



Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Electronically issued : 05-May-2021
Délivré par voie électronique : 05-May-2021
Toronto

B E T W E E N:

TORONTO DISTRICT SCHOOL BOARD

Plaintiff

- and -

**CITY OF TORONTO, HER MAJESTY THE QUEEN IN RIGHT OF THE
PROVINCE OF ONTARIO AND THE TORONTO POLICE SERVICES
BOARD**

Defendants

STATEMENT OF CLAIM

TO THE DEFENDANT(S)

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff.
The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES,

LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFF'S CLAIM, and \$500 CAD for costs, within the time for serving and filing your statement of defence you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiff's claim and \$400 for costs and have the costs assessed by the court.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date _____ Issued by _____
Local Registrar

Address of court office: **SUPERIOR COURT OF JUSTICE**
330 University Avenue
Toronto, Ontario M5G 1R7

TO: CITY OF TORONTO
City Solicitor
Legal Services, City of Toronto
Metro Hall, 26th Floor
55 John Street
Toronto, Ontario M5V 3C6

AND TO: CROWN LAW OFFICE (CIVIL LAW)
Ministry of the Attorney General
720 Bay Street, 8th Floor
Toronto, Ontario M7A 2S9

AND TO: THE TORONTO POLICE SERVICES BOARD
40 College Street
Toronto, Ontario M5G 2J3

STATEMENT OF CLAIM

1. The Plaintiff claims:
 - (a) damages in an amount to be determined;
 - (b) in the alternative, restitution, contribution and indemnity in an amount to be determined;
 - (c) pre-judgment interest in accordance with section 128 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
 - (d) post-judgment interest in accordance with section 129 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
 - (e) the costs of this action, plus goods and services tax; and
 - (f) SUCH FURTHER AND OTHER RELIEF as this Honourable Court may deem just.

A. THE PARTIES

2. The plaintiff, **the Toronto District School Board** (“**the TDSB**”), is the English-language public-secular school board servicing the district of Toronto, Ontario. Its head office is located at 5050 Yonge Street, Toronto, Ontario M2N 5N8. It is conferred corporate status pursuant to section 58.5 of Ontario’s *Education Act*.

3. The defendant, **Her Majesty the Queen in Right of the Province of Ontario** (“**the Province**”) is the Provincial Crown, as represented by the Government of Ontario, and at all material times was responsible for Ontario’s Office of the Fire Marshal (“**OFM**”).

4. The defendant, **City of Toronto** (“**the City**”), is a municipal corporation governed by the *City of Toronto Act, 2006*, S.O. 2006, c. 11, and at all material times was responsible for the Toronto Fire Services (“**TFS**”).

5. The defendant, the **Toronto Police Services Board** (“**TPSB**”), is a civilian body that oversees the Toronto Police Service (“**TPS**”), and at all material times was responsible for the TPS. Its head office is located at 40 College Street, Toronto, Ontario M5G 2J3.

B. BACKGROUND

6. TDSB is the owner of the York Memorial Collegiate Institute (the “**York Building**” or the “**Building**”), located at 2690 Eglinton Avenue West in Toronto, portions of which are designated as a heritage building pursuant to Schedule “B” of 1985 By-Law to Designate under the *Ontario Heritage Act*, R.S.O. 180.

7. The Building, a public high school operated under the jurisdiction of the TDSB, is part of a larger complex of buildings on a single plot of land owned by the TDSB.

8. The Building includes an original main building, constructed in 1929, plus a basement and a second floor auditorium. West and east wing additions were constructed in the 1950s – 1960s. The main building is constructed of conventional wood framing on steel beams and columns, with load bearing walls made of terracotta blocks, and with exterior masonry brick veneer.

9. The interior of the original Building includes masonry walls, steel lathe and plaster, gypsum, vinyl sheet flooring, vinyl floor tiles and fibre ceiling tiles. Interior pipe insulation within the floor and wall space cavities consisted of brown cellulosic paper pipe insulation, fiberglass batts and horsehair. Hydro was provided to the Building through an underground service from the east.

10. To the west side of the Building is a one-storey high TDSB gymnasium, along with a City-operated community centre and swimming pool. Attached to the east side of the Building is a TDSB-owned four storey building (“**Trethewey**”) and a two-storey Annex. The Trethewey building supplied the main power for the surrounding buildings.

11. The Building was largely destroyed by fire on May 7, 2019, (“**the Fire**”), following a rekindling of a smaller fire on May 6, 2019, that was confined to the Building’s auditorium.

C. THE FIRES

12. On May 6, 2019, at approximately 2:12 p.m., the Building's fire alarm was triggered by a fire in the second floor auditorium of the Building. The fire was located in a hallway space behind the main stage area.

13. Approximately 5 minutes prior to the fire alarm going off, there had been a drama class in the auditorium. The class had finished and all the students had exited. The three auditorium doors were locked at the time the alarm sounded.

