Social Justice Tribunals Ontario
Providing fair and accessible justice
Human Rights Tribunal of Ontario

Request for an Order During Proceedings – Rule 19
Form 10

At any time after an Application has been filed with the Tribunal, a party may make a Request for an Order during a proceeding by completing this Request for an Order During Proceedings (Form 10).

The Tribunal will determine whether a Request for an Order will be heard in writing, in person or electronically and, where necessary, will set a date for the hearing of the Request. This Request may be heard on the basis of Form 10 alone.

Follow these steps to make your request:

1. Fill out this Form 10.
2. All documents you are relying on must be included with this Form 10.
3. Deliver a copy of Form 10 to all parties and any person or organization who has an interest in this Request.
4. If this is a Request for an Order that a non-party provide a report, statement or oral or affidavit evidence in accordance with Rule 1.7 (q), this Form 10 must be delivered to the non-party in addition to the other parties in the proceeding.
5. Complete a Statement of Delivery (Form 23).
6. File Form 10 and Form 23 with the Tribunal.

Information for all parties and any person or organization who receives a copy of this Request

You may respond to this Request for an Order by completing a Response to a Request for an Order During Proceedings (Form 11).

Follow these steps to respond:

1. Fill out Form 11.
2. All documents you are relying on must be included with Form 11.
3. Deliver a copy of Form 11 to all parties and any other person or organization that has an interest in the Request.
4. Complete a Statement of Delivery (Form 23).
5. File Form 11 and Form 23 with the Tribunal.

You must file your Response to a Request for Order not later than **fourteen (14)** days after the Request for Order was delivered to you.

Download forms from the Tribunal's web site www.sjto.ca/hrto. If you need a paper copy or accessible format, contact us:

Human Rights Tribunal of Ontario
655 Bay Street, 14th floor
Toronto, Ontario
M7A 2A3

Phone: 416-326-1312 Toll-free: 1-866-598-0322
Fax: 416-326-2199 Toll-free: 1-866-355-6099
TTY: 416-326-2027 Toll-free: 1-866-607-1240
Email: hrto.registrar@ontario.ca

Social Justice Tribunals Ontario
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Request for an Order During Proceedings – Rule 19
Form 10

Application Information	
Tribunal File Number:	2018-33237-S
Name of Applicant:	The Regional Municipality of Waterloo Police Services Board ("WRPSB")
Name of each Respondent:	Kelly Donovan

1. Your contact information (person or organization making this Request)

First (or Given) Name	Last (or Family) Name	Organization (if applicable)
Virginia	Torrance	WRPS

Street Number	Street Name	Apt/Suite
200	Maple Grove Road, P.O. Box 3070	

City/Town	Province	Postal Code	Email
Cambridge	Ontario	N3H 5M1	virginia.torrance@wrps.on.ca

Daytime Phone	Cell Phone	Fax	TTY
519-650-8552		519-650-8551	

If you are filing this as the Representative (e.g. lawyer) of one of the parties please indicate:

Name of party you act for and are filing this on behalf of:	LSUC No. (if applicable)
Applicant	28483C

What is the best way to send information to you? ○ Mail ◉ Email ○ Fax

(If you check email, you are consenting to the delivery of documents by email.)

Check off whether you are (or are filing on behalf of) the:

◉ Applicant ○ Respondent ○ Ontario Human Rights Commission

○ Other - describe:

2. Please check off what you are requesting:

- ☐ Request to consolidate or have applications heard together
- ☐ Request to add a party
- ☐ Request to amend Application or Response
- ☐ Request to defer Application
- ☐ Request extension of time
- ☐ Request to re-activate deferred Application
- ☐ Request for particulars
- ☐ Request for production of documents
- ■ Other, please explain:

See Schedule "A"

3. Please describe the order requested in detail.

See Schedule "A"

4. What are the reasons for the Request, including any facts relied on and submissions in support of the Request?

See Schedule "A"

5. Do the other parties consent to your Request?

○ Yes ○ No ◉ Don't know

6. If you are requesting production of a Document(s), please explain if you have already requested the document and any response you have received. You must attach a copy of your written Request for the Document(s) and the Responding Party's Response, if any.

N/A

7. If you are relying on any documents in this Request, please list below and attach. You must include all the documents you are relying on.

See Schedule "A"

8. Please check off how you wish the tribunal to deal with the matter:

○ In writing ○ Conference call ◉ In person hearing ○ Don't know

9. Explain why you wish the Tribunal to deal with the request in the manner indicated above.

See Schedule "A"

10. Do the other parties agree with your choice for how the Tribunal should deal with your Request?

○ Yes ○ No ◉ Don't know

11. Signature

By signing my name, I declare that, to the best of my knowledge, the information that is found in this form is complete and accurate.

Name: Donald B. Jarvis	
Signature:	Date: (dd/mm/yyyy) 30/07/2018

☒ Please check this box if you are filing your Request electronically. This represents your signature. You must fill in the date, above.

Freedom of Information and Privacy

The Tribunal may release information about an Application in response to a request made under the *Freedom of Information and Protection of Privacy Act*. Information may also become public at a hearing, in a written decision, or in accordance with Tribunal policies. At the request of the Commission, the Tribunal must provide the Commission with copies of applications and responses filed with the Tribunal and may disclose other documents in its custody or control.

Schedule "A"

1. The Regional Municipality of Waterloo Police Services Board ("WRPSB") requests an Order:

    a. dismissing the Respondent's objections;

    b. deeming the Respondent to have accepted the allegations in the Application; and

    c. directing that the hearing be restricted to the issue of the appropriate remedy.

2. The WRPSB request that these Orders be granted forthwith on the basis of these written submissions or, in the alternative, that a hearing be scheduled to deal with these issues on a preliminary basis.

I. Overview

3. The WRPSB filed an Application for Contravention of Settlement – Rule 24 (Form 18), on June 28, 2018. The WRPSB is seeking an order for enforcement of the Resignation Agreement in which the parties voluntarily settled Ms Donovan's application to the HRTO dated June 3, 2016, and having Tribunal File Number 2016-24566-I (the "Settlement").

4. The Respondent, Kelly Donovan, filed a Response dated July 10, 2018. Ms Donovan has not denied any of the substantive allegations in the Application nor has she requested additional time to do so. Instead, she has simply taken the position that the Application should be dismissed because the Tribunal does not have jurisdiction over the Application, the Application is in bad faith, an abuse of process, untimely and a collateral attack on her freedom of speech.

5. There is no merit to any of these allegations and they ought to be dismissed on a preliminary basis.

6. Absent any denial of the alleged contraventions of the Settlement, the allegations contained in the Application ought to be deemed to be accepted by Ms Donovan.

Accordingly, the WRPSB requests that the hearing be restricted to the issue of the appropriate remedy.

