

May 16, 2019

**SENT VIA E-MAIL (hrto.registrar@ontario.ca)**

Mr. Georgios Fthenos  
Registrar  
Human Rights Tribunal of Ontario  
655 Bay Street, 14th Floor  
Toronto, ON M7A 2A3

Dear Mr. Fthenos:

**Re: The Regional Municipality of Waterloo Police Services Board v. Kelly Donovan (HRTO File No. 2018-33237-S); and Kelly Donovan v. The Regional Municipality of Waterloo Police Services Board and Bryan Larkin (HRTO File No. 2018-33503-S)**

As you are aware, we are counsel for the Regional Municipality of Waterloo Police Services Board (the “WRPSB”) and Chief Bryan Larkin in the above-noted matters.

We are in receipt of Ms. Donovan’s submissions dated April 30, 2019 (the “Submissions”) responding to the Notice of Intent to Dismiss (“NOID”) issued by the Human Rights Tribunal of Ontario (the “Tribunal”) on August 10, 2018 in respect of HRTO File No. 2018-33503-S and the WRPSB’s Request for an Order During Proceedings (“RFOP”) dated July 30, 2018 in respect of HRTO File No. 2018-33237-S. This letter sets out the WRPSB’s reply to the Submissions, to the extent that the Submissions respond to the preliminary issues before the Tribunal. Notably, the Submissions contain a myriad of allegations against various individuals, including many allegations regarding matters unrelated to the NOID, RFOP and/or the Applications before the Tribunal. The WRPSB and Chief Larkin will not address all of these unrelated allegations nor the merits of the Applications in this letter. The WRPSB and Chief Larkin reserve the right, however, to respond to these other matters as may become necessary in the instant proceedings.

**I. REPLY TO SUBMISSIONS IN RESPECT OF THE INSTANT PROCEEDINGS**

**(a) Response to Ms. Donovan's Submissions regarding the Tribunal's NOID (HRTO File No. 2018-33503-S)**

1. On August 10, 2018, the Tribunal, on its own initiative, advised the parties of its intent to dismiss Ms. Donovan's Application for untimeliness. The NOID required Ms. Donovan to provide written submissions responding to the delay identified by the Tribunal on or before September 7, 2018.
2. At paragraph 28 of the Submissions, Ms. Donovan has baldly alleged that "the HRTO and [WRPSB] conspired to have [Ms. Donovan]'s Application dismissed so that the [WRPSB] would not have to file their response". This allegation is patently meritless and absurd.
3. Further, Ms. Donovan has alleged that "the HRTO was allowing the [WRPSB] to harass [Ms. Donovan] using their collateral attack by requiring [Ms. Donovan] to file mountainous documentation all with brief, discriminatory deadlines for an individual suffering from PTSD" (at para 40 of the Submissions). Leaving aside the mischaracterization of the WRPSB's Application as a "collateral attack", Ms. Donovan was granted—on the WRPSB's consent—multiple generous extensions to the deadline for filing her response submissions to the NOID. Ms. Donovan's submissions were finally delivered on May 1, 2019—almost eight months after her initial September 7, 2018 deadline.
4. In any event, Ms. Donovan has failed to show that her delay in filing her Application was incurred in good faith. Ms. Donovan filed her Application in respect of HRTO File No. 2018-33503-S on July 27, 2018. However, the last incident in respect of which the Application relates—namely, Chief Larkin swearing an affidavit in support of a dismissal motion in a class action lawsuit against the WRPSB—occurred on December 21, 2017. This is a gap of **over seven months** between the date of the alleged breach and the filing of Ms. Donovan's Application. Given the delayed filing of Ms. Donovan's Application, the Tribunal's NOID directed Ms. Donovan to demonstrate that the delay was incurred in good faith.
5. Section 45.9(3) of the *Human Rights Code* (the "*Code*") requires an individual to file an application for contravention of settlement within **six months** after the contravention, or the last incident in a series of contraventions, to which the application relates. Under section 45.9(4) of the *Code*, the Tribunal has jurisdiction to consider late applications for contravention of

settlement only if the delay in filing the application was incurred in good faith and no substantial prejudice would result. When determining if an applicant's delay was incurred in good faith, the Tribunal has placed a high onus on the applicant to provide a reasonable explanation for the delay: *Freitag v Penetanguishene (Town)*, 2012 HRTO 1644 at paras 5-7; *Young-Chin v PJ O'Brien Irish Pub and Restaurant*, 2013 HRTO 1421 at paras 6-8; *Fox Estate v Mackenzie Health*, 2017 HRTO 1129 ("*Fox Estate*") at para 18; *Tiwana v Ontario Lottery and Gaming Corporation*, 2018 HRTO 483 at paras 16-17.

