

**DIVISIONAL COURT OF ONTARIO**

**B E T W E E N :**

**KELLY LYNN DONOVAN**

Applicant

- and -

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

Respondents

**FACTUM OF THE RESPONDENTS, THE REGIONAL MUNICIPALITY OF  
WATERLOO REGIONAL POLICE SERVICES BOARD,  
AND BRYAN LARKIN**

July 14, 2023

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**PART I - OVERVIEW**

1. The Applicant, Kelly Donovan, was formerly employed as a Constable with the Organizational Respondent, the Waterloo Regional Police Services Board (“WRPSB”). Her employment ceased effective on or about June 25, 2017, pursuant to a settlement (the “Resignation Agreement”) negotiated among the Applicant, the WRPSB, and the Applicant’s bargaining agent, the Waterloo Regional Police Association (“WRPA”). The Resignation Agreement settled, *inter alia*, a human rights proceeding commenced by the Applicant against the WRPSB in 2016.

2. The Applicant seeks judicial review of a Human Rights Tribunal of Ontario (the “HRTO”) decision dated November 25, 2022 (the “Preliminary Hearing Decision”), and the associated reconsideration decision dated March 2, 2023 (the “Reconsideration

Decision”) (hereinafter together referred to as the “Decisions”).

3. The Decisions follow a series of judicial rulings from the Superior Court of Justice and Court of Appeal for Ontario requiring the Applicant to seek relief from the HRTO and/or a labour arbitrator for alleged breaches of the Resignation Agreement by the WRPSB and Bryan Larkin, former Chief of Police of the WRPSB (hereinafter referred to as the “Police Respondents”). Both the Applicant and the WRPSB filed Contravention of Settlement (“COS”) applications before the HRTO alleging breaches of the Resignation Agreement.

4. The Decisions considered, *inter alia*, whether the Applicant’s allegations of breach of the Resignation Agreement against the Police Respondents was brought within the limitation period mandated by the *Human Rights Code*, RSO 1990, c H.19 (the “Code”). The HRTO dismissed one of the Applicant’s two allegations of contravention of settlement on the basis of untimeliness.

5. As the Decisions of the HRTO are reasonable and entitled to deference, the Applicant’s application for judicial review must be dismissed.

## **PART II - STATEMENT OF FACTS AND FACTUAL BACKGROUND**

6. Except where otherwise noted herein, the Police Respondents deny the Applicant’s summary of facts.

### **A. The Parties**

7. The Organizational Respondent, the WRPSB, is an agency created under the *Police Services Act* (“PSA”) that is responsible for the provision of police services to the Regional Municipality of Waterloo. It oversees the Waterloo Regional Police Service

(“WRPS”).

*Police Services Act*, R.S.O. 1990, c. P.15 [*PSA*].

8. The Personal Respondent, Bryan Larkin, is the former Chief of Police of the WRPS. Chief Larkin retired from the WRPS on or about July 3, 2022.

9. The Applicant commenced employment with the WRPS in or around 2010. She held the rank of Constable until her employment resignation. She was, at all times, represented in her employment by the WRPA and governed by the collective agreement entered into between the WRPSB and the WRPA for uniformed officers (the “Uniform Collective Agreement”). The Uniform Collective Agreement provides for a grievance and arbitration process to address all complaints or grievances of members covered by the Uniform Collective Agreement. Additionally, the *PSA* contains mandatory arbitration provisions at sections 123 and 124.

*PSA, supra*, sections 123 and 124.

**B. The Prior and Outstanding Litigation Between the Parties**

**i. The 2016 Human Rights Application and Settlement**

10. On or about June 6, 2016, the Applicant filed an application with the HRTO against the WRPSB (the “2016 Application”) alleging discrimination in employment on the grounds of sex and marital status contrary to the *Code*.

Applicant’s 2016 Human Rights Application, Tribunal’s Record of Proceedings, Tab 1, at p. 65.

11. All matters among the Applicant, the WRPA and the WRPSB (including the Applicant’s resignation from the WRPSB, the 2016 Application, and potential disciplinary charges against the Applicant under the *PSA*) were fully and finally resolved through the Resignation Agreement executed on or about June 8, 2017. In addition to being a member

of the applicable WRPA bargaining unit, the Applicant was represented by independent legal counsel throughout the negotiation of the Resignation Agreement. The WRPSB and the Applicant executed mutual Releases and agreed, *inter alia*, to keep the terms and existence of the Resignation Agreement in absolute and strict confidence “[e]xcept where disclosure is required by law...”.

Redacted Resignation Agreement, Tribunal’s Record of Proceedings, Volume 4, Tab 15, p. 1547.

12. The discussions among the parties leading to the creation of the Resignation Agreement are protected by settlement privilege, which the Police Respondents have not waived.

**ii. The Proposed Class Action Against the WRPSB and the WRPA**

13. On or about May 30, 2017, the WRPSB and the WRPA were named as defendants in a proposed class action lawsuit commenced by current and former employees of the WRPSB and their family members. The class action alleged that the WRPSB and the WRPA were liable for systemic gender-based discrimination and sexual harassment by members of the WRPS. The Applicant was not a putative class member of the class action. The class action was dismissed for lack of jurisdiction.

