

**COURT OF APPEAL FOR ONTARIO**

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

**KELLY LYNN DONOVAN**

**Plaintiff  
(Appellant)**

**- and -**

**WATERLOO REGIONAL POLICE SERVICES BOARD  
and BRYAN LARKIN**

**Defendants  
(Respondents)**

**RESPONDENTS' COMPENDIUM**

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**Plaintiff (Appellant)**

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# TAB 1

Court File No. CV-18-00001938-0000

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

KELLY LYNN DONOVAN

Plaintiff

- and -

WATERLOO REGIONAL POLICE SERVICES BOARD  
and BRYAN LARKIN

Defendants

**NOTICE OF MOTION  
(Returnable February 22, 2021)**

The Defendants will make a motion to a judge, on February 22, 2021, at 10:00 AM or as soon after that time as the motion can be heard, at the A. Grenville and William Davis Courthouse, 7755 Hurontario Street, Brampton, Ontario, L6W 4T6.

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

- ☐ in writing under subrule 37.12.1(1).  
☐ in writing as an opposed motion under subrule 37.12.1(4);  
☒ orally.

**THE MOTION IS FOR:**

- (a) An Order dismissing (or, in the alternative, staying) the Amended Amended Statement of Claim in its entirety pursuant to Rule 21.01(3)(a) on the ground that this Honourable Court has no jurisdiction over the subject matter of the within action;
- (b) In the alternative, an Order extending the time limits to allow the Defendants to file a Statement of Defence;

- (c) If necessary, an Order abridging or extending the time limit for service and/or filing of the Defendants' Motion Record, Factum, Book of Authorities, and/or Confirmation of Motion;
- (d) An Order pursuant to Rule 57.03(1) for costs of this motion and of the within action payable to the Defendants within 30 days; and
- (e) Such further and other relief as this Honourable Court deems just.

**THE GROUNDS FOR THE MOTION ARE:**

1. This Honourable Court has no jurisdiction over the within action, which, in its essential character, arises from a collective agreement between the Regional Municipality of Waterloo Police Services Board ("WRPSB") and the Waterloo Regional Police Association ("WRPA").
2. The WRPSB is an agency created under the *Police Services Act*, R.S.O. 1990, c. P.15 ("PSA"), and is responsible for the provision of police services to the Regional Municipality of Waterloo through oversight of the Waterloo Regional Police Service ("WRPS").
3. Bryan Larkin is the Chief of Police of the WRPS, having been appointed into this role on or about August 31, 2014.
4. The WRPA is a police association governed by the PSA and is the exclusive bargaining agent for uniform and civilian employees of the WRPSB.
5. The WRPSB and the WRPA are parties to a Uniform Collective Agreement that governs all terms and conditions of employment for members of the WRPA's uniform bargaining unit, subject to and in accordance with the PSA.
6. The Plaintiff, Kelly Donovan, was formerly employed by the WRPSB as a Constable from 2010 to June 25, 2017.

7. By virtue of her employment and Constable rank, the Plaintiff was represented by the WRPA in respect of her employment (including her employment cessation and issues arising therefrom) and governed by the Uniform Collective Agreement.
8. On or about May 9, 2016, the Plaintiff was served with a Notice of Internal Investigation for potential charges under the *PSA* of misconduct as a police officer.
9. On or about May 31, 2016, the Plaintiff was served with a second Notice of Internal Investigation for further possible *PSA* charges of discreditable conduct, neglect of duty, and/or breaches of confidence.
10. On or about June 3, 2016, the Plaintiff filed an application with the Human Rights Tribunal of Ontario (the “2016 Application”), alleging that she was subject to discrimination in employment on the basis of sex and marital status contrary to the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19 (the “Code”).
11. On or about June 8, 2017, the Plaintiff, the WRPSB, and the WRPA negotiated and entered into a Resignation Agreement that fully resolved all matters relating to the Plaintiff’s employment with or cessation of employment with the WRPSB (including, most critically, the 2016 Application and potential *PSA* charges against the Plaintiff).
12. Chief Larkin executed the Resignation Agreement on behalf of the WRPSB.
13. Under the Resignation Agreement:
  - (a) The Plaintiff expressly and irrevocably agreed that she was “freely and voluntarily resigning her employment with the [WRPSB] effective on or about June 25, 2017”;
  - (b) The Plaintiff and the WRPSB mutually agreed to keep the terms of their settlement and the Plaintiff’s employment resignation in strict confidence except where disclosure was required by law;
  - (c) The Plaintiff and the WRPSB executed mutual Full and Final Releases;

(d) 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] HRT0 Application”; and

(e) The Plaintiff 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] HRT0 Application”.

14. Subsequently, by decision dated July 12, 2017, the WRPSB received notice that the Workplace Safety and Insurance Board (“WSIB”) had granted initial entitlement (i.e. eligibility for benefits) to the Plaintiff in respect of her claim for work-related post-traumatic stress disorder (“PTSD”).

15. By Statement of Claim dated May 9, 2018, the Plaintiff commenced the within action against the Defendants for breach of contract.

16. On consent of the Parties, the Plaintiff filed an Amended Statement of Claim on or about January 16, 2019.

17. As permitted by an Order of the Court of Appeal for Ontario, the Plaintiff filed an Amended Amended Statement of Claim on or about January 29, 2020.

18. As set out in the Amended Amended Statement of Claim, the Plaintiff’s claims against the WRPSB and Chief Larkin arise out of allegations that:

(a) By Chief Larkin’s swearing of an affidavit in defence of a class action lawsuit against the WRPSB (which included a reference to an anonymized female officer who had voluntarily resigned from the WRPSB and withdrawn a human rights application), the Defendants breached the confidentiality provisions of the Resignation Agreement;

- (b) By filing an Intent to Object Form in respect of the WSIB's decision to grant workers' compensation benefits to the Plaintiff, the Defendants breached the provisions of the Full and Final Release executed by the WRPSB under the Resignation Agreement; and
- (c) Chief Larkin committed misfeasance in public office by knowingly including an anonymized reference to the Plaintiff in his class action affidavit in violation of the Resignation Agreement and in order to impede the Plaintiff's recovery from PTSD.

19. None of these claims are properly before this Honourable Court.

20. Put simply, the Amended Amended Statement of Claim makes allegations that, in their essential character, pertain to issues relating to human rights, labour relations, and workers' compensation benefits — namely, the freely-negotiated settlement of the Plaintiff's employment-based 2016 Application before the Human Rights Tribunal of Ontario; the terms and conditions of the Plaintiff's voluntary resignation; participation in the WSIB benefits process relating to the Plaintiff's work-related PTSD, and the Defendants' actions in respect of same.

21. All of the Plaintiff's claims properly fall within the jurisdiction of one of the following specialized forums and/or dispute resolution processes:

- (a) The application and hearing processes of the Human Rights Tribunal of Ontario as established under the *Code*, especially those processes pertaining to the interpretation and enforcement of human rights settlements;
- (b) Pursuant to the labour relations regime established by the *PSA* and the grievance and arbitration process under the Uniform Collective Agreement, a labour arbitrator;
- (c) The appeal and hearing processes of the WSIB and the Workplace Safety and Insurance Appeals Tribunal, as established under the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Sched. A ("WSIA"); and/or

- (d) The complaints process under the *PSA* and, to the extent applicable following its coming into force, the *Comprehensive Ontario Police Services Act, 2019*, S.O. 2019, c. 1 (“*COPS Act*”), along with all applicable regulations thereunder.

22. The Court therefore has no jurisdiction over the subject matter of the action.

23. Notably, on or about July 27, 2018, the Plaintiff filed an Application for Contravention of Settlement at the Human Rights Tribunal of Ontario.

24. The Plaintiff’s Application for Contravention of Settlement continues to run concurrently alongside the within action, is based on exactly the same facts, and raises the same alleged breaches of the Resignation Agreement that form the subject matter of this action.

25. The Defendants rely on:

- (a) Rules 2.03, 3.02, 21.01(3)(a), 37, 57.03(1), and 59.06(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 94;
- (b) The *Code*, including sections 45.9 and 46.1 thereof;
- (c) The *WSIA*, including sections 118 and 123 thereof;
- (d) The *PSA* and the regulations thereunder; and
- (e) Following its coming into force, the *COPS Act* and the regulations thereunder.

26. Such further and other grounds as counsel may advise and this Court may permit.

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

- (a) The Amended Amended Statement of Claim in this action and the documents referred to therein;
- (b) The Resignation Agreement;

- (c) The Uniform Collective Agreement effective January 1, 2015, to December 31, 2019;
- (d) The Affidavit(s) of Laura J. Freitag and/or Virginia Torrance, including all exhibits thereto; and
- (e) Such further and other evidence as counsel may advise and this Court may permit.

August 31, 2020

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Plaintiff

KELLY LYNN DONOVAN  
Plaintiff

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**  
**(Returnable February 22, 2021)**

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# TAB 2

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)

**AFFIDAVIT OF LAURA FREITAG  
(Sworn February 9, 2021)**

I, Laura Freitag, of the City of Toronto, in the Province of Ontario, MAKE OATH  
AND SAY:

1. I am a lawyer at the law firm of Filion Wakely Thorup Angeletti LLP, counsel for the Defendants. I have reviewed the file for this matter and as such I have knowledge of the matters to which I hereinafter depose.

**The Parties**

2. The Organizational Defendant, the Waterloo Regional Police Services Board (“WRPSB”), is an agency created under the *Police Services Act* (“PSA”) for the provision of adequate and effective police services to the Regional Municipality of Waterloo (including the cities of Kitchener, Waterloo, and Cambridge). The WRPSB oversees the Waterloo Regional Police Service (“WRPS”).
3. The Personal Defendant, Bryan Larkin, was appointed the Chief of Police of the WRPS on or about August 31, 2014, and remains in this role currently.

4. The Plaintiff, Kelly Lynn Donovan, commenced employment with the WRPSB, in or around 2010. At the time of her employment resignation, she held the rank of Constable and was assigned to Administrative Command, Training Branch.
5. At all times during her employment with the WRPSB, the Plaintiff was represented by the Waterloo Regional Police Association (the “WRPA”), the bargaining agent for all uniform and civilian members of the WRPS, save and except for the Chief of Police, the Deputy Chiefs, and employees represented by the Senior Officers’ Association. Accordingly, subject to and in accordance with the *PSA*, the terms and conditions of the Plaintiff’s employment were governed by the Uniform Collective Agreement negotiated by the WRPSB and the WRPA. A copy of the 2015-2019 Uniform Collective Agreement is attached hereto as **Exhibit “A”**.

#### **The Plaintiff’s Medical Leave of Absence**

6. On or about February 24, 2011, the Plaintiff attended at a gun range at the Ontario Police College in Aylmer, Ontario. While at the gun range, the Plaintiff witnessed an individual accidentally discharging his firearm into his leg.
7. The Plaintiff subsequently commenced a medical leave of absence in or around February 2017. The Plaintiff remained off work until her employment resignation.
8. Subsequent to commencing her medical leave, the Plaintiff was diagnosed with post-traumatic stress disorder (“PTSD”) as a result of the incident she had witnessed at the Ontario Police College.

#### **The Plaintiff’s WSIB Claim and Entitlement to Benefits Thereunder**

9. On or about April 10, 2017, the Plaintiff applied for benefits from the Workplace Safety and Insurance Board in respect of her PTSD diagnosis. The date of injury/illness specified on the Plaintiff’s claim for benefits (WSIB Form 7) was February 1, 2017.
10. On or about July 12, 2017, a Case Manager from the WSIB, Jane Drake, issued a decision granting initial entitlement to the Plaintiff and finding that the Plaintiff was

entitled to healthcare benefits and loss of earnings benefits from February 27, 2017 to June 24, 2017. A copy of the decision is attached hereto as **Exhibit “B”**.

11. Under the WSIB’s established processes, an employer can only receive a copy of an injured worker’s claim file if the employer has filed an Intent to Object (“ITO”) form with the WSIB (see **Exhibit “C”** hereto at pages 4 to 5). On or about January 11, 2018, the WRPSB filed such an ITO form (attached hereto as **Exhibit “D”**) to request a review of Case Manager Drake’s decision and obtain a copy of the Plaintiff’s WSIB claim file. As is evidenced from the WRPSB’s submissions accompanying the ITO form, the WRPSB was unaware at the time of filing the ITO form that the Plaintiff’s diagnosis was related to the shooting accident of February 2011. Rather, the WRPSB assumed that the Plaintiff’s PTSD was connected to the more recent non-compensable events surrounding the potential *PSA* charges against the Plaintiff (see Schedule “A” of Exhibit “D” at paras. 14 to 17).
12. Case Manager Drake reviewed the claims file and issued a reconsideration decision dated August 3, 2018, re-affirming her July 12, 2017 initial entitlement decision. In accordance with its practice, the WSIB also released a copy of the Plaintiff’s WSIB claim file to the WRPSB. A copy of the reconsideration decision is attached hereto as **Exhibit “E”**.
13. Following its receipt and review of the Plaintiff’s WSIB claim file, the WRPSB learned that the Plaintiff’s PTSD was connected to the February 2011 shooting accident. Since then, the WRPSB has not taken any steps to initiate any further WSIB reviews of the July 12, 2017 decision or the Plaintiff’s WSIB claim.

#### **The Plaintiff’s Initial Human Rights Application and Potential *PSA* Charges, and the Settlement Thereof**

14. On or about May 4, 2016, the Plaintiff made a delegation to the WRPSB regarding her belief that the WRPS was investigating domestic violence inconsistently where WPRS members were involved as either alleged victims or perpetrators. During her delegation, the Plaintiff identified herself as a police officer, referred to confidential

information contained in a Crown Brief, criticized the WRPS and its members, and suggested that WRPS officers may have suppressed evidence in a criminal investigation.

15. By making her delegation without prior notice or approval from the WRPS Chief of Police, or his designate, and potentially accessing a protected Crown Brief, the Plaintiff engaged in acts that appeared to constitute professional misconduct under the *PSA*. Accordingly, the WRPSB issued a formal Notice of Investigation to the Plaintiff advising that, subject to and following an external review of the substance of the Plaintiff's allegations, the Plaintiff's conduct on May 4, 2016, would be investigated to determine whether she had breached the *PSA* and/or engaged in discreditable conduct. The Plaintiff was also issued a Directive instructing her, *inter alia*, not to have any conduct with WRPSB members without prior authorization from the Chief of Police.
16. Shortly thereafter, the Plaintiff sent an email to members of the WRPSB advising that she had been served with a Directive and a Notice of Investigation. She also asserted that her actions were beyond reproach and that she had no personal interest in any of the matters that she had brought to the WRPSB's attention.
17. The Plaintiff received a second Notice of Investigation on May 31, 2016, as a result of her email communications with the WRPSB and, again, was notified that an investigation would be conducted to determine if her actions constituted discreditable conduct under the *PSA*.
18. On or about June 6, 2016, the Applicant filed an application with the Human Rights Tribunal of Ontario (the "HRTTO"), having HRTTO File No. 2016-245566-I ("the 2016 Application"), alleging that she was discriminated against on the basis of sex and marital status. A copy of the 2016 Application (excluding documents attached to the 2016 Application) is attached hereto as **Exhibit "F"**.
19. The WRPSB, the WRPA, and the Plaintiff successfully negotiated a Resignation Agreement to fully resolve and settle the 2016 Application, the potential *PSA*

charges against the Plaintiff, all matters related to the Plaintiff's employment with the WRPSB and the cessation of that employment, and all outstanding matters among the parties. The Resignation Agreement was executed by the WRPSB, the WRPA, and the Plaintiff on or about June 8, 2017. A redacted copy of the Resignation Agreement is attached hereto as **Exhibit "G"**.

20. Pursuant to the Resignation Agreement, the Plaintiff confirmed that she was freely, voluntarily, and irrevocably resigning from her employment with the WRPSB effective June 25, 2017.
21. The WRPSB and the Plaintiff also released each other from, *inter alia*, any and all complaints and claims arising out of or in any way relating to the Plaintiff's employment with the WRPSB, including but not limited to the 2016 Application and the potential *PSA* charges against the Plaintiff.
22. The Resignation Agreement contained the following confidentiality provision, at paragraph 16:

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.

### **The Class Action Against the WRPSB and the WRPA**

23. The WRPSB and the WRPA were named as defendants in a proposed class action lawsuit on or about May 30, 2017. The putative class members in the class action were current and former employees of the WRPSB and their family members. The class action alleged that the WRPSB and the WRPA were liable for systemic gender-based discrimination and sexual harassment by members of the WRPS, though the Plaintiff was not a putative class member. The class action was subsequently dismissed by Madam Justice Baltman on July 13, 2018, as outside the Court’s jurisdiction. The Court of Appeal for Ontario upheld Justice Baltman’s decision on April 5, 2019, and the putative class action plaintiffs’ application for leave to appeal to the Supreme Court of Canada was dismissed on October 24, 2019.
24. On or about December 21, 2017, the WRPS’s Chief of Police, Bryan Larkin, swore an affidavit in support of a dismissal motion in the class action. This affidavit was served on counsel for the class members as part of the WRPSB’s Reply and Responding Motion Record.
25. Chief Larkin’s affidavit attached several exhibits. Exhibit “F” to Chief Larkin’s affidavit was a chart with anonymized details about human rights applications that were commenced by female WRPSB employees from 2012 to 2017. The chart did not contain any information identifying the Plaintiff, only the following information:

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

A copy of Chief Larkin’s affidavit and its Exhibit “F” are attached hereto as **Exhibit “H”**.

26. On or about January 15, 2018, counsel for the putative class action plaintiffs’ uploaded a copy of Chief Larkin’s affidavit to a website that they had created about

the proposed class action. The WRPSB and Chief Larkin had neither involvement in nor control over the website. Counsel for the class action plaintiffs did not seek the Defendants' prior authorization before publishing Chief Larkin's affidavit online. The Defendants only learned of the online publication of Chief Larkin's affidavit after the WRPSB's Human Resources team was notified by a WRPSB employee of such publication on or about January 24, 2018.

### **The HRTO Proceedings Between the Plaintiff and the WRPSB**

27. On or about June 28, 2018, the WRPSB filed an Application for Contravention of Settlement with the HRTO, having HRTO File No. 2018-33237-S (the "WRPSB's Enforcement Application"). The WRPSB alleges that, following the execution of the Resignation Agreement, the Plaintiff has repeatedly contravened the terms, undertakings, and confidentiality provision of the Resignation Agreement by, *inter alia*, stating that she was constructively dismissed by the WRPSB, making complaints about the WRPSB, and referring to events giving rise to the 2016 Application. The WRPSB's Enforcement Application seeks such relief from the HRTO as is necessary to ensure the Plaintiff's ongoing compliance with the terms of the Resignation Agreement. A copy of the WRPSB's Enforcement Application is attached hereto as **Exhibit "I"**.
28. On or about July 10, 2018, the Plaintiff filed a Response to the WRPSB's Enforcement Application; however, her Response failed to address the merits of the WRPSB's Enforcement Application. A copy of the Plaintiff's Response is attached hereto as **Exhibit "J"**.
29. On or about July 27, 2018, the Plaintiff filed an Application for Contravention of Settlement against the WRPSB, having HRTO File No. 2018-33503-S (the "Plaintiff's Enforcement Application"). Like the instant Claim, the Plaintiff's Enforcement Application alleges a breach of the Resignation Agreement as a result of Chief Larkin's affidavit in the class action and claims damages. A copy of the Plaintiff's Enforcement Application is attached hereto as **Exhibit "K"**.

30. Due to the Plaintiff's failure to file any substantive response to the merits of the WRPSB's Enforcement Application, on or about July 30, 2018, the WRPSB filed a Request for an Order During Proceedings ("RFOP") with the HRTTO. The RFOP requested that the HRTTO move to a determination of remedy in respect of the WRPSB's Enforcement Application absent any substantive submissions by the Plaintiff in response to the merits of the WRPSB's Enforcement Application. A copy of the RFOP is attached hereto as **Exhibit "L"**.
31. The HRTTO's Rules of Procedure, and specifically Rule 19.6 therein, required the Plaintiff to file a response to the RFOP not later than 14 days (i.e. August 13, 2018) after the RFOP was delivered. A copy of the HRTTO's Rules of Procedure is attached hereto as **Exhibit "M"**.
32. On or about August 1, 2018, the Plaintiff emailed counsel for the WRPSB to request an extension for filing her response to the RFOP.
33. By email dated August 2, 2018, the WRPSB consented to granting the Plaintiff an extension to August 22, 2018, for the filing of her response to the RFOP.
34. The HRTTO issued a Notice of Hearing on August 3, 2018, in respect of the WRPSB's Enforcement Application, which scheduled the matter for hearing on February 22, 2019. A copy of the Notice of Hearing is attached hereto as **Exhibit "N"**.
35. On or about August 10, 2018, the HRTTO issued a Notice of Intent to Dismiss, informing the parties that it intended to dismiss the Plaintiff's Enforcement Application for untimeliness. The Notice of Intent to Dismiss instructed the Plaintiff to provide the HRTTO with written submissions as to the reasons for her untimely filing of the Plaintiff's Enforcement Application. The deadline for these written submissions was September 7, 2018. A copy of the Notice of Intent to Dismiss is attached hereto as **Exhibit "O"**.
36. By email dated August 20, 2018, the Plaintiff asked the HRTTO to grant time extensions for filing her response to the RFOP (in respect of the WRPSB's Enforcement Application) and for filing her written submissions in response to the

HRTO's Notice of Intent to Dismiss (in respect of the Plaintiff's Enforcement Application).

37. On or about September 4, 2018, the HRTO granted the Plaintiff until September 28, 2018, to file her response to the RFOP in respect of the WRPSB's Enforcement Application. A copy of the HRTO's extension notice is attached as **Exhibit "P"**.
38. Similarly, on or about September 7, 2018, the HRTO granted the Plaintiff until October 26, 2018, to file written submissions in response to its Notice of Intent to Dismiss in respect of the Plaintiff's Enforcement Application. A copy of this extension notice is attached hereto as **Exhibit "Q"**.
39. As a result of the Plaintiff's failure to file her written submissions and response to RFOP within the required time limits, the HRTO adjourned the February 22, 2019 hearing date and, instead, convened a case management conference call on February 19, 2019. Following the case management conference call, the HRTO directed that the WRPSB's Enforcement Application and the Plaintiff's Enforcement Application would be processed and heard together. The HRTO also scheduled a mediation between the WRPSB and the Plaintiff, which took place on May 1, 2019. The Interim Decision arising from the HRTO's February 19, 2019 case management conference call is attached hereto as **Exhibit "R"**.
40. In an Interim Decision dated September 30, 2019 (attached as **Exhibit "S"**), the HRTO stated that it would schedule a full-day preliminary hearing held by conference call. The WRPSB and the Plaintiff are currently awaiting receipt of the HRTO's Notice of Hearing for this preliminary hearing.

#### **The Plaintiff's Claim Against the Defendants**

41. On or about May 9, 2018, the Plaintiff commenced the instant action against the WRPSB and Chief Larkin by filing a Statement of Claim in the Ontario Superior Court of Justice in Brampton, Ontario. In the Statement of Claim, the Plaintiff alleges that the Defendants breached the Resignation Agreement as a result of the anonymized chart that had been appended to Chief Larkin's affidavit in the class

action lawsuit. The Plaintiff claims \$210,000.00 in damages and seeks an order that she be reinstated to employment with the WRPS. A copy of the Statement of Claim is attached hereto as **Exhibit “T”**.

42. On or about June 7, 2018, the Defendants brought a motion to dismiss the Plaintiff’s Statement of Claim on the grounds that: (a) the Court lacked jurisdiction over the subject matter of the action; (b) the Statement of Claim failed to disclose a reasonable cause of action against one or more of the Defendants; and (c) the action was frivolous, vexatious and/or an abuse of process. A copy of the Defendants’ Notice of Motion is attached hereto as **Exhibit “U”**.
43. An Amended Statement of Claim was served on the Defendants on January 16, 2019. The Amended Statement of Claim raises an additional alleged breach of the Resignation Agreement, being the WRPSB’s filing of an Intent to Object form in the Plaintiff’s WSIB claim. A copy of the Amended Statement of Claim is attached hereto as **Exhibit “V”**.
44. The Defendants’ dismissal motion was heard by Justice Doi on or about February 13, 2019. In his decision dated February 21, 2019, Justice Doi dismissed the Amended Statement of Claim for having no reasonable cause of action against the Defendants (see **Exhibit “W”** hereto). Justice Doi did not rule on the issue of the Court’s jurisdiction over the subject matter of the Amended Statement of Claim.
45. On or about October 11, 2019, the Plaintiff successfully appealed Justice Doi’s decision in respect of whether the Amended Statement of Claim disclosed a reasonable cause of action to the Court of Appeal for Ontario (see **Exhibit “X”** hereto).
46. On or about January 29, 2020, the Plaintiff served an Amended Amended Statement of Claim on the Defendants. The Amended Amended Statement of Claim alleged misfeasance in public office by Chief Larkin. The Plaintiff also pleaded new factual allegations regarding, *inter alia*, her motivations for entering into the Resignation Agreement, the Plaintiff’s PTSD symptoms, Chief Larkin’s knowledge of the

Resignation Agreement, the publication of Chief Larkin's affidavit on the class action website, and comments by Chief Larkin and the Plaintiff about PTSD in the police services sector. A copy of the Amended Amended Statement of Claim is attached hereto as **Exhibit "Y"**.

47. On or about February 19, 2020, the Defendants sought the Court's direction on the appropriate next steps in the proceeding, given that the Defendants' jurisdiction motion had not been ruled upon (see **Exhibit "Z"**). At Justice Doi's invitation, the Plaintiff and the Defendants filed submissions in respect of the processing of the Defendants' outstanding jurisdiction motion on or about, respectively, March 17, 2020, and April 3, 2020 (see **Exhibits "AA" and "BB"** hereto)
48. By Endorsement dated April 20, 2020, Justice Doi held that the Defendants' jurisdiction motion should be returned as a new motion under Rule 59.06(1) for hearing before another judge of the Court (see **Exhibit "CC"** hereto at para. 3).
49. On or about August 31, 2020, the Defendants brought the instant motion pursuant to Rule 21.01(3)(a) and, in accordance with Justice Doi's Endorsement, Rule 59.06(1).
50. On or about December 9, 2020, the Plaintiff served the Defendants with a Fresh Amended Statement of Claim (issued November 23, 2020), attached hereto as **Exhibit "DD"**. The Fresh Amended Statement of Claim included new claims in tort (*viz.* misfeasance in public office and negligence) against the Defendants jointly and severally, as well as removed the Plaintiff's remedial request for reinstatement to a Constable position with the WRPSB. The Fresh Amended Statement of Claim also pleaded new factual allegations, including that the Defendants negligently allowed Chief Larkin's affidavit to be published online and that the class action was dismissed as a result of the motion relying on Chief Larkin's affidavit.

51. I make this Affidavit in support of the Defendants' motion and for no improper purpose.

SWORN REMOTELY by Laura Freitag stated as being located in the City of Toronto, in the Province of Ontario, BEFORE me at the City of Toronto in the Province of Ontario, this 9th day of February, 2021, in accordance with O. Reg. 431/20.



Commissioner for Taking Affidavits

  
**LAURA FREITAG**

# TAB A

**THIS IS EXHIBIT "A" REFERRED TO IN THE AFFIDAVIT OF LAURA J. FREITAG  
SWORN BEFORE ME THIS 9th DAY OF February, 2021.**

A handwritten signature in cursive script, appearing to read "Assh", is written above a horizontal line.

**A COMMISSIONER FOR TAKING AFFIDAVITS**

2015 - 2019 COLLECTIVE AGREEMENT

BETWEEN

WATERLOO REGIONAL POLICE SERVICES BOARD

- AND -

THE WATERLOO REGIONAL POLICE ASSOCIATION

UNIFORM

EFFECTIVE JANUARY 1, 2015 TO DECEMBER 31, 2019

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The remainder of the Waterloo Regional Police Services Board and the Waterloo Regional Police Association's collective agreement effective January 1, 2015 to December 31, 2019 (the "Uniform Collective Agreement") has been omitted.

A full version of the Uniform Collective Agreement can be found at **Tab 33 of the Appellant's Appeal Book and Compendium.**

# TAB B

**THIS IS EXHIBIT "B" REFERRED TO IN THE AFFIDAVIT OF LAURA J. FREITAG  
SWORN BEFORE ME THIS 9th DAY OF February, 2021.**



---

**A COMMISSIONER FOR TAKING AFFIDAVITS**



Workplace Safety  
& Insurance Board  
Commission de la sécurité  
professionnelle et de l'assurance  
contre les accidents du travail

Head Office:  
200 Front Street West  
Toronto, Ontario  
Canada M5V 3J1

Siège social :  
200, rue Front Ouest  
Toronto, Ontario  
Canada M5V 3J1

Telephone / Téléphone :  
416-344-1000  
1-800-387-0750  
TTY / ATS : 1-800-387-0050

Fax / Télécopieur :  
416-344-4684  
1-888-313-7373

July 12, 2017

HEATHER HENNING  
WATERLOO REGIONAL POLICE SERVICE  
200 MAPLE GROVE ROAD  
CAMBRIDGE ON N3H 5M1  
CANADA

Claim No.: 30505408

Worker Name: KELLY DONOVAN

Date of  
Injury/Illness: 01/Feb/2017

Injury/Illness: Psychological Trauma

Dear Ms. Henning,

To keep you informed of the claim status, attached is a copy of a letter sent to Kelly Donovan.

I have made this decision based on the information available to me. If you do not understand the decision, or if you do not agree with the conclusions reached, please call me. I would be pleased to discuss your concerns.

**It is important to know that the *Workplace Safety and Insurance Act (the Act)* imposes time limits on objections. If you want to object to my decision, the Act requires that you notify me in writing no later than January 12, 2018.**

To submit this written appeal notice, please go to our website at [www.wsib.on.ca](http://www.wsib.on.ca) and complete the Intent to Object Form. There is an instruction sheet included on the site which also lists organizations that can provide free representation. You can access the form and instruction sheet by typing "appeal" into the search box on the website and accessing the Worker Appeals or Employer Appeals page. They are also available in the "Forms" section of the website. If you do not have access to our website, you may call our toll free number at 1-800-387-0750 and request the form be mailed to you.

Yours sincerely,

Operations Division  
Tel: 416-344-1000 or 1-800-387-0750

RECEIVED  
JUL 20 2017

Human Resources Branch



Workplace Safety  
& Insurance Board  
Commission de la sécurité  
professionnelle et de l'assurance  
contre les accidents du travail

Head Office:  
200 Front Street West  
Toronto, Ontario  
Canada M5V 3J1

Siège social :  
200, rue Front Ouest  
Toronto, Ontario  
Canada M5V 3J1

Telephone / Téléphone :  
416-344-1000  
1-800-387-0750  
TTY / ATS : 1-800-387-0050

Fax / Télécopieur :  
416-344-4684  
1-888-313-7373

July 12, 2017

KELLY DONOVAN  
11 DANIEL PL  
BRANTFORD ON N3R 1K6  
CANADA

Claim No.: 30505408

Worker Name: KELLY DONOVAN

Date of  
Injury/Illness: 01/Feb/2017

Injury/Illness: Psychological Trauma

Dear Ms. Donovan,

**Subject:** Initial Entitlement (Eligibility to Benefits)

I am writing to confirm the allowance of your claim for Posttraumatic Stress Disorder (PTSD) as verbally communicated to you on July 12, 2017.

**Details of the Case:**

Your claim was established in April 2017 when we received your Worker's Report of Injury/Disease, as well as an Employer's Report of Injury/Disease. You were employed as a police officer with Waterloo Regional Police Service from December 19, 2010 until you resigned effective June 25, 2017. You are claiming you developed posttraumatic stress disorder as a result of your workplace duties, and you have been off work since February 27, 2017 due to your PTSD symptoms. A June 22, 2017 assessment report from your psychologist confirmed a diagnosis of PTSD.

**Criteria:**

The Workplace Safety and Insurance Act (WSIA) was amended as of April 6, 2016 and new provisions were introduced which establish presumptive entitlement to benefits for first responders and other designated workers diagnosed with PTSD. Operational Policy Manual (OPM) document 15-03-13 titled, Posttraumatic Stress Disorder in First Responders and Other Designated Workers, guides decision makers in the implementation of these legislative changes.

The policy provides that if a first responder or other designated worker is diagnosed with PTSD by a psychiatrist or psychologist, and if certain criteria have been met, the PTSD is presumed to have arisen out of and in the course of the first responder's or other designated worker's employment, unless the contrary is shown.

**Decision:**

The information in your claim has been carefully considered. It is confirmed you are a first responder as defined in OPM 15-03-13 and you were diagnosed with PTSD by a psychologist on June 22, 2017. Therefore, your claim for PTSD is allowed by presumption and considered to have arisen out of and in

the course of your employment noting the criteria under the policy have been satisfied. Your claim is allowed for healthcare benefits. This would include 12 initial counselling sessions.

The medical information on file supports that you were unable to work in any capacity; and were clinically authorized off work. As a result, you are entitled to full loss of earnings (LOE) benefits from February 27, 2017 up to June 24, 2017. I understand you received advances from your employer, which will be reimbursed to the employer by the WSIB.

Also, your WSIB Nurse Consultant, Missa Canave, may contact you in the future, to facilitate the recommended treatment with your psychologist.

I have made this decision based on the information available to me. If you do not understand the decision, or if you do not agree with the conclusions reached, please call me. I would be pleased to discuss your concerns.

It is important to know that the Workplace Safety and Insurance Act (the Act) imposes time limits on objections. If you want to object to my decision, the Act requires that you notify me in writing no later than January 12, 2018.

To submit this written appeal notice, please go to our website at [www.wsib.on.ca](http://www.wsib.on.ca) and complete the Intent to Object Form. There is an instruction sheet included on the site which also lists organizations that can provide free representation. You can access the form and instruction sheet by typing "appeal" into the search box on the website and accessing the Worker Appeals or Employer Appeals page. They are also available in the "Forms" section of the website. If you do not have access to our website, you may call our toll free number at 1-800-387-0750 and request the form be mailed to you.

Yours sincerely,

Jane Drake, TMS EA / STCM  
Case Manager  
Traumatic Mental Stress Program

Tel: 416-344-5205 or 1-800-387-0750

Copy To: Waterloo Regional Police

# TAB C

**THIS IS EXHIBIT "C" REFERRED TO IN THE AFFIDAVIT OF LAURA J. FREITAG  
SWORN BEFORE ME THIS 9th DAY OF February, 2021.**

A handwritten signature in cursive script, appearing to read "J. J. [unclear]", is written above a horizontal line.

**A COMMISSIONER FOR TAKING AFFIDAVITS**

# APPEALS SERVICES DIVISION

## PRACTICE & PROCEDURES

### APPEALS SERVICES DIVISION

**Fax:** 416-344-3600

**Phone:** 416-344-1014

**Toll-free:** 1-800-387-0773

**TTY:** 1-800-387-0050

**Website:** [wsib.on.ca](http://wsib.on.ca)



Effective January 1, 2018

# KEY CHANGES TO THE ASD PRACTICE & PROCEDURES

## Effective January 1, 2018

This procedural document is reviewed and updated, typically on an annual basis. The updated document will remain in effect until the date of the next review. In this version, dated January 1, 2018, we have updated information about Objection Intake, further clarified how the decisions regarding methods of resolution are made, and have begun to make improvements in the overall language of the document. For previous changes made to the Practice and Procedures document, **SEE APPENDIX B on page 64.**

Issue	Description	Page(s)
<b>Objection Intake</b>	The process for objection intake has been updated and now includes a review by the decision maker's manager.	<b>6</b>
<b>Methods of Resolution and Criteria for Hearings in Writing vs. Oral Hearings</b>	The information in this practice guideline was re-organized to provide a better flow of process, further clarification around how determining method of resolution is done, and additional criteria and examples for the factors taken into account. The ASD will use this new guideline effective January 1, 2018. Traumatic Mental Stress (TMS) was removed from the Oral hearings list "B" on page 22. Complex non-organic conditions on this list are meant to include TMS and Chronic Mental Stress.	<b>17-22</b>
<b>Reconsiderations in the Appeals Services Division</b>	This guideline was updated to clarify that when a de novo decision is needed, the timelines associated with the appeals process will apply.	<b>52-55</b>

# APPEALS SERVICES DIVISION PRACTICE & PROCEDURES

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# APPEALS SERVICES DIVISION PRACTICE & PROCEDURES

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# APPEALS SERVICES DIVISION PRACTICE & PROCEDURES

## Glossary of Acronyms

The following items will be described throughout this document using the acronyms/terms set out below:

<b>WSIB</b>	Workplace Safety and Insurance Board	<b>ARO</b>	Appeals Resolution Officer
<b>WSIA</b>	Workplace Safety and Insurance Act	<b>Registrar</b>	Appeals Registrar
<b>WSIAT</b>	Workplace Safety and Insurance Appeals Tribunal	<b>Coordinator</b>	Appeals Coordinator
<b>ASD</b>	Appeals Services Division	<b>WPP</b>	Workplace Party(ies)

## Definition of Terms

<b>Workplace party(ies)</b>	The worker who has a wsib claim and the employer for that worker.
<b>Front-line decision maker</b>	This is the individual that made the initial decision on an issue of entitlement or related to an employer account.
<b>Appeals Resolution Officer</b>	The final decision maker of the WSIB.
<b>Appeals Registrar</b>	The primary contact for workplace parties and their representatives. Unrepresented workers and employers will have greater opportunity to discuss the appeals process with the appeals registrar at the beginning of the process. This role is responsible for reviewing the readiness of the appeal, making determinations on the appropriate appeal method of resolution, addressing disclosure issues, and making time limit decisions.
<b>Appeals Coordinator</b>	This role is responsible for all pre hearing activities of a file prior to assignment to an aro, and for scheduling oral hearings as required.
<b>Objection</b>	When a WPP receives a decision that they disagree with they may advise the front-line decision maker that they wish to object to that decision.
<b>Intent to Object Form</b>	This is a form available on the wsib website that allows the WPP to provide new information that might alter a decision by the front-line decision maker as well as to bookmark their objection within the time required by the workplace safety and insurance act. To bookmark an objection is to indicate disagreement with a decision made by a front-line decision maker; if it is done within the time frame required by the workplace safety and insurance act the WPP can move forward with their objection whenever they are ready to do so.
<b>Objecting Party</b>	The WPP or representative who disagrees with the decision made by the front-line decision maker and initiates an objection (appeal) to a wsib decision.
<b>Appeal Readiness Form</b>	The form that the WPP can complete and send to the wsib. It allows the parties to make their argument about their appeal and indicate their opinion on how the appeal should be resolved.

## APPEALS SERVICES DIVISION PRACTICE & PROCEDURES

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<b>Respondent Form</b>	The form that a participant (non-objecting party) completes to respond to the objecting party's argument about the appeal, and to indicate their opinion on how their appeal should be resolved.
<b>Appeal</b>	The process that occurs when a WPP has completed an intent to object form, an appeal readiness form and the file is registered in the appeals services division to resolve.
<b>Participant</b>	The WPP who has completed a participant form and wishes to participate in the appeal of the objecting party.
<b>Respondent</b>	The participant becomes the respondent for the purposes of the appeals process; they are responding to the arguments/testimony made by the objecting party.
<b>Hearing in Writing</b>	An appeal resolved by an aro based on the evidence found in the claim file and the appeal readiness form and respondent form.
<b>Oral Hearing</b>	The appeal participants attend a wsib office and appear in person (or by teleconference) before the aro. The worker and witnesses, and employer if participating, answer questions under oath and oral arguments are made by the participants.
<b>Employer Account Appeals</b>	Those appeals dealing with classification, transfer of cost, independent operator and worker status, or other revenue related issues.

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### Calculation of Time

Time in this document, unless otherwise noted, is delineated in calendar days. When a due date falls on a weekend or a holiday, the due date will be extended to the next weekday or the next day that is not a holiday.

### Mission Statement

The mission of the Workplace Safety and Insurance Board (WSIB) appeals system is to consider and reach final resolutions to claims and employer account appeals. Resolutions shall be consistent with the Workplace Safety and Insurance Act (WSIA) and WSIB policy, and shall be timely, transparent and fair in dealing with appeals from both workers and employers.

The Appeals Services Division (ASD) will ensure service excellence by demonstrating a responsive appeals system that is committed to providing independent and transparent decision-making services by one independent decision maker (ARO). The ASD will provide two resolution methods, hearings in writing and oral hearings.

Oral hearings, when requested and found necessary by the ASD, are held at locations throughout Ontario to ensure the Workplace Parties (WPP), their representatives, and any relevant witnesses are not unduly inconvenienced or the location of the hearing does not form a barrier to a party's right to a fair and timely appeals process.

## Statutory Authority

### Section 119 of the WSIA states:

- *The Board shall make its decision based upon the merits and justice of a case and it is not bound by legal precedent.*
- *If, in connection with a claim for benefits under the insurance plan, it is not practicable to decide an issue because the evidence for and against it is approximately equal in weight, the issue shall be resolved in favour of the person claiming benefits.*
- *The Board shall give an opportunity for a hearing.*
- *The Board may conduct hearings orally, electronically or in writing.*

### Section 131(1) of the WSIA states:

*The Board shall determine its own practice and procedure in relation to applications, proceedings and mediation. With the approval of the Lieutenant Governor in Council, the Board may make rules governing its practice and procedure.*

## ASD Practice and Procedures

The ASD has exercised its powers under s.131(1) to adopt the following document. The Appeals Services Division Practice & Procedures document is available on the WSIB website: [www.wsib.on.ca](http://www.wsib.on.ca).

For specific information regarding employer account appeals, **SEE PRACTICE GUIDELINE on EMPLOYER ACCOUNT APPEALS on page 61.**

This procedural document is reviewed and updated, typically on an annual basis. The updated document will remain in effect until the date of next review.

Key changes in this version are outlined at the beginning of the document.

## PRACTICE GUIDELINE

**PRACTICE GUIDELINE: Intent to Object – Handling By Operations****Adverse Decision**

When a front-line decision maker makes an adverse decision, they will communicate that decision verbally when possible and in writing. A written decision will invite the WPP that has received the adverse decision to provide any additional information that might alter the decision, and will also advise the party of the time limit to object to the decision. **SEE PRACTICE GUIDELINE on TIME LIMIT TO OBJECT on page 7.**

If concerns are raised about the decision, the decision maker will review the concerns with the party, explain the rationale for the decision and address/review any new information that may be provided. If the decision is not changed, the party can then proceed with their objection.

**Intent to Object and Possible Reconsideration**

If the objection is to an Employer Account issue, **SEE PRACTICE GUIDELINE on EMPLOYER ACCOUNT APPEALS on page 61.**

For all other issues, the party/representative is required to obtain a blank Intent to Object Form from the WSIB website ([www.wsib.on.ca](http://www.wsib.on.ca)), through the mail, or, upon request, by calling the WSIB at 416-344-1000 or 1-800-387-0750.

This form is intended to give parties an early opportunity to provide new information that might alter a decision by the front-line decision maker as well as to bookmark their objection. To bookmark an objection is to indicate disagreement with a front-line decision within the time limit set out in the WSIA.

The form requires the following information to be provided:

- Claim identifiers (worker name and claim number)
- Identification of the objecting party
- General information about the objecting party
- Representative contact information
- Date of decision(s) being objected to and the issues in dispute contained in the decision letters
- Indication of whether there is new information or additional explanation provided
- Signature and date

The form is structured so that only the first page must be returned; page 2 is optional and may be completed if the party has new information or would like to provide reasons for the objection.

The completed Intent to Object Form must be mailed/faxed to the WSIB within the Section 120 specified time limit to object. **SEE THE PRACTICE GUIDELINE ON TIME LIMIT TO OBJECT on page 7.**

While the WSIB prefers to receive the Intent to Object Form, it will continue to accept a letter of objection.

**Reconsideration Stage in Operations**

If the objecting party returns a completed Intent to Object Form, the original Operations decision maker will review the form for completeness and any new information that is provided. Where appropriate, the decision maker will reconsider the original decision. Where new issues are raised in the Intent to Object Form, the

## PRACTICE GUIDELINE

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decision maker will address those issues as well. The reconsideration process will generally take place within 14 days, or longer, if additional information must be obtained.

If the decision is altered, the objection process will not continue.

If the adverse decision is confirmed, a reconsideration letter is sent. The reconsideration letter should include the same information as the original decision, except without the inclusion of a time limit to object paragraph. The file is then referred to the Access Department.

### Access

For a claim objection, the Access Department will provide the party/representative with access to the file record (in accordance with established WSIB policy) along with an Appeal Readiness Form and instruction sheet. An appeal will not proceed until all access issues have been resolved either through consent or by order of the WSIB or by WSIAT (on appeal). The non-objecting party will be sent a Participant Form. The non-objecting party will not be provided with access to the file record at this time. Access will be provided at a later time (i.e., once the Appeal Readiness Form is received). The non-objecting party (the Respondent) will be provided with a Respondent Form (along with access to the file record) and will be granted 45 days (plus 5 days for mailing) to complete and submit the form.

In the case of an employer account objection, access to the firm file is not provided automatically, but the employer/representative is given the opportunity to obtain access if they choose, through the firm file access area. The contents of a firm file are comprised primarily of correspondence between the WSIB and the employer, which makes the need for access to that information less likely.

For transfer of cost employers, (an employer, not the accident employer, who has been charged all or part of the claims costs due to the negligence of one of their employees), access is given to enable effective participation in the decision-making process. Access to transfer of cost employers is provided in the same manner as regular employers, except the worker can object to the disclosure of any information in the claim file, not just health care information.

### Appeal Readiness Form

If the objecting party has completed and returned Intent to Object Form to the WSIB, there is no time limit attached to the completion of an Appeal Readiness Form.

If the objecting party has additional information relevant to the issue or is of the view the matter could be considered under another policy, and neither has been considered by the Operations decision maker, they should provide that information/argument to the original decision maker to consider. Only when all issues have been fully considered in Operations should the objecting party advance their appeal to the ASD by submitting an Appeal Readiness Form.

When the objecting party has gathered all of the information related to their appeal, has resolved any issues with access to medical file copies and is available to attend an oral hearing within 90 days if that is the method of resolution they have requested, they should complete the Appeal Readiness Form and fax or mail it to the WSIB. The objecting party may attach a written submission with the Appeal Readiness Form to further support their appeal.

## PRACTICE GUIDELINE

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### Objection Intake

The Objection Intake Team (OIT) will receive and track the Appeal Readiness Form and review it for administrative completeness. OIT will then refer all Appeal Readiness Forms to the originating decision maker's manager for review of the decision and approval to proceed with referral to ASD.

In cases where the decision maker's manager has determined that the file is not appeal ready due to gaps in the file record or when new information has been provided, they will communicate this to the parties and will ensure that reconsiderations, where warranted, are completed in a timely manner.

When OIT is notified the appeal is ready to proceed, they will complete an Appeals Referral Form and will send the file to the ASD. The objecting and participating party (respondent) will be sent a letter advising of the referral.

## PRACTICE GUIDELINE

**PRACTICE GUIDELINE: Time Limit to Object****Overview**

Section 120 of the WSIA establishes time limits to object to Board decisions. There is a 30-day time limit to object to a WSIB decision about Return to Work, Re-employment, or a Labour Market Re-entry (now work reintegration) plan made on or after January 1, 1998. There is a six-month time limit to object to any other WSIB decision made on or after January 1, 1998, including employer account decisions.

The WSIB will default to the 6 month time limit in a situation where a party is objecting to two different decisions with two different time limits (e.g., work transition (WT) issue with a 30 day time limit and a loss of earnings (LOE) issue with a time limit of 6 months).

**Completing the Intent to Object Form**

When the WSIB issues a decision, the WPP must be advised in a decision letter of the applicable time limits for objecting. In order to meet the Section 120 statutory requirements, the WSIB must receive a completed Intent to Object Form, or a letter of objection, by the time limit date set out in the decision letter.

If the party or parties do not confirm a desire to proceed, no further action will be taken.

If the case is brought forward for review after the appeal time limit has expired, the WSIB has the authority to extend the time limit in appropriate cases. Requests for extensions will be considered by decision makers who will notify the party in writing of the outcome of the review.

**Appealing Time Limit Rulings**

If the party or parties indicate a desire to appeal the time limit ruling, the matter will be referred by the Manager in Operations directly to a Manager in the ASD for priority assignment to a Registrar.

The completion of an Intent to Object Form on the time limit to appeal issue is not required, but both parties must be notified of the referral. The Operations decision maker has to complete an Appeals Referral Memo and place it on the file. Once the time limit appeal has been received in the ASD, the Coordinator will send/fax a letter to the objecting party giving 30 days (plus 5 days for mailing) to send in a submission on the issue.

The Registrar will rule on the time limit issue within 30 days of receiving submissions from the parties.

**Criteria for Extending Time Limit to Object**

Criteria to be considered for objections beyond the statutory time limit include:

- Whether there was actual notice of the time limit. This acknowledges that as of January 1, 1998, decisions specifically refer to the time limits but prior to that date, they do not;
- Serious health problems (experienced by the party or the party's immediate family) or the party leaving the province/country due to the ill health or death of a family member;
- An organic or non-organic condition that prevents the worker from understanding the time limit and/or meeting the time limit;
- Whether there is clear documentation in the claim file that the party was disputing the issue(s) in a particular decision even though a formal notice of objection was not filed (direct correspondence or memo outlining a telephone discussion about the particular issue);

## PRACTICE GUIDELINE

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- Whether there are other issues in the appeal that were appealed within the time limit which are so intertwined that the issue being objected to within the time limit cannot reasonably be addressed without waiving the time limit to appeal on the closely related issue.

If the extension is granted, the file will be returned to Operations and the usual access/Appeal Readiness Form process will be initiated for the substantive issue. **See PRACTICE GUIDELINE on INTENT TO OBJECT - HANDLING BY OPERATIONS on page 4.**

**NOTE:** the criteria related to the extension of the time limit to object that were in place at the time of the operating area decision on the time limit, should be applied. Appendix A includes the criteria and relevant time frames associated with those criteria.

The remainder of the WSIB Appeal Services Division Practice & Procedure is omitted.

# TAB D

**THIS IS EXHIBIT “D” REFERRED TO IN THE AFFIDAVIT OF LAURA J. FREITAG  
SWORN BEFORE ME THIS 9th DAY OF February, 2021.**

A handwritten signature in cursive script, appearing to read "J. J. [unclear]", is written above a horizontal line.

**A COMMISSIONER FOR TAKING AFFIDAVITS**

If you need assistance completing this form, see the instruction sheet or call the WSIB at 416-344-1000 or 1-800-387-0750.

**1. Claim Identifiers**

Worker's Name <b>Kelly Donovan</b>	Claim No. <b>30505408</b>
---------------------------------------	------------------------------

**2. Objecting Party**

<input type="checkbox"/> Worker	<input type="checkbox"/> Worker Representative	<input checked="" type="checkbox"/> Employer	<input type="checkbox"/> Employer Representative	<input type="checkbox"/> Transfer-of-Cost Employer
---------------------------------	--	--	--	--

**3. General Information**

Is the worker/employer address and contact information the same as the decision letter? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No, see changes below.		
Name <b>Waterloo Regional Police Service</b>		
Address <b>200 Maple Grove Road</b>	City/Town <b>Cambridge</b>	Postal Code <b>N3H 5M1</b>
Telephone No.: (Day) <b>( 519 ) 653-7700</b>	Telephone No.: (Evening) <b>( )</b>	Language <input checked="" type="checkbox"/> English <input type="checkbox"/> French <input type="checkbox"/> Other _____

**4. Representation**

See Instruction Sheet for information on possible assistance available.		
Please check one: <input type="checkbox"/> I will represent myself in the objection process, or I am currently seeking representation. <input checked="" type="checkbox"/> I have a representative to handle my objection.		
If you are represented - A signed <i>Direction of Authorization</i> for this representative must be in the claim file.		
Representative's Name <b>Donald B. Jarvis</b>	Organization <b>Filion Wakely Thorup Angeletti LLP</b>	
Address <b>333 Bay Street, Suite 2500</b>	City/Town <b>Toronto, Ontario</b>	Postal Code <b>M5H 2R2</b>
Telephone No.: (Day) <b>( 416 ) 408-5516</b>	Telephone No.: (Evening) <b>( )</b>	FAX No. <b>( 416 ) 408-4814</b>

**5. Intent to Object**

I disagree with the following decision(s):	
Date of Decision Letter(s) (dd/mm/yyyy)	Issue(s) in Dispute
<b>12/Jul/2017</b>	<b>Entitlement to healthcare and loss of earnings benefits</b>

**6. New Information/Reconsideration**

This is an opportunity to provide any new information that the front-line decision maker may not have considered, based on the contents of the decision letter(s). The decision maker can reconsider the decision(s) and may be able to change the decision(s). You will be advised of the outcome of the reconsideration.	
<input type="checkbox"/> No, I have no additional explanation/information to submit.	
<input checked="" type="checkbox"/> Yes, additional explanation/information is attached. (Please put the worker's name and claim number on each page.)	

Name (please print) <b>DONALD B. JARVIS</b>	Signature 	Date <b>11 JAN 2018</b>
--	---	----------------------------

Please print and sign the completed form before sending to the WSIB by fax to 416-344-4684 or 1-888-313-7373 or by mail to: Workplace Safety & Insurance Board, 200 Front Street West, Toronto, ON M5V 3J1

**Intent to Object Form**  
**(Optional Page)**

Worker's Name <b>Kelly Donovan</b>	Claim No. <b>30505408</b>
---------------------------------------	------------------------------

**7. Reasons for the Objection**

Please explain why you disagree with the decision(s). Your explanation may bring out new information the front-line decision maker was not aware of. Be as specific as possible and refer to any new information you are attaching, where applicable. Please attach additional pages if you need additional space.

**Please see attached Schedule "A".**

Number of pages attached  
**15**

**SCHEDULE "A" TO INTENT TO OBJECT FORM**

1. The Waterloo Regional Police Service (the "Service") disagrees with the decision because the worker's alleged injury did not arise out of or in the course of the worker's employment. The worker's diagnosis of PTSD was presumed to have arisen out of and in the course of her employment pursuant to Operational Policy Manual document 15-03-13 titled Posttraumatic Stress Disorder in First Responders and Other Designated Workers. It is the position of the Service that this presumption is clearly rebutted based on the events that occurred leading up to the worker's date of injury/illness of February 1, 2017. The decision indicates that the worker was diagnosed with Posttraumatic Stress Disorder (PTSD) on June 22, 2017.

**BACKGROUND**

2. The worker was employed by the Service as a police officer prior to her resignation effective on June 25, 2017.
3. On or about May 4, 2016, the worker made a "delegation" to the Waterloo Police Services Board (the "Board"). The worker's delegation to the Board related to the worker's belief that the Service was investigating alleged domestic violence inconsistently where members of the Service were involved, either as alleged victims or alleged perpetrators. Members of the public as well as the media were present during the worker's delegation to the Board in which she identified herself as a police officer, referred to confidential information contained in a confidential Crown Brief, criticized the Service and members of the Service, and suggested that police officers of the Service may have suppressed evidence in a criminal investigation.
4. Following the worker's delegation, the worker was advised that the Service would arrange for an external review of the substance of the worker's allegations. The worker was also advised that, subject to and following that review, the worker would be the subject of an investigation under the *Police Services Act* (the "PSA") to determine

whether her actions breached the *PSA* and constituted discreditable conduct, neglects of duty and/or breaches of confidence.

5. The worker was served with a Notice of Internal Investigation into Alleged Misconduct on May 9, 2016. The worker was also served with a Directive on May 9, 2016, which directed her not to appear before the Board without the permission of the Police Chief, and assigning her to administrative duties. The worker was assigned to administrative duties as of May 9, 2016 pending the conclusion of the *PSA* investigation. Nonetheless and despite the Directive, on May 9, 2016, the worker sent an email to members of the Board. On May 31, 2016, the worker was served with an additional Notice of Internal Investigation into Alleged Misconduct in respect of her email correspondence of May 9, 2016.
6. After learning that she would be investigated under the *PSA*, the worker filed an internal complaint on June 2, 2016. In that complaint, the worker alleged that she had been discriminated against and harassed contrary to the Ontario *Human Rights Code* by various members of the Service in connection with her delegation of May 4, 2016. The Service retained an independent third party investigator named Lauren Bernardi, of Bernardi Human Resource Law LLP, to investigate the worker's complaint of workplace harassment and discrimination. Ms Bernardi issued her report on October 31, 2016, which found that there had been no discrimination based on sex, and that no members of the service had engaged in any form of harassment.
7. The Service asked the York Regional Police ("YRP") to conduct an external review of one of the investigations that had been highlighted by the worker during her May 4, 2016 delegation. On August 18, 2016, the Service received the YRP's report, which found that there were no concerns or improprieties with the Service's criminal investigation.
8. Between November 29, 2016 and January 16, 2017, the Service also conducted an internal review of another investigation the worker alleged had been mishandled by the Service. This internal review similarly found that the Service had followed appropriate investigative procedures.

9. The Service deferred its *PSA* investigations of the worker pending the completion of the external and internal reviews of the worker's allegations of investigative misconduct by the Service, and pending the Bernardi investigation of the worker's claim that she had been subject to harassment and discrimination. Accordingly, following the Service's receipt of all of the foregoing investigative reports, the Service resumed its *PSA* investigation, and notified the worker on or about January 23, 2017 that it would be continuing with that investigation.
10. Then, very shortly thereafter, the worker commenced a medical leave of absence from work on or about February 27, 2017. Notably, the worker did not receive medical clearance to participate in the Service's *PSA* investigation, including attending for a *PSA* compelled interview where she would have been given the opportunity to respond to the allegations, prior to her resignation effective on June 25, 2017. As a result, the worker was never formally or informally disciplined and those matters ended, as a matter of law, upon her resignation.

### **SUBMISSIONS**

11. First and foremost, the Service respectfully submits that the worker's employment was not a significant contributing factor in causing her alleged PTSD. Notably, the worker was assigned to the Service's Training Branch beginning in or around 2015. In that role, the worker trained other police officers, and did not perform any work "in the field" or in the community. Further, as noted above, the worker was then assigned to administrative duties beginning on or about May 11, 2016. These duties continued until the effective date of the worker's resignation, though the worker began an approved leave of absence from work due to sickness on or about February 27, 2017.
12. In the WSIB Decision, the date of injury/illness is identified as February 1, 2017. Again, as previously noted, the worker was performing only administrative duties at that time. Moreover, the worker had just been advised on January 23, 2017, that the Service would be resuming its investigation into whether the worker had engaged in misconduct under the *PSA*.

