Request for an Order During Proceedings – Rule 19
Form 10

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

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

Follow these steps to make your request:

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

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

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

Follow these steps to respond:

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

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

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

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

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

Application Information	
Tribunal File Number:	2018-33237-S
Name of Applicant:	Waterloo Regional Police Services Board
Name of Each Respondent:	Kelly Donovan

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

First (or Given) Name	Last (or Family) Name	Organization (if applicable)
Kelly	Donovan	

Street Number	Street Name	Apt/Suite
14	Laurie Ann Lane	

City/Town	Province	Postal Code	Email
Paris	On	N3L4H4	kelly@fit4duty.ca

Daytime Phone	Cell Phone	Fax	TTY
5192095721			

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

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

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

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

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

○ Applicant ○ Respondent ○ Ontario Human Rights Commission
○ Other - describe: ______

2. Please check off what you are requesting:

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

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.

I require accommodation, having someone with me to take notes.

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

○ Yes ○ No ◉ Don't know

11. Signature

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

Name: Kelly Donovan	
Signature:	Date: (dd/mm/yyyy) 15/04/2020

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

Collection of Information:
Under the Ontario *Human Rights Code*, the Human Rights Tribunal of Ontario (HRTO) has the right to collect the personal information requested on this form. We use the information to resolve your application. After you file the form, your information may also be available to the public. If you have questions about how the HRTO uses your personal information, contact the HRTO at 416-326-1312 or 1-866-598-0322 (toll-free.)

Submit to HRTO

Case File No. 2018-33237-S

BETWEEN:

KELLY DONOVAN

Respondent

- and –

THE REGIONAL MUNICIPALITY OF WATERLOO POLICE SERVICES BOARD

Applicant

Schedule A

ORDER REQUESTED:

1. That the Regional Municipality of Waterloo Police Services Board's ("WRPSB's") application number 2018-33237-S be dismissed in its entirety for the following reasons:
    a. it is frivolous, vexatious and was commenced in bad faith.
    b. It is an abuse of process, the WRPSB has conducted these proceedings in a vexatious manner, contrary to common rule A8.2.
    c. There is no prospect of success, as there was no clause contained in the Resignation Agreement prohibiting Donovan from making oral or written statements about the WRPSB.
    d. the matter is outside the jurisdiction of the tribunal.

Submissions:

2. Donovan first raised the issue of 2018-33237-S having been filed out of retaliation in her July 10, 2018, Form 19, (paras. 6.b, 14, 16, and 17).
3. Paragraphs 6.b and 14 of her Form 19 filed on July 10, 2018, stated that the exhibits provided in the Application were all printed in June, 2018, (only after WRPSB had been served with Donovan's statement of claim in Ontario Superior Court of Justice file number CV-00001938-0000).
4. On July 4, 2019, Donovan sent an email to the Registrar, and copied all parties, which included additional evidence that the WRPSB's application number 2018-33237-S was

filed in bad faith, only to retaliate following Donovan's actions on May 9, 2018. The email was not returned as undeliverable to the Tribunal Registrar. The Tribunal has not responded to this email. Donovan received an "out of office" email from Nini Jones, counsel for the Waterloo Regional Police Association, after sending the email, indicating that the email was successfully delivered to the addressed parties. These emails are attached as **Appendix A**).

5. At para. 15, of their November 7, 2019, Reply, the WRPSB "specifically and categorically" denies that their Application was filed in bad faith, despite the evidence Donovan supplied to the Tribunal on July 4, 2019. In light of the irrefutable evidence that suggests WRPSB did in fact file their application out of retaliation, their continued denials to the Tribunal amount to an abuse of process.
6. To expand on para. 4, from the time Donovan resigned in July, 2017, to the date Donovan served her statement of claim, (May 9, 2018), counsel for the WRPSB had been administering Donovan's Workplace Safety and Insurance Board claim and preparing the WRPSB's "Intent to Object," which was filed in January, 2018.
7. For the 10 months that followed Donovan's resignation, counsel for WRPSB billed a total of $11,127.70, (an average of $1,112.77 per month).
8. Counsel for WRPSB represented in his Cost Submission for Ontario Superior Court of Justice file number CV-00001938-0000, dated March 8, 2019, that his hourly rate was $450.00 per hour. Knowing the invoices that billed to WRPSB between July, 2017, and April, 2018, this means counsel would have only worked an average of 2 hours per month, plus sales tax, ($450.00 x 2 = $900 + 13% HST = $1,017.00).
9. It is Donovan's position that it is not possible that counsel administered Donovan's WSIB claim, prepared the 5-page "Intent to Object" submission to WSIB, as well as prepared their 25-page Form 18 during this time period, working only an average of 2 hours per month.
10. Accordingly, it has been Donovan's position since her July 10, 2018, submission (prior to receiving copies of the legal invoices), that WRPSB had no intention of filing a Form 18 against her until after she filed her civil claim in the Ontario Superior Court of Justice on May 9, 2018, and they have not been truthful in their submissions to the contrary. This also explains why the printouts from Donovan's company website, contained in the WRPSB's

Application, were all printed in June, 2018, (evidence Donovan already provided to the Tribunal on July 10, 2018, as explained above at para. 3).

11. Once Donovan served WRPSB with her statement of claim, (May 9, 2018), counsel for the WRPSB billed the following amounts:
    a. May, 2018 - $16,157.49; and
    b. June, 2018 - $13,400.31;
12. Copies of the invoices mentioned in paragraphs 7 through 11 of this submission are attached at **Appendix B**.
13. Donovan submits to the Tribunal that it would be illogical to believe that counsel for WRPSB worked on average 2-hours per month leading up to her filing of her civil statement of claim, and then in the month of May, 2018, billed $16,157.49, and June, 2018, billed $13,400.31. This means, counsel for WRPSB billed approximately 31-hours in May, and approximately 26-hours in June, yet WRPSB are asking the Tribunal to believe that their Form 18 was being developed over time, and was not done out of retaliation, in the months of May and June, 2018, (after Donovan's statement of claim was filed).
14. Although Donovan is not a lawyer, she has the basic understanding of time required to research jurisprudence, compile alleged incidents of contravention and write a legal submission.
15. Considering that the only response by WRPSB to Donovan's civil statement of claim was to schedule a motion to dismiss her claim, it is evident that the bulk of work done by counsel for WRPSB in the months of May, and June, 2018, was to prepare their 25-page June 28, 2018, Application against Donovan, (the subject application of this Form 10).
16. It is Donovan's position, that the WRPSB's 25-page "Schedule A to Form 18" was prepared after she filed and served her civil claim and was done only as a means of retaliation by WRPSB.
17. Since July 10, 2018, the WRPSB has made frequent written and oral submissions to the Tribunal denying Donovan's allegation that their application was filed out of retaliation.
18. In addition to the issues already stated in this submission, there is no prospect of success, as there was no clause contained in the Resignation Agreement prohibiting Donovan from making oral or written statements about WRPSB.

19. In their November 7, 2019, Reply, at para. 3, WRPSB admit that a non-disclosure clause does not exist in the Resignation Agreement, and that they have not alleged that Donovan breached a general non-disclosure clause. The WRPSB are relying on what they refer to as the "inherent purpose of the Resignation Agreement" to allege contraventions of settlement.
20. In their November 7, 2019, Reply, at para. 10, WRPSB alleges that correspondence between Donovan and her counsel leading up to the signing of the Resignation Agreement is "extrinsic evidence" yet the WRPSB purport that the "inherent purpose" of the Agreement precludes Donovan from "reviving the allegations of her initial human rights application," (para. 4 of their Reply). If WRPSB are alleging that there is ambiguity to the Agreement (they have alleged that a clause that is not explicitly cited in the Agreement is still enforceable), then surely any evidence that contributes to the "inherent purpose" of the Agreement is admissible.
21. The WRPSB have not provided any evidence to prove that the "inherent purpose" of the Resignation Agreement was to prevent Donovan from any of the actions she has undertaken since signing the Agreement, (their alleged breaches of the Agreement).
22. As an example, in a recent case before the Tribunal, Clarke vs. Ottawa Police Services Board, 2020 HRTO 91, Clarke had alleged a contravention of settlement specific to a "non-disparagement clause." From para. 9, the clause was quoted as:

    > "The Parties agree not to in any way disparage one another, or make or cause or encourage any others to make, any comments, statements, or the like that may be considered to be harmful or derogatory or detrimental to the name, business affairs, public reputation, or standing in the community of the other Party. This prohibition extends, but is not limited to, statements, written or verbal, statements made via social media. The Applicant acknowledges and agrees that this is a fundamental term of settlement for the Respondent and if he breaches this confidentiality provision, he may be liable to any of the Releasees for damages, including but not limited to the return of all payments made to him pursuant to these Minutes."

23. It should be obvious at this point in time, almost 2 years after the WRPSB filed their application, that no such clause exists in the Resignation Agreement signed by Donovan.
24. Clarke vs. Ottawa Police Services Board, 2020 HRTO 91 is attached as **Appendix C**.

25. Para. 13 of their November 7, 2019, Reply is incorrect. WRPSB allege that describing the treatment Donovan sustained prior to her resignation as an act of constructive dismissal is "fundamentally at odds with alleged compliance with her contractual duty to state that she voluntarily resigned from employment." There is no contractual duty in the Resignation Agreement for Donovan to state that she voluntarily resigned. In fact, Donovan is prohibited from even stating that the Resignation Agreement exists.
26. In their November 7, 2019, Reply, starting at para. 8, WRPSB allege that Donovan raised "complaints" within the meaning of the Resignation Agreement, and Donovan disagrees.
27. As in Thunder Bay Police Services Board v. Burns, 2014 HRTO 1721, where a contravention of settlement application was dismissed, it was stated at para. 35:

    "While the applicant attempted to characterize this conduct as making a claim or demand within the meaning of the MOS and Full and Final Release, I do not agree. Considering the language in the MOS and the Release, it is clear that what is barred are *legal* claims that result in a proceeding and that lead to a remedy. The MOS contains a release whereby the applicant in the Transition Application releases the *respondents* from any and all claims, including claims under various statutes and the common law, none of which are engaged by the respondent's conduct."

28. Similar to Burns, WRPSB have not alleged that Donovan has made any legal claims that have resulted in a proceeding against WRPSB for matters leading up to her resignation.
29. In their November 7, 2019, Reply, at para. 11, WRPSB maintain that Donovan "made public complaints contrary to the Resignation Agreement," which are not legal claims that result in a proceeding.
30. Also in Thunder Bay Police Services Board v. Burns, 2014 HRTO 1721, at para. 35, it states:

    "Similarly, the Full and Final Release releases the *respondents* [one of whom is the applicant in this proceeding] from any and all actions, causes of action, applications, claims, complaints, demands, and "*any other proceedings of whatever kind for damages, indemnity, costs, compensation or other remedy"* (emphasis added). While the respondent has sent emails and made an online comment about an issue that was arguably resolved and has suggested

wrongdoing by characterizing the information he received as being a fabrication, no actual claim or demand for a remedy has been made **nor has he commenced a proceeding**. In my view, the reference to a proceeding and link to a remedy qualifies the type of claim or demand that is prohibited by the settlement."

> **[emphasis added]**

31. Similar to Burns, the type of claim or demand prohibited in the Resignation Agreement is clearly a legal claim resulting in a proceeding; not simply words spoken or written by Donovan.
32. As in Burns, the WRPSB application cannot succeed on the arguments advanced by the WRPSB.
33. Thunder Bay Police Services Board v. Burns, 2014 HRTO 1721 is attached as **Appendix D**.
34. It has been Donovan's position since her July 10, 2018, submission that the Tribunal does not have jurisdiction to hear the WRPSB's application.
35. In Donovan v. (Waterloo) Police Services Board, 2019 ONSC 818, (emailed to the Tribunal on February 4, 2019, attached at **Appendix E**) Justice Favreau was not convinced that the Tribunal had any jurisdiction of the WRPSB's application. At paragraph 51, Justice Favreau wrote:

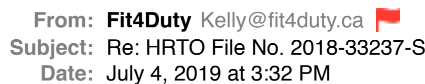
> "The Board also argues that the Human Rights Tribunal has exclusive jurisdiction over issues related to the enforcement of the Resignation Agreement. A similar issue is being raised by the Board on the motion to be heard on February 13, 2019, in the context of Ms. Donovan's civil action. While it is 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."

36. Although Donovan was unsuccessful in the February 13, 2019, motion mentioned by Justice Favreau, the Ontario Court of Appeal set aside the order of the motion judge and allowed Donovan to proceed with her civil claim. Donovan v. Waterloo Regional Police Services Board, 2019 ONCA 845 is attached at **Appendix F**.
37. The issue of jurisdiction is also covered in Jaffer v. York University, 2010 ONCA 654, at para. 21 which states:

> "In Gauthier, Rouleau J.A. at para. 29 started from the proposition that the Superior Court of Justice is a court of inherent jurisdiction. Its jurisdiction is therefore limited only by express language in a statute or a contractual provision."

38. Jaffer v. York University, 2010 ONCA 654 is attached at **Appendix G**.
39. The *Human Rights Code, R.S.O 1990, c. H.19*, does not contain express language which would oust the inherent jurisdiction of the Superior Court of Justice, and it has been Donovan's position since July 10, 2018, that jurisdiction of allegations of breaches of the Resignation Agreement lies with the Superior Court of Justice.
40. Since the WRPSB are a publicly funded agency, whose fundamental principles are based on honesty, Donovan has been significantly harmed by the efforts of WRPSB to mislead the Tribunal in their attempts to retaliate against her.
41. Donovan first raised the allegation of retaliation to the Tribunal on July 10, 2018, and since then has been subjected to repeated requests for documentation, and even warnings to bar her from further participation in WRPSB's application, without prior consideration of the objections she raised in her July 10th submission.
42. Respectfully, for reasons set out in this submission, Donovan requests the Tribunal dismiss WRPSB's Form 18 in its entirety, as to allow it to proceed any further would interfere with the integrity of the administrative justice system.
43. Paragraph 23 of the September 30, 2019, Interim Decision states: "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."
44. It is Donovan's position, that it is inappropriate to hear the merits of Application 2018-33237-S prior to the Tribunal determining these preliminary matters first raised by Donovan on July 10, 2018.
45. Donovan reserves the right to respond to the Tribunal's requests in the September 30, 2019, Interim Decision, regarding her application number 2018-33503-S, until these preliminary matters are properly disposed.