14. In response to the initial fire, the school was evacuated. The TFS responded to the fire. The first unit was on site at approximately 2:20 p.m. The fire was identified in the auditorium hallway behind the stage, and TFS commenced an offensive attack on the fire within the school.

15. TFS also contacted the TPS and OFM, who attended at the scene.

16. In the process of fighting the fire, firefighting team R423, Platoon C, attempted to breach the stage wall to apply water but they were unable to do so due to the presence of multiple layers of wood. They found a false veneer wall, then a void, and then an original wooden wall which they could not penetrate. They exited the Building to change out their air cylinders, at which time they were told that the fire had been knocked down. They abandoned further efforts to access the area below the stage and apply water. They were then reassigned to silence the alarm, retrieve personal belongings for staff and students, and other such tasks.

17. Overhaul is a tactical priority of firefighting; the activity that makes sure the fire is completely out. It has priority over ventilation. After all visible fire has been extinguished, the area must be checked for residual fire, including any fire that could have extended into areas not originally involved, such as floors, walls and ceilings. Incomplete overhaul may allow the fire to rekindle. However, in this case, inadequate or no overhaul was conducted of the floor below the stage or the ceiling of the ground floor below the center stage and hallway in the area of the fire. Before TFS personnel had conducted a thorough overhaul of the fire scene, they were re-assigned to ventilate the Building and carry out other such tasks.

18. During TFS efforts to suppress the fire, only a single thermal imaging camera (TIC) was used in the back-stage area of the auditorium to look for heat signatures. This occurred at or around 3:32 p.m.

19. Despite their being more than 20 TICs available to TFS at the site, only one (1) TIC, camera A113 (video 11-14), was used for any overhaul at the Building. The others TICs that were available to TFS personnel at the fire scene were either (i) not used on May 6, 2019; or (ii) not used for overhaul purposes.

20. At or around 3:47 p.m., a TFS spokesperson reported that the fire had been knocked down but there was still ‘hidden burning in the ceilings and walls’. However, a few minutes later, at 3:56 p.m., TFS Fire Chief Matthew Pegg reported to Mayor John Tory and others that the fire was “now under control and we are in the process of clearing crews from the scene...Our Fire Investigations Team is on scene and the investigation into origin, cause and circumstances of the fire is now underway.”

21. At or around 5:54 p.m., a TFS Fire Investigator, Isaac Cumbo, arrived on site. He advised TPS that ‘they anticipated holding the scene overnight’.

22. All fire trucks and other fire control apparatus departed the scene by 6:45 p.m. The TFS did not post a fire watch at the Building. The TFS *assumed* that the fire was out and that a fire watch was not required. TFS Division Chief Larry Cocco, TFS Fire Investigator Isaac Cumbo, and TPS Detective Shawn Gilbert remained on site.

23. Given the age of the Building and numerous uncertainties surrounding the Building’s construction attendant with its age, including but not limited to the combustible nature of its construction (i.e., cellulosic insulation, cardboard and horsehair) and the presence of concealed spaces/voids in the walls and floor cavities and lack of a sprinkler system, there was a heightened risk of the fire causing a rekindling event of which the TFS, TPS and OFM ought to have been aware.

24. At the time of the departure of TFS, the fire continued burning in the floor/walls, where there was combustible material including cellulosic insulation, horsehair, corrugated cardboard,

insulation materials of high voltage electrical wiring, and the wood subfloor. The fire continued to develop with the assistance of a wall/floor vent located in the northeast corner of the stage area.

25. TPS advised the school Principal, Donna Drummond, that the matter was under criminal investigation and that, since the site was a potential crime scene, TPS would secure the site and ensure that a fire watch was implemented overnight. The Principal left the site with this understanding.

26. Remaining TDSB personnel inquired about whether they could arrange for air testing to be performed at the school. They were told that they would have to wait.

27. At or around 7:06 p.m., an OFM Investigator, Chris ter Stege, arrived at the site. He met with TFS Division Chief Larry Cocco, TFS Fire Investigator Isaac Cumbo and TPS personnel. Police seals were placed on all doors to the auditorium with the exception of the door at the right of the stage. The investigation was to continue in the morning. It was determined amongst them that in the interim, scene security would be maintained overnight by TDSB Security, although this decision was not communicated to the TDSB at that time.

28. The OFM Investigator, Mr. ter Stege, asked the school caretaker to turn off the electricity in the auditorium area. A TDSB electrician was called to the site. He and the caretaker were escorted into the auditorium by TFS and Mr. ter Stege, in order to identify the tag on the electrical panel in the stage area. The caretaker and electrician were advised that the area was an active crime scene and they were not allowed to take any photographs or touch anything.

29. TFS left the auditorium to fetch pliers, and Mr. ter Stege, the caretaker and electrician began searching the Building for the main power switches supplying electrical power to the auditorium. They walked along a hallway on the ground floor past three classrooms, the middle classroom being located directly beneath the stage area where the fire occurred. Mr. ter Stege stopped for a second and tried to open the middle classroom door, but it was locked. The caretaker unlocked the door and Mr. ter Stege quickly looked inside, noting that there was no fire damage in the room, but there was water damage on the ceiling and water on the floor. He remarked that the room seemed “unusually warm”.

