

FORM 68A
Courts of Justice Act
NOTICE OF APPLICATION TO DIVISIONAL COURT FOR JUDICIAL REVIEW

ONTARIO
SUPERIOR COURT OF JUSTICE
(Divisional Court)

BETWEEN:

KELLY LYNN DONOVAN

Applicant

- and -

HUMAN RIGHTS TRIBUNAL OF ONTARIO,
THE REGIONAL MUNICIPALITY OF WATERLOO REGIONAL POLICE SERVICES
BOARD, and BRYAN LARKIN

Respondents

APPLICATION UNDER s. 2(1) of the *Judicial Review Procedure Act*, RSO 1990, c J.1

AMENDED
NOTICE OF APPLICATION TO DIVISIONAL COURT FOR JUDICIAL REVIEW

TO THE RESPONDENT

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears on the following page.

THIS APPLICATION for judicial review will come on for a hearing before the Divisional Court on a date to be fixed by the registrar at the place of hearing requested by the applicant. The applicant requests that this application be heard at Osgoode Hall, 130 Queen Street West, Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the office of the Divisional Court, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSSEXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the office of the Divisional Court within thirty days after service on you of the applicant's application record, or at least four days before the hearing, whichever is earlier.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN TO 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.

Date December 16, 2022

Issued by _____

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AND TO Attorney General of Ontario
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APPLICATION

1. The Applicant makes this Application under s. 2 of the [Judicial Review Procedure Act, R.S.O. 1990, c. J.1](#) (“JRPA”) for:
 - i. an order in the nature *certiorari* or otherwise, to set aside the interim decision of the Respondent Human Rights Tribunal of Ontario (the “Tribunal”) dated November 25, 2022, *The Regional Municipality of Waterloo Police Services Board v. Donovan*, [2022 HRTO 1409](#), and Reconsideration Decision dated March 1, 2023, *Regional Municipality of Waterloo Police Services Board v. Donovan*, [2023 HRTO 276](#), and allow the Applicant to proceed with the series of incidents of contravention of settlement as alleged in application 2018-33503-S;
 - ii. an order in the nature of *mandamus* compelling the Tribunal to address the Applicant’s requests for dismissal of application 2018-33237, made on July 10, 2018 and April 15, 2020, on the following bases: the Tribunal does not have jurisdiction, the application is frivolous, vexatious and was commenced in bad faith, it is an abuse of process, there is no prospect of success, as there was no clause contained in the resignation agreement prohibiting the Applicant from making oral or written statements about the Respondents, and the application is untimely;
 - iii. an order for her costs; and
 - iv. such further and other order as this Court shall provide.

THE GROUNDS FOR THE APPLICATION ARE:

Overview and Applicant

2. The current issues can only be understood with a comprehensive explanation of past events and history of litigation between the parties.
3. The Applicant was employed by the Respondent Regional Municipality of Waterloo Police Services Board (the “Board”) up until June, 2017. Prior to 2016, the Applicant was an exemplary police constable. What led to her resignation was an unprotected disclosure of wrongdoing she made to the Board in May, 2016. As a result of her disclosure she faced a misconduct investigation initiated by then chief of police Respondent Bryan Larkin (“Larkin”), and other forms of reprisal.
4. The Applicant filed an application with the Tribunal in June, 2016, as a result of the retaliation she faced following her disclosure. This application, 2016-24566-I, was never heard by the Tribunal; *Donovan v. Waterloo Regional Police Service*, [2017 HRTO 221](#).
5. When the Applicant resigned in June, 2017, her resignation agreement put an end to several processes including the misconduct investigation being conducted pursuant to the [Police Services Act, R.S.O. 1990, c. P.15](#), (the “PSA”), her Tribunal complaint was withdrawn, and the multiple complaints the Applicant had filed against the Board and Larkin were no longer pursued.
6. The Applicant adamantly refused to sign a confidentiality clause that would restrict her ability to speak about her experiences as a “police whistleblower.” The Applicant waived solicitor client privilege throughout these proceedings in order to show communication that was had between the Applicant, her counsel and counsel for the Board and Larkin during the negotiation of her resignation agreement. This evidence has been before the Tribunal since May, 2019.

