

**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

**APPLICANT'S  
FACTUM**

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## **PART I – Parties and Proceedings**

1. The applicant was employed by the respondent Regional Municipality of Waterloo Police Services Board (the “Board”) from December, 2010, to June 26, 2017. The respondent Board is responsible for the provision of adequate and effective police services in the municipality,<sup>1</sup> and shall direct the chief of police and monitor his or her performance.<sup>2</sup>
2. The respondent Bryan Larkin (“Larkin”) was the chief of police for the respondent Board from 2014 up until July 3, 2022.
3. In June, 2016, the applicant filed a human rights application, pursuant to [s. 34 of the Ontario Human Rights Code, R.S.O. 1990, c. H.19 \(the “Code”\)](#), at the respondent Human Rights Tribunal of Ontario (the “Tribunal”), alleging gender discrimination and harassment due to gender and family status, application number 2016-24566-I; the original application.
4. This legal matter involves the enforcement of the resignation agreement entered into by the parties on June 8, 2017, which terminated several ongoing legal matters, including human rights application 2016-24566-I. Despite the applicant’s resignation from employment, the broader conflict between the parties has continued.
5. On May 9, 2018, these legal proceedings began when the applicant filed a statement of claim in Superior Court against the respondent Board and Larkin, court file number CV-18-1938. The applicant believed the matter was better suited in Superior Court. The statement of claim has undergone three amendments and, in the end, alleged the following; Breach of contract; Misfeasance in public office; and Negligence.
6. On June 28, 2018, 51-days after the applicant filed her civil claim, the respondent Board filed an application for contravention of settlement at the Tribunal, pursuant to [s. 45.9 of](#)

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<sup>1</sup> [Police Services Act, R.S.O. 1990, c. P.15, \(“PSA”\) s. 31\(1\).](#)

<sup>2</sup> [PSA s. 31\(1\)\(e\).](#)

[the Code](#), against the applicant, which brought the matter before the Tribunal.

7. Despite the applicant's preliminary objections that the respondent Board's application was filed out of retaliation and did not disclose any contravention of settlement, the Tribunal indicated that it was proceeding with the respondent Board's application ahead of the applicant's civil claim.
8. The applicant then filed her own contravention of settlement application with the Tribunal, to not be prejudiced by the respondent Board's allegations proceeding ahead of her allegations against them.
9. Since 2018, both matters proceeded simultaneously, until the Ontario Court of Appeal ruled on March 10, 2022, to stay the applicant's claim until she had exhausted her remedies under the collective agreement and at the Tribunal. A list of all decisions in CV-18-1938:
  - i. *Donovan v. Waterloo Regional Police Services Board*, [2019 ONSC 1212 \(CanLII\)](#);
  - ii. *Donovan v. Waterloo Regional Police Services Board*, [2019 ONCA 845 \(CanLII\)](#);
  - iii. *Donovan v. Waterloo Regional Police Services Board*, [2019 ONCA 994 \(CanLII\)](#);
  - iv. *Donovan v. WRPSB and Larkin*, [2021 ONSC 2885 \(CanLII\)](#);
  - v. *Donovan v. Waterloo (Police Services Board)*, [2022 ONCA 199 \(CanLII\)](#);
  - vi. *Donovan v. Waterloo (Police Services Board)*, [2022 ONCA 261 \(CanLII\)](#).
10. Despite the assertions by the respondent Board, that jurisdiction of the applicant's claim lies with the Tribunal, even the Ontario Court of Appeal could not make a ruling on jurisdiction, stating at para. 31:

“The record does not permit us to decide this issue. An arbitrator is best placed to interpret the collective agreement and the Resignation Agreement and determine

whether the appellant is precluded from invoking the grievance procedure to pursue her remedies.”<sup>3</sup>

11. On May 12, 2022, the Waterloo Regional Police Association (the “Association”) declined to file a grievance on the applicant’s behalf, as they have multiple times. The *PSA* does not allow individuals to file a grievance at the Ontario Police Arbitration Commission (“OPAC”), “only the employer and the union can pursue a grievance to arbitration; an individual employee cannot do so.”<sup>4</sup> This left the applicant with only one remaining avenue for access to justice; the Tribunal.
12. The Tribunal decision to be reviewed is a final decision, which dismissed one of two allegations of contravention of settlement made by the applicant, and did not address the applicant’s multiple requests to dismiss the respondent Board’s application; *The Regional Municipality of Waterloo Police Services Board v. Donovan*, [2022 HRTO 1409](#).
13. The applicant knew that she could not satisfy the criteria for reconsideration, yet, as a result of preliminary objections by the respondent Board, she unsuccessfully attempted to have the decision to be reviewed reconsidered by the Tribunal; *Regional Municipality of Waterloo Police Services Board v. Donovan*, [2023 HRTO 276 \(CanLII\)](#).
14. Despite the deleterious effect the respondents’ conduct has had on the applicant’s health, she has not been willing to “simply give up on justice”<sup>5</sup> and cease her attempts to hold the respondent Board and Larkin accountable for the harm they continue to cause her.

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<sup>3</sup> *Donovan v. Waterloo (Police Services Board)*, [2022 ONCA 199 \(CanLII\)](#), para. 31.

<sup>4</sup> *Thunder Bay Police Services Board v. James Mauro*, [OPAC Award Number 09-012](#).

<sup>5</sup> *Hryniak v Mauldin*, [2014 SCC 7](#), [2014] 1 SCR 87 at para. 25.

15. The applicant firmly believes that the law is supreme over officials of the government as well as private individuals<sup>6</sup> and in light of the lengths to which she has had to go to be heard, and have her matter adjudicated, she believes she is being denied access to justice.

## **PART II - Facts**

16. The applicant was a successful police constable, having been promoted to Use of Force Instructor after only four and a half years of employment, and she was recognized by the YWCA of Cambridge as a Woman of Distinction in 2015. There were nothing but positive documentations in the applicant's personnel file before she made an unprotected disclosure of wrongdoing to the respondent Board in May, 2016.

17. During the complainant's employment, she was exposed to a traumatic incident at the Ontario Police College when a fellow recruit, directly beside the complainant on the firing line, almost lost his life due to an accidental discharge of his pistol. The respondent Board was aware of this traumatic incident, and the fact that the complainant was directly involved. The complainant was later diagnosed with post-traumatic stress disorder ("PTSD") as a result of this traumatic incident.

18. In May, 2016, the applicant reported to the respondent Board that she believed respondent Larkin was unlawfully affording discretion to some male police officers alleged to have committed criminal domestic violence.

19. Following her unprotected disclosure, the applicant faced reprisal by respondent Larkin in the form of a chief's complaint of misconduct, changes to her working conditions and a gag order. She filed a human rights complaint with the Tribunal in June, 2016, addressing

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<sup>6</sup> *Re Manitoba Language Rights*, [1985 CanLII 33 \(SCC\)](#), [1985] 1 SCR 721, at para. 59.

the respondents' behaviour as well as the lack of representation from the Association (the original application); 2016-24566-I.

20. The Association did not provide the applicant with legal representation for the filing of the original application, she retained a lawyer at her own expense.
21. The original application outlined several acts of discriminatory law enforcement by respondent Larkin, and discrimination and harassment against the applicant by several members of the police service, respondent Larkin and the respondent Board.
22. The original application 2016-24566-I was never heard on its merits, it was deferred once on consent, and then a second time by the Tribunal against the wishes of the applicant.<sup>7</sup>
23. In early 2017, while still employed, the applicant filed a claim with the Workplace Safety and Insurance Board (“WSIB”) for a medical leave of absence due to the severity of her PTSD symptoms.
24. In May, 2017, a \$167M class action lawsuit was filed against the respondent Board by Angelina Rivers, Sharon Zehr and Shelley Heinrich, on their own behalf and on behalf of all female persons who were present or past members of the police service in Superior Court, file number CV-17-2346, for systemic gender-based discrimination and sexual harassment by male members, senior officers and management of the Service.
25. In June, 2017, the applicant carefully and deliberately negotiated her resignation from employment with the respondent Board, making it clear that she would not resign if the respondent Board required a clause restricting her ability to speak about her experiences. A portion of the communication between the applicant and the respondent Board is contained at pages 1410 to 1414 (Volume 3) of the Record of Proceedings.