II. Ms Donovan's Objections Ought to be Dismissed

A. The Application is within the Tribunal's Jurisdiction

7. In essence, Ms Donovan is asserting that the WRPSB's Application should be dismissed because she had previously commenced a Court action alleging a completely separate and independent breach of the Settlement. For your convenience, a further copy of Ms Donovan's civil action is attached **(see Tab 1)**. As set out therein, Ms Donovan alleges that the confidentiality provisions of the Settlement were breached when Bryan Larkin, Chief of Police, swore an affidavit which provided that a human rights complaint by an unnamed female constable was settled with a monetary settlement and voluntary resignation. Ms Donovan asserts that this information was sufficient for her to be identified and, therefore, violates the Settlement. The WRPSB takes the positon that there is no merit to this allegation. However, quite apart from the merits of the allegation, the WRPSB is asserting that the Court has no jurisdiction over the dispute. Rather, the enforcement of a human rights settlement is a matter at the core of the Tribunal's jurisdiction.

8. A motion has been scheduled for February 13, 2019 to determine whether the Court ought to dismiss Ms Donovan's Application on the ground that the Court has no jurisdiction over the subject matter of the action and/or for failure to disclose a reasonable cause of action and/or on the ground that the action is frivolous, vexatious and an abuse of process. A copy of the Notice of Motion is attached to hereto **(see Tab 2).**

9. Section 45.9(1) of the *Human Rights Code* ("*Code*") provides that the settlement of an application under the *Code* that is agreed to in writing and signed by the parties is "binding on the parties". Section 45.9(3) specifically provides for an application regarding a contravention to be made to the Tribunal:

> (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)....

10. Section 45.9(8) of the *Code* gives the Tribunal broad powers to remedy contraventions of such settlements. Specifically, the Tribunal may make "any order that it considers appropriate to remedy the contravention". Pursuant to these powers, the Tribunal has issued countless decisions dealing with settlement enforcement issues.

11. Section 46.1 of the *Code* expressly limits the jurisdiction of the Courts over matters relating to human rights:

> (1) If, in a civil proceeding in a court, the court finds that a party to the proceeding has infringed a right under Part I of another party to the proceeding, the court may make either of the following orders, or both:
>
> 1. An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.
>
> 2. An order directing the party who infringed the right to make restitution to the party whose right was infringed, other than through monetary compensation, for loss arising out of the infringement, including restitution for injury to dignity, feelings and self-respect.
>
> (2) Subsection (1) does not permit a person to commence an action based solely on an infringement of a right under Part I.

12. Section 46.1(2) specifically prohibits the commencement of an action based solely on an infringement of a right under Part I of the *Code*. Accordingly, an alleged violation of a human rights settlement cannot form the **sole** basis for a civil action before the Court. As Ms Donovan's civil action is solely based on an alleged violation of the human rights settlement, the WRPSB respectfully submits that there is no question that it arises outside of the Court's jurisdiction.

13. The Court recently confirmed the limits of its jurisdiction when it refused to certify the proposed class action against the WRPSB. Notably, Ms Donovan's civil action is based on an affidavit sworn in respect of this proposed class action which has now been dismissed as falling outside of the Court's jurisdiction **(see Tab 3).** The Court found,

inter alia, that all the alleged wrongs were, "at their core, sexual discrimination" such that there was "no independent actionable wrong to ground a court action" (at para. 56). The Court found that the claim did not disclose a viable cause of action and stated (at para. 57):

> The bottom line is that whether the Plaintiffs characterize their claims as systemic negligence, the tort of harassment or as a Charter breach, this action is one of workplace discrimination which may constitute a violation of both the *Human Rights Code* and the Collective Agreement, but not the common law.
>
> [emphasis added]

14. The fact that Ms Donovan has commenced a civil action alleging a violation of the settlement is not relevant to the disposition of the instant Application brought by the WRPSB. Ms Donovan's civil action is factually distinct from the instant Application. While both Ms Donovan's civil action and the instant Application seek to enforce the settlement of her earlier human rights application, there is no other factual similarity or overlap in the allegations. Ms Donovan alleges that the WRPSB violated the settlement through certain disclosures made in response to the proposed class action against the WRPSB that has now been ruled upon by Justice Baltman on July 13, 2018. The WRPSB's Application is based on Ms Donovan's persistent and repeated complaints and allegations against and about the WRPSB. In any event, the mere fact that a Statement of Claim was filed does not confer jurisdiction on the Court.

B. The Application is Not in Bad Faith or an Abuse of Process

15. There is similarly no merit to the suggestion that the Application is in bad faith or is an abuse of process. Indeed, Ms Donovan does not advance any support for this allegation other than to state that "it is an abuse of process ... to bring this application to the Tribunal knowing that the respondent has already started a proceeding against the applicant on this matter". Ms Donovan further suggests that the Application is "an obvious retaliation against the respondent for filing the civil claim and to prevent the respondent from returning to the Tribunal to file her own form 18".

16. The WRPSB does not deny that it knew of Ms Donovan's civil action at the time of filing the instant Application. **However, the WRPSB had decided to file an enforcement**

application and commenced gathering relevant information to support the instant Application well in advance of the commencement of Ms Donovan's civil action or even being aware of same. Respectfully, however, the timing is immaterial.

a. The allegations in each proceeding are entirely independent and distinct.

b. A litigant cannot engage in retaliation at law merely by exercising a statutory right. The *Code* clearly gives the WRPSB the right to enforce a settlement at any time.

c. Most importantly, there is no merit to the suggestion that the WRPSB is seeking to prevent Ms Donovan from pursuing her allegations before the Tribunal should the Court find that it does not have jurisdiction. **Indeed, the WRPSB has no objection to Ms Donovan pursuing her allegations before the Tribunal should she wish to discontinue her Court action in recognition that the Tribunal is the appropriate forum and the Court has no jurisdiction over the claim commenced, subject to the WRPSB reserving the right to raise any preliminary objections in the normal course.**

C. The Settlement does Not Violate the Charter

17. Ms Donovan appears to be asserting that the Settlement is not enforceable as it violates her freedom of speech. Should Ms Donovan wish to pursue this argument, a Notice of Constitutional Question must be filed. In any event, there is no reasonable prospect of this argument proceeding. In *Abdul-Rahman v. Ontario (Ministry of Natural Resources and Forestry)*, 2016 HRTO 1151, the Tribunal recently refused to set aside a settlement on the basis that it violated the applicant's freedom of speech stating:

> 33 Finally, the applicant argued that the settlement represented a violation of his freedom of speech. When I asked him, in the preliminary hearing, whether he was referring to the confidentiality clause in the settlement, he confirmed that he was. **It is common for settlements to contain confidentiality clauses such as the one included in the settlement in this case. Parties insert such clauses in settlements to ensure that the matters dealt with in the settlement are put to rest and that information about the settlement is not disseminated by either party. The Tribunal itself includes such clauses in settlements arrived at in its**

> **mediations. I see nothing unusual or inappropriate about the confidentiality clause in this case and the inclusion of such a clause is not a valid reason to set aside the settlement.**
>
> [emphasis added]

18. In *Antoncic v. Ontario (Ministry of Community Safety and Correctional Services)*, [2009] O.P.S.G.B.A. No. 1, the Ontario Public Service Grievance Board similarly dismissed the argument that confidentiality provisions in a settlement agreement violated the right to freedom of speech. The minutes of settlement in issue arose from the termination of an employee. The employee alleged that his employment termination was a reprisal for the fact that he had previously been involved in a relationship with another employee who subsequently became involved in a personal relationship with a third employee. The minutes of settlement included an agreement to keep the terms and conditions of the agreement confidential, an agreement to keep information learned during employment confidential, a non-disparagement clause, and a full and final release. Subsequent to signing the minutes of settlement, the employee commenced a civil action alleging that the two individuals involved in a relationship conspired to advance false allegations to discredit him and undermine his employment, which led to his termination. The employer took the positon that the settlement was an agreement that all disputes regarding the grievor's employment were settled and the lawsuit was an attempt to resurrect a dispute that was central to the grievance in contravention of the settlement. Accordingly, the employer sought a declaration that the grievor breached the minutes of settlement. The grievor argued, *inter alia*, that the confidentiality provisions and non-disparagement language would, if interpreted in favour of the employer, limit the grievor's right to free speech and prevent him from engaging in "political discourse". The Ontario Public Service Grievance Board found that the civil suit breached the settlement and stated "Simply put, continuing to litigate issues related to his previous employment with the Ministry is not compatible with the Minutes of Settlement the grievor signed." The Board further rejected the argument that the settlement was an improper limit on his freedom of speech.

