FORM 4F

Courts of Justice Act

HRTO File No. 2018-33237-S

HUMAN RIGHTS TRIBUNAL OF ONTARIO

BETWEEN:

KELLY LYNN DONOVAN

Respondent

and

REGIONAL MUNICIPALITY OF WATERLOO POLICE SERVICES BOARD

Applicant

NOTICE OF CONSTITUTIONAL QUESTION

April 30, 2019

Kelly Donovan

(Respondent)

The Respondent, Kelly Donovan, intends to question the constitutional validity of Section 137.1, and in particular Section 137.1(3), of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, hereafter known as "*CJA*" which allows the Court to dismiss a proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that related to a matter of public interest. The Applicant seeks declarations that *CJA* s.137.1 is contrary to:

1) section 2 of the *Canadian Charter of Rights and Freedoms*; and
2) section 15 of the *Canadian Charter of Rights and Freedoms*.

The Applicant seeks a declaration that "proceeding" for the purposes of *CJA* s.137.1 encompass all legal proceedings, whether in civil court or before an administrative tribunal, if the proceeding is defined as a "gag proceeding."

Furthermore, the Applicant seeks a declaration that by protecting people who face a civil lawsuit for expressions made on matters of public interest, and not protecting people who face a different kind of lawsuit for expressions made on matters of public interest, *CJA* s. 137.1 is contrary to section 15 of the *Canadian Charter of Rights and Freedoms* and is inoperative.

The question is to be argued on a date and time to be fixed by the Registrar, at 655 Bay Street, 14th Floor, Toronto, Ontario, M7A 2A3.

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Material facts giving rise to the constitutional question:

1. The Applicant was a police officer, and worked for the Respondent from December, 2010, to June, 2017.
2. On June 8, 2017, the parties entered into a contract to end the Applicant's employment effective June 25, 2017, provided to the court at Tab A of Application Record of the Applicant, Volume I.
3. The resignation agreement did not contain a general non-disclosure clause, as the Applicant was adamant that she would not resign from her employment if she was restricted from talking about her experiences working for the Respondent.
4. The Applicant provided evidence in her submissions, and waived solicitor client privilege to show that she had instructed her counsel she would not agree to a silencing clause upon resignation.

5. The resignation agreement contained a confidentiality provision that the terms and existence of the agreement were to be kept confidential and only if asked would the parties state that the matters were settled and the terms of which are strictly confidential.
6. Since resigning, the Applicant has made several public statements, and cited evidence to illustrate, the need for more accountability and transparency in policing, in addition to protection for police whistleblowers who report internal corruption, based on her personal experiences working for the Respondent.
7. The Applicant believes that all of her expressions are regarding matters of public interest and she consistently receives accolades from members of the public to echo this belief.
8. From July, 2017, until June, 2018, the Respondent did not serve the Applicant with any documentation to suggest that the Respondent had any concerns whatsoever with the Applicant's advocacy efforts, even when the Applicant spoke publicly at a board meeting in September, 2017.
9. In January, 2018, the Respondent allowed the details of the Applicant's resignation agreement to be publicly disclosed by police chief Bryan Larkin and appealed the Applicant's claim for benefits with the Workplace Safety and Insurance Board ("WSIB").
10. On May 9, 2018, the Applicant filed a statement of claim in Ontario Superior Court, (court file number CV-18-00001938-0000), against the Respondent for breach of contract for the two incidents in paragraph 9.
11. On June 7, 2018, the Respondent filed a motion to dismiss the Applicant's action, citing (among other things) that exclusive jurisdiction for breach of the resignation agreement lies with the Human Rights Tribunal of Ontario ("HRTO").
12. The motion to dismiss was scheduled to be heard in Brampton court on February 13, 2019.