Appendix A



From: **Fit4Duty** Kelly@fit4duty.ca
Subject: Re: HRTO File No. 2018-33237-S
Date: July 4, 2019 at 3:32 PM
To: Georgios Fthenos (hrto.registrar@ontario.ca) hrto.registrar@ontario.ca, Donald B. Jarvis djarvis@filion.on.ca, Cassandra Ma cma@filion.on.ca, nini.jones@paliareroland.com

F

Dear Registrar (or person acting on behalf of Registrar due to apparent conflict of interest) and Mr. Jarvis,

This email is to formally notify all parties of evidence that has become available through the Municipal Freedom of Information and Protection of Privacy Act which proves that the Applicant in the above matter began their proceeding (2018-33237-S) in bad faith and as such should be dismissed without a hearing, pursuant to subsection 4.6(1)(a) of the Statutory Powers and Procedures Act.

The Respondent is submitting evidence to all parties that proves the application was filed out of retaliation, was vexatious, filed in bad faith and an abuse of process. These claims were already made by the Respondent to the Tribunal on July 19, 2018, in the Respondent's Form 19, which stated at paragraphs 6.b. & 6.c.:

" 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;"

The Applicant's RFOP dated July 30, 2018 contains false information at paragraph 16:

"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 of even being aware of same."

The Respondent has already brought to the Tribunal's attention that all of the time-stamped pages of the Application were all time-stamped June, 2018. The attached invoices show that the amount of work, research and legal writing necessary to complete the Application and serve and file it, were not done prior to May, 2018. Any suggestion otherwise by the Applicant is contradicted by this evidence.

Please see attached file named: Chart of Legal Fees 2018 33237 S.pdf

The chart is a collection of the amounts taken from legal invoices paid to the firm of the legal representative for the WRPSB, Filion Wakelup Thorup Angeletti LLP from following the date of the Respondent's resignation until April, 2019. That complete collection of copies of invoices can be found attached, file named: WRPS 190371.pdf

It is evident that the legal representative for the Applicant did not work to create the 400-page application filed on June 28, 2018, until the months of May and June, 2018.

In accordance with Social Justice Tribunals Ontario Common Rule A8.2, the Respondent also asks that the Tribunal find the Applicant to have conducted these proceedings in a vexatious manner, by making false statements to conceal their conduct in these proceedings.

The attached two documents will be included in the Respondent's list of documents upon which the Respondent intends to rely, which has not yet been submitted. As these documents were only obtained in June, 2019, they could not have been included in the Respondent's document submissions, which were ordered to be submitted prior to May 1, 2019.

Thank you for your consideration,

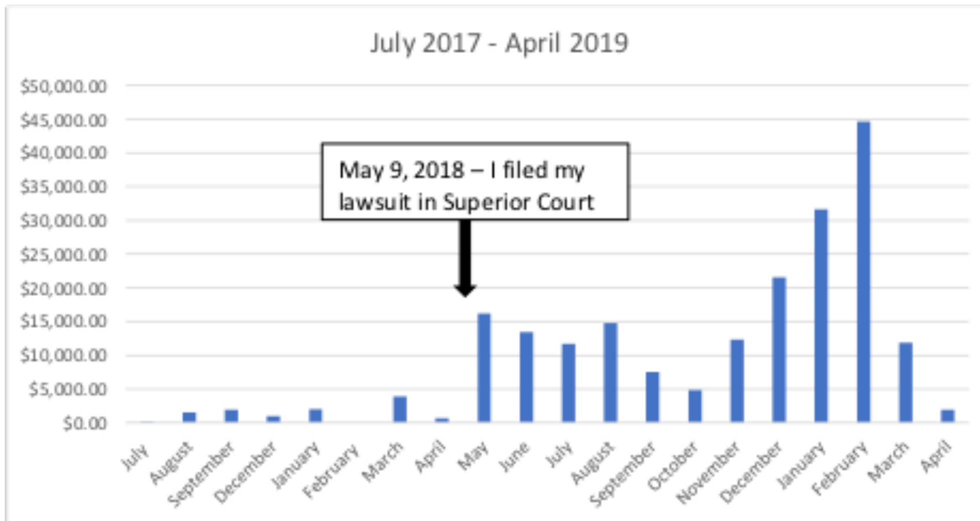
Kelly Donovan
Fit4Duty - The Ethical Standard
kelly@fit4duty.ca
+1.519.209.5721
www.fit4duty.ca

Mailing Address:
C/o Larry Donovan
14 Laurie Ann Lane
Paris, Ontario
N3L4H4

This e-mail and any files transmitted with it are confidential and are intended solely for the use of the individual or entity to whom they are addressed. This communication may contain material protected by contract law. If you are not the intended recipient or the person responsible for delivery of the e-mail to the intended recipient, be advised that you have received this e-mail in error and that any use, dissemination, forwarding, printing or copying of this e-mail is strictly prohibited. If you have received this e-mail in error, please immediately notify Fit4Duty - The Ethical Standard(TM) by telephone at 519-209-5721.

Kelly Donovan
Fit4Duty - The Ethical Standard
kelly@fit4duty.ca
+1.519.209.5721
www.fit4duty.ca

This e-mail and any files transmitted with it are confidential and are intended solely for the use of the individual or entity to whom they are addressed. This communication may contain material protected by contract law. If you are not the intended recipient or the person responsible for delivery of the e-mail to the intended recipient, be advised that you have received this e-mail in error and that any use, dissemination, forwarding, printing or copying of this e-mail is strictly prohibited. If you have received this e-mail in error, please immediately notify Fit4Duty - The Ethical Standard(TM) by telephone at 519-209-5721.



WRPS
190371.pdf

From: Nini.Jones@paliareroland.com
Subject: Automatic reply: HRTO File No. 2018-33237-S
Date: July 4, 2019 at 3:25 PM
To: Kelly@fit4duty.ca

Thank you for your e-mail. I will be away from the office until Monday July 8, 2019. I will have limited access to my email during this time. However, If you require immediate assistance, please contact my assistant, Sanja Bistricki, who can be reached at sanja.bistricki@paliareroland.com or 416.646.7411.

Thank you,
Nini Jones

Appendix B

Filion Wakely Thorup Angeletti LLP

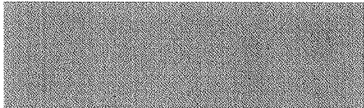
management labour and employment law

Invoice inquiries: invoices@filion.on.ca

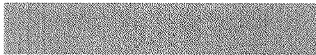
August 29, 2017

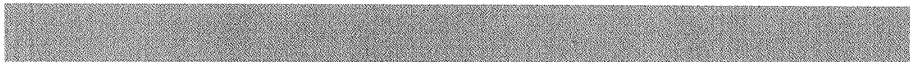
Private & Confidential

RECEIVED
SEP 0 6 2017



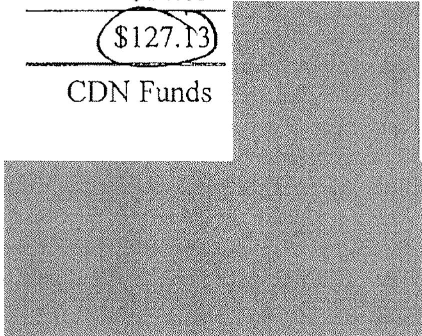
Waterloo Regional Police
200 Maple Grove Road
Cambridge ON N3H 5M1





TO PROFESSIONAL SERVICES RENDERED for the period of July 2017

Total Fees	$112.50
Total Taxes	$14.63
TOTAL DUE AND OWING	$127.13
	CDN Funds



Yours very truly,

Lia Lomtadze-Dedina
Director of Business Operations

LLD/kf

FilionWakely Thorup Angeletti LLP

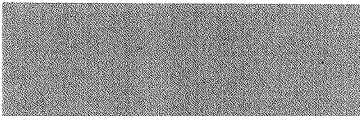
management labour and employment law

Invoice inquiries: invoices@filion.on.ca

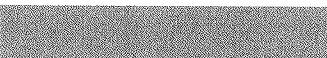
September 29, 2017

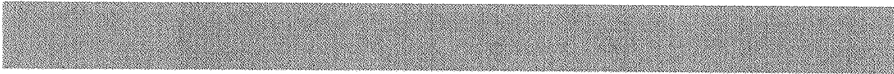
Private & Confidential

RECEIVED
OCT 05 2017



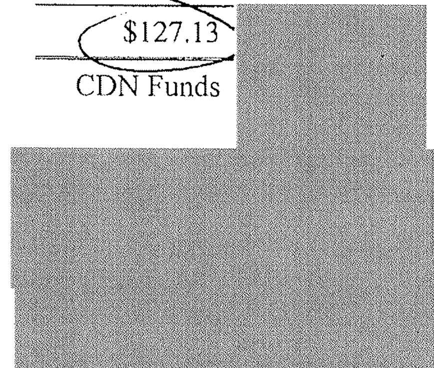
Waterloo Regional Police
200 Maple Grove Road
Cambridge ON N3H 5M1





TO PROFESSIONAL SERVICES RENDERED for the period of August 2017

Total Fees	$112.50
Total Taxes	$14.63
TOTAL DUE AND OWING	$127.13
	CDN Funds



Yours very truly,

Lia Lomtadze-Dedina
Director of Business Operations

LLD/kf

Filion Wakely Thorup Angeletti LLP

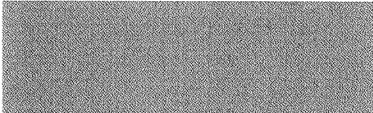
management labour and employment law

Invoice inquiries: invoices@filion.on.ca

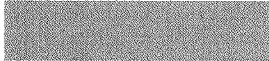
October 31, 2017

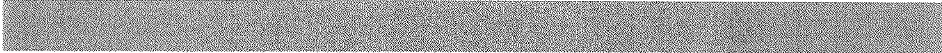
Private & Confidential

RECEIVED
NOV 0 7 2017



Waterloo Regional Police
200 Maple Grove Road
Cambridge ON N3H 5M1





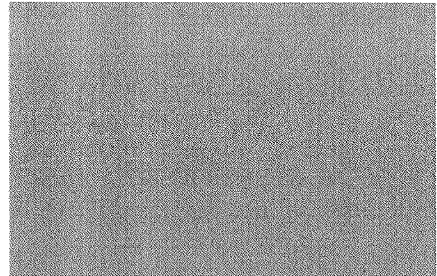
TO PROFESSIONAL SERVICES RENDERED for the period of September 2017

Total Fees	$1,350.00
Total Taxes	$175.50
TOTAL DUE AND OWING	$1,525.50
	CDN Funds

Yours very truly,

Lia Lomtadze-Dedina
Director of Business Operations

LLD/kf



Filion Wakely Thorup Angeletti LLP www.filion.on.ca

Toronto
Bay Adelaide Centre
333 Bay Street, Suite 2500, PO Box 44
Toronto, Ontario M5H 2R2
tel 416.408.3221 | fax 416.408.4814
toronto@filion.on.ca

London
620A Richmond Street, 2nd Floor
London, Ontario N6A 5J9
tel 519.433.7270 | fax 519.433.4453
london@filion.on.ca

Hamilton
1 King Street West, Suite 1201, Box 57030
Hamilton, Ontario L8P 4W9
tel 905.526.8904 | fax 905.577.0805
hamilton@filion.on.ca

Filion Wakely Thorup Angeletti LLP

management labour and employment law

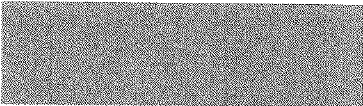
L&E GLOBAL
an alliance of employers' counsel worldwide

Invoice inquiries: invoices@filion.on.ca

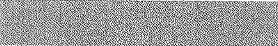
October 31, 2017

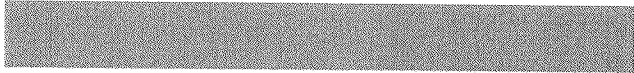
RECEIVED
NOV 0 7 2017

Private & Confidential



Waterloo Regional Police
200 Maple Grove Road
Cambridge ON N3H 5M1

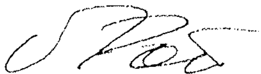




TO PROFESSIONAL SERVICES RENDERED for the period of September 2017

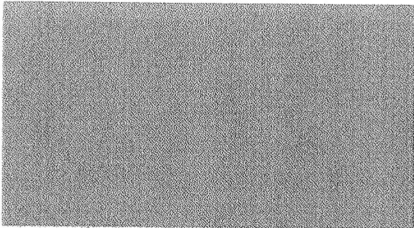
Total Fees	$1,575.00
Total Taxes	$204.75
TOTAL DUE AND OWING	$1,779.75
	CDN Funds

Yours very truly,



Lia Lomtadze-Dedina
Director of Business Operations

LLD/kf



Filion Wakely Thorup Angeletti LLP www.filion.on.ca

Toronto
Bay Adelaide Centre
333 Bay Street, Suite 2500, PO Box 44
Toronto, Ontario M5H 2R2
tel 416.408.3221 | fax 416.408.4814
toronto@filion.on.ca

London
620A Richmond Street, 2nd Floor
London, Ontario N6A 5J9
tel 519.433.7270 | fax 519.433.4453
london@filion.on.ca

Hamilton
1 King Street West, Suite 1201, Box 57030
Hamilton, Ontario L8P 4W9
tel 905.526.8904 | fax 905.577.0805
hamilton@filion.on.ca

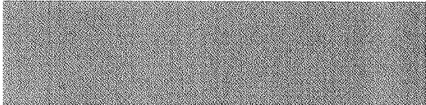
Filion Wakely Thorup Angeletti LLP

management labour and employment law

Invoice inquiries: invoices@filion.on.ca

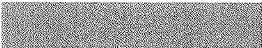
January 29, 2018

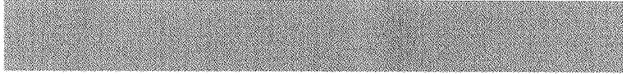
Private & Confidential



RECEIVED
FEB 02 2018

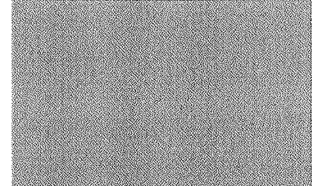
Waterloo Regional Police
200 Maple Grove Road
Cambridge ON N3H 5M1