13. In all of the circumstances, even if the worker did genuinely suffer from PTSD, it is clear that the only work-related nexus was the Service's notice to the worker that it was about to resume its *PSA* investigation. As noted in Operational Policy 15-03-13, if a worker's PTSD was caused by his or her employer's decisions or actions that are part of the employment functions such as discipline, the worker will not be entitled to benefits for PTSD.
14. In summary, the worker's employment was not a significant contributing factor in causing her alleged PTSD and/or, in the alternative, such work-relatedness was rooted in decisions or actions of the Service that were part of the employment function.
15. For the foregoing reasons, the Service submits that the worker is not entitled to healthcare benefits or LOE benefits. The Service reserves the right to make further submissions upon receipt of the Claim File, including all applicable medical reports.

# TAB E

**THIS IS EXHIBIT “E” REFERRED TO IN THE AFFIDAVIT OF LAURA J. FREITAG  
SWORN BEFORE ME THIS 9th DAY OF February, 2021.**

A handwritten signature in cursive script, appearing to read 'J. J. ...', is written above a horizontal line.

**A COMMISSIONER FOR TAKING AFFIDAVITS**



Workplace Safety  
At Work, Stay Safe  
En votre lieu de travail, restez en sécurité  
au travail, restez en sécurité

Head Office:  
200 Front Street West  
Toronto, Ontario  
Canada M5V 3H1

Siège social :  
200, rue Front Ouest  
Toronto, Ontario  
Canada M5V 3H1

Telephone / Téléphone :  
416-344-1000  
1 800 387 0750  
TTY / ATIS : 1-800-387-0050

Fax / Télécopieur :  
416-344-4684  
1 888 313 7373

August 3, 2018

DONALD B. JARVIS  
333 BAY ST SUITE 2500  
TORONTO ON M5H 2R2  
CANADA

Claim No.: 30505408  
Worker Name: KELLY DONOVAN  
Date of Injury/Illness: 01/Feb/2017  
Injury/Illness: Psychological Trauma

Dear Mr. B. Jarvis,

**Subject: Review of Intent to Object Form and Reconsideration**

I am writing in response to your January 11, 2018 Intent to Object form.

I would like to apologize for my delay in responding to your concerns.

**Concerns Indicated:**

You are objecting to initial entitlement in this claim. The letter attached to your Intent to Object form indicates the following concerns:

- On or around May 4, 2016, Ms. Donovan made a "delegation" to the Waterloo Police Services Board, which resulted in an external review of her allegations (regarding inconsistent police investigations into potential domestic violence, where Service members were involved), as well as an investigation into Ms. Donovan under the *Police Services Act (PSA)*.
- Effective May 11, 2016 Ms. Donovan was assigned to administrative duties (pending *PSA* investigations). Previously, she was assigned to the Service's Training Branch beginning in or around 2015. As such, she did not perform work "in the field" or in the community.
- The date of injury/illness is identified as February 1, 2017, which occurred when Ms. Donovan was performing only administrative duties, and had recently been advised of the resumption of the Service's *PSA* investigation.
- On June 2, 2016, Ms. Donovan filed an internal complaint, alleging harassment and discrimination under the Ontario *Human Rights Code*. An independent third party investigator addressed this complaint and the October 31, 2016 report found there had been no discrimination or harassment.
- Both an external review (which was completed on August 18, 2016) and an internal review (conducted between November 29, 2016 and January 16, 2017) found that the Service had followed appropriate investigative procedures.
- On or around January 23, 2017, the Service notified Ms. Donovan that its *PSA* investigation would now continue.
- Effective February 27, 2017, Ms. Donovan commenced a medical leave of absence.
- Ms. Donovan's PTSD would seem to be caused by her employer's decisions or actions and her employment was not a significant contributing factor in causing her PTSD.

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For information on benefits, services and working safely, visit our website, [www.wsib.on.ca](http://www.wsib.on.ca)  
Pour des renseignements sur les prestations, les services et la sécurité au travail, visitez notre site Web, [www.wsib.on.ca](http://www.wsib.on.ca)

LTR

3331A

**Criteria:**

The WSIB's Policy 11-01-04 (*Determining the Date of Injury*) states:

In a gradual onset disablement claim, the date of injury is established using the date of first medical attention, which led to the diagnosis, or the date of diagnosis, whichever is earlier.

The WSIB's Policy 15-03-13 (*Posttraumatic Stress Disorder in First Responders and Other Designated Workers*) states:

If a first responder or other designated worker is diagnosed with posttraumatic stress disorder (PTSD) and meets specific employment and diagnostic criteria, the first responder or other designated worker's PTSD is presumed to have arisen out of and in the course of his or her employment, unless the contrary is shown.

The first responder must have been employed as a first responder for at least one day on or after April 6, 2014.

The first responder must have been diagnosed with PTSD by a psychologist or psychiatrist

- on or after April 6, 2014, and
- no later than 24 months after the day he or she ceases to be employed as a first responder if he/she ceases to be employed as a first responder on or after April 6, 2016.

The presumption may be rebutted if it is established that the employment was not a significant contributing factor in causing the first responder's PTSD.

**Review and Reconsideration:**Date of Injury

In reviewing the information on file, I note that Ms. Donovan first sought medical attention due to work-related mental stress issues as early as March 11, 2016. However, she did not begin formal treatment with a psychologist until December 16, 2016. Ongoing treatment with the clinical psychologist led to the confirmed DSM-5 diagnosis of posttraumatic stress disorder (PTSD).

For these reasons, I am amending the date of injury to December 16, 2016 – the date Ms. Donovan first sought treatment with her psychologist.

Presumptive Allowance

With regard to your concerns about Ms. Donovan's exposures "in the field", you indicate Ms. Donovan was reassigned to the Service's Training Branch beginning in or around 2015. The relevant criterion of the WSIB's Policy 15-03-13 is that Ms. Donovan "must have been employed as a first responder for at least one day on or after April 6, 2014". This criterion has been met.

Regarding your concerns about Ms. Donovan's PTSD being closely related to the Service's PSA investigation, the medical information on file – from the treating psychologist, a consulting psychiatrist, and the family doctor – confirms that traumatic workplace exposure is the significant contributing factor to her PTSD condition.

While her layoff from work may coincide with notification of the resumption of the PSA investigation, this would be considered a trigger of increased symptoms. The medical evidence does not support that the

Page 3

Claim No. / N° de dossier : 30505408

employer's actions or decisions were a significant contributor to her PTSD diagnosis. Also, the medical information supports an inability to work in any capacity due to PTSD symptoms from late February 2017.

Since I am unable to alter my prior decision, I will refer this file for Access on an urgent basis, so that you will receive a copy of the file. You will also receive an Appeals Readiness form. When this form is completed and returned, I will review any new information provided in order to reconsider my decision from July 12, 2017. If I am still unable to change my decision, I will refer this claim to the Appeals Services Division.

If you have any further questions or concerns, please contact me.

Yours sincerely,

Jane Drake  
Case Manager, Mental Stress Injuries Program

Tel: 416-344-5205 or 1-800-387-0750

Copy To: Regional Municipality Of Waterloo  
Kelly Donovan

**TAB F**

**THIS IS EXHIBIT “F” REFERRED TO IN THE AFFIDAVIT OF LAURA J. FREITAG  
SWORN BEFORE ME THIS 9th DAY OF February, 2021.**



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**A COMMISSIONER FOR TAKING AFFIDAVITS**



# Human Rights Tribunal of Ontario

## Application under Section 34 of the *Human Rights Code* (Form 1)

(Disponible en français)

[www.hrto.ca](http://www.hrto.ca)

### How to Apply to the Human Rights Tribunal of Ontario

#### Before you start:

1. Read the questions and answers below to find out if the Human Rights Tribunal of Ontario (the Tribunal) has the ability to deal with your Application.
2. Download and read the Applicant's Guide from the Tribunal's web site [www.hrto.ca](http://www.hrto.ca). 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](mailto:HRTO.Registrar@ontario.ca)

Website: [www.hrto.ca](http://www.hrto.ca)

The Tribunal has other guides and practice directions to help all parties to an Application understand the process. Download copies from the Tribunal's website or contact us.

3. Complete each section of this Application form. As you fill out each section, refer to the instructions in the Applicant's Guide.

#### Getting help with your application

For free legal assistance with the application process, contact the Human Rights Legal Support Centre.

Website: [www.hrlsc.on.ca](http://www.hrlsc.on.ca), Mail: 180 Dundas Street West, 8th floor, Toronto, ON M7A 0A1, Tel: 416-597-4900, Toll-free 1-866-625-5179, Fax: 416-597-4901, Toll-free 1-866-625-5180, TTY 416-597-4903, Toll-free 1-866-812-8627.

#### Questions About Filing an Application with the Tribunal

The following questions and answers are provided for general information. They should not be taken as legal advice or a determination of how the Tribunal will decide any particular application. For legal advice and assistance, contact the Human Rights Legal Support Centre.

#### Who can file an Application with the Tribunal?

You can file an Application if you believe you experienced discrimination or harassment in one of the five areas covered by the Ontario Human Rights Code (the Code). The Code lists a number of grounds for claiming discrimination and harassment. To find out if you have grounds for your complaint under the Code, read the Applicant's Guide.

#### What is the time limit for filing an Application?

You can file an Application up to one year after you experienced discrimination or harassment. If there was a series of events, you can file up to one year after the last event. In some cases, the Tribunal may extend this time.



# Human Rights Tribunal of Ontario

## Application under Section 34 of the Human Rights Code (Form 1)

**The discrimination happened outside Ontario. Can I still apply?**

In most cases, no. To find out about exceptions, contact the Human Rights Legal Support Centre.

**My complaint is against a federal government department, agency, or a federally regulated business or service. Should I apply to the Tribunal?**

No. Contact the Canadian Human Rights Commission. Web: <http://www.chrc-ccdp.ca>. Mail: 344 Slater Street, 8th Floor, Ottawa, Ontario K1A 1E1. Phone: (613) 995-1151. Toll-free: 1-888-214-1090. TTY: 1-888-643-3304. Fax: (613) 996-9661.

**Should I use this form if I am applying because a previous human rights settlement has been breached?**

No. If you settled a previous human rights application and the respondent did not comply with the settlement agreement, use the special application called Application for Contravention of Settlement, Form 18. For a paper copy, contact the Tribunal.

**Can I file this Application if I am dealing with or have dealt with these facts or issues in another proceeding?**

The Code has special rules depending on what the other proceeding is and at what stage the other proceeding is at. Read the Applicant's Guide and get legal advice, if:

1. You are currently involved in, or were previously involved in a civil court action based on the same facts and asked for a human rights remedy; or
2. You have ever filed a complaint with the Ontario Human Rights Commission based on the same subject matter; or
3. You are currently involved in, or were previously involved in another proceeding (for example, union grievance) based on the same facts.

**How do I file an Application on behalf of another person?**

To file an application on behalf of another person, you must complete and file this Application (Form 1) as well one other form:

- Form 4A if you are filing on behalf of a minor;
- Form 4B if you are filing on behalf of a mentally incompetent person; or
- Form 27 for all other situations where you are filing on behalf of someone else.

When completing this Application, you must check the box in Question 1 that indicates you are filing an Application on Behalf of Another Person. You must provide your name and contact information in Question 1.

The completed Form 4A, Form 4B or Form 27 can be attached to your Application or sent to the Tribunal separately by mail, fax or email. If sent separately, it must be sent within five (5) days following the filing of your Application.

For more information on applications on behalf of another person, please see the following Practice Directions:

- Practice Direction on filing application on behalf of another person under section 34(5) of the Code
- Practice Direction on Litigation Guardians before Social Justice Tribunals Ontario

**Note:** If you are a lawyer or other legal representative providing representation to the applicant, do not use the Form 4A, Form 4B or Form 27. Your details should be provided in section 3, "Representative Contact Information," of this Application (Form 1).

**Learn more**

To find out more about human rights in Ontario, visit [www.ohrc.on.ca](http://www.ohrc.on.ca) or phone 1-800-387-9080.



# Human Rights Tribunal of Ontario

## Application under Section 34 of the Human Rights Code (Form 1)

**Instructions:** Complete all parts of this form, using the Applicant's Guide for help. If your form is not complete, the Tribunal may return it to you. This will slow down the application process. At the end of this form, you will be required to read and agree to a declaration that the information in your Application is complete and accurate (if you are a lawyer or legal representative assisting an applicant with this Form 1, please see the Practice Direction On Electronic Filing of Applications and Responses By Licensed Representatives).

### Contact Information for the Applicant

#### 1. Personal Contact Information

☐ Check here if you are filing an Application on Behalf of Another Person. Note: you must also complete a Form 4A, Form 4B or Form 27, whichever is applicable, see Instructions above.

Please give us your personal contact information. This information will be shared with the respondent(s) and all correspondence from the Tribunal and the respondent(s) will go here. If you do not want the Tribunal to share this contact information, you should complete section 2, below, but you must still provide your personal contact information for the Tribunal's records.

*First Name Kelly		Middle Name Lynn	*Last Name Donovan	
Street # 11	Street Name Daniel Place			Apt/Suite
City/Town Brantford	Province Ontario	Postal Code N3R1K6	Email donovandih@gmail.com	
Daytime Phone (e.g. 999-999-9999) 519-209-5721	Cell Phone (e.g. 999-999-9999)	Fax (e.g. 999-999-9999)	TTY (e.g. 999-999-9999)	

What is the best way to send information to you?

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

☐ Mail

☒ Email

☐ Fax



# Human Rights Tribunal of Ontario

## 2. Alternative Contact Information

If you want the Tribunal and respondent(s) to contact you through another person, you must provide contact information for that person below. You should fill this section out if it will be difficult for the Tribunal to reach you at the address above or if you want the Tribunal to keep your contact information private. If you complete this section, all of your correspondence will be sent to you in care of your Alternative Contact.

First (or Given) Name		Middle Name	Last (or Family) Name	
Street #	Street Name			Apt/Suite
City/Town		Province Ontario	Postal Code	Email
Daytime Phone (i.e. 999-999-9999)	Cell Phone (i.e. 999-999-9999)	Fax (i.e. 999-999-9999)	TTY (i.e. 999-999-9999)	

What is the best way to send information to you at your alternative contact?  
(If you check email, you are consenting to delivery of documents by email)

☐ Mail

☐ Email

☐ Fax

## 3. Representative Contact Information

Complete this section only if you are authorizing a lawyer or another Representative to act for you.

☐ I authorize the named organization and/or person to represent me

My representative is:

<input type="checkbox"/> Lawyer	LSUC#	
<input type="checkbox"/> Paralegal	LSUC#	
<input type="checkbox"/> Legal Support Centre		
<input type="checkbox"/> Other- please specify the Nature of Exemption from licensing requirements in the text below:		



# Human Rights Tribunal of Ontario

Nature of Exemption (e.g. family member, unpaid friend)

Please choose the type of Representative: ☒ A) Organizational Representative ☐ B) Individual Representative

## A) Organizational Representative

Full Name of Representative Organization

Waterloo Regional Police Service

Name of the Contact Person from the Organization

First (or Given) Name

Bryan

Last (or Family) Name

Larkin

Street #

200

Street Name

Maple Grove Road

Apt/Suite

City/Town

Cambridge

Province

Ontario

Postal Code

N3H5M1

Email

bryan.larkin@wrps.on.ca

Daytime Phone (i.e. 999-999-9999)

Cell Phone (i.e. 999-999-9999)

Fax (i.e. 999-999-9999)

TTY (i.e. 999-999-9999)

What is the best way to send information to your representative?  
(If you check email, you are consenting to delivery of documents by email)

☐ Mail

☐ Email

☐ Fax

## Contact Information for the Respondent(s)

### 4. Respondent Contact Information

Provide the name and contact information for any respondent against which you are filing this Application.

Please choose the type of respondent:

☒ A) Organization Respondent

☐ B) Individual Respondent



# Human Rights Tribunal of Ontario

## A) Organization Respondent

Name the organization you believe discriminated against you. You should also indicate the contact person from the organization to whom correspondence can be addressed.

Full Name of Organization

Waterloo Regional Police Service

### Name of the Contact Person from the Organization

First (or Given) Name		Last (or Family) Name		Title	
Bryan		Larkin		Chief of Police	
Street #	Street Name			Apt/Suite	
200	Maple Grove Road				
City/Town		Province	Postal Code	Email	
Cambridge		Ontario	N3H5M1	bryan.larkin@wrps.on.ca	
Daytime Phone (i.e. 999-999-9999)		Cell Phone (i.e. 999-999-9999)		Fax (i.e. 999-999-9999)	
519-653-7700					
				TTY (i.e. 999-999-9999)	

Are there any additional respondents? ☐ Yes ☒ No

## Grounds of Discrimination

### 5. Grounds Claimed

The Ontario Human Rights Code lists the following grounds of discrimination or harassment. Put an "X" in the box beside each ground that you believe applies to your Application. You can check more than one box.

- ☐ Race
- ☐ Colour
- ☐ Ancestry
- ☐ Place of Origin
- ☐ Citizenship
- ☐ Ethnic Origin
- ☐ Disability
- ☐ Creed
- ☒ Sex, Including Sexual Harassment and Pregnancy
- ☐ Sexual Solicitation or Advances
- ☐ Sexual Orientation



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- ☐ Gender Identity
- ☐ Gender Expression
- ☐ Family Status
- ☒ Marital Status
- ☐ Age
- ☐ Receipt of Public Assistance (Note: This ground applies only to claims about Housing)
- ☐ Record of Offences (Note: This ground applies only to claims about Employment)
- ☐ Association with a Person Identified by a Ground Listed Above
- ☐ Reprisal or Threat of Reprisal

## Areas of Discrimination under the Code

### 6. Area of Alleged Discrimination

The Ontario *Human Rights Code* prohibits discrimination in five areas. Put an "X" in the box beside the area where you believe you have experienced discrimination (choose one). Read the Applicant's Guide for more information on each area.

- ☒ Employment (Complete Form 1-A)
- ☐ Housing (Complete Form 1-B)
- ☐ Goods, Services and Facilities (Complete Form 1-C)
- ☐ Contracts (Complete Form 1-D)
- ☐ Membership in a Vocational Association (Complete Form 1-E)

Does your Application involve discrimination in other areas? ☐ Yes ☒ No

If "Yes", put an "X" in the box beside any other area where you believe you experienced discrimination:

☐ Employment ☐ Housing ☐ Goods, Services or Facilities ☐ Contracts ☐ Vocational Association

## Facts that Support Your Application

### 7. Location and Date (see Applicant's Guide)

Please answer the following questions.

a) \*Did these events happen in Ontario?

☒ Yes

☐ No

b) In what city/town?

Cambridge

c) \*What was the date of the last event?  
(dd/mm/yyyy)

31/05/2016

d) If you are applying more than one year from the last event, please explain why:



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### 8. What Happened

\*In the space below, describe each event you believe was discriminatory.

For each event, be sure to say:

- What happened
- Who was involved
- When it happened (day, month, year)
- Where it happened

Be as complete and accurate as possible. Be sure to give details of every incident of discrimination you want to raise in the hearing.

On May 4, 2016, I presented a delegation to the Waterloo Regional Police Services Board on the topic of the police service's inconsistencies and lack of policy when investigating its own members. This meeting took place in the Police Services Board room at 200 Maple Grove Road in the City of Cambridge. I am a Constable with the Waterloo Regional Police Service. Before this day I was an exemplary officer, having won awards and been placed in the department's Training Branch after only serving for four and a half years. I presented this delegation because I believed there were serious issues of inconsistency during internal investigations, authorized by Chief Bryan Larkin. I researched avenues available to me, as a member of the police service, and the only legal channel for me to voice my concerns and seek the help of the Board to order the service to create a policy and procedure on internal investigations was to present a delegation to the Board. I had researched service procedure and policy, the Police Services Act, and the Board By-Laws and did not locate anything from precluding me from making this delegation. I had requested time off to attend this meeting and been approved by my supervisor. During my delegation I did not disclose any information of which I have a duty to maintain in secrecy. The information presented was specific to four relevant issues. The information I presented was obtained outside of my work duties from the individual officers to whom the information pertains. I received permission from the individual officers to discuss their issues in my delegation. I was respectful to Board members and I was allowed to speak for the full ten minutes by the Board (the Board has the option to enter into a closed session if they believe the information is best kept from the public).

Following my presentation I was approached by a woman who identified herself as a reporter. The Chief's Executive Officer, Staff Sergeant Mike Haffner came up to me and stated "she's with the media, you can't talk to her." When this woman returned and began asking me questions I did not answer her questions, as I am precluded from doing so under service procedure and the PSA. The Chief's Executive Officer stood immediately beside me and stuck his head down into our conversation to hear what I was saying. There was an article in The Record (newspaper) covering my delegation in which I was misquoted and the article focused on the investigation of Sgt. Finucan, (this was one of four issues I mentioned in my delegation and the reporter had also covered this case originally). One of the four issues I discussed in my delegation involved a complaint of domestic violence being made by a female police officer and the complaint being dismissed. Another one of the four issues I discussed was a complaint of historical domestic violence being made by a female police officer and an arrest being made with little to no grounds for arrest. In this article, the Chief was quoted as saying "We take domestic violence very seriously and the complaint came from a policewoman." I was insulted by this comment because I felt that the Chief was insinuating that a female police officer is somehow more credible than a male police officer. I believe the Chief was stereotyping male police officers, that they are somehow dishonest versus female police officers. I do not believe the Chief of police should make any distinction of credibility based on gender, especially to local media.

The following day, (and every day since then), my work duties were restricted and I was restricted to working in the office only, as opposed to the training environment.

On May 9, 2016, I was called into the service's Professional Standards office at headquarters at 200 Maple Grove Road in



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Cambridge, and met with my divisional Inspector (Inspector Thiel) and Acting Inspector Goodman. I was given a directive from the Chief to not appear before the Board without his permission and relegated to administrative duties (among other things). I was served a Notice of Investigation for six Police Services Act (PSA) charges regarding the lawful presentation of my delegation. Those charges included; Discreditable Conduct (x2), Neglect of Duty (x2), Breach of Confidence (x2). I had expected that I could be disciplined for the fact that the media were present, but only one of these charges had to do with the media. I was told by Inspector Thiel that all of the incidents I mentioned in my delegation would be reviewed independently. I asked Inspector Thiel for clarification as to which incidents would be reviewed and he confirmed it would be all of them (there were four major issues I specifically called attention to in my delegation). Inspector Thiel stated that the internal investigation into my conduct would largely weigh on the findings of the independent reviews. He stated if any of the information I presented turns out to be false, it would affect the investigation. I asked if the same is true if all of the information I presented turns out to be truthful would the service withdraw the charges and he stated that it would also affect the investigation. I believe that the Chief is upset that I brought a serious internal issue to the attention of the media and is using the PSA as a means of bullying and intimidating me. I did not sign the Directive forbidding me from appearing before the Board since I did not believe I could be prohibited from attending a meeting that shall be open to the public if I were not on duty and considered a member of the public. I was told by Inspector Thiel that the Chief can tell me to "whatever he wants." I was told by Inspector Thiel that I "had to sign" the directive. When I asked if I could have a lawyer present Acting Inspector Goodman stated that I did not have to sign. That evening, from home, I sent an email to the members of the Board to notify them of the internal investigation initiated due to my lawful attendance at the Board meeting. My delegation had focused on how the service treats its members and I felt I had a duty to report to the Board who is responsible for civilian oversight of the service and performance of the Chief.

On May 11, 2016, the Cambridge Times published an article regarding my delegation. The article featured exact wording from my delegation that I believe was given to them by the service (I did not disclose my delegation to the media). The article mentioned that I focused on four high profile cases, but the majority of the article focused once again on the case of Sgt. Finucan. The following is a quote from this article "the Chief assured the media following the meeting that the officer has a democratic right to vocalize her disapproval during the public session of the police board meeting." The article stated "Donovan, who referred to herself as a friend of Finucan, said she wanted to address the board on his behalf." I did state that I am friends with Sgt. Finucan, but not once did I ever stated I was addressing the board on his behalf. When I asked for Sgt. Finucan's permission to discuss some of the issues pertaining to his case he adamantly advised against me presenting a delegation to the board. Sgt. Finucan stated his reasons for advising against my delegation was his knowledge of the service's tendency to punitively target members whose lawful actions question leadership decisions. Further quotes from the Chief led me to believe that the angle this article was taking was determined by the Chief. The Chief is quoted as saying "Sometimes, when we're close to an issue we see it very differently than when we're not close to an issue." I took great offence to that comment because the Chief is insinuating that Sgt. Finucan and I are more than friends; based on the fact that I am a single female and he is male. I believe that if I were male or a married female, having presented the same delegation under the same circumstances, the Chief would never have made that statement. I believe the Chief was using my gender and marital status to discriminate against me and attempt to embarrass me in local media and have my credibility called into question. The Chief was also quoted as saying "there are many mechanisms within the force and the union to call for change." After having extensively researched the mechanisms, or lack thereof, available to me to call for change, I believe the Chief's statement is deceitful and an attempt to have my conduct appear nefarious or vexatious when in fact my attendance at the Board meeting was lawful.

On May 18, 2016, the Training Branch held an event, because of Police Week, to put the Board members through Use of Force training. My directive stated I could not participate in the training of members yet I was excluded from training the Board members. My supervisor requested the attendance of a member from another location to attend headquarters and train in my place.

On May 31, 2016, I was escorted to Acting Inspector Goodman's office by Staff Sergeant Davis (my immediate supervisor). I was served a memorandum stating I am also under investigation for two additional PSA charges; Deceit and an additional count of Discreditable Conduct. I was also directed to not have any further contact directly or indirectly with members of the Police Services Board. The memorandum alleged that I was deceitful when I stated that had no personal interest in any of the four matters I brought to the Board's attention. I had stated in my delegation that I am friends with Sgt. Finucan and that is truthful. I can only conclude that once again the Chief has used the fact that I am a single female to make a connection between one of the male officers involved in one of the four issues I presented and my motivation to present my delegation. The charge of Deceit is a very serious offence, punishable by termination, and I am appalled that the Chief would consider that charge based solely on my marital status and gender. At that moment I verbally notified Acting Inspector Goodman and Staff Sergeant Davis that I would be filing a harassment complaint.



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On June 2, 2016, I submitted an internal Workplace Harassment form to my supervisor Sergeant Prine.

The issues I discussed in my delegation pertained to the handling of internal investigations and the need for consistent practices and policies to oversee how these investigations are completed. Up until May 9th I had never been the subject of an internal investigation. I have never discussed any of my concerns with another member of the service, whether inside or outside of a training environment. My job as a training officer would not have been impacted by my delegation in any way. I chose to present my delegation because of internal turmoil, stress and depression I was experiencing after witnessing the manner in which the service handles internal investigations. My delegation was directed at the Board and I have not and don't intend to disseminate the information with anyone at the service.

Since being relegated to administrative duties only I have continued to be a hard worker. I diligently worked on the branch statistics and was assigned to complete the inaugural Use of Force Report that was presented to the Police Services Board on June 1, 2016. The report I prepared was very well received and even covered on CTV News. I also began an audit of the branch's training material for Staff Sergeant Davls, and spent most of my days writing lesson plans to complement the learning material available. Aside from being prevented from training I am doing my best to remain a diligent and hard worker and an exemplary police officer.

### The Effect on You

#### 9. How the Events You Described Affected You

\*Tell us how the events you described affected you. What was the effect (e.g. were there financial, social, emotional or mental health, or any other)?

My mental health began to be affected by the internal dealings of the service around August, 2015. It was around that time that I started to experience a moral injury due to the inconsistent and unexplained manner in which our service handled internal investigations. One of the issues I discussed in my delegation was regarding a report of domestic violence that I had made against a member. (I did not disclose any names in my delegation). I had been disappointed that the service did not continue with the investigation despite my allegations. As time passed I spoke to other members of the service, Sgt. Finucan and Jeremy Snyder, who were both currently facing criminal charges as a result of internal investigations. The information I learned from these two men corroborated the inconsistent manner in which the service handled internal investigations. All of the information I obtained about the issues was obtained off-duty and in no way violated the secrecy which I am bound by Oath to maintain. I advised both Snyder and Finucan that I planned to address the issue with the service somehow and they both gave me permission to discuss details of their cases if it would assist.

In the fall of 2015 I became depressed. I could not sleep and frequently came to work after only have 2 or 3 hours of sleep. I did not have much of an appetite and I had difficulty eating regularly. I did not exercise as often because it caused me stress to be in the headquarters gym alongside some Sergeants, Staff Sergeants, Inspectors and Superintendents (whom I knew had been involved in some of the internal investigations). In February, 2016, I visited my Doctor and he prescribed medication for depression and anxiety. The medication helped me to sleep and eat better but I still experienced stress and anxiety every day that I attended work. I did not miss any work days during this time for a personal illness (I may have taken one family day for a sick child).

I carefully prepared my delegation for the May 4th meeting and leading up to that date continued to experience heightened anxiety and stress. The meeting itself was very stressful. Upon entering the Police Services Board room I was greeted by the Chief who purposefully shook my hand and greeted me by name. When I was called to the table I sat between the Chief and Deputy Chief Chalk. During the time that I spoke the Chief's cellphone continued to chime and he left his seat twice to speak to Gary Melanson who was seated on the east side of the room. I found the Chief's conduct to be disruptive while I was speaking. Upon conclusion of my delegation I returned to my seat until the conclusion of the meeting. I continued to feel a tremendous amount of stress and anxiety but I now felt a sense of relief for having exposed some issues I felt were imperative to improve the morale within the service and to improve the level of trust between the membership and leadership. When the meeting adjourned I was approached by Board Director Philip Huck who shook my hand and thanked me for making my presentation. Acting Board Chair Rosemary Smith also shook my hand and thanked me for my presentation. I advised Smith that I did not have enough time to conclude what I had prepared and she advised that I could email my entire delegation to be included in the minutes. I felt even more relieved to know that the Board received my information positively and were thankful that I attended.



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When the Chief's Executive Officer Staff Sergeant Mike Haffner stood beside me in the Police Services Board room on May 4, 2016, and stuck his head into my conversation with the media I felt intimidated by his behaviour.

I was embarrassed to read the comments made by the Chief in The Record article dated May 4, 2016, regarding the level of credibility of a complainant weighing on their gender. I was hurt that the Chief had taken anything I had said in my delegation and turned it into a credibility issue based on the gender of the complainant. I felt that this was an attempt by the Chief at deflecting the focus away from service policy and onto me more personally.

On May 9, 2016, when I was served with the Directive and Notice of Investigation by Inspector Thiel and Acting Inspector Goodman I experienced an overwhelming amount of stress and anxiety and I could not prevent myself from becoming emotional. I felt that the conduct of two officers were tyrannical and oppressive and using the PSA and authorities of the Chief to bully and intimidate me. When Inspector Thiel stated that the Chief can direct me to do "whatever he wants" I felt intimidated and bullied. When Inspector Thiel told me I had to sign the document and then Acting Inspector Goodman stated I did not have to sign (after I asked to have a lawyer present), I felt lied to by Inspector Thiel. I had to involve a lawyer, due to the nature of the PSA investigation, and I cannot afford to pay a lawyer. I am a single mother of three children and I own my own home in Brantford, Ontario. I do not receive support payments from my children's father. I will have to borrow money to have a lawyer represent me in a PSA proceeding. That night at home I had a difficult time dealing with my stress. I could not bring myself to be involved with my children, which is very unlike me. Due to my level of anxiety I only slept for 3 hours that evening.

On May 11, 2016, when the article was published to the Cambridge Times website I felt embarrassed and upset that the Chief had publicly stated that I was not objective in my reasoning for my delegation due to being too "close" to "an issue." I felt discriminated against because I am a single female. I felt alienated and criticized by the Chief. It caused me a tremendous amount of stress to know that the service had taken a personal angle to attempt to deflect the attention away from the issues I presented in my delegation surrounding internal policies. I became fearful that the service would turn the investigation into something that would violate my personal life and could involve my children and my status in my community in Brantford. I was also confused that the Chief was quoted as saying I had a "democratic right" to make my delegation, knowing that he had authorized the directive and six PSA charges following my appearance. I felt the Chief was being deceitful to the media and therefore the public. The article also stated that the Chief respects Donovan for coming forward with her opinions about the force's handling of internal investigations." I feel this statement is manipulative because once again he has portrayed to the media that he has acknowledged my actions were lawful and democratic while continuing to take punitive and legal action against me. I continued to feel highly stressed and anxious.

On May 18, 2016, when I was excluded from the training event for the Board members this made me feel segregated and alienated. I felt as though I was burdening Cst. Zullani for having to attend headquarters and work in place of me. I had been looking forward to the opportunity to show the Board members my abilities as a training officer and I was directed to spend the entire day in the office. I felt dismissed and I experienced tremendous anxiety that day. When the members of the Training Branch returned to the office and discussed the highlights from the day's event I felt excluded, saddened and demoralized.

On May 31, 2016, when I was served notice of the additional charges I was extremely upset. I felt an overwhelming amount of stress and anxiety. Not only had the service used my gender and marital status to embarrass me in the media but new charges were now being investigated as a result of the allegation by the Chief that I somehow have a personal interest in having the 4 issues I raised in my delegation reviewed. I believe the only reason new charges were added was to include the clause that I be prohibited from contacting the Board members directly or indirectly (which was not stated on my original directive, and there is no lawful ability for the Chief to add that clause without additional charges). I believe the Chief did not want me to contact Board members for fear I would advise them of further tyrannical and oppressive conduct within the service leadership. Since the charge of Deceit is a very serious offence and can lead to termination I was very stressed and scared at the potential of losing my income. I am the sole provider in my household and my children live with me half of the time. The thought of being unemployed as a result of doing something lawful and within my rights left me feeling more disillusioned, disheartened and mistreated by the Chief, who has publicly stated I was within my rights and he respects me. In the days that followed I have been extremely stressed and depressed over the fact that I could be terminated from my employment.

Since being ordered to not participate in the training of any sworn members I have been relegated to the office in the basement of headquarters. This has made me feel dismissed, segregated, alienated, depressed and demoralized. Other



Ontario

## Human Rights Tribunal of Ontario

officers are treating me like I did something wrong and rumours have spread through the department that I am under criminal investigation. When officers attend the office and ask me why I am in the office I have a difficult time making up excuses because I do not want to discuss the issue at work. When I see members of the senior leadership team in the hallways I continue to be pleasant and respectful. Some members of the senior leadership team are now treating me differently for having come forward with my delegation. I have maintained a very high level of professionalism despite the treatment I am receiving from senior leadership at the service. I am experiencing the following mental health issues; anxiety, stress and depression. I am currently taking medication for depression and anxiety. I have not received a bill from my lawyer.

According to Inspector Thiel and Acting Inspector Goodman, the investigation into the PSA charges will not begin until a review by a Staff Sergeant at York Regional Police into the Sgt. Finucan case concludes. I understand that this review could take months before my investigation even begins.

### The Remedy

#### 10. The Remedy You are Asking For (see Applicant's Guide)

Put an "X" in the box beside each type of remedy you are asking the Tribunal to order. Explain why you are asking for this remedy in the space below.

☒ Monetary Compensation

Enter the Total Amount \$201,751.12

Explain below how you calculated this amount:

\$2,000.00 is what I estimate I owe my lawyer for the work he has done to date.

\$10,000.00 is what I feel is the monetary value of the hurt and embarrassment the Chief has caused me with the discriminatory comments he has made in the media.

\$189,751.12 is two-times my salary. The Chief has shown his desire to terminate my employment for being honest and acting lawfully. I have a responsibility to my children to ensure I can continue to support them if I am terminated until I can update my education and seek alternative employment.

☐ Non-Monetary Remedy-Explain below:

☐ Remedy for Future Compliance (Public Interest Remedy)-Explain below:



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## Mediation

### 11. Choosing Mediation to Resolve Your Application

Mediation is one of the ways the Tribunal tries to resolve disputes. It is a less formal process than a hearing. Mediation can only happen if both parties agree to it. A Tribunal Member will be assigned to mediate your Application. The Member will meet with you to talk about your Application. The Member will also meet with the respondent(s) and will try to work out a solution that both sides can accept. If Mediation does not settle all the issues, a hearing will still take place and a different Member will be assigned to hear the case. Mediation is confidential.

Do you agree to try mediation? ☒ Yes

## Other Legal Proceedings

### 12. Civil Court Action (see Applicant's Guide)

Note: If you answer "Yes" to any of these questions, you must send a copy of the statement of claim that started the court action.

\*a) Has there been a court action based on the same facts as this Application?

☐ Yes (Answer 12b)

☒ No (Go to 13)

### 13. Complaint Filed with the Ontario Human Rights Commission (see Applicant's Guide)

Note: If you answer "Yes", you must attach a copy of the complaint.

\*Have you ever filed a complaint with the Commission based on the same facts as this Application?

☐ Yes

☒ No

### 14. Other Proceeding - In Progress (see Applicant's Guide)

Note: If you answer "Yes" to question "14a" you must attach a copy of the document that started the other proceeding.

\*a) Are the facts of this Application part of another proceeding that is still in progress?

☒ Yes (Answer 14b)

☐ No (Go to 15)

b) Describe the other proceeding:

☐ A union grievance

Name of Union:

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<input type="checkbox"/> A claim before another board, tribunal or agency	Name of board, tribunal, or agency:	
<input checked="" type="checkbox"/> Other	Explain what the other proceeding is:	An internal Workplace Harassment and/or Discrimination Complaint Form filed with the Waterloo Regional Police Service on June 2, 2016.

\*c) Are you asking the Tribunal to defer (postpone) your Application until the other proceeding is completed?

☐ Yes

☒ No

**15. Other Proceeding - Completed (see Applicant's Guide)**

**Note:** If you answer is "Yes" to question "15a" you must attach a copy of the document that started the other proceeding and a copy of the decision from the other proceeding.

\*a) Were the facts of this Application part of some other proceeding that is now completed?

☐ Yes (Answer Question 15b)

☒ No (Go to 16)

b) Describe the other proceeding:

<input type="checkbox"/> A union grievance	Name of Union:	
<input type="checkbox"/> A claim before another board, tribunal or agency	Name of board, tribunal, or agency:	
<input type="checkbox"/> Other	Explain what the other proceeding is:	



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c) Explain why you believe the other proceeding did not appropriately deal with the substance of this Application.

## Documents that Support this Application

### 16. Important Documents You Have

If you have documents that are important to your Application, list them here. List only the most important. Indicate whether the document is privileged. See the Applicant's Guide.

Note: You are not required to send copies of these documents at this time. However, if you decide to attach copies of the documents you list below to your Application they will be sent to the other parties to the Application along with your Application.

Document Name	Why It is Important to My Application

Add more Documents

### 17. Important Documents the Respondent(s) Have

If you believe the respondent(s) have documents that you do not have that are important to your Application, list them here. List only the most important.

Document Name	Why It is Important To My Application	Name of Respondent Who Has It
Any and all surveillance documents, audio and video recordings, digital recordings, photographs, licence plate enquiries for BABJ834	These items show that the service is abusing its resources to support their efforts to discipline me and change the focus to my personal life.	Chief Bryan Larkin and any and all employees under his direction

Add more Documents



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### 18. Important Documents Another Person or Organization Has

If you believe another person or organization has documents that you do not have that are important your Application, list them here. List only the most important.

Document Name	Why It Is Important to my Application	Name of Person or Organization who has it
Any and all notes, and interviews pertaining the Police Services Board meeting on May 4, 2016, and articles printed on same.	These will assist in determining if the Chief provided the discriminatory comments to the reporter	Liz Monteiro, The Record Lisa Rutledge, Cambridge Times

Add more Documents

### Confidential List of Witnesses

#### 19. Witnesses

Please list the witnesses that you intend to rely on in the hearing. **Note:** The Tribunal will not send this list to the respondent(s). (see Applicant's Guide)

Name of Witness	Why This Witness Is Important To My Application

Add more Witnesses

### Other Important Information

#### 20. Other Important Information the Tribunal Should Know

Is there any other important information you would like to share with the Tribunal?

This is my first time completing this form and I did not seek legal advice to assist me. Should there be errors or omissions they are done in error and will be corrected forthwith once I am advised.



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### Checklist of Required Documents

#### 22. Other Documents from Questions 12 to 15

Confirm whether you are sending the Tribunal any of the following documents:

- ☐ A copy of a statement of claim (from Question 12)
- ☐ A copy of a complaint filed with the Ontario Human Rights Commission (from Question 13)
- ☒ A copy of a document that started another proceeding based on these facts (from Question 14 or 15)
- ☐ A copy of a decision from another proceeding based on these facts (from Question 15)



# Human Rights Tribunal of Ontario

## Application to the Human Rights Tribunal of Ontario Area of Discrimination: Employment (Form 1-A)

Note: Complete this form if you believe you were harassed or discriminated against in the area of employment.

### PART I

#### Questions About the Respondent(s)

**A1.** Put an "X" in the box beside each point that describes the respondent(s) in your case. Check all that apply.

- ☐ The respondent is the employer at a place where I wanted to work
- ☒ The respondent is my current employer
- ☐ The respondent is my former employer
- ☐ The respondent is an employment agency
- ☐ The respondent is a union or employee association
- ☒ The respondent is a supervisor, manager, or boss
- ☐ The respondent is another employee
- ☐ Other- Please describe the respondent(s):

#### Questions About the Job

Please answer these questions.

**A2.** What was the position or job where you felt there was discrimination?

Police Training Constable, Waterloo Regional Police

**A3.** What were the requirements (essential job duties) of the position?

Conduct, plan and analyze Use of Force training to all members of the service.



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<b>A4.</b> Was it a volunteer position?	<input type="radio"/> Yes	<input checked="" type="radio"/> No
<b>A5.</b> Were you employed in this position?	<input type="radio"/> Yes	<input checked="" type="radio"/> No (Go to A6)
<b>a)</b> If you answered "Yes" to question A5, how long were you in the position? Please give the dates you started and finished.	From: (dd/mm/yyyy)	To: (dd/mm/yyyy)
<b>b)</b> If you answered answer "Yes" to question A5, what was the pay for the position? \$	<input type="radio"/> Hourly <input type="radio"/> Weekly	<input type="radio"/> Monthly <input checked="" type="radio"/> Yearly
<b>A6.</b> Are you working now?	<input checked="" type="radio"/> Yes	<input type="radio"/> No (Go to A7)
<b>a)</b> If you answered "Yes" to question A6, what is your current pay? \$94,875.56	<input type="radio"/> Hourly <input type="radio"/> Weekly	<input type="radio"/> Monthly <input checked="" type="radio"/> Yearly

## Questions About Your Union

**A7.** Were you a member of a union or other occupational or professional association responsible for collective bargaining at the time of the alleged discrimination?

☒ Yes (Fill out details below)    ☐ No (Go to A8)

If you answered "Yes", the Tribunal will send them notice of this Application.

Full Name of Organization

Waterloo Regional Police Association

### Name of Contact Person from the Organization

First (or Given) Name

Tim

Last (or Family) Name

Reparon

Street #

1128

Street Name

Rife Road

Unit/Suite Number

City/Town

Cambridge

Province

Ontario

Postal Code

N1R5S3

Email

treparon@wrpa.org



# Human Rights Tribunal of Ontario

Daytime Phone (i.e. 999-999-9999)	Cell Phone (i.e. 999-999-9999)	Fax (i.e. 999-999-9999)	TTY (i.e. 999-999-9999)
519-622-0771	519-577-5321		

## Questions About What Happened

### Alleged Discrimination Before Hiring

**A8** Put an "X" in the box beside each point that describes how you believe you were discriminated against.

I experienced discrimination:

- ☐ As a result of In a job ad
- ☐ In an application form
- ☐ In a job interview
- ☐ In drug and alcohol testing before hiring
- ☐ In other kinds of pre-employment testing
- ☐ In a hiring decision
- ☐ Other- please explain:

### Alleged Discrimination During Employment

**A9.** Put an "X" in the box beside each point that describes how you believe you were discriminated against.

I experienced discrimination:

- ☐ In my rate of pay, overtime, hours of work, or holiday
- ☐ In being denied a promotion
- ☐ In scheduling
- ☒ In discipline (such as suspensions or warning)
- ☐ In being fired
- ☒ In comments, displays, jokes, harassment, or a poisoned work environment
- ☐ In sexual harassment or solicitation or advances
- ☐ In being denied a workplace opportunity (such as a training opportunity) Please describe:

☐ In being denied employment benefits, including time off for medical or other reasons. Please describe:

**Human Rights Tribunal of Ontario**☐ In drug testing or alcohol testing☐ In being denied necessary accommodation or modified work in the workplace☒ Other- please explain:

Comments made to public media

**Workplace Policies or Practices**

**A10.** Is your Application about a workplace policy?  
(for example, absenteeism accommodation or holiday policy)

☐ Yes☐ No

**a)** If you answered "Yes" to A10, what is the policy? (Attach a copy if available)

**Questions About Complaining to Your Employer**

Complete this section only if you complained to someone in authority about the alleged harassment or discrimination.

**A11.** To whom did you complain?

Sgt. George Prime, Staff Sergeant Jen Davis, Acting Inspector Goodman

**A12.** Was there an investigation?

☒ Yes☐ No (Go to Part II)

**a)** If you answered "Yes" to A12, what was the outcome of the investigation?  
Ongoing

**PART II**



## Human Rights Tribunal of Ontario

The following Part asks you to answer how you believe you were harassed or discriminated against based on grounds you identified. If you believe that you were discriminated against or harassed based on more than one ground, fill out all the sections that apply.

### Questions About Employment Discrimination on the Grounds of Sex, Pregnancy, Gender Identity or Gender Expression

Complete this section only if you believe that you have been discriminated against on the grounds of sex, pregnancy, gender identity or gender expression

**A24.** Is your Application about discrimination on the ground of pregnancy?

☐ Yes

☐ No

**A25.** Explain why you believe you were discriminated against based on your sex, pregnancy, gender identity.

**A26.** Please identify your sex or describe your gender identity or gender expression.

### Question About Workplace Sexual Harassment

Complete this section only if you believe that you have been subjected to sexual harassment in the workplace.

**A29.** Tell us what happened.

### Questions About Employment Discrimination on the Grounds of Family or Marital Status

Complete this section only if you believe that you have been discriminated against on the grounds of family or marital status.



## Human Rights Tribunal of Ontario

### A32. Explain why you believe you were discriminated against based on your family or marital status.

The Chief has made statements about me in the media being close to a male officer whom I alleged was a friend. The Chief has attempted to explain my behaviour in the media by insinuating I am more than friends with the person whose investigation I discussed in my delegation. The Chief has attempted to put my credibility and motivation into question by referencing my personal life only to deflect the focus away from the issues I raised in my delegation regarding the lack of service policy on internal investigations.

### A33. Please describe your family or marital status.

I am a single mother. I have been a single mother since 2009. I began my employment with the Waterloo Regional Police Service in 2010.

## Declaration and Signature

### 23. Declaration and Signature

**Instructions:** Do not sign your Application until you are sure that you understand what you are declaring here.

#### Declaration:

To the best of my knowledge, the information in my Application is complete and accurate.

I understand that information about my Application can become public at a hearing, in a written decision, or in other ways determined by Tribunal policies.

I understand that the Tribunal must provide a copy of my Application to the Ontario Human Rights Commission on request.

I understand that the Tribunal may be required to release information requested under the Freedom of Information and Protection of Privacy Act (FIPPA).

**\*Signature Date (dd/mm/yyyy)**

03/06/2016

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

## Accommodation Required

If you require accommodation of Code-related needs please contact the Registrar at:

Email: [HRTO.Registrar@ontario.ca](mailto:HRTO.Registrar@ontario.ca)

Phone: 416-326-1519 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



# Human Rights Tribunal of Ontario

Note: Only file your Application once. If the Tribunal receives your application more than once, it will only accept the first Application Form received.

Submit to Prod (GDC)

Print Form

# TAB G

**THIS IS EXHIBIT "G" REFERRED TO IN THE AFFIDAVIT OF LAURA J. FREITAG  
SWORN BEFORE ME THIS 9th DAY OF February, 2021.**



---

**A COMMISSIONER FOR TAKING AFFIDAVITS**

Dated June 8, 2017

**RESIGNATION AGREEMENT**

**BETWEEN:**

**The Regional Municipality of Waterloo Police Services Board**

**(the "Board")**

**-and-**

**The Waterloo Regional Police Association**

**(the "Association")**

**-and-**

**Kelly Donovan**

**("Donovan")**

**WHEREAS** Donovan and the Board currently have an employer-employee relationship;

**AND WHEREAS** Donovan has notified the Board that she will be resigning her employment with the Board effective on or about June 25, 2017;

**AND WHEREAS** the Board wishes to recognize the past service and contributions of Donovan upon her resignation from the Board;

**AND WHEREAS** Donovan and the Board wish to fully resolve and settle the two outstanding matters between them, namely: (a) the application filed by Donovan with the Human Rights Tribunal of Ontario ("HRTO") on or about June 6, 2016 and having HRTO File No. 2016-24566-I (the "Application"); and (b) the Board's investigation into whether Donovan engaged in misconduct in or about May 2016 sufficient to warrant formal charges against Donovan under the *Police Services Act* (the "Potential PSA Charges");

**NOW THEREFORE IN CONSIDERATION OF** the above and the mutual covenants outlined below, the parties agree as follows in full and final settlement of all matters related to Donovan's

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employment with or cessation of employment with the Board, and all other outstanding matters between them:

1. Donovan hereby confirms that she is freely and voluntarily resigning her employment with the Board effective on or about June 25, 2017. Donovan acknowledges and agrees that this employment resignation decision is irrevocable. Accordingly, without limiting the generality of the foregoing, the parties acknowledge and confirm that effective June 25, 2017, Donovan will cease to be an employee of the Board for any and all purposes at law whatsoever. Donovan further waives any and all seniority and recall rights she may have under the applicable Uniform Collective Agreement between the Board and the Association.
2. Between now and June 9, 2017, Donovan will continue to remain on approved and paid sick leave. Thereafter and until June 25, 2017, Donovan will continue to be paid by using outstanding Annual Leave and/or Statutory Holiday Leave credits. Subject to and in accordance with all applicable plan provisions, terms and policies, Donovan will continue to receive her current employment benefits and participate in the OMERS Pension Plan up to and including June 25, 2017.
3. By no later than July 15, 2017, the Board will pay to Donovan all outstanding Annual Leave pay, Statutory Holiday pay and Overtime pay, if any, accrued and still owing to Donovan as of the date of her employment resignation.
4. Donovan hereby withdraws and discontinues her Application. Donovan further undertakes to forthwith file with the HRTO any documentation necessary for the HRTO to close its file in respect of the Application.
5. The Board hereby confirms that, as a result of Donovan's employment resignation effective June 25, 2017 and consistent with section 90(1) of the *Police Services Act*, it will take no further action in respect of the Potential *PSA* Charges.
6. Subject to the terms herein, this Resignation Agreement is without prejudice or precedent in any other matter. Further, this Resignation Agreement is entered into by the Board without admission of any contravention of the Uniform Collective Agreement or any

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statute (including, without limitation, the *Police Services Act* and/or the *Human Rights Code*), and all such allegations are specifically denied.

7. The Board will reimburse Donovan for legal expenses incurred in respect of the Application and/or the Potential *PSA* Charges in the amount of  
inclusive of HST or other applicable taxes. By her signature to this  
Resignation Agreement, Donovan confirms that she has incurred legal expenses of at least this amount.
8. No later than July 15, 2017 and subject to the Board's receipt of proof that the HRTO has closed its file in respect of the Application, the Board will pay to Donovan a gross lump sum payment equivalent to less all applicable deductions and remittances required by law.
9. Donovan hereby authorizes and directs the Board to allocate all monies payable to Donovan under the terms of this Resignation Agreement as directed by her legal counsel, Machado Law Professional Corporation.
10. Donovan will execute and return to the Board a Full and Final Release in the form of the attached Appendix "A" to this Resignation Agreement. Without limiting the generality of the foregoing, Donovan also undertakes and confirms, without time limitation, that she will not commence any future proceeding against the Board of any kind whatsoever (whether by way of human rights application, grievance, OCPC or OIPRD complaint under the *Police Services Act*, or otherwise) that in any way relates to or arises out of the period prior to June 26, 2017.
11. The Board will execute and return to Donovan a full and final Release in the form of the attached Appendix "B" to this Resignation Agreement. Without limiting the generality of the foregoing, the Board also undertakes and confirms, without time limitation, that it will not commence any future proceeding against Donovan of any kind whatsoever that in any way relates to or arises out of the period prior to June 26, 2017, except where such proceeding relates to the prohibited and/or unlawful disclosure of operational police information acquired by Donovan in the course of her employment.

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12. Without limiting the generality of the foregoing, Donovan also undertakes and confirms, without time limitation, that she will not commence any future proceeding against the Association of any kind whatsoever (whether by human rights application, grievance, OCPC, or OIPRD complaint under the *Police Services Act*, or otherwise) that in any way relates to or arises out of the period prior to June 26, 2017.
13. On or before the date of her employment resignation, Donovan confirms that she will return to the Board any and all property, documents, or copies thereof (whether in an electronic form or otherwise), in her possession belonging to the Board. Such police property includes, without limitation, her equipment, uniform, badge and police identification.
14. To assist Donovan in her search for alternative employment, the Board agrees to permit Donovan to seek employment reference letters, without time limitation, from Staff Sergeant Jen Davis and Sergeant George Prine. The decision to provide such letters will be entirely within their own discretion, but the letters (if provided) will contain no references to the matters resulting in this settlement.
15. If any undertaking, provision or clause contained in this Resignation Agreement is found to be void or unenforceable, in whole or in part, it shall not affect or impair the validity or enforceability of any other undertaking, provision or clause contained herein.
16. 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

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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.

DATED at the City/Town of ~~Cambridge~~ Ontario this 8<sup>th</sup> day of June, 2017.

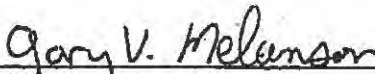
SIGNED AND WITNESSED  
in the presence of:

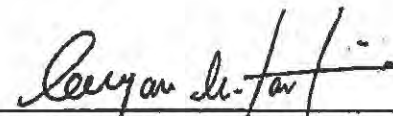
  
Witness Signature  
Print Name: Molly Kimpel

  
KELLY DONOVAN

DATED at the City/Town of Cambridge, Ontario this 8<sup>th</sup> day of June, 2017.

SIGNED AND WITNESSED  
in the presence of:


  
Witness Signature  
Print Name: GARY V. MELANSON

  
THE REGIONAL MUNICIPALITY OF  
WATERLOO POLICE SERVICES BOARD  
Per: Bryan Larkin, Chief of Police

DATED at the City/Town of \_\_\_\_\_ Ontario this \_\_\_\_\_ day of June, 2017.

SIGNED AND WITNESSED  
in the presence of:

  
Witness Signature  
Print Name: Tim Repardon U.P.

  
THE WATERLOO REGIONAL POLICE  
ASSOCIATION  
Per: Mark Egers, President

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**APPENDIX "A"**  
**FULL AND FINAL RELEASE**

I, **KELLY DONOVAN**, in consideration of the terms and conditions set out in the attached Resignation Agreement dated June 8<sup>th</sup>, 2017, do hereby release and forever discharge **THE REGIONAL MUNICIPALITY OF WATERLOO POLICE SERVICES BOARD** and the **WATERLOO REGIONAL POLICE ASSOCIATION**, its and their officers, agents, directors, commissioners, servants, employees, attorneys, related and affiliated entities, parent and subsidiary entities, predecessors, successors and assigns (the "Releasees") from any and all actions, causes of action, complaints, applications, including, without limitation, Human Rights Tribunal of Ontario ("HRTO") Application No. 2016-24566-I filed on or about June 6, 2016, appeals, requests, covenants, contracts, claims, grievances, under any terms of employment, whether express or implied, and demands whatsoever, whether arising at common law, by contract, including pursuant to the applicable Uniform Collective Agreement between **THE REGIONAL MUNICIPALITY OF WATERLOO POLICE SERVICES BOARD** and **THE WATERLOO REGIONAL POLICE ASSOCIATION**, by statute, including without limitation, the *Human Rights Code*, R.S.O. 1990, c. H.19, the *Labour Relations Act*, 1995, S.O. 1995, c. 1, Sch. A, the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, the *Pension Benefits Act*, R.S.O. 1990, c. P.8, the *Police Services Act*, R.S.O. 1990, c. P. 15 or the *Employment Standards Act*, 2000, S.O. 2000, c. 41, and any amended or successor statutes and sections, or otherwise, which I have ever had, now have or which my heirs, executors, administrators and assigns, or any of them hereafter can, shall or may have by reason of my employment with or the resignation of my employment with **THE REGIONAL MUNICIPALITY OF WATERLOO POLICE SERVICES BOARD** effective on or about June 25, 2017, or which arises out of or in any way relates to the matters giving rise to my HRTO Application No. 2016-24566-I.

**AND FOR THE SAID CONSIDERATION**, I further agree not to commence, maintain, or continue any action, cause of action, claim, request, complaint, demand or other proceeding, against any person, corporation or entity in which any claim could arise against the Releasees or any one of them for contribution or indemnity.

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**AND IT IS FURTHER AGREED** that, while I do not retract my allegations pursuant to the Ontario *Human Rights Code*, in the event that I should hereafter make any claim or demand or commence or threaten to commence any action, claim or proceeding, or make 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 my HRTO Application No. 2016-24566-I, this document may be raised as an estoppel and complete bar to any such claim, demand, action, proceeding or complaint. Further, I acknowledge and agree that, in light of this settlement, any complaint filed under the *Human Rights Code*, the *Police Services Act* or *Employment Standards Act, 2000*, or any other legislation, which in any way relates to my employment would be frivolous, vexatious and an abuse of process. Subject to the terms of the attached Resignation Agreement, I further agree that I have no claim for disability benefits and I will not institute any action against any carrier or the Releasees which relates to said benefits. I further agree that this settlement can be relied upon as a complete bar to any such action or complaint.