6. The *Code* requires an individual to act with all due diligence when he/she seeks to pursue a human rights application. For this reason, the Tribunal has long held that an applicant must show something more than simply an absence of bad faith when seeking to establish that a delay in filing was incurred in good faith: *Miller v Prudential Lifestyles Real Estate*, 2009 HRTO 1241 at para 24.
7. If an applicant fails to establish that delay was incurred in good faith, the Tribunal does not have to determine whether the delay resulted in substantial prejudice: *Fox Estate* at para 20; *Esanu v Georgetown Non-Contact Hockey League*, 2009 HRTO 579 at para 16.
8. **Ms. Donovan has failed to advance any reasonable or sufficient explanation at law for her failure to "act with all due diligence" in the pursuit of the her Application.** It is neither adequate nor justifiable for Ms. Donovan to have breached the *Code*'s mandatory time limit because she was allegedly waiting for a jurisdictional ruling from the Court. The WRPSB's dismissal motion in Ms. Donovan's civil action, which raised the issue of the Court's jurisdiction over Ms. Donovan's allegations, was filed on or about June 7, 2018. The fact remains, therefore, that over 5.5 months had elapsed from the date of the triggering event for Ms. Donovan's Application (i.e. Chief Larkin's swearing of an affidavit on December 21, 2017) and the date (i.e. June 7, 2018) that the WRPSB put Ms. Donovan on notice that it would raise a jurisdictional issue in respect of Ms. Donovan's civil action.
9. In any event, an applicant's efforts to pursue his/her rights in another forum, without more, cannot justify delay in filing an application with the Tribunal under section 34 or 35 of the *Code*: *Bounpraseuth v York University*, 2016 HRTO 374 at paras 11-13; *Richards v Ryerson University*, 2015 HRTO 1210 at paras 19-21; *Huo v University of Western Ontario*, 2012 HRTO 198 at paras 18-20; *Gagne v Maximum Mining*, 2010 HRTO 689 at para 12. The Tribunal

expects that diligent applicants will preserve their right to proceed before the Tribunal by filing timely applications under the *Code*, even while other proceedings are ongoing: *Cartier v Northeast Mental Health Centre*, 2009 HRTO 1670 at para 23. The WRPSB submits that delayed applications under section 45.9(3) of the *Code* should be treated consistently.

10. In the absence of any reasonable or legally viable explanation for the delay by Ms. Donovan in filing her Application, the Tribunal ought to dismiss Ms. Donovan's Application forthwith in accordance with the Tribunal's previously issued NOID. (In the event, for whatever reason, the Tribunal declines to do so, the WRPSB and Chief Larkin will file a formal Response to Ms. Donovan's Application in due course.)

**(b) Ms. Donovan's submissions in response to the WRPSB'S RFOP (HRTO File No. 2018-33237-S)**

11. The WRPSB repeats and relies on the submissions in its July 30, 2018 RFOP.

12. Pending the Tribunal's ruling on the WRPSB's RFOP and depending on the outcome, the WRPSB continues to reserve the right to file a Reply to Ms. Donovan's Response to its Application. As the Tribunal is aware, the WRPSB did not file a Reply to Ms. Donovan's Response. Instead, the WRPSB filed its RFOP on July 30, 2018 requesting that Ms. Donovan be deemed to have accepted the WRPSB's allegations given her lack of substantive response to the Application in HRTO File No. 2018-33237-S.

**(c) Response to allegations by Ms. Donovan regarding procedural steps in the Applications**

13. Ms. Donovan alleges that the WRPSB's Application was filed in retaliation for her civil action and "relies on the time stamp on the [WRPSB]'s supporting evidence, all within June, 2018" in support of this allegation (at para 138 of the Submissions). However, Ms. Donovan's allegation is based on time stamps that refer to the time and date when the WRPSB's supporting documents were printed. The WRPSB reasserts that the decision to file its Application and the gathering of material to support the Application occurred well in advance of when it became aware of Ms. Donovan's civil action.