[Rivers v. Waterloo \(Regional Municipality\) Police Services Board, 2018 ONSC 4307, aff’d 2019 ONCA 267, leave to appeal to SCC refused Rivers et al. v. Waterloo Regional Police Services Board et al., 2019 CanLII 99448 \(S.C.C.\)](#)

14. Former Chief Larkin swore an affidavit in support of a dismissal motion in the class action lawsuit on or about December 21, 2017. Attached to former Chief Larkin’s affidavit was an anonymized chart with non-identifying particulars of human rights applications that were commenced by female employees of the WRPSB. The chart includes, *inter alia*, the following:

NAME	GROUNDS FOR DISCRIMINATION	RESOLUTION
Female Constable	<ul style="list-style-type: none"><li>• Sex, including sexual harassment and pregnancy</li><li>• Marital status</li></ul>	SETTLED <ul style="list-style-type: none"><li>• monetary settlement</li><li>• withdrawal of OHRT application</li><li>• voluntary resignation</li></ul>

Affidavit of Chief Larkin, Exhibit F, Tribunal’s Record of Proceedings, Volume 2, Tab 3, at p. 821.

**iii. The Determination of the Applicant’s Entitlement to Workers’ Compensation Benefits**

15. The Applicant commenced a medical leave of absence on or about February 27, 2017 and claimed that she suffered from PTSD as a result of an accident she had witnessed at the Ontario Police College in 2011. In or around April 2017, the Applicant submitted a claim for workers’ compensation benefits to the WSIB.

16. In a decision dated July 12, 2017, a WSIB Case Manager allowed the Applicant’s claim for healthcare benefits and loss of earnings benefits from February 27, 2017 to June 24, 2017 (the “Initial Entitlement Decision”).

17. On or about January 11, 2018, the WRPSB filed an Intent to Object (“ITO”) form (along with accompanying submissions) with the WSIB in order to gain access to the Applicant’s WSIB claims file and medical information (as required by WSIB Procedures) and in order to assess the propriety of the Initial Entitlement Decision. The filing on an ITO is a pre-appeal step in respect of the Initial Entitlement Decision. The WSIB re-affirmed the Initial Entitlement Decision on August 3, 2018, and subsequently released the Applicant’s WSIB claims file to the WRPSB. Since then, and after having an



opportunity to review the basis for the WSIB's decision, the WRPSB has taken no steps to initiate an appeal of the Initial Entitlement Decision.

Intent to Object Form, Tribunal's Record of Proceedings, Volume 2, Tab 11, at p. 933.

**iv. The Applicant's Action Before the Superior Court of Justice**

18. The Applicant commenced a civil action against the Police Respondents in May 2018. The action initially dealt solely with the chart set out in paragraph 14 above. Thereafter, the Applicant amended the original Statement of Claim (issued May 9, 2018) on or about January 16, 2019 to include her claims related to the WSIB proceedings (the "Amended Statement of Claim").

Statement of Claim, Tribunal's Record of Proceedings, Volume 1, Tab 1, p. 749.

Amended Statement of Claim, Tribunal's Record of Proceedings, Volume 3, Tab 14, p. 1236.

19. On February 13, 2019, the Police Respondents brought a motion pursuant to both Rules 21.01(1)(b) (the "Pleadings Issue") and Rule 21.01(3)(a) (the "Jurisdiction Issue") to strike and/or to dismiss/stay the Applicant's Amended Statement of Claim.

20. Mr. Justice Doi struck the Amended Statement of Claim in its entirety, without leave to amend, based on the Pleadings Issue alone:

The Defendants' motion to strike was also brought under Rules 21.01(3)(a) and 21.01(3)(d), respectively. For the reasons set out above, **I am satisfied that this motion is fairly and fully disposed of under Rule 21.01(1)(b) without the need for recourse to these other grounds.**

[Emphasis added]

[\*Donovan v Waterloo Regional Police Services Board\*, 2019 ONSC 1212, at para. 40.](#)

21. The Applicant appealed the Order arising from Doi J.'s decision. On October 25, 2019, the Court of Appeal granted the Applicant's appeal, finding that it was not plain and obvious that the Amended Statement of Claim disclosed no reasonable cause of action. In addition, the Court of Appeal granted the Applicant leave to amend her claim against

former Chief Larkin to plead how his actions were tortious. The Honourable Court did not address, nor have before it, the Jurisdiction Issue.

[Donovan v Waterloo Regional Police Services Board, 2019 ONCA 845, at para. 20.](#)

22. Following the Court of Appeal's ruling, the Applicant amended her claim, again, on January 29, 2020, to allege misfeasance in public office by former Chief Larkin.

23. As the Jurisdiction Issue remained undecided and the Applicant had now availed herself of the opportunity to amend her claim, on February 19, 2020, the Police Respondents requested direction from Mr. Justice Doi on the appropriate next step in the proceeding. Doi J. issued an Endorsement on April 20, 2020, directing that the Jurisdiction Issue should be returned as a new motion under rule 59.06(1) and that the matter be argued before another judge.