13. On June 28, 2018, the Respondent brought an HRTO section 45.9, a contravention of settlement, application against the Applicant, HRTO file number 2018-33237-S.
14. The s. 45.9 application alleges that every public statement made by the Applicant from July 17, 2017, until June, 2018, about the Respondent has been a violation of the resignation agreement, and the application seeks significant damages from the Applicant and for her to cease speaking about the Respondent in public and retract all allegations made about the Respondent from the public realm.
15. The Applicant believes that the s. 45.9 application filed by the Respondent at the HRTO is for all intents and purposes a "gag proceeding."
16. On September 18, 2018, the Applicant brought a *Courts of Justice Act* section 137.1 application before the Ontario Superior Court of Justice to have the proceeding at the HRTO dismissed for limiting public debate on matters of public interest, Court file number CV-00605386-0000.
17. On January 10, 2019, the Honourable Madam Justice Favreau heard arguments from the parties regarding jurisdiction of the application.
18. On February 1, 2019, Justice Favreau issued her decision that *CJA* s. 137.1 does not apply to proceedings before the HRTO.

Legal basis for the constitutional question:

19. Prior to 2013, Ontario did not have an anti-SLAPP law, ("SLAPP" standing for Strategic Lawsuit Against Public Participation).
20. The first American state to adopt anti-SLAPP legislation was Washington in 1989, when the "Brenda Hill Bill" became law, recognizing the dangerous effect of SLAPP lawsuits on free expression.

21. Legislation to protect public participation in debate on matters of public interest was first introduced in Ontario by the Honourable John Gerretsen in 2013.

22. Bill 52, Protection of Public Participation Act, was first introduced, (in its current form), on December 1, 2014. The bill received Royal Assent on November 3, 2015.

23. At first reading, December 1, 2014, Honourable Madeleine Meilleur stated:

    a. "As members will recall, the proposed Protection of Public Participation Act seeks to balance the protection of public participation and freedom of expression and the protection of reputation and economic interests." Ontario, Legislative Assembly, Official Report of Debates (Hansard), 41st Parl., 1st Sess., No. 41A (10 December, 2014), (Hon. Madeleine Meilleur).

24. Bill 52 was debated on the following dates:

    a. December 10, 2014;

    b. March 5, 2015;

    c. March 23, 2015; and

    d. October 27, 2015.

25. At second reading, on December 10, 2014, Hon. Meilleur stated:

    a. "As I mentioned a moment ago, going to court can be expensive and time-consuming for everyone, but this is of particular concern when one party has much greater resources than the other. In a strategic suit, that party chooses to exploit the imbalance by taking a weaker opponent to court with a frivolous claim. Sometimes, these cases have little or no merit. Most are dropped before the lawsuit goes to trial, sometimes just weeks later. Meanwhile, the damage is done. Financially and emotionally drained, the target of a strategic suit is

effectively silenced." Ontario, Legislative Assembly, Official Report of Debates (Hansard), 41st Parl., 1st Sess., No. 41A (10 December, 2014), (Hon. Madeleine Meilleur).

November, 2015, Enactments

26. Subsections 137.1(1) and 137.1(2) of the *CJA* state:

PREVENTION OF PROCEEDINGS THAT LIMIT FREEDOM OF EXPRESSION ON MATTERS OF PUBLIC INTEREST (GAG PROCEEDINGS)

Dismissal of proceeding that limits debate
Purposes

137.1 (1) The purposes of this section and sections 137.2 to 137.5 are,

(a) to encourage individuals to express themselves on matters of public interest;

(b) to promote broad participation in debates on matters of public interest;

(c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and

(d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action. 2015, c. 23, s. 3.

27. The *CJA* provides the following definition in subsection 137.1(2):

Definition, "expression"

(2) In this section,

"expression" means any communication, regardless of whether it is made verbally or non-verbally, whether it is made publicly or privately, and whether or not it is directed at a person or entity. 2015, c. 23, s. 3.

28. Although this section does not provide a definition for the term "proceeding," Part VII, Court Proceedings, subsection 95(1) of the *CJA*, states:

> "This Part applies to civil proceedings in courts of Ontario."

29. Part VII of the *CJA* does not exclusively address proceedings brought before courts, as is evident in subsection 109(6), which applies to proceedings both before boards and tribunals and reads:

> "This section applies to proceedings before boards and tribunals as well as to court proceedings."

30. The term "gag proceeding" is not specifically defined in the *CJA*.

Is section 137.1 of the *Courts of Justice Act* unconstitutional?