14. The Submissions do not contest that the WRPSB's Application was filed beyond the six-month limitations period in section 45.9(3) of the *Code*. Rather, Ms. Donovan admits that "[there] was a series of contraventions" (at para 139 of the Submissions). In the circumstances, the WRPSB

requests that the Tribunal deem Ms. Donovan to have abandoned her objection to the timeliness of the WRPSB's Application.

15. Ms. Donovan does, however, allege that the WRPSB ought to have filed its Application or notified Ms. Donovan of her improper conduct within six months of her **first** contravention of the parties' settlement agreement. This allegation has no basis at law. Section 45.9(3) of the *Code* expressly states that an application for contravention of settlement must be filed within six months after the **last** contravention in a series of contraventions. No provision of the *Code* requires a party to inform another party about the latter party's breaches of settlement.
16. In the Submissions, Ms. Donovan repeatedly alleges that her "right to procedural fairness" was not respected as a result of the WRPSB commencing its Application. She also alleges that the WRPSB ought to have stayed its proceeding pending the disposition of her civil action. As set out in its RFOP, the WRPSB was properly entitled under the *Code* to request that the Tribunal enforce a human rights settlement. In any event, the doctrine of procedural fairness pertains to the process used by adjudicators in rendering legal decisions and not an opposing party's choice of adjudicative forum: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 23-27.
17. The WRPSB notes that, throughout the Submissions, Ms. Donovan alleges harassment in the form of the WRPSB's counsel corresponding with the Tribunal about deadlines and document filings. With respect, correspondence by the WRPSB's counsel to the Tribunal clarifying procedural steps, especially where such correspondence was sent pursuant to the Tribunal's directions and/or Rules of Procedure, does not constitute harassment at law.
18. Ms. Donovan continually references the fact that correspondence from the WRPSB's counsel is addressed to the Tribunal's Registrar, Ms. Georgios Fthenos, and appears to insinuate that this practice is indicative of improper conduct on the part of the WRPSB. However, Rule 1.12 of the Tribunal's Rules of Procedure clearly states that "[a]ll written communications with the Tribunal, including e-mail correspondence, **must be addressed to the Registrar**, with a copy delivered to all other parties" [emphasis added]. The suggestion that the WRPSB has acted inappropriately merely by complying with the Rules of Procedure is nonsensical.
19. Ms. Donovan has similarly alleged harassment and discrimination in the form of a Case Management Conference between the parties and the Tribunal on February 19, 2019 (at para 69

of the Submissions). Ms. Donovan appears to attribute this alleged harassment and discrimination to the parties' agreement to extend Ms. Donovan's filing deadlines to May 2019. Despite the insufficient particulars to this allegation, the exact basis upon which Ms. Donovan is claiming harassment and discrimination is unclear. Given that Ms. Donovan agreed to these deadlines and was granted an extra two months (in addition to the approximately 5.5 months that had already passed since her initial deadlines) for preparing her submissions, Ms. Donovan was not treated adversely in the setting of the deadlines. Rather, she was afforded generous lee-way in the time for filing her submissions above and beyond established norms and practices.

## II. RESPONSE TO MS. DONOVAN'S NOTICE OF CONSTITUTIONAL QUESTION

20. The Submissions and Tab 31 thereto comprise Ms. Donovan's *Charter* challenge and Notice of Constitutional Question. Ms. Donovan seeks: a declaration that section 137.1(3) of the *Courts of Justice Act* is unconstitutional; amendment of the *Courts of Justice Act* to extend the application of section 137.1(3) to proceedings before administrative boards and tribunals; and the dismissal of the WRPSB's Application by the Tribunal.
21. Leaving aside Ms. Donovan's blanket allegation that section 137.1(3) of the *Courts of Justice Act* violates sections 2(b) and 15 of the *Charter* (and the lack of particulars in respect of the legal basis for this position), Ms. Donovan's *Charter*-related requests are beyond the Tribunal's jurisdiction. The Tribunal does not have the authority under section 24(1) of the *Charter* to make general declarations as to the invalidity of a statute, even if it may treat an impugned statutory provision as invalid for the purposes of the specific matter before it: *Arzem v Onario (Community and Social Services)*, 2006 HRT0 17 at para 166; *Viney v. Volkswagen Group of Canada*, 2010 HRT0 1309 at para 10; *Dwyer v Metropolitan Toronto (Municipality)* (1996), 27 CHRR D/108 (Ont Bd Inq) at para 142.
22. Moreover, the Tribunal does not have the power to amend legislation. Although the Tribunal has broad remedial powers in respect of applications for contravention of settlement, the Tribunal's exercise of this remedial power must be connected to the specific settlement before it. To that end, section 45.9(8) of the *Code* expressly states that if "the Tribunal determines that a party has contravened the settlement, the Tribunal may make any order that it considers appropriate **to remedy the contravention**" [emphasis added]. It is fanciful to contemplate a scenario where wide-reaching legislative change would be necessary to remedy a contravention of a private settlement between two parties.