D. The Application is Timely

19. Section 45.9(4) of the *Code* permits a party to make a Contravention of Settlement Application more than six months after the alleged violation where the delay as "incurred

in good faith and no substantial prejudice will result to any person affected by the delay". In the present case, the WRPSB delayed filing the instant Application in the good faith hope that Ms Donovan would move on and cease making accusations and complaints. Unfortunately, her conduct is persistent and can no longer be tolerated.

20. In any event, quite apart from the fact that any delay was incurred in good faith with no substantial prejudice to Ms Donovan, her actions form "a series of contraventions". Section 45.9(3) of the *Code* expressly permits an application to enforce a settlement where there is a series of contraventions and the application is made to the Tribunal within six months of the last contravention in the series. As set out in the Application, Ms Donovan has engaged in a series of repeated violations of the Resignation Agreement, which conduct is both persistent and ongoing.

III. The Allegations in the Application Ought to be Deemed to be Admitted

21. Having failed to respond to the merits of the Application in accordance with the Rules of the Tribunal and the Tribunal's direction, the WRPSB states that Ms Donovan ought to be deemed to have accepted the allegations in the Application. Rule 5.5 of the HRTO Rules of Procedure specifically dictates this outcome:

> 5.5. Where an Application is delivered to a Respondent who does not respond to the Application, the Tribunal may:
>
> a. deem the Respondent to have accepted all of the allegations in the Application;
>
> b. proceed to deal with the Application without further notice to the Respondent;
>
> c. deem the Respondent to have waived all rights with respect to further notice or participation in the proceeding;
>
> d. decide the matter based only on the material before the Tribunal.

22. In *Kearns v. 1327827 Ontario*, 2009 HRTO 457 (CanLII), the Tribunal set out the consequence for failing to file a Response and comply with the Tribunal's Rules and directions:

[11] The *Code* is an important public statute which enshrines our most basic and fundamental rights and freedoms. The enforcement procedures in the *Code* are equally important, since without an effective means of claiming a violation of a right, and seeking redress where a violation is found, those fundamental human rights would have little meaning.

[12] The procedures established by the Tribunal's Rules provide a mechanism to resolve disputes arising under the *Code* fairly and expeditiously. An individual who believes his or her rights have been infringed may bring an Application. That Application must be complete and set out the allegations which, in the applicant's view, constitute a violation of the *Code*. Before serving an Application on the person or organization named as a respondent, the Tribunal will review the Application to ensure that it is complete and that it appears to be within the jurisdiction of the *Code.*

[13] Once served with an Application, if the respondent wishes to participate and defend against the claim made by the applicant, the respondent has only to file a Response. The Tribunal provides a respondent with clear notice of what is required, and has prepared a Guide which assists a respondent in completing its Response. The Response also provides a respondent with an opportunity to indicate which facts or allegations in the Application are agreed to, and which are disputed.

[14] A respondent who refuses, or chooses not to file a Response should not be able to frustrate the objects of the *Code,* and the applicant's right to assert a claim and seek a timely determination of that claim. Section 40 of the *Code* requires the Tribunal to dispose of Applications in a way which will provide for "a fair, just and expeditious resolution of the merits of the application." Where no Response is filed, in order to fulfill this statutory mandate, the Tribunal will proceed to determine the Application in the absence of the respondent. In all but the rarest of cases, the Tribunal will deem the respondent to have waived its right to participate pursuant to Rule 5.5(c) and deem the respondent to have accepted all of the allegations set out in the Application pursuant to Rule 5.5(a).

[10] Based on the above sequence of events, I am satisfied that the respondents received notice of the Application, but are evading service of further correspondence from the Tribunal, and are refusing or choosing not to participate in this proceeding.

23. Absent any denial of the alleged contraventions of settlement, the WRPSB requests that any upcoming scheduled HRTO hearing deal only with the appropriate remedies to be granted to the WRPSB.

TAB 1

HRTO FILE NO. 2018-33237-S

Court File No.:
CV-18-00001928-0000

Ontario

SUPERIOR COURT OF JUSTICE

BETWEEN:

KELLY LYNN DONOVAN

Plaintiff

- and -

WATERLOO REGIONAL POLICE SERVICES BOARD, and

BRYAN LARKIN

Defendants

STATEMENT OF CLAIM

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service in this court office, **WITHIN TWENTY DAYS** after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 1 8B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFFS' CLAIM, and $1,000.00 for costs, within the time for serving and filing your statement of defence you may move to have this proceeding

dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiffs' claim and $400 for costs and have the costs assessed by the court.

Date: 09 May 2018 Issued by: _____

Name: _____

Local Registrar

Address of Court Office:

7755 Hurontario Street

Brampton, Ontario

L6W 4T6

TO: WATERLOO REGIONAL POLICE SERVICES BOARD

200 Maple Grove Road

Cambridge, Ontario

N0B 1M0

AND TO: BRYAN LARKIN

378 Golf Course Road

Conestogo, Ontario

N0B 1N0

CLAIM

I. Relief Claimed

1. The plaintiff Kelly Lynn Donovan, claims against the defendants, jointly and severally, the following relief:

    a. Damages for breach of contract, in the amount of Two Hundred Thousand Dollars ($200,000.00);

    b. Punitive, exemplary and/or aggravated damages in the amount of Ten Thousand Dollars ($10,000.00);

    c. To be reinstated as a sworn member of the Waterloo Regional Police Service at full pay of a first-class constable with all the rights, privileges and prerogatives she formerly enjoyed, on terms mutually agreed upon by both the defendants and plaintiff.

    d. Pre-judgment and post-judgment interest in accordance with the Courts of Justice Act, R.S.O. 1990, c. C.43, as amended;

    e. Costs of this proceeding on a solicitor and his own client scale, together with applicable HST; and

    f. Such further and other relief as counsel may advise and this Honourable Court deems just.

II. Parties

2. The plaintiff, Kelly Lynn Donovan, is a former police officer who resides in the City of Brantford in the Province of Ontario. Prior to June 26, 2017, the Plaintiff

was employed by the defendant Waterloo Regional Police Services Board ("defendant board").