24. The Applicant did not appeal Doi J.'s Endorsement. The Applicant did, however, amend her claim for a third time on November 23, 2020 (the "Fresh as Amended Statement of Claim"), to include new claims in tort (viz. misfeasance in public office and negligence) against the Police Respondents, jointly and severally.

25. In accordance with Doi J.'s Endorsement, the Police Respondents filed a Notice of Motion regarding the Jurisdiction Issue pursuant to Rule 59.06(1), but also pursuant to Rule 21.01(3)(a).

26. The Police Respondents' motion in respect of the Jurisdiction Issue was heard by Bielby J. over the course of two days on February 23 and March 1, 2021. Bielby J. rejected the Applicant's procedural objections, and accepted that the Jurisdiction Issue remained to be decided and was properly before him. Bielby J. also held that the Fresh as Amended

Statement of Claim was outside the Court's jurisdiction and the dispute ought to be decided in accordance with the binding arbitration processes established under the Uniform Collective Agreement and the *PSA*, and/or by the HRTO.

[\*Donovan v. WRPSB and Larkin\*, 2021 ONSC 2885, at paras. 104-105.](#)

27. The Applicant appealed the Order arising from Bielby J.'s decision. On March 10, 2022, the Court of Appeal found that the Applicant's claims were subject to determination pursuant to the procedures set out in the Uniform Collective Agreement and the *PSA*. Alternatively, the Court of Appeal held that to the extent that the Applicant's claim seeks relief that is not available under the Uniform Collective Agreement and the *PSA*, the Applicant's claims were subject to the jurisdiction of the HRTO. The Court of Appeal therefore dismissed the Applicant's appeal (subject to staying the Applicant's action pending a future determination, by the court, regarding whether to grant relief, if necessary, not otherwise available at arbitration or by the HRTO).

[\*Donovan v. Waterloo \(Police Services Board\)\*, 2022 ONCA 199, at paras. 41-43.](#)

**v. The Applicant's Application under the *Courts of Justice Act***

28. The Applicant filed a separate application with the Superior Court of Justice against the WRPSB on September 18, 2018. Pursuant to section 137.1(3) of the *Courts of Justice Act*, RSO 1990, c C.43 ("*CJA*"), the Applicant sought to dismiss the WRPSB's COS application on the basis that it was an improper attempt to limit public debate.

Amended Notice of Application, Tribunal's Record of Proceedings, Volume 4, Tab 15, p. 1881.

29. By decision dated February 1, 2019, Justice Favreau dismissed the Applicant's application. Justice Favreau held that section 137.1(3) of the *CJA* did not apply to proceedings before the HRTO and that the Superior Court of Justice was without

jurisdiction to dismiss the WRPSB's COS application. During the hearing before Justice Favreau on January 10, 2019, the WRPSB undertook not to take the position before the HRTO that the Applicant was out of time to raise substantive arguments in response to the WRPSB's COS application.

[Donovan v. \(Waterloo\) Police Services Board, 2019 ONSC 818, at para. 56.](#)

**vi. The COS Applications Before the HRTO**

30. On or about June 28, 2018, the WRPSB filed a COS application with the HRTO alleging that the Applicant had breached the Resignation Agreement (the "WRPSB's COS Application").

WRPSB COS Application, Tribunal's Record of Proceedings, Tab 1, at p. 1.

31. On or about July 27, 2018, the Applicant filed her own COS application with the HRTO alleging that the Police Respondents had breached the Resignation Agreement (the "Applicant's COS Application").

Applicant's COS Application, Tribunal's Record of Proceedings, Volume 2, Tab 3, at p. 779.

32. On or about August 3, 2018, the HRTO issued a Notice of Hearing to the parties specifying February 22, 2019, as the hearing date for the WRPSB's COS Application. The Notice of Hearing required the parties to, *inter alia*, disclose all documents they intended to rely upon for the hearing.

Notice of Hearing, Tribunal's Record of Proceedings, Volume 7, Tab 35, at p. 3007.

33. On or about August 10, 2018, the HRT0 issued a Notice of Intent to Dismiss (“NOID”) the Applicant’s COS Application on the basis that it was untimely as more than six (6) months had elapsed following the date of the last alleged incident of contravention. The Applicant did not respond to the HRT0’s NOID, despite being directed to do so.

Notice of Intent to Dismiss, Tribunal’s Record of Proceedings, Volume 7, Tab 36, at p. 3012.

34. The Applicant filed her response to the WRPSB’s COS Application on or about July 10, 2018. The Applicant failed to respond to the substance of the WRPSB’s allegations; rather, the Applicant merely requested the HRT0 to dismiss the WRPSB’s COS Application. Accordingly, the WRPSB filed a Request for an Order During Proceedings (“RFOP”) on July 30, 2018, requesting the HRT0 to dismiss the Applicant’s objection, deem the Applicant to have accepted the allegations in the WRPSB’s COS Application, and schedule a hearing to address solely the issue of appropriate remedy.