30. Despite Mr. ter Stege's expressed concern that the middle classroom directly below the stage in the area of the fire was unusually warm, no thermal imaging scanning of this room was undertaken at any time, nor was any overhaul or further investigation undertaken in this room by any of the TPS, TFS or the OFM. Mr. ter Stege expressed his concern about the room being unusually warm to the TFS Investigators but no further action was taken. Mr. ter Stege did not express his concerns to the TDSB either in writing or otherwise.

31. The TDSB was then advised by TFS that they could do air testing in the adjacent building, Trethewey. After that testing was performed, the TFS permitted air testing inside the Building, excluding the third floor and the auditorium. All air tests failed, indicating that air quality was unsafe. The TDSB reported this fact to TFS Chief Cocco.

32. At approximately 8:00 p.m., a TPS Detective, Shawn Gilbert, asked a TDSB Project Supervisor who was still in attendance at the site to have the TDSB provide a security guard to guard the site. Detective Gilbert advised the TDSB Project Supervisor that they were treating the auditorium as a crime scene and they needed to put security at the door of the auditorium to ensure that no one would enter. The TDSB Project Supervisor advised Detective Gilbert that air quality tests had failed. The Detective then instructed the TDSB to post security personnel outside the exit doors of the Building instead.

33. The TDSB Project Supervisor conveyed Detective Gilbert's request internally, and a TDSB security guard was requested to attend at the site.

34. A TDSB security guard attended at the site. He advised the Detective that TDSB security personnel were needed at other schools as well and it was the job of the police to post security for their crime scenes. Detective Gilbert responded that he 'did not have the resources and his guys needed to leave'. The TDSB security guard protested that he was needed at other schools and the TDSB did not have the resources either.

35. Upon further protest by the TDSB security guard, the OFM Fire Investigator, Mr. ter Stege came over to the security guard and intervened in the discussion, stating, 'you're the owner of the Building and your fire alarm is not working so you need to provide a fire watch anyhow' (or words to that effect). The security guard called his boss, and was instructed to stay at the site.

36. Provision of a fire watch is not a responsibility of TDSB security personnel. TDSB security guards, including the guard in this case, do not have formal fire watch training, nor do they have the personal protective equipment (PPE) necessary to enter fire scenes. They are not trained to conduct overhaul, or use thermal imaging cameras to look for hot spots.

37. The OFM investigator, Mr. ter Stege, then told the security guard to park his car in the rear parking lot facing the auditorium. Mr. ter Stege told the security guard to pay attention to the windows directly below the auditorium. He said that the room seemed hotter than it should be, he was concerned about another flare up, and he wanted the security guard to pay attention to those windows for any signs of smoke. He instructed the security guard not to go into the Building, stating that they would be back in the morning.

38. None of the TFS, TPS or OFM personnel made inquiries of the security guard as to whether he had any training or the equipment necessary to conduct a proper fire watch. The direction of Mr. ter Stege to the TDSB security guard to sit in his vehicle in the rear parking lot and keep an eye out for smoke does not constitute a fire watch within any reasonable industry standard or practice.

39. At approximately 9:15 p.m., the remaining TFS Fire Investigators, OFM and TPS abandoned the fire scene, despite the expressed concerns of Mr. ter Stege to TFS Investigators about the unusually warm room below the origin of the fire and his expressed concern to the TDSB security guard about the possibility of a flare up, leaving the sole TDSB security guard, untrained in fire watch procedures and without any PPE, sitting alone in the rear parking lot of the Building.

40. At the time of their departure from the fire scene, the site had not been released to the TDSB. At all material times, the fire site remained under the care, power, direction and control of the TFS, OFM and TPS.

41. The intention of the TFS, OFM and TPS was to return to the Building the following morning at which time they would have inspected it for further safety concerns and initiated an investigation into the origin, cause and circumstances of the fire.

42. The decision of the TFS, TPS and OFM to abandon the Building on the evening of May 6, 2019, without ensuring a proper fire watch was in place, was driven primarily by cost concerns of senior personnel, including a desire to reduce overtime costs, and purported lack of adequate resources.

43. At 9:59 p.m., TFS Fire Investigator Isaac Cumbo reported to Division Chief Larry Cocco and District Chief Karen Borne, “Chiefs, The scene is being held by TDSB security. Access into the auditorium has been restricted. Chris [ter Stege, OFM] and an engineer will be back on scene tomorrow morning”. Investigator Cumbo then immediately emailed District Chief Karen Borne, stating “Overtime 19:12-22:00”.

44. At 10:30 p.m. on May 6, 2019, there was a security personnel shift change and a new security guard showed up to relieve the original guard, who imparted the instructions given to him by OFM Investigator ter Stege. The original guard and the new guard did a walk around the perimeter of the school, and the original guard explained to the new guard where to position his car, that he should focus on the windows below the auditorium for any signs of smoke, and not go into the Building.