3. The defendant Bryan Larkin is chief of Waterloo Regional Police Service and is employed by the defendant board.

III. Facts

Class action lawsuit

4. On May 30, 2017, a class action lawsuit was filed against the defendants in the Ontario Superior Court of Justice in Brampton; Court File Number CV-17-2346-00, (furthermore referred to as "the class action lawsuit"). The plaintiff is not a party to the class action lawsuit. The class action lawsuit alleges systemic and institutional gender-based discrimination and harassment and seeks total damages of One Hundred and Sixty-Seven Million Dollars ($167,000,000.00).

Plaintiff's resignation

5. On June 8, 2017, the plaintiff and defendant board entered into a Resignation Agreement, written by counsel for the defendant board, containing the following clause:

    a. *"Except where disclosure is required by law, or where disclosure is to Donovan's immediate family members or to persons providing*

professional financial/legal advice (all of whom agree to be bound by this non-disclosure and confidentiality clause), the parties undertake and agree that they will keep the terms and existence of this Resignation Agreement in absolute and strict confidence at all times, without time limitation, and not disclose its contents to any third party, person or entity. For added certainty, and without limiting the generality of the foregoing, the parties undertake and agree that they will not publicize, discuss, disclose or communicate in any way with any person, entity or organization, in any form whatsoever, the contents or terms of all or any part of this Resignation Agreement. If asked, the parties (and anyone subject to the terms of this non-disclosure and confidentiality clause) will indicate only that all outstanding matters between the parties were settled to their mutual satisfaction, the terms of which settlement are strictly confidential."

6. The Resignation Agreement was signed by the defendant Bryan Larkin on behalf of the defendant board.

Plaintiff's health

7. Prior to February, 2011, the plaintiff did not have any health issues. The plaintiff was healthy, educated and highly employable. She was hired by the defendant board on her first attempt in December, 2010.
8. Starting in February, 2017, the plaintiff could not attend work due to the severity

of her post-traumatic stress disorder (PTSD) symptoms. The plaintiff's medical condition was caused by her employment with the defendant board; both from a training accident and the moral injury she suffered in 2015 pertaining to alleged internal corrupt practices she had witnessed.

9. The plaintiff was frequently triggered by her ongoing human rights case and disciplinary proceeding. The plaintiff's symptoms briefly improved when she resigned from the police service in June, 2017.

IV. Overview

10. On December 21, 2017, defendant Bryan Larkin swore an affidavit in defense of the class action lawsuit and the document was submitted to record.

11. In the affidavit, the defendant Bryan Larkin states, at para. 13:

    a. *"Attached hereto and marked as "Exhibit F" to this my Affidavit, is an additional chart that I had requested the Human Resources Division of WRPS prepare, showing where the Human Rights Tribunal complaints that had been commenced by female employees in the last five years, and their status or resolution. Again, this chart has non-identifying information, with the exception of the Plaintiff, [name removed], who's Complaint is to the Human Rights Tribunal as it is still outstanding, and the status of which is referred to in detail below."*

12. The attachment to the defendant Bryan Larkin's affidavit is a chart titled "Police Officer Initiated Ontario Human Rights Complaints" and lists four female officers.

Those officers are identified in the following ways:

a. One female officer is named and the three remaining female officers are not.

b. Of the three-unnamed female officers, two are listed as "Constables" and one as "Sergeant."

13. Of the two-unnamed female "Constables" in the chart, one shows as having been resolved in the following manner:

i. "SETTLED: - monetary settlement, - withdrawal of OHRT application, - voluntary resignation."

14. There is only one female officer showing on this chart as having "voluntarily" resigned.

15. The plaintiff is the only female constable who was employed by the defendant board over the past five years, had filed a human rights complaint and who voluntarily resigned.

16. The public disclosure made by defendant Bryan Larkin was not required by law, contained sufficient information for the plaintiff to be identified and violates the terms of the Resignation Agreement.

17. The actions of defendant Bryan Larkin have caused the plaintiff a great deal of stress, anxiety and re-lived trauma. From December, 2017, to March, 2018, the plaintiff's PTSD symptoms worsened.

18. Defendant Bryan Larkin is aware that the plaintiff was on medical leave from February, 2017, until her resignation in June, 2017.

19. The plaintiff therefore claims the relief as set out in paragraph 1 of the Statement

of Claim.

20. The defendants are jointly and severally liable for the damages caused to the plaintiff. Further, the defendant board is vicariously liable for the conduct, representations, omissions and/or negligence of the police service's employees, agents, servants and contractors, which includes the defendant Bryan Larkin.

FORM 4C

Courts of Justice Act

BACKSHEET

Kelly Lynn Donovan vs. Waterloo Regional Police Services Board et al.

Court file no. CV-18-00001938-0000

Rec'd May 10/18
M. Mayford
Legal Services

Ontario Superior Court of Justice

PROCEEDING COMMENCED AT Brampton

STATEMENT OF CLAIM

KELLY DONOVAN
11 Daniel Place
Brantford, Ontario
N3R1K6
Phone: 519-209-5721
Email: kelly@fit4duty.ca

TAB 2

HRTO FILE NO. 2018-33237-S

Court File No. CV-18-00001938-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

KELLY LYNN DONOVAN

Plaintiff
(Responding Party)

- and -

WATERLOO REGIONAL POLICE SERVICES BOARD
and BRYAN LARKIN

Defendants
(Moving Party)

NOTICE OF MOTION OF THE MOVING PARTY
(returnable February 13, 2019)

The Defendants will make a motion to a Judge, on Wednesday, February 13, 2019, at 10:00 am or as soon after that time as the motion can be heard, at 7755 Hurontario Street, Brampton, Ontario L6W 4T1.

PROPOSED METHOD OF HEARING: The motion is to be heard:

☐ in writing under subrule 37.12.1(1) because it is on consent or unopposed or made without notice;

☐ in writing as an opposed motion under subrule 37.12.1(4);

☒ orally.

THE MOTION IS FOR:

(a) An Order dismissing the Plaintiff's action pursuant to Rule 21.01(3)(a) of the *Rules of Civil Procedure* on the ground that this Honourable Court has no jurisdiction over the subject matter of the action;

(b) In the alternative, an Order striking out the Statement of Claim, without leave to amend, pursuant to Rule 21.01(1)(b) of the *Rules of Civil Procedure* for failing to disclose a reasonable cause of action against the Defendants;

(c) In the further alternative, an Order dismissing the Plaintiff's action pursuant to Rule 21.01(3)(d) of the *Rules of Civil Procedure* on the ground that the action is frivolous, vexatious and/or an abuse of the process of the Court;

(d) In the further alternative, an Order striking out the Statement of Claim as against the personally-named Defendant, without leave to amend, on the ground that it discloses no reasonable cause of action as against the personally-named Defendant and/or the claim is frivolous, vexatious and/or an abuse of the process of the Court and/or the Court has no jurisdiction over the subject matter of the action;

(e) In the further alternative, an Order extending the time limits to allow the Defendants to file a Statement of Defence;

(f) If necessary, an Order abridging or extending the time for service, filing and/or delivery of the Motion Record, the Factum, the Book of Authorities and/or a Motion Confirmation;

(g) An Order for costs of this motion, on a substantial indemnity basis, fixed and payable to the Defendants within 30 days, pursuant to Rule 57.03(1) of the *Rules of Civil Procedure*; and

(h) Such further and other relief as counsel may advise and/or this Honourable Court deems just.