7. The only confidentiality clause in the resignation agreement was that all parties had to keep the existence and terms of the agreement strictly confidential.
8. Following her resignation, the Applicant advocated for better protections for police whistleblowers to Court of Appeal Justice Michael Tulloch, the Standing Committee on Justice Policy at the Ontario Legislature and the Standing Committee on Legislative Affairs of the Manitoba Legislative Assembly.
9. The Applicant's testimonies have resulted in positive changes to laws in Canada, including protection from reprisal for police officers in Ontario reporting wrongdoing.
10. The decision under review was released by the Tribunal on November 25, 2022, which makes this application timely.
11. No reconsideration could be requested by the Applicant because the decision did not meet the criteria for reconsideration, as outlined in [Rule 26.5 of the Tribunal Specific Rules](#).
12. The applicant subsequently submitted a Request for Reconsideration, which was denied by the Tribunal; *Regional Municipality of Waterloo Police Services Board v. Donovan*, 2023 HRTO 276.

Multiple Proceedings

13. On December 17, 2017, Larkin filed an affidavit in defence of a class action lawsuit the Board was facing, court file: CV-17-2346. The Applicant alleges that Larkin breached her resignation agreement by disclosing confidential details of the resignation agreement in the affidavit and was not required by law to do so.

14. In January, 2018, the Board filed an appeal of the Applicant's Workplace Safety and Insurance Board ("WSIB") claim. The Applicant was made aware of this appeal in August, 2018, and she alleges this is also a breach of her resignation agreement.
15. On May 9, 2018, the Applicant brought a civil claim against the Board alleging they breached the resignation agreement, court file: CV-18-1938. The Applicant believed that proper jurisdiction of her claim lie in court since her Tribunal complaint had never been heard by the Tribunal and her resignation agreement concluded several processes, including discipline under the *PSA*.
16. On June 28, 2018, before the first hearing of the Applicant's civil case, the Board brought a contravention of settlement application to the Tribunal against the Applicant, 2018-33237-S, pursuant to section 45.9 of the [Ontario Human Rights Code, R.S.O. 1990, c. H.19](#), (the "*Code*"). The Board alleged that all of the Applicant's public speaking and posts to her business website were in violation of the resignation agreement, including her testimony before the Legislature which is protected by parliamentary privilege. The Board seeks to prevent her from making future expressions, stop the sale and distribution of her book and pay significant damages.
17. As a result of the timing of the Board's application, and the fact that there is no clause in the agreement limiting the expressions made by the Applicant, she had reason to believe this application was filed out of retaliation and was an attempt to limit her freedom of expression.
18. These matters are now infinitely more complicated since both matters have progressed simultaneously over the past four and a half years. The Court of Appeal did not finally dispose of the Applicant's claim. Her claim was stayed until such time as the Applicant's

remedies under the collective agreement and in the Tribunal have been exhausted. The following is a complete list of decisions in the Applicant's civil matter:

- i. *Donovan v. Waterloo Regional Police Services Board*, [2019 ONSC 1212](#);
- ii. *Donovan v. Waterloo Regional Police Services Board*, [2019 ONCA 845](#);
- iii. *Donovan v. Waterloo Regional Police Services Board*, [2019 ONCA 994](#);
- iv. *Donovan v. WRPSB and Larkin*, [2021 ONSC 2885](#);
- v. *Donovan v. Waterloo (Police Services Board)*, [2022 ONCA 199](#);
- vi. *Donovan v. Waterloo (Police Services Board)*, [2022 ONCA 261](#).

19. On May 12, 2022, the Waterloo Regional Police Association informed the Applicant that they would not be filing a grievance on her behalf, which means her only access to justice at this time is at the Tribunal.

20. The Applicant is currently attempting to exhaust her remedies at the Tribunal in hopes of achieving access to justice on these matters.

Dismissal of First Allegation of Contravention of Settlement by Tribunal

21. Beginning at paragraph 20 of the reasons, until paragraph 31, the Tribunal conducted an extensive analysis of the timeliness of the Applicant's first allegation of contravention of settlement exclusively, without considering that the allegation was part of a series of incidents of contravention of settlement.

22. The Applicant filed her application 2018-33503-S on July 27, 2018.

23. On August 10, 2018, the Tribunal filed a Notice of Intent to Dismiss the Applicant's application, 2018-33503-S, for timeliness since her application was filed seven (7) months after the December 17, 2017, breach.