45. As no on-site washroom facilities were available to the security personnel in the parking lot, sometime between approximately 1:00 a.m. to 1:30 a.m. on May 7, 2019, the new security guard used his keys to briefly enter the Building and use a bathroom in the caretaker’s area. The security guard observed that there was bit of a ‘haze’ inside the hallway leading to the auditorium, but he did not appreciate its potential significance. He assumed that the haze was due to lack of ventilation of the Building from the original fire.

46. At approximately 3:15 a.m. on May 7, 2019, the security guard in the parking lot noticed a flicker of light in the auditorium window and immediately called TFS.

47. TFS arrived within 3-4 minutes of having been alerted. By the time TFS fire trucks arrived, the Building was ablaze. A working fire was discovered beneath the auditorium stage which then spread quickly below and behind the stage area. The fire ultimately developed into a 6-alarm fire.

48. Once the rekindled May 7, 2019 fire was confirmed to be extinguished, several safety concerns were identified at the scene including, but not limited to, the presence of asbestos within the Building, active solar array panels providing power on the roof, structural integrity issues with several collapse zones, flooding in basement areas, and air quality concerns.

49. In response to the May 7, 2019 rekindling of the May 6, 2019 fire, the TFS and OFM sought to mislead, misrepresent and suppress evidence of their negligence and gross negligence in respect of the fire. Among other things:

- While efforts to extinguish the fire were ongoing in the early hours of May 7, 2019, a TFS Spokesperson, Fire Captain David Eckerman, was interviewed by a CP24 reporter. During that early interview, he stated as fact that the TFS would have posted a fire watch overnight, that they would have walked the Building, gone in with thermal imaging and looked for any heat signatures. None of these things were, in fact, done. All subsequent interviews with respect to the fires were then given by Fire Chief Matthew Pegg on behalf of the TFS. Despite the May 7, 2019 being an evident rekindling of the May 6, 2019 fire below the stage area of the auditorium, Fire Chief Matthew Pegg falsely reported to the TDSB, media and others that the May 7, 2019 fire was “separate and distinct” from the first fire on May 6, 2019;
- On May 17, 2019, the OFM contacted the TFS, providing them with a “heads up as a professional courtesy” that the OFM had reached a conclusion as to the cause of the fire and that “it would not look good on the TFS”. The TFS responded that it had not yet sent the OFM all of the documents related to the fire including some outstanding firefighter statements, that they would advise Fire Chief Pegg of the discussion, and that they would send over the outstanding paperwork;
- After receiving the OFM’s phone call of May 17, 2019, certain of the narrative entries in the TFS Incident Report in respect of the May 6, 2019 fire were modified in an effort to suppress evidence of negligence on the part of the TFS;
- On May 27, 2019, in response to an email from a TDSB property adjuster requesting the TFS Incident Report, TFS Divisions Chief Larry Cocco advised that the TFS had opened

up two separate incident numbers in respect of the fires on May 6-7, 2019. He did not respond to a query about why two numbers had been assigned, stating that the Emergency Incident Report would not be available for release until the conclusion of the TFS investigation, and he did not know when that would be;

- On June 20, 2019, the TDSB's counsel sent a notice letter to the TFS, OFM and TPS advising them of a likely claim for damages with respect to the Fire on May 7, 2019;
- On July 25, 2019, the TFS (in the person of Fire Chief Pegg) met with the OFM (headed by his brother, Jon Pegg), to discuss the OFM's concerns respecting the conduct of TFS's response to the initial fire.
- As a result of the July 25, 2019 meeting between Fire Chief Pegg and the OFM and concerns about the potential liability of the TFS and OFM with respect to the May 7, 2019 fire, the final report of the OFM Report was drafted so as to downplay, mislead, conceal and suppress evidence of negligence and gross negligence on the part of the TFS and OFM. Among other things, the report failed to address key facts relevant to the cause of the rekindling, including but not limited to:
 - The lack of proper overhaul given the presence of cellulosic insulation at the Building, and the TFS's failure to comply with its Standard Operating Guidelines respecting cellulose insulation;
 - The fact that the TFS's own Standard Operating Guidelines respecting cellulose insulation expressly state that the rekindle risk of a fire involving cellulose insulation is high and TFS personnel *shall never assume* fires involving cellulose insulation are extinguished;
 - The lack of use of TICs by TFS to conduct overhaul, and the lack of any overhaul or use of TICs in the ceiling of the middle classroom immediately below the stage in the area of the fire origin;

- Mr. ter Stege's own observations on May 6, 2019, that the classroom below the auditorium had been unusually warm, his reporting the same to TFS Investigators, the fact that no further action was taken by either TFS or OFM in this regard, and the implications of the same;
- The absence of any fire watch despite the fact that the TFS's own Standard Operating Guidelines respecting cellulose insulation expressly required that a firewatch be established in accordance with Standard Operating Guideline G-FIWA Firewatch;
- Additionally, the OFM's report falsely states, "A fire watch was put into place by the [TDSB] security services at 9:30 p.m.". In fact, the security guard was requested by TPS, instructed by Mr. ter Stege, and could not be considered a fire watch pursuant to Standard Operating Guideline G-FIWA Firewatch, or indeed pursuant to any reasonable industry standard.