THE GROUNDS FOR THE MOTION ARE:

Overview

(a) By Statement of Claim dated May 9, 2018, the Plaintiff, Kelly Lynn Donovan, commenced an action against the Defendants, the Waterloo Regional Police Services Board ("WRPSB") and Bryan Larkin, Chief of Police, for breach of contract.

(b) The Plaintiff was previously employed by the WRPSB and held the rank of Constable assigned to Administrative Command, Training Branch. The Plaintiff was represented by the Waterloo Regional Police Association ("WRPA") in respect of her employment with and resignation from the WRPSB.

(c) On or about June 3, 2016, the Plaintiff filed an Application with the Human Rights Tribunal of Ontario (the "Tribunal"), alleging that she was subject to discrimination on the basis of sex and marital status.

(d) On or about June 8, 2017, the Plaintiff, the WRPSB, and the WRPA successfully negotiated a Resignation Agreement to fully and finally resolve the Plaintiff's human rights Application. Mr. Larkin executed the Resignation Agreement on behalf of the WRPSB.

(e) Pursuant to the Resignation Agreement, the Plaintiff expressly confirmed that "she is freely and voluntarily resigning her employment with the [WRPSB] effective on or about June 25, 2017". The Plaintiff also acknowledged and agreed that her resignation decision was irrevocable.

(f) Furthermore, the Plaintiff and the WRPSB agreed to keep the terms of the Resignation Agreement in confidence.

(g) The Resignation Agreement also included a Full and Final Release, under which the Plaintiff agreed to release and forever discharge the WRPSB from "any and all actions, causes of action, complaints...claims...which aris[e] out of or in any way relat[e] to the matters giving rise to [her] HRTO Application". The Plaintiff also expressly agreed that the Release could be raised as a complete bar to "any complaint against the Releasees or anyone connected with the Releasees for or by reason of any cause, matter or thing, including the matters arising out of or in any way relating to [her] HRTO Application".

(h) The Plaintiff claims, as pleaded in the Statement of Claim, that the Defendants breached the Resignation Agreement as Mr. Larkin swore an affidavit in defence of a class action lawsuit. Specifically, the Plaintiff

claims that the affidavit provided that an unnamed female officer had voluntarily resigned and withdrawn an Application before the Tribunal. The Plaintiff claims this disclosure contained sufficient information to identify her and, therefore, violated the confidentiality provisions of the Resignation Agreement.

The Court has no jurisdiction over the subject matter of the action

(i) The Resignation Agreement was made in settlement of the Plaintiff's human rights Application. Pursuant to the *Code*, the Tribunal has jurisdiction to determine whether a human rights complaint has been settled and to enforce the terms of any such settlement. As such, the determination of whether the Defendants violated the Resignation Agreement falls within the exclusive jurisdiction of the Tribunal.

(j) Alternatively, the grievance and arbitration process under the collective agreement between the WRPSB and the WRPA is the proper process and/or forum for the resolution of the Plaintiff's claims.

(k) The Court has no jurisdiction over the subject matter of the action.

In the alternative, the Statement of Claim should be struck in its entirety, without leave to amend, on the grounds that it discloses no reasonable cause of action

(l) The Plaintiff must, at minimum, plead the basic elements of a recognized cause of action pursuant to which an entitlement to damages is claimed.

(m) The Plaintiff has failed to plead the necessary legal elements of the alleged breach of contract or to otherwise support the remedies claimed. The Plaintiff's allegations lack supporting facts and sufficient clarity to sustain a claim of liability or damages for breach of contract or otherwise.

(n) The Plaintiff's claim discloses no reasonable cause of action and should be struck out pursuant to Rule 21.01(1)(b) of the *Rules of Civil Procedure*.

In the alternative, the action is frivolous, vexatious and/or an abuse of the process of the Court

(o) The Plaintiff's claim is clearly unmeritorious and therefore ought to be struck out as frivolous, vexatious and/or an abuse of process.

The Claim against the personally-named Defendant should be struck

(p) Claims made against a personally-named Defendant must be based on causes of action for which the personally-named Defendant is ***personally*** responsible. It is insufficient to plead that an employee committed particular acts in the course of employment. At all times, the personally-named Defendant was acting in his capacity as Chief of Police. Accordingly, the claim against him personally discloses no reasonable cause of action and/or is frivolous, vexatious and an abuse of process. Alternatively, any claim against the personally-named Defendant should be resolved through the following processes and/or forums:

(i) the application and hearing process of the Tribunal under the provisions of the *Code*; and/or

(ii) the grievance and arbitration process under the collective agreement between the WRPSB and the WRPA.

(q) The Court has no jurisdiction over the subject matter of the action as against the personally-named Defendant.

The Defendants rely on:

(r) Rules 21.01(3)(a), 21.01(1)(b), 21.01(3)(d), and 57.03(1) of the *Rules of Civil Procedure*, RRO 1990, Reg 194;

(s) Section 45.9 of the *Code*; and

(t) Such further and other grounds as counsel for the Defendants may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

(a) The Statement of Claim in this action issued May 9, 2018;

(b) The Resignation Agreement;

(c) The Affidavit of Bryan Larkin referred to in the Plaintiff's Statement of Claim; and

(d) Such further and other evidence as counsel for the Defendants may advise and this Honourable Court may permit.

June 7, 2018

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KELLY LYNN DONOVAN Plaintiff	and	WATERLOO REGIONAL POLICE SERVICES BOARD and BRYAN LARKIN Defendants	Court File No: CV-18-00001938-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at BRAMPTON

NOTICE OF MOTION OF THE MOVING PARTY (RETURNABLE FEBRUARY 13, 2019)

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Lawyers for the Defendants (Moving Party)

TAB 3

CITATION: Rivers v. Waterloo Regional Police Services Board, 2018 ONSC 4307
COURT FILE NO.: CV 17 2346
DATE: 20180713

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
ANGELINA RIVERS, SHARON ZEHR and BARRY ZEHR	R. Douglas Elliott, David Thompson, Matthew Moloci, Colleen Yamashita and Elena Mamay, for the Plaintiffs
Plaintiffs	
- and -	
WATERLOO REGIONAL POLICE SERVICES BOARD and WATERLOO REGIONAL POLICE ASSOCIATION	James H. Bennett, for the Waterloo Regional Police Services Board; Caroline (Nini) Jones and Jodi Martin for the Waterloo Regional Police Association
Defendants	
	HEARD: June 18, 19, 20 & 21, 2018

REASONS FOR JUDGMENT

BALTMAN J

Overview

[1] The Plaintiffs are former and current police officers with the Waterloo Regional Police Service ("Service"). They wish to certify this action as a class

action on behalf of all uniformed women who were or are members of the Service, claiming that both the Waterloo Regional Police Services Board ("Board") and the Waterloo Regional Police Association ("Association") are liable for systemic gender-based discrimination and sexual harassment by male members, senior officers and management of the Service.

[2] The proposed action also includes derivative claims under the *Family Law Act* by the male spouses of the Plaintiffs.