**AND IT IS FURTHER AGREED** that for the aforesaid consideration, I will pay the appropriate authorities any taxes or any Employment Insurance repayments or any interest, fines, penalties or other charges of any kind whatsoever under any statutory provision, federal or provincial, that may be claimed or levied against me as a result of the payment of the amounts referred to in the attached Resignation Agreement dated June 8<sup>th</sup>, 2017, and I hereby agree to indemnify and save harmless the Releasees from any and all claims or demands under the *Income Tax Act* of Canada, the *Employment Insurance Act* of Canada, and/or the *Income Tax Act* of the Province of Ontario, and/or under any other statute, federal or provincial, for or in respect of any failure on the part of the Releasees to withhold income tax, or any other source deductions, or remit Employment Insurance repayments from all or any part of the said consideration and any interest or penalties relating thereto and any costs or expenses incurred in defending such claims and demands.

**AND I HEREBY DECLARE** that I fully understand the terms of settlement as set out in the attached Resignation Agreement dated June 8<sup>th</sup>, 2017, that the terms thereof constitute the sole consideration for this Release and that I voluntarily accept the amounts stated therein for the purpose of making full and final compromise, adjustment and settlement of all claims aforesaid.

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AND I HEREBY CONFIRM that I have obtained independent legal advice with respect to the details of the attached Resignation Agreement dated June 8<sup>th</sup>, 2017, and this Release, and I confirm that I am executing this Release freely and voluntarily. .

IN WITNESS WHEREOF I have hereunto set my hand and seal this 8<sup>th</sup> day of

June, 2017, in the City of CAMBRIDGE, Ontario.

SIGNED AND WITNESSED  
in the presence of:

M. Kimpel  
Witness Signature

Print Name: Molly Kimpel

[Signature]  
KELLY DONOVAN

**APPENDIX "B"**  
**FULL AND FINAL RELEASE**

**THE REGIONAL MUNICIPALITY OF WATERLOO POLICE SERVICES BOARD**, in consideration of the terms and conditions set out in the attached Resignation Agreement dated June 8<sup>th</sup> 2017, does hereby release and forever discharge **KELLY DONOVAN** ("**DONOVAN**") from any and all actions, causes of action, complaints, applications, appeals, requests covenants, contracts, claims, grievances, under any terms of employment, whether express or implied, and demands whatsoever, whether arising at common law, by contract, including pursuant to the applicable Uniform Collective Agreement between **THE REGIONAL MUNICIPALITY OF WATERLOO POLICE SERVICES BOARD** and **THE WATERLOO REGIONAL POLICE ASSOCIATION**, by statute, including without limitation, the *Human Rights Code*, R.S.O. 1990, c. H.19, the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A, the *Occupational Health and Safety Act*, R.S.O. 1990, c.O.1, the *Pension Benefits Act*, R.S.O. 1990, c. P.8, the *Police Services Act*, R.S.O. 1990, C. P.15 or the *Employment Standards Act, 2000*, S.O. 2000, c. 41, and any amended or successor statutes and sections, or otherwise, which it has ever had, now has or which it hereafter can, shall or may have reason of **DONOVAN**'s employment with or the resignation of her employment with **THE REGIONAL MUNICIPALITY OF WATERLOO POLICE SERVICES BOARD** effective on or about June 25, 2017, or which arises out of or in any way relates to the matters giving rise to **DONOVAN**'S HRT0 Application No. 2016-24566-L.

**AND FOR THE SAID CONSIDERATION, THE REGIONAL MUNICIPALITY OF WATERLOO POLICE SERVICES BOARD** further agrees not to commence, maintain, or continue any action, cause of action or claim, request, complaint, demand or other proceeding, against any person, corporation or entity in which any claim could arise against **DONOVAN** for contribution or indemnity.

**AND IT IS FURTHER AGREED** that, in the event that **THE REGIONAL MUNICIPALITY OF WATERLOO POLICE SERVICES BOARD** should hereafter make any claim or demand or commence or threaten to commence any action, claim or proceeding, or make any complaint against **DONOVAN** for or by reason of any cause, matter or thing relating to **DONOVAN**'S

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employment or resignation, including the matters arising out of or in any way relating to DONOVAN'S HRTO Application No. 2016-24566-I, this document may be raised as an estoppel and complete bar to any such claim, demand, action, proceeding or complaint. Further, **THE REGIONAL MUNICIPALITY OF WATERLOO POLICE SERVICES BOARD** agrees that, in light of this settlement, any complaint filed under the *Human Rights Code*, the *Police Services Act*, or *Employment Standards Act, 2000*, or any other legislation, which in any way relates to DONOVAN'S employment would be frivolous, vexatious and an abuse of process.

**THE REGIONAL MUNICIPALITY OF WATERLOO POLICE SERVICES BOARD** further declares that it fully understands the terms of settlement as set out in the attached Resignation Agreement dated June 8<sup>th</sup>, 2017, that the terms thereof constitute the sole consideration for this Release and that **THE REGIONAL MUNICIPALITY OF WATERLOO POLICE SERVICES BOARD** voluntarily accepts the terms therein for the purpose of making full and final compromise, adjustment and settlement of all claims aforesaid.

IN WITNESS WHEREOF **THE REGIONAL MUNICIPALITY OF WATERLOO POLICE SERVICES BOARD** have hereunto set their hand and seal this 8<sup>th</sup> day of June \_\_\_\_\_, 2017, in the City of Cambridge, Ontario.

**SIGNED AND WITNESSED**  
in the presence of:

Gary V. Melanson  
Witness Signature

Bryan Larkin  
**THE REGIONAL MUNICIPALITY  
OF WATERLOO POLICE  
SERVICES BOARD**  
Per: Bryan Larkin, Chief of Police

Print Name: GARY V. MELANSON

**TAB H**

**THIS IS EXHIBIT “H” REFERRED TO IN THE AFFIDAVIT OF LAURA J. FREITAG  
SWORN BEFORE ME THIS 9th DAY OF February, 2021.**



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**A COMMISSIONER FOR TAKING AFFIDAVITS**

Court File No. CV-17-2346-00

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

ANGELINA RIVERS, SHARON ZEHR,  
and BARRY ZEHR

Plaintiffs

and

WATERLOO REGIONAL POLICE SERVICES BOARD and  
WATERLOO REGIONAL POLICE ASSOCIATION

Defendants

**AFFIDAVIT OF BRYAN LARKIN**

I, **BRYAN LARKIN**, of the City of Kitchener, in the Regional Municipality of Waterloo, **MAKE OATH AND SAY**:

1. I make this Affidavit as a Reply Affidavit to the material filed by the Plaintiffs with respect to the Jurisdiction Motion, and as a Responding Affidavit to the Plaintiff's Certification Motion, and for no improper purpose.

2. I am the Chief of Police of the Waterloo Regional Police Services (WRPS). I am employed and report to the Defendant, the Waterloo Regional Police Services Board (WRPSB), and, as such, have knowledge of the matters and facts contained in this my affidavit. Unless I indicate to the contrary, these facts are within my personal knowledge and are true. Where I

have indicated that I have obtained from information from other sources, I verily believe those facts to be true.

### **PERSONAL BACKGROUND**

3. I am 47 years of age. I began my policing career with the WRPS in 1991, as a Constable. While with the WRPS from 1991 until 2011, I progressed through the ranks from Constable to Superintendent. During that time and in addition to patrol/operational assignments, I have worked in Human Resources, been the Chief of Police's Executive Officer and Media Relations Officer, lead the largest Division in our Service. I left WRPS in 2011 to become the Deputy Chief of Police with the Guelph Police Service and then became Chief of the Guelph Police Services from 2012 to 2014, returning in August of 2014 to assume my role as Chief of Police of WRPS.

4. I am currently the President of the Ontario Association of Chiefs of Police, and participate in the Canadian Association of Chiefs of Police Working Groups on Diversity and Inclusion. During my career, including in my role in senior management with the WRPS, I have had training, attended and/or helped to arrange symposiums, conferences and seminars on Diversity, Gender Equality and Sexual Harassment (including through the Ontario Police College, internally and at a provincial and international level (International Association of Chiefs of Police- Women in Policing)).

### **STATEMENT OF DEFENCE AND ATTORNMENT TO JURISDICTION ISSUE**

5. I have reviewed the Statement of Claim in these proceedings. The Defendant, WRPSB, denies or has no knowledge of many of the allegations made in the Statement of Claim. On the

advice of counsel, we have not entered a Statement of Defence due to the fact that we would be attorning to the jurisdiction of the Superior Court of Justice by doing so in circumstances where our position has been clearly stated, in our Motion Record and Factum brought under Rule 21 of the *Rules of Civil Procedure*, that the Plaintiff's Action should be dismissed on the grounds that the Superior Court of Justice has no jurisdiction to hear the matter based on the Collective Bargaining Agreements, which govern the employment relationship between the Plaintiffs and the Defendants. I have also been advised by our counsel that they would need particulars with respect to many of the allegations in the Statement of Claim in order to properly plead to it and prepare a proper Statement of Defence should the preliminary Jurisdiction Motion be dismissed.

6. My counsel was served yesterday with new and extensive Affidavit material purporting to be Responding Affidavits to the Defendant's Jurisdiction Motion, but which contains many new, unfounded, and unchallenged allegations, to bolster the previous Affidavits filed by the Plaintiffs. My not addressing these new allegations in this Affidavit should not be taken as a concession or admission with respect to those unfounded allegations.

**COLLECTIVE BARGAINING AGREEMENT AND ITS GOVERNING THE EMPLOYMENT RELATIONSHIP BETWEEN THE WRPSB AND ITS EMPLOYEES**

7. I have reviewed the Affidavit of Fillipe Mendes, sworn September 14, 2017, contained in the Motion Record, dated September 15, 2017, filed with respect to the Jurisdiction Motion. I confirm the accuracy of the information contained in that Affidavit.

8. In addition, there is a separate Collective Bargaining Agreement in force between the WRPSB and the Waterloo Regional Police Association (WRPA) which governs the employment relationship between the employer and its civilian employees. Attached hereto and marked as "Exhibit A" to this my Affidavit, is a true copy of this Collective Bargaining Agreement, and which is currently in force.

9. There is also a Collective Bargaining Agreement which exists between the WRPSB and the Senior Officers Association (SOA), which consists of 31 employees comprised of uniform officers above the rank of Staff Sergeants, being Inspectors, Superintendents, as well as civilian Managers and Supervisors, and all other employees who are in a position to receive confidential information, such as our in-house lawyers. It is unclear to me whether the class action purports to represent the members of the SOA bargaining unit. Attached hereto and marked as "Exhibit B" to this my Affidavit, is a true copy of this Collective Bargaining Agreement.

10. Attached hereto and marked as "Exhibit C" to this my Affidavit is a breakdown of the male/female ratio of the senior management positions in the SOA bargaining unit, and which contradicts the erroneous information in the Plaintiff's materials that woman have not been promoted to senior management positions within the WRPS, and which I had requested be prepared for the purpose of this affidavit.

**INTERNAL PROCEDURES, PROTOCOLS AND POLICIES OF WRPS TO DEAL WITH SEXUAL HARASSMENT, SEXUAL ASSAULT AND GENDER DISCRIMINATION**

11. Our Policy and Procedures Development Unit was asked to compile the following list of written policies and procedures in place that deal directly or indirectly with the issue of and processes for employees to follow regarding sexual harassment sexual assault, and/or gender

discrimination, as well as the historical Procedures dealing specifically with Harassment and Discrimination :

- (a) Harassment and Discrimination Procedures – Historical:
  - (i) By-law 11 and 12 from 1983 Rules and Regulations;
  - (ii) Harassment Policy (Order 13-90; February 12, 1990);
  - (iii) Harassment Policy (67-93; December 20, 1993);
  - (iv) Harassment Policy 1996;
  - (v) Harassment and Discrimination Procedure (April 11, 2007);
  - (vi) Harassment and Discrimination Procedure (June 21, 2010); and
  - (vii) Harassment and Discrimination Procedure (October 21, 2014)
- (b) Harassment and Discrimination Procedure – Current (August 2, 2017) – Attached hereto and marked as “Exhibit D”;
- (c) Promotional Procedures:
  - (i) Promotions Senior Officer; and  
Promotions – Sergeant and Staff Sergeant; and
- (d) Other Procedures that reference or deal with harassment or discrimination, gender equity, etc. related issues (e.g., workplace violence free obligations):
  - (i) Auxiliary Police Procedure;
  - (ii) Bias Neutral Policing Procedure;
  - (iii) Emergency and Personal Safety Procedure;
  - (iv) Field Development (formerly Coach Officer) Procedure;
  - (v) Performance Management – Civilian Procedure;
  - (vi) Relationships in the Workplace Procedure;
  - (vii) Skills Development and Learning Plan Procedure;
  - (viii) Supervision Procedure;
  - (ix) Workplace Accidents Procedure; and
  - (x) Workplace Violence Procedure.

12. These specific policies and procedures have worked well in allowing most complaints to have been handled and resolved internally, but with the option for any employee to proceed with a complaint to the Human Rights Tribunal of Ontario, or a formal grievance under the applicable

Collective Bargaining Agreement and/or dealing with misconduct of a police officer under the Code of Conduct found in the *Police Services Act*. Attached hereto and marked as "Exhibit E" to this my Affidavit is a chart which I requested that the Human Resources Division of the WRPS prepare for sexual harassment/discrimination complaints for the last 9 years, with non-identifying particulars with respect to the parties and the resolution of those complaints in order to comply with the applicable legislation and respect the individuals' privacy.

13. 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, Angelina Cea, (aka Rivers), 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.

14. The WRPS with the full support of the Defendant, the WRPSB, has taken proactive steps in recent years to properly deal with the issues of sexual discrimination, gender diversity, sexual harassment and to encourage and promote women to senior management positions. Attached hereto and marked as "Exhibit G" to this my Affidavit, is a true copy of the text of a recent article from the Ottawa Citizen newspaper, dated November 28, 2017, outlining steps taken by the Ottawa Police Services arising out of a settlement of a Human Rights complaint from 2015. The WRPS had already launched similar initiatives prior to the issuance of the Statement of Claim in this action. WRPS, in January of 2017, had established an Inclusion and Equity Officer with the full support of the WRPSB. Donna Mancuso, was the first Inclusion and Equity Officer, and is now been promoted to an Inspector of the WRPS. Sergeant Julie Sudds has

replaced Inspector Mancuso. Her mandate, and the mission statement of her office, is that every member is responsible for promoting inclusivity within the organization and community.

15. In addition and since 2005, the WRPS Diversity Committee has served as a steering group for a wide variety of Service initiatives that promote the Core Value of *Diversity* within our Service and throughout Waterloo Region. Over 30 WRPS uniform and civilian members are divided equally among its 5 sub-committees, including Education (assist in coordinating Service educational programs and initiatives that promote Diversity awareness and inclusion):

16. In 2015, a program was implemented, where every female Staff Sergeant has been sent to the Women Leadership Institute, hosted by the International Association of Chiefs of Police, which is a five day, 40 hour program. This initiative has now also been expanded to include all female Sergeants.

17. In 2016, WRPS sponsored a Women's Leadership Day Forum. Ironically, the Plaintiff, Barry Zehr, advocated that men should attend this forum and was overruled by senior management on the basis that there was a consensus that the women needed a safe space as a first step to move forward, and to then subsequently involve men as part of the ongoing process. Attached hereto and marked as "Exhibit I" to this my Affidavit is the on-line Registration form for the Women's Leadership Forum scheduled for January 18, 2018

18. The internal policies referred to in Barry Zehr's Affidavit, at paragraph 42, and Exhibit B, are outdated versions of the Harassment and Discrimination Procedure, which current version is attached to this Affidavit as "Exhibit D" described above. Contrary to the allegation made by the Plaintiff, Barry Zehr, about the briefing note "highlighting the inherent ineffectiveness" of the current policies, changes made to the wording of the internal policies was simply to reflect the

new legislation and requirements of Bill 132, which had an effect on numerous other policies of the WRPS, which were also changed to be in compliance.

19. In addition, all new employees (including probationary constables) are required, as part of new employee orientation to receive training on Workplace Conduct, that includes specific lesson plan on appropriate workplace conduct and harassment and discrimination and those key and applicable Procedures. This was developed following the Service-wide training on “Ontario Human Rights – Accommodation and Harassment and Discrimination” from June to September 2007. In addition, Field Development Officer (formerly, Training Officers) have specific training dealing with harassment and discrimination and are required to address the issues with their probationary constables.

20. The Service has kept its procedures up to date and revised them as amendments to legislation have been introduced (e.g., Bill 168 (Workplace Violence and Harassment) updates and later Bill 132 (Sexual Violence and Harassment Action Plan)— which is what Ms. Penny Smiley was referring to in her report to the Senior Leadership Team). Attached hereto and marked as “Exhibit I” is the Senior Leadership Team Briefing Note dated March 2, 2017 entitled, “Bill 132 Harassment and Discrimination Procedure Changes” and as “Exhibit J” is the accompanying PowerPoint presentation entitled “Harassment and Discrimination Procedure- Bill 132 Updates”.

**EXTERNAL PROCEDURES/PROCESSES AVAILABLE TO EMPLOYEES OF WRPS  
TO DEAL WITH COMPLAINTS OF SEXUAL HARASSMENT, SEXUAL/GENDER  
DISCRIMINATION, OR SEXUAL ASSAULT**

21. The internal policies and procedures of the WRPS, while not perfect are continually progressing appropriately and provide remedies for female officers and civilian employees when they have complaints with respect to sexual/gender discrimination, sexual harassment or sexual assault to be handled either informally on an internal basis. But they also contemplate and allow for other external remedies available by way of Complaints to the Human Rights Tribunal, or under the Collective Bargaining Agreements, or the *Police Services Act* or SIU complaints and investigations.
22. Any employee who has a complaint, with respect to harassment or discrimination, sexual or otherwise, is specifically permitted to suspend or by-pass any proceedings under our internal procedures and/or any interim solutions by commencing proceedings before the Ontario Human Rights Tribunal, or a grievance under the Collective Bargaining Agreement/*Police Services Act*, or commencing a criminal prosecution.
23. In fact, if there is any concern that a potential crime may have been committed during the course and scope of a police officer's employment with the WRPS, a complaint to and investigation will be initiated by the Special Investigations Unit ("SIU"), which is a separate and independent body mandated to investigate police officers in Ontario (whether they active or retired as long as the allegation of sexual assault occurred while they were police officers and it arose out of or related to their duties or position as a police officer). The mandate of the SIU is to maintain confidence in Ontario's police services by assuring the public that police actions resulting in serious injury, death, or

allegations of sexual assault are subjected to rigorous, independent investigations. Incidents which fall within this mandate must be reported to the SIU by the police service involved and/or may be reported by the complainant or any other person.

24. As well, the *Police Services Act* explicitly provides for misconduct in the Code of Conduct (Regulation 268/10) that are designed or can be used to address matters of sexual harassment and/or discrimination in the workplace, including but not limited to:

2. (1) Any chief of police or other police officer commits misconduct if he or she engages in,

(a) Discreditable Conduct, in that he or she,

- (i) **fails to treat or protect persons equally without discrimination** with respect to police services because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, **sex, sexual orientation**, age, marital status, family status or disability,
- (ii) uses profane, abusive or insulting language that relates to a person's race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, **sex, sexual orientation**, age, marital status, family status or disability,
- (iii) **is guilty of oppressive or tyrannical conduct towards an inferior in rank,**
- (iv) **uses profane, abusive or insulting language to any other member of a police force,**
- (vii) **assaults** any other member of a police force,
- (viii) **withholds or suppresses a complaint** or report against a member of a police force or about the policies of or services provided by the police force of which the officer is a member,
- (ix) is guilty of a **criminal offence** that is an indictable offence or an offence punishable upon summary conviction, or
- (xi) **acts in a disorderly manner or in a manner prejudicial to discipline or likely to bring discredit upon the reputation of the police force** of which the officer is a member;

(b) Insubordination, in that he or she,

- (i) is **insubordinate by word, act or demeanor**, or
- (ii) without lawful excuse, **disobeys, omits or neglects to carry out any lawful order** [note: Procedures are considered orders of the Chief];

(c) Neglect of Duty, in that he or she,

(i) without lawful excuse, neglects or omits promptly and diligently to perform a duty as,

(A) a member of the police force of which the officer is a member, if the officer is a member of an Ontario police force as defined in the *Interprovincial Policing Act, 2009*, or

(iii) **fails to work in accordance with orders**, or leaves an area, detachment, detail or other place of duty, without due permission or sufficient cause,

(vi) **fails to report a matter that it is his or her duty to report**,

[Emphasis Added]

25. As noted above, all police officers are also subject to that Code of Conduct in the *Police Services Act*. While members of a Service are not permitted to bring a “public complaint” against an officer from their same Service, there are other mechanisms by which a formal complaint and, if substantiated and of a serious nature, a public hearing can be commenced. The Chief can initiate a Chief’s complaint under the *Police Services Act*. In fact, this is something that is explicitly contemplated in the Service’s Harassment and Discrimination Procedure at “Exhibit D”).
26. Lastly and notwithstanding that a member of a Police Service cannot directly bring a public complaint, the *Police Services Act* also provides at section 25 for Ontario Civilian Police Commission, on its own motion (and if a member brings an issue to their attention), the power to investigate, inquire into and report on, *inter alia*,
  - (a) the conduct or the performance of duties of a police officer, a municipal chief of police, an auxiliary member of a police force, a special constable, a municipal law enforcement officer or a member of a board;
  - (b) the administration of a municipal police force...
27. As such, there are a host of avenues that a complainant in a harassment or discrimination related matter can, and have at our Service, pursue.

**THE PLAINTIFF'S PURPORTED EXPERT, KATHY HOGARTH**

28. I am advised by my counsel that the report and alleged expert opinion of Ms. Hogarth, set forth in the Supplementary Motion Record of the Plaintiffs, is improperly before the Court in this proceeding, in that Ms. Hogarth is unqualified, biased, and that her opinions are not made in a report served in accordance of the provisions of Rule 53 of the *Rules of Civil Procedure*.
29. I specifically deny the allegations made in paragraphs 12 and 13 of Ms. Hogarth's Affidavit that she discussed with me, issues of systematic sexual harassment and practices of the WRPS dealing with sexual harassment and discrimination. My recollection of my meetings and conversations with Ms. Hogarth was that they were based on racism issues and race based interactions, such as racial profiling and the larger inclusion and diversity issue and not related to gender equity/diversity specifically.
30. I had first met Ms. Hogarth through the Waterloo Region Well-Being Working Group as part of planning on building healthier communities. I had appointed Barry Zehr to this Working Group. Ironically, it was myself that gave her name to the Plaintiff Barry Zehr, Penny Smiley, and Staff Sergeant Allison Bevington, to request that she speak at the Women and Leadership Forum, which she refers to in her Affidavit and report.
31. I recall Ms. Hogarth being critical of the appointment of Donna Mancuso, as WRPS first Inclusion and Equity Officer, saying that she was a "disciple of other senior officers" and may not be the best candidate. At the time I thought that this was a very strange comment and it now seems clear to me that she was receiving information from the Plaintiff, Barry Zehr, since she would not have known the identity of these other senior

officers, and their relationship to Donna Mancuso. Again, the context of any discussions about the Inclusion and Equity Officer was centered around racial diversity issues. The education and training assistance that was offered by Ms. Hogarth, as set out in paragraph 14 of her Affidavit, was related to systematic discrimination based on racial discrimination, not gender discrimination. In any event, given the apparent lack of support of Kathy Hogarth to the appointment of Donna Mancuso as the Inclusion and Equity officer, I did not follow up with Ms. Hogarth following that conversation and made the decision that Inspector Mancuso would be better to deal with these issues internally, and based on her own initiatives.

32. The allegation in paragraph 15 of Ms. Hogarth's Affidavit, that there were only two women in the large senior management team of the WRPS is simply wrong, and I don't know where she got that information. As seen by the charts attached as "Exhibit C" to my Affidavit, there is significant progress being made in gender diversity in our Senior Management Team.

**THE REPRESENTATIVE PLAINTIFF, ANGELINA RIVERS (CEA)**

33. Ms. Rivers, under the name Cea, made a complaint of sexual discrimination and sexual harassment in August of 2015, to the human resources division of WRPS, which was taken very seriously and prompted an internal investigation in accordance with our policies and procedures. The WRPS hired an independent lawyer, Lauren Bernardi, of Bernardi Human Resource Law LLP, to conduct an external and independent investigation. As a result of this independent investigation, the individual male officer that was the subject of the complaint was found guilty of a charge of discreditable conduct,

pursuant to the *Police Services Act*, and disciplined under our normal policies and procedures. The WRPS would have had a meeting with Ms. Rivers to discuss the findings set out in the Bernardi report and to resolve her complaint (including advising her of the discipline imposed on the subject of her complaint), but when she was contacted (in October of 2016) so that a meeting could be scheduled with the Director of Human Resources, Lauren Bernardi and Shirley Hilton (the then Inspector of Professional Standards), Ms. Rivers refused, citing that she was sick and that for medical reasons, she could not meet. Ms. Rivers' has been on 100% employer paid sick leave from WRPS since July 29, 2015.

34. Contrary to the allegations set out in paragraph 28 of Ms. Rivers' Affidavit, she does in fact have a copy of the Bernardi report and in fact has quoted from it in this proceeding and publicly, which my counsel advises me is in complete breach of what is referred to as, the Deemed Undertaking Rule.
35. Ms. Rivers filed a complaint with the Human Rights Tribunal of Ontario in 2016. The mediation for Ms. Rivers' complaint was scheduled for December 18, 2017, but at the request of Ms. Rivers and her counsel, they cancelled the mediation and are now seeking to have the hearing cancelled or stayed until it is determined if she can proceed with her claims as a Representative Plaintiff in the class action. The WRPS is opposing this request to stay the HRT. Attached hereto as "Exhibit K" to this my Affidavit is the email chain dated December 15, 2017, to the HRT from Ms. Rivers' counsel in that proceeding and the counsel of the WRPSB in that proceeding.

36. It is the position of the Defendant, WRPSB, that the Plaintiff, Angelina Rivers (aka Cea), with her HRT0 outstanding and in fact now refusing to proceed with the scheduled hearing of her Complaint before the HRT0 which is a preferable procedure for the resolution of any issues, which are identical to the issues raised in the Statement of Claim, and is therefore not a proper Representative Plaintiff, completely separate and apart from the jurisdiction of the Superior Court of Justice to deal with the proposed class action.

**THE REPRESENTATIVE PLAINTIFF, SHARON ZEHR**

37. The allegations made by Ms. Zehr of gender based discrimination and sexual harassment and bullying are at least 26 years old, and there is no evidence that she ever complained about any of these incidents or issues while in the employ of the WRPS, or at any time subsequent to the issuance of the current Statement of Claim.
38. I note that in paragraph 17(c) and (d) of Ms. Zehr's Affidavit, that when she subsequently had complaints with respect to sexual harassment and gender discrimination, following her leaving her employment at Wilfred Laurier University in 2006, she made a specific complaint to the Human Rights Tribunal of Ontario and had her complaint successfully resolved at that time by way of a settlement.
39. When the WRPS received a copy of the Statement of Claim, issued May 30, 2017, on the basis that the allegations in paragraph 52 of that claim potentially disclosed sexual assaults, the WRPS, as they are mandated to do, reported these incidents to the Special Investigations Unit of the Ministry for investigation. I am advised by Staff Sergeant David MacMillan, of our Professional Standards Branch, that on June 2, 2017, he

emailed the Statement of Claim to Oliver Gordon, at the Special Investigations Unit (“SIU”), specifically drawing his attention to paragraph 52. He was subsequently contact by Mr. Gordon on June 5, 2017, and advised that the SIU had sent a letter to Plaintiff’s counsel in this action inquiring if they wished to speak to them, and whether or not they were alleging sexual assaults in the Statement of Claim. In a subsequent follow up by Staff Sergeant MacMillian to Mr. Gordon, on October 2, 2017, he was advised that the SIU had not received any response from Plaintiff’s counsel to their proceeding to investigate the alleged sexual assaults, and had therefore closed their file.

40. For whatever reason, Ms. Zehr does not seem to want to pursue other preferable and available remedies to deal with the issues set out in the Statement of Claim.

**THE REPRESENTATIVE PLAINTIFF, BARRY ZEHR**

41. The Plaintiff, Barry Zehr, is an alleged *Family Law Act* Plaintiff, whose claims are derivative from any claims of his spouse, Sharon Zehr.
42. It is correct that Mr. Zehr was employed by the WRPS from April 12, 1987 to April 16, 2017, when he retired from his position as Superintendent. He had previously been a Superintendent of Human Resources from November 2008 to November 2013.
43. There are many allegations and statements made by Mr. Zehr in his Affidavit, and alleged in the Statement of Claim, which are incorrect and will be denied in an eventual Statement of Defence if this action proceeds.
44. It is not correct that Mr. Zehr brought forward issues about gender equality while part of the Senior Management Team. I certainly recall him speaking to him on occasion,

speaking about racial diversity, but I never recall him raising a gender issue at a Senior Leadership team meeting. We had assigned a female acting Inspector for Mr. Zehr to mentor his feedback was not positive of her abilities. He was also critical of his only female Inspector when he was serving as the Neighbourhood Policing Superintendent.

45. I have specifically reviewed paragraphs 11, 12, and 13, of Mr. Zehr's Affidavit dealing with the alleged "Lamport" issue. I was not the Chief of Police at the time, but having reviewed the files I can confirm that Greg Lamport was disciplined for substantiated misconduct, but which had nothing to do with the gender issues or any issues raised in this current action. Upon Greg Lamport subsequently being promoted, contrary to the allegations contained in Mr. Zehr's Affidavit, a female officer was promoted to be the first female Staff Sergeant of the Emergency Responsive Unit (ERU) and that individual has subsequently been promoted to be an Inspector.
46. I do not understand the relevance of the Lamport issue since it has nothing to do with the issues raised in this litigation. It now appears from my review of Mr. Zehr's most recent Affidavit, where he has included portions of the Investigative Report dealing with Greg Lamport, that he was improperly and illegally taken this Report from the WRPS and produced it along with the other information in his Affidavit in direct violation of S.95 of the *Police Services Act*, which provides:

*"Confidentiality*

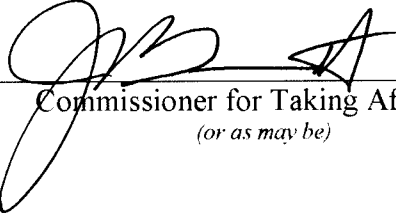
*95. Every person engaged in the administration of this Part shall preserve secrecy with respect to all information obtained in the course of his or her duties under this Part and shall not communicate such information to any other person except,*

- (a) As may be required in connection with the administration of this Act and the regulations;*
- (b) To his or her counsel;*
- (c) As may be required for law enforcement purposes; or*
- (d) With the consent of the person, if any, to whom the information relates."*

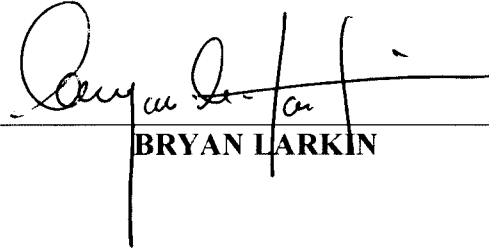
47. Contrary to the allegations in Mr. Zehr's Affidavit, rather than being a champion of women's rights, and taking steps to deal with gender equality and sexual harassment, he admits that he encouraged Sharon Zehr not to come forward to pursue any complaints with respect to her allegations of discrimination and sexual harassment.
48. In January of 2017, prior to his retirement in April of 2017, I recall being approached by Barry Zehr, asked whether I was going to approach the Defendant, WRPSB, with respect to an early buyout and retirement package for Senior Staff such as himself. I told Mr. Zehr that as a Senior Officer he was doing a good job, but that there was no justification or reason to request an early retirement and buyout. Certainly, Mr. Zehr did not communicate to me in any way the allegations set forth in paragraph 39(b) of his Affidavit, that he was demoralized. I recall him saying, I have "boulders on my shoulders", but when I pressed him to elaborate he did not want to and would not share any information or explain. He did not take early retirement as he eludes to in paragraph 40 of his Affidavit, but retired with a full unreduced pension, at 30 years of service, as almost all officers in the employ of WRPS do.
49. Unfortunately, serious issues were uncovered by the WRPS surrounding Mr. Zehr's departure from our employment which constituted a serious breach of his employment contract, his fiduciary duties as a police officer, and a contravention of his Oath of Office.

50. Upon leaving his employment, Mr. Zehr completely erased all files on the hard drive of his computer. He also recalled, from storage, all of his police notebooks, which are the property of Waterloo Regional Police Services, and took them from the premises. Attached hereto and marked as "Exhibit L" to this my Affidavit is a true copy of the letter sent by counsel for the WRPSB to Plaintiff's counsel, dated October 17, 2017. Similarly, Ms. Rivers' had also improperly taken her notebooks and provided them to Plaintiff's counsel.
51. The original notebooks and other files taken by Mr. Zehr were only returned directly to the WRPS by courier on October 31, 2017, but there remains a serious problem in that, as requested, Plaintiff's counsel has refused to return all copies of the notebooks that were made. Certain pages from the notebooks were also removed. This causes a serious problem with respect to the confidential contents of the police notebooks, and the chain of their custody, since they contain protected and confidential information in no way connected to the class action, such as confidential informants, past and/or ongoing investigations, references to young persons, all of which is in contravention of the legislative provisions of the *Youth Criminal Justice Act*, *Police Services Act*, *Municipal Freedom and Information and Protection of Privacy Act* and/or *The Personal Health Information Protection Act*. It may be that by improperly copying and reviewing all of the notebooks, Plaintiff's counsel has put themselves in a conflict of interest and the Defendant, WRPSB, is currently considering whether it will become necessary to bring a Motion to have them removed as the Lawyers of Record for the Plaintiffs in this proceeding and for a Court Order to be obtained to compel the return of all copies made of the notebooks.

**SWORN BEFORE ME** at the City of  
Kitchener, in the Regional Municipality of  
Waterloo on ... December 21st 2017 }

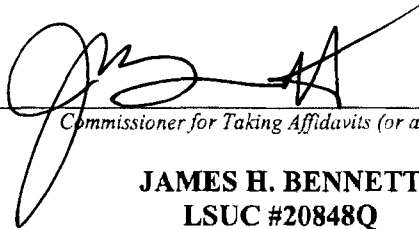


Commissioner for Taking Affidavits  
(or as may be)



**BRYAN LARKIN**

This is Exhibit "F" referred to in the Affidavit of Bryan Larkin  
sworn December 21, 2017



Commissioner for Taking Affidavits (or as may be)

**JAMES H. BENNETT**  
**LSUC #20848Q**

## Police Officer Initiated Ontario Human Rights Complaints

NAME	GROUND FOR DISCRIMINATION	RESOLUTION
Angie Cea (a.k.a. Rivers)	<ul style="list-style-type: none"> <li>Disability</li> <li>Sex, including sexual harassment &amp; Pregnancy</li> <li>Sexual solicitation or advances</li> </ul>	ON GOING
Female Constable	<ul style="list-style-type: none"> <li>Sex, including sexual harassment and pregnancy</li> <li>Marital status</li> </ul>	SETTLED <ul style="list-style-type: none"> <li>monetary settlement</li> <li>withdrawal of OHRT application</li> <li>voluntary resignation</li> </ul>
Female Constable	<ul style="list-style-type: none"> <li>employment (rate of pay, denied promotion, discipline)</li> <li>sexual harassment (comments, displays, jokes, poisoned work environment, denied accommodation or modified work in the workplace)</li> </ul>	WITHDRAWN <ul style="list-style-type: none"> <li>Tribunal directed Summary Hearing to determine if application should be dismissed on basis there was no reasonable prospect that Application would be successful – withdrawn prior to hearing)</li> </ul>

Female Sergeant	<ul style="list-style-type: none"><li>• Disability</li><li>• Sex including sexual harassment, pregnancy, gender identity</li><li>• Reprisal or threat of Reprisal</li><li>• Discrimination in employment on basis of sex and disability</li><li>• Discrimination in discipline</li><li>• Discrimination in comments, displays, jokes, harassment, poison environment, sex harassment, solicitation or advances</li><li>• Denied workplace opportunity</li><li>• Denied employment benefits</li><li>• Denied necessary accommodation or modified work</li></ul>	SETTLED <ul style="list-style-type: none"><li>• monetary settlement</li><li>• withdrawal of Application</li></ul>
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**TAB I**

**THIS IS EXHIBIT "T" REFERRED TO IN THE AFFIDAVIT OF LAURA J. FREITAG  
SWORN BEFORE ME THIS 9th DAY OF February, 2021.**



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**A COMMISSIONER FOR TAKING AFFIDAVITS**



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

**Application for  
 Contravention of Settlement – Rule 24  
 Form 18**

**Information for all parties who receive a copy of this Application for Contravention of Settlement:**

You may respond to this Application for Contravention of Settlement by completing a *Response to an Application for Contravention of Settlement (Form 19)*.

**Follow these steps to respond:**

1. Fill out Form 19.
2. Deliver a copy of Form 19 to each party to the settlement.
3. Complete a *Statement of Delivery (Form 23)*.
4. File Form 19 and Form 23 with the Tribunal.

You must file your Response to an Application for Contravention of Settlement **14 days** after the Application for Contravention of Settlement was delivered to you.

Download forms from the Forms & Filing section of the HRTO web site at [www.sjto.ca/hrto](http://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](mailto:hrto.registrar@ontario.ca)



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

**Application for  
 Contravention of Settlement – Rule 24  
 Form 18**

Application Information	
Tribunal File Number:	
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 Virginia		Last (or Family) Name Torrance		Organization (if applicable) WRPS	
Street Number 200	Street Name Maple Grove Road			Apt/Suite P.O. Box 3070	
City/Town Cambridge		Province Ontario	Postal Code N3H 5M1	Email virginia.torrance@wrps.on.ca	
Daytime Phone 519-650-8552	Cell Phone		Fax 519-650-8551	TTY	

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 the:

- ☒ Applicant ☐ Respondent ☐ Ontario Human Rights Commission  
☐ Other - describe: \_\_\_\_\_

**2. Representative Contact Information**

☒ I authorize the organization and/or person named below to represent me.

First (or Given) Name Donald		Last (or Family) Name Jarvis			
Organization (if applicable) Filion Wakely Thorup Angeletti LLP					LSUC No. (if applicable) 28483C
Street Number 333	Street Name Bay Street			Apt/Suite Suite 2500	
City/Town Toronto		Province ON	Postal Code M5H 2R2	Email djarvis@filion.on.ca	
Daytime Phone 416-408-5516	Cell Phone		Fax 416-408-4814	TTY	

What is the best way to send information to your representative? ☐ Mail ☒ Email ☐ Fax  
 (If you check email, you are consenting to the delivery of documents by email.)



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

**Application for  
 Contravention of Settlement – Rule 24  
 Form 18**

**3. Contact Information for the Other Parties to the Settlement**

Name and provide contact information for all of the other parties to the settlement. If the other party is an organization complete **a) Organization**. If the other party is an individual complete **b) Individual**.

**a) Organization**

Full Name of Organization  
 Waterloo Regional Police Association

Name of the person within this organization who is authorized to negotiate and bind the organization with respect to this application:

First (or Given) Name Caroline V. (Nini)		Last (or Family) Name Jones		Title Solicitor	
Street Number 155	Street Name Wellington Street			Apt/Suite 35th Floor	
City/Town Toronto		Province ON	Postal Code M5V 3H1	Email nini.jones@paliareroland.com	
Daytime Phone 416.646.7433	Cell Phone		Fax 416.646.4301	TTY	

**b) Individual**

First (or Given) Name Kelly		Last (or Family) Name Donovan	
Street Number 11	Street Name Daniel Place		Apt/Suite
City/Town Brantford		Province ON	Postal Code N3R 1K6
Daytime Phone 519-209-5721		Cell Phone	Fax
			TTY

**4. What is the date of the last alleged contravention or breach of the settlement?**

Ongoing. (dd/mm/yyyy)

**5. If you are applying more than six months from the last alleged contravention, please explain why:**

See Schedule "A".



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

**Application for  
 Contravention of Settlement – Rule 24  
 Form 18**

**6. What term of the settlement do you allege has been contravened or breached? Provide all the material facts you are relying upon to support your claim that the settlement has been contravened or breached.**

See Schedule "A".

**7. Explain what remedy you wish the HRTTO to provide.**

See Schedule "A".

**8. Declaration and Signature**

**Instructions:** Do not sign your application until you are sure that you understand what you are declaring here.

**Declaration:**

To the best of my knowledge, the information in my Application for Contravention of Settlement is complete and accurate.

I understand that information about my Application for Contravention of Settlement can become public at a hearing, in a written decision, or in other ways determined by HRTTO policies.

I understand that the HRTTO must provide a copy of my application to the Ontario Human Rights Commission on request.

I understand that the HRTTO may be required to release information requested under the *Freedom of Information and Protection of Privacy Act* (FIPPA).

Name:

Donald B. Jarvis

Signature:

*Donald Jarvis*

Date: (dd/mm/yyyy)

28/06/2018



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

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**SCHEDULE "A" TO FORM 18**  
**(CONTRAVENTION OF SETTLEMENT)**

BETWEEN:

**THE REGIONAL MUNICIPALITY OF WATERLOO POLICE SERVICES BOARD**

Applicant

- and -

**KELLY DONOVAN**

Respondent

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## I. INTRODUCTION

1. This is an application by the The Regional Municipality of Waterloo Police Services Board (hereinafter referred to as the “WRPSB” or the “Board”) for an order for enforcement of the Resignation Agreement in which the parties voluntarily settled the Applicant’s application to the HRTO dated June 3, 2016, and having Tribunal File Number 2016-24566-I (the “HRTO Application”).

## II. THE PARTIES

2. The WRPSB is an agency created under the *Police Services Act*, RSO 1990, c P-15 (“PSA”) that is responsible for the provision of adequate and effective police services to The Regional Municipality of Waterloo (including the cities of Kitchener, Waterloo and Cambridge).
3. Kelly Donovan commenced employment with the WRPSB in or around 2010. She was, at all material times, represented by The Waterloo Regional Police Association in respect of her employment with the WRPSB.

## III. BACKGROUND

### A. *The HRTO Application*

4. On or about June 6, 2016, Ms Donovan filed the HRTO Application alleging that she was discriminated against on the basis of sex and marital status. A copy of the HRTO Application is attached at **Tab 1**.
5. The foundation for Ms Donovan’s claim of alleged discrimination was a series of events that began with Ms Donovan’s delegation (or presentation) to the WRPSB on or about May 4, 2016.
6. The WRPSB is a civilian board that oversees the Waterloo Regional Police Service (the “WRPS” or the “Service”). The WRPSB is tasked with ensuring that the community is policed effectively, and that any and all policing standards are complied with.
7. Ms Donovan’s delegation to the Board on or about May 4, 2016 was regarding Ms Donovan’s belief that the Service was investigating domestic violence inconsistently

where members of the Service were involved, either as alleged victims or as alleged perpetrators. Members of the public as well as the media were present during Ms Donovan's delegation. As set out in her HRTO Application, "I presented this delegation because I believed there were serious issues of inconsistency during internal investigations, authorized by Chief Bryan Larkin". Ms Donovan identified herself as a police officer; referred to confidential information contained in a Crown Brief; criticized the Service and members of the Service; and suggested that police officers of the Service may have suppressed evidence in a criminal investigation.

8. Ms Donovan's delegation was predominantly focused on the Service's investigation of allegations against Sergeant Bradley Finucan, though Ms Donovan also referred to the Service's investigation of a complaint she made on behalf of an unnamed friend relating to alleged criminal harassment by an unnamed officer of the WRPS, as well as the Service's criminal investigations of Constable Jeremy Snyder.
9. Ms Donovan's actions in making a delegation to the Board at its open and public meeting and with media present on May 4, 2016, without prior notice or approval from the WRPS Chief of Police (or an appropriate delegate in the chain of command), and the serious allegations made against other members of the Service (including the investigators of the Finucan matter that ended in a criminal guilty plea) and potentially accessing a protected Crown Brief in the Finucan matter may have constituted misconduct under the *PSA*. Further, because of the extremely serious nature of the allegations Ms Donovan had made regarding the Service's investigations of domestic violence, the WRPS determined that it would be appropriate to ask another police service to conduct an independent review of the Service's investigation of Sergeant Finucan.
10. Ms Donovan also made it clear, due to the fact that her time for making her deputations ran out, that she would be re-attending the next Board meeting in June to complete her delegation.
11. On or about May 11, 2014, Ms Donovan met with Inspector Doug Thiel and Acting Inspector John W. Goodman, Professional Standards. At that meeting, Inspector Thiel issued a Directive to Ms Donovan directing that:

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- Ms Donovan not appear before the Board without the permission of the Chief of Police;
  - Ms Donovan notify the Board's secretary via email that she would be cancelling her appearance at the July 2016 Board meeting;
  - Ms Donovan cooperate with the external review process by participating in interviews and providing information in support of her allegations to investigators; and
  - Ms Donovan be assigned to administrative duties (unless she preferred to be transferred to Patrol duties), and would not participate in the direct training of any Service members during the external review and during any pending *PSA* investigation.
11. At the same meeting, Ms Donovan was also issued a formal Notice of Investigation by Acting Inspector Goodman advising that, subject to and following an external review of the substance of Ms Donovan's allegations, Ms Donovan's conduct on May 4, 2016 would be investigated to determine whether her actions breached the *PSA* and constituted discreditable conduct, neglects of duty, and/or breaches of confidence. In her HRT0 Application, Ms Donovan characterized the *PSA* Investigation as "bullying" and intimidation in response to her delegation.
12. Notably, despite Ms Donovan's meeting with Inspector Thiel and Acting Inspector Goodman during which she had been expressly directed not to appear before the Board, Ms Donovan subsequently sent an email to members of the Board advising that she had been served with a Directive and a Notice of Investigation. Ms Donovan also asserted that her actions were above reproach and that she had no personal interest in any of the matters she brought to the Board's attention. Ms Donovan was subsequently served with a second Notice of Investigation on May 31, 2016 in relation to her email to members of the Board. This notice indicated that an investigation would be conducted to determine whether Ms Donovan's actions constituted deceit and/or discreditable conduct under the *PSA*. Once again, the Notice of Investigation ordered Ms Donovan not to have any contact with members of the Board without the permission of the Chief of Police.
13. On or about June 2, 2016, Ms Donovan filed an internal complaint alleging that she had been discriminated against and harassed contrary to the *Human Rights Code* and WRPS

policy by various members of the Service in connection with her delegation. These allegations were repeated in the HRTTO Application.

14. In response to Ms Donovan's delegation to the Board and subsequent discrimination and harassment complaints, the WRPS took the following steps:
  - (a) On or about May 25, 2016, Chief Larkin requested York Regional Police ("YRP") review the criminal investigation of Sergeant Finucan to ensure that the incident had been properly investigated. The YRP's external review was completed on or about August 12, 2016. The YRP investigator concluded that the Service had conducted a full, fair and transparent criminal investigation against Sergeant Finucan, and that the Service had reasonable grounds to arrest and charge Sergeant Finucan.
  - (b) On or about July 12, 2016, the Board retained Lauren Bernardi of Bernardi Human Resource Law LLP to conduct an independent, third party investigation into Ms Donovan's internal harassment and discrimination complaint.
15. On consent, by letter dated July 25, 2016, the HRTTO placed the HRTTO Application in abeyance pending the conclusion the internal investigation processes.
16. During the period of deferral, the WRPS took the following additional steps in response to Ms Donovan's delegation to the Board and subsequent internal discrimination and harassment complaint:
  - (a) On or about November 29, 2016, the Service commenced an internal review of the allegation Ms Donovan had made during her delegation to the Board in respect of the Service's investigation of a reported harassment incident relating to a friend of Ms Donovan and a member of the Service. In April 2015, Ms Donovan reported that her friend was being repeatedly contacted by a member of the Service with whom her friend had previously been in a romantic relationship. Ms Donovan's report was investigated at that time, though Ms Donovan's friend did not wish to make a complaint. In any event, an internal review of the April 2015 report was conducted by Investigator Sergeant Greg Fiss of the Domestic Violence Unit commencing on or about November 29, 2016. Investigator Fiss

found that the appropriate procedures had been followed by the Service in investigating the April 2015 report. This internal review was completed on or about January 16, 2017.

- (b) As a result of a law suit commenced by Constable Jeremy Snyder arising out of his acquittal following a criminal trial for sexual assault, the Board had already had a review done and received an independent report, subject to solicitor-client privilege and litigation privilege – the existence of which was well-known to Constable Snyder. In addition, Constable Snyder was actively involved in another criminal prosecution (this time for domestic assault, mischief and threats) that resulted in a withdrawal of charges and peace bond, but was still outstanding at the time of Ms Donovan's deputations to the Board. On January 10, 2017, Constable Snyder pleaded guilty to Discreditable Conduct under the *PSA* arising out of the underlying incidents of the criminal charges.
  - (c) The independent, third-party investigation into Ms Donovan's internal harassment and discrimination complaint was concluded in October 2016. Ms Bernardi's report was issued on October 31, 2016, and was shared with counsel for Ms Donovan on or about November 27, 2016. Ms Bernardi found that there had been no discrimination based on sex, and that no members of the Service had engaged in any form of harassment. What is more, Ms Bernardi noted that it was reasonable in the circumstances for the Service to take the position that an investigation into Ms Donovan's conduct in making a delegation to the Board was warranted.
- 17. On or about December 14, 2016, Ms Donovan requested that her HRTO Application be reactivated.
  - 18. The WRPSB opposed Ms Donovan's request to reactivate her Application, taking the position that the Application should continue to be deferred pending the conclusion of an ongoing investigation under the *PSA* and any disciplinary proceeding that may arise in the event that charges were laid against Ms Donovan under the *PSA*. Ms Donovan had made serious allegations against other members of the Service and may have improperly accessed and publicly shared details from a protected Crown Brief in the Finucan matter,

all of which needed to be investigated to determine whether such actions were neglects of duty, breaches of confidence, discreditable conduct and/or deceitful.

19. The Service had reasonable and demonstrable grounds to investigate Ms Donovan's conduct on and following May 4, 2016 and to determine whether charges under the *PSA* were necessary and appropriate. This investigation, by consent of Ms Donovan's counsel, was deferred pending the completion of the internal Harassment and Discrimination investigation and the final report regarding the independent review conducted by the YRP of the Finucan matter.
20. A *PSA* investigation is a statutorily mandated employment misconduct and discipline system. In this case, it was to cover the same facts and underlying allegations made by Ms Donovan in her HRTTO Application under the *Code*. In addition, the determination of whether Ms Donovan had engaged in misconduct under the *PSA* would have borne directly upon the Tribunal's assessment of the actions of the Service and the outcome of the HRTTO Application.
21. Furthermore, should the *PSA* allegations of misconduct have been considered of a serious nature or had Ms Donovan refused an informal resolution, the *PSA* mandated a hearing to take place that is subject to the *Statutory Powers and Procedures Act*. Such hearing is a public proceeding wherein all evidence filed, transcripts, and the decision itself are all public and may be filed in any subsequent proceeding.
22. The WRPSB, therefore, requested that the Tribunal defer the HRTTO Application pending the conclusion of the *PSA* investigation and, in the event that charges were laid against Ms Donovan, any resulting disciplinary proceeding under the *PSA*.
23. By decision dated February 17, 2017, the HRTTO found that the issues "while not co-extensive, significantly overlap such that all of the concerns with duplicative concurrent litigation are in play". Accordingly, the HRTTO deferred the HRTTO Application for 60 days or such shorter time period in which a decision was made as to whether or not more charges ought to be brought against Ms Donovan under the *PSA*.
24. However, the WRPSB was not able to reach a final decision regarding whether to bring charges against Ms Donovan within the 60 day period due to a necessary interview with

Ms Donovan being repeatedly rescheduled and delayed to accommodate Ms Donovan's medical condition(s).

25. In the result, the HRTTO Application was deferred by HRTTO letter dated May 5, 2017 for a further period of 60 days.

**B. *Settlement of the HRTTO Application: The Resignation Agreement***

26. During the period of deferral, the parties successfully negotiated a Resignation Agreement to "fully resolve and settle the two outstanding matters between them, namely: (a) the application filed by Donovan with the Human Rights Tribunal of Ontario ("HRTTO") on or about June 6, 2016 and having HRTTO File No. 2016-245566-I (the "Application"); and (b) the Board's investigation into whether Ms Donovan engaged in misconduct in or about May 2016 sufficient to warrant formal charges against Donovan under the *Police Services Act* (the "Potential PSA Charges")".
27. Pursuant to the Resignation Agreement, Ms Donovan expressly confirmed that "she is freely and voluntarily resigning her employment with the Board effective on or about June 25, 2017" and that this resignation was "irrevocable".
28. Not only did the parties expressly agree that Ms Donovan resigned but the parties agreed to strict confidentiality provisions pursuant to which the parties undertook to keep the terms of the Resignation Agreement in absolute and strict confidence. The Resignation Agreement provided that "[i]f asked, the parties .... will indicate only that all outstanding matters between the parties were settled to their mutual satisfaction, the terms of which settlement are strictly confidential".
29. The Resignation Agreement also included a Full and Final Release pursuant to which Ms Donovan released and forever discharged "the Regional Municipality of Waterloo Police Services Board ...from any and all ...complaints...claims....which I have ever had...by reason of my employment with or the resignation of my employment with the Regional Municipality of Waterloo Police Services Board... or which arises out of or in any way relates to the matters giving rise to my HRTTO Application". Pursuant to the Full and Final Release, Ms Donovan further agreed that the Release could be raised as a complete bar to "any complaint against any of 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 my HRT0 Application”.

**IV. MS DONOVAN ENGAGED IN A CONTINUING SERIES OF VIOLATIONS OF THE RESIGNATION AGREEMENT**

30. Notwithstanding that two of the clear terms of the Resignation Agreement were that Ms Donovan freely resigned and she was prohibited from any further “complaints” against the WRPSB, Ms Donovan has engaged in a continuing series of violations of the Resignation Agreement by (a) stating that she was constructively dismissed contrary to the agreement that she resigned, (b) complaining about the Service and repeating the allegations giving rise to her HRT0 Application, and (c) violating the confidentiality provisions.

31. Ms Donovan’s violations of the Resignation Agreement appear to be part of a scheme to advertise and generate business for Fit4Duty, a business established by Ms Donovan, to provide:

- (a) training to police services boards regarding such matters as human rights, systemic racism and ethical leadership;
- (b) speaking engagements regarding Ms Donovan’s allegations, accountability, transparency, and ethics;
- (c) engagement strategies;
- (d) policy development and review services; and
- (e) workplace investigations.

Excerpts from the Fit4Duty website are attached at **Tab 2**.

32. Put simply, notwithstanding that she fully and finally resolved her HRT0 Application and the allegations therein and notwithstanding the undertakings of confidentiality, Ms Donovan is seeking to profit from her allegations without regard to either the undertakings in the Resignation Agreement or the deleterious impact of her actions on the reputation of the WRPS.

33. The particulars of Ms Donovan’s ongoing series of violations of the Resignation Agreement commenced with the publication of a 93-page book entitled “*Report of*

*Systemic Misfeasance in Ontario Policing and the Coordinated Suppression of Whistleblowers*". A copy of the Book is attached at **Tab 3** and is sold for \$25 on the Fit4Duty website at <https://fit4duty.ca/book>.

34. The Book appears to be intended, at least in part, to generate business for Fit4Duty which is advertised in the Executive Summary as being available to "heighten your Ethical Standard". The Book advertises Ms Donovan as follows at page 3:

"Kelly Donovan is available for speaking engagements, training, policy development, and whistleblower programs for both government and corporations. For more information visit [www.fit4duty.ca](http://www.fit4duty.ca)."

35. In effect, Ms Donovan's Book is a 93-page "complaint" against the WRPS and police services across the Province. Indeed, the Book repeats the allegations giving rise to the HRT0 Application. For example, the Book provides at page 10:

"It wasn't until 2015, that I witnessed misconduct during multiple internal investigations at my own police service and I soon learned that the issue was systemic. I witnessed police officers sweep allegations under the rug, violate internal policy, if they were about a favourable officer and I saw good, hardworking officers be humiliated and non-criminal allegations be stretched into homicide scale criminal investigations for officers who were not favourable. I became determined to address the mishandling of internal investigations and deficiencies in police legislation. I began my journey by addressing my police services board with my issues, since I had learned that my service does not permit members to file internal complaints. I was subsequently disciplined, constructively dismissed, my issues were not adequately addressed and I began to research just how often police services silence whistleblowers. I attempted to have the OCPC investigate my service for changing internal policy to no avail. I attempted to have the OIRPD investigate officers who conducted a negligent investigative review to no avail. I complained to the Human Rights Tribunal for the reprisal action taken against me and the Tribunal refused to intervene. I went as far as asking the Office of the Ombudsman to examine the systemic issues and to date, no oversight body has chosen to exercise their legislated authority or investigate. From the time I reported the issues to my Board (May, 2016), to the date of my resignation in June, 2017, the service has been more interested in attacking my credibility than acknowledging that these problems exist and show a true desire to improve."

36. At pages 74 to 77 of her Book, Ms Donovan set out a more detailed complaint regarding her personal experiences, repeating the allegations underlying the HRT0 Application, as follows:

"In 2015, Constable Kelly Donovan, a 6-year member of the Waterloo Regional Police Service (WRPS), witnessed misconduct by senior investigators at the WRPS by not following service procedure and failing to properly investigate criminal allegations against members of the WRPS. Donovan began to research avenues to address complaints of internal misconduct. Donovan learned that the WRPS procedure on Complaints had been changed in April, 2014, to no longer allow a member of the service to make a complaint through the chain of command. Donovan learned from Constable Jeremy Snyder that he had submitted an internal complaint following his acquittal from criminal charges in January, 2014, and had never received a response. Donovan learned that although the WRPS had prohibited members from making internal complaints there were no adequacy standards established by the Ministry requiring the WRPS to maintain such policy.

Donovan consulted with other officers during her off-duty time and determined that several issues existed at the service with the lack of identification of conflicts of interest during investigations, lack of policy on ethics and conflicts of interest, and overall inconsistency in the manner in which the service exercises discretion and investigates allegations against its officers. Donovan extensively researched current legislation and determined that the only manner to address concerns with the police service was through the police services board. Donovan was aware that the Board is legislatively responsible for the provision of adequate and effective police services in the municipality.

In May, 2016, Donovan addressed the WRPS Board by way of delegation regarding the inconsistencies in internal investigations. Throughout the ten minutes that Donovan was allowed to speak the Board remained in public session, it is at the Board's discretion to enter into a closed session.