Police Respondents’ Response to an Application for Contravention of Settlement, Tribunal’s Record of Proceedings, Volume 2, Tab 2, at p. 769.  
Request for an Order During Proceedings, Tribunal’s Record of Proceedings, Volume 2, Tab 4, at p. 833.

35. On or about January 25, 2019, the date on which the parties were required to submit various materials and documents to the HRT0 for the hearing of the WRPSB’s COS Application scheduled for February 22, 2019, the WRPSB wrote to the HRT0 proposing that the filing of these materials be held in abeyance pending further direction from the HRT0 on the outstanding matters before the HRT0.

Police Respondents’ correspondence to the HRT0, Tribunal’s Record of Proceedings, Volume 2, Tab 7, pp. 900-901.

36. Contrary to the Applicant’s false and inflammatory allegation at paragraph 48 of her Factum, the WRPSB did not breach the undertaking that it had provided to Justice

Favreau during the hearing held on January 10, 2019 (see paragraph 29, *supra*). The reference in the WRPSB's correspondence dated January 25, 2019 to the Applicant's "failure to comply with the Tribunal's filing directions" was unrelated to the undertaking given to Justice Favreau; rather, it related to the WRPSB's filing obligations ahead of the February 22, 2019, HRTO hearing date.

37. In lieu of the originally scheduled February 22, 2019 HRTO hearing, the HRTO scheduled a Case Management Conference Call ("CMCC") for February 19, 2019, to address outstanding procedural issues, including the Applicant's failure to respond to the HRTO's NOID. In a decision dated February 20, 2019, Vice Chair Laurie Letheren directed the Applicant to file her response to the NOID and a response to the WRPSB's RFOP dated July 30, 2018. The HRTO also consolidated the parties' respective COS Applications and directed that they be heard together.

Interim Decision 2018 HRTO 308, Tribunal's Record of Proceedings, Volume 7, Tab 42, at p. 3042.

38. On or about February 19, 2019, the Applicant filed her own RFOP seeking the HRTO's consent to amend her COS Application to include allegations in respect of the WRPSB's filing of an Intent to Object Form with the WSIB.

Applicant's Request for an Order During Proceedings dated February 19, 2019, Tribunal's Record of Proceedings, Volume 2, Tab 11, at p. 922.

39. On or about September 30, 2019, the HRTO issued an Interim Decision addressing further preliminary and procedural issues; this Interim Decision also dismissed the Applicant's request for the HRTO to declare section 137.1 of the *CJA* as unconstitutional. Vice Chair Laurie Letheren directed the HRTO to schedule a full-day preliminary hearing to determine whether:

- (a) the HRTO has jurisdiction to hear the Applicant's COS Application;
- (b) the Applicant can amend her COS Application;
- (c) the Applicant's production request should be granted; and
- (d) the Applicant's undisclosed recording of the Case Management Conference Call held on February 19, 2019, was an abuse of the HRTO's process.

Interim Decision 2019 HRTO 1326, Tribunal's Record of Proceedings, Volume 7, Tab 43, at pp. 3051 and 3054, paras. 16 and 36.

40. Following the Court of Appeal for Ontario's decision dated March 10, 2022, the Applicant filed a further RFOP, on or about May 24, 2022, seeking to amend her COS Application to include claims of misfeasance in public office and negligence against the Police Respondents.

Applicant's Request for an Order During Proceedings, Tribunal's Record of Proceedings, Volume 6, Tab 27, at p. 2867.

41. The HRTO's previously directed preliminary hearing was held on September 8, 2022, following which Vice Chair Marla Burstyn released the Preliminary Hearing Decision that dismissed the Applicant's contravention of settlement allegation arising from former Chief Larkin's affidavit in the proposed class action. In addition, Vice Chair Burstyn:

- (a) allowed the Applicant to amend her COS Application to include alleged breaches of the Resignation Agreement arising from the WRPSB's alleged "appeal" of her WSIB claim;
- (b) denied the Applicant's proposed amendments to her COS Application to include claims for misfeasance in public office and negligence;
- (c) deferred the issue of productions;

(d) held that the Applicant's surreptitious recording of the February 19, 2019 CMCC did not rise to the level of abuse of process; and

(e) dismissed the Applicant's allegations of violations of the HRTO's Code of Conduct and Conflict of Interest Rules against the HRTO's former Registrar and Vice Chair Letheren.

Interim Decision 2022 HRTO 1409, Tribunal's Record of Proceedings, Volume 7, Tab 48, at p. 3069.

[The Regional Municipality of Waterloo Police Services Board v. Donovan, 2022 HRTO 1409, at para. 63.](#)

42. The Applicant then sought reconsideration of the Preliminary Hearing Decision. Specifically, the Applicant sought reconsideration of: a) the HRTO's decision that her contravention of settlement allegation arising from former Chief Larkin's affidavit in the proposed class action was untimely; and b) the HRTO's failure to address her previous requests to dismiss the WRPSB's COS Application as a breach of procedural fairness. Notably, the Applicant's requests to dismiss the WRPSB's COS Application was neither an issue scheduled to be heard nor substantively raised by the Applicant at the September 8, 2022, preliminary hearing.