TO PROFESSIONAL SERVICES RENDERED for the period of December 2017

Total Fees	$850.00
Total Taxes	$110.50
TOTAL DUE AND OWING	$960.50
	CDN Funds



Yours very truly,

Lia Lomtadze-Dedina
Director of Business Operations

LLD/kf

Filion Wakely Thorup Angeletti LLP www.filion.on.ca

Toronto
Bay Adelaide Centre
333 Bay Street, Suite 2500, PO Box 44
Toronto, Ontario M5H 2R2
tel 416.408.3221 | fax 416.408.4814
toronto@filion.on.ca

London
620A Richmond Street, 2nd Floor
London, Ontario N6A 5J9
tel 519.433.7270 | fax 519.433.4453
london@filion.on.ca

Hamilton
1 King Street West, Suite 1201, Box 57030
Hamilton, Ontario L8P 4W9
tel 905.526.8904 | fax 905.577.0805
hamilton@filion.on.ca

FilionWakely ThorupAngeletti LLP

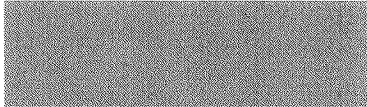
management labour and employment law

L&E GLOBAL
an alliance of employers' counsel worldwide

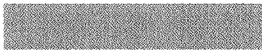
Invoice inquiries: invoices@filion.on.ca

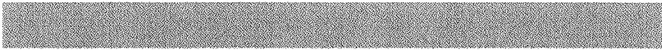
February 27, 2018

Private & Confidential



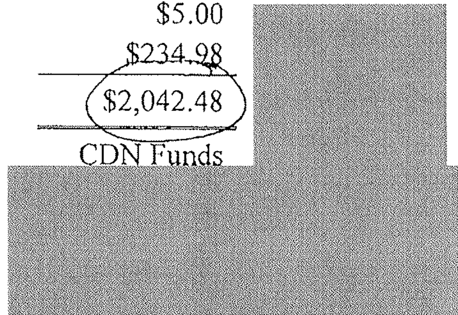
Waterloo Regional Police
200 Maple Grove Road
Cambridge ON N3H 5M1





TO PROFESSIONAL SERVICES RENDERED for the period of January 2018

Total Fees	$1,802.50
Total Disbursements	$5.00
Total Taxes	$234.98
TOTAL DUE AND OWING	$2,042.48
	CDN Funds



Yours very truly,

P.P. Lia Lomtadze-Dedina
Director of Business Operations

LLD/kf

Filion Wakely Thorup Angeletti LLP www.filion.on.ca

Toronto
Bay Adelaide Centre
333 Bay Street, Suite 2500, PO Box 44
Toronto, Ontario M5H 2R2
tel 416.408.3221 | fax 416.408.4814
toronto@filion.on.ca

London
620A Richmond Street, 2nd Floor
London, Ontario N6A 5J9
tel 519.433.7270 | fax 519.433.4453
london@filion.on.ca

Hamilton
1 King Street West, Suite 1201, Box 57030
Hamilton, Ontario L8P 4W9
tel 905.526.8904 | fax 905.577.0805
hamilton@filion.on.ca

Filion Wakely Thorup Angeletti LLP

management labour and employment law

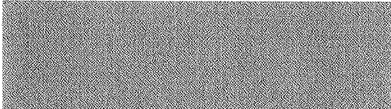
L&E GLOBAL
an alliance of employers' counsel worldwide

Invoice inquiries: invoices@filion.on.ca

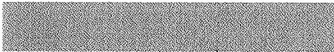
April 17, 2018

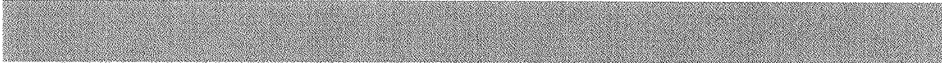
Private & Confidential

RECEIVED
APR 24 2018



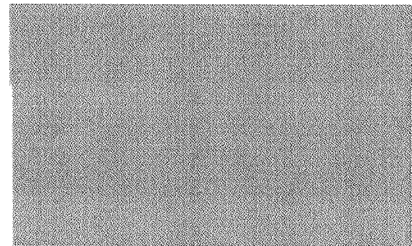
Waterloo Regional Police
200 Maple Grove Road
Cambridge ON N3H 5M1





TO PROFESSIONAL SERVICES RENDERED for the period of March 2018

Total Fees	$3,037.50
Total Taxes	$394.88
TOTAL DUE AND OWING	$3,432.38
	CDN Funds



Yours very truly,

Lia Lomtadze-Dedina
Director of Business Operations

LLD/kf

Filion Wakely Thorup Angeletti LLP

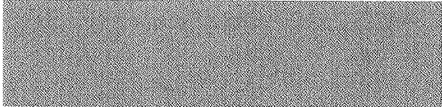
management labour and employment law

Invoice inquiries: invoices@filion.on.ca

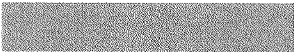
April 17, 2018

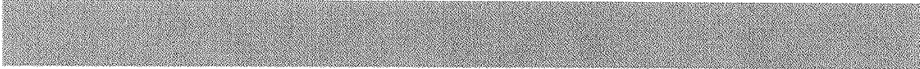
APR 24 2018

Private & Confidential



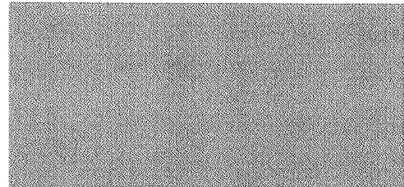
Waterloo Regional Police
200 Maple Grove Road
Cambridge ON N3H 5M1





TO PROFESSIONAL SERVICES RENDERED for the period of March 2018

Total Fees	$395.00
Total Taxes	$51.35
TOTAL DUE AND OWING	$446.35
	CDN Funds



Yours very truly,

Lia Lomtadze-Dedina
Director of Business Operations

LLD/kf

Filion Wakely Thorup Angeletti LLP

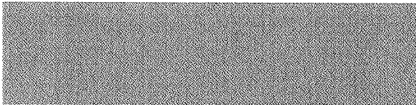
management labour and employment law

Invoice inquiries: invoices@filion.on.ca

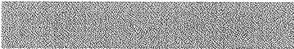
May 31, 2018

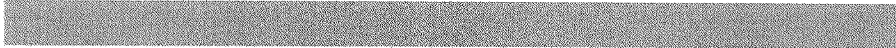
Private & Confidential

RECEIVED
JUN 08 2018



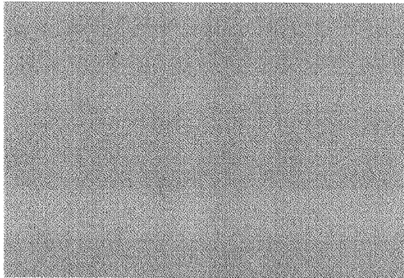
Waterloo Regional Police
200 Maple Grove Road
Cambridge ON N3H 5M1





TO PROFESSIONAL SERVICES RENDERED for the period of <u>April 2018</u>

Total Fees	$607.50
Total Taxes	$78.98
TOTAL DUE AND OWING	$686.48
	CDN Funds



Yours very truly,

Lia Lomtadze-Dedina
Director of Business Operations

LLD/kf

FilionWakely LLP ThorupAngeletti

management labour and employment law

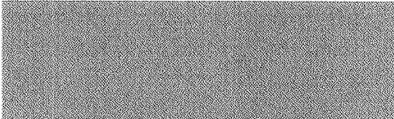
L&E GLOBAL
an alliance of employers' counsel worldwide

Invoice inquiries: invoices@filion.on.ca

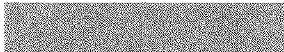
June 30, 2018

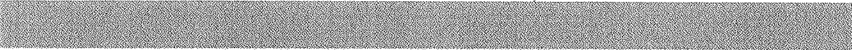
Private & Confidential

RECEIVED
JUL 11 2018



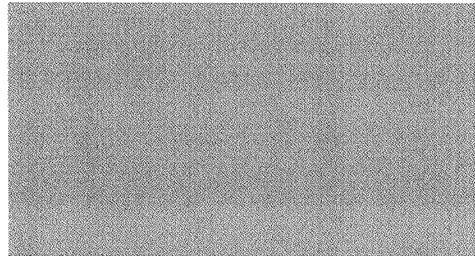
Waterloo Regional Police
200 Maple Grove Road
Cambridge ON N3H 5M1





TO PROFESSIONAL SERVICES RENDERED for the period of May 2018

Total Fees	$5,421.25
Total Taxes	$704.76
TOTAL DUE AND OWING	$6,126.01
	CDN Funds



Yours very truly,

Lia Lomtadze-Dedina
Director of Business Operations

LLD/kf

Filion Wakely Thorup Angeletti LLP www.filion.on.ca

Toronto
Bay Adelaide Centre
333 Bay Street, Suite 2500, PO Box 44
Toronto, Ontario M5H 2R2
tel 416.408.3221 | fax 416.408.4814
toronto@filion.on.ca

London
620A Richmond Street, 2nd Floor
London, Ontario N6A 5J9
tel 519.433.7270 | fax 519.433.4453
london@filion.on.ca

Hamilton
1 King Street West, Suite 1201, Box 57030
Hamilton, Ontario L8P 4W9
tel 905.526.8904 | fax 905.577.0805
hamilton@filion.on.ca

Filion Wakely Thorup Angeletti LLP

management labour and employment law

Invoice inquiries: invoices@filion.on.ca

June 30, 2018

Private & Confidential

RECEIVED
JUL 11 2018

Waterloo Regional Police
200 Maple Grove Road
Cambridge ON N3H 5M1

TO PROFESSIONAL SERVICES RENDERED for the period of May 2018

Total Fees	$8,865.00
Total Disbursements	$12.42
Total Taxes	$1,154.06
TOTAL DUE AND OWING	$10,031.48
	CDN Funds

Yours very truly,

Lia Lomtadze-Dedina
Director of Business Operations

LLD/kf

Filion Wakely Thorup Angeletti LLP
management labour and employment law

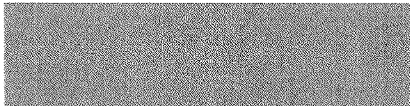
L&E GLOBAL
an alliance of employers' counsel worldwide

Invoice inquiries: invoices@filion.on.ca

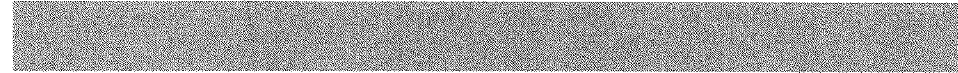
RECEIVED
AUG 1 3 2018

July 31, 2018

Private & Confidential

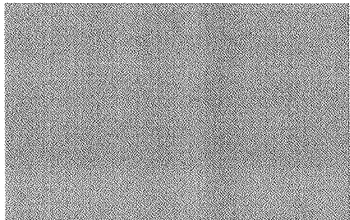


Waterloo Regional Police
200 Maple Grove Road
Cambridge ON N3H 5M1



TO PROFESSIONAL SERVICES RENDERED for the period of <u>June 2018</u>

Total Fees	$8,300.00
Total Disbursements	$888.93
Total Taxes	$1,194.56
TOTAL DUE AND OWING	$10,383.49
	CDN Funds



Yours very truly,

Lia Lomtadze-Dedina
Director of Business Operations

LLD/kf

Filion Wakely Thorup Angeletti LLP

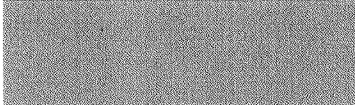
management labour and employment law

Invoice inquiries: invoices@filion.on.ca

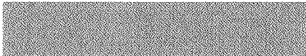
July 31, 2018

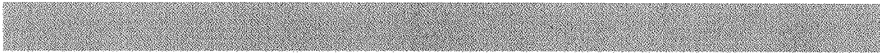
RECEIVED
AUG 1 3 2018

Private & Confidential



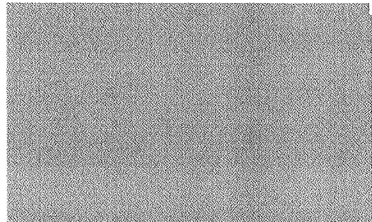
Waterloo Regional Police
200 Maple Grove Road
Cambridge ON N3H 5M1





TO PROFESSIONAL SERVICES RENDERED for the period of June 2018

Total Fees	$2,426.25
Total Disbursements	$243.50
Total Taxes	$347.07
TOTAL DUE AND OWING	$3,016.82
	CDN Funds



Yours very truly,

Lia Lomtadze-Dedina
Director of Business Operations

LLD/kf

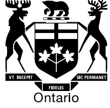
Filion Wakely Thorup Angeletti LLP www.filion.on.ca

Toronto
Bay Adelaide Centre
333 Bay Street, Suite 2500, PO Box 44
Toronto, Ontario M5H 2R2
tel 416.408.3221 | fax 416.408.4814
toronto@filion.on.ca

London
620A Richmond Street, 2nd Floor
London, Ontario N6A 5J9
tel 519.433.7270 | fax 519.433.4453
london@filion.on.ca

Hamilton
1 King Street West, Suite 1201, Box 57030
Hamilton, Ontario L8P 4W9
tel 905.526.8904 | fax 905.577.0805
hamilton@filion.on.ca

Appendix C



HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Matthew Clarke

Applicant

-and-

Ottawa Police Services Board

Respondent

DECISION

Adjudicator: Annie McKendy

Date: January 27, 2020

File Number: 2019-37521-S

Citation: 2020 HRTO 91

Indexed as: **Clarke v. Ottawa Police Services Board**

2020 HRTO 91 (CanLII)

APPEARANCES

Matthew Clarke, Applicant	)	Self-represented
Ottawa Police Services Board, Respondent	)	Jock Climie, Counsel

2020 HRTO 91 (CanLII)

[1] This Application alleges that the respondent contravened a settlement entered into between the parties, contrary to s.45.9 of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the “*Code*”).

[2] The applicant filed an earlier application which was resolved by way of Minutes of Settlement. The applicant filed the present Application alleging that the terms of the settlement were breached, and the Tribunal conducted a hearing on January 23, 2020 to decide the matter.