[3] An important first obstacle in this case is the Defendants' challenge to this Court's jurisdiction. Following the principles established by the Supreme Court of Canada in *Weber v. Ontario Hydro,* [1995] 2 S.C.R. 929, they argue that labour arbitrators and/or adjudicators at the Human Rights Tribunal of Ontario (HRTO) have exclusive jurisdiction over this dispute.

[4] In a previous court attendance, I determined that that the jurisdictional and certification motions should be heard together given that the factual matrix is important to the determination of the jurisdictional question and overlaps with some of the certification criteria.

[5] For the reasons that follow, I have determined, with some regret, that this court has no jurisdiction over this dispute. Moreover, even if it did, the certification motion must fail because it does not identify a viable cause of action.

The prevailing legislative regime and jurisprudence require that the disputed claims – which all essentially concern gender discrimination - be adjudicated either at the HRTO or before a labour arbitrator.

Factual allegations

[6] Broadly speaking, the Plaintiffs make three substantive claims against the Board:

1. Systemic gender-based discrimination and harassment committed by male members of the Service against the class members ("systemic gender discrimination");
2. Breach of class members' rights under s. 15 of the *Charter* to be free from gender-based discrimination ("breach of the *Charter*") ;
3. Liability through the tort of harassment for the outrageous conduct of its male members against the class members ("tort of harassment")

[7] The allegations against the Association include the following additional claims:

1. The Association failed to provide the class members with a work environment free of gender-based discrimination and sexual harassment;

2. The Association failed to ensure that complaints and grievances regarding discrimination were properly investigated and resolved under the Harassment and Discrimination Procedure and the Collective Agreement;
3. The Association discouraged or ignored complaints from female members about sexual harassment, and advised them that filing complaints or grievances would negatively affect their career prospects.

[8] There is a pending motion by the Plaintiffs to add additional plaintiffs, which is unopposed by the Defendants. For the purposes of the motions being addressed in this decision, I will assume that all of the pleaded facts in the proposed Amended Statement of Claim are true.

[9] There are currently 778 uniform officers in the Waterloo Police Service, of which 178 (23%) are female. Collectively, the female Plaintiffs allege a wide range of facts and circumstances in support of their claims of gender-based discrimination and sexual harassment, spanning from 1988 to the present. These include:

a) Certain male officers made offensive comments and/or unwanted sexual advances towards them;

b) Male officers spread false rumors about them suggesting they were interested in sexual relations with other officers;

c) Male officers wrongly disparaged their work to other officers and supervisors;

d) Certain male officers refused to provide them with back-up when they were dispatched to a dangerous situation;

e) When they reported their concerns to their superiors, they were isolated, disregarded, and warned of repercussions to their career;

f) Not only were the offending officers rarely and inadequately sanctioned, they were sometimes promoted.

[10] In their Statement of Claim, the Plaintiffs plead statutory causes of action under the *Human Rights Code*, the *Occupational Health and Safety Act,* and the *Employment Standards Act*, confirming that all their complaints and causes of action arise from their workplace and employment.

[11] The allegations against the Association include several lodged directly against its President, Mark Egers, who nonetheless remains in that position today.

The Available Fora for Allegations of Systemic Workplace Discrimination

[12] It is undisputed that there are several fora with the jurisdiction to address the Plaintiffs' allegations of systemic workplace discrimination and sexual harassment.

1. Grievance Procedure under the Collective Agreement

[13] Throughout the years in issue the representative Plaintiffs and all the putative class members were or are employees of the Board. Their employment is governed by the terms of Collective Agreements, which contain grievance procedures and ultimately provide for binding arbitration under Part VIII of the *Police Services Act* (*PSA*). These terms are mandatory: as stipulated by s. 48(1) of the *Ontario Labour Relations Act,* S.O. 1995, the Collective Agreements provide that all complaints "shall" be dealt with through the grievance procedures set out within.

[14] All officers up to the rank of Staff Sergeant are deemed to be members of the Association, which is the sole collective bargaining agent for such members under the terms of their Collective Agreements.

[15] The Collective Agreements expressly prohibit discrimination on the basis of sex, and by extension preclude sexual harassment. Complaints and grievances about discrimination or sex-based harassment by the Board, its

management or any members are arbitrable under the Collective Agreements and are clearly within the jurisdiction of a specialized labour arbitrator to adjudicate.

[16] The Collective Agreements and the *PSA* set out the procedure for filing a grievance against the Board. A member is to convey their complaints to their supervisor, in writing, within 21 days. If their supervisor cannot resolve the problem at this preliminary stage, then after 14 days the Member must send their grievance in writing to an Association representative who, if views the complaints as justified, must pass on to the Deputy Chief within 14 days. S/he will then investigate and issue a decision in writing; if the Association is dissatisfied with the decision, it may refer the matter to conciliation and/or arbitration under Part VIII of the *PSA*.

[17] If the matter remains unresolved, either party may seek arbitration under s. 124 of the *PSA*, the results of which are binding on the Association, the Employer, and the individual members.

2. Harassment and Discrimination Policy

[18] The Board has a Harassment and Discrimination Procedure as mandated by the *Occupational Health and Safety Act*. If any Member initiates a complaint

an investigation must be conducted. Should another Member be found at fault, they may be subject to disciplinary action.

[19] If a Member believes the Procedure has not been properly applied by the Board, they may ask the Association to file a grievance on their behalf. If the Member feels the Association did not represent them fairly in the pursuit of their complaint, they may file a duty of fair representation complaint.

3. Duty of Fair Representation (DFR) Complaints

[20] Under the Collective Agreement, the Association has a duty to fairly represent its members in all aspects of the employer-employee relationship. If a Member has a complaint about the adequacy or quality of the Association's representation, a Member may bring a DFR complaint.

[21] These claims are within the exclusive jurisdiction of a specialized labour tribunal under Part VIII of the *PSA*, and are determined by expert arbitrators with significant labour relations expertise. The arbitrators' decisions are subject to judicial review in the Divisional Court, pursuant to the *Judicial Review Procedure Act*.

4. Human Rights Tribunal of Ontario (HRTO)

[22] Members of the Service who believe they have experienced workplace discrimination or sexual harassment may also apply to the HRTO for an adjudication of their complaint. Where an applicant's rights are found to be infringed under the *Code*, the HRTO has the jurisdiction to award monetary compensation for injury to dignity, feelings, and self-respect ("*Code* damages"), as well as restitution and broad "public interest" remedies to promote compliance with the *Code*.

[23] Moreover, the HRTO can and does hear multi-party complaints alleging gender-based discrimination against identified groups: *OPSEU v. Liquor Control Board,* 2015 HRTO 766; *Association of Ontario Midwives v. Ontario (Ministry of Health and Long-Term Care*), 2014 HRTO 1370.

[24] Ms. Rivers currently has a complaint pending before the HRTO, which she agrees covers the same allegations as those set out in the Statement of Claim. She has adjourned the HRTO matter pending the result of this motion.

Issue #1: Does this court have jurisdiction over this dispute?

Legal Framework on Jurisdiction

[25] It is well established that a dispute between an employer and an employee that arises *in its essential character* from the interpretation, application or violation of a collective agreement is to be determined not in the courts but according to the arbitration provisions of the collective agreement: *Weber,* at paras. 55, 72. *Weber* draws on the earlier judgment of the Supreme Court of Canada in *St Anne-Nackawic Pulp & Paper Co. v. C.P.U.*, [1986] 1 S.C.R. 704, which emphasized the need for judicial deference to the collective bargaining relationship: para. 20.