Request for Reconsideration, Tribunal's Record of Proceedings, Volume 6, Tab 31, at p. 2932.

43. On March 1, 2023, Vice Chair Burstyn issued the Reconsideration Decision that affirmed the Preliminary Hearing Decision.

Reconsideration Decision dated March 1, 2023, Tribunal's Record of Proceedings, Volume 7, Tab 49, p. 3073.

### **PART III - THE ISSUES AND LAW RAISED BY THE APPLICANT**

#### **A. Standard of Review**

44. Notwithstanding that section 45.8 of the *Code* prescribes a "patently



unreasonable” standard of review, the standard of review of the HRTTO’s decisions is presumptively reasonableness.

[Canada \(Minister of Citizenship and Immigration\) v. Vavilov, 2019 SCC 65, at para. 23](#) [“*Vavilov*”].  
[Ontario \(Health\) v. Association of Ontario Midwives, 2022 ONCA 458, at para. 83](#) [“*Midwives*”].

45. Accordingly, the focus of the court’s analysis is on the underlying rationale and outcomes of the administrative decision and ensuring that “the decision as a whole is transparent, intelligible and justified”. As such, the focus of the review is not on whether the conclusion is one the court would have reached.

*Vavilov, ibid*, at paras. [15](#), [83](#), and [86](#).

46. The administrative decision-maker’s reasons are important. A reasonable decision is one that is “based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker”.

*Vavilov, ibid*, at paras. [85](#) and [99](#).

47. The burden on the party challenging the decision is high. That party must demonstrate that the alleged flaws are not merely “superficial or peripheral to the merits of the decision”. Put another way, it would be improper for a court to overturn an administrative decision “simply because its reasoning exhibits a minor misstep” or for the court to embark upon a “line-by-line treasure hunt for error”. Rather, the court should assess whether the decision-maker’s reasoning exhibits any “fatal flaws in the overarching logic”.

*Vavilov, ibid*, at paras. [82-87](#), [102](#).  
[Hawkes v. Max Aicher \(North America\) Limited, 2021 ONSC 4290 \(Ont. Div. Ct.\), at paras. 14-19](#).  
[Midwives, supra](#), at para. [82](#).

48. With respect to statutory interpretation, the administrative decision-maker's task is to interpret a provision in a manner that is "consistent with the text, context and purpose" of the legislation by applying the decision-maker's own insight into the statutory scheme. A decision-maker does not need to dwell on every "signal of statutory intent".

[Vavilov, supra, at paras. 120-121.](#)

**B. The Preliminary Hearing and Reconsideration Decisions are Reasonable**

49. While the Police Respondents did not challenge the timeliness of the Applicant's contravention of settlement allegations at the September 8, 2022 preliminary hearing, the Decisions are reasonable and must be accorded deference. The HRTO is the master of its own process and is entitled to take any action that it determines appropriate, including on its own initiative.

[HRTO Rules of Procedure, Rule 1.7 and Rule 13.](#)

**i. No Series of Contraventions**

50. The *Code* requires that COS applications be filed:

- (a) within six (6) months after the contravention to which the application relates; or
- (b) if there was a series of contraventions, within six (6) months after the last contravention in the series.

COS applications filed after the above-stated deadlines are only permissible if the HRTO is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay.

The *Code*, sections 45.9(3) and (4).

51. For a "series of contraventions" to be established within the meaning of section

45.9(3) of the *Code*, the HRTO considers the following factors:

- 1) What is the last alleged incident of discrimination to which the Application relates?
- 2) Do the allegations relate to a series of separate and independent incidents of discrimination or do they relate to the continuing effect of a single incident of discrimination?
- 3) What is the nature or character of the alleged discrimination and is it part of a pattern or series of incidents or contraventions of a similar nature or character?
- 4) What is the temporal gap between alleged incidents of discrimination?

[Garrie v. Janus Joan Inc., 2012 HRTO 1955 at para. 30;](#)

[James v. The Regional Municipality of Waterloo Police Services Board, 2016 HRTO 206 \[“James”\], at para. 28.](#) See also [paras. 30-31](#), where the vice-chair did not distinguish the meaning of “series” as between series of incidents and series of contraventions.

[MacFarlane v. The Regional Municipality of Peel Police Services Board, 2023 HRTO 863, at paras. 10, 33.](#)

52. In respect of factor 3), the HRTO will consider the nature of events and whether they may reasonably be viewed as a pattern of conduct or are comprised of incidents or contraventions relating to discrete and separate issues without some connection or nexus. The HRTO will also consider whether incidents share a common theme and whether they involve similar parties or circumstances. To establish a series of incidents or contraventions, it is not enough for an applicant merely to rely on separate incidents that are alleged to be discrimination on the same ground or are separate breaches of an agreement.