24. On or about August 18, 2018, the Applicant was made aware of a second alleged breach of the resignation agreement by the Respondents.
25. The parties do not dispute that the Applicant has alleged two contraventions of settlement, in application 2018-33503-S, on the following two effective dates:
 - i. December 17, 2017 – The Larkin affidavit; and
 - ii. August 18, 2018 – the WSIB appeal.
26. On August 20, 2018, the Applicant first informed the Tribunal of the second alleged breach of the resignation agreement in an email requesting an extension to file her documents.
27. The Applicant formally notified the Tribunal of the second allegation of contravention of settlement in February, 2019, when she filed her Form 10, Request for Order During Proceeding – Rule 19, to amend her application 2018-33503-S to include the second allegation of contravention of settlement.
28. Having been notified of a second contravention of settlement, therefore a series of incidents, it was unreasonable for the Tribunal to proceed with the August 10, 2018, Notice of Intent to Dismiss, which it did on September 8, 2022, and forms part of the decision under review. The Applicant had raised this issue at both Case Management Conference Calls before the Tribunal.
29. In allowing the Applicant to amend her application 2018-33503-S to include the second allegation of contravention of settlement, which the Tribunal does at paragraph 17 of the decision, the Tribunal accepts that there was a series of incidents.
30. Despite their earlier objection to the filing of the Applicant’s application 2018-33503-S, the Board and Larkin did not take issue with her delay in filing, as indicated in their August 5, 2022, submission to the Tribunal.

31. The Board and Larkin believe the Applicant's delay was incurred in good faith, and they submitted to the Tribunal that the Tribunal's adjudicating of both allegations in the series of incidents of contravention of settlement in application 2018-33503-S is the most fair, just and expeditious manner to resolve the dispute between the parties.
32. It is irrational to allow the second incident of contravention of settlement and disallow the first incident as being too late. When a series of incidents are alleged, the time to make an application to the Tribunal is six months from the last incident, and in this case there is no timeliness issue from the second incident as the application 2018-33503-S was filed in advance on July 27, 2018.
33. At paragraph 34 of the decision, the Tribunal found that the two alleged breaches of the settlement did not constitute a series of contraventions under [s. 45.9\(3\) of the Code](#) because they were "very different in nature." There was no evidence or precedence provided by the Tribunal to support this finding.
34. Although it is not noted in the decision, the Applicant is aware of cases where an application brought pursuant to [Part I of the Code](#), (for harassment, discrimination or reprisal), is only considered to be a series of incidents if they are of the same nature. A frequently cited case on this issue is *Visic v. Ontario Human Rights Commission*, [2008 CanLII 20993 \(ON SCDC\)](#), (the use of contravention in this sense referring to contraventions of the *Code*, not a settlement):

"To be a 'continuing contravention', there must be a succession or repetition of separate acts of discrimination of the same character. There must be present acts of discrimination which could be considered as separate contraventions of the Act,

and not merely one act of discrimination which may have continuing effects or consequences,” para. 45.

35. The Applicant brought an application pursuant to [Part IV of the Code](#), not [Part I](#), and had not alleged that the second incident of contravention of settlement was simply the continuing effects or consequences of the first contravention of settlement. The Applicant alleged two distinct breaches that form a series of incidents.
36. There are no authorities requiring a series of contraventions of settlement, pursuant to [Part IV of the Code](#), to be of the same nature in order to be considered a series. Based on internally coherent reasoning, any action that constitutes a contravention of a settlement is an incident for the purposes of [section 45.9\(1\) of the Code](#).
37. It is patently unreasonable for the Tribunal to conclude that the Applicant’s two allegations of contravention of settlement do not constitute a series of incidents for the purposes of [section 45.9\(3\) of the Code](#), as it does at paragraph 34 of the decision. There is no evidence to support this conclusion.
38. The statutory powers of decision concerning a contravention of settlement application are:
- i. [Section 45.8 of the Code](#): Subject to section 45.7 of this Act, section 21.1 of the *SPPA* and the Tribunal rules, a decision of the Tribunal is final and not subject to appeal and shall not be altered or set aside in an application for judicial review or in any other proceeding unless the decision is patently unreasonable. 2006, c. 30, s. 5; 2009, c. 33, Sched. 2, s. 35(3).
 - ii. [Section 45.9\(1\) of the Code](#): If a settlement of an application made under section 34 or 35 is agreed to in writing and signed by the parties, the settlement is binding on the parties. 2006, c. 30, s. 5.

- iii. [Section 45.9\(3\) of the Code](#): a party who believes that another party has contravened the settlement may make an application to the Tribunal for an order under subsection (8), (a) within six months after the contravention to which the application relates; or (b) if there was a series of contraventions, within six months after the last contravention in the series. 2006, c. 30, s. 5;
- iv. [Section 45.9\(4\) of the Code](#): A person may apply under subsection (3) after the expiry of the time limit under that subsection if the Tribunal is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay. 2006, c. 30, s. 5.