[26] In assessing the true nature of the dispute, one must look not to how the wrong is characterized, but to the facts giving rise to the dispute. Otherwise "innovative pleaders" can "evade" the legislative intent by raising "new and imaginative causes of action": *Weber,* para 54.

[27] The exclusive jurisdiction model represents a critical policy choice. Labour arbitrators and labour boards are specialized administrative decision makers with exceptional expertise in adjudicating workplace disputes and interpreting collective agreements in the context of long term and ongoing relationships. As noted by Justice Cromwell writing for the Nova Scotia Court of

Appeal in *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)*, 2007 NSCA 38, at para. 41:

> ...A significant objective of this comprehensive scheme is to minimize, if not eliminate entirely the involvement of the courts as first instance decision-makers with respect to workplace disputes...

[28] This type of exclusive power includes a corresponding obligation on the union of fair representation of all employees in the bargaining unit. The duty of fair representation is therefore encompassed within the bargaining relationship: *Canadian Merchant Service Guild v. Gagnon,* [1984] 1 S.C.R. 509, at p. 527.

[29] The comprehensive labour arbitration scheme is central to labour relations in all unionized sectors throughout Ontario, as "[i]t has the advantage of both accessibility and expertise, each of which increases the likelihood that a just result will be obtained with minimal disruption to the employer-employee relationship: *Parry Sound (Social Services) v. OPSEU,* [2003] 2 S.C.R. 157, at para. 51.

[30] Where the essential character of the dispute is covered by the collective agreement, it must also be determined whether an arbitrator is empowered by way of final resolution to provide an effective remedy for the alleged wrong. If so, precluding the plaintiff from the civil court causes no "real deprivation of ultimate remedy": *Weber,* at para. 62.

[31] Even if a successful grievance does not permit certain heads of damages, that does not mean the worker has been deprived of an adequate remedy. What matters is that the scheme provides a solution to the problem: *Vaughan v. R.*, 2005 SCC 11, para. 36; *A. (K.) v. City of Ottawa* (2006), 80 O.R. (3d) 161 (C.A.), para. 20; *Giorno v. Pappas* (1999), 42 O.R. (3d) 626 at pp. 630-631; *Piko v. Hudson's Bay Co.*, [1998] O.J. No. 4714 (C.A.), para. 22; *De Montigny v. Roy et al* 2018 ONSC 858, para. 43. Consequently, the fact that neither F.L.A. awards nor punitive damages are available from an arbitrator (or at the HRTO) does not allow for a court action to be substituted.

[32] Finally, conveniency is not a determining factor. The prospect of multiple proceedings or of potential conflicts amongst separate arbitration awards does not confer jurisdiction where it does not exist: *Bisaillon v. Concordia University* 2006 SCC 19, at para. 58.

Submissions and Analysis re Jurisdiction

[33] The Plaintiffs concede that both a labour arbitrator and the HRTO have jurisdiction to adjudicate their claims. They argue, however, that the Court has "residual, inherent jurisdiction" to adjudicate this matter. In particular, they submit that because there is no clear and explicit statutory language ousting the Court's jurisdiction, I may assume it.

[34] Moreover, they assert that in this case I *should* assume jurisdiction, for four reasons. First, the Plaintiffs maintain that the Association will not properly advance their grievances, because that would implicate all of its male members, who compose the large majority of the uniformed officers in Waterloo. Second, the HRTO will not effectively remedy the problem, as it cannot award FLA damages, punitive damages, or costs. Third, an action in the Superior Court, with its broad oversight powers, carries greater weight and "gravitas" than any alternative venues. Fourth, and perhaps most importantly, in a class action all the female officers can shelter anonymously behind the representative plaintiffs, and thereby avoid the ridicule and reprisals that the named Plaintiffs have already endured.

[35] However compelling the Plaintiffs' cause may be, I do not see any jurisdictional "gap" that would permit this matter to proceed in the Superior Court. The *PSA* sets out a mandatory conciliation and arbitration process, overseen by the Ontario Police Arbitration Commission. Under s. 123(1) of the *PSA,* arbitration is mandatory "if a difference arises *between the parties* concerning an agreement or an arbitrator's decision or award made under this Part, or if it is alleged that an agreement or award has been violated." [emphasis added]

[36] In *Renaud v. LaSalle (Town) Police Association,* [2006] O.J. No. 2842 our Court of Appeal determined that the word "party" should be interpreted

broadly in keeping with the legislature's intention that the *Act* together with the Collective Agreement "provide a complete and comprehensive scheme for police officers relating to their employment relationship": para. 7. In other words, the word "party" includes individual police officers who wish to challenge their Association's handling of a grievance. They too must follow the dispute resolution mechanism set out in the *PSA* and the Collective Agreement, and are precluded from coming to court. There is no statutory gap. See also *Abbott v. Collins* (2003), 64 O.R. (3d) 789 (C.A.), para. 33, and *Heasman v. Durham*, [2005] O.J. No. 5096 (C.A.), para. 14.

[37] Relying in part upon the Supreme Court's decision in *Regina Police Assn., Inc. v. Regina (City) Police Commissioners*, [2000] 1 S.C.R. 360, *Renaud* affirmed that courts do not have jurisdiction to deal with any aspects of the employment relationship between individual police officers and their Association or Board.

[38] A similar argument was addressed in *A.(K.)*, where the plaintiffs, two female transit workers, alleged sexual assault and harassment within the unionized workplace. In response to a Rule 21 motion, our Court of Appeal determined that because the claims arise from the administration – and alleged violation – of the collective agreement, the dispute fell exclusively within the jurisdiction of the arbitrator under the collective agreement. On behalf of the

court, Sharpe J.A. expressed "considerable sympathy" for the plaintiffs' desire to pursue their claims for sexual assault in the courts. At para. 24 he stated:

> ...The claims arise from allegations of criminal misconduct that affront the respondents' personal dignity and physical integrity, yet they are compelled to pursue them under the collective agreement's arbitration procedure, where they will not have personal carriage of the proceedings. However, *Weber* and its progeny deprive them of the right to prosecute their claim in the courts and we must give effect to the jurisprudence that is binding on this court.

[39] More recently, our Court of Appeal heard and rejected the same argument raised in *A.(K.)* and *Renaud*, again in a policing context. In *Cumming v. Peterborough Police Association,* 2013 ONCA 670 (C.A.), at para. 3, the Court stated that "an alleged breach of a police association's duty of fair representation falls within the exclusive jurisdiction of an arbitrator appointed pursuant to ss. 123 and 124 of the *PSA*..."

[40] In sum, consistent with *A.(K.)*, both *Renaud* and *Cumming* confirm that claims relating to an alleged breach of a police union's duty of fair representation fall within the exclusive jurisdiction of an arbitrator appointed under sections 123 and 124 of the *PSA.* The only narrow exceptions relate to disputes that cannot be said to arise from the employment relationship: see *Piko*, where Laskin J.A. determined that because the employer took its quarrel with Piko to the criminal courts, the dispute was no longer confined to the labour relations regime. As all the allegations in this case unquestionably spring from dynamics within the

workplace, and the employer has not sought to bring these disputes into the courts, they are entirely captured under the *PSA* and the Collective Agreement. The Court's jurisdiction has been expressly ousted.