A week later, Donovan was served with a Notice of Investigation for six PSA allegations, and directed by the Chief of the WRPS to no longer address the Board at future meetings. That same day, the Cambridge Times published an article about Donovan's delegation which stated that Chief Larkin assured the media "that the officer has a democratic right to vocalize her disapproval during the public session of the police board meeting." Larkin also questioned Donovan's decision to address the civilian board stating there are many mechanisms within the force and the union to call for change. Larkin added that investigations are done by "exemplary" and high-calibre members with input from the Crown Attorney's office.

Donovan sent an email to Board members to notify them of the reprisal action taken against her and was served with a second Notice of Investigation for doing so, including allegations of two further offences under the PSA. At that time, Donovan was ordered by the Chief to not communicate with members of the Board.

Donovan filed workplace harassment and human rights complaints immediately.

Donovan also filed a complaint with the OCPC regarding the change of service procedure by the WRPS to prohibit a member from making an internal complaint and regarding the conduct of members of the Board to suppress her complaints addressed in her delegation.

The WRPS hired a lawyer to complete the workplace harassment investigation. According to Donovan, this investigation was biased and did not objectively investigate her allegations or even deny them. The investigator focused much of her final report on the personal life of Donovan as opposed to Donovan's allegations of workplace harassment. The lawyer even stated in her report that Donovan was not a reliable witness because she deflected the questions regarding her personal life and attempted to refocus the interview on her allegations of harassment.

The WRPS contracted the York Regional Police Service (YRP) to conduct an investigative review of one of the criminal investigations cited in Donovan's delegation to the Board. Donovan was interviewed by the senior investigator from YRP and provided an extensive list of false statements made in court documents by WRPS investigators and victim, who was also a police officer. Donovan provided the YRP investigator with a list of exculpatory evidences that were known to investigators and which they failed to report in favour of the defendant.

...

Donovan's Human Rights Tribunal of Ontario (HRT) complaint had been deferred in July, 2016, upon consent. In December, 2016, (upon completion of her workplace harassment investigation and investigative review by York), Donovan applied to have the HRT matter resume. The WRPS objected and requested another deferral in order to prosecute Donovan under the PSA. Donovan cited several violations of her Charter Rights in her objection to the request by WRPS, alleging that a deferral of her HRT application is in essence permitting reprisal by the WRPS, further harassment and discrimination and denying her fundamental rights afforded to her by the Charter. In February, 2017, the HRT delivered a decision to allow WRPS the continued deferral of Donovan's Human Rights complaint. The HRT's decision did not address Donovan's allegations of violations of her Charter Rights or reprisal.

....

Failing the intervention by any independent agency into her matter, Donovan remained the subject of a PSA investigation. The misconduct reported by Donovan to the Board has never been objectively and impartially investigated.

Donovan did not receive any financial support from her Association and since May, 2016, had been forced to work in a toxic environment, doing nothing but administrative duties at a desk in a basement office at headquarters with no daylight. As of June, 2017, Donovan chose to resolve all matters between herself and the WRPSB in order to focus on starting her own business (Fit4Duty™) and

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moving on with her life. This ordeal cost Donovan over \$10,000.00 in legal fees.”

37. In addition to her personal complaints and the public repetition of the allegations and factual underpinnings of her HRT0 Application, Ms Donovan outlined in the Book various complaints about the treatment of others, including:
  - (a) At page 11, Ms Donovan wrote that in her policing career she “saw very qualified, confident and intelligent women come and go because they refused to remain in the toxic environment, impenetrable to change; that is policing”.
  - (b) Commencing at page 36, Ms Donovan complained about the conduct of the Chief of the WRPS in respect of his release of a personal email sent by Constable Craig Markham.
  - (c) At pages 54-55, Ms Donovan set out complaints against the WRPS in respect of matters regarding Constable Jeremy Snyder and Sergeant Bradley Finucan.
  - (d) At pages 57-58, Ms Donovan complained about the treatment of Rajiv Sharma by the WRPS.
38. Ms Donovan’s Book generated media attention, including the following:
  - (a) In an interview with 570 News, Ms Donovan is recorded as saying that the WRPS is attacking her credibility and failing to acknowledge the problems that exist. A copy the inquiry from 570 News is attached at **Tab 4**. A copy of the 570 News article dated July 17, 2017 is attached at **Tab 5**.
  - (b) A CBC report dated July 18, 2017 is attached at **Tab 6** and records Ms Donovan as alleging that she was subject to reprisals for raising issues with the WRPS regarding its handling of internal investigations.
39. Subsequent to the publication of her Book, Ms Donovan continued to make public complaints about the WRPS, repeating both the allegations giving rise to her HRT0 Application and the Potential *PSA* Charges and alleging that she was constructively dismissed. These complaints and allegations have been made in various public speaking engagements, communications with government and the media, and through social media (including her website, her LinkedIn account, her twitter account, Facebook (at fit4dutyanda) and YouTube). The particulars of this ongoing series of contraventions of the Resignation Agreement include the following.
40. In or about June 2017, Ms Donovan established a twitter account ([https://twitter.com/fit4duty\\_ethics?lang=en](https://twitter.com/fit4duty_ethics?lang=en)), which she has used as a forum to advertise

Fit4Duty and make complaints against the WRPS and other police services. For example, on April 25, 2018, Ms Donovan posted a tweet stating that she “exposed internal corruption” and that Chief was allowed to “silence” her and “take reprisal”. A copy of this tweet is attached at **Tab 7**.

41. In September 2017, Ms Donovan appeared before the WRPSB asking them to hire her to help train board members. In a CBC report regarding her presentation, Ms Donovan was reported as saying “officers who complain are treated unfairly and targeted by their superiors”. A copy of the CBC report is attached at **Tab 8**.
42. On or about November 14, 2017, Ms Donovan attended the Ryerson Forum on Police Oversight accountability and Public Consent at which she gave a video interview. During the interview, Ms Donovan stated that she addressed the Board about “corrupt practices”, “favoritism” and “abuse of power” which resulted in the Service taking “punitive action” against her and imposing discipline and she was “ultimately silenced”. A copy of the interview can be found on YouTube at <https://www.youtube.com/watch?v=PYEPmH4wV5U>.
43. On or about December 11, 2017, Ms Donovan presented to the Durham Regional Police Services Board regarding gender diversity and the services she provides through Fit4Duty. During her presentation, she alleged that when she raised allegations of “internal corruption” during her time as a police officer, she was “silenced and disciplined as a result”. Her presentation is available on YouTube at <https://www.youtube.com/watch?v=VPlIMYKa5Ag>.
44. By letter dated January 8, 2018, Ms Donovan wrote to the Honorable Yasir Naqvi, the Attorney General, alleging that she has “personal knowledge of the issues at WRPS” and holding him responsible for ensuring that “this misfeasance does not continue, and that those committing these unethical and illegal acts are held accountable”. Attached to her letter is a detailed complaint against the WRPS repeating the allegations giving rise to her HRTO Application. A copy of Ms Donovan’s letter is attached to her submissions to the Standing Committee on Justice Policy in respect of Bill 175, An Act to implement measures with respect to policing, coroners and forensic laboratories and to enact, amend

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or repeal certain other statutes and revoke a regulation ("Bill 175"), which are set out at **Tab 9**.

45. On February 22, 2018, Ms Donovan appeared before the Standing Committee on Justice Policy in respect of Bill 175. During her presentation, Ms Donovan made numerous allegations against the WRPS, repeated the allegations underlying the HRTO Application and alleged that she had been constructively dismissed. A copy of her submissions is attached at **Tab 9** and a copy of the transcripts are at **Tab 10** (commencing at page JP-667). The allegations in her oral presentation include:

**"Ms. Kelly Donovan:** Thank you. My name is Kelly Donovan and up until June 2017, I was a police officer with Waterloo Regional Police....

**During my time at Waterloo, I witnessed misfeasance during internal investigations of other police officers at the service; more specifically, unlawful arrest of members, corrupt investigations and criminal allegations being overlooked.**

Waterloo only allows members of the public to make a complaint of misconduct, and the OIPRD does not accept complaints from police officers. Therefore, I made a lawful delegation to my police services board to disclose the misconduct of several high ranking members of the service and, as a result, I was disciplined and silenced.

Chief Bryan Larkin ordered me to have no further contact with members of the board. I was relegated to administrative duties and I was put under investigation for eight Police Services Act charges. There was never a complaint from a member of the public; this was the result of a chief's complaint. **Over the next 14 months, I was constructively dismissed. Chief Larkin used the Police Services Act to silence me so that I could no longer disclose to the board the unethical conduct happening within the service.**

Following my delegation to the board, another police service was contracted to conduct an impartial review of a recent internal criminal investigation. That review was negligent and biased, and is irrefutable evidence that when police investigate police, there is bias.

During my constructive dismissal, I wrote a 93-page report citing cases that show just how systemic misfeasance is in Ontario police services and how often police chiefs and ineffective oversight bodies are able to silence police whistleblowers. This report is contained in tab A of my submission. I made complaints to all of

the applicable police oversight bodies and none of them chose to enforce their legislated authorities.

....

The lack of consultation prior to the release of Bill 175 shows a continued reluctance by government to accept the gravity of internal corruption that exists within our police services.

I am living proof that internal corrupt practices are eliminating good, honest people from the profession. I was an exemplary police officer until Chief Larkin used internal discipline to constructively dismiss me. Nothing in Bill 175 would prevent what happened to me from happening again to another honest police officer. In fact, after I was diagnosed with post-traumatic stress disorder last February, I could have faced termination under part VII of schedule 1.”

[emphasis added]

46. On or about March 1, 2018, Ms Donovan again addressed the Standing Committee on Justice Policy about Bill 175. At this presentation, Ms Donovan presented on behalf of Angie Rivers and repeated various complaints and allegations against the WRPS. Without limitation, she alleged that she reported “internal corruption” and, as a result, the Chief “targeted” her, she faced *PSA* charges, and she was “constructively dismissed”. She later elaborated that she reported corruption to her Board and instead of listening they allowed the Service to come after her “punitively”. She further stated that the Human Rights Tribunal did not help her. A copy of the transcripts is attached at **Tab 11** (see pages JP-718 to JP-720).
47. On or about March 5, 2018, Ms Donovan sent an email to various members of the WRPS attaching a link to her YouTube channel and her presentation to the Standing Committee on Justice Policy regarding Bill 175. A copy of her email is attached at **Tab 12**.
48. On or about March 7, 2018, Ms Donovan published an article on her LinkedIn account entitled “Perception of Bias? Or, Blatant, Advertised Bias”. The same article was posted on the Fit4Duty blog on March 10, 2018 (a copy of the article is attached at **Tab 13**). In the Article, Ms Donovan complained of corruption at the WRPS and alleged that she was constructively dismissed. She wrote, *inter alia*:

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"If you follow my material, you'll know that in 2016 I reported to my police services board that corruption existed during internal investigations. As a result of that report, I faced constructive dismissal. In 2017, I resigned and published a research paper to bring those systemic issues to light....

...

Now, police chiefs can use internal discipline, criminal charges AND the officer's disability as a means to dismiss them. I know this; because it happened to me."

49. In addition to the above, Ms Donovan has engaged in numerous speaking engagements across the country repeating her allegations of corruption, lack of integrity and constructive dismissal.
50. In addition to her linkedin and twitter accounts, Ms Donovan maintains a website "fit4duty.ca" and a blog (<https://fit4duty.ca/kelly-donovan>). She continues to use these to post complaints about the WRPSB, the particulars of which include.

- (a) On the "Her Story" section of the Fit4Duty website, Ms Donovan wrote:

"Fit4Duty Founder & President, Kelly Donovan, had been a police officer for 5 years when she witnessed corruption within her police service when conducting internal investigations. In May, 2016, Kelly addressed her Police Services Board since they are the oversight body responsible for the effective management of the police service.

The issues Kelly addressed were not objectively or impartially investigated and she became the subject of the very corrupt internal investigation process she had originally addressed.

Over the next 14 months, Kelly contacted every government agency responsible for police oversight to draw attention to the reprisal she was now facing and no agency was willing to intervene. Kelly was forced to resign from policing, after facing a protracted and corrupt discipline proceeding that would have lasting effects on her career. She released a report to the media detailing the corruption in policing, and later published her first book."

- (b) On January 31, 2018, Ms Donovan posted a blog entry entitled #MeToo, but #NotYou" in which she alleged corruption and threats by the WRPS. She wrote:

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"When I came forward with allegations of corruption during internal investigations, I was threatened with charges and taken out of my job.

...

Well, when I chose to go public with my Report in July, 2017, I did so because I had investigated just how often that is not the case. Our laws around transparency and disclosure by police services are so out of date and inadequate that police services have been able to use the Oath of Secrecy as a way to silence victims, silence witnesses, and allow total autonomy of leadership. What was once an Oath to protect members of the public from ever having their interactions with police exposed, has evolved into a breeding ground for internal corruption and selective suppression of information. No one can tell me I'm wrong; I have lived it. And the actions the Waterloo Regional Police Service took against me cannot be disputed."

- (c) On February 4, 2018, Ms Donovan posted a blog entry entitled "Are all Whistleblower Programs created equal?" in which she implied that the WRPS suppresses complaints and punishes complainants.
- (d) On or about March 10, 2018, Ms Donovan posted the above mentioned blog entitled "Perceived Bias? or Blatant advertised Bias?"
- (e) On April 5, 2018, in a blog entry entitled "The \$1.27M "Bad Apple?"", Ms Donovan accused the WRPS of misfeasance and wasting taxpayer funds and "ineffective management". She also referred to policing as "one of the most toxic work environments".
- (f) On May 11, 2018 in a blog entry entitled, "What Policing Culture is Doing to Good People" Ms Donovan alleged that the WRPS knowingly tolerated unprofessional and sexual interactions in the workplace:

"Luckily, I never had to deal with any physical advances when I was a "PW" (police woman - common nickname for female constables). But, to say that there wasn't locker room banter in the briefing room, commentary about women encountered the night before, discussions better left for the bar than a professional workplace... I'd be lying. Policemen have been very comfortable in their work environments, absent the need to act professionally or careful to not offend anyone. No one listening was going to do anything about it, and the women were "good sports" and "sucked it up." Some of them are having a very hard time adjusting to a new day where police are professionals and expected to act as such."

51. Ms Donovan also has a YouTube Channel (Fit4Duty – the Ethical Standard) in which she regularly posts videos including allegations of impropriety by the WRPS and complaints of constructive dismissal, the particulars of which include:
- (a) On July 9, 2017, Ms Donovan published a video entitled “Fit4Duty Intro” in which Ms Donovan alleged that maintaining her integrity and following her internal morals and ethics cost her her career as a police officer.
  - (b) On November 24, 2017, Ms Donovan published a video entitled “Fit4Duty Founder Kelly Ms Donovan’s Story” in which she alleged that she was silenced, charged and lectured as a result of having raised issues of impropriety in the Service.
  - (c) On December 11, 2017, Ms Donovan published a video of her presentation to the Durham Regional Police Services Board in which she stated, *inter alia*, that she “tried to address internal corruption with my police services board and I was silenced and disciplined as a result”.
  - (d) On February 23, 2018, Ms Donovan published a video of herself speaking at the public consultation hosted by Justice Tulloch during the Independent Police Oversight Review in October 2016 as well as a video of her presentations to the Standing Committee on Justice Policy about Bill 175.
  - (e) On March 2 and 5, 2018, Ms Donovan published various videos including portions of her presentations to the Standing Committee on Justice Policy about Bill 175.
  - (f) On March 5, 2018, Ms Donovan also published a series of video clips collectively entitled “Why we need Whistleblower Programs for Police”, in which she stated, *inter alia*, that her allegations were not taken seriously and she became the subject of an investigation. She stated when she spoke up she was subject to discipline and removed from her position at the Service and she was “made an example of”.
  - (g) On May 19, 2018, Ms Donovan published a video entitled “About my Book”, in which she says 100s of officers across Ontario have “tried to do the right thing” and “been silenced by the system”.
  - (h) On June 21, 2018, Ms Donovan published a video entitled “Kelly Donovan at One Woman International Fearless Women's Summit in St. John's Newfoundland”, in which she says that internal investigations at WRPS were “corrupt” and “negligent”. The complaints in the video include the following. She said there were cases of evidence being withheld and allegations being “swept under the rug”. Ms Donovan described how she went to the Board to report “systemic corruption” and a “web of people who are willing to cover it up because they all want to see their next promotion”. She said that as a result she was told that the Chief did not want her to communicate with the Board any more, she was removed from her office and put in a basement, and she was put under

investigation for *PSA* charges. She said she was “vilified” and “constructively dismissed”. She also said that she has been going across Canada telling her story.

## V. SUBMISSIONS

52. Section 45.9(1) of the *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”.
53. Not only are settlements legally binding, but adherence to settlements promotes essential *Code* values. The Tribunal has repeatedly recognized that a contravention of a settlement can undermine the administration of justice, discredit the human rights system, and create adverse incentives in respect of dispute resolution. In *Saunders v. Toronto Standard Condominium Corp.* No. 1571 2010 HRTO 2516, the Tribunal stated:

“Respect for terms of settlement is not only a legally binding, contractual obligation; it also promotes essential *Code* values. A contravention of settlement can undermine the administration of justice by discrediting the human rights system and generating wrong disincentives to negotiation. The uncertainty created by a contravention of settlement potentially undermines the substantive and procedural provisions of the *Code*. An award of monetary compensation can help reflect both the private and public importance of complying with settlement terms.”

See also *Ye v. Pestell Pet Products Inc.* 2014 HRTO 156.

54. In determining the meaning of contractual settlement provisions, the primary goal is to give effect to the parties’ intentions.
55. In the present case, the primary intention of the parties was clearly set out in the Resignation Agreement. This intention was to “fully resolve and settle” the HRTO Application and the Potential *PSA* Charges. Accordingly, the parties agreed that Ms Donovan would “withdraw and discontinue” the HRTO Application in paragraph 4, execute a Full and Final Release, and maintain confidentiality over the Resignation Agreement other than to indicate that “all outstanding matters between the parties were settled to their mutual satisfaction, the terms of which are strictly confidential.” Despite this clear and fundamental purpose, Ms Donovan has persisted in publicly repeating the allegations giving rise to the HRTO Application. Rather than concluding the HRTO Application, Ms Donovan has simply shifted her allegations into the public domain. Ms

Donovan's actions are a blatant and continuing failure to abide by the terms of the settlement.

56. She has further violated the provisions of the Full and Final Release, which forms an integral part of the Resignation Agreement, by raising new "complaints" against the WRPSB and/or the WRPS. This is a clear violation of the Full and Final Release, pursuant to which Ms Donovan released and forever discharged "the Regional Municipality of Waterloo Police Services Board ...from any and all ...complaints...claims....which I have ever had...by reason of my employment with or the resignation of my employment with the Regional Municipality of Waterloo Police Services Board... or which arises out of or in any way relates to the matters giving rise to my HRTO Application". Pursuant to the Full and Final Release, Ms Donovan also expressly agreed that the Release could be raised as a complete bar to "any complaint against any of 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 my HRTO Application". As such, the Release specifically provides that it is a bar against all complaints against the Releasees or anyone connected with them. The Release covers but is not limited to those allegations giving rise to the HRTO Application.
57. In addition, Ms Donovan has violated the confidentiality undertakings in the Resignation Agreement. Specifically, paragraph 16 of the Resignation Agreement requires the parties to "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". Read in context, it is clear that the parties intended this confidentiality undertaking to apply broadly. The parties specifically included a clarity note confirming that the parties will not "publicize, discuss, disclose or communicate in any way without 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... will indicate only that all outstanding matters between the parties were settled to their mutual satisfaction, the terms of which settlement are strictly confidential". Ms Donovan has not restricted her comments to the agreed upon statement that her complaints were resolved to the parties' mutual satisfaction but has persistently and publicly repeated her allegations.

58. Finally, while the Resignation Agreement provides that “Ms Donovan hereby confirms that she is freely and voluntarily resigning her employment” and that this resignation is “irrevocable”, Ms Donovan has publicly stated that she was constructively dismissed. Publicly alleging constructive dismissal is incompatible with and directly contradicts her agreement that she freely and voluntarily resigned her employment.
59. Subsection 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”.
60. The Tribunal has recognized that it has broad remedial authority to remedy any contravention of a settlement and that this power includes both common law remedies and “innovative remedial action”. In *Saunders v. Toronto Standard Condominium Corp.* No. 1571, 2010 HRT0 2516, the Tribunal stated at paragraph 39:

“Section 45.9(8) gives the broad power to make “any order that it considers appropriate to remedy the contravention.” There is no reason to limit the potential scope of this power. At minimum, it allows for consideration of any common law remedy, and may contemplate additional or innovative remedial action, subject to the circumstances of the case and the discretion and statutory authority of the Tribunal.”

61. To assist it in determining the appropriate remedy, the Tribunal has considered the following questions as set out in *Saunders v. Toronto Standard Condominium Corp.* No. 1571 2010 HRT0 2516:

For the purposes of this case, I find it appropriate to ask the following questions in order to determine the appropriate remedy:

- ☐ What is the nature of the breach – does it go to the heart of the MOS?
- ☐ Does anything need to be done to fulfil the terms of the MOS? If so, what?
- ☐ Were the applicant’s contractual expectations adversely affected?
- ☐ Did the applicant suffer any quantifiable harm or material loss as a result of the breach?

☐ Did the applicant suffer any harm to dignity, feelings or self-respect as a result of the breach?

62. These factors all weigh in favour of significant remedies, including substantial damages, in this case.
63. The Tribunal has recognized that damages must recognize the cost, inconvenience and aggravation involved in enforcement of the settlement. In *Harvey v Newtek Automotive*, 2013 HRT0 677, the Tribunal stated:

“This Tribunal can exercise its discretion to award a reasonable amount of damages for breach of the settlement in the face of a blatant and continuing failure of a respondent to abide by the terms of a settlement, particularly in the absence of an explanation for that breach. The damages can amount to an award which recognizes that there is some cost, inconvenience and aggravation involved with the enforcement of the settlement. The award, however, should be made solely as against the party who has breached the settlement in a material respect and always in an amount that is appropriate under the circumstances.”

64. In the present case, however, the wrongdoing is compounded by bad faith and willfulness, factors which ought to increase the damages. Ms Donovan has persistently failed to abide by the most fundamental terms of the Resignation Agreement. Her conduct is both intentional and repeated. Her breaches go to “the heart” of the settlement. Moreover, her actions are public and intended to bring the WRPSB into disrepute with the objective of causing the WRPSB and other police service boards to retain the services of Ms Donovan as a consultant through her Fit4Duty business. This conduct evidences bad faith and ought to be severely sanctioned.
65. Further, as recognized by the Tribunal in *Saunders v. Toronto Standard Condominium Corp.* No. 1571, 2010 HRT0 2516, damages must be sufficiently high so as to not “trivialize the social importance of the *Code*”.
66. The WRPSB respectfully states that the circumstances of this case demand the highest level of damages to remedy the ongoing damage to its reputation in the context of intentional and repeated violations of the most fundamental nature.

67. Alternatively, the WRPSB states that the Tribunal ought to assess damages with reference to the revenue generated by Ms Donovan through her ongoing breaches of the Resignation Agreement which are being undertaking to generate work for her business.
68. In addition to significant damages, the WRPSB requests an order directing Ms Donovan to cease violating the terms of the Resignation Agreement, to redact allegations against the WRPSB from her Book and to remove from the public domain any other allegations she has made against the WRPSB. To the extent that allegations have been made by Ms Donovan and publicly been posted by others, Ms Donovan ought to be directed to make best efforts to have those public allegations removed from the public domain.
69. Notably, 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 is as “incurred in good faith and no substantial prejudice will result to any person affected by the delay”. In the present case, the WRPSB has delayed 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. Her ongoing accusations are tantamount to slander and defamation. Indeed the triggering event is her filing of a Statement of Claim seeking to enforce the Resignation Agreement in response to the WRPSB’s good faith attempt to defend itself against a proposed class action. In support of its defence, the WRPSB referred to the Donovan case on a completely no-names basis. While the reference was consistent with the requirements of the Resignation Agreement, Ms Donovan objected by commencing a civil action. In effect, while Ms Donovan has completely disregarded the obligations of the Resignation Agreement, she is using the Agreement to try to limit the ability of the WRPS to defend itself in the proposed class action. A copy of the Statement of Claim is attached at **Tab 14**.
70. 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 above, Ms Donovan

has engaged in a series of repeated violations of the Resignation Agreement, which conduct is both persistent and ongoing.

## **VI. CONCLUSION**

71. The WRPSB and Ms Donovan concluded her HRT0 Application in good faith with a comprehensive Resignation Agreement. While the WRPSB has, at all times, honoured its obligations as set out in the Resignation Agreement, Ms Donovan has willfully and flagrantly disregarded her corresponding commitments.
72. Rather than accepting the Resignation Agreement as the agreed upon resolution of her HRT0 Application, Ms Donovan has publicly repeated the allegations giving rise to her HRT0 Application in order to promote her business and profit from her experiences. Her actions are willful, deliberate and in bad faith. Rather, than accepting the resolution of all issues, Ms Donovan has simply moved her allegations from the HRT0 to the public domain. These actions breach the fundamental purpose of the Resignation Agreement -- namely, to resolve the HRT0 Application. Her actions further violate her confidentiality obligations.
73. Not only has she repeated the allegations giving rise to her HRT0 Application but she has made complaints against the WRPSB of misfeasance, corruption and other improprieties. These complaints violate the clear undertaking the Full and Final Release to not make any complaints against the Releasees.
74. Her inappropriate actions are compounded by the fact that the WRPSB is bound by confidentiality provisions which limit its ability to defend against her accusations.
75. In addition to making complaints barred by the Resignation Agreement, Ms Donovan has persistently characterized her employment as having been constructively dismissed which characterization completely contradicts her agreement in the Resignation Agreement to freely and voluntarily resign.
76. The WRPSB respectfully states that the ongoing, persistent and willful nature of the violations of the Resignation Agreement demand a severe remedial response so as to not

trivialize the breaches and so as to uphold the principles of the *Code* and the goals of expeditious dispute resolution.

77. For all of the foregoing reasons, the WRPSB requests that the Tribunal:
- (a) declare that Ms Donovan has engaged in an ongoing series of contraventions of the Resignation Agreement;
  - (b) direct Ms Donovan to cease and desist from any further violations of the Resignation Agreement;
  - (c) direct Ms Donovan to redact allegations against the WRPSB from her Book and to remove from the public domain any other allegations she has made against the WRPSB contrary to the Resignation Agreement;
  - (d) direct Ms Donovan to make best efforts to have those public allegations that are under the control of other parties removed from the public domain; and
  - (e) order Ms Donovan to pay significant damages to remedy the ongoing damage to the WRPS's reputation in the context of intentional and repeated violations of the most fundamental nature. In the alternative, the WRPSB states that the Tribunal ought to assess damages with reference to the revenue generated by Ms Donovan through her ongoing breaches which are being undertaking to generate work for her business.
78. The WRPSB reserves the right to seek further remedial relief and to raise such other arguments as counsel may advise and the Tribunal permits.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

**TAB J**

**THIS IS EXHIBIT “J” REFERRED TO IN THE AFFIDAVIT OF LAURA J. FREITAG  
SWORN BEFORE ME THIS 9th DAY OF February, 2021.**



---

**A COMMISSIONER FOR TAKING AFFIDAVITS**



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

**Response to an Application for  
 Contravention of Settlement – Rule 24  
 Form 19**

A party to a settlement may respond to an Application for Contravention of Settlement by completing this Form 19.

**Follow these steps to make your Response:**

1. Fill out Form 19.
2. Deliver a copy of Form 19 to each party to the settlement.
3. Complete a Statement of Delivery (Form 23).
4. File Form 19 and Form 23 with the Tribunal.

You must file your Response to an Application for Contravention of a Settlement **fourteen (14) days** after the Application for Contravention of Settlement was delivered to you.

Download forms from the Tribunal's web site [www.sjto.ca/hrto](http://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](mailto:hrto.registrar@ontario.ca)



**Social Justice Tribunals Ontario**  
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**Human Rights Tribunal of Ontario**

**Response to an Application for  
 Contravention of Settlement – Rule 24  
 Form 19**

<b>Application Information</b>	
Tribunal File Number:	
Name of Applicant:	The Regional Municipality of Waterloo Police Services Board ("WRPSB")
Name of each Respondent:	Kelly Donovan

<b>1. Contact Information</b>
-------------------------------

Please provide your contact information. Complete **a) Organization** or **b) Individual**.

**a) Organization**

Full Name of Organization: \_\_\_\_\_

Name of the person within this organization who is authorized to negotiate and bind the organization with respect to this application:

First (or Given) Name	Last (or Family) Name	Title	
Street Number	Street Name		Apt/Suite
City/Town	Province	Postal Code	Email
Daytime Phone	Cell Phone	Fax	TTY

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.)

**b) Individual**

First (or Given) Name Kelly	Last (or Family) Name Donovan		
Street Number 11	Street Name Daniel Place	Apt/Suite	
City/Town Brantford	Province Ontario	Postal Code N3R1K6	Email kelly@fit4duty.ca
Daytime Phone 5192095721	Cell Phone	Fax	TTY

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.)



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**Human Rights Tribunal of Ontario**

**Response to an Application for  
 Contravention of Settlement – Rule 24  
 Form 19**

**2. Representative Contact Information**

☐ I authorize the organization and/or person named below to represent me.

First (or Given) Name

Last (or Family) Name

Organization (if applicable)

LSUC No. (if applicable)

Street Number

Street Name

Apt/Suite

City/Town

Province

Postal Code

Email

Daytime Phone

Cell Phone

Fax

TTY

What is the best way to send information to your Representative? ☐ Mail ☐ Email ☐ Fax  
 (If you check email, you are consenting to the delivery of documents by email.)

**3. What is your response to each allegation of a contravention of the settlement? What is your response to the remedy requested?**

See Appendix A



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**Human Rights Tribunal of Ontario**

**Response to an Application for  
 Contravention of Settlement – Rule 24  
 Form 19**

**4. Declaration and Signature**

**Instructions:** Do not sign your Response until you are sure that you understand what you are declaring here.


**Declaration:**

To the best of my knowledge, the information in my Response is complete and accurate.

I understand that information about my Response can become public at a hearing, in a written decision, or in other ways determined by Tribunal policies.

I understand that the Tribunal must provide a copy of my Response to the Ontario Human Rights Commission on request.

I understand that the Tribunal may be required to release information requested under the *Freedom of Information and Protection of Privacy Act* (FIPPA).

Name: Kelly Donovan	
Signature: 	Date: (dd/mm/yyyy) 10/07/2018

☒ Please check this box if you are filing your Response 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.

BETWEEN:

THE REGIONAL MUNICIPALITY OF WATERLOO POLICE SERVICES BOARD

Applicant

- and -

KELLY DONOVAN

Respondent

### **Appendix A**

#### **BACKGROUND**

1. The respondent has commenced a civil proceeding that alleges the applicant breached the terms of the resignation agreement (the “contract”) between the applicant and the respondent, (Ontario Superior Court of Justice, Court File No. CV-18-00001938-000, the “civil claim” filed on May 9, 2018);
2. Since resigning from employment with the applicant, the respondent has made attempts to earn an income to support her family and improve her mental and physical health.
3. Since resigning from employment with the applicant, the respondent has participated in debate to improve the level of accountability and transparency in policing legislation.
4. The respondent has been openly critical of police services across Ontario to shed light on issues that the respondent believes need to be addressed by oversight bodies and government.
5. The respondent has been volunteering her time to assist police services boards in Ontario.

#### **REQUEST TO DISMISS:**

6. The section 45.9 application (the “application”) should be dismissed because:

- a. the tribunal has not been granted jurisdiction over the same matter in the respondent's civil claim;
    - i. *Statutory Powers and Procedures Act ("SPPA")*, R.S.O. 1990, c. S.22, subsection 4.6(1)(b).
  - b. the application is frivolous, vexatious and was commenced in bad faith by the applicant as a means of retaliation against the respondent for having filed the civil claim;
    - i. *SPPA*, subsection 4.6(1)(a).
  - c. the application is a flagrant abuse of process;
  - d. the application is untimely;
    - i. *Ontario Human Rights Code*, R.S.O. 1990, c. H.19, subsection 45.9(3).
  - e. the application is a collateral attack on the respondent's fundamental freedoms, as guaranteed by the *Canadian Charter of Rights and Freedoms*.
    - i. *The Constitution Act, 1982*, Part I, Canadian Charter of Rights and Freedoms, s. 2.
    - ii. *Courts of Justice Act*, R.S.O. 1990, c. C.43, subsection 137.1(3).
7. The respondent requests that the Tribunal's decision be delivered in person.

#### REASONS FOR REQUEST:

- 8. The respondent has already alleged that the applicant breached the same term of the same contract.
- 9. The applicant notified the respondent that it believed the matter was better suited at the Tribunal. The respondent received an email on May 29, 2018, from the applicant that a motion was being filed to evaluate jurisdiction of the respondent's civil claim. This motion is being heard February 13, 2019.
- 10. If the applicant's motion is successful, the respondent would then proceed with her allegation to the Tribunal.
- 11. The respondent believes the courts will have jurisdiction over the civil claim, the applicant argues the jurisdiction will belong with the tribunal. No jurisdiction order has been made by the courts.

12. It is premature and improper for the Tribunal to examine issues that are currently before the Ontario Superior Court of Justice.
13. It is an abuse of process for the applicant to bring this application to the Tribunal knowing that the respondent has already started a proceeding against the applicant on this matter.
14. The application was compiled and filed by the applicant after the civil claim was served by the respondent and was done in retaliation to harass the respondent and cause her to incur additional costs. The supporting documents in the applicant's submission were all printed in June, 2018, after the filing of the civil claim (as indicated in the footer).
15. The application is untimely. The issues in the application were brought to the applicant's attention in July, 2017, and the applicant remained aware of the respondent's conduct since that time.
16. There is no logical explanation as to why the applicant waited until June, 2018, to file allegations dating back to July, 2017, and then contain a series of allegations that the applicant alleges have been continuous. This delay was not incurred in good faith.
17. 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 in February, 2019, if the courts decide.
18. The applicant's form 18 is an assault on the respondent's fundamental right to free expression.
19. The remedies sought by the applicant are an attempt to deprive the respondent of her fundamental right to free expression.
20. The respondent must now seek legal counsel to defend this action brought by the applicant. This will take the respondent time in excess of the required timeline to properly respond to the applicant's form 18.

#### RESPONSE TO FORM 18:

21. It would be premature and inappropriate at this time for the respondent to respond to the specific allegations contained in the applicant's form 18.

# TAB K

**THIS IS EXHIBIT “K” REFERRED TO IN THE AFFIDAVIT OF LAURA J. FREITAG  
SWORN BEFORE ME THIS 9th DAY OF February, 2021.**

A handwritten signature in cursive script, appearing to read 'J. J. H.', is written above a horizontal line.

**A COMMISSIONER FOR TAKING AFFIDAVITS**



You may make an *Application for Contravention of Settlement (Form 18)* to the Human Rights Tribunal of Ontario if:

- You were a party to a written settlement of an application made under section 34 or 35 of the *Human Rights Code*, **and**
- the settlement was signed by the parties, **and**
- you believe a party has contravened the settlement.

Or

- You were a party to a settlement of a complaint made under the old Part IV before June 30, 2008 or during the six (6) month period following June 30, 2008, **and**
- the settlement was agreed to in writing, signed by the parties and approved by the Commission, **and**
- you believe a party has contravened the settlement.

**Deadline:**

- You must make your application within six (6) months after the contravention to which the application relates, **or**
- if there was a series of contraventions, within six (6) months after the last contravention in the series.

The HRTTO may extend this time if the HRTTO is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay.

**Follow these steps to make your application:**

1. Fill out this Form 18.
2. Attach a copy of the settlement.
3. Deliver a copy of Form 18 to each party to the settlement.
4. Complete a *Statement of Delivery (Form 23)*.
5. File Form 18 and Form 23 with the HRTTO.



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**Human Rights Tribunal of Ontario**

**Application for  
 Contravention of Settlement – Rule 24  
 Form 18**

**Information for all parties who receive a copy of this Application for Contravention of Settlement:**

You may respond to this Application for Contravention of Settlement by completing a *Response to an Application for Contravention of Settlement (Form 19)*.

**Follow these steps to respond:**

1. Fill out Form 19.
2. Deliver a copy of Form 19 to each party to the settlement.
3. Complete a *Statement of Delivery (Form 23)*.
4. File Form 19 and Form 23 with the Tribunal.

You must file your Response to an Application for Contravention of Settlement **14 days** after the Application for Contravention of Settlement was delivered to you.

Download forms from the Forms & Filing section of the HRTO web site at [www.sjto.ca/hrto](http://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](mailto:hrto.registrar@ontario.ca)



**Social Justice Tribunals Ontario**  
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**Human Rights Tribunal of Ontario**

**Application for  
 Contravention of Settlement – Rule 24  
 Form 18**

Application Information	
Tribunal File Number:	
Name of Applicant:	Kelly Donovan
Name of Each Respondent:	The Regional Municipality of Waterloo Police Services Board et al.

**1. Your Contact Information (person or organization making this request)**

First (or Given) Name Kelly		Last (or Family) Name Donovan		Organization (if applicable)	
Street Number 11	Street Name Daniel Place			Apt/Suite	
City/Town Brantford		Province On	Postal Code N3R1K6	Email kelly@fit4duty.ca	
Daytime Phone 5192095721	Cell Phone		Fax	TTY	

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 the:

- ☒ Applicant ☐ Respondent ☐ Ontario Human Rights Commission  
☐ Other - describe: \_\_\_\_\_

**2. Representative Contact Information**

☐ I authorize the organization and/or person named below to represent me.

First (or Given) Name		Last (or Family) Name			
Organization (if applicable)				LSUC No. (if applicable)	
Street Number	Street Name			Apt/Suite	
City/Town		Province	Postal Code	Email	
Daytime Phone	Cell Phone		Fax	TTY	

What is the best way to send information to your representative? ☐ Mail ☐ Email ☐ Fax  
 (If you check email, you are consenting to the delivery of documents by email.)



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

**Application for  
 Contravention of Settlement – Rule 24  
 Form 18**

**3. Contact Information for the Other Parties to the Settlement**

Name and provide contact information for all of the other parties to the settlement. If the other party is an organization complete **a) Organization**. If the other party is an individual complete **b) Individual**.

**a) Organization**

Full Name of Organization

The Regional Municipality of Waterloo Police Services Board

Name of the person within this organization who is authorized to negotiate and bind the organization with respect to this application:

First (or Given) Name Virginia		Last (or Family) Name Torrance		Title WRPS	
Street Number 200	Street Name Maple Grove Road				Apt/Suite P.O.Box 3070
City/Town Cambridge		Province On	Postal Code N3H5M1	Email virginia.torrance@wrps.on.ca	
Daytime Phone 5196508552	Cell Phone		Fax 5196508851	TTY	

**b) Individual**

First (or Given) Name Bryan		Last (or Family) Name Larkin			
Street Number 378	Street Name Golf Course Road				Apt/Suite
City/Town Conestogo		Province On	Postal Code N0B1N0	Email bryan.larkin@wrps.on.ca	
Daytime Phone	Cell Phone		Fax	TTY	

**4. What is the date of the last alleged contravention or breach of the settlement?**

21/12/2017 (dd/mm/yyyy)

**5. If you are applying more than six months from the last alleged contravention, please explain why:**

See Schedule A



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

**Application for  
 Contravention of Settlement – Rule 24  
 Form 18**

**6. What term of the settlement do you allege has been contravened or breached? Provide all the material facts you are relying upon to support your claim that the settlement has been contravened or breached.**

See Schedule A

**7. Explain what remedy you wish the HRTO to provide.**

See Schedule A

**8. Declaration and Signature**

**Instructions:** Do not sign your application until you are sure that you understand what you are declaring here.

**Declaration:**

To the best of my knowledge, the information in my Application for Contravention of Settlement is complete and accurate.

I understand that information about my Application for Contravention of Settlement can become public at a hearing, in a written decision, or in other ways determined by HRTO policies.

I understand that the HRTO must provide a copy of my application to the Ontario Human Rights Commission on request.

I understand that the HRTO may be required to release information requested under the *Freedom of Information and Protection of Privacy Act* (FIPPA).

Name:

Signature:

Date: (dd/mm/yyyy)

27/07/2018

☒ Please check this box if you are filing your application 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 Ontario Human Rights Commission (OHRC), the tribunal must provide the OHRC with copies of applications and responses filed with the tribunal and may disclose other documents in its custody or control.

BETWEEN:

KELLY DONOVAN

Applicant

- and -

THE REGIONAL MUNICIPALITY OF WATERLOO POLICE SERVICES BOARD and

BRYAN LARKIN

Respondents

**Schedule A**

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## **I. Background**

1. From December, 2010, until June 26, 2017, the applicant was a police constable with the organizational respondent.
2. In 2017, the applicant was diagnosed with post-traumatic stress disorder.
3. Since the applicant's resignation on June 26, 2017, the applicant has made several attempts to gain employment, she has applied to post-secondary institutions and has been trying to get her business of providing workplace solutions off the ground.
4. The applicant is an advocate for whistleblower protection in Canada and has volunteered her time to raise awareness of current deficiencies in legislation.
5. The applicant lives in Brantford, and is a single-mother to three children under the age of fourteen.
6. The individual respondent, Bryan Larkin, is chief of Waterloo Regional Police Service ("WRPS") and is employed by the organizational respondent.
7. As a police officer in the province of Ontario, the individual respondent has sworn an oath of office to uphold the Constitution of Canada.

## **II. Facts**

### **Class action lawsuit**

8. On May 30, 2017, a class action lawsuit was filed against the organizational respondent in the Ontario Superior Court of Justice in Brampton; Court File Number CV-17-2346-00, (furthermore referred to as "the class action lawsuit"). Neither the applicant nor her family members are parties 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).

#### **Applicant's resignation**

9. On June 8, 2017, the applicant and respondents entered into a Resignation agreement, written by counsel for the organizational respondent, 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."*
10. The Resignation agreement was signed by the individual respondent on behalf of the organizational respondent.
11. The intent of the resignation agreement was to prevent the applicant from joining the class

action lawsuit.

### III. Overview

12. On December 21, 2017, the individual respondent swore an affidavit in defense of the class action lawsuit and that document was submitted to record.

13. In the affidavit, the individual respondent 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."*

14. The attachment to the individual respondent'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."

15. 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 resigned.
15. The applicant is the only female constable who was employed by the organizational respondent over the past five years, had filed a human rights complaint and who voluntarily resigned.
16. The public disclosure made by the individual respondent was not required by law, contained sufficient information for the applicant to be identified and violates the terms of the Resignation agreement.
17. The applicant received notification from Mark Egers, Waterloo Regional Police Association President, in February, 2018, that a group grievance was being filed for all current members of WRPS whose privacy was breached when the individual respondent's affidavit was published online. The individual respondent ought to have known that his actions constituted a breach of the privacy of those named in his affidavit after the filing of this grievance.
18. The reckless actions of the individual respondent have caused the applicant a great deal of stress, anxiety, depression and re-lived moral trauma.
19. The individual respondent is aware that the applicant was on medical leave from February, 2017, until her resignation in June, 2017.
20. The respondents are jointly and severally liable for the damages caused to the applicant. Further, the organizational respondent is vicariously liable for the conduct, representations, omissions and/or negligence of the police service's employees, agents, servants and contractors, which includes the individual respondent.

#### **IV. Timeliness & Retaliation**

21. The applicant had chosen to proceed with an allegation of breach of contract in the Ontario Superior Court of Justice against the respondents as opposed to the Human Rights Tribunal due to the complexities of the employment relationship which led to her resignation.
22. The applicant filed a statement of claim in the Ontario Superior Court of Justice, court file number CV-18-00001938-0000 ("the statement of claim"), on May 9, 2018, which is within the six-month limitation period.
23. The organizational respondent brought a motion on June 7, 2018, to dismiss the statement of claim on several bases, including jurisdiction, and that motion is being heard on February 13, 2019.
24. The applicant did not file a Form 18 within the six-month period because she was waiting for the courts to make a ruling regarding jurisdiction. This ruling will not be made until after the February 13, 2019, date.
25. Despite the ongoing court proceeding against the organizational respondent, the organizational respondent filed HRTO File No. 2018-33237-S in bad faith against the applicant in June, 2018.
26. The applicant brings this application now as a result of a letter she received from the registrar on July 19, 2018, indicating there would be a full day in-person hearing scheduled to hear the parties' submissions on the matters raised in the application brought forward by the organizational respondent.
27. The applicant's position is that the application brought forward by the organizational respondent should be dismissed without a hearing, the reasons were set out in the applicant's Form 19 of HRTO File No. 2018-33237-S.
28. The filing of the section 45.9 application 2018-33237-S by the organizational respondent

is a significant insult to the dignity of the applicant and is an additional form of blatant discrimination and harassment against her.

29. The applicant has no other option but to file this application so that her original allegation of a breach of contract or contravention of settlement against the organizational respondent will be heard when the Tribunal hears the retaliatory allegations made by the organizational respondent.
30. It would severely prejudice the applicant if the Tribunal hears submissions which support only the organizational respondent's section 45.9 application done out of retaliation in June, 2018, and not the applicant's original allegation made in May, 2018, that the organizational respondent violated the terms of the resignation agreement.

#### **V. Applicant's health**

31. Prior to February, 2011, the applicant did not have any health issues. The applicant was healthy, educated and highly employable. She was hired by the organizational respondent on her first attempt in December, 2010.
32. Since February, 2017, the applicant has suffered from severe post-traumatic stress disorder ("PTSD") symptoms.
33. The applicant's symptoms briefly improved when she resigned from the police service in June, 2017.
34. The applicant's moral injury causes her to be triggered any time she witnesses an individual in a position of authority who has sworn an oath to uphold the law commit an act that the applicant perceives as unlawful or unethical.
35. The applicant's PTSD was severely triggered in early January, 2018, when she read the

affidavit of the individual respondent which was available on a public website.

36. The applicant's depression has worsened since January, 2018, and she has suffered periods of suicidal thoughts.
37. The applicant feels psychologically imprisoned by the actions both respondents have taken since December, 2017, to violate her privacy, recklessly and blatantly violate a legal agreement between the parties and attempt to vilify her and deprive her of her fundamental right to freedom of expression.

## **VI. Relief Claimed**

38. The applicant, claims against the respondents, jointly and severally, the following relief:
  - a. General damages, in the amount of twenty-thousand dollars (\$20,000.00);
  - b. Special damages for the living expenses of the applicant, since she has not been well enough to earn an income, for every month since January, 2018, when she was re-injured as a result of the reckless violation of the resignation agreement by the individual respondent and the retaliation by the organizational respondent;
  - c. As a public interest remedy, the applicant seeks 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, in the capacity of Integrity Commissioner reporting directly to the organizational respondent;
  - d. Dismissal of HRTO File No. 2018-33237-S for reasons set-out in the applicant's Form 19 on file;
  - e. Pre-judgment and post-judgment interest in accordance with the Courts of Justice Act, R.S.O. 1990, c. C.43, as amended; and

- f. Such further and other relief as counsel may advise and the Tribunal deems just.

**TAB L**

**THIS IS EXHIBIT “L” REFERRED TO IN THE AFFIDAVIT OF LAURA J. FREITAG  
SWORN BEFORE ME THIS 9th DAY OF February, 2021.**



---

**A COMMISSIONER FOR TAKING AFFIDAVITS**



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](http://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](mailto:hrto.registrar@ontario.ca)



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

**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 Virginia		Last (or Family) Name Torrance		Organization (if applicable) WRPS	
Street Number 200	Street Name Maple Grove Road, P.O. Box 3070				Apt/Suite
City/Town Cambridge		Province Ontario	Postal Code N3H 5M1	Email virginia.torrance@wrps.on.ca	
Daytime Phone 519-650-8552	Cell Phone		Fax 519-650-8551	TTY	

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: Applicant	LSUC No. (if applicable) 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:**

- |   |  |
|---|--|
| <input type="checkbox"/> Request to consolidate or have applications heard together | <input type="checkbox"/> Request to re-activate deferred Application |
| <input type="checkbox"/> Request to add a party                                     | <input type="checkbox"/> Request for particulars                     |
| <input type="checkbox"/> Request to amend Application or Response                   | <input type="checkbox"/> Request for production of documents         |
| <input type="checkbox"/> Request to defer Application                               | <input checked="" type="checkbox"/> Other, please explain:           |
| <input type="checkbox"/> Request extension of time                                  | 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



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

**Request for an Order During Proceedings**  
**– Rule 19**  
**Form 10**

### 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 position 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 HRT0 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 position 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 HRTTO 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 HRTTO 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.

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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 M**

**THIS IS EXHIBIT “M” REFERRED TO IN THE AFFIDAVIT OF LAURA J. FREITAG  
SWORN BEFORE ME THIS 9<sup>th</sup> DAY OF February, 2021.**



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**A COMMISSIONER FOR TAKING AFFIDAVITS**



**Social Justice Tribunals Ontario**

*Providing fair and accessible justice*

**Human Rights Tribunal of Ontario**

## Rules of Procedure

Applications under the *Human Rights Code*, Part IV, R.S.O. 1990, c.H.19 as amended  
Disponible en français

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## **Rules of Procedure**

The Human Rights Tribunal of Ontario (HRTO) has the authority to make rules to govern its practices under the Ontario Human Rights Code ("Code"). There are two parts to the HRTO Rules. Part I is the Social Justice Tribunals Ontario (SJTO) Common Rules, which also apply in other tribunals within SJTO. Part II is the Human Rights Tribunal of Ontario Specific Rules which apply only within the HRTO. Both parts should be read together.

### **I) SOCIAL JUSTICE TRIBUNALS ONTARIO COMMON RULES**

#### **INTRODUCTION**

Social Justice Tribunals Ontario (SJTO) is a cluster of eight adjudicative tribunals with a mandate to resolve applications and appeals under statutes relating to child and family services oversight, youth justice, human rights, residential tenancies, disability support and other social assistance, special education and victim compensation.

The SJTO is committed to providing quality dispute resolution across the cluster including ensuring that its procedures are transparent and understandable. Identifying common procedures and values across the SJTO and, where appropriate, harmonizing those procedures improves access to justice and fosters consistency in the application of fundamental principles of fairness.

These Common Rules are grounded in the core adjudicative values and principles of the SJTO which govern the work of the cluster. The Common Rules provide a consistent overarching framework of common procedures that will continue to evolve.

#### **HOW TO USE THESE RULES**

- a. The SJTO Common Rules apply to all cases in any SJTO tribunal and form part of the rules and procedures of each tribunal.
- b. For more specific rules please refer to the rules and procedures of:
  - Child and Family Services Review Board
  - Criminal Injuries Compensation Board
  - Custody Review Board
  - Human Rights Tribunal
  - Landlord and Tenant Board
  - Ontario Special Education Tribunal - English
  - Ontario Special Education Tribunal - French
  - Social Benefits Tribunal

### **PART A - ADJUDICATIVE VALUES AND INTERPRETIVE PRINCIPLES**

#### **A1 APPLICATION**

The Common Rules apply to the proceedings of the SJTO. The Common Rules form part of the rules of each SJTO tribunal.

#### **A2 DEFINITIONS**

"rules and procedures" includes rules, practice directions, policies, guidelines and procedural directions;

"tribunal" means any SJTO tribunal or board.

**A3 INTERPRETATION**

- A3.1 The rules and procedures of the tribunal shall be liberally and purposively interpreted and applied to:
- a. promote the fair, just and expeditious resolution of disputes,
  - b. allow parties to participate effectively in the process, whether or not they have a representative,
  - c. ensure that procedures, orders and directions are proportionate to the importance and complexity of the issues in the proceeding.
- A3.2 Rules and procedures are not to be interpreted in a technical manner.
- A3.3 Rules and procedures will be interpreted and applied in a manner consistent with the *Human Rights Code*.

**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.
- A4.2 The tribunal may vary or waive the application of any rule or procedure, on its own initiative or on the request of a party, except where to do so is prohibited by legislation or a specific rule.

**A5 ACCOMMODATION OF HUMAN RIGHTS CODE-RELATED NEEDS**

- A5.1 A party, representative, witness or support person is entitled to accommodation of Human Rights Code-related needs by the tribunal and should notify the tribunal as soon as possible if accommodation is required.

**A6 LANGUAGE**

- A6.1 Individuals may provide written materials to the tribunal in either English or French.
- A6.2 Individuals may participate in tribunal proceedings in English, French, American Sign Language (ASL) or Quebec Sign Language (QSL).
- A6.3 A person appearing before the tribunal may use an interpreter. Interpretation services will be provided, upon request, in accordance with tribunal policy.

**A7 COURTESY AND RESPECT**

- A7.1 All persons participating in proceedings before or communicating with the tribunal must act in good faith and in a manner that is courteous and respectful of the tribunal and other participants in the proceeding.

**A8 ABUSE OF PROCESS**

- A8.1 The tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes.
- A8.2 Where the tribunal finds that a person has persistently instituted vexatious proceedings or conducted a proceeding in a vexatious manner, the tribunal may find that person to be a vexatious litigant and dismiss the proceeding as an abuse of process for that reason. It may also require a person found to be a vexatious litigant to obtain permission from the tribunal to commence further proceedings or take further steps in a proceeding.

**A9 REPRESENTATIVES**

- A9.1 Parties may be self-represented, represented by a person licensed by the Law Society of Upper Canada or by an unlicensed person where permitted by the Law Society Act and its regulations and by-laws.
- A9.2 Individuals representing a party before a tribunal have duties to both the tribunal and the party they are representing. Representatives must provide contact information to the tribunal and be available to be contacted promptly. Representatives are responsible for conveying tribunal communications and directions to their client. Representatives should be familiar with tribunal rules and procedures, communicate the tribunal's expectations to their client, and provide timely responses to the other parties and the tribunal.
- A9.3 Where a representative begins or ceases to act for a client, the representative must immediately advise the tribunal and the other parties in writing, and provide up-to-date contact information for the party and any new representative. Where a representative ceases to act for a client the tribunal may issue directions to ensure fairness to all parties and to prevent undue delay of proceedings.
- A9.4 The tribunal may disqualify a representative from appearing before it where the representative's continued appearance would lead to an abuse of process.

**A10 LITIGATION GUARDIANS**

- A10.1 This Rule applies where a person seeks to be a litigation guardian for a party. It does not apply where no litigation guardian is required as a result of the nature of the proceeding.
- A10.2 Persons are presumed to have the mental capacity to manage and conduct their case and to appoint and instruct a representative.

**Litigation Guardian Declarations**

- A10.3 A litigation guardian for a minor under the age of 18 is required to file a signed declaration in the form designated by the tribunal, confirming:
- a. the litigation guardian's consent to serve in this role;
  - b. the minor's date of birth;
  - c. the nature of the relationship to the minor;
  - d. that any other person with custody or legal guardianship of the minor has been provided with a copy of the materials in the proceeding and a copy of the SJTO practice direction on litigation guardians;
  - e. that the litigation guardian has no interest that conflicts with those of the person represented;
  - f. an undertaking to act in accordance with the responsibilities of a litigation guardian as set out in Rule A10.8; and
  - g. that the litigation guardian is at least 18 years of age and understands the nature of the proceeding.
- A10.4 A litigation guardian for a person who lacks mental capacity to participate in the tribunal proceeding must file a signed declaration in the form designated by the tribunal, confirming:
- a. the litigation guardian's consent to serve in this role;
  - b. the nature of the litigation guardian's relationship to the person represented;
  - c. reasons for believing that the person is not mentally capable of participating in the proceeding;
  - d. the nature and extent of the disability causing the mental incapacity;

- e. that no other person has authority to be the person's litigation guardian in the proceeding;
- f. that any person who holds power of attorney or guardianship for the person for other matters has been provided with a copy of the materials in the proceeding and a copy of the SJTO practice direction on litigation guardians;
- g. that the litigation guardian has no interest that conflicts with the interests of the person represented;
- h. an undertaking to act in accordance with the responsibilities of a litigation guardian as set out in Rule A10.8; and
- i. that the litigation guardian is at least 18 years of age and understands the nature of the proceeding.

### **Naming and Removing a Litigation Guardian**

- A10.5 Upon the filing of a complete declaration as required by this Rule and unless refused or removed by the Tribunal, the person may act as litigation guardian for the party.
- A10.6 The Tribunal will review the declaration and may direct submissions by the parties on whether the litigation guardian should be refused pursuant to Rule A10.7.
- A10.7 Upon review of the declaration, or at any later time in the proceeding, the Tribunal may refuse or remove a litigation guardian on its own initiative or at the request of any person because:
- a. the litigation guardian has an interest that conflicts with the interests of the person represented;
  - b. the appointment conflicts with the substitute decision making authority of another person;
  - c. the person has capacity to conduct or continue the proceeding;
  - d. the litigation guardian is unable or unwilling to continue in this role;
  - e. a more appropriate person seeks to be litigation guardian; or
  - f. no litigation guardian is needed to conduct the proceeding.

### **Responsibilities of Litigation Guardians**

- A10.8 A litigation guardian shall diligently attend to the interests of the person represented and shall take all steps necessary for the protection of those interests including:
- a. to the extent possible, informing and consulting with the person represented about the proceedings;
  - b. considering the impact of the proceeding on the person represented;
  - c. deciding whether to retain a representative and providing instructions to the representative; and
  - d. assisting in gathering evidence to support the proceeding and putting forward the best possible case to the tribunal.
- A10.9 No one may be compensated for serving as a litigation guardian unless provided for by law or a pre-existing agreement.
- A10.10 When a minor who was represented by a litigation guardian turns 18, the role of the litigation guardian will automatically end.

## **II) HUMAN RIGHTS TRIBUNAL OF ONTARIO SPECIFIC RULES**

### **RULE 1 GENERAL RULES**

#### **Application and Interpretation of Rules**

- 1.1 Removed and replaced. Please see SJTO Common Rules.

- 1.2 The Chair of the Tribunal may also issue Practice Directions to provide further information about the Tribunal's practices or procedures.

### **Forms**

- 1.3 The Tribunal may establish forms to be used in its proceedings. In these Rules, where a form is referred to by number, the reference is to the form with that number that is described in the List of Forms ("Forms") at the end of these Rules. The Forms are not part of these Rules.