2020 HRTO 91 (CanLII)

FACTS

[3] The applicant is a police officer employed by the respondent. He filed an Application in 2016 alleging a breach of his rights pursuant to s. 34(1) of the *Code*. In that Application, the applicant made a significant number of allegations, one of which related to comments made by his superiors in a tracking log used by the respondent for performance management. In the 2016 Application, the applicant sought to have two specific entries removed from the tracking log, which he believed were discriminatory.

[4] The parties reached a settlement with respect to the 2016 Application on December 13, 2018. The terms of the settlement include a mutual non-disparagement clause and a statement in the recitals that the parties wish to “fully and finally resolve all outstanding matters without further litigation.”

[5] On February 20, 2019, the applicant sent an email to the respondent’s Talent Management department requesting that the tracking log entries referenced in the 2016 Application be removed from the system. This Application for Contravention of Settlement arises because the applicant submits that the email received in response constitutes a breach of the non-disparagement clause contained in the settlement.

[6] None of the facts central to the issue before me are in dispute. The applicant testified on his own behalf and the Director of Labour Relations testified for the

respondent. Additionally, the parties filed documents which clearly reflect the facts, and which I have reviewed and considered in coming to this Decision.

Allegation of Contravention of Settlement

2020 HRTO 91 (CanLII)

[7] On March 28, 2019, the respondent's Talent Management Advisor sent a response to the applicant's request that the tracking log entries be deleted. The email stated the following:

> I have reviewed your request to have the tracking log entries deleted. In speaking with [the] Director, Labour Relations, he advises me that there was a settlement in late 2018 regarding your Human Rights complaint which resolved all issues relating to the tracking log entries in question.
>
> In addition, the tracking log entries in question were completed under previous Performance Management policies, which did not specify that that tracking log entries need to be reviewed by the member.
>
> As you know, these entries are from 3 and 4 years ago. It is our practice not to remove tracking log entries from such a long time ago. However, once a member's performance review has been finalized, previous tracking log entries are archived, and only the current year's tracking log is viewable.

[8] The email was copied to the Director of Labour Relations, the manager of Talent Management, the director of Human Resources, the Manager of the department of Occupational Health, Safety and Lifestyle, and two representatives from the applicant's union (who were initially copied in the applicant's email requesting the removal of the tracking log entries).

[9] The non-disparagement clause in the Minutes of Settlement reads as follows:

> The Parties agree not to in any way disparage one another, or make or cause or encourage any others to make, any comments, statements, or the like that may be considered to be harmful or derogatory or detrimental to the name, business affairs, public reputation, or standing in the community of the other Party. This prohibition extends, but is not limited to, statements, written or verbal, statements made via social media. The Applicant acknowledges and agrees that this is a fundamental term of settlement for the Respondent and if he breaches this confidentiality

> provision, he may be liable to any of the Releasees for damages, including but not limited to the return of all payments made to him pursuant to these Minutes.

ANALYSIS

2020 HRTO 91 (CanLII)

[10] The applicant submits that by stating in the email that the settlement of the 2016 Application resolved all issues relating to the tracking log entries, the respondent disparaged him to those who were copied on the email. He submits that the inference to be drawn from the email was that he had accepted the comments made in the tracking log. He submits that as a police officer his reputation is paramount and that the settlement should not have been mentioned in email. He also submits that the email is inaccurate with respect to the respondent's policy regarding the review of tracking log comments by police officers.

[11] The respondent submits that the email does not constitute disparagement of the applicant. Rather, they believe that the applicant requested the removal of the notes in the tracking log, despite having failed to achieve that outcome through the settlement, and that the respondent raised the settlement only as a defence to his attempt to revisit what they believed to be a settled matter. The respondent submits that the very purpose of entering into a full and final settlement and release is to bring closure to the underlying allegations, and that to suggest that they cannot reference the settlement as a bar to the pursuit of those issues would defeat the purpose of the settlement.

[12] I agree that there is nothing in the March 28, 2019 email that can be construed as disparagement of the applicant. It is clear from the email exchange, and moreover from the respondent's email alone, that the applicant is not accepting the comments made in the tracking log. I therefore do not accept the applicant's suggestion that the inference can be drawn from the exchange that he accepts the underlying allegations. I further do not accept that the email is likely to cause damage to the reputation of the applicant. The applicant did not establish on a balance of probabilities that the contents of the email could damage his reputation. In the unlikely event that they could, I note that the email was copied only to human resources, occupational health and talent

management employees and to the union representatives who were included in the discussion by the applicant in his original email.

[13] To the extent that the applicant suggests that the respondent could not make mention of the settlement to those who were copied, I note that there is no mutual confidentiality clause to the settlement. Rather, the confidentiality clause applies only to the applicant.

[14] I agree with the respondent's position that the mention of the settlement was a legitimate response to the applicant attempting to achieve additional outcomes contemplated by the 2016 Application in the face of a clear release of the allegations. It is noteworthy that the remedy requested by the applicant for the alleged contravention of the settlement is that I order the respondent to remove the two entries in the tracking log. The integrity of the release signed by the applicant must be respected as a matter of public policy, and though the respondent did not make any submissions to this effect, in my view, this Application for Contravention of Settlement is an abuse of the Tribunal's process.

[15] For all of these reasons, I find that the applicant has not established that the respondent contravened the Minutes of Settlement.

DECISION

[16] This Application for Contravention of Settlement is dismissed.

Dated at Toronto, this 27th day of January, 2020.

"Signed by"

____

Annie McKendy
Vice-chair

2020 HRTO 91 (CanLII)

Appendix D

HUMAN RIGHTS TRIBUNAL OF ONTARIO

2014 HRTO 1721 (CanLII)

B E T W E E N:

Thunder Bay Police Services Board

Applicant

-and-

Richard Burns

Respondent

DECISION

Adjudicator: Kathleen Martin

Date: November 28, 2014

File Number: 2013-15404-S

Citation: 2014 HRTO 1721

Indexed as: **Thunder Bay Police Services Board v. Burns**

APPEARANCES

Thunder Bay Police Services Board, Applicant	))))	Holly Walbourne, Counsel
Richard Burns, Respondent	)))	Self-represented

2014 HRTO 1721 (CanLII)

[1] This is an Application filed under section 45.9(3) of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended ("the *Code*"), alleging a contravention of settlement. The applicant alleges that the respondent contravened Minutes of Settlement entered into on February 1, 2011 and Confidentiality Agreements signed by the parties during the mediations that were held to resolve the original application.

[2] A hearing into the Application was held on August 19, 2014 by conference call. At the outset of the hearing, I heard submissions from the parties on the impact of the respondent's failure to comply with the Tribunal's various directions on the ability to the respondent to participate. The applicant took the position that the respondent should be bound by what he said previously, whereas the respondent stated that he wished to call witnesses on some future date. After hearing from the parties, I ruled that the hearing would proceed and Mr. Burns would be able to participate consistent with his earlier submissions.

[3] During the hearing, the respondent also complained about the manner of hearing by conference call as opposed to an in-person hearing and following the hearing, filed several emails repeating this concern, as well as raising other issues with respect to process. The applicant filed a response to the same. Given my disposition below, while I have reviewed the additional submissions made, I do not find necessary to address the substance of the respondent's concerns.

[4] I have determined that the applicant has not established a contravention of the Minutes of Settlement. My reasons follow.

Background Facts

[5] The background facts and many of the facts underlying the alleged contravention are not in dispute. In those few instances where there are disputes I do not find it necessary to resolve the disputes for the purpose of this decision.

2014 HRTO 1721 (CanLII)

[6] The Contravention Application relates to the settlement of a complaint originally filed with the Ontario Human Rights Commission in July 2007. This OHRC complaint was transitioned into an application at the Tribunal ("the Transition Application").

[7] On December 1, 2010, prior to engaging in the Tribunal's mediation process, the parties agreed to meet in effort to try to resolve some or all issues in the Transition Application. The confidentiality agreement entered into as part of this private mediation included the understanding and agreement that the meeting was "confidential" and that all statements made were "without prejudice" and could not be used in evidence before the Tribunal or in any other proceeding without the consent of the party who made the statement. Further, the confidentiality agreement stated that "nothing said at the meeting is to be disclosed to any other person". The Transition Application was not resolved at this meeting.

[8] On February 1, 2011, the parties met again in a mediation convened by the Tribunal in an effort to resolve the Transition Application. In accordance with the Tribunal's process, the parties signed a Confidentiality Agreement (the "Tribunal's Confidentiality Agreement"), which among other things stated that, "we understand and agree that this is a confidential process"; and all documents provided and statements made during the mediation are "without prejudice and cannot be used in evidence before the Tribunal or in any other civil proceeding". The session resulted in Minutes of Settlement which were entered into on February 1, 2011, by the applicant, Chief Robert Herman, and the respondent ("the MOS").

[9] The MOS state that the "terms of the Settlement are confidential and shall not be disclosed to any persons other than the signatories…". In addition, the respondent (the applicant in the Transition Application) agrees in the MOS that the settlement is in "full, final and complete settlement of all claims existing up to the date hereof, arising out of, or in any way relating to the matters giving rise to the Application against the Respondents" and to a full and final release of any and all claims related to the events

2014 HRTO 1721 (CanLII)

in the Transition Application. Further, the respondent signed a separate Full and Final Release of All Claims which elaborates on the terms of the release.

[10] The Contravention Application was filed on September 4, 2013 by the applicant and alleged that the respondent had contravened the MOS, the confidentiality agreement signed during the private mediation session and the Tribunal's Confidentiality Agreement. In particular, the applicant alleged that the respondent made false and malicious statements to numerous individuals, including media and politicians, that the settlement he achieved was the result of a fraudulent misrepresentation. The applicant further alleged that the respondent contravened the confidentiality agreements entered into at the private mediation of the parties but also during the Tribunal's mediation. The applicant alleged that the "libel and slander" heaped on the applicant is an unacceptable abuse of the Tribunal's process and that the respondent was seeking to maliciously damage the applicant and harm its reputation.

[11] The applicant sought a number of remedies related to the alleged contraventions including that the respondent be ordered to pay back the settlement monies, pay $50,000.00 in damages and that he cease and desist from sending abusive correspondence to the applicant and others about the applicant and violating the MOS and the signed confidentiality agreements. The applicant also sought that the respondent be declared a vexatious litigant.

[12] Subsequent to the filing, the procedural history of the Contravention Application was somewhat protracted, although I do not find it necessary to review this procedural history in detail for the purposes of this decision, with the exception of what is summarized below. The history is documented in nine Case Assessment Directions of the Tribunal dated October 23, 2013, December 4, 2013, February 3, 2014, February 4, 2014, March 3, 2014, March 26, 2014, April 17, 2014, June 16, 2014 and August 13, 2014.

2014 HRTO 1721 (CanLII)

[13] The Contravention Application was initially scheduled for a conference call hearing given the respondent's failure to file a complete response. It was then re-scheduled for an in-person hearing when the respondent orally stated during a conference call on March 25, 2014, that he was challenging the facts underlying certain allegations, and additional directions were issued which included directing the respondent to file a complete response and hearing materials. Prior to the August 19th hearing date, the applicant filed a Request for Order During Proceedings asking that the hearing be done by oral or written submissions. In its Request, the applicant withdrew its request that the respondent be declared a vexatious litigant (albeit without prejudice to further proceedings if warranted). The applicant emphasized that the Contravention Application was narrow in scope, characterizing its claim as being limited to an order for damages and an order that the respondent cease and desist from repeating falsehoods based on information received under the confidentiality protection provisions of the Tribunal mediation process.

[14] Having regard to the material filed and submissions made, including the absence of a proper response from the respondent and any witness statements, in a Case Assessment Direction dated August 13, 2014, the Tribunal determined that the hearing would be converted to a one-day hearing by conference call.

[15] At the hearing, the applicant narrowed the Contravention Application further. The applicant stated that it was limiting the factual basis of its allegations to those that stem from the "federal crown" incident disclosed during the mediation sessions. The applicant states that during both mediation sessions it was disclosed to the respondent that the police had received information from a federal crown and acted on that information in detaining the respondent on March 17, 2008, but that it was subsequently determined that the information was a mistake so the respondent was released. The applicant relies on two affidavits confirming the circumstances surrounding the respondent's detention on March 17, 2008, which were submitted in the hearing. Among other things, the affidavits substantiate that a police constable of the applicant Police Service (working as a court officer) received information that there was an arrest warrant issued

2014 HRTO 1721 (CanLII)

for the respondent from a federal crown, that other officers then located and detained the respondent, that subsequently, the police constable received clarification that it was a "discretionary" bench warrant and not yet registered on CPIC and that as a result, the respondent was released (the entire events taking less than 30 minutes).

2014 HRTO 1721 (CanLII)

[16] The applicant states that this specific incident was not an allegation in the Transition Application but that the respondent raised the issue in the mediation and thus it fell within the scope of the full and final release which was ultimately agreed to.

[17] It would appear that following the mediation, the respondent complained to the federal prosecutor in Ottawa about the role of the federal agents in his arrest/detention. While no copy of any complaint was submitted in the hearing, it would appear from the letter disposing of a complaint which was submitted that the respondent alleged that the federal agents had "directed" his arrest (which I note is different from what the applicant states occurred). In a letter to the respondent dated July 10, 2013, the chief federal prosecutor concluded that based on the investigation and the complete lack of documentation, there was no evidence that the respondent's arrest by the police was carried out as a result of "any action" by federal agents. While the date of the arrest referenced in the letter is March 17, 2010, I have presumed this is in error, but even if it is not, the federal prosecutor makes it clear that federal agents have not directed the respondent's arrest in the manner complained of at any time.

[18] Aside from contacting the federal prosecutor, the respondent's conduct that is complained of in the Contravention Application stems from the respondent's actions following the receipt of this letter from the federal prosecutor. In particular, the respondent engaged in the following conduct:

- On August 15, 2013, the respondent sent an email to the Office of the Independent Police Review Director, the Tribunal, the Attorney General's Office of Ontario, a member of the Police Services Board and the Chief of Police for Thunder Bay, referring, among other things, to "the fabrication of the Federal Crown and the willingness of others such as Police legal Counsel…to participate in the deception of the

substantively disabled victim demonstrates the need for deterrence" and that the "court will be asked to consider these facts when the civil action is filed later this month…".