[41] I recognize that recently, a large class action was successfully initiated – and resolved – against the RCMP by its female officers, also alleging systemic sexual discrimination. However, unlike the Plaintiffs here, those employees are not captured within a legislative framework and collective agreement that requires workplace disputes to be arbitrated.

Conclusion on Jurisdiction

[42] This Court lacks jurisdiction over the dispute between the parties.

[43] That conclusion, on its own, would terminate this proceeding. However, at the strong urging of the Plaintiffs (opposed by the Defendants), I will further consider whether there is otherwise any bar to the certification motion.

Issue #2 Do the Plaintiffs satisfy the criteria for certification?

Legal Framework on Certification

[44] Certification of a class is mandatory where the requirements in s. 5 of the *Class Proceedings Act, 1992* (the "*CPA*") are satisfied. They are as follows:

a) the pleadings or the notice of application disclose a cause of action;

b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff;

c) the claims or defences of the class members raise common issues;

d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

e) there is a representative plaintiff who would properly represent the interests of the class, has a workable plan to advance the proceeding on behalf of the class, and does not have any conflict of interest with other class members.

[45] Although the Plaintiffs seek to certify this action against both the Board and the Association, they claim damages solely against the Board. The Association, an alleged joint tortfeasor, was named as a necessary party.

[46] Both Defendants oppose certification on all five grounds, but their primary focus is on the first ground, namely whether the statement of claim discloses a viable cause of action.

Analysis of Cause of Action Requirement

[47] As noted above, the Statement of Claim contains three substantive claims against the Defendants: (1) systemic gender-based discrimination and

harassment by male members; (2) breach of equality rights under s. 15 of the *Charter*, and (3) the tort of harassment.

[48] During argument, Plaintiffs' counsel asserted that the "essential character" of the dispute is "systemic and institutional negligence". However the dispute is phrased, there is no question that all three causes of action, at their core, relate to gender-based discrimination and sexual harassment in the workplace. The issue is whether such claims amount to actionable causes.

[49] In addressing that question, the court must keep in mind that, as stipulated in *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57 at para. 63, there is a very low threshold to prove the existence of a cause of action. A claim will only be defeated if, assuming all pleaded facts to be true, it is plain and obvious that the plaintiff's claim cannot succeed. See also *Williams v. Canon Canada Inc*, [2011] O.J. No. 5049, at para. 176.

[50] The difficulty here is that s. 46.1(2) of the *Human Rights Code* prohibits the commencement of an action based solely on an infringement of a right under Part 1 of the *Code*, entitled "Freedom from Discrimination". Part 1 specifically provides that individuals have a right to employment without discrimination and to be free from sexual harassment in the workplace. It also prohibits reprisals to any complaints made in that regard.

[51] In *Seneca College v. Bhadauria,* [1981] 2 S.C.R. 181, the Supreme Court engaged in a comprehensive review of the statutory regime and held, at p. 195:

> For the foregoing reasons, I would hold that not only does the *Code* foreclose any civil action based directly upon a breach thereof but it also **excludes any common law action** based on an invocation of the public policy expressed in the *Code*. The *Code* itself has laid out the procedures for vindication of that public policy, procedures which the plaintiff respondent did not see fit to use. [emphasis added]

[52] While the plaintiff in *Bhadauria* alleged discrimination on the basis of race, the legal principle arising from the case clearly applies to allegations of sex-based discrimination and sexual harassment. In *Chapman v. 3M Canada Inc.,* [1997] O.J. No. 928, at paras. 4 & 7, the Ontario Court of Appeal concluded that civil claims of sexual harassment and discrimination are similarly precluded by the Supreme Court's holding in *Bhadauria*.

[53] In 2008, the Supreme Court reaffirmed that "a plaintiff is precluded from pursuing a common law remedy when human rights legislation contains a comprehensive enforcement scheme for violations of its substantive terms". Consequently, a breach of the *Code* cannot constitute an actionable wrong: *Honda v. Keays,* 2008 SCC 39, at paras. 63-64.

[54] This principle was recently restated in *Lorion v. 1163957799 Quebec Inc.,* 2015 ONSC 2417, at para. 24, where Smith J. struck out a civil claim for sexual harassment:

> Sexual harassment is not an independent tort recognized in Ontario and hence cannot support a cause of action. This Court's jurisdiction to deal with damages arising from sexual harassment is ousted by Ontario's *Human Rights Code*, R.S.O. 1990, C.H.19.

[55] In 2008, the *Code* was amended to allow a plaintiff to advance a breach of the *Code* as a cause of action solely in connection with another wrong; under s. 46.1, a plaintiff who has a civil claim properly before the court may "piggy-back" their *Code* claim so that the entire dispute can be adjudicated in one forum. Even then, the Court's remedial authority is limited.

[56] However, as all the alleged wrongs in this case claim, at their core, sexual discrimination, there is no independent actionable wrong to ground a court action. The plaintiffs have not pleaded any independent cause of action which would permit them to bring the *Code* claim before this court.

[57] The bottom line is that whether the Plaintiffs characterize their claims as systemic negligence, the tort of harassment, or a *Charter* breach, this action is

one of workplace discrimination which may constitute a violation of both the *Human Rights Code* and the Collective Agreement, but not the common law.

[58] As my determination on this issue is fatal to the certification motion, I need not address the remaining grounds.

Overall Conclusion and Final Remarks

[59] I have concluded that this Court lacks jurisdiction over the dispute between the parties. The jurisdiction motion is therefore allowed.

[60] I have further concluded that even if I had jurisdiction to hear this claim, it does not disclose a viable cause of action, and therefore could not be certified as a class action. Consequently, the certification motion is dismissed.

[61] The Defendants should not regard this result as a vindication of current practices. Like Sharpe J.A. in *A.(K.)*, I have considerable sympathy for the Plaintiffs' desire to have this litigated in court. Even on the limited and contradictory evidence before me, it is apparent that this case raises serious, triable issues relating to the workplace culture. The allegations are very troubling and will require close scrutiny should this matter proceed to another forum for adjudication.

[62] With these remarks in mind, I strongly urge the parties to resolve any issue of costs consensually. If absolutely necessary, I may be consulted.

Baltman J.

Released: July 13, 2018

CITATION: Rivers v. Waterloo Regional Police Services Board, 2018 ONSC 4307
COURT FILE NO.: CV 17 2346
DATE: 20180713

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

ANGELINA RIVERS, SHARON ZEHR and BARRY ZEHR

R. Douglas Elliott, David Thompson, Matthew Moloci, Colleen Yamashita and Elena Mamay, for the Plaintiffs

- and -

WATERLOO REGIONAL POLICE SERVICES BOARD and WATERLOO REGIONAL POLICE ASSOCIATION

James H. Bennett, for the Waterloo Regional Police Services Board; Caroline (Nini) Jones and Jodi Martin for the Waterloo Regional Police Association

REASONS FOR JUDGMENT

BALTMAN J

Released: July 13, 2018