Applicant's Requests to Dismiss 2018-33237-S

- 39. Since the Board's application 2018-33237-S was first filed, the Applicant has done everything within her power to attempt to have the application dismissed as she believes it has no reasonable prospect of success, was filed out of retaliation and is an attempt to restrict her constitutional right to freedom of expression.
- 40. On July 10, 2018, the Applicant responded to application 2018-33237-S and notified the Tribunal of the ongoing civil proceeding. She requested the application be dismissed on several grounds including:
 - i. The Tribunal does not have jurisdiction over the matter; *Statutory Powers and Procedures Act*, R.S.O. 1990, c. S.22 ("SPPA") [s. 4.6\(1\)\(b\)](#);
 - ii. The application is frivolous, vexatious and was commenced in bad faith by the applicant as a means of retaliation against the respondent for having filed the civil claim; *SPPA*, [s. 4.6\(1\)\(a\)](#);
 - iii. The application is a flagrant abuse of process;

- i. The application is untimely; the *Code*, [s. 45.9\(3\)](#);
- ii. The application is a collateral attack on the respondent's fundamental freedoms, as guaranteed by the [The Constitution Act, 1982, Part I, Canadian Charter of Rights and Freedoms, s. 2.](#), and *Courts of Justice Act*, R.S.O. 1990, c. C.43, ("CJA") [s.137.1\(3\)](#).

41. On July 19, 2018, the Tribunal issued a letter acknowledging the Applicant's July 10th submission, and stated that the Respondents' application 2018-33237-S would be scheduled for a full day in-person hearing on the matters raised in the application. The Applicant wrote to the Tribunal asking for clarification as to whether or not her request to dismiss the application would be heard, and the response was that she could raise those issues at the hearing.

42. On August 5, 2018, the Tribunal scheduled a hearing of application 2018-33237-S on its merits for February 22, 2019, which was later adjourned and not rescheduled.

43. On September 18, 2018, the Applicant brought an application in Superior Court for dismissal of application 2018-33237-S pursuant to [section 137.1 of the CJA](#), as she believed the application was a proceeding to limit freedom of expression on matters of public interest, court file: CV-18-605386.

44. On February 1, 2019, Justice Favreau (as she was then known, now Justice of Appeal of the Court of Appeal for Ontario), ruled that Superior Court did not have jurisdiction over the application:

Donovan v. (Waterloo) Police Services Board, [2019 ONSC 818](#).

45. At paragraph 52 of her reasons, Justice Favreau wrote:

“Section 137.1 of the *Courts of Justice Act* is meant to provide a rapid and effective mechanism for defendants facing litigation that attacks their freedom to express themselves on matters of public interest. There is no such mechanism available to Ms. Donovan before the Human Rights Tribunal.”

46. On February 6, 2019, the Tribunal issued a Case Assessment Direction (“CAD”) which did not address the request to dismiss application 2018-33237-S contained in the Applicant’s response filed July 10, 2018.
47. On February 6, 2019, the Applicant emailed the Tribunal outlining her concerns that the Tribunal was not respecting procedural fairness in these matters.
48. On May 7, 2019, the Applicant filed a Notice of Constitutional Question with the Tribunal, copying the Attorney Generals of Ontario and Canada, whom both declined to intervene.
49. On July 4, 2019, the Applicant sent the Tribunal an email with what she believed to be evidence that the Board had filed application 2018-33237-S in bad faith as a means of retaliation. The email contained legal invoices paid by the Board, obtained through the [*Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. M.56*](#), which showed a significant increase in their legal fees paid from May, 2018, onward, after her civil suit was filed. The Applicant had also informed the Tribunal that all of the evidence contained in the Board’s application had been printed and timestamped in June, 2018, after she filed her suit.
50. On September 30, 2019, the Tribunal issued an Interim Decision. The Tribunal addressed the Form 10, Request for Order During Proceedings – Rule 19, filed by the Respondents, yet still did not address the Applicant’s request to dismiss application 2018-33237-S.

The Regional Municipality of Waterloo Police Services Board v. Donovan, [2019 HRTO 1326](#)

51. On September 30, 2019, the Applicant filed a formal complaint against the Tribunal Registrar and adjudicator to Social Justice Tribunals Ontario, as it was then known, now Tribunals Ontario.
52. On October 30, 2019, the Applicant received a response to her complaint. Jonathan Batty, Associate Chair of the Tribunal, advised the Applicant that she would have an opportunity to provide submissions at the preliminary hearing that would be scheduled. The Applicant was also advised to raise her issues of procedural fairness directly with the adjudicator, which she had already done without success.
53. On April 15, 2020, the Applicant filed a Form 10, Request for an Order During Proceedings – Rule 19, and requested that the matter be dealt with at an in-person hearing. The Applicant assumed that the Tribunal had not acted on her request previously because she had not used the Form 10. The Applicant requested application 2018-33237-S be dismissed in its entirety for the following reasons:
 - i. It is frivolous, vexatious and was commenced in bad faith;
 - ii. It is an abuse of process, the WRPSB has conducted these proceedings in a vexatious manner, contrary to common [Rule A8.2](#);
 - iii. There is no prospect of success, as there was no clause contained in the Resignation Agreement prohibiting Donovan from making oral or written statements about the Board and Larkin;
 - iv. The matter is outside the jurisdiction of the Tribunal.