### **Definitions**

- 1.4 In these Rules:

"affected person" means a person, organization, trade union or other occupational or professional association identified in an Application or Response as being affected by a proceeding and entitled to notice of the proceeding;

"bargaining agent" means a union or association of employees which has the right to represent employees in a workplace;

"case conference" means an in-person, telephone conference call or electronic meeting of all the parties to an application, convened by the Tribunal;

"Code" means the Ontario *Human Rights Code*;

"Commission" means the Ontario Human Rights Commission;

"Confirmation of Hearing" means a notice sent by the Tribunal to the parties setting out dates for the parties to complete a step in the hearing process;

"file" means file with the Tribunal and a "filing" is anything that is filed;

"holiday" means any Saturday, Sunday, or other day on which the Tribunal's offices are closed;

"Legal Support Centre" means the Human Rights Legal Support Centre established under Part IV.1 of the Code;

"member" means a member of the Tribunal;

"party" means any person or organization entitled to participate in a proceeding as a party under s. 36 of the Code and the Commission if added with the consent of the Applicant under s. 37(2), and includes any other person or organization added by the Tribunal as a party or intervenor, with or without terms, including the Commission under s. 37(1).

"proceedings" before the Tribunal include all processes of the Tribunal at any time following the filing of an Application until the Application is finally determined;

"rules" means the specific Rules of Procedure for the Human Rights Tribunal of Ontario and the Social Justice Tribunals Ontario Common Rules;

"Tribunal" means the Human Rights Tribunal of Ontario; and "vice-chair" means a vice-chair of the Tribunal.

### **Powers of the Tribunal**

- 1.5 Removed and replaced. Please see SJTO Common Rules.
- 1.6 The Tribunal will determine how a matter will be dealt with and may use procedures other than traditional adjudicative or adversarial procedures.

- 1.7 In order to provide for the fair, just and expeditious resolution of any matter before it the Tribunal may:
- a. lengthen or shorten any time limit in these Rules;
  - b. add or remove a party;
  - c. allow any filing to be amended;
  - d. consolidate or hear Applications together;
  - e. direct that Applications be heard separately;
  - f. direct that notice of a proceeding be given to any person or organization, including the Commission;
  - g. determine and direct the order in which issues in a proceeding, including issues considered by a party or the parties to be preliminary, will be considered and determined;
  - h. define and narrow the issues in order to decide an Application;
  - i. make or cause to be made an examination of records or other inquiries, as it considers necessary;
  - j. determine and direct the order in which evidence will be presented;
  - k. on the request of a party, direct another party to adduce evidence or produce a witness when that person is reasonably within that party's control;
  - l. permit a party to give a narrative before questioning commences;
  - m. question a witness;
  - n. limit the evidence or submissions on any issue;
  - o. advise when additional evidence or witnesses may assist the Tribunal;
  - p. require a party or other person to produce any document, information or thing and to provide such assistance as is reasonably necessary, including using any data storage, processing or retrieval device or system, to produce the information in any form;
  - q. on the request of a party, require another party or other person to provide a report, statement, or oral or affidavit evidence;
  - r. direct that the deponent of an affidavit be cross-examined before the Tribunal or an official examiner;
  - s. make such further orders as are necessary to give effect to an order or direction under these Rules;
  - t. attach terms or conditions to any order or direction;
  - u. consider public interest remedies, at the request of a party or on its own initiative, after providing the parties an opportunity to make submissions;
  - v. notify parties of policies approved by the Commission under s. 30 of the Code, and receive submissions on the policies; and
  - v.1) removed and replaced. Please see SJTO Common Rules;
  - w. take any other action that the Tribunal determines is appropriate.

#### **Calculation of Time**

- 1.8 Where an order of the Tribunal or a Rule refers to a number of days, the reference is to calendar days.
- 1.9 Where an action is to be done within a specified number of days, the days are counted by excluding the first day and including the last day.
- 1.10 When the time for doing an act expires on a holiday, the act may be done on the next day that is not a holiday.

#### **Communications with the Tribunal and other Parties**

- 1.11 Individuals are entitled to communicate with the Tribunal in either English or French.

- 1.12 All written communications with the Tribunal, including e-mail correspondence, must be addressed to the Registrar, with a copy delivered to all other parties.
- 1.12.1 Removed and replaced. Please see SJTO Common Rules.
- 1.13 A party must notify the Tribunal and all parties and their representatives, in writing, of any change in their contact information, as soon as possible.
- 1.14 Removed and replaced. Please see SJTO Common Rules.
- 1.15 Removed and replaced. Please see SJTO Common Rules.

#### **Filing Documents with the Tribunal**

- 1.16 When filing any document with the Tribunal, except for documents filed with an Application (Form 1), a Response (Form 2) or a Reply (Form 3), a party or any other person must include the following information:
  - a. name of the Applicant and Respondent in the Application;
  - b. name of the person filing the document and, if applicable, his/her representative's name;
  - c. mailing address, telephone number and, if available, e-mail address and facsimile number of the person filing the document or his/her representative; and
  - d. Application file number, if available.
- 1.17 Documents may be filed with the Tribunal by:
  - a. facsimile transmission (fax) to the Tribunal's fax number;
  - b. hand delivery, courier, or regular, registered or certified mail to the Human Rights Tribunal of Ontario at its mailing address;
  - c. e-mail - [HRTO.Registrar@ontario.ca](mailto:HRTO.Registrar@ontario.ca), with attachments not greater than 10mb in one e-mail;
  - d. as directed by the Tribunal.
- 1.18 Notwithstanding Rule 1.17, Applications filed by the Commission or by the Legal Support Centre must be filed electronically in accordance with the Practice Directions of the Tribunal.
- 1.19 Documents received after 5 p.m. by fax or e-mail will be deemed to have been received on the next business day.
- 1.19.1 A party must file a paper copy and an electronic copy or a second unbound paper copy of any bound document.
- 1.20 A party filing any document, other than an Application (Form 1) or a Response (Form 2) under ss. 34(1) or 34(5) of the Code, including by e-mail, must deliver a copy of the document to all other parties to the Application and must verify that s/he has done so by filing a Statement of Delivery in Form 23 or by confirming the delivery to the other parties on the cover letter or e-mail.

#### **Delivery of Documents to Parties or other Persons**

- 1.21 Documents must be delivered in one of the following ways:
  - a. hand delivery;
  - b. regular, registered or certified mail;
  - c. courier;

- d. fax, but only if the document is less than 20 pages in length or, if longer, with consent;
- e. e-mail where the person or parties receiving the document has consented to e-mail delivery; or
- f. any other way agreed upon by the parties or directed by the Tribunal.

1.21.1 When a party has a representative, documents must be delivered to the representative.

- 1.22 Where a document is delivered by a party or sent by the Tribunal, receipt is deemed to have occurred when delivered or sent:
- a. by mail, on the fifth day after the postmark date;
  - b. by fax, when the person sending the document receives a fax confirmation receipt, but if the fax confirmation receipt indicates a delivery time after 5 p.m., delivery will be deemed to have occurred the next day;
  - c. by courier, on the second day after it was given to the courier;
  - d. by e-mail, on the day sent or if sent after 5 p.m., delivery will be deemed to have occurred the next day;
  - e. by hand, when given to the party or when left with a person at the party's last known address.

#### **Verifying delivery**

- 1.23 A party responsible for delivering a document under these Rules must file a Statement of Delivery in Form 23 with the Tribunal or confirm delivery to the other parties on the cover letter or e-mail. The Statement of Delivery must be filed:
- a. with the document, when the document is filed with the Tribunal; or
  - b. no later than two days after the deemed date of delivery, if the document is not being filed with the Tribunal.

**RULE 2** Removed and replaced. Please see SJTO Common Rules.

### **RULE 3 TRIBUNAL PROCEEDINGS**

#### **Summonses**

- 3.1 On the request of a party, the Tribunal will provide a summons to witness in blank form, dated and signed by the Tribunal adjudicator, and the party may complete the summons and insert the name of the witness.
- 3.2 Delivery of a summons to a witness and payment of the attendance money is the responsibility of the party who obtained the summons.

#### **Confidentiality of Documents Disclosed Under These Rule**

- 3.3 Parties and their representatives may not use documents obtained under these Rules for any purpose other than in the proceeding before the Tribunal.

#### **Setting Dates in a Proceeding**

- 3.4 The Tribunal may schedule hearing dates, or other dates in a proceeding, with or without consultation with the parties, as the Tribunal considers appropriate.

#### **Form of Proceedings**

- 3.5 The Tribunal may conduct hearings in person, in writing, by telephone, or by other electronic means, as it considers appropriate. However, no Application that is within the jurisdiction of the Tribunal will be finally disposed of without affording the parties an opportunity to make oral submissions in accordance with these Rules.

- 3.5.1 An Application will not be finally disposed of without written reasons.
- 3.6 The location of in-person hearings will be determined by the Registrar, in accordance with the Tribunal's policies.

#### **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*.
- 3.8 Removed and replaced. Please see SJTO Common Rules.
- 3.9 Removed and replaced. Please see SJTO Common Rules.

#### **Public Proceedings**

- 3.10 The Tribunal's hearings are open to the public, except when the Tribunal determines otherwise.
- 3.11 The Tribunal may make an order to protect the confidentiality of personal or sensitive information where it considers it appropriate to do so.
- 3.11.1 Unless otherwise ordered, the Tribunal will use initials in its decisions to identify children under age 18 and the next friend of children under 18. It may use initials to identify other participants in the proceeding if necessary to protect the identity of children.
- 3.12 All written decisions of the Tribunal are available to the public.

#### **Non-Attendance at a Hearing**

- 3.13 Where a party has been notified of a hearing and fails to attend, the Tribunal may:
- a. proceed in the party's absence;
  - b. determine that the party is not entitled to further notice of the proceedings;
  - c. determine that the party is not entitled to present evidence or make submissions to the Tribunal;
  - d. decide the Application based solely on the materials before it;
  - e. take any other action it considers appropriate.

#### **Participation of Affected Persons or Organizations**

- 3.14 Where a person or organization is identified in an Application or in a Response as an affected person as defined in these Rules, that person or organization may file a Request to Intervene under Rule 11 within 35 days of delivery of the Application or the Response, failing which the Tribunal may proceed without further notice to the person or organization.

### **RULE 4 NOTICE OF CONSTITUTIONAL QUESTION**

- 4.1 Where a party intends to question the constitutional validity or applicability of any law, regulation, by-law or rule or where a party claims a remedy under s. 24(1) of the Charter of Rights and Freedoms, in relation to an act or omission of the Government of Canada or the Government of Ontario, a Notice of Constitutional Question must be delivered to the Attorneys General of Canada and Ontario and all other parties and filed with the Tribunal as soon as the circumstances requiring the notice become known and, in any event, at least 15 days before the question is to be argued.

**RULE 5 NON-COMPLIANCE WITH THE RULES**

- 5.1 Removed and replaced. Please see SJTO Common Rules.
- 5.2 Removed and replaced. Please see SJTO Common Rules.
- 5.3 The Tribunal may decide not to deal with an Application that is not filed in compliance with these Rules.
- 5.4 The Tribunal may finally determine an Application without further notice to any person who cannot be contacted by the Tribunal according to the contact information provided to the Tribunal by that person.
- 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.
- 5.6 Where a party fails to deliver material to another party or person as required by these Rules, the Tribunal may refuse to consider the material, or may take any other action it considers appropriate.
- 5.7 Where a party seeks to present evidence or make submissions with respect to a fact or issue that was not raised in the Application, Response, Reply, or in the materials filed under Rule 16 or 17, the Tribunal may refuse to allow the party to present evidence or make submissions about the fact or issue unless satisfied that there would be no substantial prejudice and no undue delay to the proceedings.

**RULE 6 APPLICATIONS: SECTIONS 34(1) or 34(5) OF THE CODE**

- 6.1 An Application under ss. 34(1) or 34(5) of the Code must be filed in Form 1, Application, and must include the related supplemental form(s) and Form 4A, 4B or 27, if applicable. These documents need not be delivered to the other parties.
- 6.2 A complete Application must provide the information requested in every section of the Application form and the related supplemental form(s) and Form 4A, 4B or 27 (if applicable), and must set out all the facts that form the substance of the allegations of discrimination including the circumstances of what happened, where and when it happened, and the names of person(s) or organization(s) alleged to have violated the Applicant's rights under the Code.
- 6.3 An Applicant who has commenced a civil proceeding in a court seeking an order under s. 46.1 with respect to any of the allegations in the Application must include a copy of the statement of claim with the Application.
- 6.4 Upon receiving an Application, the Tribunal will determine whether it complies sufficiently with these Rules to allow it to be processed. An Application filed under Rule 6.1 that is not sufficiently complete:
  - a. may be sent back to the Applicant with an explanation as to how the Application is incomplete;

- b. may be re-submitted not later than 20 days after the date that the Application was sent back; and
  - c. may be closed as not accepted, pursuant to Rule 5.3, if it is not completed.
- 6.5 If the Tribunal determines a re-submitted Application can be processed, it will be dealt with as if complete on the day it was originally filed with the Tribunal for the purposes of s. 34(1).
- 6.6 An Application accepted by the Tribunal for processing:
  - a. will be sent by the Tribunal to the Respondent(s), and to any trade union, occupational or professional organization identified in the Application, at the addresses provided in the Application; or
  - b. will not be dealt with in respect of a Respondent or a trade union, occupational or professional organization that cannot be contacted in accordance with paragraph (a) above, and the Applicant will be so advised; or
  - c. will be dealt with according to Rule 13, where the Tribunal determines that the Application is arguably outside of the Tribunal's jurisdiction.
- 6.7 The Application sent by the Tribunal to the Respondent and to any trade union or occupational or professional organization, will not include the confidential list of witnesses and the related witness information provided in that part of the Application Form.
- 6.8 An Application filed on behalf of another person under s. 34(5) of the *Code* must be filed together with the signed Consent in Form 27 of the person on whose behalf the Application is brought.

## **RULE 7 APPLICATION WITH REQUEST TO DEFER CONSIDERATION**

- 7.1 An Applicant may file an Application under Rule 6.1 and, at the same time, ask the Tribunal to defer consideration of the Application in accordance with Rule 14 if there are other legal proceedings dealing with the subject-matter of the Application.
- 7.2 A request for deferral will only be considered by the Tribunal where the other legal proceeding does not fall within the scope of s. 34(11) of the *Code*.
- 7.3 Where an Application is filed with a request for a deferral, the Applicant must include the following additional information with the Form 1:
  - a. identifying information about the other legal proceeding dealing with the subject matter of the Application; and
  - b. a copy of the document that commenced the other legal proceeding.
- 7.4 The Tribunal will not defer consideration of an Application without first giving all the parties, and any affected persons or organizations identified in the Application or Response, an opportunity to make submissions on the request for deferral.
- 7.5 Where an Applicant wants the Tribunal to proceed with an Application that was deferred pending completion of another legal proceeding, the Applicant must make a request, in accordance with Rules 14.3 and 14.4, no later than 60 days after completion of the other proceeding.

## **RULE 8 RESPONSE TO APPLICATION UNDER SECTIONS 34(1) OR 34(5) OF THE CODE**

- 8.1 To respond to an Application under ss. 34(1) or 34(5) of the *Code*, a Respondent must file a complete Response in Form 2 not later than 35 days after a copy of the Application was sent to the Respondent by the Tribunal. The Response need not be delivered to the other parties.

8.2 A complete Response must provide the information requested in each section of the Form 2, respond to each allegation set out in the Application and must also include any additional facts and allegations on which the Respondent relies. Where a Respondent alleges the issues in dispute in the Application are the subject of:

- a. a full and final signed release between the parties; or
- b. a civil court proceeding requesting a remedy based on the alleged human rights infringement; or
- c. a complaint filed with the Ontario Human Rights Commission; or
- d. exclusive federal jurisdiction,

the Respondent need not respond to the allegations in the Application, but must attach a copy of the applicable release, or statement of claim or court decision, or complaint filed with the Ontario Human Rights Commission or its decision and must include with the Response complete argument in support of its position that the Application should be dismissed. Notwithstanding anything else in Rule 8.2, the Tribunal may direct a Respondent to file a complete Response where the Tribunal considers it appropriate.

8.2.1 Where a Respondent alleges the issues in dispute are the subject of an ongoing grievance or arbitration brought pursuant to a collective agreement, the Respondent need not respond to the allegations in the Application but must provide its contact information, attach a copy of the document which commenced the grievance, confirm that the grievance or arbitration is ongoing and include argument in support of its position that the Application should be deferred pending the conclusion of the grievance or arbitration. The Tribunal may direct a Respondent to file a complete Response where the Tribunal considers it appropriate.

8.3 A Response that is not complete:

- a. may be sent back to the Respondent with an explanation of how the Response is incomplete; and
- b. may be re-submitted no later than 20 days after the Response was sent back.

8.4 A Response that is accepted by the Tribunal for processing, including a Response that is accepted after being re-submitted in accordance with Rule 8.3(b), will be sent by the Tribunal to:

- a. the Applicant;
- b. any trade union, occupational or professional association identified in the Application; and,
- c. any other Respondent or affected person identified in the Response, at the addresses identified.

8.5 A Response that has been re-submitted in accordance with Rule 8.3(b) will be dealt with as if complete on the day that it was originally filed with the Tribunal.

8.6 The Response sent by the Tribunal to the Applicant and to any other person or organization will not include the confidential list of witnesses and any related witness information included in that part of the Response.

## **RULE 9 REPLY**

9.1 An Applicant who intends to prove a version of the facts different from those set out in a Response must deliver and file a Reply in Form 3 setting out the different version, unless it is already contained in the Application. An Applicant may also reply to any other matter raised in the Response.

- 9.2 The Reply must deal only with new matters that are raised in the Response.
- 9.3 The Applicant must deliver a copy of the Reply to the other parties and any trade union or occupational or professional organization and other person or organization identified as an affected person in the Application or Response and file it with the Tribunal not later than 21 days after the Response was sent to the Applicant.

## **RULE 10 WITHDRAWAL OF AN APPLICATION**

- 10.1 Except where the withdrawal forms part of the terms of a settlement of an Application, an Applicant wishing to withdraw an Application must deliver a completed Request to Withdraw in Form 9 to:
- a. all other parties;
  - b. any trade union or occupational or professional organization identified in the Application; and
  - c. any other person or organization identified as an affected person before filing it with the Tribunal.
- 10.2 Where the Application was filed on behalf of another person under s. 34(5) of the *Code*, the Request to Withdraw must also include a completed Consent.
- 10.3 Where a Respondent or other person or organization receiving notice under Rule 10.1 wishes to respond to a Request to Withdraw, the response must be in Form 11, Response to Request, and must be filed no later than two days after the Request to Withdraw was delivered.
- 10.4 A copy of the Response to Request under Rule 10.3, if any, must be delivered to the other parties and any other person or organization that received notice under Rule 10.1, before it is filed with the Tribunal.
- 10.5 Where a Response to the Application has already been filed, an Application may be withdrawn only with the permission of the Tribunal and upon such terms as the Tribunal may determine.

## **RULE 11 REQUEST TO INTERVENE**

- 11.1 The Tribunal may allow a person or organization to intervene in any case at any time on such terms as the Tribunal may determine. The Tribunal will determine the extent to which an intervenor will be permitted to participate in a proceeding.

### **Intervention by a Person or Organization other than the Commission**

- 11.2 A request to intervene by a person or organization, other than a request by the Commission, must be made in Form 5, Request to Intervene, and must be delivered to all parties and any affected persons or organizations identified in the Application or the Response and filed with the Tribunal.
- 11.3 A Request to Intervene must include an answer to each question in Form 5 and must:
- a. describe the issue(s) that the person or organization wants to address;
  - b. explain the proposed intervenor's interest in the issue(s) and its expertise, if any, regarding the issue(s);
  - c. set out the proposed intervenor's position, if any, on each of the issues raised in the Application and the Response; and
  - d. set out all the material facts upon which the proposed intervenor will rely.

11.4

Where a party wishes to respond to a Request to Intervene, the response must be in Form 11, Response to Request, and must be filed with the Tribunal no later than 21 days after the Request to Intervene was delivered.

- 11.5 A copy of the Response to Request under Rule 11.4, if any, must be delivered to the proposed intervenor, all other parties and any identified affected persons or organizations and filed with the Tribunal.

#### **Intervention by Commission Without Consent of Applicant**

- 11.6 The Commission may, in accordance with s. 37(1) of the *Code*, intervene in an Application under s. 34 of the *Code* on such terms as the Tribunal considers appropriate.
- 11.7 Where the Applicant has not consented to the Commission intervening in the Application, the Commission shall complete a Request to Intervene in Form 5 and deliver it to the other parties and to any identified affected persons and file it with the Tribunal.
- 11.8 A Commission Request to Intervene filed under Rule 11.6 must:
- a. include a statement of the issues that the Commission wants to address;
  - b. explain how the issues relate to the Commission's role, mandate and the public interest;
  - c. set out the Commission's position, if any, on each of the issues raised in the Application and the Response;
  - d. set out all of the material facts upon which the Commission will rely;
  - e. set out the remedies that the Commission is seeking; and,
  - f. set out the terms on which the Commission seeks to intervene.
- 11.9 A response to a Commission Request to Intervene must be in Form 11, Response to Request, and must be filed with the Tribunal no later than 21 days after the Request to Intervene was delivered.
- 11.10 A copy of the Response to Request under Rule 11.9, if any, must be delivered to the Commission and to all the other parties and to any identified affected person, and filed with the Tribunal.

#### **Intervention by Commission with Consent of Applicant**

- 11.11 The Commission may intervene in an Application with the consent of the Applicant by filing a Notice of Commission Intervention in Form 6, with a Consent completed by the Applicant.
- 11.12 The Commission must deliver copies of the Form 6 with the completed Consent, to the other parties and to any identified affected persons, before filing with the Tribunal.
- 11.13 A Notice of Commission Intervention in Form 6 must be complete and must:
- a. include a statement of the issues that the Commission wants to address;
  - b. set out the Commission's position, if any, on each of the issues raised in the Application and the Response;
  - c. set out all of the material facts upon which the Commission will rely;
  - d. set out the remedies that the Commission is seeking; and
  - e. set out the terms on which the Commission seeks to intervene.

#### **Intervention by a Bargaining Agent**

- 11.14 The bargaining agent for an applicant who has filed an Application about his or her employment

may intervene in the Application by filing a Notice of Intervention by Bargaining Agent in Form 28.

- 11.15 A request to remove a bargaining agent as an intervenor shall be made as a Request for Order During Proceedings in accordance with Rule 19.

## **RULE 12 COMMISSION APPLICATIONS UNDER SECTION 35 OF THE CODE**

### **Commission Application**

- 12.1 A Commission Application under s. 35 of the *Code* must be in Form 7, Application by Commission and must be complete. The Application must be delivered to the Respondents and any affected persons identified in Form 7 and filed with the Tribunal.
- 12.2 A complete Commission Application under s. 35 of the *Code* must:
- a. include a statement why, in the opinion of the Commission, the Application is in the public interest;
  - b. set out the issues the Commission wants to address;
  - c. set out all the material facts upon which the Commission intends to rely; and
  - d. set out the remedies the Commission is seeking.

### **Response of Respondents and Affected Persons Identified in the Commission Application**

- 12.3 A Respondent or an identified affected person who wishes to respond to the Commission Application must deliver a completed Response to Commission Application in Form 8 to the Commission and any other party or identified affected person named in the Commission Application, and file the Response with the Tribunal, not later than 60 days after delivery of the Form 7.
- 12.4 A complete Response to a Commission Application must:
- a. include a statement setting out the position of the Respondent or affected person in respect of each of the issues and material facts set out in the Commission Application;
  - b. set out all of the material facts upon which the Respondent or affected person intends to rely; and,
  - c. include a response to the remedies requested by the Commission.

### **Case Conference**

- 12.5 Within 45 days of filing the Response(s) the Tribunal will convene a Case Conference with all the parties and affected persons to discuss the conduct of the proceeding under s. 35 of the *Code*.

## **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.

### **Tribunal-Initiated Preliminary Consideration of Jurisdiction**

- 13.2 Where it appears to the Tribunal that an Application is outside the jurisdiction of the Tribunal, the Tribunal shall, prior to sending the Application to the Respondent(s), issue a Notice of Intention to Dismiss the Application. The Notice will:
- a. be sent to the Applicant only;
  - b. set out reasons for the intended dismissal; and,
  - c. require the Applicant to file written submissions within 30 days.

- 13.3 Where the Tribunal dismisses the Application under Rule 13.1 the decision will be sent to the Applicant. At the same time the Tribunal will send the decision to the Respondent(s), and any trade union or occupational or professional organization identified in the Application, at the addresses provided in the Application, and include a copy of the Application, the Applicant's submissions and all correspondence between the Tribunal and the Applicant on the jurisdictional issue.
- 13.4 Where, after considering the Applicant's Rule 13.2 submissions, the Tribunal decides to continue to deal with an Application, the Tribunal will send the Application to Respondent(s), and any trade union or occupational or professional organization identified in the Application, at the addresses provided in the Application, and include a copy of the Application, its Rule 13.1 decision, the Applicant's Rule 13.2 submissions and all correspondence between the Tribunal and the Applicant on the jurisdictional issue.
- 13.5 A decision by the Tribunal under Rule 13.4 to continue to deal with an Application is not a final decision regarding the Tribunal's jurisdiction in respect of the Application.

#### **RULE 14 DEFERRAL OF AN APPLICATION BY THE TRIBUNAL**

- 14.1 The Tribunal may defer consideration of an Application, on such terms as it may determine, on its own initiative or at the request of any party.
- 14.2 Where the Tribunal intends to defer consideration of an Application under Rule 14.1, it will first give the parties, any identified trade union or occupational or professional organization and any identified affected persons, notice of its intention to consider deferral of the Application and an opportunity to make submissions.
- 14.3 Where a party wishes the Tribunal to proceed with an Application which has been deferred the request must be made in accordance with Rule 19.
- 14.4 Where an Application was deferred pending the outcome of another legal proceeding, a request to proceed under Rule 14.3 must be filed no later than 60 days after the conclusion of the other proceeding, must set out the date the other legal proceeding concluded and include a copy of the decision or order in the other proceeding, if any.
- 14.5 The Tribunal may, on its own motion, require a deferred Application to proceed in appropriate circumstances.

#### **RULE 15 MEDIATION**

- 15.1 At any time after an Application is filed, mediation assistance may be offered by the Tribunal or requested by a party.
- 15.2 Parties and their representatives who participate in mediation under Rule 15.1 must sign a confidentiality agreement before the mediation commences.
- 15.3 The Tribunal may direct that a party or a person with authority to settle on the party's behalf be present at the mediation.
- 15.4 All matters disclosed during mediation are confidential and may not be raised before the Tribunal or in other proceedings, except with the permission of the person who gave the information.

15.5 The Tribunal may determine that affected persons or organizations should receive notice of mediation and should be entitled to participate.

15.6 Where the terms of any settlement are in writing and signed by the parties the parties may request that the Tribunal dispose of the matter in accordance with their agreement by filing a confirmation of settlement using Form 25 (Settlement). Parties may also ask the Tribunal to issue a consent order in accordance with s. 45.9 of the *Code*. A completed Form 25 must be filed within ten (10) days of the date of the agreement.

#### **RULE 15A MEDIATION-ADJUDICATION WITH AGREEMENT OF THE PARTIES**

15.1A With the agreement of the parties, the Tribunal member hearing an Application may act as mediator. In such circumstances, the mediator may continue to hear the matter as adjudicator.

15.2A Where the parties agree to mediation-adjudication, they must sign a mediation-adjudication agreement before the mediation commences.

#### **RULE 16 DISCLOSURE OF DOCUMENTS**

16.1 Not later than 21 days after the Tribunal sends a Confirmation of Hearing to the parties, each party must deliver to every other party (and file a Statement of Delivery):

- a. a list of all arguably relevant documents in their possession. Where a privilege is claimed over any document the party must describe the nature of the document and the reason for making the claim; and
- b. a copy of each document contained on the list, excluding any documents for which privilege is claimed.

16.2 Unless otherwise ordered by the Tribunal, not later than 45 days prior to the first scheduled day of hearing, each party must deliver to every other party (and file a Statement of Delivery):

- a. a list of documents upon which the party intends to rely; and
- b. a copy of each document on the list or confirmation that each document has already been provided to the other parties in accordance with Rule 16.1.

16.3 Unless otherwise ordered by the Tribunal, not later than 45 days prior to the first scheduled day of hearing, each party must file with the Tribunal:

- a. a list of documents upon which the party intends to rely; and
- b. a copy of each document contained on the list.

16.4 No party may rely on or present any document not included on a document list and provided to other parties in accordance with Rule 16.1 and 16.2, and filed with the Tribunal under Rule 16.3, except with the permission of the Tribunal.

#### **RULE 17 DISCLOSURE OF WITNESSES**

17.1 Unless otherwise ordered by the Tribunal, not later than 45 days prior to the first scheduled day of hearing, each party must deliver a witness list to every other party and file it with the Tribunal, along with a Statement of Delivery. The witness list must include the name of every witness, including expert witnesses, the party intends to present to the Tribunal.

17.2 The witness list must include a brief statement summarizing each witness' expected evidence.

17.3 A copy of an expert witness' written report, or full summary of proposed evidence, and curriculum vitae must accompany the witness list.

- 17.4 No party may present a witness whose name and summary of evidence was not included in a witness list and delivered and filed in accordance with Rules 17.1 and 17.2 or present an expert witness if material has not been delivered and filed in accordance with Rule 17.3, except with the permission of the Tribunal.

#### **RULE 18 CASE ASSESSMENT DIRECTION**

- 18.1 The Tribunal may prepare and send the parties a Case Assessment Direction where it considers it appropriate. The Case Assessment Direction may address any matter that, in the opinion of the Tribunal, will facilitate the fair, just and expeditious resolution of the Application and may include directions made in accordance with any of its powers in Rule 1.6 and 1.7.
- 18.2 At the hearing parties must be prepared to respond to any issues identified in the Case Assessment Direction and to proceed in accordance with the directions set out in the Case Assessment Direction.

#### **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.
- 19.4 A Request for Order (Form 10) must:
- a. describe the order requested;
  - b. contain reasons for the request, including any facts relied on and submissions in support of the request;
  - c. 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;
  - d. include the documents relied on in support of the request, if any;
  - e. indicate whether the requesting party wishes the Tribunal to deal with the matter in writing, in person, or electronically; and,
  - f. 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.
- 19.6 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:
- a. 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;

- b. 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;
- c. reasons and any submissions in support of the responding party's position;
- d. any additional facts relied on by the responding party; and,
- e. 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.

#### **RULE 19A SUMMARY HEARINGS**

- 19.1A The Tribunal may hold a summary hearing, on its own initiative or at the request of a party, on the question of whether an Application should be dismissed in whole or in part on the basis that there is no reasonable prospect that the Application or part of the Application will succeed.
- 19.2A Rules 16 and 17 do not apply to summary hearings. The Tribunal may give directions about steps the parties must take prior to the summary hearing, including disclosure or witness statements.
- 19.3A When a party requests that an Application be dismissed pursuant to this Rule, it shall deliver to the other parties and file with the Tribunal a Request for Summary Hearing (Form 26), which includes full argument in support of the Request that the Application be dismissed. The party making the Request shall also deliver to the other parties a copy of the Practice Direction: Summary Hearing Requests.
- 19.4A A party may respond to the Request for Summary Hearing by completing Form 11, delivering a copy to all parties and filing it with the Tribunal not later than 14 days after the Request for Summary Hearing was delivered.
- 19.5A Upon review of the Request and any Response to the Request, the Tribunal will determine whether to hold a summary hearing on the question of whether the Application should be dismissed, in whole or in part, on the basis that there is no reasonable prospect that the Application will succeed. The Tribunal need not give reasons for a decision to hold or not to hold a summary hearing following a party's request.
- 19.6A Where the Tribunal decides not to dismiss an Application following a summary hearing, it need not give reasons.

#### **RULE 20 TRIBUNAL-ORDERED INQUIRIES**

- 20.1 A party may request an Order from the Tribunal to appoint a person to conduct an inquiry under s. 44(1) of the Code. A Request for a Tribunal-Ordered Inquiry must be made in Form 12, delivered to the other parties and filed with the Tribunal. The Request must be made promptly after the party becomes aware of the need for an inquiry.
- 20.2 A Request for Tribunal-Ordered Inquiry under Rule 20.1 must:
- a. describe the evidence or nature of the evidence to be obtained;
  - b. explain why the evidence is necessary to achieve a fair, just and expeditious resolution of the Application;
  - c. describe the efforts already made to obtain the evidence;
  - d. provide reasons why an inquiry is necessary to obtain the evidence; and,

e. propose terms of reference for the inquiry.

- 20.3 The other parties must deliver their response, if any, in Form 13, Response to Request for Inquiry, to all other parties and file it with the Tribunal not later than 14 days after the request was delivered.
- 20.4 A Response to Request for Inquiry must include complete submissions in support of the party's position.
- 20.5 An order made under s. 44(1) of the Code will include terms of reference for the inquiry.
- 20.6 A person conducting an inquiry will prepare a written report and submit it to the Tribunal and the parties in accordance with the terms of reference established by the Tribunal.
- 20.7 A report submitted to the Tribunal under s. 44(14) of the Code is not evidence in a proceeding, unless:
  - a. its author testifies in the proceeding and the parties are given an opportunity to question him or her;
  - b. the parties otherwise agree to the admission of the report as evidence in the proceeding; or,
  - c. the Tribunal otherwise directs

## **RULE 21 EXPEDITED PROCEEDINGS**

- 21.1 An Applicant may request that the Tribunal deal with an Application on an expedited basis in circumstances which require an urgent resolution of the issues in dispute. A Request to Expedite an Application must be made in Form 14 and filed with the Application in accordance with Rule 6.1 or 24.1.
- 21.2 A Request to Expedite an Application made under Rule 21.1 must include:
  - a. a detailed description of the requested changes to the Tribunal's normal process, including timelines;
  - b. one or more declarations signed by persons with direct first-hand knowledge detailing all the facts upon which the Applicant relies in support of the request to expedite; and
  - c. submissions that explain:
    - a. why there are urgent circumstances that may affect the fair and just resolution of the merits of the Application if the Application proceeds in accordance with the Tribunal's regular process;
    - b. the harm that would result if the Request is denied; and,
    - c. why the Application should be given priority for Tribunal resources over other matters.
- 21.2.1 Where the Tribunal denies a Request to Expedite, it need not give reasons.
- 21.3 A response to a Request to Expedite an Application must be in Form 15, Response to Request to Expedite an Application, delivered to all other parties and any affected persons identified in the Application and filed with the Tribunal not later than seven days after the request was sent or as the Tribunal directs.

## **RULE 22 WHERE THE SUBSTANCE OF AN APPLICATION HAS BEEN DEALT WITH IN ANOTHER PROCEEDING**

- 22.1 The Tribunal may dismiss part or all of the Application where it determines, under s. 45.1 of the

Code, that another proceeding has appropriately dealt with the substance of part or all of an Application.

- 22.2 The parties will have the opportunity to make oral submissions before the Tribunal dismisses an Application under Rule 22.1.

## **RULE 23 INTERIM REMEDIES**

- 23.1 An Applicant may request that the Tribunal order an interim remedy in an Application. A Request for an Interim Remedy must be made in Form 16. If the Request is made at the same time the Application is filed, it need not be delivered to the other parties. If it is made at a later stage, it must be delivered to the other parties and filed with the Tribunal.
- 23.2 The Tribunal may grant an interim remedy where it is satisfied that:
- a. the Application appears to have merit;
  - b. the balance of harm or convenience favours granting the interim remedy requested; and,
  - c. it is just and appropriate in the circumstances to do so.
- 23.3 A Request for an Interim Remedy must include:
- a. a detailed description of the order sought;
  - b. one or more declarations signed by persons with direct first-hand knowledge detailing all of the facts upon which the Applicant relies; and,
  - c. submissions with respect to the merits of the Application, the balance of harm or convenience and why an interim remedy would be just and appropriate in the circumstances, in accordance with the Rule 23.2.
- 23.4 The other parties must file their response, if any, in Form 17, Response to Request for Interim Remedy, not later than seven days after the Form 16 was delivered. The Form 17 must be delivered to the other parties and any affected persons identified in the Application and filed with the Tribunal not later than seven days after the request was sent or as the Tribunal directs.
- 23.5 A Response to Request for Interim Remedy must be delivered to all other parties and filed with the Tribunal and must include:
- a. one or more declarations signed by persons with direct first-hand knowledge detailing all of the facts upon which the Respondent relies; and,
  - b. submissions with respect to the merits of the Application, the balance of harm or convenience and why an interim remedy would not be just and appropriate in the circumstances, in accordance with the Rule 23.2.

## **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.

**RULE 25 REQUEST TO AMEND CLERICAL ERRORS**

- 25.1 Within 30 days from the date of a decision or order, a party may request that the Tribunal correct a typographical error, error of calculation, or similar error made in the decision or order. The Tribunal may, at any time, make similar corrections.
- 25.2 The request shall be considered by the same panel that rendered the original decision or order, unless the Tribunal Chair determines otherwise.

**RULE 26 REQUEST FOR RECONSIDERATION**

- 26.1 Any party may request reconsideration of a final decision of the Tribunal within 30 days from the date of the decision.
- 26.2 A Request for Reconsideration must be made in Form 20 and be delivered to all parties and filed with the Tribunal.
- 26.3 A Request for Reconsideration must include:
- a. reasons for the request, including the basis upon which the Tribunal is asked to grant the request for reconsideration;
  - b. submissions in support of the request; and,
  - c. remedy or relief sought.
- 26.4 A party who has been served with a Request for Reconsideration need not file a response with the Tribunal unless the Tribunal directs that a response is required. Where a party is directed to file a response to the request, it must be in Form 21, Response to Request for Reconsideration, and must include complete written submissions in support of its position.
- 26.5 A Request for Reconsideration will not be granted unless the Tribunal is satisfied that:
- a. there are new facts or evidence that could potentially be determinative of the case and that could not reasonably have been obtained earlier; or
  - b. the party seeking reconsideration was entitled to but, through no fault of its own, did not receive notice of the proceeding or a hearing; or
  - c. the decision or order which is the subject of the reconsideration request is in conflict with established jurisprudence or Tribunal procedure and the proposed reconsideration involves a matter of general or public importance; or
  - d. other factors exist that, in the opinion of the Tribunal, outweigh the public interest in the finality of Tribunal decisions.
- 26.5.1 A Request for Reconsideration made more than 30 days following the Decision will not be granted unless the Tribunal determines that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay.
- 26.6 The Tribunal shall not grant a Request for Reconsideration without providing the parties an opportunity to make submissions.
- 26.7 The determination of the Request for Reconsideration shall be conducted by written submissions unless the Tribunal decides otherwise.
- 26.7.1 Where a Request for Reconsideration has been determined, the Tribunal will not consider a subsequent Request for Reconsideration of the same decision, absent exceptional

circumstances. The Tribunal need not give reasons for a decision not to consider a subsequent Request.

#### **Where Reconsideration Request Granted**

- 26.8 Where the Tribunal considers it appropriate to reconsider its decision it may:
- a. make a decision on the substance of the Request without further submissions from the parties, or
  - b. determine a procedure for rehearing all or part of the matter.

#### **Reconsideration at the Initiative of the Tribunal**

- 26.9 The Tribunal may reconsider a decision on its own initiative where it considers it advisable and appropriate to do so.
- 26.10 Where the Tribunal decides to reconsider a decision on its own initiative, it will determine a procedure for rehearing all or part of the matter, which will include an opportunity for the parties to make submissions.

### **RULE 27 STATED CASE TO DIVISIONAL COURT**

- 27.1 Where the Tribunal has made a final decision or order in a proceeding in which the Commission was a party or intervenor, the Commission may, under s. 45.6 of the *Code*, apply to the Tribunal to have the Tribunal state a case to the Divisional Court.
- 27.2 An application under Rule 27.1 shall be delivered to all the parties to the proceeding in which the decision or order was issued and filed with the Tribunal no later than 60 days after the date of the decision or order. The application shall be in Form 22, Commission Application to Request Stated Case and shall:
- a. identify the Commission policy, approved under s. 30 of the *Code*, that is the subject of the application under Rule 27.1;
  - b. include a statement setting out the reasons why the Commission believes that the decision or order is not consistent with the Commission-approved policy; and,
  - c. state why the Commission believes that the application under Rule 27.1 relates to a question of law and that it would be appropriate for the Tribunal to state a case for the opinion of the Divisional Court on the question of law.
- 27.3 Any party who supports the Commission Application to Request Stated Case may, not later than 20 days after the Form 22 was delivered, deliver their submissions to all other parties and the Commission and file the submissions at the Tribunal.
- 27.4 Any party who opposes the Application to Request Stated Case may, not later than 30 days after the Form 22 was delivered, deliver submissions to all other parties and the Commission and file their submissions at the Tribunal.
- 27.5 The Commission may, not later than ten (10) days from delivery of opposing submissions, if any, deliver reply submissions to all other parties and file them at the Tribunal.
- 27.6 A Commission Application to Request Stated Case does not operate as a stay of the final decision or order at issue, unless otherwise ordered by the Tribunal or the Court.

### **LIST OF FORMS REFERRED TO IN RULES**

Form	Title	Rule
1	Application	6
2	Response	8
3	Reply	9
4A	Litigation Guardian on Behalf of a Minor	A10
4B	Litigation Guardian: Mental Incapacity	A10
5	Request to Intervene	11
6	Notice of Commission Intervention (with Consent)	11
7	Application by Commission	12
8	Response to Commission Application	12
9	Request to Withdraw	10
10	Request for Order During Proceedings	19
11	Response to a Request for Order During Proceedings	19
12	Request for Tribunal-ordered Inquiry	20
13	Response to Request for Tribunal-ordered Inquiry	20
14	Request to Expedite Proceeding	21
15	Response to Request to Expedite Proceeding	21
16	Request for Interim Remedy	23
17	Response to Request for Interim Remedy	23
18	Application for Contravention of Settlement	24
19	Response to Application for Contravention of Settlement	24
20	Request for Reconsideration	26
21	Response to Request for Reconsideration	26
22	Commission Application to Request Stated Case	27
23	Statement of Delivery	1.23
24	Summons to Witness	3.1
25	Settlement	15
26	Request for Summary Hearing	19A

27	Application under Section 34(5) of the HRC on Behalf of Another Person	6
28	Notice of Intervention by Bargaining Agent	11

Effective as of October 24, 2017

[sjto.ca/hrto](http://sjto.ca/hrto)

**TAB N**

**THIS IS EXHIBIT “N” REFERRED TO IN THE AFFIDAVIT OF LAURA J. FREITAG  
SWORN BEFORE ME THIS 9th DAY OF February, 2021.**



---

**A COMMISSIONER FOR TAKING AFFIDAVITS**



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

655 Bay Street, 14<sup>th</sup> Floor  
 Toronto ON M7A 2A3  
 Tel: 416 326-1312 or 1-866-598-0322  
 Fax: 416-326-2199 or 1-866-355-6099  
 E-mail: [hrtto.registrar@ontario.ca](mailto:hrtto.registrar@ontario.ca)  
 Website: [sjto.ca/hrtto](http://sjto.ca/hrtto)

**Tribunaux de justice sociale Ontario**  
*Pour une justice accessible et équitable*  
**Tribunal des droits de la personne de l'Ontario**

655, rue Bay, 14<sup>e</sup> étage  
 Toronto ON M7A 2A3  
 Tél.: 416-326-1312 ou 1-866-598-0322  
 Téléc.: 416-326-2199 ou 1-866-355-6099  
 Courriel: [hrtto.registrar@ontario.ca](mailto:hrtto.registrar@ontario.ca)  
 Site Web: [tjsso.ca/tdpo](http://tjsso.ca/tdpo)

**NOTICE OF HEARING  
 CONTRAVENTION OF SETTLEMENT**

**HRTO FILE: 2018-33237-S**

August 3, 2018

Filion Wakely Thorup Angeletti LLP  
 c/o Donald Jarvis  
 333 Bay Street, Suite 2500  
 Toronto, Ontario M5H 2R2  
 Via Mail & Email: [djarvis@filion.on.ca](mailto:djarvis@filion.on.ca)

Kelly Donovan  
 11 Daniel Place  
 Brantford, Ontario N3R 1K6  
 Via Mail & Email: [kelly@fit4duty.ca](mailto:kelly@fit4duty.ca)

Waterloo Regional Police Association  
 c/o Caroline V. (Nini) Jones  
 155 Wellington St 35th Floor  
 Toronto, Ontario M5V 3H1  
 Via Mail & Email: [nini.jones@paliarerland.com](mailto:nini.jones@paliarerland.com)

**Re: The Regional Municipality of Waterloo Police Services Board v.  
 Kelly Donovan**

Child and Family Services Review Board  
 Custody Review Board  
 Human Rights Tribunal of Ontario  
 Landlord and Tenant Board Ontario  
 Special Education (*English*) Tribunal Ontario  
 Special Education (*French*) Tribunal Ontario  
 Social Benefits Tribunal

Commission de révision des services à l'enfance et à la famille  
 Commission de révision des placements sous garde  
 Tribunal des droits de la personne de l'Ontario  
 Commission de la location immobilière  
 Tribunal de l'enfance en difficulté de l'Ontario (*anglais*)  
 Tribunal de l'enfance en difficulté de l'Ontario (*français*)  
 Tribunal de l'aide sociale

A hearing before the Human Rights Tribunal of Ontario has been scheduled for:

Date: **February 22, 2019**

Time: **10:00 a.m. to 5:00 p.m., E.S.T.**

Location: **Mohawk Residence & Conference Centre, 245 Fennell Avenue West,  
Hamilton, Ontario, Meeting Room 1**

The hearing will deal with the issues identified in the Contravention of Settlement Application and in any Response to the Contravention of Settlement Application, and is being held under s. 45.9 of the *Human Rights Code*, R.S.O. 1990, c. H.19.

By no later than **January 25, 2019**, the parties shall serve on each other and file with the Tribunal:

- A list of all documents upon which they intend to rely for the hearing and a copy of each document on the list; and
- A list of any witnesses they intend to call to give evidence at the hearing, together with a brief statement of each witness' expected evidence.

### IMPORTANT INFORMATION

**Please read this entire notice right away. It explains what you must do before the hearing. It also explains what you must do within the next 14 days if you need to reschedule the hearing. The HRTO's disclosure rules (Rules 16 and 17 of the Rules of Procedure) do not apply to this hearing.**

For more information or explanations of legal terms, see the HRTO's Rules of Procedure (Rule 24) available on the HRTO's website at [sjto.ca/hrto](http://sjto.ca/hrto) or from the Registrar's Office.

### RESCHEDULING AND ADJOURNMENTS

If you cannot attend the hearing on the date(s) scheduled, you must act within 14 days of the date of this Notice to request to reschedule. After that, a hearing will be adjourned or rescheduled only in exceptional circumstances, even if both parties agree to an adjournment. Retaining a new representative who is not available or prepared to proceed on the scheduled date is normally not considered an exceptional circumstance.

To reschedule the hearing you must take the following steps:

1. Contact the other party(ies) and create a list of 3-5 dates where everyone is available to participate in a rescheduled hearing. The 3-5 dates **MUST** fall within 8 weeks of the original hearing date.

**NOTE – The HRTO does NOT schedule hearings on Mondays. The 3 -5 dates provided must fall on Tuesdays, Wednesdays, Thursdays and Fridays.**

2. Provide these-agreed upon 3-5 dates to the HRTO by **August 17, 2018.**

**Note – Do not copy the HRTO on your discussions with other parties about date selection. This correspondence will not be retained as part of your case file. Please ONLY submit the final list of 3-5 agreed-upon dates for rescheduling the hearing.**

3. If the other party(ies) refuses to provide dates and/or doesn't respond to you, provide a list of 3-5 dates within 8 weeks of the original hearing date, on which *you* are available to the HRTO by **August 17, 2018.**
4. Always copy the other party(ies) on all correspondence sent to the HRTO (or file a Statement of Delivery/Form 23 if correspondence is sent by fax or mail).

The HRTO will try to reschedule the hearing on one of the dates you provided, subject to the availability of the HRTO's venues and its adjudicators.

**If the parties do not respond as directed or are unable to agree on alternate dates for rescheduling, in accordance with the HRTO's practice direction, the HRTO may select the date for the rescheduled hearing without the agreement of the parties.**

Requests for rescheduling and adjournment will be dealt with in accordance with the Practice Direction on Scheduling located on the HRTO's website at [www.sjto.gov.on.ca/hrto/rules-and-practice-directions/](http://www.sjto.gov.on.ca/hrto/rules-and-practice-directions/).

## **CONTACT INFORMATION**

The HRTO will send information to the address you have provided to us. If your contact information changes, you must immediately advise the HRTO and the other parties. We may send you directions before the hearing that require you to take action, so be sure to check your e-mail and mail regularly. If an applicant fails to respond, the Application may be dismissed. If a respondent fails to respond, they may lose the ability to present a defence.

## **FAILURE TO ATTEND THE HEARING**

If you do not attend the hearing after receiving proper notice, the HRTO may proceed in your absence (if you are a respondent or intervener) or dismiss the Application as abandoned (if you are the applicant).

## FILING DOCUMENTS WITH THE HRTO

The HRTO's computer system requires that documents filed with the HRTO as email attachments must be less than 10 mb. in any one email. See Rule 1.17(c) of the HRTO's Rules of Procedure.

At least one paper copy and an electronic copy of each document must be provided to the HRTO. If the paper copy is bound and you do not provide an electronic copy, then you must provide a second unbound paper copy. See Rule 1.19.1.

All written communications must be addressed to the Registrar. Any document, including emails, **must** be copied to the other parties before being filed with the HRTO. The HRTO cannot accept any materials unless you confirm that they have been copied to the other parties. See Rules 1.12 and 1.20.

## ACCOMMODATION

You, your representative and your witnesses are entitled to accommodation of any *Human Rights Code*-related needs. The SJTO/HRTO's Accessibility and Accommodation Policy is available at <http://www.sjto.gov.on.ca/hrto/accessibility-and-accommodations/>. Notify the Registrar as soon as possible if accommodation is required.

## FRAGRANCE POLICY

As fragrances cause health problems for some individuals, the HRTO asks people not to use scented products such as perfumes, after-shave, creams or hair-care products when attending in-person hearings and mediations and coming to its offices..

## FORMS, RULES, GUIDES, POLICIES AND PRACTICE DIRECTIONS

The HRTO's Forms, Rules of Procedure, Guides, Policies and Practice Directions are available on our website at [sjto.ca/hrto](http://sjto.ca/hrto). To request a copy of these documents, you can also contact the HRTO by e-mail ([hrto.registrar@ontario.ca](mailto:hrto.registrar@ontario.ca)), by phone (toll-free at 1-866-598-0322 or in Toronto at 416-326-1312; TTY toll-free at 1-866-607-1240 or TTY Toronto 416-326-2027) or in person at 655 Bay Street, 14<sup>th</sup> Floor, Toronto, Ontario. These documents are available in a variety of accessible formats.

## THE HUMAN RIGHTS LEGAL SUPPORT CENTRE

The Human Rights Legal Support Centre (HRLSC) is a separate organization that provides free legal assistance to people who believe they have experienced discrimination under the Ontario *Human Rights Code*.

If you are the applicant and do not already have a representative, you may want to contact the HRLSC to discuss your Application. Depending on the situation, they may provide advice or agree to represent you at the hearing.

**You must contact the HRLSC quickly.** The HRTO will not reschedule a hearing because a party has retained a new representative.

You can contact the HRLSC Monday, Tuesday, Wednesday and Friday from 9 am to 5 pm, Thursday from 2 pm to 6 pm at:

**Tel:** 416-597-4900  
**Toll Free:** 1-866-625-5179  
**TTY:** 416-314-6651  
**TTY Toll Free:** 1-866-612-8627

**Website:** [www.hrlsc.on.ca](http://www.hrlsc.on.ca)

**TAB O**

**THIS IS EXHIBIT “O” REFERRED TO IN THE AFFIDAVIT OF LAURA J. FREITAG  
SWORN BEFORE ME THIS 9th DAY OF February, 2021.**



**A COMMISSIONER FOR TAKING AFFIDAVITS**


**Social Justice Tribunals Ontario**
*Providing fair and accessible dispute resolution*

Human Rights Tribunal of Ontario  
 655 Bay Street, 14<sup>th</sup> Floor  
 Toronto ON M7A 2A3  
 Tel: 416-326-1312 or 1-866-598-0322  
 Fax: 416-326-2199 or 1-866-355-6099  
 E-mail: [hrtto.registrar@ontario.ca](mailto:hrtto.registrar@ontario.ca)  
 Website: [www.hrtto.ca](http://www.hrtto.ca)

**Tribunaux de justice sociale Ontario**
*Pour une justice accessible et équitable*

Tribunal des droits de la personne de l'Ontario  
 655, rue Bay, 14<sup>e</sup> étage  
 Toronto ON M7A 2A3  
 Tél.: 416-326-1312 ou 1-866-598-0322  
 Téléc.: 416-326-2199 ou 1-866-355-6099  
 Courriel: [hrtto.registrar@ontario.ca](mailto:hrtto.registrar@ontario.ca)  
 Site Web: [www.hrtto.ca](http://www.hrtto.ca)

**HRTO FILE: 2018-33503-S**

August 10, 2018

Kelly Donovan  
 11 Daniel Place  
 Brantford, Ontario N3R 1K6  
*Via mail and email:*  
[kelly@fit4duty.ca](mailto:kelly@fit4duty.ca)

**Re: Kelly Donovan v. The Regional Municipality of Waterloo Police  
 Services Board, and Bryan Larkin**

**Subject: Notice of Intent to Dismiss**

The Human Rights Tribunal of Ontario (HRTO) is in receipt of an Application for Contravention of Settlement, HRTO file number 2018-33503-S filed by Kelly Donovan on July 27, 2018.

The HRTO has reviewed the Application for Contravention of Settlement. It appears the Application for Contravention of Settlement is outside the HRTO's jurisdiction because:

- the Application for Contravention of Settlement was filed more than six months after the alleged contravention of settlement described in your Application for Contravention of Settlement and you do not appear to have cited facts that constitute "good faith" within the meaning of the HRTO's case law [s.45.9(4)]. See for example *Thomas v. Toronto Transit Commission*, 2009 HRTO 1582 (CanLII) and see for example *Diler v. Cambridge Memorial Hospital*, 2010 HRTO 1224 (CanLII) for a discussion of "good faith", and see for example *Freitag v. Penetanguishene (Town)*, 2012 HRTO 1644 (CanLII) for a discussion of "good faith" within the context of Applications for Contravention of Settlement.

Child and Family Services Review Board  
 Custody Review Board  
 Human Rights Tribunal of Ontario  
 Landlord and Tenant Board Ontario  
 Special Education (*English*) Tribunal Ontario  
 Special Education (*French*) Tribunal Ontario  
 Social Benefits Tribunal

Notice of Intent to Dismiss – February 17, 2015

Commission de révision des services à l'enfance et à la famille  
 Commission de révision des placements sous garde  
 Tribunal des droits de la personne de l'Ontario  
 Commission de la location immobilière  
 Tribunal de l'enfance en difficulté de l'Ontario (*anglais*)  
 Tribunal de l'enfance en difficulté de l'Ontario (*français*)  
 Tribunal de l'aide sociale

Page 1 of 3

You may wish to review the provisions of the *Human Rights Code* noted above as well as the HRTO's Rules of Procedure and Guides to its processes, all available on the HRTO's website at [www.sjto.on.ca/hrto](http://www.sjto.on.ca/hrto), before responding to this Notice. HRTO decisions can be accessed free of charge on CanLII at [www.canlii.org](http://www.canlii.org).

You **must** provide written submissions responding to the issues identified above. You **must** file your written submissions **on or before September 07, 2018**.

**At this time, the respondents are not required to file a Response to Application for Contravention of Settlement (Form 19). The HRTO will communicate further directions to the respondents once the applicant's submissions have been reviewed.**

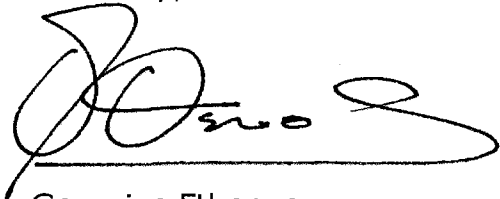
The HRTO will consider your submissions and may decide whether to dismiss your Application for Contravention of Settlement, may decide to continue processing the Application for Contravention of Settlement or may provide further directions to the parties regarding this proceeding.

If you do not respond to this letter and file written submissions by the deadline, the HRTO will consider the failure to respond as an abandonment of your Application for Contravention of Settlement and dismiss the Application for Contravention of Settlement for that reason.

You may file your written submissions with the HRTO by email, fax or mail. Please clearly write your name and the HRTO file number, **2018-33503-S**, on all correspondence and any other documents you file with the HRTO.

The HRTO will send a copy of its decision, a registrar's letter or directions regarding the next steps in this proceeding to you. Unless you fail to respond to this letter by the deadline and your file is dismissed as abandoned, a copy of your Application for Contravention of Settlement, the HRTO's decision, letter or directions regarding next steps as well as copies of your submissions and any other correspondence between you and the HRTO will be sent to the respondent(s) and to any trade union or occupational or professional organization named in your Application for Contravention of Settlement.

Sincerely,

A handwritten signature in black ink, appearing to read 'Georgios Fthenos', written over a horizontal line.

Georgios Fthenos  
Registrar

cc.

The Regional Municipality of  
Waterloo Police Services Board  
c/o Virginia Torrance  
200 Maple Grove Rd.,  
PO Box 3070  
Cambridge, Ontario N3H 5M1  
*Via mail and email:*  
[virginia.torrance@wrps.on.ca](mailto:virginia.torrance@wrps.on.ca)

Bryan Larkin  
378 Golf Course Rd  
Conestogo, Ontario N0B 1N0  
*Via mail and email:*  
[bryan.larkin@wrps.on.ca](mailto:bryan.larkin@wrps.on.ca)

**TAB P**

**THIS IS EXHIBIT “P” REFERRED TO IN THE AFFIDAVIT OF LAURA J. FREITAG  
SWORN BEFORE ME THIS 9th DAY OF February, 2021.**



---

**A COMMISSIONER FOR TAKING AFFIDAVITS**

**Donald B. Jarvis**

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**From:** Balaskanthan, Krishi (MAG) <Krishi.Balaskanthan@ontario.ca> on behalf of HRTO-Registrar (MAG) <hrt.registrar@ontario.ca>  
**Sent:** September 4, 2018 12:34 PM  
**To:** Donald B. Jarvis  
**Cc:** Kelly@fit4duty.ca; Nini.Jones@paliareroland.com  
**Subject:** RE: The Regional Municipality of Waterloo Police Services Board ("WRPSB") v. Kelly Donovan; HRTO File No. 2018-33237-S

Good Afternoon,

The Human Rights Tribunal of Ontario (HRTO) is in receipt of a request for an extension of time, from the respondent received by e-mail on August 22, 2018, to respond to the Applicant's Request for Order During Proceedings (Form 10) for HRTO File **2018-33237-S**.