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<sup>7</sup> *Donovan v. Waterloo Regional Police Service*, [2017 HRTO 221 \(CanLII\)](#).

26. The applicant has advanced her position before the Tribunal that if the negotiations leading up to the creation of the resignation agreement were privileged, the respondent Board has waived any such privilege by relying on the “intent” of the resignation agreement as part of a substantive position taken in their application 2018-33237-S.<sup>8</sup>
27. The resignation agreement was signed by the applicant, respondent Larkin and Mark Egers, president of the Association. The resignation agreement terminated several ongoing proceedings, among them an investigation pursuant to [Part V of the PSA](#) and the original application 2016-24566-I. A redacted copy of the resignation agreement had been submitted to the Tribunal by the respondent Board when their application was filed in June, 2018. A copy of the redacted resignation agreement is attached at **Tab 3** of the Application Record of Applicant.
28. The Association was party to the resignation agreement, yet did not provide the applicant with legal representation, she was represented by her own lawyer throughout the negotiation and signing of the agreement.
29. Even before resigning from her employment, the applicant had been speaking publicly about the need for more transparency and accountability in policing, and protections for those reporting misconduct; whistleblower protection. After she resigned, the applicant made it her goal to use her experience in policing to make positive changes to laws to ensure that the next police officer who makes an internal disclosure is protected from the reprisal she faced.
30. As a direct result of the applicant’s submissions, the Honourable Michael H. Tulloch, (as he was then known, now Chief Justice of Ontario), recommended protection for police

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<sup>8</sup> *Gupta v. Royal College of Physicians and Surgeons of Canada*, [2019 HRTO 469 \(CanLII\)](#), para. 9.

whistleblowers in his Independent Police Oversight Review (“IPOR”) Report, released in 2017. As a result of the IPOR Report, and the applicant’s testimony before the Standing Committee on Justice Policy at the Ontario Legislature, policing legislation was revised in 2018 to allow police officers to report suspected wrongdoing and protect them from reprisal.<sup>9</sup> Before this change, police officers were prohibited from complaining about officers at their own police service.<sup>10</sup>

31. In December, 2017, it is alleged by the applicant that respondent Larkin cited confidential details of her resignation agreement in an affidavit he swore in defence of the class action lawsuit to have the case dismissed.
32. On May 9, 2018, the applicant filed a statement of claim in Superior Court for breach of contract against the respondent Board and Larkin.
33. On June 7, 2018, the respondent Board filed a motion to dismiss the applicant’s lawsuit for lack of jurisdiction, failing to disclose a reasonable cause of action, and because the action was frivolous, vexatious and/or an abuse of the process of the Court. The motion was scheduled to be heard February 13, 2019.
34. On June 28, 2018, the respondent Board filed an application for contravention of settlement [under s. 45.9 of the Code](#), pursuant to [Human Rights Tribunal of Ontario Rule 24](#), by way of Form 18, against the applicant alleging that all of her expressions are “complaints” and violate the resignation agreement. This was designated as application 2018-33237-S by the Tribunal, and is at Tab 1, page 1 (Volume 1), of the Record of Proceedings; reproduced at **Tab 4** of the Application Record of Applicant.
35. The respondent Board has alleged that, even the applicant’s testimony before the

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<sup>9</sup> [Comprehensive Ontario Police Services Act, 2019, S.O. 2019, c. 1 – Bill 68](#), s. 190.

<sup>10</sup> [PSA, s. 58\(2\)](#).



Honourable Michael H. Tulloch, in the IPOR, and before the Ontario Legislature were breaches of her resignation agreement; despite parliamentary privilege and nothing in the agreement preventing the applicant from speaking publicly about her experiences.

36. On July 10, 2018, the applicant responded to application 2018-33237-S, by way of Form 19, requesting that it be dismissed for lack of jurisdiction, because the action was frivolous, vexatious and was commenced in bad faith, the application was a flagrant abuse of process, was untimely and was an attack on the applicant's fundamental freedoms. The applicant believed that the respondent Board had only filed their application out of retaliation for filing her civil claim against them. In this submission, the applicant noted that the respondent Board filed the application 51-days after she filed her civil claim, and the evidence supplied by the respondent Board was all printed in June, 2018, (after the filing of her claim). The July 10, 2018, submission is at Tab 2, page 769 (Volume 2), of the Record of Proceedings; reproduced at **Tab 5** of the Application Record of Applicant.
37. On July 13, 2018, the class action lawsuit the respondent Board was facing, referenced above at paragraph 24, was dismissed,<sup>11</sup> due in part to the assertions made in respondent Larkin's December, 2017, affidavit, cited at paragraph 31. The applicant had agreed to not participate in the class action lawsuit, yet respondent Larkin had involved her and held her out as a satisfied complainant, with disregard for the truth and the legal contract he signed. This reckless behaviour caused the applicant additional psychological harm.
38. On July 19, 2018, the Tribunal issued a letter to the parties advising that the respondent Board's matter would be scheduled for a full day in-person hearing. This letter is at Tab 32 of the Record of Proceedings (the Index shows this document at Tab 34, but it is actually

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<sup>11</sup> *Rivers v. Waterloo Regional Police Services Board*, [2018 ONSC 4307 \(CanLII\)](#).

- at Tab 32 of Volume 7); reproduced at **Tab 6** of the Application Record of Applicant.
39. That same day, July 19, 2018, the applicant wrote to the Tribunal asking if her request to dismiss application 2018-33237-S would be heard, and the Tribunal responded stating that she could raise the matter at the hearing. These emails were not contained in the Record of Proceeding, and are attached at **Tab 7** of the Application Record of Applicant.
40. On July 27, 2018, believing she would be prejudiced by the respondent Board's application proceeding ahead of her civil claim, the applicant brought her own application for contravention of settlement application against the respondent Board and Larkin. This was designated as application 2018-33503-S by the Tribunal, is at Tab 3, page 777 (Volume 2), of the Record of Proceedings; reproduced at **Tab 8** of the Application Record of Applicant.
41. On July 30, 2018, the respondent Board filed a request pursuant to [Human Rights Tribunal of Ontario Rule 19](#) (a Form 10) to dismiss the applicant's objections, deem her to have accepted the allegations in the application and direct that a hearing be restricted to the issue of appropriate remedy. This submission is at Tab 4, page 833 (Volume 2), of the Record of Proceedings; reproduced at **Tab 9** of the Application Record of Applicant.
42. On August 3, 2018, the Tribunal sent the parties a Notice of Hearing for application 2018-33237-S for February 22, 2019; nine (9) days after the hearing of the motion in the applicant's civil lawsuit. See Tab 35, page 3007 (Volume 7) of the Record of Proceedings; reproduced at **Tab 10** of the Application Record of Applicant.
43. On August 10, 2018, the Tribunal issued a Notice of Intent to Dismiss the applicant's application 2018-33503-S alleging the application was untimely, filed outside of the prescribed 6-month period. See Tab 36, page 3012 (Volume 7) of the Record of Proceedings; reproduced at **Tab 11** of the Application Record of Applicant.