31. It is the Applicant's position that since *CJA* subsection 109(6), referenced above in paragraph 29, speaks to "proceedings" in both boards and tribunals, as well as in court, when questioning the constitutional applicability of an Act, it would be unconstitutional to not provide the same explicit applicability to *CJA* s. 137.1 for board and tribunal proceedings when freedom of expression on matters of public interest is threatened.

32. The same relief for members of the public facing a "gag proceeding" in section 137.1(3) of the *CJA* is not provided to those facing a "gag proceeding" filed anywhere other than in civil court. This is incompatible with our current system of quasi-judicial administrative tribunals, and contradictory to modern access practices in government institutions of the free and democratic world.

33. The constitutionality of section 137.1 of the *CJA* appears to have never been tested in any court or tribunal in Canada.

34. Subsection 2(b) of the *Canadian Charter of Rights and Freedoms* guarantees freedom of expression, including freedom of the press and other media of communication.

35. Section 15 of the *Canadian Charter of Rights and Freedoms* guarantees equality before and under law and equal protection and benefit of law.

36. All persons, even those whose expression is the subject of a lawsuit brought against them at a quasi-judicial administrative tribunal, deserve the same right to freely express themselves on matters of public interest.

37. Excluding persons facing "gag proceedings" at administrative tribunals from the relief available in *CJA* s. 137.1(3) is not providing equal protection and benefit of law, and is contrary to s. 15(1) of the *Canadian Charter of Rights and Freedoms*.

Case Law Analysis

1704604 Ontario Ltd. V. Pointes Protection Association, 2018 ONCA 685

38. The Ontario Court of Appeal set out a substantive analysis of *CJA* s. 137.1 in *1704604 Ontario Ltd. V. Pointes Protection Association*, 2018 ONCA 685.

39. At para. 1, Honourable Justice Doherty states:

> "Freedom of expression is a constitutionally-protected right in Canada. The free and open expression of divergent, competing, and strong viewpoints on matters of public interest is essential to personal liberty, self-fulfillment, the search for the truth, and the maintenance of a vibrant democracy."

40. At para. 2, Honourable Justice Doherty states:

> "From time to time, those who are the target of criticism resort to litigation, not to vindicate any genuine wrong done to them, but to silence, intimidate, and punish those who have spoken out. Litigation can be a potent weapon in the hands of the rich and

powerful. The financial and personal costs associated with defending a lawsuit, particularly one brought by a deeppocketed plaintiff determined to maximize the costs incurred in defending the litigation, can deter even the most committed and outspoken critic."

41. At para. 28, the origins of our current anti-SLAPP laws are explained as follows:

> The pertinent history of Ontario's AntiSLAPP legislation begins with the 2010 Report of the AntiSLAPP Advisory Panel to the Attorney General. Many the Panel's recommendations ultimately found their way into the legislation.
>
> [29] In the Report, the Panel recognized the need to protect and foster a broad spectrum of expression relating to matters of public interest. The Panel proposed a pretrial procedure designed to quickly and inexpensively identify and dismiss those unmeritorious claims that unduly entrenched on an individual's right to freedom of expression on matters of public interest. The Panel observed, at para. 18 of its Report:
>
> The legislation should therefore state that the purpose of the statute is to expand the democratic benefits of broad participation in public affairs and to reduce the risk that such participation will be unduly hampered by fear of legal action. It would seek to accomplish these purposes by encouraging the responsible exercise of free expression by members of the public on matters of public interest and by discouraging litigation and related legal conduct that interferes unduly with such expression.

42. At para. 33, comments are cited of the Attorney General at the time the proposed legislation received second reading, to clarify the purpose and intent of the legislation as:

> [TRANSLATION:] The purpose of the Bill is to protect freedom of expression…. It aims to achieve a significant balance, to the benefit of all parties to a dispute…. Balance is a constant theme: the need to strike a balance that will end abusive litigation while allowing legitimate actions.
>
> …
>
> [The Bill] does not create a socalled "licence to slander". Instead, the Bill aims to protect expression on matters of public interest. What the Bill would do is let a court review lawsuits brought against such expression at an early stage. It would then be up to the court to decide whether the expression at issue is likely to cause serious harm. If so, the court may allow the lawsuit to continue in the normal course of litigation. I strongly believe that the law must defend reputation, but not at any cost and not in every case. I do not believe that a mere technical case without actual harm – should be allowed to suppress the kind of democratic expression that is crucial for our democracy: Ontario, Legislative Assembly, Official Report of Debates (Hansard), 41st Parl., 1st Sess., No. 41A (10 December 2014), at pp. 197172 (Hon. Madeleine Meilleur). [Emphasis added.]