[James, \*ibid\*, at paras. 29, 34.](#)

[Pakarian v. Chen, 2010 HRTO 457, at para. 25.](#)

[AlSaigh v. University of Ottawa, 2012 HRTO 2, at para. 8.](#)

53. Vice Chair Burstyn’s determination that the Applicant’s allegations of

contravention of settlement on December 21, 2017, and January 11, 2018, did not constitute a series of contraventions was reasonable, appropriate, and in accordance with the HRTO's long established jurisprudence. The Applicant's two contravention of settlement allegations against the Police Respondents are based on entirely discrete and separate facts that engaged entirely different terms of the Resignation Agreement.

54. The Applicant's first allegation of contravention (i.e. former Chief Larkin's affidavit in the proposed class action) is grounded upon an alleged breach of the confidentiality provisions of the Resignation Agreement. Indeed, the Applicant herself asserts this characterization of the allegation in her RFOP dated May 24, 2022.

Applicant's COS Application, Tribunal's Record of Proceedings, Volume 2, Tab 2, at pp. 786-788, at paras. 9, 14-16.

Request for an Order During Proceedings dated May 24, 2022, Tribunal's Record of Proceedings, Volume 6, Tab 25, at pp. 2870-2875, at paras. 9, 27-34.

55. The Applicant's second allegation of contravention (i.e. the WRPSB's alleged "appeal" of her WSIB claim) is grounded upon an entirely different factual matrix and is rooted in an alleged violation of the release provisions of the Resignation Agreement. Again, even the Applicant herself acknowledges that her claim for relief is for "two distinct and separate contraventions of the [Resignation] Agreement".

Request for an Order During Proceedings dated May 24, 2022, Tribunal's Record of Proceedings, Volume 6, Tab 25, at p. 2876, at para. 42.

56. Put simply, the Applicant's assertion that the alleged contraventions of settlement on December 21, 2017, and January 17, 2018, form a "series" is based upon nothing more than the mere fact that they both involve alleged breaches of the Resignation Agreement. This is insufficient at law.

[James, supra, at para. 34.](#)

**ii. No Good Faith Explanation for Delay**

57. Vice Chair Burstyn determined that the Applicant's delay in filing her COS Application was not incurred in good faith.

58. The Applicant's COS Application was commenced on July 27, 2018. This is over seven (7) months following the WRPSB's and former Chief Larkin's alleged breach of the Resignation Agreement on December 21, 2017, and, as such, contrary to section 45.9(3)(a) of the *Code*.

59. The civil action commenced by the Applicant on May 9, 2018 – which alleges the very same contravention of settlement – establishes that the Applicant could have proceeded before the HRTO in order to preserve her legal rights.

60. Moreover, as early as February 7, 2018, the WRPA expressly advised the Applicant that her allegations of contravention against the WRPSB and Bryan Larkin should be pursued as a contravention of settlement application before the HRTO and that she should be cognizant of the strict time limits under the *Code*.

Correspondence from the WRPA dated May 12, 2022, Tribunal's Record of Proceedings, Volume 6, Tab 25, p. 2884.

[\*The Regional Municipality of Waterloo Police Services Board v. Donovan\*, 2022 HRTO 1409, at para. 25.](#)

61. It is trite law that the pursuit of legal recourse in a different forum, ignorance of the law, or exhaustion of a prior proceeding are not bases for failure to comply with the *Code*'s limitation periods. Vice Chair Burstyn's determination that a good faith explanation for the Applicant's delay did not arise merely because the Applicant had commenced a parallel civil proceeding was not only reasonable, but correct at law.

[\*Poole v. Trent University\*, 2011 HRTO 2086, at para. 10.](#)

[\*White v. Saint Elizabeth Health Care\*, 2020 HRTO 358, at paras. 21-22.](#)

[Preece v. Lowes Canada, 2021 HRTO 64 at paras. 20 to 22.](#)

[Mufata v. Ottawa Police Services Board, 2010 HRTO 814, at paras. 19-22.](#)

62. In summary, precisely because the Decisions are internally coherent, rational, and justified in relation to the facts and the law that constrained Vice Chair Burstyn, they meet the standard of reasonableness.

**C. The Applicant's Procedural Fairness Allegations Are Untimely, Inappropriate, and/or Without Merit**

**i. The Applicant's Request for an Order of Mandamus is Premature**

63. For an order of *mandamus* to be granted, the Applicant must establish four criteria:

(a) the Applicant must have a clear legal right for something to be done;

(b) the duty to be performed must be incumbent on the party that the order is sought to be directed;

(c) the duty must be purely ministerial in nature; and

(d) there must be a demand and a refusal to perform the duty for which performance is being sought.

[Ash v. Chief Medical Officer of Health of Ontario, 2022 ONSC 1778 \(Div. Ct.\), at para. 12.](#)

64. The Applicant's request for an order of *mandamus* is premature and inappropriate. The HRTO has not denied or refused to perform the duty for which performance is being sought by the Applicant. While the Applicant has made requests to dismiss the WRPSB's COS Application, including through her RFOP filed on April 15, 2020, the HRTO has not refused to adjudicate the Applicant's requests.