- On August 16, 2013, the respondent sent an email to some of the same individuals and also a senior counsel in the office of the federal prosecution service, a member of Parliament, and a civil lawyer, stating among other things, that the respondent completed an interview with members of the media and asked that "special attention be placed on the Police fabrication of a Federal Crown in the Provincial Courthouse incident"; that "Once the victim has established the claimed basis for the encounters is like the Federal Crown a police fabrication then action can be taken to obtain injunctive relief from further abuse and this role falls to the HRTO and OIPRD"; and other similar statements.

- On August 17, 2013, the respondent made a comment online in response to a news article which stated:

  In July 2013 the Federal Crown's office released the findings of it's investigation, and found the claims by police to have been acting on the direction of a Federal Crown when arresting this victim FALSE. The fabrication of evidence by police in an abuse investigation is serious. In response to hearing from the other side, I agreed to waive the confidentiality provision in the HRTO police declined to do so. They are choosing not to debate this issue and instead lets blame the victim. Police and their lawyers were asked several times to disclose the identity of this Federal Crown and refused mostly because there wasn't one :)

- On August 19, 2013, the respondent sent an email to the Tribunal, the Attorney General's Office of Ontario, the Chief of Thunder Bay police, a member of the Police Services Board, a lawyer and an individual of the Ombudsman Office stating, among other things, that "I have argued that my agreement was obtained by false pretences based on a fabrication by the respondent [the applicant in this proceeding]"; and "During a settlement conference at the Prince Arthur Hotel in Thunder Bay police legal Counsel…stated he possessed the identity of the federal crown who his client had claimed directed the Provincial Courthouse incident."; and "I doubt anyone could have predicted the respondent would be found to have fabricated evidence ot [sic] the fabrication would be facilitated by their legal counsel…".

- On August 22, 2013, the respondent sent an email to the Chief of Police, a senior partner at the law firm (the employer of the respondent's legal counsel), a senior counsel in the office of the federal prosecution service, a television reporter, and a member of

2014 HRTO 1721 (CanLII)

> Parliament stating, among other things, that "legal counsel has threatened me with legal action for disclosing the fabrication of evidence in the provincial courthouse incident" and that the respondent has met with the media and "am now suggesting they follow up this story".

2014 HRTO 1721 (CanLII)

[19] The respondent does not dispute the conduct complained about, i.e. that he authored these emails and the online comment. However, the respondent disputed for the first time during the conference call that he obtained the information about the federal crown during the mediation sessions; instead he claimed that while the issue was raised at mediation, he knew about the information earlier. While I am somewhat skeptical of this assertion given that the respondent himself appears to suggest in his August 17, 2013 online comment that he is prepared to waive "confidentiality", ultimately, I do not find it necessary to resolve this difference for purposes of this decision. I address this in my analysis and decision below.

[20] Notwithstanding the reference to a civil action being filed in one of the respondent's emails, there was no submission made that another proceeding has been commenced either in the civil process or otherwise.

[21] Following the hearing, in a Case Assessment Direction dated November 17, 2014, the Tribunal asked the applicant to confirm by November 19, 2014 if the Contravention Application was filed on behalf of both the named applicant and Robert Herman (who had been a respondent party to the MOS), and if it was not, the applicant's submissions on whether Mr. Herman was entitled to notice and/or had received notice. The Tribunal directed that by November 21, 2014, the respondent may provide any submissions in response.

[22] On November 19, 2014, the applicant clarified that the Application was filed only on behalf of the Thunder Bay Police Services Board and that while Mr. Herman was aware of the Application, he did not wish to participate and waives the need to any further notice or service in this matter. Such information was confirmed by Mr. Herman

in an email dated November 18, 2014. While the respondent sought a brief extension to the deadline to make submissions in response, ultimately, the respondent did not file any submissions in accordance with the extension granted.

[23] Having regard to the information filed, I am satisfied that Mr. Herman had notice of the proceeding but does not wish to participate in the proceeding. The Tribunal will not provide a copy of this Decision directly to Mr. Herman, but directs the applicant to do so within seven days of the date of this Decision.

2014 HRTO 1721 (CanLII)

Analysis and Decision

[24] Section 45.9 states in part:

> (1) If a settlement of an application made under section 34 or 35 is agreed to in writing and signed by the parties, the settlement is binding on the parties.
>
> (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),…
>
> (8) <u>If, on an application under subsection (3), the Tribunal determines that a party has contravened the settlement</u>, the Tribunal may make any order that it considers appropriate to remedy the contravention.
>
> (emphasis added)

[25] As is apparent from the statutory language, the key question in any contravention application is whether or not a party has contravened the *settlement*. The Tribunal has stated that to establish a breach of settlement the allegations have to be based on the terms as agreed to by the parties and reduced to writing in the settlement.

[26] The applicant bears the onus of proving a contravention: see, for example, *Levinsky v. Canadian Tire Corporation*, 2012 HRTO 783.

[27] In this case, the applicant makes several arguments why the MOS have been contravened. First, the applicant submits that by using the information given in the confidential mediation sessions and subsequently repeating (and misstating) the information disclosed, the respondent has breached the confidentiality agreements signed in those mediation sessions. The applicant relies on the language in the respective agreements that refer to the meetings being "confidential" and the restrictions on the use of documents and statements made as summarized in paragraphs 7 and 8 above. The applicant submits that the confidentiality agreements have to be in place to permit a settlement meeting and therefore are "part and parcel" of one contract made by the parties, which I presume is a reference to the settlement.

[28] In addition, the applicant submits that the respondent has contravened the MOS. The applicant relies on the provision that states that the "terms of the Settlement are confidential" and the term that the settlement is in "full, final and complete settlement of all claims existing up to the date hereof…" and that the applicant in the Transition Application agrees to "release the respondents…from any and all claims related to the events in this Application…." Further, the applicant relies on the Full and Final Release attached to the MOS which releases and discharges the respondents "from any and all actions, causes of action, applications, claims, complaints, demands, and any other proceedings of whatever kind for damages, indemnity, costs, compensation or any other remedy…."

[29] The applicant submits that by raising the issue with the federal crown, the respondent is making a "claim or demand", although the applicant acknowledges that it is not saying that the respondent has commenced a "proceeding". The applicant also submits that the raising of the issue with the federal crown breaches confidentiality. The applicant urges the Tribunal to find a contravention, submitting that no respondent would enter into a settlement if the precise matters settled could be continuously litigated and discussed publicly as the respondent has done in this case.

2014 HRTO 1721 (CanLII)

[30] There appears to no doubt that the respondent is talking about the issues discussed during the mediations (even he acknowledges as much although he asserts now that he knew it before). In general, this type of conduct is not helpful to facilitating and encouraging settlements in most situations. However, while I can appreciate the concerns raised, I do not find that the applicant has established a contravention of the MOS.

[31] In considering the issues in this Application, I do not find it necessary to determine whether or not the respondent learned about the federal crown through the mediations or not. Even assuming without finding that the information in question was disclosed in the mediations in question, I do not find that the applicant has satisfied me that the use and disclosure of information provided during the course of a mediation to resolve the Transition Application is a contravention of the MOS.

[32] Turning first to the confidentiality agreements, the applicant quite properly highlights that the confidentiality agreement (at least in the Tribunal's process) is a condition to engaging in that process. However, that does not make the confidentiality agreement a term of the settlement unless it is negotiated to be a term of the settlement. Thus, even assuming that the respondent repeated information and/or misstated information disclosed in that process, I do not find that the disclosure is a contravention of settlement in the absence of language incorporating obligations to maintain the confidentiality of those statements and/or information in the settlement itself. There is no such incorporation of this obligation in these MOS.

[33] This does not mean that there is not a mechanism to enforce the confidentiality agreement, particularly the confidentiality agreement in the Tribunal's process (obviously the confidentiality agreement signed outside of the Tribunal's process presents other challenges). Subject to the circumstances, there may be an issue of whether or not a breach of confidentiality provision is an abuse of process, although in a case such as the Contravention Application before me where the issue is limited to the enforcement of a private contract – i.e. the settlement between the parties – I do not find

2014 HRTO 1721 (CanLII)

that an abuse of process argument has merit. In a case where there is only a settlement, there may be other mechanisms to enforce the agreement, including in the civil courts. However, the only issue before me is the alleged contravention of the settlement and I do not find that a breach of the confidentiality provisions contained in the Confidentiality Agreement, but not in the MOS, is, in this case, a contravention of settlement.

[34] I also am not satisfied that the applicant has established a contravention of the MOS more directly. I do not find that the respondent has contravened the term of confidentiality in the MOS. The MOS state that the parties agree that "the terms of Settlement are confidential and shall not be disclosed…" There is no term addressing the discussions that may have occurred in mediation.

[35] Further, I am not convinced that the terms setting out the full and final release either in the MOS or in the attached Full and Final Release are contravened by the respondent's conduct in this case. There appears to be no dispute that the respondent made a complaint to the federal prosecutor and then used the information from the prosecutor's letter to accuse the applicant in a public way of fabricating information, given the content of the various emails and the online comment. While the applicant attempted to characterize this conduct as making a claim or demand within the meaning of the MOS and Full and Final Release, I do not agree. Considering the language in the MOS and the Release, it is clear that what is barred are *legal* claims that result in a proceeding and that lead to a remedy. The MOS contains a release whereby the applicant in the Transition Application releases the *respondents* from any and all claims, including claims under various statutes and the common law, none of which are engaged by the respondent's conduct. Similarly, the Full and Final Release releases the *respondents* [one of whom is the applicant in this proceeding] from any and all actions, causes of action, applications, claims, complaints, demands, and "*any other proceedings of whatever kind for damages, indemnity, costs, compensation or other remedy"* (emphasis added). While the respondent has sent emails and made an online comment about an issue that was arguably resolved and has suggested wrongdoing by

2014 HRTO 1721 (CanLII)

characterizing the information he received as being a fabrication, no actual claim or demand for a remedy has been made nor has he commenced a proceeding. In my view, the reference to a proceeding and link to a remedy qualifies the type of claim or demand that is prohibited by the settlement.

[36] While I can appreciate that the applicant is frustrated given its perspective on what occurred, I do not find that the respondent's conduct is a contravention of the MOS and in particular the terms of the Release, whether those in the body of the MOS or in the attached Schedule.

[37] For all of the foregoing reasons, the Application for Contravention of Settlement is dismissed.

Dated at Toronto, this 28th day of November, 2014.

"Signed by"
____
Kathleen Martin
Vice-chair

2014 HRTO 1721 (CanLII)

Appendix E

CITATION: Donovan v. (Waterloo) Police Services Board, 2019 ONSC 818
COURT FILE NO.: CV-18-00605386-0000
DATE: 20190201

2019 ONSC 818 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N :	
KELLY LYNN DONOVAN	*in person*
– AND –	
REGIONAL MUNICIPALITY OF WATERLOO POLICE SERVICES BOARD	*Donald B. Jarvis and Cassandra Ma* for the respondent
	HEARD: January 10, 2019

FAVREAU J.:

Introduction

[1] The applicant, Kelly Lynn Donovan, has brought an application pursuant to section 137.1(3) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, for an order dismissing an application made by the respondent, the Regional Municipality of Waterloo Police Services Board (the "Board"), to the Human Rights Tribunal for Ontario. In her application to this Court, Ms. Donovan alleges that the Board's application to the Human Rights Tribunal is an attempt to prevent her from advocating for whistle-blower protection and from speaking freely about her own experience as a police officer with the Board.

[2] This decision addresses the preliminary issue of whether the Superior Court has jurisdiction over Ms. Donovan's application.

[3] Ms. Donovan takes the position that the Superior Court has jurisdiction to entertain her application, arguing that the Court's power to dismiss a "proceeding" pursuant to section 137.1(3) of the *Courts of Justice Act* applies to proceedings before administrative tribunals such as the Human Rights Tribunal for Ontario.

[4] The Board argues that section 137.1(3) of the *Courts of Justice Act* does not apply to administrative tribunal proceedings because, as a matter of statutory interpretation, that provision only applies to civil proceedings before a Superior Court.

[5] For the reasons that follow, I agree with the Board that section 137.1(3) of the *Courts of Justice Act* does not give the Superior Court jurisdiction to dismiss a proceeding pending before the Human Rights Tribunal, and Ms. Donovan's application must therefore be dismissed.

2019 ONSC 818 (CanLII)

[6] However, as discussed further in these reasons, I do not agree with the other arguments advanced by the Board, including that the Human Rights Tribunal has exclusive jurisdiction over the matters raised in its application to the Tribunal. It will be up to the Tribunal to decide whether it has any jurisdiction over the application brought by the Board in that forum, and, if so, the merits of the Board's position.

Background to Ms. Donovan's section 137.1(3) application

[7] The history of dealings between Ms. Donovan and the Board is complex. This overview is limited to the events that are relevant and necessary for the purpose of deciding the narrow issue of this Court's jurisdiction over Ms. Donovan's section 137.1(3) application.

[8] Ms. Donovan was previously employed by the Board as a police officer. She resigned from that position on June 25, 2017. On June 8, 2017, Ms. Donovan entered into an agreement with the Board and the Waterloo Police Association that set out the terms of her resignation (the "Resignation Agreement").

[9] During the course of the events leading up to the Resignation Agreement, Ms. Donovan brought an application against the Board to the Human Rights Tribunal for Ontario. Prior to Ms. Donavan's resignation, the Board had also initiated an investigation into potential misconduct by Ms. Donovan under the *Police Services Act*, R.S.O. 1990, c.P.15.

[10] The preamble to the Resignation Agreement states that Ms. Donovan notified the Board that she intended to resign from her position, that the Board wished to recognize Ms. Donovan for her years of service, that the parties wished to resolve Ms. Donovan's application to the Human Rights Tribunal and the Board's complaint under the *Police Services Act*, and that the parties wished to resolve all outstanding matters between them.

[11] As part of the Resignation Agreement, Ms. Donovan and the Board agreed to sign mutual releases and not to commence any further proceedings "related to the period prior to June 25, 2017". In addition, the parties entered into the following confidentiality provision:

> 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 the 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 statement are strictly confidential.

2019 ONSC 818 (CanLII)

[12] Since the parties entered into the Resignation Agreement, disputes have arisen on both sides about whether the parties have respected the confidentiality provision of the agreement.