El-Helou v Courts Administration Service, 2011 CanLII 93945 **(CA PSDPT)**

43. In an Application to the Public Servants Disclosure Protection Tribunal, the Public Sector Integrity Commissioner of Canada referred to the ability of public service employees to protect the public by disclosing wrongdoing, at para. 34, as:

> "With respect to public criticisms of the employer, the duty of fidelity does not impose an absolute "gag rule" against an employee making any public statements that might be critical of his employer. An employee need not, in every circumstance, follow Cervantes' advice, "A closed mouth gathers no flies." The duty of fidelity does not mean that the Daniel Ellsbergs and Karen Silkwoods of the world must remain silent when they discover wrongdoing occurring at their place of employment. Neither the public nor the employer's long-term best interests are served if these employees, from fear of losing their jobs, are so intimidated that they do not bring information about wrongdoing at their place of employment to the attention of those who can correct such wrongdoing."

44. With regard to a public servant's protection by the Charter and common law, para. 40 states:

> "It also specified that the "whistleblowing" defence, which arises from *Fraser*, applies to issues of public interest."

45. At para. 50, the Public Sector Integrity Commissioner of Canada argued:

> "…the Act must be interpreted through a consideration of its preamble and its reference to freedom of expression, which is an important Charter value and which is also recognized as an important freedom in jurisprudence generally."

46. The very title of Bill 52, clearly depicts its reference to freedom of expression:

> "An Act to amend the Courts of Justice Act, the Libel and Slander Act and the Statutory Powers Procedure Act **in order to protect expression on matters of public interest**." **[emphasis added]**

47. The amendments to the Courts of Justice Act, the Libel and Slander Act and the Statutory Powers Procedures Act achieved the intention of Bill 52. Unfortunately, failing to provide similar relief to protect expression on matters of public interest in other statutes such as the *Human Rights Code, R.S.O. 1990, c. H.19*, has meant that in some cases, our government is not protecting expression on matters of public interest.

Law Society of Upper Canada v. Kivisto, 2017 ONLSTH 157

48. Mr. John E. Callaghan, (for the panel), determined, when considering whether Mr. Kivisto's conduct was considered vexatious by bringing multiple legal proceedings, at para. 31, that 'the term "proceeding" is not restrictive in the sense of being limited only to the institution of a lawsuit.'

Taylor v. The Crown in Right of Ontario (Ministry of Community Safety and Correctional Services), 2018 CanLII 7166 **(ON PSGB)**

49. Reva Devins, Vice-Chair of the Public Service Grievance Board, cited the HRTO, at para. 16, from an earlier decision wherein the HRTO had concluded that the common-law principle of absolute privilege applied to statements made in court and in legal pleadings. Para. 16 states:

> "Furthermore, although typically used in defamation cases, the doctrine is not limited to that kind of lawsuit. The HRTO ultimately concluded that it also applied in the context of human rights proceedings and that a letter written by counsel in the course of representing their client was covered by absolute privilege and could not form the basis for an application under the Human Rights Code."

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

50. The Honourable Justice Favreau cited *1704604 Ontario Ltd. v. Pointes Protection Association, 2018 ONCA 685*, at para. 26 which states:

> The purpose of s. 137.1 is crystal clear. Expression on matters of public interest is to be encouraged. Litigation of doubtful merit that unduly discourages and seeks to restrict free and open expression on matters of public interest should not be allowed to proceed beyond a preliminary stage. Plaintiffs who commence a claim alleging to have been wronged by a defendant's expression on a matter of public interest must be prepared from the commencement of the lawsuit to address the merits of the claim and demonstrate that the public interest in vindicating that claim outweighs the public interest in protecting the defendant's freedom of expression.