54. During a Case Management Conference Call on May 10, 2022, the Applicant once again raised the issue of her unaddressed requests to dismiss application 2018-33237-S. The Tribunal wrote in the May 25, 2022, CAD that only those issues identified by the previous adjudicator would be addressed at the preliminary hearing that was to be scheduled.
55. Despite several attempts by the Applicant, her requests to have the Board's application dismissed have not been heard by the Tribunal, yet the Tribunal proceeded to dismiss her application.
56. It is the Applicant's position that there is adequate evidence to suggest bad faith and retaliation which warrants a preliminary examination, and by refusing the Applicant's requests, the Tribunal has unnecessarily prolonged the Board's proceeding which has come at a great cost to the Applicant.
57. The Tribunal has several statutory powers of decision for early dismissal of an application, those statutes include:
- i. [Section 40 of the Code](#): The Tribunal shall dispose of applications made under this Part by adopting the procedures and practices provided for in its rules or otherwise available to the Tribunal which, in its opinion, offer the best opportunity for a fair, just and expeditious resolution of the merits of the applications. 2006, c. 30, s. 5;
 - ii. [Section 42\(1\) Code](#): The provisions of the *SPPA* apply to a proceeding before the Tribunal unless they conflict with a provision of this Act, the regulations or the Tribunal rules. 2006, c. 30, s. 5;
 - iii. [Section 4.6\(1\) of the SPPA](#): Subject to subsections (5) and (6), a tribunal may dismiss a proceeding without a hearing if,
 - a. the proceeding is frivolous, vexatious or is commenced in bad faith;

- b. the proceeding relates to matters that are outside the jurisdiction of the tribunal; or
- c. some aspect of the statutory requirements for bringing the proceeding has not been met;
- iv. [Tribunals Ontario Rules of Procedure, I\) Social Justice Tribunals Ontario Common Rules, Rule A8.1](#): The Tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes.
- v. [Tribunals Ontario Rules of Procedure, II\) Human Rights Tribunal of Ontario Specific Rules, Rule 13.1](#): The Tribunal may, on its own initiative or at the request of a Respondent, filed under Rule 19, dismiss part or all of an Application that is outside the jurisdiction of the Tribunal;
- vi. [Tribunals Ontario Rules of Procedure, II\) Human Rights Tribunal of Ontario Specific Rules, Rule 19.1](#): A party may request that the Tribunal make an order at any time during a proceeding by oral submission in the course of the hearing or by written request;
- vii. [Tribunals Ontario Rules of Procedure, II\) Human Rights Tribunal of Ontario Specific Rules, Rule 19.7](#): The Tribunal will determine whether a Request for Order will be heard in writing, in person, or electronically and, where necessary, will set a date for the hearing of the Request.

DOCUMENTARY EVIDENCE:

58. The following documentary evidence will be used at the hearing of the application:

- i. Redacted resignation agreement;

- ii. Application 2018-33237-S filed June 28, 2018, (attachments/evidence not supplied electronically by Respondent Board);
- iii. Application 2018-33503-S filed July 27, 2018;
- iv. Notice of Intent to Dismiss 2018-33503-S dated August 10, 2018;
- v. WSIB letter dated August 18, 2018, regarding appeal;
- vi. Email from Applicant to Tribunal dated August 20, 2018, regarding second breach;
- vii. Form 10, Request for Order During Proceeding – Rule 19, filed by Applicant on February 19, 2019;
- viii. Respondent Board’s Submission for Preliminary Hearing filed August 5, 2022;
- ix. Applicant’s Response to 2018-33237-S filed July 10, 2018;
- x. Tribunal letter dated July 19, 2018;
- xi. Notice of Hearing by Tribunal dated August 3, 2018;
- xii. Case Assessment Direction dated February 6, 2019;
- xiii. Email from Applicant to Tribunal dated February 6, 2019, regarding procedural fairness;
- xiv. Notice of Constitutional Question filed by Applicant on May 7, 2019;
- xv. Email from Applicant to Tribunal dated July 4, 2019, with evidence of retaliation;
- xvi. Form 10, Request for Order During Proceedings – Rule 19, filed by Applicant on April 15, 2020;
- xvii. Case Assessment Direction dated May 25, 2022.

December 16, 2022

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