44. On August 14, 2018, the applicant received a package from the Workplace Safety and Insurance Board (“WSIB”) which stated that the respondent Board had informed them of “their intention to appeal a decision(s) in this claim.” The applicant believed this was another intentional breach of the resignation agreement by the respondent Board, intended to cause her harm by removing the only medical care she was receiving at the time for her PTSD. This action, along with the baseless application filed by the respondent Board caused the applicant’s health to spiral downward further. This letter is at page 903 (Volume 2) of the Record of Proceedings; reproduced at **Tab 12** Application Record of Applicant.
45. On August 20, 2018, the applicant sent an email to the Tribunal informing the parties of her declining health, requesting extensions for submitting documentation, and notified them of the second alleged breach of the resignation agreement. This email is not included in the Record of Proceedings provided by the Tribunal, and is attached at **Tab 13** of the Application Record of Applicant.
46. On September 18, 2018, the applicant brought an application to Superior Court in Toronto to attempt to dismiss the respondent Board’s application pursuant to [Courts of Justice Act, R.S.O. 1990, c. C.43, \(“CJA”\) s. 137.1\(3\)](#), on the ground that it was a proceeding that limits freedom of expression on matters of public interest, CV-18-00605386-0000. The original and amended applications can be found at pages 1434 to 1443 (Volume 3) of the Record of Proceedings; reproduced at **Tab 14** of the Application Record of Applicant.
47. On January 10, 2019, Justice Favreau, (as she was then known, now Justice for the Court of Appeal for Ontario), heard application CV-00605386-0000 and on February 1, 2019, dismissed it for lack of jurisdiction over a Tribunal proceeding. Favreau J. wrote:

“While I have found that this Court does not have the authority to dismiss the Board’s application to the Human Rights Tribunal, there is no doubt that Ms. Donovan raises legitimate concerns about whether the Board’s application is a justified effort to prevent her from speaking out about her experience as a police officer with the Board.”<sup>12</sup>

48. Despite the undertaking given to Favreau J. by the respondent Board on January 10<sup>th</sup>, cited at *Donovan v. (Waterloo) Police Services Board*, [2019 ONSC 818 \(CanLII\)](#), para. 56, and before her reasons were released, the respondent Board sent their January 25, 2019, letter to the Tribunal regarding the applicant’s “failure to comply with the Tribunal’s filing directions.” See Tab 7, page 897 (Volume 2) of the Record of Proceedings; reproduced at **Tab 15** of the Application Record of Applicant.

49. On February 4, 2019, the applicant sent an email to the Tribunal to inform them of the respondent Board’s undertaking, and provided the Tribunal with the above noted decision. See Tab 8, page 902 (Volume 2) of the Record of Proceedings; reproduced at **Tab 16** of the Application Record of Applicant.

50. On February 6, 2019, the Tribunal released a Case Assessment Direction (“CAD”) which still did not address the applicant’s request to dismiss application 2018-33237-S, yet addressed the issue of dismissal of her application 2018-33503-S. The applicant was ordered to proceed with the Tribunal application ahead of the motion in her civil lawsuit, or her application would be dismissed. See Tab 39, page 3037 (Volume 7) of the Record of Proceedings, (it is listed as Tab 41 in the Index).

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<sup>12</sup> *Donovan v. (Waterloo) Police Services Board*, [2019 ONSC 818 \(CanLII\)](#), para. 55.

51. That same day, February 6, 2019, the applicant wrote an email to the Tribunal informing the parties about her concerns regarding the conduct of Tribunal members. The applicant did not believe the adjudicator was affording her procedural fairness, by ordering a decision prior to the Superior Court deciding jurisdiction of her civil lawsuit. As well, the applicant pointed out that the Registrar of the Tribunal may be in violation of the [Tribunal's Conflict of Interest Rules](#) by participating in the processing of the respondent Board's application. This email is not contained in the Record of Proceedings.
52. When the applicant sent the February 6<sup>th</sup> email, she received a confirmation that the Tribunal had received her message. Despite this, the Tribunal wrote to her on February 11, 2019, stating they had not received her February 6<sup>th</sup> email, so she sent it a second time. This email is not included in the Record of Proceedings provided by the Tribunal, and is attached at **Tab 17** of the applicant's Application Record of Applicant, along with the confirmation that the Tribunal received the February 6<sup>th</sup> email.
53. The [Tribunals Ontario Conflict of Interest Rules](#) state in Part III, para. 32, that a Tribunal staff person and member shall not adjudicate, or participate in the processing or discussions of, any proceeding, in which the staff person or member has had any prior involvement.
54. The applicant had become aware that prior to his appointment as Tribunal Registrar in November, 2016, Georgios Fthenos was Chief Instructor and Senior Manager of the Ontario Police College, a position that requires frequent consultations with stakeholders and involved participating in committees of the Ontario Association Chiefs of Police ("OACP"). Respondent Larkin was named president of the OACP in June, 2017; before that he held various positions including Vice-President. Mr. Fthenos had participated in the

processing of the applicant's original application in 2016/2017, and was continuing to participate in the processing of both applications filed in 2018.

55. Senior members of police services in Ontario are in regular contact with the Ontario Police College throughout the year regarding programming and instructors, as all instructors at the college are seconded from police services, or are retired senior members. This clearly created a conflict of interest affecting not only the applicant, but all other applicants before the Tribunal with cases against police services in Ontario dating back to 2016.
56. The Tribunal had proceeded with a Notice of Intent to Dismiss the applicant's application, yet had not taken action on the applicant's request made in writing in her July 10, 2018, submission for dismissal of the respondent Board's application.
57. The applicant believed that the Registrar and adjudicator of the Tribunal were selectively enforcing the Tribunal's Rules in favour of the respondent Board and Larkin, while her submissions were being lost, and not acted upon since the very beginning of these matters.
58. On February 12, 2019, the Tribunal requested an unredacted copy of the resignation agreement from the respondent Board. See Tab 9, page 918 (Volume 2) of the Record of Proceedings; reproduced at **Tab 18** of the Application Record of Applicant. This was never supplied by the respondent Board.
59. On February 19, 2019, a Case Management Conference Call ("CMCC") took place during which the applicant still believed she was not being afforded procedural fairness or access to justice. The applicant made a personal recording of the CMCC so she could make accurate notes afterwards. On the call, the adjudicator accused the applicant of not making the Tribunal aware of her civil lawsuit, and claimed to not know that she was bound by a

[Code of Conduct](#).<sup>13</sup> The Tribunal has Rules for recording hearings, ([Rule 3.7](#)); the rule does not apply to conference calls.<sup>14</sup>

60. Following the CMCC, the applicant realized she had not formally requested an amendment to her application to include the second alleged contravention of settlement, of which she was made aware on August 14, 2018. The applicant filed a Form 10, in accordance with [Rule 19](#) to amend her application to include the WSIB appeal. See Tab 11, page 921 (Volume 2) of the Record of Proceedings; reproduced at **Tab 19** of the Application Record of Applicant.

61. On February 20, 2019, an Interim Decision was issued which still did not address the applicant's request to dismiss application 2018-33237-S, and ordered that if the applications were not resolved through mediation, the applicant was to provide her outstanding submissions to the Tribunal. The hearing of the respondent Board's application was postponed, and not rescheduled. See Tab 40, page 3042 (Volume 7) of the Record of Proceedings.

62. Mediation was scheduled for May 1, 2019. At the mediation appearance, the applicant hand delivered her responding material to the parties. The Record of Proceeding shows these submissions on March 1, 2019, at Tabs 13, 14, and 15 (Volumes 3, 4, and 5).

63. In her submissions, the applicant once again noted the outstanding issue of her request to dismiss the respondent Board's application made on July 10, 2018, and formally noted her complaints of [Code of Conduct](#) and [Conflict of Interest Rules](#) violations by the adjudicator and Registrar. The applicant's submissions to the Tribunal on these particular issues are

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<sup>13</sup> [Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009, S.O. 2009, c. 33, Sched. 5, s. 7\(1\)](#).

<sup>14</sup> *The Regional Municipality of Waterloo Police Services Board v. Donovan*, [2022 HRTO 1409 \(CanLII\)](#), para. 43.

included at pages 1106 to 1109 (Volume 3) of the Record of Proceedings.