The HRTO has considered the respondent's request and reasons. Pursuant to Rule A3.1 and 1.7(a) of the HRTO's Rules of Procedure the request for an extension of time is granted.

The Respondent is granted until **September 28, 2018** to complete and deliver the Response to a Request for Order During Proceedings (Form 11) to all parties and any affected persons named in the Application and file it, with a Statement of Delivery (Form 23), with the HRTO.

Pursuant to Rule 1.12 of the HRTO's Rules of Procedure, all written communications with the HRTO, including e-mail correspondence, must be addressed to the Registrar at [hrt.registrar@ontario.ca](mailto:hrt.registrar@ontario.ca), with a copy delivered to all other parties.

Krishi Balaskanthan  
 Case Processing Officer  
 Social Justice Tribunals Ontario  
 Tel: 416-326-1312 | [hrt.registrar@ontario.ca](mailto:hrt.registrar@ontario.ca)

**Social Justice Tribunals Ontario**

*Providing fair and accessible dispute resolution*

<http://www.sjto.gov.on.ca>

NOTICE: Confidential message which may be privileged. If received in error, please delete the message and advise me by return email. Thank you.

**From:** Donald B. Jarvis [<mailto:DJarvis@filion.on.ca>]  
**Sent:** August-22-18 3:50 PM  
**To:** HRTO-Registrar (MAG)  
**Cc:** Fit4Duty ([Kelly@fit4duty.ca](mailto:Kelly@fit4duty.ca)); Nini.Jones@paliareroland.com  
**Subject:** The Regional Municipality of Waterloo Police Services Board ("WRPSB") v. Kelly Donovan; HRTO File No. 2018-33237-S

Mr. Georgios Fthenos  
Registrar, HRTO

Dear Sir:

As you are aware, we act as counsel for the Applicant, WRPSB, in the above-noted matter. Further to the below email of Respondent Donovan, the WRPSB states as follows.

The WRPSB filed an RFOP (Form 10) with the Tribunal on July 30<sup>th</sup>, 2018. Respondent Donovan's Response to RFOP (Form 11) was due on August 13<sup>th</sup>, 2018. On August 2<sup>nd</sup>, 2018 the WRPSB consented to granting Respondent Donovan a filing extension to today's date, **August 22, 2018**. We note that Respondent Donovan now seeks a further filing extension in excess of two months to **October 26, 2018**.

The WRPSB will defer to the discretion of the Registrar/HRTO regarding what additional filing extension, if any, is reasonable in all of the circumstances. The WRPSB does submit, however, that a further filing extension of in excess of two months—especially when one extension has already been granted for a matter that is normally expected to be filed within two weeks—is excessive and not appropriate.

In assessing this matter, the WRPSB would also ask that the Tribunal note the following:

- Respondent Donovan appears to be fit and capable of participating in other human rights proceedings. For example, as recently as July 27, 2018 Respondent Donovan filed her own Application for Contravention of Settlement (see HRTO File No. 2018-33503-S);
- According to her website (Fit4Duty), Respondent Donovan is currently scheduled to present Webinars before the Human Resources Professionals Association (HRPA) on both Sept. 18 and Oct. 4, 2018; and
- Respondent Donovan has not provided the Tribunal with any objective supporting documentation—medical or otherwise—to substantiate that she is currently incapable of filing the necessary documents/pleadings in a timely manner.

Thank you in advance for your consideration of the foregoing.

Yours truly,

**Donald B. Jarvis**

Partner

\*Practising as a professional corporation

**Filion Wakely  
Thorup Angeletti LLP**  
management labour and employment law

Bay Adelaide Centre  
333 Bay Street  
Suite 2500 Box 44  
Toronto, Ontario  
Canada M5H 2R2

[djarvis@filion.on.ca](mailto:djarvis@filion.on.ca)  
t: 416-408-5516  
f: 416-408-4814  
[www.filion.on.ca](http://www.filion.on.ca)

**From:** Fit4Duty [<mailto:Kelly@fit4duty.ca>]

**Sent:** August 20, 2018 10:11 AM

**To:** HRTO-Registrar

**Cc:** Christa Ambrose; Donald B. Jarvis; [nini.jones@paliareroland.com](mailto:nini.jones@paliareroland.com)  
**Subject:** HRT0 File No. 2018-33237-S & 2018-33503-S

Dear Mr. George Fthenos,

Mr. Don Jarvis had consented to an extension for me to file a completed Response to the Form 18 for 33237 until August 22nd.

My health is too poor for me to meet that deadline and I request an extension to complete my Response to 33237 as well as the Tribunal's Form 10 for 33503. I also request adequate time for an individual suffering from PTSD to respond to the WRPSB's Form 10 filed July 30, 2018. It seems no matter what paperwork I complete, I am bombarded with more requests to dismiss any and all of my material; these are triggers for me and has made me more ill.

As there has been another breach by WRPSB, I will also need to prepare additional documentation for 33503.

As our hearing date has been set for February, 2019, and I was not consulted on this date, however I suspect that WRPSB was, I am requesting an extension until October 26, 2018, to complete my Response to 33237, the Form 10 to dismiss the response I did submit, the HRT0's Form 10 on 33503 and any additional forms I may have missed.

This email is being sent from a place of mental illness that is the worse it has ever been in my life. Please excuse any tones that are perceived as anything other than respectful,

Kelly Donovan  
 Fit4Duty - The Ethical Standard  
[kelly@fit4duty.ca](mailto:kelly@fit4duty.ca)  
 +1.519.209.5721  
[www.fit4duty.ca](http://www.fit4duty.ca)

---

FILION WAKELY THORUP ANGELETTI LLP

**CONFIDENTIALITY NOTE:**

The information contained in this message is legally privileged and confidential information that is exempt from disclosure under applicable law and is intended only for use of the individual or entity to which it is addressed. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by e-mail, and delete this message from your computer. Thank you for your co-operation.

**WARNING:**

From time to time, our spam filters eliminate legitimate emails from clients and other parties. If you wish to confirm that your email has been received, please contact the e-mail recipient by telephone to confirm receipt.

**TAB Q**

**THIS IS EXHIBIT “Q” REFERRED TO IN THE AFFIDAVIT OF LAURA J. FREITAG  
SWORN BEFORE ME THIS 9th DAY OF February, 2021.**



---

**A COMMISSIONER FOR TAKING AFFIDAVITS**

**From:** Radisic, Radovan (MAG) [mailto:Radovan.Radisic@ontario.ca] **On Behalf Of** HRT0-Registrar (MAG)  
**Sent:** September 7, 2018 10:52 AM  
**To:** Kelly@fit4duty.ca; Donald B. Jarvis  
**Cc:** HRT0-Registrar (MAG)  
**Subject:** RE: Kelly Donovan v. The Regional Municipality of Waterloo Police Services Board and Bryan Larkin; HRT0 File No. 2018-33503-S

Hello,

The Human Rights Tribunal of Ontario (HRT0) is in receipt of a request for an extension of time, from the applicant, received by e-mail on August 20, 2018, to respond to the letter as issued by the Registrar of the HRT0, "Notice of Intent to Dismiss", dated August 10, 2018, for HRT0 File **2018-33503-S**.

The HRT0 has considered the applicant's request and reasons. The HRT0 also acknowledges the respondent's communication on August 23, 2018, as shown below.

Pursuant to Rule A3.1 and 1.7(a) of the HRT0's Rules of Procedure the request for an extension of time is granted.

The applicant is granted until **October 26, 2018**, to complete and deliver submissions to the "Notice of Intent to Dismiss" to all parties and any affected persons named in the Application for Contravention of Settlement and file it, with a Statement of Delivery (Form 23), with the HRT0.

Pursuant to Rule 1.12 of the Rules of Procedure, all correspondence must be directed to the Registrar at [hrt0.registrar@ontario.ca](mailto:hrt0.registrar@ontario.ca), and copied to the others.

Conformément à la Règle 1.12 (Règles de Procédure), toute communication, y compris les courriels, doit être adressée au greffier à [hrt0.registrar@ontario.ca](mailto:hrt0.registrar@ontario.ca) et copie aux autres parties avant d'être déposés avec le TDPO

Thank you / Cordialement,

**Radovan Radisic**

Case Processing Officer/  
Agent de traitement des cas  
Human Rights Tribunal of Ontario/  
Tribunal des droits de la personne de l'Ontario  
416-326-7674 | [hrto.registrar@ontario.ca](mailto:hrto.registrar@ontario.ca)

**Social Justice Tribunals Ontario**

*Providing fair and accessible justice*

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**From:** Donald B. Jarvis [<mailto:DJarvis@filion.on.ca>]

**Sent:** August-22-18 5:29 PM

**To:** HRT0-Registrar (MAG)

**Cc:** Fit4Duty ([Kelly@fit4duty.ca](mailto:Kelly@fit4duty.ca)); [Nini.Jones@paliareroland.com](mailto:Nini.Jones@paliareroland.com)

**Subject:** Kelly Donovan v. The Regional Municipality of Waterloo Police Services Board and Bryan Larkin; HRT0 File No. 2018-33503-S

Mr. Georgios Fthenos  
Registrar, HRT0

Dear Sir:

As you are aware, we act as counsel for the Respondents in the above-noted matter. Further to the below email of the Applicant (Kelly Donovan), the Respondents state as follows.

The Applicant filed the instant Application on July 27<sup>th</sup>, 2018. On August 10<sup>th</sup>, 2018, you issued a Notice of Intent to Dismiss and directed the Applicant to file written submissions in response to the matters raised in the Notice of Intent to Dismiss by **September 7, 2018**. We note that the Applicant now seeks a further filing extension in excess of six weeks to **October 26, 2018**.

The Respondents will defer to the discretion of the Registrar/HRT0 regarding what additional filing extension, if any, is reasonable in all of the circumstances. The Respondents do submit, however, that a filing extension of in excess of six weeks is excessive.

In assessing this matter, the Respondents would also ask that the Tribunal note the following:

- The Applicant appears to have been sufficiently fit to file the instant Application just over three weeks ago;
- According to her website (Fit4Duty), the Applicant is currently scheduled to present Webinars before the Human Resources Professionals Association (HRPA) on both Sept. 18 and Oct. 4, 2018; and
- The Applicant has not provided the Tribunal with any objective supporting documentation—medical or otherwise—to substantiate that she is currently incapable of filing the necessary documents/pleadings in a timely manner.

Thank you in advance for your consideration of the foregoing.

Yours truly,

**Donald B. Jarvis**

Partner

\*Practising as a professional corporation

**Filion Wakely  
Thorup Angeletti LLP**

management labour and employment law

Bay Adelaide Centre  
333 Bay Street  
Suite 2500 Box 44  
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[djarvis@filion.on.ca](mailto:djarvis@filion.on.ca)  
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f: 416-408-4814  
[www.filion.on.ca](http://www.filion.on.ca)

**From:** Fit4Duty [<mailto:Kelly@fit4duty.ca>]

**Sent:** August 20, 2018 10:11 AM

**To:** HRTO-Registrar

**Cc:** Christa Ambrose; Donald B. Jarvis; [nini.jones@paliareroland.com](mailto:nini.jones@paliareroland.com)

**Subject:** HRTO File No. 2018-33237-S & 2018-33503-S

Dear Mr. George Fthenos,

Mr. Don Jarvis had consented to an extension for me to file a completed Response to the Form 18 for 33237 until August 22nd.

My health is too poor for me to meet that deadline and I request an extension to complete my Response to 33237 as well as the Tribunal's Form 10 for 33503. I also request adequate time for an individual suffering from PTSD to respond to the WRPSB's Form 10 filed July 30, 2018. It seems no matter what paperwork I complete, I am bombarded with more requests to dismiss any and all of my material; these are triggers for me and has made me more ill.

As there has been another breach by WRPSB, I will also need to prepare additional documentation for 33503.

As our hearing date has been set for February, 2019, and I was not consulted on this date, however I suspect that WRPSB was, I am requesting an extension until October 26, 2018, to complete my Response to 33237, the Form 10 to dismiss the response I did submit, the HRTO's Form 10 on 33503 and any additional forms I may have missed.

This email is being sent from a place of mental illness that is the worse it has ever been in my life. Please excuse any tones that are perceived as anything other than respectful,

Kelly Donovan

Fit4Duty - The Ethical Standard  
[kelly@fit4duty.ca](mailto:kelly@fit4duty.ca)  
+1.519.579.5721  
[www.fit4duty.ca](http://www.fit4duty.ca)

FILION WAKELY THORUP ANGELETTI LLP

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**TAB R**

**THIS IS EXHIBIT “R” REFERRED TO IN THE AFFIDAVIT OF LAURA J. FREITAG  
SWORN BEFORE ME THIS 9th DAY OF February, 2021.**

A handwritten signature in cursive script, appearing to read 'J. J. R.', is written above a horizontal line.

**A COMMISSIONER FOR TAKING AFFIDAVITS**



# HUMAN RIGHTS TRIBUNAL OF ONTARIO

---

## B E T W E E N:

**The Regional Municipality of Waterloo Police Services Board**

**Applicant**

**-and-**

**Kelly Donovan**

**Respondent**

## A N D B E T W E E N:

**Kelly Donovan**

**Applicant**

**-and-**

**The Regional Municipality of Waterloo Police Services Board and Bryan Larkin**

**Respondent**

---

## INTERIM DECISION

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**Adjudicator:** Laurie Letheren

**Date:** February 20, 2019

**File Number:** 2018-33237-S and 2018-33503-S

**Citation:** 2019 HRT0 308

**Indexed as:** **Waterloo Police Services Board v. Donovan**

---

**APPEARANCES**

	)	
Kelly Donovan, Applicant on 2018-33503-S	)	Self-Represented
and Respondent to 2018-33237-S	)	
	)	
	)	
The Regional Municipality of Waterloo	)	Donald B. Jarvis and Cassandra
Police Services Board and Bryan Larkin,	)	Ma, Counsel
Respondent to 2018-33503-S and	)	
Applicant on 2018-33237-S	)	
	)	
	)	
Waterloo Regional Police Association,	)	Nini Jones, Counsel
Interested Party	)	
	)	
	)	
	)	
	)	
	)	

[1] The Regional Municipality of Waterloo Police Services Board (“Board”) filed a Breach of Settlement Application against Kelly Donovan (“Donovan”) on June 28, 2018. This is Tribunal file number 2018-33237-S. The Board alleges that there are a number of instances when Donovan breached the terms of the Resignation Agreement and Release.

[2] Donovan filed a Response to that Application on July 10, 2018.

[3] Donovan filed a Breach of Settlement Application against the Board and Bryan Larkin (“Larkin”) on July 27, 2018 alleging breach of the Resignation Agreement in a document prepared as part of another court proceeding. This is Tribunal file number 2018-33503-S.

[4] Prior to the Board and Larkin filing their Response to Application 2018-33503-S. 2018, the Tribunal issued a Notice of Intent to Dismiss (“NOID”) Application 2018-33503-S. The NOID raised the issue of the Tribunal’s jurisdiction to hear the Application because it had been filed more than 6 months after the date of the last alleged incident of contravention of the settlement.

[5] Donovan was directed to provide her submissions in response to the NOID on or before September 7, 2018. The Tribunal provided Donovan with an extension to October 26, 2018 to file those submissions. Donovan was warned that if she did not respond and file written submissions by the deadline, the HRT0 will consider the failure to respond as an abandonment of Application 2018-33503-S and could dismiss the Application for that reason. Donovan was again directed to provide a response by February 15, 2019. She has not provided those submissions to date.

[6] It is the Tribunal’s understanding that Donovan also filed an action in Superior Court for breach of the Resignation Agreement. The Board has brought a motion to dismiss that action. That motion heard on February 13, 2019. The respondent has advised that a decision on this motion is expected by mid-March 2019.

[7] On July 30, 2018, the Board filed a Request for Order During Proceedings (“Request”) that the Tribunal order that Donovan has accepted the allegations made in Application 2018-33237-S and the Tribunal move to determine remedy.

[8] According to the Tribunal’s Rules, Donovan was to file a Response to this Request by August 13, 2018. To date, Donovan has not filed a Response to this Request.

[9] The hearing of Application 2018-33237-S is scheduled for February 22, 2019.

[10] The Board requested that the Tribunal provide further direction on the timing for disclosure of documents. The Board also raised the issue of dismissal of Application 2018-33503-S or a consolidation of the two Applications.

[11] A case management conference call was convened on February 19, 2019.

## **DECISION**

[12] Tribunal file numbers 2018-33237-S and 2018-33503-S shall be processed and heard together.

[13] The hearing of file 2018-33237-S that is scheduled for February 22, 2019 is adjourned.

## **NEXT STEPS AND DIRECTIONS**

[14] The Registrar will canvass the parties for their availability to schedule a full-day mediation in Toronto.

### **Direction to Donovan**

[15] Should Tribunal file numbers 2018-33237-S and 2018-33503-S not be resolved through mediation, then **on or before May 17, 2019** Donovan shall file her submissions in response to the NOID that was issued on August 10, 2018 and her submissions in

response to the Request for Order During Proceedings filed by the Board on July 30, 2019.

## **ORDER**

[16] Tribunal file numbers 2018-33237-S and 2018-33503-S shall be processed and heard together.

[17] The hearing of file 2018-33237-S that is scheduled for February 22, 2019 is adjourned.

[18] If these Applications are not both resolved through mediation, then on or before May 17, 2019 Donovan shall file her submissions in response to the NOID that was issued on August 10, 2018 and her submissions in response to the Request for Order During Proceedings filed by the Board on July 30, 2019. Should Donovan not comply with this Order, the Tribunal shall dismiss Application 2018-33503-S and her position in response to Application 2018-33237-S shall be confined to what is stated in the Form 19 filed on July 10, 2018.

Dated at Toronto, this 20<sup>th</sup> day of February, 2019.

*“Signed by”*

---

Laurie Letheren  
Vice-chair

# TAB S

**THIS IS EXHIBIT "S" REFERRED TO IN THE AFFIDAVIT OF LAURA J. FREITAG  
SWORN BEFORE ME THIS 9th DAY OF February, 2021.**

A handwritten signature in cursive script, appearing to read "J. J. [unclear]", is written above a horizontal line.

**A COMMISSIONER FOR TAKING AFFIDAVITS**



# HUMAN RIGHTS TRIBUNAL OF ONTARIO

---

## B E T W E E N:

**The Regional Municipality of Waterloo Police Services Board**

**Applicant**

**-and-**

**Kelly Donovan**

**Respondent**

## A N D B E T W E E N:

**Kelly Donovan**

**Applicant**

**-and-**

**The Regional Municipality of Waterloo Police Services Board and Bryan Larkin**

**Respondents**

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## INTERIM DECISION

---

**Adjudicator:** Laurie Letheren

**Date:** September 30, 2019

**File Number:** 2018-33237-S and 2018-33503-S

**Citation:** 2019 HRTO 1326

**Indexed as:** **The Regional Municipality of Waterloo Police Services Board  
v. Donovan**

---

**APPEARANCES**

	)	
Kelly Donovan, Applicant on 2018-33503-S	)	Self-Represented
and Respondent to 2018-33237-S	)	
	)	
	)	
The Regional Municipality of Waterloo	)	Donald B. Jarvis and Cassandra
Police Services Board and Bryan Larkin,	)	Ma, Counsel
Respondent to 2018-33503-S and	)	
Applicant on 2018-33237-S	)	
	)	
	)	
	)	
Waterloo Regional Police Association,	)	Caroline Jones, Counsel
Interested Party	)	
	)	

[1] The Regional Municipality of Waterloo Police Services Board (“Board”) filed a Breach of Settlement Application against Kelly Donovan (“Donovan”) on June 28, 2018. This is Tribunal file number 2018-33237-S. The Board alleges that there are a number of instances when Donovan breached the terms of the Resignation Agreement and Release.

[2] Donovan filed a Response to that Application on July 10, 2018.

[3] Donovan filed a Breach of Settlement Application against the Board and Bryan Larkin (“Larkin”) on July 27, 2018 alleging breach of the Resignation Agreement in a document prepared as part of another court proceeding. This is Tribunal file number 2018-33503-S.

[4] Prior to the Board and Larkin filing their Response to Application 2018-33503-S, the Tribunal issued a Notice of Intent to Dismiss (“NOID”) Application 2018-33503-S to Donovan. The NOID raised the issue of the Tribunal’s jurisdiction to hear Application 2018-33503-S because it had been filed more than 6 months after the date of the last alleged incident of contravention of the settlement.

[5] On July 30, 2018, the Board filed a Request for Order During Proceedings (“Request”) that the Tribunal order that Donovan has accepted the allegations made in Application 2018-33237-S and the Tribunal move to determine remedy.

[6] On May 1, 2019 Donovan filed her submissions in response to the NOID that was issued on August 10, 2018 and her submissions in response to the Request for Order During Proceedings filed by the Board on July 30, 2018.

[7] On May 7, 2019 Donovan filed a Notice of Constitutional Question (“Notice”) in which she indicated that she intends to question the constitutional validity of Section 137.1 of the *Courts of Justice Act*, (“CJA”) R.S.O. 1990, c.C. 43.

[8] In her Response to Application 2018-33237-S and in her submissions, Donovan also raised issues of whether the Board's Application for Breach of Settlement violates her rights as protected under the *Canadian Charter of Rights and Freedoms* ("*Charter*").

[9] On July 3, 2019 the Attorney General of Ontario advised that they did not intend to become involved at this point in the proceeding.

[10] The Attorney General of Canada has not responded to this Notice.

[11] Donovan has also made a Request for Production.

[12] On May 16, 2019 the Board filed its reply submissions to the submissions filed by Donovan on May 1, 2019.

### **CONSTITUTIONAL CHALLENGE TO CJA AND BREACH OF DONOVAN'S CHARTER RIGHTS**

[13] The Tribunal consistently has held that it does not have the authority to decide stand-alone constitutional issues such as claims that the Board has violated Donovan's rights as protected under the *Charter* or the constitutional validity of Section 137.1 of the *CJA*. See *MacLennan v. Ontario (Transportation)*, 2013 HRTO 714 at paras. 10-11; *Barber v. South East Community Care Access Centre*, 2010 HRTO 581 at para. 7; *Wilson v. Toronto Catholic District School Board*, 2011 HRTO 1040 at para. 19; *Hendershott v. Ontario (Community and Social Services)*, 2011 HRTO 482 at para. 8; and *Kostiuk v. Toronto Community Housing Corporation*, 2012 HRTO 388 at para. 18.

[14] This conclusion flows directly from the Supreme Court of Canada's jurisprudence on the issue of a tribunal's authority to apply the *Charter*. A tribunal with power to decide questions of law has the power to decide the constitutional validity of provisions that are relevant to decisions it must make (*Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54 (CanLII) at para. 36), and to "grant *Charter* remedies in relation to

Charter issues arising in the course of carrying out its statutory mandate” (*R. v. Conway*, 2010 SCC 22 (CanLII) at para. 22).

[15] 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.

[16] The Tribunal does not have jurisdiction to address Donovan’s allegation that the Board violated her *Charter* rights or to determine whether Section 137.1 of the *CJA* is unconstitutional and will therefore not address those issues any further.

### **DELAY AND REQUEST TO AMEND APPLICATION 2018-33503-S**

[17] The May 1, 2019 document filed by Donovan included her submissions in response to the Tribunal’s Notice of Intent to Dismiss Application 2018-33503-S on the basis that it is outside the Tribunal’s jurisdiction because it was filed more the 6 months after the alleged incidents of breach of settlement.

[18] The Board has filed Reply to her submissions on May 16, 2019.

[19] The Tribunal has held in numerous decisions that if an applicant seeks to rely upon an untimely allegation, he or she must satisfy the Tribunal that the delay in raising the allegations was incurred in good faith pursuant to section 34(2) of the *Code*. The Tribunal has set a fairly high onus on applicants to provide a reasonable explanation for the delay, while recognizing that there will be legitimate circumstances that justify exercising the discretion under section 34(2). See *Miller v. Prudential Lifestyles Real Estate*, 2009 HRT0 1241.

[20] In determining requests to amend applications, the Tribunal generally considers the nature of the proposed amendments, the reasons for the amendments, the timing of the request to amend, and the prejudice to the respondent. See, for example, *Odell v.*

TTC, [2001] OHRBID No. 2, *Dube v. Canadian Career College*, 2008 HRTO 336, and *Wozenilek v. 7-Eleven Canada Inc.*, 2009 HRTO 926. The Tribunal will also consider whether the allegations that the applicant wishes to include are within the Tribunal's jurisdiction see: *Shiao v. Toronto Police Services Board*, 2019 HRTO 535 and or whether they have no reasonable prospect of success see: *Johl v. ArcelorMittal Dofasco*, 2017 HRTO 923.

### **REQUEST FOR ORDER DURING PROCEEDINGS THAT APPLICANT BE DEEMED TO HAVE ACCEPTED ALLEGATION SET OUT IN 2018-33272-S**

[21] On July 30, 2018, the Board filed a Request for Order During Proceedings ("Request") that the Tribunal order that Donovan has accepted the allegations made in Application 2018-33237-S and the Tribunal move to determine remedy.

[22] Donovan provided her submissions in response to this Request at paragraphs 83-133 of the submissions she filed on May 1, 2019. Although Donovan does not appear to dispute the facts alleged in the Board's Application, she makes arguments as to why the facts alleged do not amount to breaches of the settlement.

[23] The Board has asked that the Tribunal move to determine remedy. The Tribunal would not be in a position to determine remedy until it determines that the facts alleged do amount to a breach of the settlement. This will need to be determined following the hearing on the merits of Application 2018-33237-S.

[24] The Board may file a Reply in Application 2018-33237-S within 40 days of the of date this Interim Decision, if it deems that necessary.

### **PRODUCTION REQUEST**

[25] Donovan has made a Request for production.

[26] The Board takes the position that the documents requested have no relevance to the issues to be determined in these Applications; and are protected by legal privilege.

[27] This issue will be determined after the Tribunal has heard the parties' oral submission during a telephone conference to be scheduled by the Registrar.

#### **CODE OF CONDUCT AND CONFLICT OF INTEREST VIOLATIONS BY TRIBUNAL REGISTRAR AND VICE-CHAIR**

[28] In the submissions that Donovan filed on May 1, 2019 she makes statements about the "repeated ignorance of the HRTO to consider the 33237 vexatious and an abuse of process". She makes no formal Request as to what if anything she is asking the Tribunal to do as a result of its "repeated ignorance".

[29] In addition, at paragraphs 199 to 216 of her May 1, 2019 submissions, Donovan makes allegations of Code of Conduct and Conflict of Interest violations by Georgios Fthenos and Vice-Chair Letheren. She does not appear to be making any formal Request of the Tribunal in relation to these allegations.

[30] It is not clear what jurisdiction the Tribunal has to make findings about code of conduct or conflict of interest violations committed by the Registrar of a Vice-chair. However, the Tribunal may consider Donovan to be abusing the Tribunal's process if she continues to make statements that the Tribunal is ignorant; or that in making directions to her that she is to comply with its Rules and directions it is violating codes of conduct; or that this is discrimination or favouritism.

[31] Should Donovan continue to make such statements, the Tribunal may consider whether her Application 2018-33503-S should be dismissed and whether she should be barred from any further participation in Application 2018-33237-S as a result of her abuse of the Tribunal's process.

## **RECORDING OF TRIBUNAL PROCEEDINGS WITHOUT CONSENT OR KNOWLEDGE**

[32] It is clear from Donovan's submissions filed on May 1, 2019 that she recorded the Case Management Conference Call on February 19, 2019. Donovan had not made a request for permission to record this proceeding and she did not advise the Tribunal of her intention to record this proceeding.

[33] This raises the issue of whether Donovan has abused the Tribunal's process in making this recording.

[34] The Tribunal will hear the parties submissions on whether Donovan's Application 2018-33503-S should be dismissed and whether she should be barred from any further participation in Application 2018-33237-S as a result of her abuse of the Tribunal's process. See: *Taylor Estate v. Royal Canin Canada Company*, 2017 HRT0 1600.

## **DIRECTIONS AND NEXT STEPS**

[35] The Registrar will schedule a full-day preliminary hearing held by conference call. The parties will receive a notice of hearing, setting out the time, and date for the hearing and instructions on how to connect to the conference call.

[36] During this conference call, the parties will be expected to present their submissions on:

- The issue of the Tribunal's jurisdiction to hear Application 2018-33503-S
- Donovan's Request to Amend Application 2018-33503-S
- Donovan's Production Request
- Whether Donovan's Recording of the February 19, 2019 should be determined to be an abuse of the Tribunal's process and the consequences of such a determination

[37] After this hearing and the Tribunal's determination of the issues outlined above, the Tribunal will provide further direction on the hearing of the merits of these Applications.

[38] The Board may file a Reply in Application 2018-33237-S within 40 days of the of date this Interim Decision if it deems that necessary.

Dated at Toronto, this 30<sup>th</sup> day of September, 2019.

*"Signed by"*

---

Laurie Letheren  
Vice-chair

**TAB T**

**THIS IS EXHIBIT "T" REFERRED TO IN THE AFFIDAVIT OF LAURA J. FREITAG  
SWORN BEFORE ME THIS 9th DAY OF February, 2021.**



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**A COMMISSIONER FOR TAKING AFFIDAVITS**

Court File No.:

CU-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 18B 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.

CU-18-00001938-000  
Court file no.

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

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

RCP-E 4C (May 1, 2016)

**TAB U**

**THIS IS EXHIBIT “U” REFERRED TO IN THE AFFIDAVIT OF LAURA J. FREITAG  
SWORN BEFORE ME THIS 9th DAY OF February, 2021.**

A handwritten signature in cursive script, appearing to read "J. J. [unclear]", is written above a horizontal line.

**A COMMISSIONER FOR TAKING AFFIDAVITS**

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);

x 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] HRTTO 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] HRTTO 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

**Filion Wakely Thorup Angeletti LLP**  
333 Bay Street, Suite 2500  
Toronto, Ontario M5H 2R2

Donald B. Jarvis LSUC#: 28483C  
Carol S. Nielsen LSUC#: 40594A  
Tel: 416-408-3221  
Fax: 416.408.4814

Lawyers for the Defendants

TO: Kelly Donovan  
11 Daniel Place  
Brantford, Ontario N3R 1K6  
  
Tel: 519-209-5721

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)**

**Filion Wakely Thorup Angeletti LLP**  
333 Bay Street, Suite 2500  
Toronto, Ontario M5H 2R2

Donald B. Jarvis    LSUC#: 28483C  
Carol S. Nielsen    LSUC#: 40594A  
Tel: 416-408-3221  
Fax: 416.408.4814

Lawyers for the Defendants (Moving Party)

# TAB V

**THIS IS EXHIBIT “V” REFERRED TO IN THE AFFIDAVIT OF LAURA J. FREITAG  
SWORN BEFORE ME THIS 9th DAY OF February, 2021.**



**A COMMISSIONER FOR TAKING AFFIDAVITS**

Amended this 16 day  
of JAN 2019

Pursuant to Rule 26.02(2)

  
A. Drew

Court File No.: CV18-00001938-0000

*Ontario*

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**KELLY LYNN DONOVAN**

Plaintiff

- and -

**WATERLOO REGIONAL POLICE SERVICES BOARD, and**

**BRYAN LARKIN**

Defendants

AMENDED

**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 18B 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  
~~JAN 16 2018~~ Issued by: 'C. DAVIES'

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 agreement also contained a release signed by chief Bryan Larkin which stated:
  - a. “THE REGIONAL MUNICIPALITY OF WATERLOO POLICE SERVICES BOARD [...] does hereby release and forever discharge KELLY DONOVAN (“DONOVAN”) from any and all actions, causes of action, complaints, applications, appeals...”
  - b. “AND FOR THE SAID CONSIDERATION, THE REGIONAL MUNICIPALITY OF WATERLOO POLICE SERVICES BOARD further agrees not to commence, maintain, or continue any action, cause of action or claim, request, complaint, demand or other proceeding, against

any person, corporation or entity in which any claim could arise against DONOVAN for contribution or indemnity.”

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

#### **Plaintiff's health**

8. 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.
9. In December 2015, the plaintiff was diagnosed with post-traumatic stress disorder (“PTSD”).
10. 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.
11. In April, 2017, the plaintiff applied to the Workplace Safety and Insurance Board (“WSIB”) for benefits as a result of her workplace injury. The plaintiff’s claim was approved, claim number 30505408.
12. 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

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

14. 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."*

15. 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."

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

*1. "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. Following the plaintiff's resignation, she continued to receive benefits from WSIB in the form of psychological treatment by Dr. Kathy Lawrence. Since the plaintiff voluntarily resigned, her salary was no longer being paid by WSIB.
20. In August, 2018, the plaintiff was made aware by WSIB that on January 11, 2018, the defendant Board submitted an appeal of the plaintiff's claim number 30505408. The appeal was prepared by counsel for the defendant, the same counsel who represented the defendants when the resignation agreement was prepared and signed.

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

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Ontario Superior Court of Justice

PROCEEDING COMMENCED AT Brampton

Amended STATEMENT OF CLAIM

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

RCP-E 4C (May 1, 2016)

**TAB W**

**THIS IS EXHIBIT “W” REFERRED TO IN THE AFFIDAVIT OF LAURA J. FREITAG  
SWORN BEFORE ME THIS 9th DAY OF February, 2021.**

A handwritten signature in cursive script, appearing to read 'J. J. H.', is written above a horizontal line.

**A COMMISSIONER FOR TAKING AFFIDAVITS**

**CITATION:** Donovan v. Waterloo Regional Police Services Board, 2019 ONSC 1212

**COURT FILE NO.:** CV-18-1938

**DATE:** 2019 02 21

## ONTARIO

### SUPERIOR COURT OF JUSTICE

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

KELLY LYNN DONOVAN

Plaintiff

**- and -**

WATERLOO REGIONAL POLICE  
SERVICES BOARD and BRYAN  
LARKIN

Defendants

Self-Represented

Donald Jarvis and Cassandra Ma,  
for the Defendants

**HEARD:** February 13, 2019

### REASONS FOR JUDGMENT

**DOI J.**

#### Introduction

[1] This is an action for breach of contract. The Plaintiff claims that the Defendants appealed her claim for workers' compensation benefits and thereby

breached the terms of a release under a Resignation Agreement they executed with her. She also claims that the Defendants delivered an affidavit in a separate court proceeding which identified her, contrary to the confidentiality terms of the Resignation Agreement.

[2] The Defendants brought this motion under Rules 21.01(1)(b), 21.01(3)(a) and 21.01(3)(d) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended, to strike the Amended Statement of Claim issued May 4, 2018. For the reasons that follow, the pleading is struck under Rule 21.01(1)(b) without leave to amend.

### **Background**

[3] The Amended Statement of Claim discloses the following.

[4] The Plaintiff is a former police officer who resigned her position with the Defendant Waterloo Regional Police Services Board (“Board”) after executing a Resignation Agreement on June 8, 2017 with the Board and her collective bargaining agent, the Waterloo Regional Police Association.

[5] The Amended Statement of Claim refers to the Resignation Agreement and pleads, among other things, the following provisions:

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.

[...]

THE REGIONAL MUNICIPALITY OF WATERLOO POLICE SERVICES BOARD [...] does hereby release and forever discharge KELLY DONOVAN ("DONOVAN") from any and all actions, causes of action, complaints, applications, appeals

[...]

AND FOR THE SAID CONSIDERATION, THE REGIONAL MUNICIPALITY OF WATERLOO POLICE SERVICES BOARD further agrees not to commence, maintain, or continue any action, cause of action or claim, request, complaint, demand or other proceeding, against any person, corporation or entity in which any claim could arise against DONOVAN for contribution or indemnity.

[6] After the Resignation Agreement was executed, the pleading alleges that the Defendants breached the terms of the contract.

### **The Claim**

[7] On May 9, 2018, the Plaintiff commenced this action. Her Amended Statement of Claim seeks damages against the Board and the personally-named Defendant, Bryan Larkin, Chief of the Waterloo Regional Police Service, and her reinstatement as a police officer with the Board, for the Defendants' alleged breach of the Resignation Agreement by: (i) appealing her claim (Claim No. 30505408) for statutory care and benefits to the Workplace Safety and Insurance Board ("WSIB") arising from a workplace incident; and (ii) delivering an affidavit

sworn by Chief Larkin on December 21, 2017 in a separate court proceeding that contained information that is said to have disclosed her identity in breach of the confidentiality terms under the Resignation Agreement.<sup>1</sup>

[8] The Defendants responded to the claim by delivering a Notice of Motion dated June 7, 2018 to strike the claim.

### **The Test under Rule 21.01(1)(b)**

[9] Under Rule 21.01(1)(b), a party may strike all or part of a claim for failing to disclose a reasonable cause of action. The framework for a Rule 21.01(1)(b) motion is well established. There is no evidence on a Rule 21.01(1)(b) motion. The material facts pleaded are deemed to be proven or true, except to the extent that the alleged facts are patently ridiculous or manifestly incapable of being proven. The court is entitled to read and rely on the terms of any document pleaded or incorporated by reference in the claim. As the facts pleaded are the basis for evaluating the claim's possibility of success, a claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The novelty of the cause of action is of no concern at this stage of the proceeding, and the statement of claim must be read generously to allow for drafting deficiencies. If the claim has some chance of success, it must be permitted to

---

<sup>1</sup> On or about May 30, 2017, the Board was named as a defendant in a class action. The putative class members in the class action were current and former employees of the Board and their family members. The Plaintiff was not a putative class member in the proceeding. On July 13, 2018, Baltman J. dismissed the class action; *Rivers v. Waterloo Regional Police Services Board*, 2018 ONSC 4307.

proceed; *R. v. Imperial Tobacco*, 2011 SCC 42 at para. 22; *Castrillo v. Workplace Safety and Insurance Board*, 2017 ONCA 121 at paras. 14 and 15.

[10] To strike a claim under Rule 21.01(1)(b), it must be plain and obvious on a generous reading that the claim discloses no reasonable cause of action; *Conway v. L.S.U.C.*, 2016 ONCA 72 at para. 7; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980. In *Imperial Tobacco*, the rationale for this test was explained (at paras. 17 and 19 to 21):

#### The Test for Striking Out Claims

A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action. Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial.

[...]

The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.

This promotes two goods — efficiency in the conduct of the litigation and correct results. Striking out claims that have no reasonable prospect of success promotes litigation efficiency, reducing time and cost. The litigants can focus on serious claims, without devoting days and sometimes weeks of evidence and argument to claims that are in any event hopeless. The same applies to judges and juries, whose attention is focused where it should be — on claims that have a reasonable chance of success. The efficiency gained by weeding out unmeritorious claims in turn contributes to better justice. The more the evidence and arguments are trained on the real issues, the more likely it is that the trial process will successfully come to grips with the parties' respective positions on those issues and the merits of the case.

Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. [...] The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *Donoghue v. Stevenson*.

Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial. [citations omitted]

[11] Leave to amend a claim will not be permitted when it is plain and obvious that no tenable cause of action is possible on the facts alleged: *Conway v. L.S.U.C.*, 2016 ONCA 72 at para. 16.

### **Position of the Parties**

[12] The Defendants submit that the Amended Statement of Claim fails to plead the requisite elements to support a breach of contract claim against them. Their argument is two-fold. First, they submit that the Board's effort to seek a review of the Plaintiff's initial entitlement decision by the Workplace Safety and Insurance Board ("WSIB") (i.e., by filing an Intent to Object) under the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c.17, Sch. A, as amended ("WSIA"), was not a breach of contract because the WSIA expressly prohibits parties from contracting out of the statutory scheme. They further submit that Chief Larkin's affidavit cannot form the basis of a claim for breach of contract as it was prepared for use in a court proceeding and is subject to absolute privilege.

[13] The Plaintiff relies on the Resignation Agreement as the contractual basis for her claim. By commencing a review or appeal of her initial entitlement decision by the WSIB for statutory workplace insurance benefits, the Plaintiff

claims that the Defendants breached the terms of their settlement agreement with her. She further alleges that Chief Larkin's affidavit was made without regard to the confidentiality term under the Retirement Agreement as pleaded in the Amended Statement of Claim, and relies on this in further support of her breach of contract claim.

### **Analysis**

[14] As the Plaintiff's action is for a breach of contract, the claim must prove: (i) the existence of a contract with the Defendants; and (ii) a breach of the contract; *Mars Canada Inc. v. Bemco Cash & Carry Inc.*, 2018 ONCA 239 at para. 32.

[15] The Amended Statement of Claim pleads the Resignation Agreement as the underlying basis for the claim. Paragraph 5 of the claim pleads the confidentiality clause under the Resignation Agreement, and paragraph 6(a) pleads an excerpt of the Resignation Agreement by which the Board broadly agreed to release and forever discharge the Plaintiff "*from any and all actions, causes of action, complaints, applications and appeals ...*" Paragraph 6(b) pleads a further provision of the Resignation Agreement by which the Defendants agreed "*not to commence, maintain or continue any action, cause of action, claim, request, complaint, demand or other proceeding, against any person,*

*corporation or entity in which any claim could arise against DONOVAN for contribution or indemnity.”*

**Claim for breach of contract by commencing a proceeding under the WSIA**

[16] I am persuaded that the release executed by the Board under the Resignation Agreement did not preclude it from participating in the WSIB proceedings. I also find that it is plain and obvious that the claim arising from the Board’s effort to review the Plaintiff’s initial entitlement decision by the WSIB has no reasonable prospect of succeeding.

[17] The Amended Statement of Claim pleads that the terms of the Resignation Agreement include a release in favour of the Plaintiff against “*any and all actions, causes of action, complaints, applications, [and] appeals,*” among other things, as well as a further agreement “*not to commence any action, cause of action or claim, request, complaint, demand or other proceeding against any person corporation or entity in which any claim could arise against the Plaintiff for contribution or indemnity.*” The Plaintiff relies on these terms under the Resignation Agreement for her breach of contract claim against the Defendants for submitting an appeal of her initial entitlement decision by the WSIB on January 11, 2018.

[18] The Defendants submit that the Board’s review of the Plaintiff’s initial entitlement decision by the WSIB could not have led to any kind of finding of

liability or obligation owed by the Plaintiff. Absent any fraud or misrepresentation, which is not alleged here, the Defendants submit that the WSIB will not pursue a recovery of benefits from a worker if it reverses a previous decision that granted the worker entitlement to benefits; WSIB Policy 19-08-04: Recovery of Benefit-Related Debts, at pp. 1, 3 and 4; Decision No. 1658/02, 2002 WSIA 2718 at para. 20. Accordingly, the Defendants submit that the Board's review of the initial entitlement decision did not implicate the term under the Resignation Agreement by which the Board agreed to not commence a proceeding in which a claim could arise against the Plaintiff for contribution or indemnity.

[19] Assuming that the Defendants' view accurately reflects the policy intent of the above-mentioned WSIB Policy and its interpretation by the appeals tribunal, it still remains uncertain (albeit in a remote sense) as to whether the Plaintiff may, at some future time, incur a potential claim for contribution or indemnity based on some aspect of the Board's review of her initial entitlement decision. To definitively say otherwise would necessarily call for speculation as to future events and cause the decision to fall outside the plain and obvious test.

[20] Moreover, the Amended Statement of Claim also pleads a much broader release by the Board under the Resignation Agreement to release the Plaintiff from "*any and all ... complaints, applications and appeals.*" On a plain reading of this term on its face, it seems at least arguable that it captures the Board's review of the WSIB's initial entitlement decision, as the Plaintiff's submits. She also

notes that the Board sought a review of her initial entitlement decision by the WSIB several months after it executed the Resignation Agreement.

[21] Despite the foregoing, I accept that the Resignation Agreement cannot prevent the parties from participating in proceedings before the WSIB as parties cannot contract out from their rights and obligations under the legislative scheme governing workers' compensation in Ontario. As explained by Juriansz J.A. for the Court of Appeal for Ontario, workplace parties cannot waive their rights and obligations under the WSIA as a matter of law:

I recognize that the courts should exercise extreme caution in interfering with the freedom to contract on the grounds of public policy. Considering the sweeping overriding of the common law made by workers' compensation legislation and the broad protection it is designed to provide to workers in the public interest, it would be contrary to public policy to allow employers and workers to contract out of its regime, absent some contrary legislative indication.

[22] *Fleming v. Massey*, 2016 ONCA 70 at para. 34; leave to appeal to the SCC dismissed with costs, 2016 CanLII 33997; citing *Ontario (Human Rights Commission) v. Etobicoke (Borough)*, [1982] 1 S.C.R. 202 at 214.

[23] The finding by the Court of Appeal in *Fleming* makes is abundantly clear that the release provision under the Resignation Agreement cannot operate to preclude the Board, or the Plaintiff for that matter, from exercising rights and discharging obligations under the WSIA. As a matter of law, parties cannot contract out of the scheme under the WSIA. Accordingly, it is plain and obvious

that the Plaintiff's claim for breach of contract based on the Board's effort to seek a review of her initial entitlement decision by the WSIB simply fails to disclose a reasonable cause of action.

[24] In arriving at this finding, I also am mindful of ss. 118(1), (2), (3) and (4) of the WSIA which provide the WSIB with exclusive statutory jurisdiction that cannot be restrained by a proceeding in court:

118 (1) the Board has exclusive jurisdiction to examine, hear and decide all matters and questions arising under this Act, except where this Act provides otherwise.

(2) Without limiting the generality of subsection (1), the Board has exclusive jurisdiction to determine the following matters:

[...]

2. Whether personal injury or death has been caused by an accident.

3. Whether an accident arose out of and in the course of an employment by a Schedule 1 of Schedule 2 employer;

[...]

(3) An action or decision of the Board under this Act is final and is not open to question or review in a court.

(4) No proceeding by or before the Board shall be restrained by injunction, prohibition or other process or procedure in a court or be removed by application for judicial review or otherwise in a court. [emphasis added]

[25] Of particular note is the strongly worded privative clause at s.118(4) of the WSIA that precludes a party from restraining proceedings before the WSIB by pursuing a claim or remedy in court; *Rodrigues v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 719 at para. 22. While the legislature cannot completely oust the jurisdiction of the Superior Court, which is

derived under s. 96 of the *Constitution Act, 1867*, I find that s. 118(4) precludes the Plaintiff from pursuing her breach of contract claim to restrain the Board from taking part in proceedings before the WSIB involving her workers' compensation claim under the WSIA; *Castrillo v. Workplace Safety and Insurance Board*, 2017 ONCA 121 at paras. 54-56, 59 and 66.

### **Claim for breach of contract by filing affidavit**

[26] The Defendants argue that it is plain and obvious that the Plaintiff's claim based on Chief Larkin's affidavit has no reasonable prospect of success. I agree with this.

[27] The Amended Statement of Claim pleads that Chief Larkin swore an affidavit on December 21, 2017 to defend a class action lawsuit (Court File No. CV-17-2346-00) which made allegations alleged of systemic and institutional gender-based discrimination and harassment. Specifically, the claim pleads that Chief Larkin attached to his affidavit a chart prepared by the Human Resources Division of the police service to show complaints to the Human Rights Tribunal that female employees had made in the last five years, together with their status or resolution. The affidavit expressly states that this chart provides non-identifying information to preserve the identities of the complainants, with the exception of the representative class action plaintiff whose complaint to the Human Rights Tribunal remained outstanding when the affidavit was sworn.

[28] The claim pleads that the attached chart to Chief Larkin's affidavit is titled "*Police Officer initiated Ontario Human Rights Complaints*" and lists four (4) female officers who are identified as follows:

- 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."

[29] Of the two unnamed "Constables" who are mentioned in the chart, the Amended Statement of Claim pleads that one complaint is shown as having had been resolved in the following manner:

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

[30] The claim pleads that only one female officer is listed on the chart as having "voluntarily" resigned. By process of elimination, the claim asserts that Chief Larkin's affidavit has the effect of identifying the Plaintiff as she is the only female constable employed by the Board over the past five years who had filed a human rights complaint and voluntarily resigned.

[31] In pleading a breach of contract, the Amended Statement of Claim states that Chief Larkin's public disclosure was not required by law, contained sufficient information to identify the Plaintiff, and violated the terms of the Resignation Agreement.

[32] The Defendants submit that Chief Larkin's affidavit does not disclose information in breach of the confidentiality term of the Resignation Agreement, and thus does not give rise to a reasonable cause of action for breach of contract. According to the Defendants, the Plaintiff's claim that the affidavit contains sufficient information for the plaintiff to be identified is wholly speculative and remote at law. In any event, as Chief Larkin's affidavit was delivered for use in court proceedings, the Defendants submit that it is covered by absolute privilege and cannot form the basis of the Plaintiff's claim for breach of contract. They rely on a body of jurisprudence which supports the proposition that statements made in the course of a judicial proceeding, including statements in pleadings and other documents made for the proceeding, are subject to absolute privilege and cannot ground a cause of action.

[33] From the information pleaded in the Amended Statement of Claim, I recognize that Chief Larkin's affidavit, on its face, does not directly identify the Plaintiff or the other complainants who are mentioned in it. I accept that the references in the affidavit to the four (4) female complainants are oblique and anonymized to some degree. However, given that the pool of female complainants is fairly small and features only four members, with one member apparently named given her known role as a representative plaintiff in the class action, it is unclear to me just how anonymous the remaining three complainants actually are to those with some knowledge of the police service. This may be

particularly true in the case of one complainant who is identified in the affidavit as having the rank of sergeant. In the circumstances, it seems less than clear whether Chief Larkin's affidavit sufficiently preserves the Plaintiff's confidentiality. Accordingly, I find that the issue of whether the unnamed reference in Chief Larkin's affidavit is sufficiently capable of identifying the Plaintiff and breaches the confidentiality term of the Resignation Agreement remains an open question.

[34] Regardless of the foregoing, however, it is clear that Chief Larkin's affidavit was prepared and used in a court proceeding. Accordingly, I find that the affidavit is covered by absolute privilege and cannot support the Plaintiff's claim in breach of contract.

[35] Brown J.A. for the Court of Appeal has explained that, "*The doctrine of absolute privilege contains several basic elements: no action lies, whether against judges, counsel, jury, witnesses or parties, for words spoken in the ordinary course of any proceedings before any court or judicial tribunal recognized by law; the privilege extends to documents properly used and regularly prepared for use in the proceedings;*" *Salasel v. Cuthbertson*, 2015 ONCA 115 at para. 35, citing *Amato v. Welsh*, 2013 ONCA 258 at para. 34. In determining whether absolute privilege applies to a communication, the analysis necessarily focuses on the occasion that the communication is made, not its content; *Salasel* at para. 46. This immunity extends to any and all causes of action, however framed, and is not limited to actions for defamation; *Salasel* at

para. 38, and *Samuel Manu-Tech Inc. v. Redipac Recycling Corp.*, [1999] O.J. No. 3242 (C.A.) at para. 20. A claim based on communications which take place during, incidental to, and in the furtherance of a court proceeding is subject to absolute immunity; *Cook v. Milborne*, 2018 ONSC 419 at paras. 17-19. The existing doctrine of absolute privilege affords a fulsome immunity that is broadly applied to all matters done *coram judice*, and is unaffected by whether the evidence was given in bad faith and actual malice or without justification or excuse; *Cook* at paras. 19-21; *Fabian v. Margulies* (1985), 53 O.R. (2d) 380 (C.A.) at para. 9, *Lincoln v. Daniels*, [1962] 1 Q.B. 237 (C.A.) at 257-8.

[36] In view of the foregoing, it is plain and obvious that the Plaintiff's claim for breach of contract arising from Chief Larkin's affidavit discloses no reasonable cause of action. His affidavit clearly was used in defending a class action in court, which the Amended Statement of Claim expressly acknowledges. To the extent that the claim rests on this affidavit, it has no reasonable chance of success in law and should not continue; *Cook* at paras. 21, 32-33 and 57; see also *Gray Investigations Inc. v. Mitchell*, [2007] O.J. No. 1936 (S.C.J.) at paras. 17-20, and *Dooley v. C.N. Weber Ltd.* (1994), 19 O.R. (3d) 779 (Gen.Div.).

[37] From my review of the Amended Statement of Claim, I further find that the pleading is insufficient to establish an independent cause of action against the personally-named defendant, Bryan Larkin. The pleading identifies him as the Chief of the police service and an employee of the Board. The claim gives no

indication that he acted outside the scope of his employment duties. While recognizing that he swore the affidavit that the Board relied upon in defending the class action, the claim does not set out separate facts against him or personal interests that are independent from the breach of contract claim against the Board. Rather, the claim against both Defendants is essentially the same. It was the Board, and not Chief Larkin, which was party to the Resignation Agreement, although he signed the agreement on behalf of the Board. As such, and in the circumstances of this case, I find that he is protected from personal liability; *Lussier v. Windsor-Essex Catholic District School Board*, [1999] O.J. No. 4303 (Div. Ct.) at paras. 17-18, citing *Normart Management Ltd. v. West Hill Redevelopment Co.* (1998), 37 O.R. (3d) 97 (C.A.) at 104.

### **No Leave to Amend**

[38] I recognize that leave to amend a pleading should not lightly be withheld; *Conway v. L.S.U.C.*, 2016 ONCA 72 at paras. 16-18. However, given the context of this case, it is plain and obvious that no tenable cause of action supporting a breach of contract claim under the Resignation Agreement is possible. The Amended Statement of Claim essentially frames a tandem breach of contract claim by relying on the Defendant's effort to review the Plaintiff's initial entitlement decision by the WSIB, and by also relying on Chief Larkin's affidavit to defend the class action proceeding. As explained above, it is plain and obvious that these material facts cannot possibly give rise to a breach of contract

given the parties' inability to contract out of the WSIA and the absolute privilege that attached to the affidavit. No opportunity to amend the pleading could alter this and realistically preserve the action. Accordingly, leave to amend is denied.

### **Conclusion**

[39] The Amended Statement of Claim is struck under Rule 21.01(1)(b) without leave to amend.

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

[41] I strongly encourage the parties to agree on costs. If they are unable, the Defendants may deliver cost submissions not to exceed three (3) pages (excluding any cost outline and offer(s) to settle) within fifteen (15) days from this judgment, followed by the Plaintiff's cost submissions on the same terms within a further fifteen (15) days. No reply submissions are permitted without leave.

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Doi J.

**Released:** February 21, 2019

**CITATION:** Donovan v. Waterloo Regional Police Services Board, 2019 ONSC 1212  
**COURT FILE NO.:** CV-18-1938  
**DATE:** 2019 02 21

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

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

KELLY LYNN DONOVAN

Plaintiff

**- and -**

WATERLOO REGIONAL POLICE  
SERVICES BOARD and BRYAN LARKIN

Defendants

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**REASONS FOR JUDGMENT**

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Doi J.

**Released:** February 21, 2019

# TAB X

**THIS IS EXHIBIT "X" REFERRED TO IN THE AFFIDAVIT OF LAURA J. FREITAG  
SWORN BEFORE ME THIS 9th DAY OF February, 2021.**

A handwritten signature in cursive script, appearing to read "J. J. [unclear]", is written above a horizontal line.

**A COMMISSIONER FOR TAKING AFFIDAVITS**

## COURT OF APPEAL FOR ONTARIO

CITATION: Donovan v. Waterloo Regional Police Services Board, 2019 ONCA 845

DATE: 20191025

DOCKET: C66718

Hoy A.C.J.O., van Rensburg and Roberts JJ.A.

BETWEEN

Kelly Lynn Donovan

Plaintiff/Responding Party (Appellant)

and

Waterloo Regional Police Services Board and Bryan Larkin

Defendants/Moving Parties (Respondents)

Kelly Lynn Donovan, acting in person

Donald B. Jarvis and Cassandra Ma, for the respondents

Heard: October 11, 2019

On appeal from the order of Justice Michael T. Doi of the Superior Court of Justice, dated March 20, 2019, with reasons reported at 2019 ONSC 1212.

## REASONS FOR DECISION

**I. OVERVIEW**

[1] The appellant appeals from the motion judge's order dismissing her action against the respondents under r. 21.01(1)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, without leave to amend, and ordering her to pay costs to the respondents. For the reasons that follow, we allow the appeal, set aside the

order of the motion judge, and grant the appellant leave to further amend her Amended Statement of Claim in respect of the claim against Bryan Larkin.

## II. BACKGROUND

[2] In her Amended Statement of Claim, the appellant alleges that the respondents breached the terms of a Release and of a confidentiality provision contained in a settlement agreement (the “Agreement”), dated June 8, 2017. Under the Agreement, the appellant resigned her employment in June 2017, as a police officer with the respondent Waterloo Regional Police Services Board (the “Board”). She seeks damages against the Board and Bryan Larkin, the Chief of the Waterloo Regional Police Service.

[3] The appellant alleges that the respondents (1) breached the Release by appealing her claim for benefits to the Workplace Safety and Insurance Board (“WSIB”) arising from a workplace injury; and (2) breached the confidentiality provisions of the Agreement by delivering an affidavit sworn by Chief Larkin, containing information about the Agreement, in defence of a class proceeding against the Board.

[4] The motion judge struck the claim related to the WSIB appeal on the basis that an employer cannot contract out of the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Sched. A (“WSIA”). Pursuant to the Release, the Board, among other things, “release[s] and forever discharge[s] [the appellant] from any

and all...appeals". The appellant pleads that she applied to the WSIB in April 2017, before signing the Release, for benefits related to post-traumatic stress disorder ("PTSD"). After the Board signed the Release, it submitted an appeal of the WSIB's decision.