50. Had the TFS conducted a proper, thorough overhaul of the fire on May 6, 2019 and extinguished the initial fire, damage to the Building would have been confined primarily to the stage area of the auditorium and the damages being claimed in this case would have been avoided.

51. Had the TFS, OFM or TPS ensured that a proper fire watch was in place inside the Building by trained fire watch personnel equipped with proper PPE, the rekindled fire would have been identified and extinguished, so that the damages being claimed in this case would have been avoided.

D. DAMAGES

52. The Fire struck the Building only weeks before a celebration to mark the school's 90th anniversary. The consequences of the Fire have been devastating for the TDSB, as well as its staff and its students. Fortunately, there were no injuries, however the historic Building sustained catastrophic damage, and there was significant environmental impact due to smoke, fire suppression chemicals and asbestos contamination. The students' school years were disrupted; the students and staff needed to be relocated to a different school and they lost educational and

extracurricular opportunities as a result, as well as their personal belongings – photos, wallets, phones, laptops and other such contents. The Building and the Trethewey building had other tenants, such as the TFS (Toronto Foundation for Student Success) and the Transit Consortium, who were impacted by the May 7, 2019 fire, and the broader community was affected as well. Among other things, the outdoor track could not be used, nor could field permits be issued for it.

53. As a result of the Fire, the TDSB incurred damage in an amount not yet finally quantified but anticipated to meet or exceed \$90,000,000.00. Anticipated heads of damage include but are not limited to the following:

- a) Emergency clean-up, demolition, restoration and rebuilding costs to the Building and adjacent/nearby impacted structures and buildings owned by the TDSB and/or for which the TDSB had potential liability, including the Trethewey building, the TDSB gymnasium, and other impacted structures/buildings;
- b) Rebuilding costs and associated costs/expenses (surveys, permits etc.);
- c) Professional fees, including those of cost consultants, accountants, heritage consultants, engineers of various disciplines, legal fees, media consultancy fees, investigators, and others;
- d) Loss of contents;
- e) Supply of temporary and permanent heat and power to the Building and adjacent buildings/structures;
- f) Loss of valuable papers, historical artifacts and memorabilia, and preservation efforts with respect to the same;
- g) Fire, smoke and water damage, and environmental damage to adjacent buildings and structures, associated obligations and liabilities, as well as expenses and costs arising from loss of heating and electricity to those buildings/structures;
- h) Costs relating to environmental abatement and asbestos containment remediation;

- i) Costs to rehabilitate another school to transfer York students while the Building was out of commission, and other costs associated with said relocation;
- j) Increased insurance premiums directly attributable to the Fire;
- k) Liability, including contingent future liability, to third parties, in contract, tort and otherwise;
- l) Costs necessitated by compliance with heritage requirements, modern Building Code requirements and costs related to compliance with other associated rules, laws and regulations, all of which would have been avoided but for the May 7, 2019 Fire;
- m) Increased/extra costs, including increased labour and expenses associated with the foregoing; and
- n) Such further and other damages, costs, expenses and liabilities as may become known to the TDSB prior to the trial of this action.

54. The TDSB excludes from its claim any damages sustained during the May 6, 2019 initial fire and associated suppression efforts.

55. The defendants are vicariously liable for the acts, omissions, negligence, gross negligence, breach of contract, misrepresentations of their employees, servants, agents, consultants, contractors, sub-contractors and others for whom they may be held responsible at law.

E. LIABILITY

56. At all material times, the Building was in the care, custody and control of the defendants.

57. At all material times, the defendants failed to exercise and ensure proper care, control, supervision of the fire scene and the Building so as to ensure the safety of persons and property, and failed to ensure the same of others.

58. At all material times, the defendants failed to ensure the clear, appropriate and direct, transfer of custody/control of the fire scene and the Building so as to ensure the safety of persons and property, and failed to ensure the same of others.

E.1 City of Toronto and TFS

59. Pursuant to Ontario's *Fire Protection and Prevention Act, 1997*, S.O. 1997, c. 4, the City of Toronto's fire department is required to "provide...fire protection services as it determines may be necessary in accordance with its needs and circumstances." In discharging this duty, the City of Toronto is mandated to set up a fire department, and it is vicariously liable for the torts committed by the fire department in providing fire-fighting services.

60. The City of Toronto, having acted upon a decision to establish and maintain a fire department, placed itself in a relationship to the public that carried with it a common law duty of care. It is liable in law for any damage caused to another through its fault and through that of its employees in the course of their duties.