64. Along with her submissions, the applicant also filed a Notice of Constitutional Question. See Tab 16, page 2474 (Volume 6) of the Record of Proceedings; reproduced at **Tab 20** of the Application Record of Applicant. The Attorney General of Ontario declined to intervene. The Attorney General of Canada never responded.
65. On July 4, 2019, the applicant sent an email to the Tribunal which provided additional evidence that the respondent Board's application was filed in bad faith and should be dismissed without a hearing pursuant to [s. 4.6\(1\)\(a\) of the Statutory Powers and Procedures Act, R.S.O. 1990, c. S.22 \("SPPA"\)](#). The evidence is a chart of legal invoices obtained pursuant to the [Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c.M.56 \("MFIPPA"\)](#), which shows that very little legal work was done in the months leading up to May, 2018, and then once the applicant's civil claim was filed, significantly more legal work was done. This, combined with the timing of their application, and the fact that all supporting evidence was compiled in June, 2018, supported the applicant's belief that their application was filed in bad faith out of retaliation. This email was not contained in the Record of Proceedings, and is attached at **Tab 21** of the Application Record of Applicant.
66. On September 30, 2019, the Tribunal released an Interim Decision.<sup>15</sup> In this decision, the Tribunal wrote that if the applicant wanted to claim that her *Charter* rights had been violated by the respondent Board, or that the *CJA* was unconstitutional, she would have to bring a civil claim in court. The applicant had previously made the Tribunal aware of her *CJA* challenge; *Donovan v. (Waterloo) Police Services Board*, [2019 ONSC 818 \(CanLII\)](#),

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<sup>15</sup> *The Regional Municipality of Waterloo Police Services Board v. Donovan*, [2019 HRTO 1326 \(CanLII\)](#).



and had filed a Notice of Constitutional Challenge. See Tab 41, page 3047 (Volume 7) of the Record of Proceedings.

67. In the September 30, 2019, decision, the Tribunal addressed the respondent Board's requests made under [Rule 19](#), but not the applicant's request to dismiss application 2018-33237-S, made on July 10, 2018, or the additional evidence she supplied the Tribunal in her May 1, 2019, submissions or July 4, 2019, email.
68. The applicant interpreted the adjudicator's tone in the decision that she was offended that the applicant had alleged violations of the Code of Conduct and recorded the conference call. The adjudicator threatened to dismiss the applicant's application 2018-33503-S and bar her from any further participation in application 2018-33237-S, alleging she may have abused the Tribunal's process.
69. The adjudicator set out next steps in the September 30, 2019, decision addressing only particular requests, still not addressing the applicant's request to dismiss the respondent Board's application. As time passed, the applicant's belief that she was not being afforded procedural fairness or access to justice grew stronger.
70. On April 15, 2020, the applicant filed a Form 10, pursuant to [Rule 19](#), to formally request dismissal of the respondent Board's application 2018-33237-S. This request can be found at page 2605 (Volume 6) of the Record of Proceedings; reproduced at **Tab 22** of the Application Record of Applicant.
71. On June 16, 2020, the respondent Board responded to the applicant's Form 10 alleging that the legal invoices did not provide evidence of when the work was conducted and alleged that the invoices were protected by solicitor/client privilege, despite the invoices being

obtained lawfully pursuant to the *MFIPPA*. This submission can be found at pages 2722 to 2725 (Volume 6) of the Record of Proceedings.

72. There was little to no action taken on these files in the year 2021.

73. On January 4, 2022, the Tribunal sent an email to canvass dates for a preliminary hearing. This email is not contained in the Record of Proceedings, and is at **Tab 23** of the Application Record of Applicant.

74. On January 5, 2022, the applicant responded by email reminding the Tribunal that her request to dismiss the respondent Board's application remained outstanding, and requested that the Tribunal matters not proceed ahead of the Ontario Court of Appeal releasing their decision in her civil lawsuit. This email is at page 2788 (Volume 6) of the Record of Proceedings; reproduced at **Tab 24** of the Application Record of Applicant.

75. On January 21, 2022, the respondent Board objected to the postponement of a preliminary hearing of application 2018-33503-S. This letter is at page 2794 (Volume 6) of the Record of Proceedings.

76. On February 24, 2022, the Tribunal released a Case Assessment Direction ("CAD"). In it, the adjudicator failed to include the applicant's requests to dismiss the respondent Board's application, and relied only on the issues identified by the previous adjudicator and Registrar, noted in the September 30, 2019, Interim Decision, above at para. 66. The CAD approved the applicant's request to postpone the preliminary hearing. See page 3056 (Volume 7) of the Record of Proceedings.

77. On March 10, 2022, the final decision by the Ontario Court of Appeal in the applicant's civil lawsuit was released and forwarded to the Tribunal.<sup>16</sup>

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<sup>16</sup> *Donovan v. Waterloo (Police Services Board)*, [2022 ONCA 199 \(CanLII\)](#).

78. On April 8, 2022, the Tribunal released another CAD scheduling a CMCC for May 10, 2022. See page 3061 (Volume 7) of the Record of Proceedings.
79. During the May 10, 2022, CMCC, the applicant pointed out to the adjudicator that she had previously challenged the respondent Board's application in civil court, (see para. 46 above), which is incorrectly noted in the September 30, 2019, Interim Decision.<sup>17</sup>
80. On the May 10<sup>th</sup> call, the applicant reminded the adjudicator that her requests to dismiss the respondent Board's application were still outstanding and needed to be addressed. The adjudicator stated that she believed the previous adjudicator had already dealt with the applicant's request. This was incorrect, and the applicant corrected the adjudicator. The adjudicator stated that the applicant's requests were to be dealt with at a hearing on the merits of the respondent Board's application, which had not been rescheduled since it was postponed in February, 2019.
81. On May 25, 2022, a CAD was issued directing that a preliminary hearing be scheduled to hear only those issues identified by the previous adjudicator in the September 30, 2019, Interim Decision,<sup>18</sup> along with one final request to amend the applicant's application to reflect her claim before civil court. Despite the extensive record on file, the parties were directed to file new submissions for the preliminary hearing. The applicant had made a request to record the preliminary hearing but decided not to, as it was cost prohibitive, seeing as how the party requesting that the proceeding be recorded must bear the cost of the court reporter and transcripts. This CAD is at page 3063 (Volume 7) of the Record of Proceedings.

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<sup>17</sup> See note 15.

<sup>18</sup> See note 15.

82. Both the applicant and respondent Board made written submissions for the September 8<sup>th</sup> hearing. The applicant's written submissions summarized all of the unaddressed issues dating back to 2018, and pointed out that her application 2018-33503-S was filed before her second allegation of contravention of settlement, which made the timeliness issue now moot. The applicant had alleged a series of two separate breaches of the resignation agreement; December 17, 2017, and August 14, 2018, and filed her application on July 27, 2018.
83. The respondent Board's written submissions now stated that they did not oppose the applicant amending her application, and did not oppose the timeliness issue.
84. At the September 8, 2022, preliminary hearing, the Tribunal adjudicator reiterated that she would only be dealing with the four issues identified by the previous adjudicator, and she told the applicant that the Tribunal has discretionary powers to hold preliminary hearings and control its own process. The applicant reiterated, orally and in writing, her concerns about the respondent Board's application proceeding despite disclosing no breach of the *Code*, and the public cost of allowing the proceeding to be unnecessarily prolonged.
85. The applicant stated that she believed that a conflict of interest had affected the manner in which the Tribunal managed both applications in the early stages, which led to her requests to dismiss the respondent Board's application not being heard by the Tribunal, yet her application was being scrutinized under the Rules.
86. On November 25, 2022, the Interim Decision under review was issued.<sup>19</sup> In it, the Tribunal allowed the applicant's second allegation of contravention of settlement, and dismissed her first allegation.

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<sup>19</sup> *The Regional Municipality of Waterloo Police Services Board v. Donovan*, [2022 HRTO 1409 \(CanLII\)](#).