[5] The motion judge accepted that it was at least arguable that the Release captured the Board's review of the WSIB's initial entitlement decision: at para. 20. His decision that it was plain and obvious that the Amended Statement of Claim failed to disclose a cause of action in respect of the alleged breach of the Release was based on his conclusion that the result was governed by this court's decision in *Fleming v. Massey*, 2016 ONCA 70, 128 O.R. (3d) 401, leave to appeal refused, [2016] S.C.C.A. No. 113. The motion judge concluded that *Fleming* made it abundantly clear that the Release "cannot operate to preclude the Board, or the [appellant] ...from exercising rights and discharging obligations under the WSIA", because "as a matter of law, parties cannot contract out of the scheme under the WSIA": at para. 23. The motion judge also concluded that the privative clause in s. 118(4) of the WSIA, which provides, in relevant part, that an action or decision of the WSIB under the Act cannot be restrained by a court process or procedure, would preclude the appellant's claim for breach of the Release in relation to the WSIB proceedings: at paras. 24-25.

[6] The motion judge struck the claim related to the breach of confidentiality because he concluded that it could not be based solely on an affidavit prepared

for a court proceeding. The Agreement required the parties, except where required by law, to “keep the terms and existence of [the Agreement] in absolute and strict confidence at all times”. While the motion judge found, at para. 33, that “it seems less clear whether Chief Larkin’s affidavit sufficiently preserves the [appellant’s] confidentiality”, he concluded that because his affidavit was used in defending a class action in court, it was covered by absolute privilege. Accordingly, the motion judge concluded that the appellant’s claim had no reasonable chance of success.

[7] The motion judge further concluded that the pleading contained insufficient allegations to establish an independent cause of action against Bryan Larkin with respect to either of the appellant’s claims.

### **III. ANALYSIS**

[8] We are not persuaded that it is plain and obvious that the appellant’s claims against the Board cannot succeed. We agree with the motion judge that the appellant did not plead a tenable claim against Chief Larkin, but in the circumstances of the case we would allow the appellant leave to amend this claim.

#### **(1) The Breach of Release Claim**

[9] As already indicated, the motion judge made his order dismissing the appellant’s action without leave to amend under r. 21.01(1)(b). As a result, and

as he acknowledged in his reasons, he could not consider anything extrinsic to the Amended Statement of Claim which was not referenced in the claim. Moreover, he had to accept the pleaded facts as true for the purpose of the r. 21 motion.

[10] On a generous reading of the Amended Statement of Claim, the appellant had applied for and had been receiving WSIB benefits at the time the Agreement containing the Release was signed. She pleads, at paras. 9-10, that she was diagnosed with PTSD in December 2015, and that, starting in February 2017, she could not attend work due to the severity of her PTSD symptoms. She pleads that in April 2017 she applied to the WSIB for benefits and that her claim was approved: at para. 11. Indeed, she pleads at para. 19 that after her resignation she “continued to receive benefits from WSIB in the form of psychological treatment”. The appellant pleads, at para. 20, that in August 2018 she was made aware by WSIB that on January 11, 2018 the Board submitted an appeal of her claim.

[11] *Fleming* was a case that involved uninsured employment under Part X of the WSIA. At issue was the enforceability of a waiver signed by Fleming, who was injured in a go-kart race in which he was the race director. The waiver purported to release all of the respondents from liability for all damages associated with participation in the event. This court concluded that Fleming was an employee, and that the waiver contravened s. 114 of the WSIA, which

provides specifically that workers who are not insured under the workers' compensation scheme, like Fleming, are permitted to sue their employers for workplace accidents. The court concluded that enforcement of the waiver would constitute a contracting out of the protections of the WSIA, and that contracting out of this protection would be contrary to public policy. At para. 34, Juriansz J.A. wrote the passage that the motion judge relied on:

Considering the sweeping overriding of the common law made by workers' compensation legislation and the broad protection it is designed to provide to workers in the public interest, it would be contrary to public policy to allow employers and workers to contract out of its regime, absent some contrary legislative indication.  
[Emphasis added.]

[12] However, Juriansz J.A. also wrote, at para. 45, that, "[r]eading the WSIA as a whole, it is apparent its objective is to ensure injured workers have access to compensation".

[13] The Release is not plainly contrary to the WSIA's objective, as identified by Juriansz J.A. Nor have the respondents identified any express statutory provision that the Release would contravene.

[14] Respectfully, it is not plain and obvious that *Fleming* would stand in the way of the appellant's claim in this case. Again, on the facts pleaded by the appellant, following her resignation, she continued to receive benefits from the WSIB in the form of psychological treatment, and it was not until several months after the parties signed an Agreement in respect of her resignation, which

included the Release, that the Board initiated an appeal to the WSIB, to challenge her entitlement to benefits. This is very different from the *Fleming* case where the waiver signed by the employee violated a provision of the WSIA specifically providing for the employee's right of action.

[15] And with respect to the motion judge's conclusion based on the privative clause in s. 118(4) of the WSIA, in our view it is not plain and obvious that the appellant's action in respect of the Release would contravene the WSIB's exclusive jurisdiction to determine matters set out in s. 118 of the WSIA and the privative clause contained in that section.

## **(2) The Breach of Confidentiality Claim**

[16] Nor is it plain and obvious that Chief Larkin's affidavit is subject to absolute privilege and that, accordingly, the appellant's claim has no reasonable prospect of success.

[17] There is arguably an important competing interest at stake that weighs against absolute privilege: there is a confidentiality provision that is part of a settlement agreement. There is an overriding public interest in favour of settlement; promoting settlements contributes to the effective administration of justice in this province: *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, [2013] 2 S.C.R. 623, at para. 11. This is not a situation where a party seeks to rely on the provisions of a confidentiality agreement to shield itself

from claims. Moreover, the statement at issue was not made by counsel and it is not apparent that it was necessary for the respondents to include the information that allegedly breached the Agreement in the affidavit for the Board to defend against the certification motion.

[18] We conclude, as this court did in *Amato v. Welsh*, 2013 ONCA 258, 305 O.A.C. 155, at paras. 68-69, 97, that because this matter arguably involves competing interests and privileges, it should be decided with an evidentiary record and not on a pleadings motion.

### **(3) The Claim against Chief Larkin**

[19] The appellant's claim against him is pleaded in contract and is based only on the fact that he swore the affidavit and signed the Release and Agreement on behalf of the Board. The appellant did not plead any facts showing that the Chief's actions were tortious: see e.g., *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 2 S.C.R. 263.

[20] However, the appellant represents herself in this matter. Having concluded that the motion judge erred in striking her claims against the Board, we would grant her leave to amend her claim against Chief Larkin to plead how his actions were tortious.

#### IV. DISPOSITION

[21] Accordingly, we would allow the appeal and set aside the order of the motion judge. If the appellant seeks costs of this appeal and of the motion before the motion judge, she shall, within 14 days, serve on the respondents and file with this court brief written submissions, including proof of any disbursements she has incurred and seeks to recover. The respondents shall serve on the appellant and file with this court their responding submissions within 10 days thereafter.

“Alexandra Hoy A.C.J.O.”  
“K. van Rensburg J.A.”  
“L.B. Roberts J.A.”

# TAB Y

**THIS IS EXHIBIT “Y” REFERRED TO IN THE AFFIDAVIT OF LAURA J. FREITAG  
SWORN BEFORE ME THIS 9th DAY OF February, 2021.**

A handwritten signature in black ink, appearing to be 'J. J. H.', is written above a horizontal line.

**A COMMISSIONER FOR TAKING AFFIDAVITS**

Amended this 29 day of January  
2020

338

Pursuant to the order of the Honourable  
Justice Roberts and Justice Van Rensburg  
Dated this 25 day of October  
2019

Court File No.: CV18-00001938-0000

Ontario



Per 

SUPERIOR COURT OF JUSTICE

BETWEEN:

KELLY LYNN DONOVAN

Plaintiff

- and -

WATERLOO REGIONAL POLICE SERVICES BOARD, and

BRYAN LARKIN

Defendants

AMENDED

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: May 9, 2018 Issued by: "C. Davies"

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

c/o Waterloo Regional Police Services Board

200 Maple Grove Road

Cambridge, Ontario

N0B 1M0

## 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.

2. The Plaintiff, Kelly Lynn Donovan, claims against the Defendant Bryan Larkin, the following relief:

- a. Damages for misfeasance in public office, in the amount of Fifty Thousand Dollars (\$50,000.00);
- b. Punitive, exemplary and/or aggravated damages in the amount of Ten

Thousand Dollars (\$10,000.00);

- c. Pre-judgment and post-judgment interest in accordance with the Courts of Justice Act, R.S.O. 1990, c. C.43, as amended;
- d. Costs of this proceeding on a solicitor and his own client scale, together with applicable HST; and
- e. Such further and other relief as counsel may advise and this Honourable Court deems just.

## **II. Parties**

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

## **III. Facts**

### **Class action lawsuit**

- 5. 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**

6. 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.”*

7. The agreement also contained a release signed by chief Bryan Larkin which stated:
  - a. “THE REGIONAL MUNICIPALITY OF WATERLOO POLICE SERVICES BOARD [...] does hereby release and forever discharge KELLY DONOVAN (“DONOVAN”) from any and all actions, causes of action, complaints, applications, appeals...”
  - b. “AND FOR THE SAID CONSIDERATION, THE REGIONAL MUNICIPALITY OF WATERLOO POLICE SERVICES BOARD further agrees not to commence, maintain, or continue any action, cause of action or claim, request, complaint, demand or other proceeding, against any person, corporation or entity in which any claim could arise against DONOVAN for contribution or indemnity.”
8. The Resignation Agreement was signed by the defendant Bryan Larkin on behalf of the defendant board.
9. The plaintiff agreed to resign from her career in order to recover from her workplace injury and establish comparable employment as a single mother supporting her three children in exchange for the contractual and statutory obligations placed upon the defendants; a public body and a public officer.

### **Plaintiff's health**

10. 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.
11. In December 2015, the plaintiff was diagnosed with post-traumatic stress disorder (“PTSD”).
12. In May, 2016, the plaintiff made a disclosure of internal misconduct to the defendant board, her disclosure included allegations that the defendant Bryan Larkin had authorized unlawful arrests of police officers and had failed to properly investigate criminal allegations against police officers.
13. The defendant Bryan Larkin retaliated against the plaintiff by removing her from her position of employment, putting her under investigation by the police service’s professional standards branch and she was ordered to have no contact with members of the defendant board.
14. It was defendant Bryan Larkin’s retaliation against the plaintiff that caused the plaintiff’s health to worsen drastically. These abuses of power, as the plaintiff saw them, became significant triggers of a workplace injury she sustained in February, 2011.
15. 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.
16. In April, 2017, the plaintiff applied to the Workplace Safety and Insurance Board

(“WSIB”) for benefits as a result of her workplace injury. The plaintiff’s claim was approved, claim number 30505408.

17. 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

18. On January 6, 2016, defendant Bryan Larkin was interviewed by Craig Norris, of the CBC News, about the need to prevent PTSD in police. An excerpt from the article reads;

- a. “More can be done to prevent first responders from getting post-traumatic stress disorder, rather than waiting until treatment is necessary.”

19. On July 5, 2017, the defendant board received the provincially mandated “PTSD Prevention Plan” prepared by members of the service under the direction of defendant Bryan Larkin. The defendant board’s minutes for that meeting show that a Power Point presentation was made to the board that states;

- a. “All PTSD diagnoses in Police Officers and communicators are presumptive;” and
- b. “Plan outlines our commitment to Employees by documenting what we are currently doing and committed to doing for the Prevention, Intervention and recovery from PTSD.”

20. On July 17, 2017, the plaintiff published a research paper titled “Misfeasance in

Ontario Policing and the Coordinated Suppression of Whistleblowers.” The defendant board received this paper directly from the plaintiff by email. The paper detailed the way the plaintiff was treated when she made a disclosure of misconduct to the defendant board as well as other cases from across Canada of ‘whistleblower’ retaliation by police chiefs. An excerpt from page 8 of the report reads:

- a. “What the public do not know is that at times it is the operational stress an officer is facing that causes them to deal with PTSD symptoms. In some cases, the internal issues created by management can leave effects that last far longer than the difficult calls for service.”

21. Defendant Bryan Larkin submitted a statement to CBC News on July 17, 2017, that he was aware of the plaintiff’s report.

22. On December 21, 2017, defendant Bryan Larkin swore an affidavit in defense of the class action lawsuit, to support a motion to dismiss the class action lawsuit and advance his position as chief of police employed by the defendant board, and the document was submitted to record. The affidavit was published on the public website of the law firm advancing the class action lawsuit.

23. 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."*

24. 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."

25. 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."*

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

27. 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.

28. The information disclosed by defendant Bryan Larkin was sufficient to identify the plaintiff and caused her a great deal of humiliation, mental distress and anger. The plaintiff was used by defendant Larkin to attempt to stop the efforts of the plaintiff's female colleagues in their fight for justice.

29. 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.
30. The defendant Bryan Larkin knew the content of his affidavit was inappropriate because the Waterloo Regional Police Association, (the bargaining agent for current members of the police service), filed a grievance against the defendant board for the violation of several female members' privacy in this same affidavit.
31. Defendant Bryan Larkin was aware of the terms contained in the Resignation Agreement, in that he knew that the plaintiff was contractually barred from participating in the class action lawsuit, and the terms of the Resignation Agreement were to be kept confidential, yet he unnecessarily requested the Human Resources Division of the police service prepare an additional chart that included the plaintiff in his affidavit.
32. Defendant Bryan Larkin has an advanced level of knowledge about police officers who have been diagnosed with PTSD.
33. Defendant Bryan Larkin knew, or ought to have known, the triggers that were responsible for the rapid decline of the plaintiff's health between 2016 and 2017. More specifically, the plaintiff was healthy and actively working until after defendant Larkin retaliated against her for making a disclosure to the defendant board.
34. Defendant Bryan Larkin, who is the chief of police of a large regional municipality and swore an oath to discharge his duties according to law, deliberately involved the plaintiff in the class action lawsuit and violated the terms of the Resignation

Agreement knowing this would injure the plaintiff by impeding her recovery and worsening her PTSD symptoms.

35. 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.

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

37. Following the plaintiff's resignation, she continued to receive benefits from WSIB in the form of psychological treatment by Dr. Kathy Lawrence. Since the plaintiff voluntarily resigned, her salary was no longer being paid by WSIB.

38. In August, 2018, the plaintiff was made aware by WSIB that on January 11, 2018, the defendant Board submitted an appeal of the plaintiff's claim number 30505408. The appeal was prepared by counsel for the defendant, the same counsel who represented the defendants when the resignation agreement was prepared and signed.

39. The plaintiff therefore claims the relief as set out in paragraph 1 of the Statement of Claim for two distinct and separate breaches of the resignation agreement by the defendant Board and individual defendant.

40. The plaintiff therefore claims the relief as set out in paragraph 2 of the Amended Statement of Claim for the deliberate and unlawful conduct by defendant Bryan Larkin.

41. 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

Ontario Superior Court of Justice

PROCEEDING COMMENCED AT Brampton

Amended STATEMENT OF CLAIM

KELLY DONOVAN  
14 Laurie Ann Lane  
Paris, Ontario  
N3L 4H4  
Phone: 519-209-5721  
Email: kelly@fit4duty.ca

RCP-E 4C (May 1, 2016)

**TAB Z**

**THIS IS EXHIBIT "Z" REFERRED TO IN THE AFFIDAVIT OF LAURA J. FREITAG  
SWORN BEFORE ME THIS 9th DAY OF February, 2021.**



---

**A COMMISSIONER FOR TAKING AFFIDAVITS**



management labour and employment law



Reply to Donald B. Jarvis  
Toronto Office  
tel 416.408.5516 | email djarvis@filion.on.ca

February 19, 2020

**SENT VIA E-MAIL & COURIER**

Justice Michael T. Doi  
Ontario Superior Court of Justice  
A. Grenville & William Davis Court House  
7755 Hurontario Street, Suite 100  
Brampton, ON L6W 4T6

Dear Mr. Justice Doi:

**Re: Kelly Lynn Donovan v. Waterloo Regional Police Services Board and Bryan Larkin  
(Court File No. CV-18-1938)**

The Plaintiff's appeal in this matter was heard by the Court of Appeal for Ontario on October 11, 2019. For your reference, the Court of Appeal's decision is attached hereto at **Tab A**.

We are writing to seek your direction on the appropriate next step in this proceeding. As you will recall, the Defendants' Rule 21 Motion raised, *inter alia*, the issue of whether the subject matter of the Plaintiff's Amended Statement of Claim was within the jurisdiction of the Ontario courts pursuant to Rule 21.01(3)(a). The parties made full submissions in respect of this jurisdiction issue when the Motion was heard by this Honourable Court on February 13, 2019. In your Reasons for Judgment issued on February 21, 2019 (see **Tab B**), you found that the Motion was fairly and fully disposed of under Rule 21.01(1)(b) without need for recourse to the Defendants' Motion under Rule 21.01(3)(a). Notably, the Court of Appeal did **not** address the jurisdiction issue during the hearing of the Plaintiff's appeal or in its decision. In short, the Defendants' jurisdiction motion remains undecided and the Defendants are entitled to a decision on this issue (see *Sun Oil Co. v. City of Hamilton and Veale*, [1961] O.R. 209 (C.A.) at p. 6 (see **Tab C**)).

Given the fact that you did not rule on the Defendants' jurisdiction motion in your Reasons for Judgment, are you still seized with this matter or should the Defendants' jurisdiction motion be reargued before another judge? If you advise that you remain seized of the Defendants' jurisdiction motion, we respectfully ask that you provide the parties with an approximate time frame for the release of your decision in respect of the Defendants' jurisdiction motion.

Filion Wakely Thorup Angeletti LLP [www.filion.on.ca](http://www.filion.on.ca)

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February 19, 2020  
Page 2

Filion Wakely Thorup Angeletti  
LLP

Thank you for your immediate attention to this matter. We look forward to your earliest reply.

Yours truly,

A handwritten signature in blue ink, appearing to read "Donald B. Jarvis". The signature is fluid and cursive, with a large, stylized "D" and "J".

Donald B. Jarvis  
CM/

cc Ms. Kelly Donovan, Plaintiff (*via email*)  
Ms. Virginia Torrance, Regional Municipality of Waterloo Police Services Board (*via email*)

**TAB A**

# COURT OF APPEAL FOR ONTARIO

CITATION: Donovan v. Waterloo Regional Police Services Board, 2019 ONCA 845

DATE: 20191025

DOCKET: C66718

Hoy A.C.J.O., van Rensburg and Roberts JJ.A.

BETWEEN

Kelly Lynn Donovan

Plaintiff/Responding Party (Appellant)

and

Waterloo Regional Police Services Board and Bryan Larkin

Defendants/Moving Parties (Respondents)

Kelly Lynn Donovan, acting in person

Donald B. Jarvis and Cassandra Ma, for the respondents

Heard: October 11, 2019

On appeal from the order of Justice Michael T. Doi of the Superior Court of Justice, dated March 20, 2019, with reasons reported at 2019 ONSC 1212.

## REASONS FOR DECISION

### I. OVERVIEW

[1] The appellant appeals from the motion judge's order dismissing her action against the respondents under r. 21.01(1)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, without leave to amend, and ordering her to pay costs to the respondents. For the reasons that follow, we allow the appeal, set aside the

order of the motion judge, and grant the appellant leave to further amend her Amended Statement of Claim in respect of the claim against Bryan Larkin.

## II. BACKGROUND

[2] In her Amended Statement of Claim, the appellant alleges that the respondents breached the terms of a Release and of a confidentiality provision contained in a settlement agreement (the "Agreement"), dated June 8, 2017. Under the Agreement, the appellant resigned her employment in June 2017, as a police officer with the respondent Waterloo Regional Police Services Board (the "Board"). She seeks damages against the Board and Bryan Larkin, the Chief of the Waterloo Regional Police Service.

[3] The appellant alleges that the respondents (1) breached the Release by appealing her claim for benefits to the Workplace Safety and Insurance Board ("WSIB") arising from a workplace injury; and (2) breached the confidentiality provisions of the Agreement by delivering an affidavit sworn by Chief Larkin, containing information about the Agreement, in defence of a class proceeding against the Board.

[4] The motion judge struck the claim related to the WSIB appeal on the basis that an employer cannot contract out of the *Workplace Safety and Insurance Act*, 1997, S.O. 1997, c. 16, Sched. A ("WSIA"). Pursuant to the Release, the Board, among other things, "release[s] and forever discharge[s] [the appellant] from any

and all...appeals". The appellant pleads that she applied to the WSIB in April 2017, before signing the Release, for benefits related to post-traumatic stress disorder ("PTSD"). After the Board signed the Release, it submitted an appeal of the WSIB's decision.

[5] The motion judge accepted that it was at least arguable that the Release captured the Board's review of the WSIB's initial entitlement decision: at para. 20. His decision that it was plain and obvious that the Amended Statement of Claim failed to disclose a cause of action in respect of the alleged breach of the Release was based on his conclusion that the result was governed by this court's decision in *Fleming v. Massey*, 2016 ONCA 70, 128 O.R. (3d) 401, leave to appeal refused, [2016] S.C.C.A. No. 113. The motion judge concluded that *Fleming* made it abundantly clear that the Release "cannot operate to preclude the Board, or the [appellant] ...from exercising rights and discharging obligations under the WSIA", because "as a matter of law, parties cannot contract out of the scheme under the WSIA": at para. 23. The motion judge also concluded that the privative clause in s. 118(4) of the WSIA, which provides, in relevant part, that an action or decision of the WSIB under the Act cannot be restrained by a court process or procedure, would preclude the appellant's claim for breach of the Release in relation to the WSIB proceedings: at paras. 24-25.

[6] The motion judge struck the claim related to the breach of confidentiality because he concluded that it could not be based solely on an affidavit prepared

for a court proceeding. The Agreement required the parties, except where required by law, to "keep the terms and existence of [the Agreement] in absolute and strict confidence at all times". While the motion judge found, at para. 33, that "it seems less clear whether Chief Larkin's affidavit sufficiently preserves the [appellant's] confidentiality", he concluded that because his affidavit was used in defending a class action in court, it was covered by absolute privilege. Accordingly, the motion judge concluded that the appellant's claim had no reasonable chance of success.

[7] The motion judge further concluded that the pleading contained insufficient allegations to establish an independent cause of action against Bryan Larkin with respect to either of the appellant's claims.

### **III. ANALYSIS**

[8] We are not persuaded that it is plain and obvious that the appellant's claims against the Board cannot succeed. We agree with the motion judge that the appellant did not plead a tenable claim against Chief Larkin, but in the circumstances of the case we would allow the appellant leave to amend this claim.

#### **(1) The Breach of Release Claim**

[9] As already indicated, the motion judge made his order dismissing the appellant's action without leave to amend under r. 21.01(1)(b). As a result, and as he acknowledged in his reasons, he could not consider anything extrinsic to the

Amended Statement of Claim which was not referenced in the claim. Moreover, he had to accept the pleaded facts as true for the purpose of the r. 21 motion.

[10] On a generous reading of the Amended Statement of Claim, the appellant had applied for and had been receiving WSIB benefits at the time the Agreement containing the Release was signed. She pleads, at paras. 9-10, that she was diagnosed with PTSD in December 2015, and that, starting in February 2017, she could not attend work due to the severity of her PTSD symptoms. She pleads that in April 2017 she applied to the WSIB for benefits and that her claim was approved: at para. 11. Indeed, she pleads at para. 19 that after her resignation she “continued to receive benefits from WSIB in the form of psychological treatment”. The appellant pleads, at para. 20, that in August 2018 she was made aware by WSIB that on January 11, 2018 the Board submitted an appeal of her claim.

[11] *Fleming* was a case that involved uninsured employment under Part X of the WSIA. At issue was the enforceability of a waiver signed by Fleming, who was injured in a go-kart race in which he was the race director. The waiver purported to release all of the respondents from liability for all damages associated with participation in the event. This court concluded that Fleming was an employee, and that the waiver contravened s. 114 of the WSIA, which provides specifically that workers who are not insured under the workers’ compensation scheme, like Fleming, are permitted to sue their employers for workplace accidents. The court concluded that enforcement of the waiver would constitute a contracting out of the

protections of the WSIA, and that contracting out of this protection would be contrary to public policy. At para. 34, Juriansz J.A. wrote the passage that the motion judge relied on:

Considering the sweeping overriding of the common law made by workers' compensation legislation and the broad protection it is designed to provide to workers in the public interest, it would be contrary to public policy to allow employers and workers to contract out of its regime, absent some contrary legislative indication. [Emphasis added.]

[12] However, Juriansz J.A. also wrote, at para. 45, that, "[r]eading the WSIA as a whole, it is apparent its objective is to ensure injured workers have access to compensation".

[13] The Release is not plainly contrary to the WSIA's objective, as identified by Juriansz J.A. Nor have the respondents identified any express statutory provision that the Release would contravene.

[14] Respectfully, it is not plain and obvious that *Fleming* would stand in the way of the appellant's claim in this case. Again, on the facts pleaded by the appellant, following her resignation, she continued to receive benefits from the WSIB in the form of psychological treatment, and it was not until several months after the parties signed an Agreement in respect of her resignation, which included the Release, that the Board initiated an appeal to the WSIB, to challenge her entitlement to benefits. This is very different from the *Fleming* case where the

waiver signed by the employee violated a provision of the WSIA specifically providing for the employee's right of action.

[15] And with respect to the motion judge's conclusion based on the privative clause in s. 118(4) of the WSIA, in our view it is not plain and obvious that the appellant's action in respect of the Release would contravene the WSIB's exclusive jurisdiction to determine matters set out in s. 118 of the WSIA and the privative clause contained in that section.

## **(2) The Breach of Confidentiality Claim**

[16] Nor is it plain and obvious that Chief Larkin's affidavit is subject to absolute privilege and that, accordingly, the appellant's claim has no reasonable prospect of success.

[17] There is arguably an important competing interest at stake that weighs against absolute privilege: there is a confidentiality provision that is part of a settlement agreement. There is an overriding public interest in favour of settlement; promoting settlements contributes to the effective administration of justice in this province: *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, [2013] 2 S.C.R. 623, at para. 11. This is not a situation where a party seeks to rely on the provisions of a confidentiality agreement to shield itself from claims. Moreover, the statement at issue was not made by counsel and it is not apparent that it was necessary for the respondents to include the information that allegedly

breached the Agreement in the affidavit for the Board to defend against the certification motion.

[18] We conclude, as this court did in *Amato v. Welsh*, 2013 ONCA 258, 305 O.A.C. 155, at paras. 68-69, 97, that because this matter arguably involves competing interests and privileges, it should be decided with an evidentiary record and not on a pleadings motion.

### **(3) The Claim against Chief Larkin**

[19] The appellant's claim against him is pleaded in contract and is based only on the fact that he swore the affidavit and signed the Release and Agreement on behalf of the Board. The appellant did not plead any facts showing that the Chief's actions were tortious: see e.g., *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 2 S.C.R. 263.

[20] However, the appellant represents herself in this matter. Having concluded that the motion judge erred in striking her claims against the Board, we would grant her leave to amend her claim against Chief Larkin to plead how his actions were tortious.

## **IV. DISPOSITION**

[21] Accordingly, we would allow the appeal and set aside the order of the motion judge. If the appellant seeks costs of this appeal and of the motion before the motion judge, she shall, within 14 days, serve on the respondents and file with this

Page: 9

court brief written submissions, including proof of any disbursements she has incurred and seeks to recover. The respondents shall serve on the appellant and file with this court their responding submissions within 10 days thereafter.

*disburse: re ACU*

*K. van Rensburg*

*J.B. Ralutso JA.*

**TAB B**

**CITATION:** Donovan v. Waterloo Regional Police Services Board, 2019 ONSC 1212

**COURT FILE NO.:** CV-18-1938

**DATE:** 2019 02 21

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

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

KELLY LYNN DONOVAN

)  
)  
) Self-Represented  
)  
)  
)

Plaintiff )

- and -

WATERLOO REGIONAL POLICE  
SERVICES BOARD and BRYAN  
LARKIN

)  
)  
) Donald Jarvis and Cassandra Ma,  
) for the Defendants  
)  
)

Defendants )

)  
)  
) **HEARD:** February 13, 2019

**REASONS FOR JUDGMENT**

**DOI J.**

**Introduction**

[1] This is an action for breach of contract. The Plaintiff claims that the Defendants appealed her claim for workers' compensation benefits and thereby

- 2 -

breached the terms of a release under a Resignation Agreement they executed with her. She also claims that the Defendants delivered an affidavit in a separate court proceeding which identified her, contrary to the confidentiality terms of the Resignation Agreement.

[2] The Defendants brought this motion under Rules 21.01(1)(b), 21.01(3)(a) and 21.01(3)(d) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended, to strike the Amended Statement of Claim issued May 4, 2018. For the reasons that follow, the pleading is struck under Rule 21.01(1)(b) without leave to amend.

### **Background**

[3] The Amended Statement of Claim discloses the following.

[4] The Plaintiff is a former police officer who resigned her position with the Defendant Waterloo Regional Police Services Board ("Board") after executing a Resignation Agreement on June 8, 2017 with the Board and her collective bargaining agent, the Waterloo Regional Police Association.

[5] The Amended Statement of Claim refers to the Resignation Agreement and pleads, among other things, the following provisions:

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

- 3 -

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.

[...]

THE REGIONAL MUNICIPALITY OF WATERLOO POLICE SERVICES BOARD [...] does hereby release and forever discharge KELLY DONOVAN ("DONOVAN") from any and all actions, causes of action, complaints, applications, appeals

[...]

AND FOR THE SAID CONSIDERATION, THE REGIONAL MUNICIPALITY OF WATERLOO POLICE SERVICES BOARD further agrees not to commence, maintain, or continue any action, cause of action or claim, request, complaint, demand or other proceeding, against any person, corporation or entity in which any claim could arise against DONOVAN for contribution or indemnity.

[6] After the Resignation Agreement was executed, the pleading alleges that the Defendants breached the terms of the contract.

### **The Claim**

[7] On May 9, 2018, the Plaintiff commenced this action. Her Amended Statement of Claim seeks damages against the Board and the personally-named Defendant, Bryan Larkin, Chief of the Waterloo Regional Police Service, and her reinstatement as a police officer with the Board, for the Defendants' alleged breach of the Resignation Agreement by: (i) appealing her claim (Claim No. 30505408) for statutory care and benefits to the Workplace Safety and Insurance Board ("WSIB") arising from a workplace incident; and (ii) delivering an affidavit

- 4 -

sworn by Chief Larkin on December 21, 2017 in a separate court proceeding that contained information that is said to have disclosed her identity in breach of the confidentiality terms under the Resignation Agreement.<sup>1</sup>

[8] The Defendants responded to the claim by delivering a Notice of Motion dated June 7, 2018 to strike the claim.

**The Test under Rule 21.01(1)(b)**

[9] Under Rule 21.01(1)(b), a party may strike all or part of a claim for failing to disclose a reasonable cause of action. The framework for a Rule 21.01(1)(b) motion is well established. There is no evidence on a Rule 21.01(1)(b) motion. The material facts pleaded are deemed to be proven or true, except to the extent that the alleged facts are patently ridiculous or manifestly incapable of being proven. The court is entitled to read and rely on the terms of any document pleaded or incorporated by reference in the claim. As the facts pleaded are the basis for evaluating the claim's possibility of success, a claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The novelty of the cause of action is of no concern at this stage of the proceeding, and the statement of claim must be read generously to allow for drafting deficiencies. If the claim has some chance of success, it must be permitted to

---

<sup>1</sup> On or about May 30, 2017, the Board was named as a defendant in a class action. The putative class members in the class action were current and former employees of the Board and their family members. The Plaintiff was not a putative class member in the proceeding. On July 13, 2018, Baltman J. dismissed the class action; *Rivers v. Waterloo Regional Police Services Board*, 2018 ONSC 4307.

proceed; *R. v. Imperial Tobacco*, 2011 SCC 42 at para. 22; *Castrillo v. Workplace Safety and Insurance Board*, 2017 ONCA 121 at paras. 14 and 15.

[10] To strike a claim under Rule 21.01(1)(b), it must be plain and obvious on a generous reading that the claim discloses no reasonable cause of action; *Conway v. L.S.U.C.*, 2016 ONCA 72 at para. 7; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980. In *Imperial Tobacco*, the rationale for this test was explained (at paras. 17 and 19 to 21):

#### The Test for Striking Out Claims

A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action. Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial.

[...]

The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.

This promotes two goods — efficiency in the conduct of the litigation and correct results. Striking out claims that have no reasonable prospect of success promotes litigation efficiency, reducing time and cost. The litigants can focus on serious claims, without devoting days and sometimes weeks of evidence and argument to claims that are in any event hopeless. The same applies to judges and juries, whose attention is focused where it should be — on claims that have a reasonable chance of success. The efficiency gained by weeding out unmeritorious claims in turn contributes to better justice. The more the evidence and arguments are trained on the real issues, the more likely it is that the trial process will successfully come to grips with the parties' respective positions on those issues and the merits of the case.

Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. [...] The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *Donoghue v. Stevenson*.

Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial. [citations omitted]

[11] Leave to amend a claim will not be permitted when it is plain and obvious that no tenable cause of action is possible on the facts alleged: *Conway v. L.S.U.C.*, 2016 ONCA 72 at para. 16.

### **Position of the Parties**

[12] The Defendants submit that the Amended Statement of Claim fails to plead the requisite elements to support a breach of contract claim against them. Their argument is two-fold. First, they submit that the Board's effort to seek a review of the Plaintiff's initial entitlement decision by the Workplace Safety and Insurance Board ("WSIB") (i.e., by filing an Intent to Object) under the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c.17, Sch. A, as amended ("WSIA"), was not a breach of contract because the WSIA expressly prohibits parties from contracting out of the statutory scheme. They further submit that Chief Larkin's affidavit cannot form the basis of a claim for breach of contract as it was prepared for use in a court proceeding and is subject to absolute privilege.

[13] The Plaintiff relies on the Resignation Agreement as the contractual basis for her claim. By commencing a review or appeal of her initial entitlement decision by the WSIB for statutory workplace insurance benefits, the Plaintiff

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claims that the Defendants breached the terms of their settlement agreement with her. She further alleges that Chief Larkin's affidavit was made without regard to the confidentiality term under the Retirement Agreement as pleaded in the Amended Statement of Claim, and relies on this in further support of her breach of contract claim.

### **Analysis**

[14] As the Plaintiff's action is for a breach of contract, the claim must prove: (i) the existence of a contract with the Defendants; and (ii) a breach of the contract; *Mars Canada Inc. v. Bemco Cash & Carry Inc.*, 2018 ONCA 239 at para. 32.

[15] The Amended Statement of Claim pleads the Resignation Agreement as the underlying basis for the claim. Paragraph 5 of the claim pleads the confidentiality clause under the Resignation Agreement, and paragraph 6(a) pleads an excerpt of the Resignation Agreement by which the Board broadly agreed to release and forever discharge the Plaintiff "*from any and all actions, causes of action, complaints, applications and appeals ...*" Paragraph 6(b) pleads a further provision of the Resignation Agreement by which the Defendants agreed "*not to commence, maintain or continue any action, cause of action, claim, request, complaint, demand or other proceeding, against any person,*

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*corporation or entity in which any claim could arise against DONOVAN for contribution or indemnity."*

**Claim for breach of contract by commencing a proceeding under the WSIA**

[16] I am persuaded that the release executed by the Board under the Resignation Agreement did not preclude it from participating in the WSIB proceedings. I also find that it is plain and obvious that the claim arising from the Board's effort to review the Plaintiff's initial entitlement decision by the WSIB has no reasonable prospect of succeeding.

[17] The Amended Statement of Claim pleads that the terms of the Resignation Agreement include a release in favour of the Plaintiff against "*any and all actions, causes of action, complaints, applications, [and] appeals,*" among other things, as well as a further agreement "*not to commence any action, cause of action or claim, request, complaint, demand or other proceeding against any person corporation or entity in which any claim could arise against the Plaintiff for contribution or indemnity.*" The Plaintiff relies on these terms under the Resignation Agreement for her breach of contract claim against the Defendants for submitting an appeal of her initial entitlement decision by the WSIB on January 11, 2018.

[18] The Defendants submit that the Board's review of the Plaintiff's initial entitlement decision by the WSIB could not have led to any kind of finding of

liability or obligation owed by the Plaintiff. Absent any fraud or misrepresentation, which is not alleged here, the Defendants submit that the WSIB will not pursue a recovery of benefits from a worker if it reverses a previous decision that granted the worker entitlement to benefits; WSIB Policy 19-08-04: Recovery of Benefit-Related Debts, at pp. 1, 3 and 4; Decision No. 1658/02, 2002 WSIA 2718 at para. 20. Accordingly, the Defendants submit that the Board's review of the initial entitlement decision did not implicate the term under the Resignation Agreement by which the Board agreed to not commence a proceeding in which a claim could arise against the Plaintiff for contribution or indemnity.

[19] Assuming that the Defendants' view accurately reflects the policy intent of the above-mentioned WSIB Policy and its interpretation by the appeals tribunal, it still remains uncertain (albeit in a remote sense) as to whether the Plaintiff may, at some future time, incur a potential claim for contribution or indemnity based on some aspect of the Board's review of her initial entitlement decision. To definitively say otherwise would necessarily call for speculation as to future events and cause the decision to fall outside the plain and obvious test.

[20] Moreover, the Amended Statement of Claim also pleads a much broader release by the Board under the Resignation Agreement to release the Plaintiff from "*any and all ... complaints, applications and appeals.*" On a plain reading of this term on its face, it seems at least arguable that it captures the Board's review of the WSIB's initial entitlement decision, as the Plaintiff's submits. She also

notes that the Board sought a review of her initial entitlement decision by the WSIB several months after it executed the Resignation Agreement.

[21] Despite the foregoing, I accept that the Resignation Agreement cannot prevent the parties from participating in proceedings before the WSIB as parties cannot contract out from their rights and obligations under the legislative scheme governing workers' compensation in Ontario. As explained by Juriansz J.A. for the Court of Appeal for Ontario, workplace parties cannot waive their rights and obligations under the WSIA as a matter of law:

I recognize that the courts should exercise extreme caution in interfering with the freedom to contract on the grounds of public policy. Considering the sweeping overriding of the common law made by workers' compensation legislation and the broad protection it is designed to provide to workers in the public interest, it would be contrary to public policy to allow employers and workers to contract out of its regime, absent some contrary legislative indication.

[22] *Fleming v. Massey*, 2016 ONCA 70 at para. 34; leave to appeal to the SCC dismissed with costs, 2016 CanLII 33997; citing *Ontario (Human Rights Commission) v. Etobicoke (Borough)*, [1982] 1 S.C.R. 202 at 214.

[23] The finding by the Court of Appeal in *Fleming* makes is abundantly clear that the release provision under the Resignation Agreement cannot operate to preclude the Board, or the Plaintiff for that matter, from exercising rights and discharging obligations under the WSIA. As a matter of law, parties cannot contract out of the scheme under the WSIA. Accordingly, it is plain and obvious

that the Plaintiff's claim for breach of contract based on the Board's effort to seek a review of her initial entitlement decision by the WSIB simply fails to disclose a reasonable cause of action.

[24] In arriving at this finding, I also am mindful of ss. 118(1), (2), (3) and (4) of the WSIA which provide the WSIB with exclusive statutory jurisdiction that cannot be restrained by a proceeding in court:

118 (1) the Board has exclusive jurisdiction to examine, hear and decide all matters and questions arising under this Act, except where this Act provides otherwise.

(2) Without limiting the generality of subsection (1), the Board has exclusive jurisdiction to determine the following matters:

[...]

2. Whether personal injury or death has been caused by an accident.

3. Whether an accident arose out of and in the course of an employment by a Schedule 1 or Schedule 2 employer;

[...]

(3) An action or decision of the Board under this Act is final and is not open to question or review in a court.

(4) No proceeding by or before the Board shall be restrained by injunction, prohibition or other process or procedure in a court or be removed by application for judicial review or otherwise in a court. [emphasis added]

[25] Of particular note is the strongly worded privative clause at s.118(4) of the WSIA that precludes a party from restraining proceedings before the WSIB by pursuing a claim or remedy in court; *Rodrigues v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 719 at para. 22. While the legislature cannot completely oust the jurisdiction of the Superior Court, which is

derived under s. 96 of the *Constitution Act, 1867*, I find that s. 118(4) precludes the Plaintiff from pursuing her breach of contract claim to restrain the Board from taking part in proceedings before the WSIB involving her workers' compensation claim under the WSIA; *Castrillo v. Workplace Safety and Insurance Board*, 2017 ONCA 121 at paras. 54-56, 59 and 66.

**Claim for breach of contract by filing affidavit**

[26] The Defendants argue that it is plain and obvious that the Plaintiff's claim based on Chief Larkin's affidavit has no reasonable prospect of success. I agree with this.

[27] The Amended Statement of Claim pleads that Chief Larkin swore an affidavit on December 21, 2017 to defend a class action lawsuit (Court File No. CV-17-2346-00) which made allegations alleged of systemic and institutional gender-based discrimination and harassment. Specifically, the claim pleads that Chief Larkin attached to his affidavit a chart prepared by the Human Resources Division of the police service to show complaints to the Human Rights Tribunal that female employees had made in the last five years, together with their status or resolution. The affidavit expressly states that this chart provides non-identifying information to preserve the identities of the complainants, with the exception of the representative class action plaintiff whose complaint to the Human Rights Tribunal remained outstanding when the affidavit was sworn.

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[28] The claim pleads that the attached chart to Chief Larkin's affidavit is titled "*Police Officer initiated Ontario Human Rights Complaints*" and lists four (4) female officers who are identified as follows:

- 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."

[29] Of the two unnamed "Constables" who are mentioned in the chart, the Amended Statement of Claim pleads that one complaint is shown as having had been resolved in the following manner:

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

[30] The claim pleads that only one female officer is listed on the chart as having "voluntarily" resigned. By process of elimination, the claim asserts that Chief Larkin's affidavit has the effect of identifying the Plaintiff as she is the only female constable employed by the Board over the past five years who had filed a human rights complaint and voluntarily resigned.

[31] In pleading a breach of contract, the Amended Statement of Claim states that Chief Larkin's public disclosure was not required by law, contained sufficient information to identify the Plaintiff, and violated the terms of the Resignation Agreement.

[32] The Defendants submit that Chief Larkin's affidavit does not disclose information in breach of the confidentiality term of the Resignation Agreement, and thus does not give rise to a reasonable cause of action for breach of contract. According to the Defendants, the Plaintiff's claim that the affidavit contains sufficient information for the plaintiff to be identified is wholly speculative and remote at law. In any event, as Chief Larkin's affidavit was delivered for use in court proceedings, the Defendants submit that it is covered by absolute privilege and cannot form the basis of the Plaintiff's claim for breach of contract. They rely on a body of jurisprudence which supports the proposition that statements made in the course of a judicial proceeding, including statements in pleadings and other documents made for the proceeding, are subject to absolute privilege and cannot ground a cause of action.

[33] From the information pleaded in the Amended Statement of Claim, I recognize that Chief Larkin's affidavit, on its face, does not directly identify the Plaintiff or the other complainants who are mentioned in it. I accept that the references in the affidavit to the four (4) female complainants are oblique and anonymized to some degree. However, given that the pool of female complainants is fairly small and features only four members, with one member apparently named given her known role as a representative plaintiff in the class action, it is unclear to me just how anonymous the remaining three complainants actually are to those with some knowledge of the police service. This may be

particularly true in the case of one complainant who is identified in the affidavit as having the rank of sergeant. In the circumstances, it seems less than clear whether Chief Larkin's affidavit sufficiently preserves the Plaintiff's confidentiality. Accordingly, I find that the issue of whether the unnamed reference in Chief Larkin's affidavit is sufficiently capable of identifying the Plaintiff and breaches the confidentiality term of the Resignation Agreement remains an open question.

[34] Regardless of the foregoing, however, it is clear that Chief Larkin's affidavit was prepared and used in a court proceeding. Accordingly, I find that the affidavit is covered by absolute privilege and cannot support the Plaintiff's claim in breach of contract.

[35] Brown J.A. for the Court of Appeal has explained that, "*The doctrine of absolute privilege contains several basic elements: no action lies, whether against judges, counsel, jury, witnesses or parties, for words spoken in the ordinary course of any proceedings before any court or judicial tribunal recognized by law; the privilege extends to documents properly used and regularly prepared for use in the proceedings;*" *Salasel v. Cuthbertson*, 2015 ONCA 115 at para. 35, citing *Amato v. Welsh*, 2013 ONCA 258 at para. 34. In determining whether absolute privilege applies to a communication, the analysis necessarily focuses on the occasion that the communication is made, not its content; *Salasel* at para. 46. This immunity extends to any and all causes of action, however framed, and is not limited to actions for defamation; *Salasel* at

para. 38, and *Samuel Manu-Tech Inc. v. Redipac Recycling Corp.*, [1999] O.J. No. 3242 (C.A.) at para. 20. A claim based on communications which take place during, incidental to, and in the furtherance of a court proceeding is subject to absolute immunity; *Cook v. Milborne*, 2018 ONSC 419 at paras. 17-19. The existing doctrine of absolute privilege affords a fulsome immunity that is broadly applied to all matters done *coram judice*, and is unaffected by whether the evidence was given in bad faith and actual malice or without justification or excuse; *Cook* at paras. 19-21; *Fabian v. Margulies* (1985), 53 O.R. (2d) 380 (C.A.) at para. 9, *Lincoln v. Daniels*, [1962] 1 Q.B. 237 (C.A.) at 257-8.

[36] In view of the foregoing, it is plain and obvious that the Plaintiff's claim for breach of contract arising from Chief Larkin's affidavit discloses no reasonable cause of action. His affidavit clearly was used in defending a class action in court, which the Amended Statement of Claim expressly acknowledges. To the extent that the claim rests on this affidavit, it has no reasonable chance of success in law and should not continue; *Cook* at paras. 21, 32-33 and 57; see also *Gray Investigations Inc. v. Mitchell*, [2007] O.J. No. 1936 (S.C.J.) at paras. 17-20, and *Dooley v. C.N. Weber Ltd.* (1994), 19 O.R. (3d) 779 (Gen.Div.).

[37] From my review of the Amended Statement of Claim, I further find that the pleading is insufficient to establish an independent cause of action against the personally-named defendant, Bryan Larkin. The pleading identifies him as the Chief of the police service and an employee of the Board. The claim gives no

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indication that he acted outside the scope of his employment duties. While recognizing that he swore the affidavit that the Board relied upon in defending the class action, the claim does not set out separate facts against him or personal interests that are independent from the breach of contract claim against the Board. Rather, the claim against both Defendants is essentially the same. It was the Board, and not Chief Larkin, which was party to the Resignation Agreement, although he signed the agreement on behalf of the Board. As such, and in the circumstances of this case, I find that he is protected from personal liability; *Lussier v. Windsor-Essex Catholic District School Board*, [1999] O.J. No. 4303 (Div. Ct.) at paras. 17-18, citing *Normart Management Ltd. v. West Hill Redevelopment Co.* (1998), 37 O.R. (3d) 97 (C.A.) at 104.

### **No Leave to Amend**

[38] I recognize that leave to amend a pleading should not lightly be withheld; *Conway v. L.S.U.C.*, 2016 ONCA 72 at paras. 16-18. However, given the context of this case, it is plain and obvious that no tenable cause of action supporting a breach of contract claim under the Resignation Agreement is possible. The Amended Statement of Claim essentially frames a tandem breach of contract claim by relying on the Defendant's effort to review the Plaintiff's initial entitlement decision by the WSIB, and by also relying on Chief Larkin's affidavit to defend the class action proceeding. As explained above, it is plain and obvious that these material facts cannot possibly give rise to a breach of contract

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given the parties' inability to contract out of the WSIA and the absolute privilege that attached to the affidavit. No opportunity to amend the pleading could alter this and realistically preserve the action. Accordingly, leave to amend is denied.

### **Conclusion**

[39] The Amended Statement of Claim is struck under Rule 21.01(1)(b) without leave to amend.

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

[41] I strongly encourage the parties to agree on costs. If they are unable, the Defendants may deliver cost submissions not to exceed three (3) pages (excluding any cost outline and offer(s) to settle) within fifteen (15) days from this judgment, followed by the Plaintiff's cost submissions on the same terms within a further fifteen (15) days. No reply submissions are permitted without leave.

(Original signed by Justice Doi)

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Doi J.

**Released:** February 21, 2019

**CITATION:** Donovan v. Waterloo Regional Police Services Board, 2019 ONSC 1212

**COURT FILE NO.:** CV-18-1938

**DATE:** 2019 02 21

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

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

KELLY LYNN DONOVAN

Plaintiff

**- and -**

WATERLOO REGIONAL POLICE  
SERVICES BOARD and BRYAN LARKIN

Defendants

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**REASONS FOR JUDGMENT**

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Doi J.

**Released:** February 21, 2019

**TAB C**

Sun Oil Co. v. City of Hamilton and Veale

[1961] O.R. 209

ONTARIO  
[COURT OF APPEAL]  
PORTER, C.J.O. MACKAY  
AND MORDEN, JJ.A.  
25TH JANUARY 1961

1961 CanLII 121 (ON CA)

Municipal Corporations IV B -- Motions & Orders -- Whether validity of by-law determinable on originating motion or motion to quash -- Municipal Act (Ont.), s. 296 -- R. 604 (Ont.) -- Whether by-law an "instrument".

After a municipal by-law has been duly passed, its validity cannot be determined upon an originating motion nor can the Court entertain a motion to quash. The effect of s. 296 of the Municipal Act, R.S.O. 1950, c. 243 cannot be avoided by bringing an originating motion to have a by-law declared inapplicable to a business covered thereby, on the ground of want of power to enact it. Assuming that a by-law is an "instrument" within R. 604 (Ont.), the only jurisdiction on an originating motion is to interpret the by-law and not to determine its validity. Held, on appeal, in so far as the Judge below purported to interpret an "automobile service station" licensing by-law, he was wrong in concluding that it did not apply to a proposed gasoline service station business and it was also clear that a separate licence was required to each location.

[Re Clements & Toronto, 20 D.L.R. (2d) 497, [1960] O.R. 18; Rigden v. Whitstable Urban Dist. Council, [1959] Ch. 422, folld; City of Toronto v. Can. Oil Companies Ltd., 45 O.L.R. 225, apld; City of Windsor v. Dapco Ltd., 19 D.L.R. (2d) 688,

[1959] O.W.N. 238, refd to]

APPEAL from an order of Stewart, J., on a motion respecting the applicability and validity of a by-law. Reversed.

J.T. Weir, Q.C., for appellants; R.C. Sharp, Q.C., and David Pozer, for applicant, respondent.

The judgment of the Court was delivered by

MORDEN, J.A.:-- This is an appeal by the City of Hamilton and its Building Commissioner from an order made by Mr. Justice Stewart on May 13, 1960.

Sun Oil Company Ltd., the respondent to this appeal, moved by originating notice for an order of mandamus directing the appellants to issue permits for the erection and operation of a gasoline service station upon certain lands fronting on Aberdeen Ave. in Hamilton. Before this motion was heard, the applicant served a further notice stating that it would also move "for a declaration that by-law 3022 of the Corporation of the City of Hamilton does not apply for the purpose of licensing and regulating owners of Gasoline Service Stations or alternatively if the said by-law does apply, that such an owner is not required to obtain more than one licence to carry on the business of a Service Station Operator in the City of Hamilton at different locations". By-law 3022 is the city's general licensing by-law.

The learned Judge of first instance, after hearing the motion on March 15, 1960, reserved his judgment until May 13th when he made a declaration "that By-law Number 3022, being a by-law of the Corporation of the City of Hamilton, does not apply for the purpose of licensing and regulating owners of gasoline service stations". In view of this declaration the learned Judge was not required to deal with the relief asked alternatively to it. No reasons were given. No disposition was made of first notice asking for mandamus.

The appellants base their appeal to this Court upon two grounds -- (1) the learned Judge lacked jurisdiction to make the declaration and (2) he misdirected himself as to the meaning and effect of the by-law.

The view I take of the law applicable to the procedure taken by the applicant and of the effect of the Judge's failure to dispose of the motion for mandamus renders much of the argument we heard irrelevant. It is to be regretted that our decision on this appeal will not settle of the important issues between the parties. In my opinion, neither the learned Judge of first instance nor this Court can in these proceedings pass upon the validity of the whole or of any part of By-law 3022.

The paragraphs of the by-law dealing with automobile service stations were passed in 1951. Their validity cannot now be determined upon an originating motion: *Re Clements & Toronto*, 20 D.L.R. (2d) 497, [1960] O.R. 18. The Court cannot at this late date entertain a motion to quash any part of the by-law.

The effect of s. 296 of the Municipal Act, R.S.O. 1950, c. 243, cannot be avoided by bringing an originating motion for an order declaring that any part of the by-law is inapplicable to a particular trade or business, purportedly governed by it, on the ground that the city lacked the legislative power to enact that part. Nor can R. 604 be invoked where the validity of an instrument is the issue to be decided: *Rigden v. Whitstable Urban Dist. Council*, [1959] Ch. 422. To obtain a decision upon the validity of the by-law or any part of it, the applicant should have instituted proceedings by writ of summons. In proceedings as now constituted we are bound, as was Mr. Justice Stewart, to assume that the by-law is valid and for this reason we cannot consider and express our opinion upon many interesting submissions advanced by Mr. Sharp. For instance, he argued that in 1951, the city had no legislative power to pass a by-law licensing and regulating gasoline service stations and in support of this contention he cited the decision of LeBel J. (as he then was) in *Can. Oil Companies Ltd. v. City of London*, 5 D.L.R. (2d) 230, [1956] O.R. 878. In my opinion, it is unnecessary, in fact it would be improper,

for this Court upon this appeal to decide whether that case and *City of Toronto v. Can. Oil Companies Ltd.* (1919), 45 O.L.R. 225, were correctly decided. For the same reason we can not express our opinion whether or not the by-law is invalid because it does not contain a series of rules governing the issue of licences.

Upon the assumption that By-law 3022 is valid in all respects then the only possible jurisdiction Mr. Justice Stewart had was to interpret it. This can only be found in R. 604 which reads: "Where the rights of any person depend upon the construction of any deed, will or other instrument, he may apply by originating notice, upon notice to all persons concerned, to have his rights declared and determined." This Court has recently on two occasions expressed grave and serious doubts whether a municipal by-law is an "instrument" within the meaning of the rule: *City of Windsor v. Dapco Ltd.*, 19 D.L.R. (2d) 688, [1959] O.W.N. 238; and *Re Clements & Toronto*, supra. The appellants' counsel made no submissions upon this point. Counsel for the respondent argued that the doubts expressed by this Court were obiter dicta and that they should give way to the contrary practice of single Judges beginning in *Blainey v. Toronto*, [1935], 4 D.L.R. 328, O.R. 476. However, because I have concluded that if the learned Judge of first instance did in fact interpret the by-law, he was incorrect in his interpretation and should have refused to make the declaration he did, I am not compelled to decide whether or not R. 604 empowers the Court to interpret municipal by-laws.

The relevant parts of By-law 3022 are as follows:

1. The charges hereinafter set forth are hereby fixed and shall be levied and collected from all persons obtaining licences for the several trades, businesses or objects hereinafter mentioned.....

(36) For a licence for

Automobile Service Station

(c) A building or place where gasoline and oils are stored

or kept for sale. Where only one service hose for supply of gasoline or motor fuel oil to motor vehicles,

-- an annual fee of . . . . . \$10.00

for each additional service hose,

-- an annual fee of . . . . . \$7.50

2. No person shall carry on in the City of Hamilton any trade, business, calling or affairs, mentioned in this By-law without first obtaining a licence therefor, and paying the fee for such licence required by this By-law.

(2) No such licence shall authorize any person to carry on any such trade, business, calling or affairs at any premises, other than those identified in the licence certificate issued.

(3) No licence issued pursuant to a by-law of the City Council shall be transferred either from the licensee to any other such person or corporation, or so as to authorize the carrying on of any such trade, business, calling or affairs at any building or place other than that for which the licence was issued, save upon application in writing filed with the City Clerk, together with a fee of one dollar.

It is plain to me that the applicant's proposed business comes within the ordinary meaning of "a building or place where gasoline and oils are stored or kept for sale". Very similar words were held by Masten, J., in *City of Toronto v. Can. Oil Companies Ltd.*, 45 O.L.R. 225, to comprehend a gasoline service station. Mr. Sharp argued that the by-law should be interpreted as applying only to public garages as defined by s. 388(1) (121) (a) (before it was amended by 1958, c. 64, s. 29(7) of the Municipal Act and not to "automobile service stations" as defined by s. 388(1) (122) (a) of the Act which he submitted the city had in 1951 no power to license or regulate generally. This contention, in effect, raises the issue of the validity of s. 1(36) of the by-law which, for reasons I have endeavoured to state, cannot be decided in these proceedings.

The respondent's counsel further argued that the by-law did not require an owner to obtain more than one licence to operate several service stations in the city. From the fact that he advanced this argument, I infer that the respondent already holds at least one licence granted by the City of Hamilton. The extracts I have quoted from the by-law require, in my view, a separate licence for each location. Here again Mr. Sharp challenges the power of the City Council to enact a by-law requiring more than one licence from the same person which he submits is beyond the powers conferred upon the city by s. 388(1) (121). This raises an issue of validity and not one of interpretation.

Fianlly, on the assumption that the by-law is valid and applies to service stations and requires a separate licence for each location, counsel for the respondent urged this Court to send the matter back to the City Council for reconsideration because the Council in refusing the licence "took into account matters which were not proper for the guidance of its discretion and further that the Council did not exercise its discretion honestly, impartially and in good faith". This is a matter we assume was argued before Mr. Justice Stewart. However, he did not decide it; the order he made does not determine it; and it is still open to the respondent to pursue. In the circumstances no appeal was taken or could be taken upon this part of the case and this Court has no original jurisdiction which would empower it to decide it.

For these reasons, I would allow the appeal with costs, set aside the order below and I would dismiss the motion, but only insofar as ti relates to the matters raised by the second notice, with costs.

Appeal allowed.