[13] For its part, the Board alleges that Ms. Donovan has made public statements that contravene the Resignation Agreement. For her part, Ms. Donovan claims that the Board disclosed the terms of the settlement in the context of defending a class proceeding brought against the Board by some of its former employees.

[14] Both sets of allegations have led to a series of legal proceedings.

[15] On May 9, 2018, Ms. Donovan commenced an action in the Superior Court in Brampton against the Board. Ms. Donovan claims that the Board breached the Resignation Agreement by disclosing the terms of the settlement in an affidavit sworn in the context of the class proceeding. Ms. Donovan seeks damages of over $210,000. In response to the action, the Board has brought a motion to dismiss the claim on the basis that the Court does not have jurisdiction over the action, taking the position that the Human Rights Tribunal has exclusive jurisdiction over issues related to the enforcement of the settlement or, alternatively, that the grievance and arbitration process under the collective agreement between the Board and the Waterloo Police Association is the proper forum for resolving the issues raised in Ms. Donovan's claim. The motion is scheduled to be heard on February 13, 2019.

[16] On June 28, 2018, the Board filed an application to the Human Rights Tribunal seeking enforcement of the Resignation Agreement. The application is brought pursuant to section 45.9(3) of the *Human Rights Code*, R.S.O. 1990, c. H.19, which gives parties a right to apply to the Tribunal to address the contravention of a settlement of a Human Rights Tribunal application. In its application to enforce the Resignation Agreement, the Board alleges that Ms. Donovan has engaged in a series of violations of the confidentiality provisions of the agreement. The alleged violations include claims that Ms. Donovan has made a number of public statements in which she has been critical of the Board. For example, the Board claims that the following activities have violated the terms of the Resignation Agreement:

a. Ms. Donavan published a booklet titled "Systemic Misfeasance in Ontario Policing and the Coordinated Suppression of Whistleblowers", in which Ms. Donavan makes some reference to her own experiences with the Board;

b. Ms. Donovan participated in interviews with various news outlets, including 570 News and the CBC, in which she stated that she had been the subject of reprisals by the Board;

c. Ms. Donovan established a Twitter account, website and YouTube channel in which she has made complaints about the Board;

d. Ms. Donovan wrote to former Attorney-General Yasir Naqvi about her views of misfeasance within the Board; and

e. Ms. Donovan made a presentation to the Standing Committee on Justice Policy in respect of Bill 175 in which she stated that she was constructively dismissed from her employment and in which she stated that she had witnessed misfeasance and corrupt practices in the context of internal investigations while working for the Board.

2019 ONSC 818 (CanLII)

[17] The Human Rights Tribunal has scheduled a hearing of the Board's application for February 22, 2019.

[18] On July 27, 2018, Ms. Donovan brought her own application to the Human Rights Tribunal, claiming that the Board has contravened the Resignation Agreement. Ms. Donovan's application raises the same issues as her civil action, alleging that the Board breached the Resignation Agreement by disclosing the settlement in the context of the class action. During argument of the motion before me, Ms. Donovan indicated that she commenced the application to the Tribunal for the purpose of protecting her interests in the event that the civil action is dismissed.

[19] On September 18, 2018, Ms. Donovan commenced this application under section 137.1(3) of the *Courts of Justice Act*. In her amended notice of application, Ms. Donovan seeks the dismissal of the application brought by the Board to the Human Rights Tribunal "on the ground that it is a proceeding that limits freedom of expression on matters of public interest".

[20] On September 24, 2018, the parties attended Civil Practice Court for the purpose of addressing the scheduling of Ms. Donovan's section 137.1(3) application. During the attendance, the Board's counsel raised the issue of the Court's jurisdiction to dismiss a proceeding before the Human Rights Tribunal. The presiding judge directed the parties to attend a Chamber's appointment to address the jurisdictional issues.

[21] Accordingly, on November 13, 2018, the parties attended a Chamber's appointment. The presiding judge determined that the jurisdictional issue could not be decided in the context of a Chamber's appointment, and directed that a one hour motion be heard to address the issue on January 10, 2019, which is the motion that came before me. As part of his direction, the judge made a schedule requiring the applicant to serve her materials after which the respondent was to serve its materials. Therefore, while the jurisdictional issue was raised by the Board, the motion before me proceeded as though it was brought by the applicant, with Ms. Donovan presenting her arguments first after which the Board presented its responding arguments.

2019 ONSC 818 (CanLII)

Analysis

[22] The narrow issue to be decided on this motion is whether section 137.1 gives the Superior Court jurisdiction to dismiss the application brought by the Board to the Human Rights Tribunal.

Section 137.1 of the Courts of Justice Act

[23] Section 137.1(1) describes the purposes of the Court's power to dismiss an action under sections 137.1 to 137.5 of the *Courts of Justice Act*:

> 137.1 (1) The purposes of this section and sections 137.2 to 137.5 are,
>
> (a) to encourage individuals to express themselves on matters of public interest;
>
> (b) to promote broad participation in debates on matters of public interest;
>
> (c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and
>
> (d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action.

[24] Section 137.1(3) requires a judge to dismiss a proceeding in the following circumstances:

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

[25] Section 137.1(4) of the *Courts of Justice Act* provides as follows:

> (4) A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,
>
> (a) there are grounds to believe that,
>
> (i) the proceeding has substantial merit, and
>
> (ii) the moving party has no valid defence in the proceeding; and
>
> (b) the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

[26] Enacted in 2015, these provisions are fairly recent and were interpreted for the first time by the Court of Appeal for Ontario in a series of decisions, including *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685. In that decision, the Court conducted a detailed review of section 137.1 of the *Courts of Justice Act*, including its purpose, which was described as follows, at para. 45:

> The purpose of s. 137.1 is crystal clear. Expression on matters of public interest is to be encouraged. Litigation of doubtful merit that unduly discourages and seeks to restrict free and open expression on matters of public interest should not be allowed to proceed beyond a preliminary stage. Plaintiffs who commence a claim alleging to have been wronged by a defendant's expression on a matter of public interest must be prepared from the commencement of the lawsuit to address the merits of the claim and demonstrate that the public interest in vindicating that claim outweighs the public interest in protecting the defendant's freedom of expression.

Positions of the Parties

[27] Ms. Donovan argues that the use of the word "proceeding" in section 137.1(3) does not just apply to court proceedings, but also applies to proceedings brought before administrative tribunals such as the Human Rights Tribunal.

[28] The Board argues that Ms. Donovan's application should be dismissed for the following reasons:

a. The Court's power to dismiss a proceeding pursuant to section 137.1 is limited to civil actions and applications. The Court does not have the power to dismiss a proceeding before an administrative tribunal such as the Human Rights Tribunal;

b. The Board's application before the Human Rights Tribunal does not relate to the “expression” of a matter of "public interest" because it arises from the Resignation Agreement;

c. The Human Rights Tribunal has exclusive jurisdiction over enforcement of the Resignation Agreement; and

d. Even if the Human Rights Tribunal does not have exclusive jurisdiction, allowing Ms. Donovan's application to go forward would lead to the unnecessary expenditure of limited judicial resources given that proceedings have already been commenced before the Human Rights Tribunal.

[29] In my view, the matter can be decided entirely on the basis of whether the Board's application to the Human Rights Tribunal is a "proceeding" for the purposes of section 137.1(3). However, as set out below, I do address the other issues raised by the Board to emphasize that I see no merit to those arguments and that my decision is confined to the jurisdictional issue.

Whether the application to the Human Rights Tribunal is a "proceeding" for the purpose of section 137.1(3) of the Courts of Justice Act

[30] The determination of this issue is a matter of statutory interpretation.

2019 ONSC 818 (CanLII)

[31] As held by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[32] From a review of the use of the word “proceeding” in section 137.1(3) of the *Courts of Justice Act* in the context of the statute as a whole, in my view this section does not give the Court jurisdiction to dismiss an application pending before an administrative tribunal such as the Human Rights Tribunal.

[33] Section 1 of the *Courts of Justice Act* does not define "proceeding", however it defines "action" and "application" as both being civil proceedings.

[34] Rule 1.03 of the Rules of Civil Procedure defines "proceeding" as "an action or application".

[35] Section 137.1 of the *Courts of Justice Act* falls within Part VII of the Act, which is titled "Court Proceedings". Section 95(1), which describes the application of Part VII of the Act, specifies that "This Part applies to civil proceedings in the province of Ontario".

[36] Notably, sections 95(2) and 95(3) identify specific sections of Part VII that "also" apply to proceedings under the *Criminal Code* and the *Provincial Offences Act*.

[37] Similarly, section 109, which sets out the requirements for service of a Notice of Constitutional Question on the Attorney General of Canada and the Attorney General of Ontario in certain circumstances, specifies at subsection 109(6) that "This section applies to proceedings before boards and tribunals as well as to court proceedings".

[38] While there is no case that has specifically decided whether the availability of motions under section 137.1(3) only applies to civil proceedings, a number of decisions in Ontario have decided that other provisions under Part VII of the *Courts of Justice Act* only apply to civil proceedings unless otherwise specified. For example, in *Poulton v. Ontario (Racing Commission)*, [1999] O.J. No. 3152 (C.A.), at para. 19, the Court of Appeal for Ontario held that the power to award costs under section 131(1) of the *Courts of Justice Act*, which falls within Part VII of the Act, does not apply to administrative tribunals because a "proceeding" within the meaning of the Act does not include a proceeding before an administrative tribunal:

> As stated above, a hearing before a tribunal is not a proceeding within the meaning of s. 131(1) of *Courts of Justice Act*. Nor was it a proceeding with in the meaning of its predecessor, the *Judicature Act*, R.S.O. 1970 c. 288 s. 82. The order in *Re Sawyer, supra*, should not be interpreted as authority for awarding costs of proceedings before the Commission.

2019 ONSC 818 (CanLII)

See also: *Chornyj v. Weyerhaeuser Co.*, [2007] O.J. No. 1758 (Div. Ct.), at paras. 11-12.

[39] Accordingly, it is evident that all provisions in Part VII of the *Courts of Justice Act* only apply to civil proceedings unless there is an indication that the specific provision also applies to other types of proceedings. There is no such indication with respect to section 137.1.

2019 ONSC 818 (CanLII)

[40] Ms. Donovan argues that section 137.4 of the *Courts of Justice Act* demonstrates that section 137.1 is meant to also apply to proceedings brought before administrative tribunals. Section 137.4 provides as follows:

> 137.4 (1) If the responding party has begun a proceeding before a tribunal, within the meaning of the *Statutory Powers Procedure Act*, and the moving party believes that the proceeding relates to the same matter of public interest that the moving party alleges is the basis of the proceeding that is the subject of his or her motion under section 137.1, the moving party may file with the tribunal a copy of the notice of the motion that was filed with the court and, on its filing, the tribunal proceeding is deemed to have been stayed by the tribunal.
>
> (2) The tribunal shall give to each party to a tribunal proceeding stayed under subsection (1),
>
> (a) notice of the stay; and
>
> (b) a copy of the notice of motion that was filed with the tribunal.
>
> (3) A stay of a tribunal proceeding under subsection (1) remains in effect until the motion, including any appeal of the motion, has been finally disposed of, subject to subsection (4).
>
> (4) A judge may, on motion, order that the stay is lifted at an earlier time if, in his or her opinion,
>
> (a) the stay is causing or would likely cause undue hardship to a party to the tribunal proceeding; or
>
> (b) the proceeding that is the subject of the motion under section 137.1 and the tribunal proceeding that was stayed under subsection (1) are not sufficiently related to warrant the stay.
>
> (5) A motion under subsection (4) shall be brought before a judge of the Superior Court of Justice or, if the decision made on the motion under section 137.1 is under appeal, a judge of the Court of Appeal.
>
> (6) This section applies despite anything to the contrary in the *Statutory Powers Procedure Act*.

[41] Rather than assisting Ms. Donovan in her argument, this provision reinforces my view that this Court does not have jurisdiction to dismiss the Board's application to the Human Rights Tribunal. Section 137.4 creates a mechanism for staying a proceeding before an administrative

tribunal where there is a related civil proceeding that is the subject of an application under section 137.1. However, section 137.4 does not provide a mechanism conferring authority on a Superior Court judge to stay or dismiss a standalone tribunal proceeding. This is evident from the language in section 137.4(1) which sets as a condition to the application of the section "that the proceeding relates to the **same matter** of public interest that the moving party alleges is the basis **of the proceeding that is the subject of his or her motion under section 137.1**" (emphasis added). Similarly, subsection (4)(b) sets out the Court's ability to lift a stay where "**the proceeding that is the subject of the motion under section 137.1** and **the tribunal proceeding** that was stayed under subsection (1) are not sufficiently related to warrant the stay" (emphasis added). This makes clear that, as a precondition to staying a tribunal proceeding, there must also be an underlying civil proceeding that is the subject matter of the section 137.1(3) motion. Therefore, section 137.4 does not provide for the stay or dismissal of an application before an administrative tribunal in the absence of a parallel proceeding in the Superior Court.

2019 ONSC 818 (CanLII)

[42] Besides her reliance on section 137.4 of the *Courts of Justice Act*, Ms. Donovan advances a number of other arguments in support of her position that section 137.1(3) allows the Court to dismiss a standalone proceeding before an administrative tribunal.

[43] First, she argues that the word "proceeding" is used in other parts of the *Courts of Justice Act* to refer to administrative proceedings, and therefore its use in section 137.1(3) of the *Courts of Justice Act* cannot be limited to civil proceedings before the Superior Court. For example, she relies on the use of the word "proceeding" in sections 137.4 and 109(6). However, as reviewed above, these sections deal with circumstances where the *Courts of Justice Act* explicitly applies to proceedings other than civil proceedings. There is no doubt that the word "proceeding" on its own does not only mean a civil proceeding. However, the issue in this case is what the word "proceeding" means as used in section 137.1(3) of the *Courts of Justice Act*, and whether in that context it is limited to civil proceedings. As reviewed above, a contextual analysis of that provision within the *Courts of Justice Act* makes clear that the Court's powers on a motion brought pursuant to section 137.1(3) are limited to dismissing actions or applications brought in the Superior Court.