87. The applicant expected that her claims of misfeasance in public office and negligence would be dismissed, since the Tribunal has no jurisdiction over those claims. The applicant had brought her entire civil claim before the Tribunal in order to determine remedies available prior to returning to civil court to have the stay lifted on her civil claim.
88. On December 20, 2022, the applicant filed a Form 20, Request for Reconsideration, under [Rule 26 of the Human Rights Tribunal of Ontario Specific Rules](#), which was dismissed by the Tribunal on March 1, 2023.<sup>20</sup> The applicant also addressed her concerns regarding procedural fairness in this submission. Attached at **Tab 25** of the Application Record of the Applicant is the applicant's Request for Reconsideration, Form 20, filed in accordance with [Rule 26](#).
89. On December 23, 2022, despite all of the applicant's preliminary objections and requests to dismiss the respondent Board's application, they filed an amendment to their application to add voluminous, additional allegations spanning from 2018 to 2022.

### **PART III – Issues and Law**

90. The Divisional Court has jurisdiction to review decisions of the Tribunal pursuant to ss. 2 & 6(1) of the [Judicial Review Procedure Act, R.S.O. 1990, c. J.1](#).
91. The standard of review, as established in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019 SCC 65](#), is that of reasonableness.

#### **Allegations Form a Series of Incidents**

92. It was patently unreasonable for the Tribunal to have dismissed the applicant's first allegation of contravention of settlement for untimeliness, while accepting the second

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<sup>20</sup> *Regional Municipality of Waterloo Police Services Board v. Donovan*, [2023 HRTO 276 \(CanLII\)](#).

incident of a series of incidents.

93. The Tribunal stated, at para. 34 of the Interim Decision under review,<sup>21</sup> that “the two alleged breaches of the settlement do not constitute a series of contraventions under s. 45.9(3) because they are very different in nature.” This conclusion is unreasonable, as there is no jurisprudence or law to suggest that contraventions of settlement must be similar in nature in order to constitute a series of incidents, and this requires a full analysis.

94. The applicant’s application 2018-33503-S contains two distinct allegations of contravention of settlement, and the effective dates are not disputed by the parties:

- i. December 21, 2017 – The sworn affidavit by respondent Larkin which the applicant alleges disclosed confidential details of her resignation agreement; and
- ii. August 14, 2018 – The WSIB appeal which the applicant alleges violates the resignation agreement (this is the date the applicant was made aware of the appeal filed on January 11, 2018, by the respondent Board).

95. The allegations in the applicant’s application 2018-33503-S form a series of incidents because they are separate incidents of contravention of settlement, do not relate to the continuing effect of a single incident,<sup>22</sup> and there was not a significant gap between alleged incidents.<sup>23</sup>

96. A party who believes that another party has contravened an agreement made in writing of an application made under s. 34 of the *Code*, may make an application to the Tribunal, if there was a series of contraventions, within six months after the last contravention in the series.<sup>24</sup>

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<sup>21</sup> See note 19, para. 34.

<sup>22</sup> *Garrie v. Janus Joan Inc.*, [2012 HRTO 1955 \(CanLII\)](#), p. 30.

<sup>23</sup> *Stewart v. York Condominium Corporation 165*, [2023 HRTO 579 \(CanLII\)](#), p. 6.

<sup>24</sup> [Human Rights Code, R.S.O. 1990, c. H.19, s. 45.9.](#)

97. The applicant brought her application on July 27, 2018, which was within six months of the last alleged contravention of settlement. By allowing the second contravention of settlement<sup>25</sup>, the Tribunal had accepted that there was a series and it was unreasonable to dismiss the first contravention of settlement as untimely, especially considering the respondent Board did not oppose the untimeliness. “Once the final incident is found to be timely, all other incidents are presumed to be timely.”<sup>26</sup>
98. In the reconsideration decision, the Tribunal gives the same words the same meaning throughout the *Code*, in comparing allegations made under ss. 34 & 45.9 of the *Code*.<sup>27</sup> It is obvious that discriminatory conduct can take on many forms, yet conduct constituting a contravention of settlement is conduct that violates a term of a binding settlement of an application made under s. 34 of the *Code*,<sup>28</sup> and is not subjective. The reconsideration decision states; “The Tribunal has stated it is necessary to determine which events can be grouped together into a “class” in relation to discrimination,”<sup>29</sup> yet has not distinguished what makes a “class” of incidents of contravention of settlement.
99. “The Tribunal’s approach to what is a ‘series of incidents’ is developing on a case-by-case basis. It has been said that events are not part of a series of incidents if there is a significant break in the temporal connection between them.”<sup>30</sup> The two allegations of contravention of settlement occurred on December 17, 2017, and January 11, 2018, (less than one month apart). The applicant was only made aware of the second allegation of contravention on August 14, 2018; she should not be punished for that.

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<sup>25</sup> See note 19, paras. 16-17.

<sup>26</sup> *City of Toronto v Grange*, [2016 ONSC 869 \(CanLII\)](#), p. 21.

<sup>27</sup> See note 20, para. 23.

<sup>28</sup> [Code, s. 45.9\(3\)](#).

<sup>29</sup> See note 20, para. 25.

<sup>30</sup> *Henry v. Waterloo (Regional Municipality)*, [2011 HRTO 1927 \(CanLII\)](#), para. 10.

100. A “series of incidents” may be considered to exist where the incidents share a common theme, similar parties and/or circumstances.<sup>31</sup> The applicant’s allegations are that the same parties violated the same settlement agreement on two occasions. To suggest that, in order to be a series of incidents, the contraventions must somehow be the same, and that separate incidents of contravention cannot be considered a series is unreasonable. There is no jurisprudence to this effect. In fact, if the contraventions were the same, and where an incident referred to the ongoing effects of the contravention, they would then be dismissed, as cited in *Garrie*, at footnote 22.

101. Had the applicant not filed her application until after the second alleged contravention of settlement in August, 2018, it is highly unlikely that the Tribunal would have allowed the second allegation, and not the first. The decision under review is unreasonable because the Tribunal’s Notice of Intent to Dismiss was filed even before the second allegation of contravention of settlement was known.

102. The Tribunal also dismissed the applicant’s allegations of misfeasance in public office and negligence, as being outside of the jurisdiction of the Tribunal.<sup>32</sup> The applicant does not challenge this determination, this was the reason she brought her civil claim to the Ontario Superior Court in the first place; CV-18-1938.

### **The Tribunal has refused to hear the Applicant’s Requests to Dismiss**

103. The law and authorities relating to Tribunal powers to dismiss are the following:

- 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

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<sup>31</sup> *Twyne v. Dominion Colour Corporation*, [2013 HRTO 1769 \(CanLII\)](#), para. 8.

<sup>32</sup> *See note* 19, paras. 18 & 19.



- 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 A4.1](#): The tribunal may exercise any of its powers at the request of a party, or on its own initiative, except where otherwise provided.
  - 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;

- i. [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.
104. *Courts of Justice Act* allows for the dismissal of a proceeding that limits freedom of expression on matters of public interest, [section 137.1\(3\)](#). As the applicant learned, *CJA* s. 137.1(3) does not apply to a “proceeding” brought before the Tribunal, and as was stated by Justice Favreau:
- “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.”<sup>33</sup>
105. The applicant also filed a Notice of Constitutional Question since she did not believe that *CJA* s. 137.1 provided her equal protection and benefit of the law.
106. The applicant has followed every procedure available to her to attempt to have the respondent Board’s application dismissed, yet her requests have not been heard, and the respondent Board’s proceeding has survived, without scrutiny, for over 5 years.
107. As early as July 10, 2018, the applicant has made the following pleas regarding the constitutionality of the respondent Board’s application 2018-33237-S:
- i. On July 10, 2018, by requesting dismissal of the application since it was an attack on her fundamental freedoms, as guaranteed by the *Canadian Charter of Rights and Freedoms*;

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<sup>33</sup> See note 12, para. 52.

- ii. In January, 2019, when the applicant attempted to have the respondent Board's proceeding dismissed pursuant to *CJA* s. 137.1;<sup>34</sup>
- iii. In May, 2019, in the applicant's submissions to the Tribunal, pages 1101 to 1106 (Volume 3) of the Record of Proceedings; and
- iv. In May, 2019, in her Notice of Constitutional Question to the Attorney General of Ontario, pages 2474 to 2491 (Volume 6) of the Record of Proceedings.