23. In accordance with the separation of powers fundamental to Canadian government and enshrined in the *Constitution Acts, 1867 to 1982*, the legislature has the exclusive power to enact legislation and amendments thereto. The Tribunal, although able to interpret and apply legislation, does not have the constitutional authority to draft and amend legislation.
24. In light of the foregoing, the WRPSB will hold off disclosing any documents to Ms. Donovan, as requested in paragraph 144 of the Submissions, unless and until the Tribunal states its intention to hear Ms. Donovan's *Charter* challenge and directs documentary disclosure by the WRPSB. Nevertheless, even if the Tribunal decides to hear Ms. Donovan's *Charter* challenge, it is fundamentally the choice of the WRPSB, and not Ms. Donovan, as to whether the WRPSB wants to waive legal privilege.
25. The WRPSB and Chief Larkin reserve the right to make any other submissions deemed necessary and/or appropriate at a future time should Ms. Donovan's *Charter* issues not be dismissed forthwith.

### **III. MS. DONOVAN'S ALLEGATIONS AGAINST THE TRIBUNAL OUGHT TO BE PURSUED IN ANOTHER PROCEEDING**

26. Ms. Donovan has alleged violation of the Social Justice Tribunals of Ontario ("SJTO") Code of Conduct and Conflict of Interest Rules by Mr. Fthenos and Vice-Chair Laurie Letheren. These allegations appear to be rooted in Mr. Fthenos's alleged prior work with the Ontario Police College and statements made by Vice-Chair Letheren during the parties' Case Management Conference of February 19, 2019.
27. Without commenting on the merits of these allegations (which are wholly without merit and nonsensical), the WRPSB submits that these allegations are beyond the scope of the Applications at issue and should not be adjudicated as part of the instant Tribunal proceedings. If Ms. Donovan has concerns about the conduct of the Tribunal's members, she should bring these concerns directly to the SJTO and/or Tribunal separate and apart from the Applications.

For the reasons set out above, the WRPSB requests that:

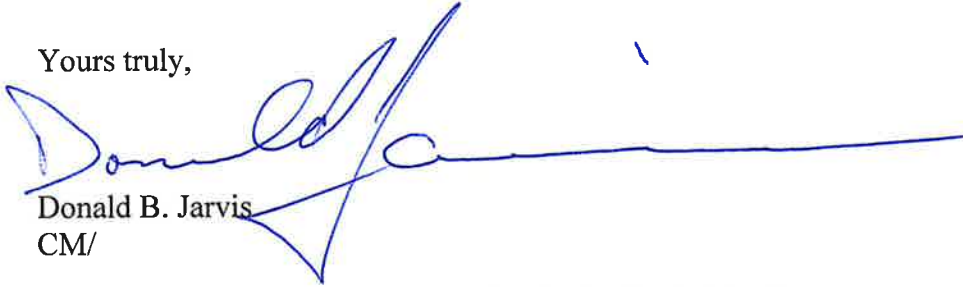
- (a) Ms. Donovan's Application (HRTO File No. 2018-33503-S) be dismissed forthwith for delay and that the NOID initiated by the Tribunal be acted upon;
- (b) The Tribunal issue a ruling on the WRPSB's RFOP in respect of HRTO File No. 2018-333237-

S; and

(c) Ms. Donovan's *Charter* challenges be forthwith barred and/or dismissed for being outside of the Tribunal's jurisdiction.

Thank you in advance for your earliest attention to these matters.

Yours truly,



Donald B. Jarvis  
CM/

cc Virginia Torrance, Waterloo Regional Police Services Board  
Nini Jones, counsel for Waterloo Regional Police Association  
Kelly Donovan, Applicant  
The Honourable David Lametti, Minister of Justice and Attorney General of Canada  
The Honourable Caroline Mulroney, Attorney General for Ontario