51. With regard to the application of CJA s. 137.1(3), Justice Favreau had this to say at para. 50:

> In its arguments, the Board suggested that its application to the Human Rights Tribunal would not be caught by section 137.1(3) because it is simply trying to enforce the Resignation Agreement. In my view, this argument is disingenuous. Section 137.1(3) does not limit the causes of action susceptible to its application. It may turn out that the Resignation Agreement provides a justification for the Board's attempt to interfere with Ms. Donovan's public expression, but the fact that the underlying proceeding is about the enforcement of an agreement does not oust this Court's jurisdiction to deal with the issue. In this respect, I note that the decision in 1704604 Ontario Ltd. v. Pointes Protection Association, in which the Court of Appeal addressed the purpose of section 137.1 and the powers of a court under that provision, dealt with facts very similar to those in this case. In that case, the plaintiff brought an action on the basis that statements made by the one of the defendants in a proceeding before the Ontario Municipal Board contravened a

> settlement agreement. The Court of Appeal found that section 137.1 applied to the litigation and dismissed the action. In doing so, the Court emphasized, at para. 120, that the issues to be decided pursuant to section 137.1 included the scope of the agreement and whether it foreclosed the evidence given by the defendants before the Ontario Municipal Board. The issue raised by the Board's application here is almost identical, and is whether the Resignation Agreement precludes Ms. Donovan from making public statements about her experience with the Board. If the Board had brought an action in this Court to enforce the Resignation Agreement, there is no doubt that Ms. Donovan could bring a motion pursuant to section 137.1 of the Courts of Justice Act for an early determination of whether the Board's litigation is an illegitimate attempt to preclude her from speaking out on matters of public interest. As I indicated to the parties during the hearing of this motion, whether Ms. Donovan's public statements about her former employer and her experience as a police officer are a form of expression in the public interest are issues that go to the core of determining a motion brought under section 137.1(3) of the Courts of Justice Act. They are not properly characterized as preliminary jurisdictional matters, and I would not have dismissed Ms. Donovan's application on that basis.

52. Regarding the Respondent's choice of venue to litigate the Applicant, and the applicability of *CJA* s. 137.1, Justice Favreau had this to say, at para. 52:

> Finally, the Board argues that, even if this Court has jurisdiction over Ms. Donovan's application, it should decline to exercise its jurisdiction because the matter is already before the Human Rights Tribunal. If this Court did have jurisdiction, for example if the Board had brought a civil action and a parallel application to the Human Rights Tribunal

as contemplated by section 137.4 of the Courts of Justice Act, I do not see that this is a case in which it would be appropriate to decline jurisdiction. 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. Section 137.4 clearly provides that, where there are proceedings before the Court and before a tribunal, the tribunal proceedings can be stayed pending the resolution of a motion under section 137.1(3). Therefore, in the face of a choice of forum, the legislature has signaled that the Court is clearly preferable.

Conclusion

52. The Applicant relies on these grounds, and such further and other grounds as she may advise and this Honourable Court may permit.

53. The remedy sought by the Respondent, pursuant to subsection 24(1) of the *Charter*, is a dismissal of the Application brought against the Respondent by the Applicant for the reasons stated herein, that the proceeding is a proceeding limiting debate on matters of public interest.

April 30, 2019

Kelly Lynn Donovan
Applicant, self-represented

11 Daniel Place,
Brantford, Ontario
Tel: 519-209-5721
Email: kelly@fit4duty.ca

TO The Attorney General of Ontario
Constitutional Law Branch

4th floor
720 Bay Street
Toronto, Ontario M5G 2K1
Fax: (416) 326-4015

The Attorney General of Canada
Justice Building
234 Wellington Street
Ottawa, Ontario K1A 0H8
Fax: (613) 954-1920

Ms. Linda Lamoureux
Executive Chair, Tribunals Ontario
Social Justice Division

Donald Jarvis, counsel for Respondent
Filion Wakely Thorup Angeletti LLP
Bay Adelaide Centre
333 Bay Street, Suite 2500, Box 44
Toronto, Ontario
M5H 2R2
Tel: 416-408-5516
Fax: 416-408-4814
Email: DJarvis@filion.on.ca