108. The applicant had previously utilized our civil court system to attempt to have the respondent Board's application dismissed, (CV-18-00605386-0000, see para. 46 above). Her requests to the Tribunal, that the respondent Board's application be dismissed, were within the Tribunal's legislated powers. Despite these facts, the Tribunal decided; "In order to claim that her *Charter* rights have been violated by the Board or that the *CJA* is unconstitutional, Donovan must bring a civil claim in court."<sup>35</sup>

109. As stated in *R. v. Conway*, [2010 SCC 22, \[2010\] 1 S.C.R. 765](#) at para. 21, "The jurisprudential evolution has resulted in this Court's acceptance not only of the proposition that expert tribunals should play a primary role in the determination of *Charter* issues falling within their specialized jurisdiction, but also that in exercising their statutory discretion, they must comply with the *Charter*."

110. It was patently unreasonable and inconsistent with *R. vs. Conway*, for the Tribunal to decide in September, 2019, that it would "not address those issues any further."<sup>36</sup> Because of the September, 2019, decision by the previous adjudicator, (which was not a final decision), the Tribunal has not addressed any of the issues the applicant has raised

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<sup>34</sup> See note 12.

<sup>35</sup> See note 15, para. 15.

<sup>36</sup> See note 15, para. 16.

with regard to the respondent Board's application since 2018.

111. The applicant has made requests to dismiss the respondent Board's application 2018-33237-S, as it falls outside of the jurisdiction of the Tribunal, it is frivolous, vexatious and was commenced in bad faith, it is an abuse of process, and untimely on the following 7 dates (as outlined in detail above); July 10, 2018, in writing; February 19, 2019, orally; May 1, 2019, in writing; April 15, 2020, in writing; May 10, 2022, orally; August 5, 2022, in writing; and September 8, 2022, orally.

112. The applicant believes she has been denied procedural fairness. Although the Tribunal has the discretion to exercise its powers at the request of a party, ([Rule A4.1](#)), and may dismiss an application at the request of a party, it is clear that once the applicant filed a Form 10, pursuant to [Rule 19](#) on April 15, 2020, she had a right to be heard on the issue.

113. The Tribunal has applied [Rule 13.1](#) to the applicant's application 2018-33503-S, see para. 43 above, yet, despite the applicant's repeated requests, made orally and in writing, in accordance with [Rule 19](#), the Tribunal has refused to hear her requests in writing, in person, or electronically, or even set a date for the hearing of her request, as required in [Rule 19.7](#).

114. The Tribunal has, on many occasions, adopted the practices associated with the Tribunal's summary hearing procedure to allow for the fair and just determination of a preliminary matter in applications for contravention of settlement. See the following case law references to this effect:

- i. *Liu v. Metropolitan Toronto Condominium Corporation No. 541*, [2014 HRTO 292 \(CanLII\)](#), paras. 10 – 12;
- ii. *Riopel v. Foster*, [2013 HRTO 1977 \(CanLII\)](#), para. 16;

iii. *Forde v. Avon Maitland District School Board*, [2010 HRTO 2367 \(CanLII\)](#), para. 5;

iv. *BB v. Thames Valley District School Board*, [2018 HRTO 536 \(CanLII\)](#).

115. Specifically, the case at bar is almost identical to *Riopel*, cited above. In *Riopel*, there had been “significant conflict between the parties” and although the agreement had settled the application, it had not addressed the broader conflict, and the conflict had continued.<sup>37</sup> The contravention of settlement filed by the respondents was “in essence a complaint that the applicants have continued to speak of the issues giving rise to the original application and that they have continued to directly or indirectly disparage him.”<sup>38</sup>

116. In *Riopel*, the Tribunal applied [Rule 19A](#) within one year of the contravention of settlement application being filed and determined that no allegations had been made which, if true, could result in a finding that the applicants contravened the settlement. The Tribunal decided there was no reasonable prospect that the application could succeed if it were to proceed to a full hearing before the Tribunal and that it must be dismissed on that basis.<sup>39</sup>

117. In *Riopel*, the Tribunal disposed of the application because it was the best opportunity for a fair, just and expeditious resolution of the merits of the applications, and fulfilled its obligation under s. 40 of the *Code*. It is unreasonable that the Tribunal has refused to hear the applicant’s requests to dismiss application 2018-33237-S, which mirrors *Riopel*, for over 5 years.

118. The Tribunal’s refusal to hear the applicant’s preliminary objections has resulted in a protracted, adversarial and costly parallel proceedings that has come at a cost to the public

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<sup>37</sup> *Riopel v. Foster*, [2013 HRTO 1977 \(CanLII\)](#), para. 9.

<sup>38</sup> See note 37, para. 10.

<sup>39</sup> See note 37, para. 15.

of over \$590,000.00, which invokes the public interest. The legal invoices were lawfully obtained by the applicant, pursuant to *MFIPPA*, and much of this public expense could have been avoided.

119. Prior to the February 19, 2019, CMCC the applicant was already doubting that she was being treated fairly by the Tribunal. It is said, at paragraph 31 of *Lewis v. Toronto Transit Commission*, [2018 HRTO 1147 \(CanLII\)](#), that:

“...“duty to act fairly includes the duty to provide procedural fairness to the parties. That simply cannot exist if an adjudicator is biased”. He states that an adjudicator must be held to the highest standards of fairness and submits the Tribunal can cure this unfairness by recording its proceedings going forward.”

120. The applicant has taken every opportunity available to her to draw the Tribunal’s attention to procedural fairness issues in these matters. Once a new adjudicator had been assigned to these matters, the applicant attempted to inform her of the previous issues at the May 10, 2022, CMCC, and in writing in her submission for the September 8, 2022, preliminary hearing. See pages 2899 to 2902 (Volume 6) of the Record of Proceedings, (specifically paragraphs 23 to 35). The applicant supplied the adjudicator with the audio file and written transcript of the February 19, 2019, CMCC because she believed that the transcript explains why her requests have not been heard and it was important context for the new adjudicator.

121. It has been said in case law that, it would be preferential to both the Tribunal and the applicants to record all proceedings. In *Peel Law Association v. Pieters*, [2013 ONCA 396 \(CanLII\)](#), at para. 135, the Court of Appeal for Ontario wrote:

“We were advised that the HRTO does not normally record or transcribe its proceedings. This is difficult to understand given the availability of modern and simple-to-operate digital recording equipment. It seems to me that the advantages of recording the proceedings to the parties, the reviewing courts and to the tribunal itself outweigh any perceived difficulties.”<sup>40</sup>

122. The applicant prepared an accurate transcript of the CMCC on February 19, 2019, and provided the transcript and digital audio file to the Tribunal to support her claim that she had not been afforded procedural fairness by the previous adjudicator. There were no inaccuracies which would have rendered the transcript or recording unreliable,<sup>41</sup> yet, the Tribunal did not consider the transcript or audio recording.<sup>42</sup>

123. It is unreasonable that the Tribunal did not consider events which led up to the 2019 Interim Decision<sup>43</sup>, when it decided 3 years later, in 2022, to proceed only with preliminary issues identified by the previous adjudicator,<sup>44</sup> and not the requests to dismiss application 2018-33237-S made by the applicant. This decision has denied the applicant procedural fairness and access to justice and has unnecessarily prolonged the respondent Board’s application 2018-33237-S.

124. Even without considering the transcript of the CMCC on February 19, 2019, it is clear to see that the Tribunal Rules have been applied against application 2018-33503-S, that of the applicant, and not 2018-33237-S, that of the respondent Board.

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<sup>40</sup> *Peel Law Association v. Pieters*, [2013 ONCA 396 \(CanLII\)](#), at para. 135.

<sup>41</sup> *Subramaniam v. McMaster University*, [2018 HRTO 792 \(CanLII\)](#), para. 8.

<sup>42</sup> See note 19, para. 49.

<sup>43</sup> See note 35, para. 36.

<sup>44</sup> See note 19, para. 3.