61. Members of the community of the City of Toronto, including the TDSB, are entitled to expect a high standard of service from the TFS consistent with the resources that the community has made available for fire protection. The Toronto community, including the TDSB, are entitled to receive from the TFS the best performance that that TFS is capable of in the circumstances. The City of Toronto owed a duty of care to the TDSB to ensure that the TFS carried out a response to the fire on May 6, 2019, in a reasonable manner and without negligence.

62. TFS Standard Operating Guideline "Cellulose Insulation", (File Code: G-Cell, issued January 15, 2018) provides in relevant part:

Responsibility: All [TFS] personnel are responsible for maintaining an understanding of the precautions that should be exercised at incidents involving cellulose insulation. Company Officers are responsible for treating fires involving cellulose insulation with the *utmost caution*. Incident Commanders are responsible for ensuring *complete* extinguishment of fires and determining extent of overhaul required.

Guideline:

General

1. Cellulose insulation is a material with significant rekindle capability. ...
 4. The rekindle risk at a fire involving cellulose insulation is high. **Personnel *shall never assume fires involving cellulose insulation are extinguished*** [emphasis added].
 5. Upon discovery of cellulose insulation involved in any building fire, the Incident Commander shall... (d) Ensure overhaul procedures are carried out which include complete removal of the cellulose insulation from a reasonable size area beyond the fire area (approx. 3 m radius) whenever possible. ...
 7. **Firewatch is to be established in accordance with G-FIWA – Firewatch.**
63. The TFS Firewatch Guidelines (Incident and Emergency Operations, File Code G-FIWA) issued March 29, 2019, provides in relevant part:
- a. TFS Incident Commanders are responsible for the verification of the extinguishment of fire;
 - b. Where circumstances warrant, TFS Incident Commanders will establish and maintain a fire watch, including but not limited to continuing fire risk and undue risk of public hazard;
 - c. All TFS personnel are responsible for being knowledgeable of fire watch procedures;
 - d. TFS Platoon Chiefs are responsible for scheduling, implementing and maintaining a fire watch where the circumstances require it;
 - e. TFS Platoon Chiefs are required to provide to the Communications Center Officer a fire watch schedule detailing assigned apparatus and times for the rotations of personnel during a fire watch;
 - f. The Communications Center Officer is responsible for notifying crews assigned fire watch duties to inform them of their assigned times provided by the Platoon Chief; and

- g. Once fire watch times have been assigned, it is the Company Officer's responsibility to ensure that they are on the scene at their designated times.

64. The National Fire Protection Association's (NFPA) 101 Life Safety Code (2019) s. 3.3.18, defines a Fire Watch as, "the assignment of a person or persons to an area for the express purpose of notifying the fire department, the building occupants, or both of an emergency; preventing a fire from occurring, extinguishing small fires, or protecting the public from fire or life safety dangers." The NFPA Code requires that only trained fire watch personnel be used; that they have appropriate protective equipment; that they patrol the site at least once per hour; and that they have access to hoses or portable fire extinguishers.

65. The TFS Standard Operating Guideline, "Overhaul and Salvage Operations", issued March 29, 2019 (Incident and Emergency Operations, File Code G-OVER), provides all TFS personnel with guidelines for overhaul operations. This standard requires, among other things, that:

- a. the primary reason for overhaul operations at firefighting incidents should be the prevention of rekindling of fire;
- b. all TFS personnel are responsible for maintaining an understanding of proper overhaul and utilizing effective practices; and
- c. Incident Commanders are responsible for ensuring property has been sufficiently overhauled to prevent the rekindling of fire;

66. In responding to a fire, fire departments in Ontario, including the TFS, have a duty to overhaul the fire area by searching for and extinguishing hidden fires, restoring the premises to a secure state, and using such tools as may be necessary to ensure that the fire is completely extinguished, no rekindling can occur and the building is secure. A properly completed overhaul is a completely extinguished fire.

67. Overhaul in accordance with accepted industry firefighting standards, and the TFS's own internal standards, was not completed on May 6, 2019.

68. Where there is a risk that a fire has not been completely extinguished, reasonable and proper firefighting methodology requires that a fire watch be implemented. In the circumstances of the May 6, 2019 fire at the Building, the proper procedure would have been to assign a fire truck and two firefighters, each equipped with a radio, to conduct a fire watch overnight. A proper fire watch would have necessitated that the firefighters enter and patrol the auditorium of the Building with TICs and fire suppression equipment, looking for heat signatures and smoke.

69. A proper fire watch in accordance with accepted industry firefighting standards, and the TFS's own internal standards, was not put in place or implemented on May 6, 2019.

70. The conduct of the TFS on May 6, 2019 fell below the reasonably accepted standards for professional firefighting, and its own internal standards, in all of the circumstances.