Applicant's Request for an Order During Proceedings dated April 15, 2020, Tribunal's Record of Proceedings, Volume 6, Tab 21, at p. 2606.

65. As stated by Vice Chair Burstyn in the Reconsideration Decision, the Applicant's requests to dismiss the WRPSB's COS Application will be adjudicated in due course. What is more, the Applicant's request to dismiss the WRPSB's COS Application was neither scheduled to be addressed nor substantively raised by the Applicant at the September 8, 2022 preliminary hearing. In the result, no procedural unfairness can be asserted by the Applicant.

Reconsideration Decision dated March 2, 2023, Tribunal's Record of Proceedings, Volume 7, Tab 49, p. 3084, at para. 38.

**ii. The Applicant's Constitutional Allegations are Irrelevant and Untimely**

66. The HRTO's refusal to consider the Applicant's constitutional concerns are irrelevant to the instant Judicial Review Application. Constitutional concerns were neither raised before Vice-Chair Burstyn nor form part of the Decisions.

67. The Applicant's constitutional concerns are also untimely. The HRTO's decision not to adjudicate the Applicant's constitutional concerns was decided on September 30, 2019. To allow the Applicant to raise concerns regarding the HRTO's September 30, 2019, decision nearly four (4) years after it was rendered, would amount to an abuse of process.

Interim Decision 2019 HRTO 1326, Tribunal's Record of Proceedings, Volume 7, Tab 43, at pp. 3050-3051, paras. 13-16.

68. In any event, the HRTO does not have authority to decide stand-alone constitutional issues, such as the constitutional validity of section 137.1 of the *CJA*. While the HRTO may have the power to decide questions surrounding the constitutional validity of provisions within its enabling statute, it has no general power to make declaratory statements regarding the Constitution or the *Charter*.

[\*Nova Scotia \(Workers' Compensation Board\) v. Martin\*, 2003 SCC 54, at para. 36](#)  
[\*R. v. Conway\*, 2010 SCC 22, at para. 22.](#)  
[\*MacLennan v. Ontario \(Transportation\)\*, 2013 HRTO 714, at paras. 10-11.](#)  
[\*Donovan v. \(Waterloo\) Police Services Board\*, 2019 ONSC 818, at para. 47.](#)

#### **PART IV - ORDER REQUESTED**

69. Based on the foregoing, the Police Respondents, the WRPSB and Bryan Larkin, respectfully request that the Applicant's application for judicial review be dismissed with costs to the WRPSB and Bryan Larkin on a substantial indemnity basis and made payable within 30 days.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14 day of July, 2023.



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Donald B. Jarvis  
Clifton Yiu  
**Filion Wakely Thorup Angeletti LLP**  
Lawyers for the Respondents, The Regional  
Municipality Of Waterloo Regional Police  
Services Board, and Bryan Larkin



**CERTIFICATE**

I, Donald B. Jarvis, counsel for the WRPSB and Bryan Larkin, certify that:

1. If permitted by the Court, approximately one (1) hour will be required for the WRPSB and Bryan Larkin's oral argument.

Dated at Toronto, Ontario this 14<sup>th</sup> day of July, 2023.



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Donald B. Jarvis  
Clifton Yiu  
**Filion Wakely Thorup Angeletti LLP**  
Lawyers for the Respondents, The Regional  
Municipality Of Waterloo Regional Police  
Services Board, and Bryan Larkin

**SCHEDULE “A”  
LIST OF AUTHORITIES**

1. *Rivers v. Waterloo (Regional Municipality) Police Services Board*, 2018 ONSC 4307,
2. *Rivers v. Waterloo (Regional Municipality) Police Services Board*, 2019 ONCA 267
3. *Rivers et al. v. Waterloo Regional Police Services Board et al.*, 2019 CanLII 99448 (S.C.C.)
4. *Donovan v Waterloo Regional Police Services Board*, 2019 ONSC 845
5. *Donovan v. WRPSB and Larkin*, 2021 ONSC 2885
6. *Donovan v. (Waterloo) Police Services Board*, 2019 ONSC 818
7. *The Regional Municipality of Waterloo Police Services Board v. Donovan*, 2022 HRTO 1409
8. *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65
9. *Ontario (Health) v. Association of Ontario Midwives*, 2022 ONCA 458
10. *Hawkes v. Max Aicher (North America) Limited*, 2021 ONSC 4290 (Ont. Div. Ct.)
11. *Garrie v. Janus Joan Inc.*, 2012 HRTO 1955
12. *James v. The Regional Municipality of Waterloo Police Services Board*, 2016 HRTO 206
13. *AlSaigh v. University of Ottawa*, 2012 HRTO 2
14. *MacFarlane v. The Regional Municipality of Peel Police Services Board*, 2023 HRTO 863
15. *Poole v. Trent University*, 2011 HRTO 2086
16. *White v. Saint Elizabeth Health Care*, 2020 HRTO 358
17. *Preece v. Lowes Canada*, 2021 HRTO 64