**TAB AA**

**THIS IS EXHIBIT "AA" REFERRED TO IN THE AFFIDAVIT OF LAURA J. FREITAG  
SWORN BEFORE ME THIS 9th DAY OF February, 2021.**



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**A COMMISSIONER FOR TAKING AFFIDAVITS**

Court File No.: CV18-00001938-0000

*Ontario*

**SUPERIOR COURT OF JUSTICE**

B E T W E E N:

**KELLY LYNN DONOVAN**

Plaintiff

- and -

**WATERLOO REGIONAL POLICE SERVICES BOARD, and**

**BRYAN LARKIN**

Defendants

**SUBMISSIONS AS TO OUTSTANDING ISSUES AND DELAYS**

It is the Plaintiff's position that the issue of jurisdiction raised by the Defendants should be dismissed with costs, for the reasons that follow, and are explained in detail in this submission:

- A. The issue of jurisdiction of the Plaintiff's amended statement of claim was addressed, considered and decided on in Justice Doi's decision dated February 21, 2019.
- B. The issue of jurisdiction of the Plaintiff's amended statement of claim was confirmed by the Court of Appeal in their analysis and ultimate ruling.
- C. The Defendants are now estopped from raising the issue of jurisdiction again.
- D. Justice Doi is *functus officio* and does not have jurisdiction to make any further decision that would change the original order made on March 20, 2019.
- E. Attempting to re-litigate the issue of jurisdiction is an abuse of process.

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### A - The Issue of Jurisdiction was Decided by Justice Doi

1. A critical issue in the Defendants’ motion was whether or not court had jurisdiction to hear the Plaintiff’s amended statement of claim. Without jurisdiction, Justice Doi could not rule on any argument raised by the Defendants, including the argument that the amended pleading disclosed no reasonable cause of action.
2. It is the Plaintiff’s position that Justice Doi decided the jurisdiction issue at para. 40 of *Donovan vs. Waterloo Regional Police Services Board*, 2019 ONSC 1212, (provided in the Defendants’ submission at Tab B):
 

“For the reasons set out above, I am satisfied that this motion is fairly and fully disposed of under Rule 21.01(1)(b) without the need for recourse to these other grounds.”
3. On March 20, 2019, Justice Doi signed an order of the court, seizing the substance of the critical issues in question (jurisdiction). The Defendants did not appeal this order.
4. In *R. v. R.E.M.*, [2008] 3 S.C.R. 3, 2008 SCC 51, (attached at **Appendix A**), the Chief Justice wrote at para. 55:
 

“The appellate court, proceeding with deference, must ask itself whether the reasons, considered with the evidentiary record, the submissions of counsel and the live issues at the trial, reveals the basis for the verdict reached. It must look at the reasons in their entire context. It must ask itself whether, viewed thus, the trial judge appears to have seized the substance of the critical issues on the trial. If the evidence is contradictory or confusing, the appellate court should ask whether the trial judge appears to have recognized and dealt with the contradictions. If there is a difficult or

novel question of law, it should ask itself if the trial judge has recognized and dealt with that issue.”

#### **B - The Issue of Jurisdiction was Confirmed by Court of Appeal**

5. When the matter came before the appellate court on October 11, 2019, the Defendants did not raise a critical outstanding issue of allegedly undecided jurisdiction in either their written or oral submissions.
6. The Court of Appeal set aside the order of Justice Doi and ruled that the case at bar “should be decided with an evidentiary record and not on a pleadings motion”, (see para. 18 of *Donovan vs. Waterloo Regional Police Services Board*, 2019 ONCA 845, provided by the Defendants at Tab A).
7. On January 28, 2020, the Defendants approved a draft order of the Court of Appeal and have not appealed this decision.
8. When the question of jurisdiction of breaches of the Plaintiff’s resignation agreement came before Justice Favreau, in *Donovan v. (Waterloo) Police Services Board*, 2019 ONSC 818, (attached at **Appendix B**), Justice Favreau wrote at para. 51:

“The Board argues that the Human Rights Tribunal has exclusive jurisdiction over issues related to the enforcement of the Resignation Agreement. A similar issue is being raised by the Board on the motion to be heard on February 13, 2019, in the context of Ms. Donovan’s civil action. While it is not necessary for me to decide this issue in the context of this motion, I note that it is not clear to me that the Human Rights Tribunal has any jurisdiction over the Board’s application, let alone exclusive jurisdiction. Evidently, there were many issues between the parties that led to the Resignation Agreement.”

#### **C - The Defendants are Estopped from Raising the Issue of Jurisdiction**

9. The Defendants seek to re-litigate a claim that was decided or could have been raised in an earlier proceeding.
10. In *Minott v. O’Shanter Development Co.*, 42 O.R. (3d) 321 [1999] O.J. No. 5, (attached at **Appendix C**), Justice Laskin wrote at p. 329:

“*Res judicata* itself is a form of estoppel and embraces both cause of action estoppel and issue estoppel. Cause of action estoppel prevents a party from relitigating a claim that was decided or *could have been raised in an earlier proceeding*. [Emphasis added.]”

11. The Defendants failed to raise the allegedly outstanding issue of jurisdiction in their submissions made on the following dates:

- i. On March 8, 2019, the Defendants filed their costs submission to Justice Doi.
- ii. On April 15, 2019, the Defendants approved the draft order of Justice Doi.
- iii. On June 24, 2019, the Defendants filed their responding appeal material which did not contain any written arguments regarding the alleged outstanding issue of jurisdiction of Justice Doi to make the order dated March 20, 2019.
- iv. On October 11, 2019, the Plaintiff’s appeal was heard and the Defendants neglected to make any oral arguments regarding an alleged outstanding question of jurisdiction.

12. In *Authorson v. Canada (Attorney General)*, 2003 CanLII 11223 (ON SC), (attached at **Appendix D**), at para. 22, Justice Brockenshire wrote:

“In the normal course of litigation, once a motions court or trial court has delivered a judgment and the matter is appealed, the motion or trial court has no further jurisdiction in the matter unless the appellate court should send the matter back.”

13. In para. 43 of *Kendall v. Sirard*, 2007 ONCA 468, (attached at **Appendix E**), *Ward v. Dana G. Colson Management Ltd.* (1994), 24 C.P.C. (3d) 211 (Gen. Div.) at 218, aff’d. [1994] O.J. No. 2792 (C.A.) E. Macdonald J. noted:

“A decision in an interlocutory application is binding on the parties, at least with respect to other proceedings in the same action. I agree with the submission that the general principle is that it is not open for the court, in a case of the same question arising between the same parties, to review a previous decision not open to appeal. If the decision was wrong, it ought to have been appealed within the appropriate time frames.”

14. That same, para. 43, of *Kendall v. Sirard*, 2007 ONCA 468, quotes *Fidelitas Shipping Co. v. V/O Exportchleb*, [1966] 1 Q.B. 630 (C.A.) (hereinafter “*Fidelitas*”), Lord Denning comments on page 640:

“And within one issue, there may be several points available which go to aid one party or the other in his efforts to secure a determination of the issue in his favour. The rule then is that each party must use reasonable diligence to bring forward every point which he thinks would help him. If he omits to raise any particular point, from negligence, inadvertence, or even accident (*which would or might have decided the issue in his favour*), he may find himself shut out from raising that point again, at any rate in any case where the same issue arises in the same or subsequent proceedings.”

15. The Defendants did not use reasonable diligence to bring forward the issue of jurisdiction of the motions court forward and now seek disposition of all of the action. It is the Plaintiff’s position that the Defendants are now shut out from raising that point again in this same or subsequent proceeding.

16. At para. 24, in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 (CanLII), [2001] 2 SCR 460, (attached at **Appendix F**), Justice Binnie wrote:

“...Dickson J. (later C.J.), speaking for the majority in *Angle*, supra, at p. 255, subscribed to the more stringent definition for the purpose of issue estoppel. “It will not suffice” he said, “if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment.” The question out of which the estoppel is said to arise must have been “fundamental to the decision arrived at” in the earlier proceeding. In other words, as discussed below, the estoppel extends to the material facts and the conclusions of law or of mixed fact and law (“the questions”) that were necessarily (even if not explicitly) determined in the earlier proceedings.”

17. In *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 (CanLII), [2013] 2 SCR 125, (attached at **Appendix G**), at p. 129, the Supreme Court of Canada wrote:

“The twin principles which underlie the doctrine of issue estoppel — that there should be an end to litigation and that the same party shall not be harassed twice for the same cause — are core principles which focus on achieving fairness and preventing injustice by preserving the finality of litigation. The ultimate

goal of issue estoppel is to protect the fairness of finality in decision-making and the avoidance of the relitigation of issues already decided by a decision-maker with the authority to resolve them.”

18. The issue of jurisdiction was fundamental to Justice Doi’s decision rendered February 21, 2019, and estoppel extends to the conclusions of law that were not explicitly determined by Justice Doi.

#### **D - Justice Doi is *functus officio***

19. Further action by Justice Doi would amount to a breach of the principle of *functus officio*.

20. It is stated at para. 79 of *Doucet-Boudrea v. Nova Scotia (Minister of Education)*, 2003 SCC 62 (CanLII), [2003] 3 SCR 3, (attached at **Appendix H**), that:

“If a court could continually hear applications to vary its decisions, it would assume the function of an appellate court and deny litigants a stable base from which to launch an appeal.”

21. In the case at bar, the Defendants have asked Justice Doi to make a ruling as to whether or not court has jurisdiction to hear the Plaintiff’s amended claim, after a final judgment has been made on the issue and that issue was subject to appeal.

22. The definition of *functus officio* is stated in *Doucet-Boudrea, supra*, at para. 115:

“[TRANSLATION] Qualifies a court or tribunal, a public body or an official that is no longer seized of a matter because it or he or she has discharged the office. E.g. A judge who has pronounced a final judgment is *functus officio*.”

23. Justice Doi finds himself in a similar position as that of the trial judge in *Doucet-Boudrea, supra*, whose position was articulated by Justices Iacobucci and Arbour, at para. 119, as follows:

“As we noted above, the trial judge equivocated on the question of whether his purported retention of jurisdiction empowered him to make further orders. Regardless of which position is taken, the separation of powers was still breached. On the one hand, if he did purport to be able to make further orders, based on the evidence presented at the reporting hearings, he was *functus officio*. We find it difficult to imagine how any subsequent order would not have resulted

in a change to the original final order. This necessarily falls outside the narrow exceptions provided by *functus officio*, and breaches that rule.”

## **E - Abuse of Process**

24. In *Re: Mid-Bowline Group Corp*, 2016 ONSC 669, (attached at **Appendix I**), Justice Newbould wrote, at para. 59:

“...To lie in the weeds until the hearing of the application and assert such a right to stop the plan of arrangement is troubling indeed and not acting in good faith. Waiting and seeing how things are going in the litigation process before springing a new theory at the last moment is not to be encouraged.”

25. In *Canam Enterprises Inc. v. Coles*, 2000 CanLII 8514 (ON CA), (attached at **Appendix J**), the appeal was dismissed with costs because the proceeding was an abuse of process. At para. 34, Justice Finlayson wrote:

“Maintaining open and ready access to the courts by all legitimate suitors is fundamental to our system of justice. However, to achieve this worthy purpose, the courts must be vigilant to ensure that our system does not become clogged with unnecessary, repetitious litigation. To allow the defendant to retry the issue of misrepresentation would be a classic example of abuse of process and a waste of the time and resources of the litigants and the court. The retrying of the issues in this case would also erode the principle of finality that is crucial to the proper administration of justice.”

26. There is no new evidence, special circumstances or equitable reasons for the Defendants to be entitled to retry the issue of jurisdiction of the Plaintiff’s amended statement of claim.

27. It is the Plaintiff’s position that Defendants’ letter to Justice Doi dated February 19, 2020, one-day after the end of their twenty-days to file their statement of defence, is “at the last moment,” was done in bad faith, and is an abuse of process.

## **Response to Defendants’ Submissions**

28. *Sun Oil v. City of Hamilton* (Tab C, of Defendants’ submissions), surrounded the issue of determining validity of a by-law. A decision was made on first instance, and it was not until appeal, that the parties raised the issue of the jurisdiction of court to decide

the validity of by-law 3022. It was for this reason, that the Ontario Court of Appeal granted the respondent the right to pursue the matter following appeal, stating that neither the Judge of first instance nor the Ontario Appeal Court have jurisdiction to determine validity of a by-law by way of originating motion.

29. This is not at all similar to the case at bar, and does not entitle the Defendants a right to be heard on what they believe is an outstanding issue of jurisdiction of the Plaintiff's amended statement of claim, an issue that was fully argued and decided on.

### **Remedy**

30. The Plaintiff agrees with the Court of Appeal decision, that it is time for these matters to be decided with an evidentiary record, (*Donovan v. Waterloo Regional Police Services Board*, 2019 ONCA 845, para. 18, Tab A of the Defendants' submission).
31. The Plaintiff is entitled to the Defendants' statement of defence, that was due February 18, 2020, or for the Defendants to be noted in default, in accordance with rules 18 & 19 of the *Civil Rules of Procedure*. The Defendants have not requested more time to file their statement of defence.
32. The Plaintiff does not believe there are any outstanding issues in this matter, however, if Justice Doi agrees to consider the issues raised in the February 19, 2020, letter from the Defendants, the Plaintiff requests the opportunity to make full oral submissions if Justice Doi seeks to hear them.

### **Costs**

33. The Defendants acknowledge in their February 19, 2020, letter that full submissions in respect of this jurisdiction issue had been made when the motion was heard and fairly and fully disposed of in February, 2019.
34. The Defendants did not raise any outstanding issues regarding jurisdiction on appeal, or in any other submission made to Justice Doi or the Court of Appeal prior to February 19, 2020.
35. The Defendants have already been ordered to pay the Plaintiff's costs for the appeal and the originating motion, and now the Defendants seek to re-litigate the issues raised at the originating motion. The Plaintiff had to seek legal advice to prepare this submission, and as a result some of her costs associated with the originating motion have now been duplicated.

36. The Defendants acted in bad faith by choosing to “lie in the weeds” on the issue of jurisdiction until the twenty-days to file their statement of defence had expired, and unnecessarily delay this proceeding.
37. Should Justice Doi dismiss the issues raised by the Defendants in their February 19, 2020, letter, the Plaintiff seeks substantial indemnity costs associated with the preparation of this submission and such further and other relief as this Honourable Court deems just for the unnecessary delay of this proceeding and abuse of process.
38. In a recent Superior Court of Justice decision against the Hamilton Police Services Board, the issue of delays without good reason was noted by Master P. Tamara Sugunasiri, in *Manning v. Hamilton Police Services Board*, 2019 ONSC 5528, (attached at **Appendix K**), at para. 8, as follows:

“Justice Skarica ordered that the Plaintiffs could cross-examine a representative of the HPSB Defendants on their sworn Affidavit of Documents and that their defence would be struck if they did not comply. Justice Skarica also ordered the HPSB Defendants to pay costs of \$20,000 and cautioned them that further delays without good reason would not be tolerated.”

**TAB BB**

**THIS IS EXHIBIT “BB” REFERRED TO IN THE AFFIDAVIT OF LAURA J. FREITAG  
SWORN BEFORE ME THIS 9th DAY OF February, 2021.**

A handwritten signature in cursive script, appearing to read "J. J. [unclear]", is written above a horizontal line.

**A COMMISSIONER FOR TAKING AFFIDAVITS**



management labour and employment law



Reply to Donald B. Jarvis  
Toronto Office  
tel 416.408.5516 | email djarvis@filion.on.ca

April 3, 2020

**SENT VIA E-MAIL**

Justice Michael T. Doi  
Ontario Superior Court of Justice  
A. Grenville & William Davis Court House  
7755 Hurontario Street, Suite 100  
Brampton, ON L6W 4T6

Dear Mr. Justice Doi:

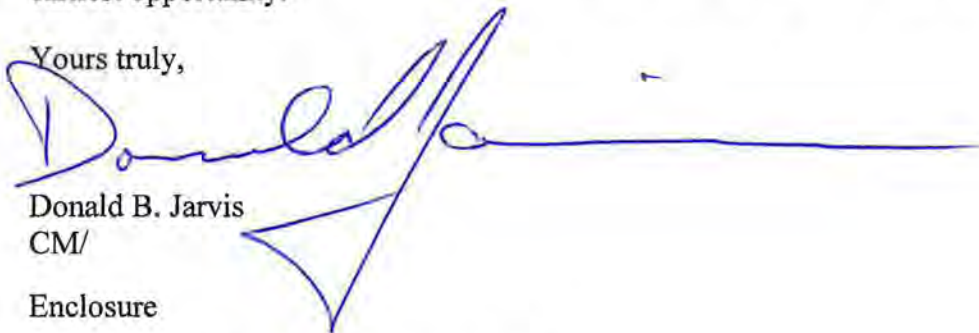
**Re: Kelly Lynn Donovan v. Waterloo Regional Police Services Board and Bryan Larkin  
(Court File No. CV-18-1938)**

Further to our office's email correspondence dated March 17, 2020 to Ms. Snaza Velanovski, Judicial Secretary, please find enclosed the Defendants' response submissions regarding the processing of the outstanding preliminary jurisdiction issue before the Court.

In light of the ongoing COVID-19 pandemic and the corresponding suspension of regular operations at the Ontario Superior Court of Justice, we have delivered the Defendants' submissions by email only. If, however, you wish to receive a hard-copy version of the enclosed materials, please let us know and we will arrange to have a hard copy delivered to the Court.

Thank you for your attention to this matter and we look forward to receiving your decision at your earliest opportunity.

Yours truly,



Donald B. Jarvis  
CM/

Enclosure

cc Ms. Kelly Donovan, Plaintiff (*via email*)  
Ms. Virginia Torrance, Regional Municipality of Waterloo Police Services Board (*via email*)

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Court File No. CV-18-00001938-0000

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**KELLY LYNN DONOVAN**

Plaintiff

- and -

**WATERLOO REGIONAL POLICE SERVICES BOARD  
and BRYAN LARKIN**

Defendants

**RESPONSE SUBMISSIONS OF THE DEFENDANTS  
REGARDING THE PRELIMINARY ISSUE OF JURISDICTION**

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Plaintiff

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## PART I - OVERVIEW

1. These submissions are filed by the Defendants, Waterloo Regional Police Services Board and Bryan Larkin, in response to the submissions filed by the Plaintiff on March 17, 2020 (the Plaintiff's "Submissions").
2. The Defendants disagree with the entirety of the Plaintiff's Submissions. Put simply, no judge has ruled on whether the Ontario courts exercise jurisdiction over the subject matter of the Amended Statement of Claim (and, now, the Amended Amended Statement of Claim). Until this issue is decided, it would be improper for the instant action to continue. The doctrines of *res judicata* and *functus officio* do not apply and do not preclude the Court's determination of the outstanding jurisdiction issue.
3. In addition to the submissions herein, the Defendants repeat and rely on the submissions contained in their February 19, 2020 correspondence to the Court, including their request to have a decision rendered on the outstanding jurisdiction issue.

## PART II - LAW AND ANALYSIS

- A. **No Court Has Rendered a Final Decision on the Defendants' Jurisdiction Motion. As a Result, Whether the Court Has Jurisdiction Over the Amended Statement of Claim Remains an Open Question**
  4. Contrary to the Plaintiff's allegations, neither this Honourable Court nor the Court of Appeal for Ontario has rendered any decision on the issue of the Court's jurisdiction over the Amended Statement of Claim. That issue remains open for determination.
    - i. **Mr. Justice Doi Did Not Rule on the Jurisdiction Issue. Rather, Mr. Justice Doi Expressly Refrained from Making Any Such Ruling**
  5. On June 7, 2018, the Defendants filed a Notice of Motion raising a number of critical preliminary issues in the instant proceeding — namely, whether:
    - (a) The subject matter of the Plaintiff's Amended Statement of Claim was beyond the jurisdiction of the Ontario courts (the "Jurisdiction Issue");
    - (b) The Amended Statement of Claim failed to disclose a reasonable cause of action against one or both of the Defendants (the "Pleadings Issue"); and
    - (c) The Plaintiff's action was frivolous, vexatious and/or an abuse of process as against one or both of the Defendants.

6. On February 13, 2019, the parties appeared before this Honourable Court and made submissions on all issues raised by the Motion, including the Jurisdiction Issue. The Court struck the Amended Statement of Claim in its entirety without leave to amend.

*Donovan v. Waterloo Regional Police Services Board*, 2019 ONSC 1212 (Tab 1) [*Donovan ONSC*].

7. In his reasons for judgment, Mr. Justice Doi disposed of the Motion under Rule 21.01(1)(b) of the *Rules of Civil Procedure*, but provided only the following comment in respect of the Jurisdiction Issue:

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

[Emphasis added]

*Donovan ONSC, supra*, (Tab 1) at para. 40.

*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 21.01(1)(b) [*Rules*].

8. The Plaintiff appealed the Order arising from Mr. Justice Doi's decision. On October 25, 2019, the Court of Appeal for Ontario granted the Plaintiff's appeal, finding that it was **not** plain and obvious that the Amended Statement of Claim disclosed no reasonable cause of action. Nowhere in its decision, however, did the Court of Appeal address the Jurisdiction Issue or Rule 21.01(3)(a).

*Donovan v. Waterloo Regional Police Services Board*, 2019 ONCA 845 (Tab 2) [*Donovan ONCA*].

9. At Part A of her Submissions, the Plaintiff alleges that the above-quoted statement of Mr. Justice Doi (see paragraph 7, above) is tantamount to a decision on the Jurisdiction Issue. With respect, this allegation is incorrect and wholly nonsensical.
10. The Court's silence on the Jurisdiction Issue cannot constitute a decision on that issue. Indeed, it is trite law to say that a legal 'decision' arises only where a court or tribunal expressly answers a question submitted to it:

**DECISION.** In practice. A judgment or decree **pronounced** by a court in settlement of a controversy submitted to it and **by way of authoritative answer to the questions raised before it.**

“Decision” is not synonymous with “opinion.” **A decision of the court is its judgment; the opinion is the reasons given for that judgment.**

[Emphasis added; citations omitted]

*Black’s Law Dictionary*, 2<sup>nd</sup> ed., (Tab 3) *sub verbo* “decision” [*Black’s*].

11. In the Motion before him, Mr. Justice Doi provided an authoritative answer to only the Pleadings Issue and concluded that the other Motion questions, including the Jurisdiction Issue, did not need to be addressed. Put plainly: while the Pleadings Issue was finally decided, the Jurisdiction Issue was not addressed at all, let alone decided or authoritatively answered.
12. The Plaintiff quotes from *R v. R.E.M.* to support her allegation that the Jurisdiction Issue was decided by the Court. The Defendants respectfully submit that this case has no relevance to the instant matter. In *R v. R.E.M.*, the Supreme Court of Canada determined whether the British Columbia Court of Appeal improperly substituted its own factual findings when overturning a criminal verdict by Supreme Court of British Columbia. The quotation at paragraph 4 of the Plaintiff’s Submissions simply describes the principles guiding appellate review in the Canadian judicial system. These principles are not applicable to the Defendants’ request that a decision on the Jurisdiction Issue be rendered by the same level of court that heard the Defendants’ Motion.

*R v. R.E.M.*, 2008 SCC 51 (Appendix “A” to the Plaintiff’s Submissions).

13. In any event, the prevailing law confirms that an issue is not decided by a court if the court does not authoritatively answer the questions raised by that issue. In *Sun Oil Co. v. City of Hamilton and Veale*, the respondent brought a motion for an order of *mandamus* directing the appellants to issue permits for the execution and operation of certain gasoline service stations. Before this motion was heard, the respondent served further notice that it would move for a declaration that the by-law in question did not apply for the purposes of licensing and regulating gasoline service stations. The motions Judge granted the second declaration sought and, as a result, no disposition was made in respect of the *mandamus* motion. At appeal, the motion Judge was found to have erred in his interpretation of the by-law and the respondent, *inter alia*, attempted to raise its alternative argument that the appellants’ refusal to issue necessary licenses was an improper exercise of discretion. The

Court of Appeal expressly held that this issue was still live and open for the respondent to pursue before the lower court:

This is a matter we assume was argued before Mr. Justice Stewart. **However, he did not decide it; the order he made does not determine it; and it is still open to the respondent to pursue.** In the circumstances no appeal was taken or could be taken upon this part of the case and this Court has no original jurisdiction which would empower it to decide it.

[Emphasis added]

*Sun Oil Co. v. City of Hamilton and Veale*, [1961] O.R. 209 (C.A.) (Tab 4) at p. 6.

14. The mere reference to an issue, without more, does not amount to a judicial decision. In *Celebija v. Cooperators*, the Ontario Court of Justice dismissed the defendant's motion for summary judgment after identifying three triable issues in the proceeding, including whether the plaintiff's claim was barred by a contractual limitations period. Subsequent to this decision, the plaintiff moved for a declaration that the defendants be estopped from arguing that the claim was not commenced within the contractual limitations period. Mr. Justice Somers dismissed this second motion after holding that, although the first motions Judge had identified the limitations issue, "he did not deal with this issue, that it has not been decided and that, therefore, the matter must proceed to trial, without the limitation defence being excised from the defence raised by the defendants."

*Celebija v. Cooperators* (1993), 44 A.C.W.S. (3d) 467 (Ont. Ct. (Gen. Div.)) (Tab 5), aff'd (1994), 47 A.C.W.S. (3d) 837 (Ont. Ct. (Gen. Div.)) (Tab 6) at para. 8.

15. There is a world of difference between a passing reference to an issue that was not decided (i.e. the Jurisdiction Issue) and a judicial ruling on that issue. With respect, to find that this Court's explicit declination to rule on the Jurisdiction Issue amounts to a decision on that issue would be fundamentally absurd. Moreover, the proposition that the Court's Rule 21.01(1)(b) decision confirms, in and of itself, that the Court has jurisdiction over the subject matter of the Amended Statement of Claim (as appears at paragraph 1 of the Plaintiff's Submissions) is nonsensical and blurs the distinction between the Court's jurisdiction over preliminary issues and its jurisdiction over the merits of an action. In any event, the Court's jurisdiction over the Amended Statement of Claim could not have been determined on the basis of the 'plain and obvious' test pertaining to Rule 21.01(1)(b).

*TeleZone Inc. v Canada (A.G.)*, 2008 ONCA 892 (Tab 7) at para. 92 [TeleZone].

16. In short, Mr. Justice Doi did not decide the Jurisdiction Issue and this preliminary question remains unanswered.

**ii. The Jurisdiction Issue Was Neither Addressed by Nor Within the Jurisdiction of the Court of Appeal for Ontario**

17. At Part B of her Submissions, the Plaintiff incorrectly alleges that the Jurisdiction Issue was “confirmed by [the] Court of Appeal”. In addition to being without merit, this allegation is at odds with the procedural history of the instant action.
18. An appeal lies from an order of the Court. It is the direction of the Court, and not the supporting reasons for judgment, that comprise the appealable order. This trite principle was articulated as follows in the seminal case of *Canadian Express Ltd. v. Blair*:

Reasons for judgment do not constitute the judgment of the court. An appeal is taken not from the reasons for judgment but from the judgment itself, and it is the order of the court appealed from which binds, not the reasons assigned for making it: the reasons may be wrong but the order right.

*Black's, supra*, (Tab 3) *sub vero* “order”,  
*Canadian Express Ltd. v. Blair* (1991), 6 O.R. (3d) 212 (Div. Ct.) (Tab 8) at p. 3. See also *Grand River Enterprises v. Burnham* (2005), 197 O.A.C. 168 (Tab 9) at para. 10.

19. Only two appealable directions or ‘orders’ arose from the hearing of the Defendants’ Motion before this Honourable Court: (1) that the Amended Statement of Claim be struck under Rule 21.01(1)(b) without leave to amend; and (2) that the Plaintiff pay \$5,500.00 in costs to the Defendants. Consequently, there was no order in respect of the Jurisdiction Issue that could be confirmed by — let alone appealed to — the Court of Appeal.

*Donovan ONSC, supra*, (Tab 1) at paras. 39-41.  
Costs Endorsement of Mr. Justice Doi dated March 20, 2019 (Tab 10) at para. 7.

20. This conclusion is reinforced by the contents of the draft Order endorsed by Mr. Justice Doi on March 20, 2019: there is no mention whatsoever of a Court direction regarding jurisdiction or Rule 21.01(3)(a). Notably, the draft Order was jointly prepared and approved by the Parties, based off an initial draft Order prepared by the Plaintiff; the final draft Order was also filed by the Plaintiff. In approving the draft Order, both Parties indicated their agreement that the document set out what the Court had ordered.

Order of Mr. Justice Doi dated March 20, 2019 (Tab 11).  
*Chrysler Credit Canada Ltd. v. 734925 Ontario Ltd.*, (1991), 5 O.R. (3d) 65 (Ct. (Gen. Div.)) (Tab 12) at p. 4 [*Chrysler Credit*].

21. Even if Mr. Justice Doi's Motion decision could be said to amount to a direction on the Jurisdiction Issue (which is categorically denied), the Jurisdiction Issue would have still been outside of the Court of Appeal's jurisdiction. Pursuant to Rule 61.04(3), the Court of Appeal's jurisdiction is limited to the grounds and legislative authorities set out in the Plaintiff's Notice of Appeal. Despite setting out 12 different grounds of appeal, the Plaintiff's Notice of Appeal is devoid of any reference whatsoever to the Jurisdiction Issue. As the Plaintiff made no reference to the Jurisdiction Issue in her Notice of Appeal, the Jurisdiction Issue was neither before nor within the jurisdiction of the Court of Appeal.

*Rules, supra*, r. 61.04(3).

Notice of Appeal dated March 13, 2019 filed by Kelly Donovan (**Tab 13**).

22. The Plaintiff relies upon the Court of Appeal's statement that the Amended Statement of Claim (i.e. insofar as whether Chief Larkin's affidavit in the class action amounts to a breach of confidentiality) "should be decided with an evidentiary record and not on a pleadings motion". However, the Court of Appeal's statement was made solely to support the conclusion that the Amended Statement of Claim could not be struck under Rule 21.01(1)(b); it was not a finding in respect of the Jurisdiction Issue.

*Donovan ONCA, supra*, (**Tab 2**) at para. 18.

23. The comments of Madam Justice Favreau, quoted at paragraph 8 of the Plaintiff's Submissions, also appear to be relied upon by the Plaintiff to suggest that the Jurisdiction Issue has already been decided by the Court. The issue before Madam Justice Favreau, however, was whether section 137.1(3) of the *Courts of Justice Act* permits the Court to dismiss an application before the Human Rights Tribunal of Ontario ("HRTO"). Clearly, the jurisdictional concerns raised by the Defendants before Madam Justice Favreau arose in a wholly different context than the Jurisdiction Issue in the instant action. In any event, Madam Justice Favreau expressly declined to decide the issue of jurisdiction. Her *obiter dicta* comments are neither binding nor dispositive.

*Donovan v. (Waterloo) Police Services Board*, 2019 ONSC 818 (**Appendix "B" to the Plaintiff's Submissions**) at para. 51.

*Courts of Justice Act*, R.S.O. 1990, c. C.43.

24. In conclusion, no judge has held that the subject matter of the Amended Statement of Claim falls within the Court's jurisdiction. Not only are the Defendants entitled to a decision in

respect of the Jurisdiction Issue, but this outstanding issue ought to be determined before the instant action can proceed.

**B. As the Doctrine of Estoppel Does Not Apply to the Instant Proceeding, It Cannot Bar a Ruling on the Jurisdiction Issue**

25. *Res judicata* prevents parties from pursuing matters adjudged. The doctrine operates to bar both issues and causes of action that have been decided or could have been raised in an earlier proceeding (known, respectively, as ‘issue estoppel’ and ‘cause of action estoppel’).

26. The required elements of issue estoppel are:

- (a) The same question has been decided in a prior proceeding;
- (b) The judicial decision which is said to create the estoppel was a final decision; and
- (c) The parties to the judicial decision (or their privies) were the same persons (or their privies) as the parties to the proceedings in which the estoppel is raised.

*Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 (Appendix “F” to the Plaintiff’s Submissions) at para 25 [*Danyluk*].

27. A final decision was issued by this Court in the Motion and the Parties to the Motion hearing are the same Parties to the instant request. Nevertheless, the question decided at the Motion hearing (i.e. the Pleadings Issue) is **entirely different** than the question now before the Court (i.e. the Jurisdiction Issue). The absence of any decision on the Jurisdiction Issue is necessarily fatal to the Plaintiff’s claim of estoppel in the instant matter.

See *Minott v. O’Shanter Development Co.* (1999) 42 O.R. (3d) 321 (C.A.) (Appendix “C” to the Plaintiff’s Submissions) at pp. 15-19, 27.

28. Ironically, the Plaintiff actually relies upon authorities that emphasize the need for a final decision **in respect of the Jurisdiction Issue** to support a claim of estoppel. All of *Kendall v. Sirard*, *Danyluk v. Ainsworth Technologies Inc.*, and *Penner v. Niagara (Regional Police Services Board)* — cases relied upon by the Plaintiff at paragraphs 13, 16, and 17 of her Submissions — emphasize that, for estoppel to apply, there must have been a decision on the very same question before the Court. Based on these authorities, no estoppel has been triggered as the Jurisdiction Issue has not been decided in any proceeding.

*Kendall v. Sirard*, 2007 ONCA 468 (Appendix “E” to the Plaintiff’s Submissions) at para. 43, citing *Ward v. Dana G. Colson Management Ltd.* (1994), 34 C.P.C. (3d) 211 (Ont. Ct. (Gen. Div.)). *Danyluk*, *supra*, (Appendix “F” to the Plaintiff’s Submissions) at para. 24. *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 (Appendix “G” to the Plaintiff’s Submissions) at para. 89.

29. At paragraphs 14 and 15 of her Submissions, the Plaintiff baldly alleges that the Defendants did not use reasonable diligence to bring forward the Jurisdiction Issue. This allegation is patently incorrect. This is not a situation where a party, after having omitted to raise an argument, is seeking to raise an argument for the first time. It is precisely because the Defendants raised and argued the Jurisdiction Issue in its Motion that this issue remains outstanding and requires a ruling from this Court.
30. The elements of issue estoppel have not been met in this case. In requesting the Court's ruling on the Jurisdiction Issue, the Defendants are properly pursuing the determination of an issue that has not yet been the subject of a final judicial decision and that was pursued from the outset of this action.

**C. Mr. Justice Doi Is Not *Functus Officio* in Respect of the Jurisdiction Issue**

31. The Plaintiff alleges that a ruling on the Jurisdiction Issue would breach the *functus officio* doctrine. This allegation is predicated on the Plaintiff's erroneous belief that the Jurisdiction Issue was decided by this Honourable Court. However, the doctrine of *functus officio* does **not** preclude the determination of outstanding issues that have already been argued by the Parties.
32. Whether a judge is *functus officio* in respect of an issue necessarily depends on whether that issue was previously raised and answered by the judge. If a party raises multiple arguments at a hearing but the presiding judge only determines one of these arguments, the judge retains his duty to determine the balance of the arguments:

*Functus officio* means, literally, having discharged his duty. Determining whether a judge is *functus officio* involves, in light of Rule 15.07, drawing a line between an omission by the trial judge — a failure to do something which should have been done — and the discharge of the duty but failing to consider some argument which had someone, whether counsel or judge, thought about it might have had an impact on the result. The line is not easily drawn. **If a court was required to answer four questions, but determined only three, clearly, it would not have done something it was required to do. The judge would not be *functus officio*, at least, in respect of the fourth question....**

[Emphasis added]

*Badejo v. McLean* (1996), 138 D.L.R. (4th) 541 (Nfld. C.A.) (Tab 14) at para. 16.

33. As the Defendants duly pursued the Jurisdiction Issue at the Motion and a decision on this issue has not been rendered, the Court cannot be *functus officio* in respect of the Jurisdiction Issue. To the contrary, the Defendants respectfully submit that the Court is required to discharge its duty to decide the Jurisdiction Issue previously argued by the Parties.
34. This state of affairs remains true even when a decision is appealed and overturned on other grounds. In *Authorson (Litigation Guardian of) v. Canada (A.G.)*, cited at paragraph 12 of the Plaintiff's Submissions, the Court was faced with four class action issues. In an initial decision, the Court rendered a decision on two liability-related issues but left the other two damages-related issues undecided. One of the decided issues was overturned on appeal. Nevertheless, the other finding in respect of liability still stood and, on that basis, the Court was not *functus officio* with respect to damages. In concluding that it could rule on damages, the Court stated that its previous partial judgment created an exception to how jurisdiction would flow between lower and appeal courts in the normal course of litigation:

In the normal course of litigation, once a motions court or trial court has delivered a judgment and the matter is appealed, the motion or trial court has no further jurisdiction in the matter unless the appellate court should send the matter back. **However, this was not ordinary litigation. I had delivered a judgment restricted to liability only.** The assessment of damages arising from that liability was to be dealt with separately.

[Emphasis added]

*Authorson (Litigation Guardian of) v. Canada (A.G.)* (2003), 69 O.R. (3d) 106 (Sup. Ct.) (Appendix "D" to the Plaintiff's Submissions) at para. 22 [*Authorson*].

35. Applying *Authorson*, the Court of Appeal's October 25, 2019 decision does not preclude this Honourable Court from granting the Defendants' February 19, 2020 request. The Court of Appeal's ruling was limited to strictly whether the Amended Statement of Claim ought to be struck under Rule 21.01(1)(b). To the extent that this Honourable Court is *functus officio*, it is in respect of the Pleadings Issue only.
36. This application of the *functus officio* doctrine is consistent with the *Rules*. Notably, the Legislature has expressly contemplated and permitted the Court's amendment of orders to address matters not previously adjudicated; it follows, perforce, that the doctrine of *functus officio* does not preclude the Court from adjudicating issues previously undecided.

*Rules, supra*, r. 59.06(1).

37. Put simply, this Honourable Court is not *functus officio* in respect of the Jurisdiction Issue. Both the common law and the *Rules* permit the Court to decide matters not yet adjudicated.

**D. The Defendants' Request Does Not Amount to an Abuse of Process. On the Contrary, the Defendants' Request Promotes the Expeditious Resolution of the Parties' Dispute**

38. The Plaintiff baldly alleges that the Defendants are engaging in an abuse of process and bad faith litigation. The Defendants respectfully submit that these allegations are based on a misunderstanding of the Defendants' intention to have the instant action processed properly and efficiently.
39. Rule 1.04(1) requires court actions to be determined in the most just, expeditious, and cost-effective manner. This is a fundamental tenet of Ontario's justice system.

*Rules, supra*, r. 1.04(1).

40. Consistent with Rule 1.04(1) is the requirement that the Court confirm, from the outset, that claims are being adjudicated in the proper forum. For the Parties to litigate the subject matter of the Amended Amended Statement of Claim only to discover that the Court did not have jurisdiction over that subject matter would fly in the face of Rule 1.04(1). Moreover, the Court of Appeal has expressly held that questions of jurisdiction must be decided early in a proceeding — in fact, before the delivery of a Statement of Defence — in order to promote efficient, cost-effective litigation:

**Motions to determine whether a court has jurisdiction to adjudicate a plaintiff's claim are intended to be decided expeditiously and early in the proceedings, preferably before a statement of defence has been filed.** Invariably, such proceedings are decided by reading the plaintiff's claim. No extrinsic evidence is required as on a motion to determine the substantive adequacy of a pleading. If the claim is within the subject matter jurisdiction of the Superior Court, that is the end of the matter. The courts' jurisdiction will be affirmed. However, as I have pointed out, there are exceptions. The court will be deprived of its jurisdiction where there is a statutory scheme intended to determine the subject matter of the claim administratively and able to provide the remedy sought by the plaintiff. An example of this type of case is *Weber*. As **the jurisdiction of a court to adjudicate a claim can, and should, be decided without the consideration and application of extrinsic evidence bearing upon the conduct of the parties that gave rise to their dispute**, this court is in a position to decide the issue in these appeals by examining the statement of claim in each case. However, I am of the view that extrinsic evidence that has been explicitly

referred to within the pleadings or documents referred to and relied on in the statement of claim may be considered to determine the substance and the nature of the plaintiff's claim when this is unclear from reading the statement of claim.

The process to decide whether a court has subject matter jurisdiction is found in rule 21.01(3), which permits a defendant to move to have an action stayed or dismissed on the ground that the court has no jurisdiction over the subject matter of the action. **This a summary procedure well suited to determining the issue as a preliminary matter. To follow this procedure avoids such a motion becoming a trial within a trial into facts not even pleaded in the underlying statements of claim,** as occurred in [past cases]. In my view, so long as the facts pleaded in the statement of claim raise a claim cognizable in the Superior Court, that court has jurisdiction to decide the claim. This would occur in virtually all cases given that the Superior Court is a court of general jurisdiction. That is why extrinsic evidence of facts not pleaded is generally not receivable. Moreover, **it is essential to decide jurisdiction motions early in the proceedings and expeditiously so that the plaintiff can get on with its case....**

[Emphasis added]

*TeleZone, supra*, (Tab 7) at para. 108-109.

41. The Plaintiff's Submissions repeatedly reference the Defendants' approval of draft Orders in this proceeding, so it would appear, to make the argument that the Defendants have conceded the Court's jurisdiction over the subject matter of the Amended Amended Statement of Claim. This is an argument wholly without merit. A party's approval of a draft order is strictly an administrative step taken in an action and does not constitute any substantive concession:

I should make it clear that, as I have mentioned above, approval of a draft order is only an agreement that that is what the court ordered. It is not, in the slightest degree, a concession that the order was right, or that the court had jurisdiction, or an agreement not to appeal. It is purely an administrative act for the purpose of permitting the court system to function.

*Chrysler Credit, supra*, (Tab 12) at p. 4.

42. The Plaintiff refers to events surrounding this proceeding in an attempt to allege inaction by the Defendants in their pursuit of the Jurisdiction Issue. This is also an assertion wholly without merit. Until the Court of Appeal's ruling on October 25, 2019, the Amended Statement of Claim had been found to disclose no reasonable cause of action. As such,

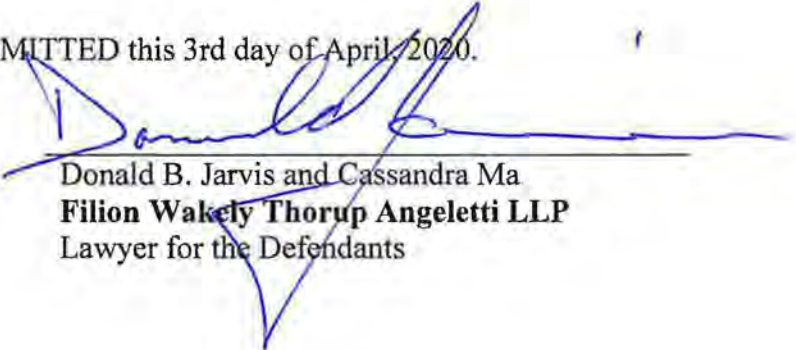
there was no requirement for the Defendants to seek a determination of the proper forum for the Plaintiff's claims. Moreover, a proper and complete assessment of the continuing relevance of the Jurisdiction Issue could not be finalized until the Defendants' receipt of the Amended Amended Statement of Claim. Only after the Defendants had been served with the Amended Amended Statement of Claim on January 29, 2020, and had an opportunity to evaluate those amendments, could the Defendants knowledgeably instruct counsel to proceed with securing a ruling on the Jurisdiction Issue. To characterize the Defendants as 'lying in the weeds' is wholly disingenuous.

43. In summary, the granting of the Defendants' request is consistent with the efficient litigation of this matter and the timely resolution of the outstanding Jurisdiction Issue. This is especially critical given that the Plaintiff has initiated concurrent proceedings before the Court and the HRTO in respect of the same allegations. Contrary to the Plaintiff's allegations of bad faith and abuse of process, the Defendants' request, if granted, would serve to streamline the processing of the Parties' dispute and ensure the economical use of judicial resources.

### **PART III - ORDER REQUESTED**

44. Based on the foregoing, the Defendants request that this Court render a determination on the Jurisdiction Issue as requested.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of April 2020.



Donald B. Jarvis and Cassandra Ma  
**Filion Wakely Thorup Angeletti LLP**  
Lawyer for the Defendants

**TAB CC**

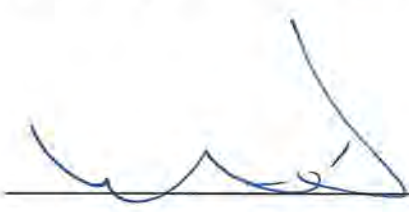
**THIS IS EXHIBIT "CC" REFERRED TO IN THE AFFIDAVIT OF LAURA J. FREITAG  
SWORN BEFORE ME THIS 9th DAY OF February, 2021.**

A handwritten signature in cursive script, appearing to read "J. J. [unclear]", is written above a horizontal line.

**A COMMISSIONER FOR TAKING AFFIDAVITS**

**ENDORSEMENT  
SHORT STYLE OF CAUSE:  
DONOVAN V. WATERLOO REGIONAL POLICE SERVICES BOARD**

File No. CV-18-1938

Date	Counsel	
April 20, 2020  In Chambers	D. Jarvis (for Moving Defendants)  K. Donovan (self-represented Responding Plaintiff)	<p>[1] On February 21, 2019, I released my decision to strike the <u>Amended</u> Statement of Claim under Rule 21.01(1)(b) without leave to amend: <i>Donovan v. Waterloo Regional Police Services Board</i>, 2019 ONSC 1212. On October 25, 2019, the Court of Appeal allowed the Plaintiff's appeal and set aside my order: 2019 ONCA 845.</p> <p>[2] On February 19, 2020, the Defendants wrote to me for directions on seeking a decision on their alternate grounds under Rule 21.01(3) for striking the claim, which they had raised in their notice of motion and was not addressed in the foregoing decisions. On March 17, 2020, the Plaintiff filed a written response to the Defendants' request for directions, and on April 13, 2020 the Defendants filed reply submissions.</p> <p>[3] In my view, this matter should appropriately be returned as a new motion under Rule 59.06(1) for hearing before the court. Given my prior involvement with this case, I believe that this motion should be argued before another judge and should not come back before me.</p> <p>[4] Due to the serious health risks posed by the COVID-19 global pandemic, regular court operations have been suspended since March 15, 2020: see <i>Notice to the Profession for Civil and Family Matters</i>, Chief Justice of the Ontario Superior Court of Justice dated April 2, 2020, <a href="https://www.ontariocourts.ca/scj/notice-profession-civil-family/">https://www.ontariocourts.ca/scj/notice-profession-civil-family/</a>. Once court operations resume, the parties may schedule the return on this motion through the Trial Coordinator's Office.</p> <p>[5] Costs are reserved to the judge hearing the return of the motion.</p> <div style="text-align: right;">         Doi J.     </div>

**TAB DD**

**THIS IS EXHIBIT “DD” REFERRED TO IN THE AFFIDAVIT OF LAURA J. FREITAG  
SWORN BEFORE ME THIS 9th DAY OF February, 2021.**

A handwritten signature in cursive script, appearing to read 'J. J. H.', is written above a horizontal line.

**A COMMISSIONER FOR TAKING AFFIDAVITS**

"Fresh as Amended November 23 2020  
pursuant to Rule 26.02 (b) of the Rules of Civil  
Procedure."

Court File No.: CV18-00001938-0000

SHARON DOE Digitally signed by SHARON DOE  
DN: cn=SHARON DOE, email=sharon.doe@ontario.ca, o=Ontario  
Date: 2020.12.29 13:13:53 -0500

*Ontario*  
**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**KELLY LYNN DONOVAN**

Plaintiff



- and -

**WATERLOO REGIONAL POLICE SERVICES BOARD, and  
BRYAN LARKIN**

Defendants

**FRESH AMENDED 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: May 9, 2018

Issued by: "C.OLIVEIRA"  
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  
c/o Waterloo Regional Police Services Board  
200 Maple Grove Road  
Cambridge, Ontario  
N0B 1M0

## 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, misfeasance in public office and negligence 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. Pre-judgment and post-judgment interest in accordance with the Courts of Justice Act, R.S.O. 1990, c. C.43, as amended;
  - d. Costs of this proceeding on a solicitor and his own client scale, together with applicable HST; and
  - e. Such further and other relief as counsel may advise and this Honourable Court deems just.
2. The Plaintiff, Kelly Lynn Donovan, claims against the Defendant Bryan Larkin, the following relief:
  - a. Damages for misfeasance in public office, in the amount of Fifty Thousand Dollars (\$50,000.00);
  - b. Punitive, exemplary and/or aggravated damages in the amount of Ten Thousand Dollars (\$10,000.00);
  - c. Pre-judgment and post-judgment interest in accordance with the Courts of Justice Act, R.S.O. 1990, c. C.43, as amended;
  - d. Costs of this proceeding on a solicitor and his own client scale, together with applicable HST; and
  - e. Such further and other relief as counsel may advise and this Honourable Court deems just.

### II. Parties

3. 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”).

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

### **III. Facts**

#### **Class action lawsuit**

5. 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**

6. 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.”*

7. The agreement also contained a release signed by chief Bryan Larkin which stated:

- a. “THE REGIONAL MUNICIPALITY OF WATERLOO POLICE SERVICES BOARD [...] does hereby release and forever discharge KELLY DONOVAN (“DONOVAN”) from any and all actions, causes of action, complaints, applications, appeals...”
- b. “AND FOR THE SAID CONSIDERATION, THE REGIONAL MUNICIPALITY OF WATERLOO POLICE SERVICES BOARD further agrees not to commence, maintain, or continue any action, cause of action or claim, request, complaint, demand or other proceeding, against any person, corporation or entity in which any claim could arise

against DONOVAN for contribution or indemnity.”

8. The Resignation Agreement was signed by the defendant Bryan Larkin on behalf of the defendant board.
9. The plaintiff agreed to resign from her career in order to recover from her workplace injury and establish comparable employment as a single mother supporting her three children in exchange for the contractual and statutory obligations placed upon the defendants; a public body and a public officer.

### **Plaintiff's health**

10. 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.
11. In December 2015, the plaintiff was diagnosed with post-traumatic stress disorder (“PTSD”).
12. In May, 2016, the plaintiff made a disclosure of internal misconduct to the defendant board, her disclosure included allegations that the defendant Bryan Larkin had authorized unlawful arrests of police officers and had failed to properly investigate criminal allegations against police officers.
13. The defendant Bryan Larkin retaliated against the plaintiff by removing her from her position of employment, putting her under investigation by the police service's professional standards branch and she was ordered to have no contact with members of the defendant board.
14. It was defendant Bryan Larkin's retaliation against the plaintiff that caused the

plaintiff's health to worsen drastically. These abuses of power, as the plaintiff saw them, became significant triggers of a workplace injury she sustained in February, 2011.

15. 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.
16. In April, 2017, the plaintiff applied to the Workplace Safety and Insurance Board ("WSIB") for benefits as a result of her workplace injury. The plaintiff's claim was approved, claim number 30505408.
17. 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**

18. On January 6, 2016, defendant Bryan Larkin was interviewed by Craig Norris, of the CBC News, about the need to prevent PTSD in police. An excerpt from the article reads;
  - a. "More can be done to prevent first responders from getting post-traumatic stress disorder, rather than waiting until treatment is necessary."
19. On July 5, 2017, the defendant board received the provincially mandated "PTSD

Prevention Plan” prepared by members of the service under the direction of defendant Bryan Larkin. The defendant board’s minutes for that meeting show that a Power Point presentation was made to the board that states:

- a. “All PTSD diagnoses in Police Officers and communicators are presumptive;” and
- b. “Plan outlines our commitment to Employees by documenting what we are currently doing and committed to doing for the Prevention, Intervention and recovery from PTSD.”

20. On July 17, 2017, the plaintiff published a research paper titled “Misfeasance in Ontario Policing and the Coordinated Suppression of Whistleblowers.” The defendant board received this paper directly from the plaintiff by email. The paper detailed the way the plaintiff was treated when she made a disclosure of misconduct to the defendant board as well as other cases from across Canada of ‘whistleblower’ retaliation by police chiefs. An excerpt from page 8 of the report reads:

- a. “What the public do not know is that at times it is the operational stress an officer is facing that causes them to deal with PTSD symptoms. In some cases, the internal issues created by management can leave effects that last far longer than the difficult calls for service.”

21. Defendant Bryan Larkin submitted a statement to CBC News on July 17, 2017, that he was aware of the plaintiff’s report.

22. On December 21, 2017, defendant Bryan Larkin swore an affidavit in defense of the class action lawsuit, to support a motion to dismiss the class action lawsuit and advance his position as chief of police employed by the defendant board, and

the document was submitted to record. The affidavit was published on the public website of the law firm advancing the class action lawsuit. The Defendant Board was negligent in allowing the Defendant Bryan Larkin's affidavit to be published.

23. 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.”*

24. 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.”

25. 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.”*

26. There is only one female officer showing on this chart as having “voluntarily” resigned.
27. 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.
28. The information disclosed by defendant Bryan Larkin was sufficient to identify the plaintiff and caused her a great deal of humiliation, mental distress and anger. The plaintiff was used by defendant Larkin to attempt to stop the efforts of the plaintiff’s female colleagues in their fight for justice. The class action was subsequently dismissed as a result of the motion relying on the affidavit of Defendant Bryan Larkin.
29. 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.
30. The defendant Bryan Larkin knew the content of his affidavit was inappropriate because the Waterloo Regional Police Association, (the bargaining agent for current members of the police service), filed a grievance against the defendant board for the violation of several female members’ privacy in this same affidavit.
31. Defendant Bryan Larkin was aware of the terms contained in the Resignation Agreement, in that he knew that the plaintiff was contractually barred from participating in the class action lawsuit, and the terms of the Resignation Agreement were to be kept confidential, yet he unnecessarily requested the Human Resources Division of the police service prepare an additional chart that included the plaintiff in his affidavit.

32. Defendant Bryan Larkin has an advanced level of knowledge about police officers who have been diagnosed with PTSD.
33. Defendant Bryan Larkin knew, or ought to have known, the triggers that were responsible for the rapid decline of the plaintiff's health between 2016 and 2017. More specifically, the plaintiff was healthy and actively working until after defendant Larkin retaliated against her for making a disclosure to the defendant board.
34. Defendant Bryan Larkin, who is the chief of police of a large regional municipality and swore an oath to discharge his duties according to law, deliberately involved the plaintiff in the class action lawsuit and violated the terms of the Resignation Agreement knowing this would injure the plaintiff by impeding her recovery and worsening her PTSD symptoms.
35. 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. The Plaintiff increased the frequency and duration of her therapy after March, 2018, to continue indefinitely.
36. Defendant Bryan Larkin is aware that the plaintiff was on medical leave from February, 2017, until her resignation in June, 2017.
37. Following the plaintiff's resignation, she continued to receive benefits from WSIB in the form of psychological treatment by Dr. Kathy Lawrence. Since the plaintiff voluntarily resigned, her salary was no longer being paid by WSIB.
38. In August, 2018, the plaintiff was made aware by WSIB that on January 11, 2018, the defendant Board submitted an appeal of the plaintiff's claim number 30505408. The appeal was prepared by counsel for the defendant, the same

counsel who represented the defendants when the resignation agreement was prepared and signed.

39. The plaintiff therefore claims the relief as set out in paragraph 1 of the Statement of Claim for two distinct and separate breaches of the resignation agreement by the defendant Board and individual defendant.

40. The plaintiff therefore claims the relief as set out in paragraph 2 of the Amended Statement of Claim for the deliberate and unlawful conduct by defendant Bryan Larkin.

41. 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.

May 8, 2018

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N3R 6Y9  
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**KELLY LYNN DONOVAN**

Plaintiff

**v. WATERLOO REGIONAL POLICE SERVICES  
BOARD, and BRYAN LARKIN**

Defendants

**Ontario  
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT BRAMPTON

FRESH AMENDED STATEMENT OF CLAIM

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KELLY LYNN DONOVAN  
Plaintiff/Responding Party

and

WATERLOO REGIONAL POLICE  
SERVICES BOARD and BRYAN LARKIN  
Defendants/Moving Party

Court File No: CV-18-00001938-0000

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at BRAMPTON

**AFFIDAVIT OF LAURA FREITAG  
(Sworn February 9, 2021)**

**Filion Wakely Thorup Angeletti LLP**

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Lawyers for the Defendants/Moving Party

# TAB 3

Court of Appeal File No. C66718

**COURT OF APPEAL FOR ONTARIO**

THE HONOURABLE ASSOCIATE	)	
CHIEF JUSTICE OF ONTARIO	)	FRIDAY, THE 25TH
	)	
THE HONOURABLE JUSTICE	)	
ROBERTS	)	DAY OF OCTOBER, 2019
	)	
THE HONOURABLE JUSTICE VAN	)	
RENSBURG	)	

BETWEEN:

KELLY LYNN DONOVAN

Plaintiff  
(Appellant)

- and -

WATERLOO REGIONAL POLICE SERVICES BOARD  
and BRYAN LARKINDefendants  
(Respondents)**ORDER**

**THIS APPEAL** by the Plaintiff/Appellant, Kelly Lynn Donovan, for an Order setting aside the Order of the Superior Court of Justice dated March 20, 2019, striking the Amended Statement of Claim without leave to amend was heard on October 11, 2019 at Osgoode Hall, 130 Queen Street West in Toronto, Ontario. M5H 2N5.

**ON READING** the Appeal Book and Compendium, Factum, Book of Authorities and Cost Submissions of the Appellant and the Compendium, Factum, Book of Authorities and Cost Submissions of the Respondents, and on hearing the oral submissions of the

Appellant and counsel for the Respondents, and judgment having been reserved until this day with the cost decision made on December 17, 2019:

1. **THIS COURT ORDERS** that the Order of the Superior Court of Justice dated March 20, 2019 is hereby set aside.

2. **THIS COURT ORDERS** that the Plaintiff is granted leave to amend the Amended Statement of Claim as against the Respondent, Bryan Larkin, to plead how his actions were allegedly tortious.

3. **THIS COURT ORDERS** that the Respondents shall pay the Plaintiff's costs of this Appeal fixed in the amount of \$4,000.00, inclusive of taxes and disbursements, as well as costs of the Motion in the Court below fixed in the amount of \$3,500.00, inclusive of taxes and disbursements. This order bears interest at the rate of 3% per year commencing on the 25<sup>th</sup> day of October, 2019.



Svetlana MacBain

Registrar  
Court of Appeal of Ontario

ENTERED AT / INSCRIPT À TORONTO  
ON / BOOK NO.  
LE / DANS LE REGISTRE NO.

JAN 21 2020

PER / PAR:



**KELLY LYNN DONOVAN**  
Plaintiff (Appellant)

and

**WATERLOO REGIONAL POLICE  
SERVICES BOARD and BRYAN LARKIN**  
Defendants (Respondents)

**Court of Appeal File No. C69467**

**COURT OF APPEAL FOR ONTARIO**

Proceeding commenced at **TORONTO**

**RESPONDENTS' COMPENDIUM**

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Lawyers for the Defendants (Respondents)