[44] Second, Ms. Donovan relies on the Hansard debates that preceded the enactment of sections 137.1 to 137.5 of the *Courts of Justice Act*. She relies on the following statement made by Yasir Naqvi, who was the Minister of Community Safety and Correctional Services and the Government House Leader at the time:

> The legislation, if passed, will also make procedural amendments to the *Statutory Procedure Act* to avoid lengthy and expensive legal cost applications before administrative tribunals. That's a very important point, because we forget that a lot of matters in our system today are dealt with by quasi-judicial tribunals. They've been created because they're expert tribunals. They bring a certain level of expertise, and proceedings at those tribunals can be used as a matter of strategic lawsuits against public participation. The Ontario Municipal Board

comes to mind because of development issues that many, many communities face. So this particular change is extremely important.

[45] While Hansard debates can play a limited role in statutory interpretation (see *Rizzo & Rizzo Shoes Ltd.*, at para. 35), this passage does not assist Ms. Donovan's position. At the time the *Courts of Justice Act* was amended to add sections 137.1 to 137.5, amendments were also made to the *Statutory Powers and Procedures Act* to address the issue of costs before administrative tribunals. This passage clearly refers to those changes and is not relevant to the issue of whether the Court's powers under section 137.1(3) are meant to extend to the dismissal of proceedings before administrative tribunals. Ms. Donovan relies on a couple of other passages from the debates, but they offer no further support for her position.

2019 ONSC 818 (CanLII)

[46] Finally, Ms. Donovan relies on Rule 1.04(2) of the Rules of Civil Procedure which provides that "Where matters are not provided for in these rules, the practice shall be determined by analogy to them". The issue at the heart of this motion is a matter of jurisdiction and not a matter of procedure. Rule 1.04(2) does not give this Court jurisdiction to dismiss or stay a proceeding before the Human Rights Tribunal by analogy to the power to do so under section 137.1(3) of the *Courts of Justice Act*.

[47] Accordingly, based on the wording of section 137.1 (3) of the *Courts of Justice Act,* viewed in the context of the statute as a whole, this Court does not have jurisdiction to dismiss the application the Board has brought to the Human Rights Tribunal to enforce the confidentiality provision of the Resignation Agreement.

Other issues raised by the Board

[48] While the jurisdictional issue is sufficient to dispose of this motion, in my view it is appropriate and necessary to address the balance of the arguments advanced by the Board. I do so to make clear the limited scope of my decision and that I have in fact not decided the balance of the issues in favour of the Board.

[49] As indicated above, one of the Board's arguments is that the Court does not have jurisdiction over Ms. Donavan's application because the issues raised by the Board in its application to the Human Rights Tribunal do not relate to expressions made by Ms. Donovan in the public interest. In advancing this argument, the Board relies on the fact that its application arises from the terms of the Resignation Agreement. I would reject this argument.

[50] In its arguments, the Board suggested that its application to the Human Rights Tribunal would not be caught by section 137.1(3) because it is simply trying to enforce the Resignation Agreement. In my view, this argument is disingenuous. Section 137.1(3) does not limit the causes of action susceptible to its application. It may turn out that the Resignation Agreement provides a justification for the Board's attempt to interfere with Ms. Donovan's public expression, but the fact that the underlying proceeding is about the enforcement of an agreement does not oust this Court's jurisdiction to deal with the issue. In this respect, I note that the decision in *1704604 Ontario Ltd. v. Pointes Protection Association*, in which the Court of

Appeal addressed the purpose of section 137.1 and the powers of a court under that provision, dealt with facts very similar to those in this case. In that case, the plaintiff brought an action on the basis that statements made by the one of the defendants in a proceeding before the Ontario Municipal Board contravened a settlement agreement. The Court of Appeal found that section 137.1 applied to the litigation and dismissed the action. In doing so, the Court emphasized, at para. 120, that the issues to be decided pursuant to section 137.1 included the scope of the agreement and whether it foreclosed the evidence given by the defendants before the Ontario Municipal Board. The issue raised by the Board's application here is almost identical, and is whether the Resignation Agreement precludes Ms. Donovan from making public statements about her experience with the Board. If the Board had brought an action in this Court to enforce the Resignation Agreement, there is no doubt that Ms. Donovan could bring a motion pursuant to section 137.1 of *the Courts of Justice Act* for an early determination of whether the Board's litigation is an illegitimate attempt to preclude her from speaking out on matters of public interest. As I indicated to the parties during the hearing of this motion, whether Ms. Donovan's public statements about her former employer and her experience as a police officer are a form of expression in the public interest are issues that go to the core of determining a motion brought under section 137.1(3) of the *Courts of Justice Act*. They are not properly characterized as preliminary jurisdictional matters, and I would not have dismissed Ms. Donovan's application on that basis.

[51] The Board also 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. One of those issues was an application made by Ms. Donovan to the Human Rights Tribunal. Under the circumstances, it is difficult to see how the Tribunal has exclusive jurisdiction over the issue of whether the Resignation Agreement precludes Ms. Donovan from making the public statements targeted by the Board. Ultimately, it will be up to the Human Rights Tribunal to decide whether it has jurisdiction over the matter.

[52] Finally, the Board argues that, even if this Court has jurisdiction over Ms. Donovan's application, it should decline to exercise its jurisdiction because the matter is already before the Human Rights Tribunal. If this Court did have jurisdiction, for example if the Board had brought a civil action and a parallel application to the Human Rights Tribunal as contemplated by section 137.4 of the *Courts of Justice Act*, I do not see that this is a case in which it would be appropriate to decline jurisdiction. Section 137.1 of the *Courts of Justice Act* is meant to provide a rapid and effective mechanism for defendants facing litigation that attacks their freedom to express themselves on matters of public interest. There is no such mechanism available to Ms. Donovan before the Human Rights Tribunal. Section 137.4 clearly provides that, where there are proceedings before the Court and before a tribunal, the tribunal proceedings can be stayed pending the resolution of a motion under section 137.1(3). Therefore, in the face of a choice of forum, the legislature has signaled that the Court is clearly preferable.

2019 ONSC 818 (CanLII)

[53] Accordingly, while I have decided that this Court does not have jurisdiction to dismiss the Board's application to the Human Rights Tribunal, I do not agree with the other arguments advanced by the Board.

Board's undertaking

2019 ONSC 818 (CanLII)

[54] Before concluding my reasons, I wish to address one last matter. During argument, the Board noted on a number of occasions that Ms. Donovan had failed to comply with various timelines set by the Human Rights Tribunal for her responding materials, while arguing that the Tribunal is the forum in which the scope of the Resignation Agreement must be addressed. In response, Ms. Donovan, who is acting on her own behalf, explained that she is finding it challenging to deal with a multiplicity of legal proceedings, and that she has focused her efforts on her section 137.1 application to this Court.

[55] While I have found that this Court does not have the authority to dismiss the Board's application to the Human Rights Tribunal, there is no doubt that Ms. Donovan raises legitimate concerns about whether the Board's application is a justified effort to prevent her from speaking out about her experience as a police officer with the Board. In the circumstances, in my view, while she has been unsuccessful, Ms. Donovan's application to this Court was not frivolous or unreasonable.

[56] Given this context, during the hearing of this motion, I sought assurances from the Board that it would not impede Ms. Donovan's ability to make substantive arguments before the Human Rights Tribunal despite the fact that she may have missed some deadlines. In response, the Board's counsel gave an undertaking in court not to take the position before the Tribunal that Ms. Donovan is out of time to raise substantive arguments in response to the application. Therefore, subject to the Tribunal's ability to control its own process, at the Tribunal hearing Ms. Donovan should be allowed to raise issues she may wish to address about the Tribunal's jurisdiction over enforcement of the Resignation Agreement and to fully respond to the Board's position that the Resignation Agreement precludes her from speaking publicly about the matters the Board claims are captured by the confidentiality provision of the agreement.

Conclusion

[57] For the reasons above, I find that the Superior Court does not have jurisdiction over Ms. Donovan's application, and the application is therefore dismissed.

[58] At the conclusion of the hearing, I invited submissions on costs. Quite properly, the Board indicated that, in the event it was successful on the motion, it does not seek costs. Accordingly, there shall be no costs on the motion or application.

FAVREAU J.

RELEASED: February 1, 2019

2019 ONSC 818 (CanLII)

CITATION: Donovan v. (Waterloo) Police Services Board, 2019 ONSC 818
COURT FILE NO.: CV-18-00605386-0000
DATE: 20190201

2019 ONSC 818 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N :

KELLY LYNN DONOVAN

– AND –

REGIONAL MUNICIPALITY OF WATERLOO POLICE SERVICES BOARD

REASONS FOR JUDGMENT

FAVREAU J.

RELEASED: February 1, 2019

2019 ONSC 818 (CanLII)

Appendix F

COURT OF APPEAL FOR ONTARIO

CITATION: Donovan v. Waterloo Regional Police Services Board, 2019 ONCA 845
DATE: 20191025
DOCKET: C66718

2019 ONCA 845 (CanLII)

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

2019 ONCA 845 (CanLII)

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

2019 ONCA 845 (CanLII)

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

2019 ONCA 845 (CanLII)

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.

2019 ONCA 845 (CanLII)

[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, <u>it would be contrary to public policy to allow employers and workers to contract out of its regime</u>, 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

2019 ONCA 845 (CanLII)

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.

2019 ONCA 845 (CanLII)

[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.

2019 ONCA 845 (CanLII)

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."

2019 ONCA 845 (CanLII)

Appendix G

CITATION: Jaffer v. York University, 2010 ONCA 654
DATE: 20101007
DOCKET: C51476

COURT OF APPEAL FOR ONTARIO

Feldman, MacFarland and Karakatsanis JJ.A.

BETWEEN:

Ashif A. Jaffer

Plaintiff (Appellant)

and

York University

Defendant (Respondent)

James S. Schacter, for the appellant

Alexander D. Pettingill, for the respondent

Heard: June 28, 2010

On appeal from the order of Justice Romain Pitt of the Superior Court of Justice, dated November 2, 2009, with reasons reported at 2009 CanLII 60086 (ON S.C.).

Karakatsanis J.A.:

[1] This is an appeal from the order of Pitt J. dismissing the appellant's claim against the respondent university seeking damages for the university's failure to accommodate him as a student with a disability.

2010 ONCA 654 (CanLII)

[2] The respondent, York University, brought a motion under rr. 21 and 25.11 for an order striking out the appellant's Statement of Claim on the basis that it failed to plead a known cause of action within the jurisdiction of the Superior Court of Justice, or in the alternative, that it disclosed no reasonable cause of action, or was frivolous, vexatious, and otherwise an abuse of process.

2010 ONCA 654 (CanLII)

[3] The motion judge found that the matter was outside the jurisdiction of the Superior Court of Justice on the basis that the issue relates to academics and is within the discretion of the University or alternatively, if the issue is one of human rights, it is properly a matter for the Ontario Human Rights Commission (OHRC).[1]

BACKGROUND FACTS

[4] The appellant, Ashif Jaffer, has Trisomy 21 Down Syndrome. He had been accommodated in high school in accordance with an Independent Education Plan and graduated as an Ontario scholar.

[5] His pleadings assert that when he was 19 years old, he enrolled at Glendon Campus at York University for the academic term commencing in September 2006. After his application had been accepted, in the summer leading up to and during his freshman year there were communications between the parties regarding the accommodations

---

[1] Although the motion judge and the parties refer to the OHRC, subsequent to the *Human Rights Code Amendment Act, 2006,* S.O. 2006, c. 30, the proper body to which to apply is the Human Rights Tribunal of Ontario: *Human Rights Code*, R.S.O. 1990, c. H.19, s. 34, as amended by S.O. 2006, c. 30, s. 5.

Jaffer should receive, but no resolution was reached. In April 2007, one of Jaffer's professors offered Jaffer the opportunity to resubmit a paper, and confirmed that he would not be giving Jaffer a failed grade but would instead enter a deferred status. That paper was submitted in the summer of 2007. Jaffer pleads that he relied upon his professor's statements and understood that his status for all his academic courses for the 2006-2007 academic term would be deferred because of the ongoing dispute over the failure to accommodate him. He enrolled in courses for his second year but was informed that, because he did not achieve at least a D+ average, his academic status was "failed to gain standing, no credit retained". He was advised that this standing meant he could not continue his studies. His relationship with York has now ended.

The Statement of Claim

[6] Jaffer claims breach of contract, negligence and negligent misrepresentation, as well as a breach of a duty of good faith, for York's failure to accommodate his disabilities and to properly investigate, assess and evaluate his claim for accommodation.

[7] With respect to breach of contract, Jaffer alleges at paras. 47 and 48 of his Statement of Claim that York "is in breach of its contract with him to provide educational courses" and "failed to honour its contractual obligations, including, but [not] limited to, failing to provide appropriate accommodations to Mr. Jaffer while he attended courses at Glendon Campus given that he was a student with a disability".

2010 ONCA 654 (CanLII)

2010 ONCA 654 (CanLII)

[8] At paras. 49 and 50, the Statement of Claim also alleges that York has "a duty to act in good faith in providing Mr. Jaffer with timely and appropriate accommodations in accordance with [his] specific needs" and "has a duty to act in good faith by acting fairly and expeditiously in investigating, assessing, and evaluating [his] claim for accommodations, particularly where they have knowledge that [he] is a person in a vulnerable position with a disability".

[9] Jaffer further claims at para. 51 that York "owes a duty of care to [him] and is obliged to deal with him in a fair, honest, and judicious manner in the investigation, assessment, and evaluation of the necessary and appropriate accommodations [he] requires", and that there is a "special relationship" between the parties "giv[ing] rise to a duty of care with respect to the representations made by its agents".

[10] At para. 53, Jaffer alleges "that the misrepresentations made by the professor that Mr. Jaffer could provide his paper by the end of the summer of 2007 constituted negligent misrepresentation and was made with the purpose of inducing Mr. Jaffer into refraining from pursuing further complaints or action against the professor" or others at York.

[11] Finally, Jaffer also pleads at para. 54 that York "failed to comply with their own policies to provide accommodations to students with disabilities, which clearly breached their duty of good faith". He provides 13 particulars relating to York's failure to accommodate him and its failure to properly investigate his situation, including that it

"failed to allow Mr. Jaffer to complete his courses... with timely and appropriate accommodations" and "issued failing grades… rather than an 'in process' grade standing".