71. The Plaintiff's damages were caused by reason of the acts, omissions, negligence, gross negligence and breach of duty of the TFS, particulars of which include but are not limited to the following:

- a) It failed to undertake reasonable, or any, steps, to ensure that the fire on May 6, 2019, had been extinguished, with no possibility of rekindling;
- b) It failed to conduct a reasonable, adequate overhaul and fire watch on May 6, 2019, in all of the circumstances;
- c) It failed to institute an adequate, reasonable overhaul and fire watch that accorded with industry standards, best practices and the TFS's own internal standards;
- d) It failed to comply with industry standards, reasonable standards, TFS standards, and such other standards, codes, laws and regulations as may be applicable in the circumstances of this case;
- e) It failed to adequately supervise and instruct employees, servants, and agents with respect to overhaul and implementing a fire watch;

- f) It chose to override and ignore the concerns expressed by the OFM about the unusually warm classroom below the area of fire origin, risk of rekindling and request that a fire watch be put in place;
- g) It failed to warn the Plaintiff, or anyone, of the dangers inherent in leaving the Building without having properly determined the cause of the fire, ascertaining the possibility of it rekindling during the night, and implementing a professional fire watch by qualified persons;
- h) It abandoned the Building in an unsafe situation, where it knew or ought to have known there was a serious risk of a rekindling event;
- i) It failed to ensure proper care, control, supervision and transfer of custody/control of the fire scene at material times;
- j) It used incompetent employees, agents, and servants without proper knowledge, experience, training, licensing and certification;
- k) It failed to provide promised services;
- l) It created a dangerous situation; and
- m) Such further and other particulars as may become known to the TDSB prior to a trial of this action.

E.2 The Province of Ontario and the OFM

72. Notice of this Claim was provided to the province of Ontario on June 20, 2019, pursuant to the notice requirements in the *Proceedings Against the Crown Act*, then in force.

73. The OFM, having sent an Investigator to attend at the fire scene on May 6, 2019, and in giving directives to the TDSB, placed itself in a relationship to the TDSB that carried with it a

common law duty of care. It is liable in law for any damage caused to another through its fault and through that of its employees in the course of their duties.

74. Members of the community of the City of Toronto, including the TDSB, are entitled to expect a high standard of service from the OFM and are entitled to receive the best performance that the OFM is capable of in the circumstances. The OFM owed a duty of care to the TDSB to ensure that its actions in respect of the fire on May 6, 2019, were carried out in a reasonable manner and without negligence, so as to ensure the safety of persons and property at the fire scene.

75. The OFM investigator who attended the scene, Chris ter Stege, knew, or ought to have known, by reason of his professional experience, that there was a serious risk that the fire could rekindle and that a proper, adequate fire watch that complied with acceptable industry standards, was warranted in the circumstances.

76. Despite having a concern on May 6, 2019, that the classroom below the stage was unusually warm, and recognizing that there was a serious risk of fire rekindling, the OFM Investigator Chris ter Stege acquiesced in the decision of the TFS and TPS to abandon the Building without implementing further overhaul or ensuring the presence of a proper, reasonable fire watch overnight by qualified TFS personnel that would accord with industry standards in all of the circumstances.

77. The Plaintiff's damages were caused by reason of the acts, omissions, negligence, gross negligence and breach of duty of the OFM, particulars of which include but are not limited to the following:

- a) It failed to undertake reasonable, or any, steps, to ensure that the fire had been extinguished, with no possibility of rekindling;
- b) It failed to undertake reasonable, or any, steps to ensure or require that an examination of the Building with thermal imaging cameras was conducted in a proper, workman like and safe manner, in order to identify existing heat signatures;

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- c) It failed to institute a reasonable, adequate fire watch by trained, qualified personnel that accorded with industry standards in all of the circumstance, or to ensure the same of others;
- d) It failed to adequately supervise and instruct employees, servants, and agents with respect to investigating the fire and implementing a fire watch;
- e) It failed to warn the Plaintiff, or anyone, of the dangers inherent in leaving the Building without having properly determined the cause of the fire, where there was a heightened risk of rekindling due to the presence of cellulose insulation, where he had expressed concerns about a classroom below the area of origin being “unusually warm”, and without the TFS and TPS having implemented a professional fire watch by qualified persons that conformed to reasonable industry standards in all of the circumstances;
- f) It used incompetent employees, agents, and servants who lacked adequate knowledge, training, equipment, certification, education, and experience;
- g) It failed to provide promised services;
- h) It failed to act reasonably and prudently to ensure the safety of persons and property in all of the circumstances;
- i) It created a dangerous situation; and
- j) Such further and other particulars as may become known to the TDSB prior to a trial of this action.

78. The Province of Ontario and the OFM are vicariously liable for the negligence, breach of contract, breach of duty and breach of warranties of their employees, servants, agents, consultants, contractors and sub-contractors.

79. The *Crown Liability and Proceedings Act, 2019*, S.O. s. 7, Sched. 17 does not protect the Province of Ontario and the OFM from liability pleaded herein as the impugned conduct is

operational in nature rather than a policy decision. The TDSB pleads and relies on *Francis v. Ontario*, 2020 ONSC 1644 (SCJ).

