the Board had made modified work available. As a result, her benefits were terminated effective December 10, 2001. Ms. Rudback attended York University and Teacher's College between January, 2002, and June, 2003, and subsequently attended York University in a specialist's course. While attending York University and Teacher's College, Ms. Rudback pursued an appeal of the decision of claims adjudicator made December, 2001, to terminate her loss of earnings benefits and accordingly, the claims

adjudicator arranged for Ms. Rudback to undergo further psychiatric testing. As a result, Ms. Rudback attended at CAMH, and in a report dated March 27, 2003, Drs. Shapiro and Bagy recorded that her PTSD was "directly related to the workplace accident" and recommended that "she is permanently disabled from police work, or work with the police force" and that her prognosis "for return to work is very poor". After receiving the updated medical information, the claims adjudicator, on April 15, 2003, restored her loss of earnings benefits to December 11, 2001.

In a telephone conversation with Ms. Rudback in September, 2003, the claims adjudicator learned for the first time, that Ms. Rudback had been attending Teacher's College for the previous year. After receiving updated medical information, he found Ms. Rudback had been offered a suitable job in December, 2001, and inactivated her loss of earnings benefits and created a recoverable overpayment.

On appeal, the WSIAT found that reporting physicians suggested Ms. Rudback was totally disabled and incapable of employment beginning in December, 2001, and the WSIAT was "particularly concerned that none of the physicians who provided these supporting opinions appear to understand that the worker had been accepted to, and was enrolled in, Teacher's College". The WSIAT stated that "while the worker had suggested that these physicians were aware of what she was doing, we share the concern of the Board adjudicators that if the physicians had been aware, it seems reasonable that they would have made some notation of it in their reporting."

In addition, the WSIAT noted that when the Board informed Dr. Dorian at the Psychological Trauma Program that Ms. Rudback had successfully completed Teacher's College, Dr. Dorian was quite clear that "those circumstances clearly call into question the validity of aspects of his assessment and, in particular, conclusions regarding level of disability" and he concluded Ms. Rudback was "capable of working for [the employer] and as a schoolteacher." The WSIAT concluded that the adjudicator was correct in terminating Ms. Rudback's loss of benefits in December, 2001, on the grounds that she was partially impaired and refused suitable work which had been offered by the Employer Board and had pursued alternative employment with another employer in another field.

After reviewing the decision of the WSIAT and after considering the submissions of the parties, I determine that Ms. Rudback's psychiatric condition is relevant. Ms. Rudback received benefits from the Board, which as a schedule 2 Employer under the Workers' Safety and Insurance Act, was obligated to make payments to her. Those payments were made on the basis of her psychiatric condition. Also, psychiatric assessments were, in whole or in part, solicited by the claims adjudicator as the result of an appeal by Ms. Rudback seeking to restore her benefits. The psychiatric examinations had a direct bearing on both the receipt of and the restoration of Ms. Rudback's benefits, and, consequently, on the Board paying that entitlement. Accordingly, I am in agreement with Counsel for the Board's submissions that what Ms. Rudback disclosed to the physicians or persons at CAMH throughout about her ability to work and her activities, including her attendance at various educational institutions, is relevant.

Ms. Rudback ignored the offer of modified work while attending York University and Teacher's College, and the WSIAT doubted she had made the physicians aware of her attendance at Teacher's College. In all these circumstances there is doubt about the integrity of the psychiatric evaluations which recommended she was permanently disabled from police work, thereby justifying her declining modified work. Further, Ms. Rudback cannot shield behind a privacy exemption for psychiatric records and their relevancy when she herself took advantage of the psychiatric assessments to gain benefits paid by the Board. Accordingly, I determine that the psychiatric records are relevant to this matter.

(3) PRODUCTION OF ACADEMIC RECORDS

Ms. Symes has also argued that the decision of the WSIAT is sufficient for the purposes of this arbitration and the school records need not be disclosed. However, at this preliminary stage, there is no agreement between Counsel that the decision of the WSIAT only should form the basis for an arbitration decision under the collective agreement, nor am I able to ascertain at this stage the precise direction that this matter will take once the evidentiary stage of this arbitration is reached. Ms. Rudback declined modified duties and chose to pursue educational opportunities. The WSIAT found that her pursuit of "alternative employment", her "ability to successfully complete Teacher's College, undertake special education courses and work as a full time teacher" were reasons for both deciding her impairment was minimal, and also terminating her loss of earnings benefits in December, 2001, on the grounds that she was only partially disabled and refused suitable work which had been offered by the employer. Accordingly, I find that the

Rudback's educational activities at a time when she declined modified work to be relevant.

For the foregoing reasons I determine:

(a) That Ms. Rudback identify all of the educational institutions from which she took classes in 2002 and 2003 and to produce all records in her possession concerning her attendance;

(b) In the alternative, that Ms. Rudback consent to each of those institutions disclosing all the records in their possession concerning Ms. Rudback;

(c) That all psychiatric records and materials held by CAMH be disclosed and transmitted to Mr. M. Hines, Counsel for the Board, to be examined by him only, for the purpose of this arbitration and not to be communicated to any other person except by leave. Ms. Rudback shall provide the necessary consents to the officer in charge at CAMH to permit the disclosure, transmission and examination of those records of personal health information to Mr. Hines only.

Dated at Toronto this 16th day of June, 2008.

Owen B. Shime, Q.C.