#### **Part IV - Order**

125. The applicant seeks the following Order:
- i. The applicant's application 2018-33503-S proceed with the series of alleged contraventions of settlement, specifically respondent Larkin's affidavit dated December 17, 2017, and the WSIB appeal dated August 14, 2018;
  - ii. The Tribunal proceed with a preliminary hearing to determine whether or not the respondent Board's application 2018-33237-S falls within the jurisdiction of the Tribunal, is frivolous, vexatious and was commenced in bad faith, is an abuse of process, is untimely, or has a reasonable prospect that the respondent Board could successfully prove that the resignation agreement has been contravened;
  - iii. Costs, in favour of the applicant, commensurate with costs claimed by the respondent Board for this same matter;
  - iv. Such further and other relief as this Honourable Court deems just.

#### **Applicant's Request for Time**

126. The applicant estimates she will require 1.5 hours for her oral argument, inclusive of clarifying questions from the Honourable panel, not including reply.

Signed electronically June 9, 2023, by the self-represented applicant,



Kelly Donovan



## Schedule A

List of authorities referred to (also hyperlinked throughout Factum)

In order of appearance:

1. *Donovan v. Waterloo Regional Police Services Board*, [2019 ONSC 1212 \(CanLII\)](#)
2. *Donovan v. Waterloo Regional Police Services Board*, [2019 ONCA 845 \(CanLII\)](#)
3. *Donovan v. Waterloo Regional Police Services Board*, [2019 ONCA 994 \(CanLII\)](#)
4. *Donovan v. WRPSB and Larkin*, [2021 ONSC 2885 \(CanLII\)](#)
5. *Donovan v. Waterloo (Police Services Board)*, [2022 ONCA 199 \(CanLII\)](#)
6. *Donovan v. Waterloo (Police Services Board)*, [2022 ONCA 261 \(CanLII\)](#).
7. *The Regional Municipality of Waterloo Police Services Board v. Donovan*, [2022 HRTO 1409](#)
8. *Thunder Bay Police Services Board v. James Mauro*, [OPAC Award Number 09-012](#)
9. *Hryniak v Mauldin*, [2014 SCC 7](#), [2014] 1 SCR 87
10. *Re Manitoba Language Rights*, [1985 CanLII 33 \(SCC\)](#), [1985] 1 SCR 721
11. *Donovan v. Waterloo Regional Police Service*, [2017 HRTO 221 \(CanLII\)](#).
12. *Gupta v. Royal College of Physicians and Surgeons of Canada*, [2019 HRTO 469 \(CanLII\)](#)
13. *Rivers v. Waterloo Regional Police Services Board*, [2018 ONSC 4307 \(CanLII\)](#)
14. *Donovan v. (Waterloo) Police Services Board*, [2019 ONSC 818 \(CanLII\)](#)
15. *The Regional Municipality of Waterloo Police Services Board v. Donovan*, [2019 HRTO 1326 \(CanLII\)](#)
16. *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019 SCC 65](#)
17. *Garrie v. Janus Joan Inc.*, [2012 HRTO 1955 \(CanLII\)](#)

18. *Stewart v. York Condominium Corporation 165*, [2023 HRTO 579 \(CanLII\)](#)
19. *City of Toronto v Grange*, [2016 ONSC 869 \(CanLII\)](#)
20. *Henry v. Waterloo (Regional Municipality)*, [2011 HRTO 1927 \(CanLII\)](#)
21. *Twyne v. Dominion Colour Corporation*, [2013 HRTO 1769 \(CanLII\)](#)
22. *Liu v. Metropolitan Toronto Condominium Corporation No. 541*, [2014 HRTO 292 \(CanLII\)](#)
23. *Riopel v. Foster*, [2013 HRTO 1977 \(CanLII\)](#)
24. *Forde v. Avon Maitland District School Board*, [2010 HRTO 2367 \(CanLII\)](#)
25. *BB v. Thames Valley District School Board*, [2018 HRTO 536 \(CanLII\)](#)
26. *Lewis v. Toronto Transit Commission*, [2018 HRTO 1147 \(CanLII\)](#)
27. *Peel Law Association v. Pieters*, [2013 ONCA 396 \(CanLII\)](#)
28. *Subramaniam v. McMaster University*, [2018 HRTO 792 \(CanLII\)](#)

## **Schedule B**

Relevant provisions of statutes, regulations and by-laws (also hyperlinked in Factum)

In order of appearance:

[Police Services Act, R.S.O. 1990, c. P.15, \(“PSA”\) s. 31\(1\):](#)

### **Responsibilities of boards**

31 (1) A board is responsible for the provision of adequate and effective police services in the municipality and shall,

- (a) appoint the members of the municipal police force;
- (b) generally determine, after consultation with the chief of police, objectives and priorities with respect to police services in the municipality;
- (c) establish policies for the effective management of the police force;
- (d) recruit and appoint the chief of police and any deputy chief of police, and annually determine their remuneration and working conditions, taking their submissions into account;
- (e) direct the chief of police and monitor his or her performance;
- (f) establish policies respecting the disclosure by chiefs of police of personal information about individuals;
- (g) receive regular reports from the chief of police on disclosures and decisions made under section 49 (secondary activities);
- (h) establish guidelines with respect to the indemnification of members of the police force for legal costs under section 50;
- (i) establish guidelines for dealing with complaints under Part V, subject to subsection (1.1);
- (j) review the chief of police’s administration of the complaints system under Part V and receive regular reports from the chief of police on his or her administration of the complaints system. R.S.O. 1990, c. P.15, s. 31 (1); 1995, c. 4, s. 4 (7); 1997, c. 8, s. 21 (1-3); 1997, c. 17, s. 8; 2007, c. 5, s. 9 (1).

[Ontario Human Rights Code, R.S.O. 1990, c. H.19 \(the “Code”\) s. 34\(1\)](#)

### **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.
- 2006, c. 30, s. 5

### **Settlements**

45.9 (1) 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.

### **Consent order**

(2) If a settlement of an application made under section 34 or 35 is agreed to in writing and signed by the parties, the Tribunal may, on the joint motion of the parties, make an order requiring compliance with the settlement or any part of the settlement. 2006, c. 30, s. 5.

### **Application where contravention**

(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. 2006, c. 30, s. 5.

### **Complaints by chief**

**76** (1) A chief of police may make a complaint under this section about the conduct of a police officer employed by his or her police force, other than the deputy chief of police, and shall cause the complaint to be investigated and the investigation to be reported on in a written report. 2007, c. 5, s. 10; 2009, c. 30, s. 57.

### **Reporting of misconduct**

**184** (1) If a member or former member of a police service has reason to believe that another member of the police service has engaged in conduct that constitutes misconduct, he or she may disclose the misconduct in accordance with the applicable procedure established under subsection 183 (1), (2) or (3).

### **No reprisals**

**190** (1) No person shall take a reprisal against a member of a police service or special constable employed by a special constable employer because he or she has,

- (a) sought advice about making a disclosure about misconduct in accordance with this Part;
- (b) made a disclosure about misconduct in accordance with this Part;
- (c) co-operated in an investigation or other process related to a disclosure of misconduct made in accordance with this Part; or
- (d) sought enforcement of this Part.

### **Same**

- (2) For the purposes of subsection (1), a reprisal is any measure taken against a member of a police service or special constable employed by a special constable employer that adversely affects his or her employment or appointment and includes but is not limited to,
- (a) terminating or threatening to terminate the person's employment or appointment;
  - (b) disciplining or suspending or threatening to discipline or suspend the person;
  - (c) imposing or threatening to impose a penalty related to the employment or appointment of the person; or
  - (d) intimidating or coercing the person in relation to his or her employment or appointment.

### [PSA, s. 58](#)

#### **Complaint may be made to Independent Police Review Director**

- 58** (1) Any member of the public may make a complaint under this Part to the Independent Police Review Director about,
- (a) the policies of or services provided by a police force; or
  - (b) the conduct of a police officer. 2007, c. 5, s. 10.