E.3 Toronto Police Services Board

80. Pursuant to the *Police Services Act*, R.S.O. 1990, c. P15 (“**PSA**”), the Toronto Police Services Board (the “**Police Board**”) is responsible for the provision of adequate and effective police services in the City of Toronto. Members of the Toronto Police Force are under the Police Board’s jurisdiction.

81. The Police Board must ensure that its police force “consists of...police officers employed by the police force and other employees of the police force as are adequate”, and with adequate equipment and facilities. By regulation made under the *PSA, Adequacy and Effectiveness of Police Services*, O. Reg. 3/99, the police are required to use their own police officers to respond to emergency calls for service, and provide general and directed patrols.

82. In media interviews on May 6 and May 7, 2019, both the TFS and TPS chiefs stated that the fires were being treated as potential cases of arson. The TPS placed evidence tapes on the doors of the Building auditorium and prohibited entry to unauthorized personnel. Since the fire scene was an active crime scene at all material times, the TPS was under a duty to take steps to ensure the safety of the Building, and was responsible for ensuring an adequate, reasonable fire watch was in place overnight that complied with industry standards and reasonable standards was in place on the evening of May 6, 2019.

83. The instruction by TPS to the TDSB security guard to provide security for their crime scene was an improper delegation of police duties that they were under a statutory obligation to carry out themselves or directly supervise. TPS then abandoned the Building without ensuring a proper, reasonable, adequate fire watch was in place at material times.

84. The Plaintiff’s damages were caused by reason of the negligence, gross negligence and breach of duty of the TPS, particulars of which include but are not limited to the following:

- a. It failed to maintain a presence in the Building, which it had deemed a crime scene;

- b. It abandoned the Building without ensuring that a proper, reasonable adequate fire watch was in place that compiled with industry standards, and safe and reasonable standards;
- c. It failed to adequately supervise and instruct employees, servants, and agents with respect to their care, custody and control of the crime scene, the Building and TDSB property;
- d. It failed to warn the Plaintiff, or anyone, of the dangers inherent in the foregoing;
- e. It failed to ensure proper care, control, supervision of the property and transfer of custody/control of the fire scene at material times;
- f. It used incompetent employees, agents, and servants without proper knowledge, education, licensing, certification and training;
- g. It failed to provide promised services;
- h. It delegated its statutory duties improperly, negligently and without authority;
- i. It created a dangerous situation; and
- j. Such further and other particulars as may become known to the TDSB prior to a trial of this action.

F. CONCLUSIONS

85. As a result of the foregoing, the defendants are fully, jointly and severally liable to the Plaintiff for the full amount of damages claimed herein.

86. As a result of the negligence, gross negligence and breach of duty of the defendants, the Plaintiff has suffered damages, including liability to third parties, in an amount to be determined, but which is anticipated to meet or exceed \$90,000,000.00 CAD.

87. The TDSB pleads and relies on all legal theories of liability and causes of action that may arise on the facts as pleaded herein, including common law and statutory causes of action that are not expressly particularized in this Claim.

88. The TDSB pleads and relies upon the provisions of:

- a) the *Negligence Act*, R.S.O. 1990, c. N-1;
- b) the *Fire Code*, O. Reg. 213/07;
- c) TFS Standard Operating Guideline, “Cellulose Insulation”, Equipment, File Code: G-Cell, issued January 15, 2018;

TFS Firewatch Guideline, File Code G-FIWA, issued March 29, 2019;
- e) TFS Standard Operating Guideline, “Overhaul and Salvage Operations”, Incident and Emergency Operations, File Code G-OVER, issued March 29, 2019;
- f) *Fire Protection and Prevention Act, 1997*, S.O. 1997, c. 4 and Directive 2015-002, “Reporting of Fires and Explosions Requiring Investigation” (issued July 2015 and in effect at all material times);
- g) National Fire Protection Association (NFPA) standards, as may be applicable;
- h) The *Police Services Act*, R.S.O. 1990, c. P15;
- i) *Adequacy and Effectiveness of Police Services*, O. Reg. 3/99;
- j) *Gallagher v. Burlington (City)*, [1994] O.J. No. 255 (S.C.J.);
- k) *Francis v. Ontario*, 2020 ONSC 1644 (S.C.J.);

- l) *O. Reg. 73/20* under s. 7(1) of the *Emergency Management and Civil Protection Act*, R.S.O. 1990, c. E.9; and
- m) Such further and other Codes, regulations, standards, by-laws, industry practices; TFS practices and standards; OFM practices and standards, TPS practices and standards, and best practices as may apply to the facts of this case.

89. The TDSB proposes that this action be tried in the city of Toronto, in the province of Ontario. A trial of this action will not take more than 25 days.

Date Issued: _____

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ONTARIO
SUPERIOR COURT OF JUSTICE
PROCEEDING COMMENCED AT
TORONTO

STATEMENT OF CLAIM

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