18. *Mufata v. Ottawa Police Services Board*, 2010 HRTO 814
19. *Ash v. Chief Medical Officer of Health of Ontario*, 2022 ONSC 1778 (Div. Ct.)
20. *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54
21. *R. v. Conway*, 2010 SCC 22
22. *MacLennan v. Ontario (Transportation)*, 2013 HRTO 714
23. *Donovan v. (Waterloo) Police Services Board*, 2019 ONSC 818

**SCHEDULE “B”  
RELEVANT STATUTES**

***Human Rights Code, RSO 1990, c H. 19***

**Application by person**

**34 (1)** If a person believes that any of his or her rights under Part I have been infringed, the person may apply to the Tribunal for an order under section 45.2,

- (a) within one year after the incident to which the application relates; or
- (b) if there was a series of incidents, within one year after the last incident in the series.

**Late applications**

**34 (2)** A person may apply under subsection (1) 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.s

[...]

**Reconsideration of Tribunal decision**

**45.7 (1)** Any party to a proceeding before the Tribunal may request that the Tribunal reconsider its decision in accordance with the Tribunal rules.

**Same**

**45.7 (2)** Upon request under subsection (1) or on its own motion, the Tribunal may reconsider its decision in accordance with its rules.

**Decisions final**

**45.8** Subject to section 45.7 of this Act, section 21.1 of the Statutory Powers Procedure Act 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.

[...]

**Application where contravention**

**45.9 (3)** If a settlement of an application made under section 34 or 35 is agreed to in writing and signed by the parties, 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.

### **Late applications**

**45.9 (4)** 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.

### ***Courts of Justice Act, RSO 1990, c C. 43***

### **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.

[...]

#### **Order to dismiss**

**137.1 (3)** On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest.

[...]

#### **Stay of related tribunal proceeding**

**137.4 (1)** If the responding party has begun a proceeding before a tribunal, within the meaning of the Statutory Powers Procedure Act, and the moving party believes that the proceeding relates to the same matter of public interest that the moving party alleges is the basis of the proceeding that is the subject of his or her motion under section 137.1, the moving party may file with the tribunal a copy of the notice of the motion that was filed with the court and, on its filing, the tribunal proceeding is deemed to have been stayed by the tribunal.

## Human Rights Tribunal of Ontario Rules of Procedure

**1.7** In order to provide for the fair, just and expeditious resolution of any matter before it the Tribunal may:

- a. lengthen or shorten any time limit in these Rules;
- b. add or remove a party;
- c. allow any filing to be amended;
- d. consolidate or hear Applications together;
- e. direct that Applications be heard separately;
- f. direct that notice of a proceeding be given to any person or organization, including the Commission;
- g. determine and direct the order in which issues in a proceeding, including issues considered by a party or the parties to be preliminary, will be considered and determined;
- h. define and narrow the issues in order to decide an Application;
- i. make or cause to be made an examination of records or other inquiries, as it considers necessary;
- j. determine and direct the order in which evidence will be presented;
- k. on the request of a party, direct another party to adduce evidence or produce a witness when that person is reasonably within that party's control;
- l. permit a party to give a narrative before questioning commences;
- m. question a witness;
- n. limit the evidence or submissions on any issue;
- o. advise when additional evidence or witnesses may assist the Tribunal;
- p. require a party or other person to produce any document, information or thing and to provide such assistance as is reasonably necessary, including using any data storage, processing or retrieval device or system, to produce the information in any form;
- q. on the request of a party, require another party or other person to provide a report, statement, or oral or affidavit evidence;
- r. direct that the deponent of an affidavit be cross-examined before the Tribunal or an official examiner;
- s. make such further orders as are necessary to give effect to an order or direction under these Rules;
- t. attach terms or conditions to any order or direction;
- u. consider public interest remedies, at the request of a party or on its own initiative, after providing the parties an opportunity to make submissions;
- v. notify parties of policies approved by the Commission under s. 30 of the Code, and receive submissions on the policies; and [...]
- w. take any other action that the Tribunal determines is appropriate.

[...]

**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.

***Police Services Act, RSO 1990, c P.15***

**Dispute, appointment of conciliation officer**

**123 (1)** The Solicitor General shall appoint a conciliation officer, at a party's request, if a difference arises between the parties concerning an agreement or an arbitrator's decision or award made under this Part, or if it is alleged that an agreement or award has been violated.

[...]

**Arbitration after conciliation fails**

**124 (1)** If the conciliation officer reports that the dispute cannot be resolved by conciliation, either party may give the Solicitor General and the other party a written notice referring the dispute to arbitration.

**KELLY LYNN DONOVAN**  
Applicant

and

**HUMAN RIGHTS TRIBUNAL OF  
ONTARIO et al.**  
Respondents

**Court File No. 699/22**

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**DIVISIONAL COURT FOR ONTARIO**

Proceeding commenced at TORONTO

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**FACTUM OF THE RESPONDENTS, THE  
REGIONAL MUNICIPALITY OF WATERLOO  
REGIONAL POLICE SERVICES BOARD, AND  
BRYAN LARKIN**

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