#### **Prohibition**

(2) Despite subsection (1), the following persons cannot make a complaint to the Independent Police Review Director:

1. The Solicitor General.
2. An employee in the office of the Independent Police Review Director.
3. A member or employee of the Commission.
4. **A member or auxiliary member of a police force, if that police force or another member of that police force is the subject of the complaint.**
5. Repealed: 2009, c. 33, Sched. 2, s. 60 (1).
6. A member or employee of a board, if the board is responsible for the police force that is, or a member of which is, the subject of the complaint.
7. A person selected by the council of a municipality to advise another municipality's board under subsection 6.1 (2), if the board is responsible for the police force that is, or a member of which is, the subject of the complaint.
8. A delegate to a community policing advisory committee established under subsection 5.1 (4), if the community policing advisory committee advises the detachment

commander of the Ontario Provincial Police detachment that is, or a member of which is, the subject of the complaint. 2007, c. 5, s. 10; 2009, c. 33, Sched. 2, s. 60 (1).

#### Human Rights Tribunal of Ontario Rule 24

### **RULE 24      CONTRAVENTION OF SETTLEMENTS**

#### 24.1

An application under s. 45.9(3) of the Code alleging contravention of a settlement must be filed in Form 18, Application for Contravention of Settlement, delivered to the other parties to the settlement and filed with the Tribunal.

#### 24.2

The Application for Contravention of Settlement must include an answer to each question in Form 18 and include a copy of the settlement alleged to have been contravened.

#### 24.3

The other parties must deliver and file their response, if any, in Form 19, Response to Application for Contravention of Settlement, not later than 14 days after the Form 18 was delivered.

#### Human Rights Tribunal of Ontario Rule 19

### **RULE 19                      REQUEST FOR AN ORDER DURING PROCEEDINGS**

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.

19.2                      Where a request is made in writing, it must be made in Form 10, Request for Order during Proceedings ("Request for Order") and must be delivered to all parties and any person or organization who may have an interest in the request and filed with the Tribunal.

19.3                      A request for an order that a non-party provide a report, statement or oral or affidavit evidence in accordance with Rule 1.7(r), must be in writing and must be delivered to the non-party in addition to the other parties to the proceeding.

A Request for Order (Form 10) must:

1. describe the order requested;
2. contain reasons for the request, including any facts relied on and submissions in support of the request;
- 19.4                      3. where the order requested is for production of a document(s) a copy of the party's written request for the document(s) and the responding party's response, if any, must be attached to the Form 10;
4. include the documents relied on in support of the request, if any;
5. indicate whether the requesting party wishes the Tribunal to deal with the matter in writing, in person, or electronically; and,

6. indicate whether the consent of another party has been obtained as to any term of the order sought or as to the manner in which the request should be dealt with.

- 19.5 If the requesting party wants the Request for Order dealt with on an urgent basis, it must provide supporting reasons.  
Unless the Tribunal directs otherwise, parties responding to the written Request for Order, must complete the Response to Request for Order ("Response to Request") in Form 11 and deliver a copy to all other parties and file it with the Tribunal not later than 14 days after the Request for Order was delivered. The Response to Request must include:
1. the responding party's position on the order(s) requested and the whether the Request for Order should be dealt with in writing, in person, or electronically;
- 19.6
2. identify which facts in the Request for Order are accepted and which are disputed. Where the order requested is for production of documents the responding party must attach the written response to the request, if any;
  3. reasons and any submissions in support of the responding party's position;
  4. any additional facts relied on by the responding party; and,
  5. include any documents not included in the Request for Order upon which the responding party intends to rely.
- 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.

[Courts of Justice Act, R.S.O. 1990, c. C.43, \("CJA"\) s. 137.1\(3\)](#)

**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.

**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.

### **Order to dismiss**

(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. 2015, c. 23, s. 3.

## [Tribunal’s Conflict of Interest Rules Part III, para. 32](#)

### **Prior Involvement**

32. An SJTO staff person shall not process, and an SJTO Member shall not adjudicate, or participate in processing or discussions of, any proceeding, in which the SJTO staff person, SJTO Member, any person with whom he or she is in a significant professional relationship, or his or her spouse, child, parent, sibling, or any other person with whom they have a close business or personal relationship, has had any prior involvement.

## [Code of Conduct](#)

### **Code of Conduct**

*Adjudicative Tribunals Accountability, Governance and Appointments Act,  
2009*

### **Introduction**

The purpose of the [Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009 \(“ATAGAA”\)](#) is to ensure that adjudicative tribunals are accountable, transparent and efficient in their operations, while remaining independent in their decision-making.

Tribunals Ontario has developed documents to meet the legislative requirements of the ATAGAA.

Section 7 of the ATAGAA requires that every adjudicative tribunal shall develop a member accountability framework. The framework must contain, among other things, a code of conduct for the members of the constituent tribunals.

[Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009, S.O. 2009, c. 33, Sched. 5, s. 7\(1\)](#)

### **Member accountability framework**



7 (1) Every adjudicative tribunal shall develop a member accountability framework. 2009, c. 33, Sched. 5, s. 7 (1).

## **Contents**

- (2) The member accountability framework must contain,
- (a) a description of the functions of the members, the chair and the vice-chairs, if any, of the tribunal;
  - (b) a description of the skills, knowledge, experience, other attributes and specific qualifications required of a person to be appointed as a member of the tribunal;
  - (c) a code of conduct for the members of the tribunal; and
  - (d) any other matter specified in the regulations or in a directive of the Management Board of Cabinet. 2009, c. 33, Sched. 5, s. 7 (2).

### [Tribunal Rule 3.7](#)

#### **Recording of Proceedings**

3.7

The Tribunal does not normally record or transcribe its proceedings. Where a hearing is recorded the recording does not form part of the Tribunal's record of proceedings including any record filed in respect of an application made under the *Judicial Review Procedures Act*.

### [Statutory Powers and Procedures Act, R.S.O. 1990, c. S.22 \(“SPPA”\) s. 4.6\(1\)](#)

#### **Dismissal of proceeding without hearing**

**4.6** (1) 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.

### [Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c.M.56](#)

#### **Right of access**

**4** (1) Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,

- (a) the record or the part of the record falls within one of the exemptions under sections 6 to 15; or
- (b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

### **Applications for judicial review**

**2** (1) On an application by way of originating notice, which may be styled “Notice of Application for Judicial Review”, the court may, despite any right of appeal, by order grant any relief that the applicant would be entitled to in any one or more of the following:

1. Proceedings by way of application for an order in the nature of mandamus, prohibition or certiorari.
2. Proceedings by way of an action for a declaration or for an injunction, or both, in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power. R.S.O. 1990, c. J.1, s. 2 (1).

### **Application to Divisional Court**

**6** (1) Subject to subsection (2), an application for judicial review shall be made to the Divisional Court. R.S.O. 1990, c. J.1, s. 6 (1).

### [Section 40 of the Code](#)

#### **Disposition of applications**

**40** 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.

### [Section 42\(1\) Code](#)

#### **Statutory Powers Procedure Act**

**42** (1) The provisions of the *Statutory Powers Procedure Act* 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.

#### **Conflict**

(2) Despite section 32 of the *Statutory Powers Procedure Act*, this Act, the regulations and the Tribunal rules prevail over the provisions of that Act with which they conflict. 2006, c. 30, s. 5.

A4

**TRIBUNAL POWERS**

A4.1 The tribunal may exercise any of its powers at the request of a party, or on its own initiative, except where otherwise provided.

[Tribunals Ontario Rules of Procedure, II\) Human Rights Tribunal of Ontario Specific Rules, Rule 13.1](#)

**RULE 13 DISMISSAL OF AN APPLICATION OUTSIDE THE TRIBUNAL'S JURISDICTION**

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.

Court file no. 699/22

**KELLY LYNN DONOVAN**

Applicant

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

Respondents

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**Ontario Superior Court of Justice**

**(Divisional Court)**

PROCEEDING COMMENCED AT TORONTO

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**APPELLANT'S FACTUM**

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