2010 ONCA 654 (CanLII)

[12] While Jaffer refers in his factum to a breach of fiduciary duty, it has not been pleaded in the Statement of Claim.

The motion judge's decision

[13] The motion judge concluded at paras. 20 and 24 that there was no jurisdiction to hear the action, both because the complaint was academic in nature and because it belonged before the OHRC:

> [I]t seems to me that this is a matter outside of the court's jurisdiction. There are two parts to the plaintiff's argument. First, he asserts that the school failed to accommodate him. Second, he asserts that this failure to accommodate led to his unjust expulsion from the program. Failure to accommodate belongs to the OHRC, and a dispute about expulsion is within the university's internal resolution process.
>
> ...
>
> While there may be contractual or tortious issues within the broader claim, if the pith and substance of the impugned conduct is academic in nature, the action cannot be continued in the courts.

ISSUES

[14] This appeal raises the issue of whether the Superior Court of Justice has jurisdiction to hear this action notwithstanding that it relates to a dispute about academics

and, if so, whether the pleadings disclose a reasonable cause of action based upon breach of contract or in tort. The appeal also raises the issue of whether this matter should be properly dealt with under the enforcement scheme of the *Human Rights Code,* R.S.O. 1990, c. H.19 (the "Code"). Specifically, this appeal raises the following questions:

1. Does the court lack jurisdiction to hear this action because it relates to a dispute as to academics?

2. Does the court have jurisdiction to hear an action based upon the university's failure to accommodate disabilities?

3. If the court has jurisdiction to hear this action, do the pleadings disclose a reasonable cause of action for breach of contract, including a breach of the duty of good faith?

4. If the court has jurisdiction to hear this action, do the pleadings disclose a reasonable cause of action for negligence or misrepresentation?

[15] For the following reasons, I would affirm the motion judge's decision dismissing Jaffer's claim, but I would grant Jaffer leave to amend the Statement of Claim in accordance with these reasons.

2010 ONCA 654 (CanLII)

2010 ONCA 654 (CanLII)

ANALYSIS

Rules

[16] A Rule 21 motion must be based upon the facts alleged in the Statement of Claim unless they are patently ridiculous or incapable of proof: see e.g. *Slater Steel Inc (Re)*, 2008 ONCA 196, at para. 22, leave to appeal refused, [2008] S.C.C.A. No. 230. A pleading should only be struck under Rule 21 where it is "plain and obvious" that the claim has no chance of success: *Freeman-Maloy v. Marsden* (2006), 79 O.R. (3d) 401 (C.A.), at para. 18, leave to appeal refused, [2006] S.C.C.A. No. 201, citing *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.

[17] There are a number of different grounds upon which a pleading may be struck or an action may be dismissed. The rules relevant to this appeal provide:

> **21.01** **(1)** A party may move before a judge,
>
> …
>
> (b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,
>
> and the judge may make an order or grant judgment accordingly.
>
> **(2)** No evidence is admissible on a motion,
>
> …
>
> (b) under clause (1) (b).

> **(3)** A defendant may move before a judge to have an action stayed or dismissed on the ground that,
>
> > (a) the court has no jurisdiction over the subject matter of the action;
> >
> > …
> >
> > (d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court,
>
> and the judge may make an order or grant judgment accordingly.
>
> > ...
>
> **25.11** The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,
>
> > (a) may prejudice or delay the fair trial of the action;
> >
> > (b) is scandalous, frivolous or vexatious; or
> >
> > (c) is an abuse of the process of the court.

2010 ONCA 654 (CanLII)

1. Jurisdiction to hear an action based upon a dispute as to academics

[18] Jaffer submits that the motion judge erred in finding that the action related to a matter of academics and therefore in finding that the court had no jurisdiction to hear an action based in contract and tort. He argues that having pleaded that it was an implied term of his contract with York that he was to be provided with appropriate accommodation for his disability, the scope and extent of the contract raises triable issues. Further, Jaffer argues that he has properly pleaded that York owed him a duty of

care and a duty to act in good faith to provide appropriate accommodations. With respect to the negligent misrepresentation claim, Jaffer claims that he has pleaded the elements of the tort and seeks damages for his unnecessary expenses and for the resulting delayed entry into the workforce. Jaffer asserts that, given that these causes of action were properly pleaded, the Superior Court had jurisdiction to hear the claim.

2010 ONCA 654 (CanLII)

[19] York submits that, even if Jaffer frames the dispute in contract or tort, the essential character of the dispute is academics as it arises out of academic decisions and procedures of the university and is therefore beyond the jurisdiction of the court. Essentially, York argues, Jaffer complains that during his first academic year he should have obtained a deferred grade standing instead of failing grades, and that in assigning him failing grades, York failed to follow its own internal policies and procedures. York submits that a student has a right of judicial review with respect to procedural matters, but the court should not be asked to interfere with a university's decisions or judgments relating to academic matters. York submits that Jaffer has attempted to frame his dispute with his professor regarding his paper assignment as grounds for a claim for negligent misrepresentation; however, that dispute is "part and parcel" of the dispute over Jaffer's grades.

[20] The motion judge did not have the benefit of this court's decision in *Gauthier c. Saint-Germain*, 2010 ONCA 309, when he concluded at para. 24 of the endorsement that "[w]hile there may be contractual or tortious issues within the broader claim, if the pith

and substance of the impugned conduct is academic in nature, the action cannot be continued in the courts." After the release of the motion judge's reasons, this court in *Gauthier* addressed the basis upon which a university may be sued in relation to academic matters.

2010 ONCA 654 (CanLII)

[21] In *Gauthier*, Rouleau J.A. at para. 29 started from the proposition that the Superior Court of Justice is a court of inherent jurisdiction. Its jurisdiction is therefore limited only by express language in a statute or a contractual provision. After analyzing the case law related to academic questions, he determined at para. 45 that the jurisprudence did not stand for the broad proposition that the court lacks jurisdiction solely because a breach of contract or negligence claim arises out of a dispute of an academic nature. At para. 46, Rouleau J.A. found that where the elements of a breach of contract or negligence are properly pleaded, the Superior Court will have jurisdiction to hear a claim even if the dispute is academic in nature and arises out of the academic activities of the university.

[22] I do not accept York's submission that *Gauthier* was wrongly decided or that there are conflicting cases of this court. *Gauthier* has clarified that the decisions of this court upholding the dismissal of claims relating to academic matters did not do so on the basis that the court lacked jurisdiction pursuant to r. 21.01(3)(a), but rather under r. 21.01(1) because the pleadings did not disclose a reasonable cause of action based upon contract, tort, or negligence or under r. 25.11 because the cause of action was untenable in law.

[23] For example, in *Wong v. University of Toronto* (1992), 4 Admin. L.R. (2d) 95 (Ont. C.A.), the question of jurisdiction was not argued on appeal. The plaintiff argued in that case that the university's decision to assign him a new supervisor constituted a breach of contract. However, this court noted that for a cause of action based upon breach of contract to succeed, the plaintiff would have to show that it was an implied term of the contract that the university agreed that it would provide a specific professor as supervisor. The court held that it was not necessary to imply such a term in that case in order to give the "contract" efficacy. The basis for the Court of Appeal's decision was therefore based upon the terms of the contract between the university and its student, and not the jurisdiction of the Superior Court.

2010 ONCA 654 (CanLII)

[24] In *Dawson v. University of Toronto,* 2007 ONCA 875, this court did not adopt all the reasons of the motion judge by agreeing with the result that the statement of claim disclosed no cause of action. The court did not base its decision upon the court's lack of jurisdiction; rather, the court concluded that the particulars of the plaintiff's "negligence" claim demonstrated that the plaintiff's complaint was part and parcel of her academic dispute with the university. The court also noted that in advising the plaintiff of her options, the supervising professor referred her to the calendar which clearly set out the options available to her. Thus, the claim did not disclose a valid cause of action in negligence.

[25] In *Zabo v. University of Ottawa*, 2005 CanLII 22452 (ON C.A.), leave to appeal refused, [2005] S.C.C.A. No. 354, this court agreed that the motion judge properly dismissed the action because, on the facts pleaded, breach of contract could not succeed as a cause of action. The court was doubtful that the action could have been dismissed under r. 21.01(3)(a) on the ground that the court had no jurisdiction, but concluded that the claim was untenable in law as essentially an academic matter and thus could be struck under r. 25.11. It should also be noted that the motion judge refused to strike out claims based on allegations of bad faith and a conspiracy to cause the plaintiff harm: [2004] O.J. No. 1499, at para. 57. Thus, neither the motion judge nor the Court of Appeal found that the court lacked jurisdiction over the dispute by virtue of its academic nature. Rather, the question was one of the tenability of each claim.

[26] After reviewing the cases, Rouleau J.A. concluded at para. 46 of *Gauthier* that it is the remedy sought that is indicative of jurisdiction. Judicial review is the proper procedure when seeking to reverse an internal academic decision. However, if a plaintiff alleges the basis for a cause of action in tort or contract and claims damages, then the court will have jurisdiction even if the dispute arises out of an academic matter:

> À mon avis, pour déterminer si la cour est compétente, il est plus révélateur de se pencher sur la réparation revendiquée par le demandeur. Quand une partie cherche à faire renverser la décision académique interne d'une université, la voie appropriée est le contrôle judiciaire. Par contre, si la partie demanderesse allègue les éléments constitutifs d'une cause d'action fondée en délits civils ou en rupture de contrat, tout en réclamant des dommages-intérêts, la cour s'avérera

2010 ONCA 654 (CanLII)

> compétente et ce, même si le différend découle des activités scolaires ou académiques de l'université en question.
>
> [In my opinion, to determine whether the court has jurisdiction it is more useful to look at the remedy claimed by the plaintiff. When a party is seeking to have the internal academic decision of a university reversed, the proper procedure is judicial review. However, if the plaintiff is alleging the basis for a cause of action in tort or breach of contract and claiming damages, the court will have jurisdiction even if the dispute arises out of the scholastic or academic activities of the university in question. **[Note: this is an unofficial translation]**

2010 ONCA 654 (CanLII)

[27] At para. 47, Rouleau J.A. noted that by enrolling at the university, it is understood that the student agrees to be subject to the institution's discretion in resolving academic matters, including the assessment of the quality of the student's work and the organization and implementation of university programs. As a result, a student will usually have to do more than simply argue that an academic result is wrong or a professor is incompetent in order to make out a cause of action in breach of contract or a duty of care.

[28] Thus, although the court has jurisdiction to hear such claims, Rouleau J.A. noted at para. 50 that the court may strike a claim under r. 21.01(1), or in exceptional circumstances r. 25.11, when it appears that the cause of action is untenable or unlikely to succeed. This will occur if, for example, an action is simply an indirect attempt to appeal an academic decision and the appropriate remedy would be judicial review, or if the pleadings do not disclose details necessary to establish that the university's actions go beyond the broad discretion that it enjoys.

2010 ONCA 654 (CanLII)

[29] The Superior Court's jurisdiction over the action in this case is thus not ousted by the raising of issues relating to the university's academic function. As in *Gauthier*, the action is not simply an indirect attempt at judicial review, as the appellant does not seek to reverse decisions with respect to his grades or compel the university to readmit him. His claim is that the university owed him various obligations in both contract and in tort, and that its failure to meet those obligations has caused him pecuniary and non-pecuniary damages. Such claims fall within the jurisdiction of the Superior Court and may proceed if they are properly pleaded and tenable in law and disclose a reasonable cause of action.

[30] There is no dispute that the relationship between a student and a university has a contractual foundation, giving rise to duties in both contract and tort: *Young v. Bella*, [2006] 1 S.C.R. 108, at para. 31.

[31] The real issue in this case is not whether the dispute is academic in nature, but rather whether the pleadings support a cause of action in either contract or tort.

2. Duty to accommodate disabilities

[32] With respect to the application of the Code, it is Jaffer's position that the motion judge erred in finding this matter falls only under the jurisdiction of the OHRC and is solely a discrimination claim. He submits that the court has jurisdiction to hear cases that not only touch on discrimination, but refer to human rights legislation in pursuing a civil

action. Jaffer notes that he neither relies on human rights legislation nor asserts any claim for discrimination in his pleadings.

2010 ONCA 654 (CanLII)

[33] York submits that the motion judge did not err in finding that this is a matter to be properly brought before the OHRC. They argue that Jaffer's action invokes the public policy expressed in the Code, namely, the university's obligation to accommodate students with disabilities. The action therefore falls within the jurisdiction of the OHRC and not the Superior Court.

[34] The complaint in this case is that York failed to offer Jaffer reasonable accommodation for his disability in its provision of educational services. However, for the reasons below, such failure does not by itself give rise to an action in negligence.

[35] The Statement of Claim does not specifically refer to the Code. Although the pleadings rely upon the *Ontarians with Disabilities Act, 2001*, S.O. 2001, c. 32, counsel was unable to identify the relevance of the legislation or in what respect it was relied upon. Instead, the pleadings appear to allege that York's duty to accommodate arose from the special relationship with Jaffer; from its duty of care and its duty to act in good faith; and from its own policies and procedures.

[36] In the absence of a specific contractual term, however, the duty to accommodate arises from the Code. It is common ground that the Code obligates an educational institution to accommodate disabilities. According to section 1 of the Code, every person

has a right to equal treatment with respect to services, goods and facilities, without discrimination because of "disability". Education is a service under the Code: *Peel Board of Education v. Ontario (Human Rights Commission)* (1990), 72 O.R. (2d) 593 (Div. Ct.). The appellant suffered from a "disability" as defined under s. 10 of the Code. Section 17 of the Code requires accommodation of a disability unless it cannot be provided without undue hardship on the person responsible for providing accommodation. In addition, the OHRC has issued detailed Policies and Guidelines, both on Accessible Education and Disability and the Duty to Accommodate. Accordingly, the Code, along with the publications of the OHRC, sets out the analysis and principles which are applicable when determining whether an educational institution has made the appropriate accommodations for a student with a disability. The duty to accommodate a disability is a central part of the public policy enshrined in the Code.

[37] In *Seneca College of Applied Arts and Technology v. Bhadauria*, [1981] 2 S.C.R. 181, the Supreme Court of Canada rejected the recognition of an independent tort of discrimination and established that a civil cause of action cannot be grounded directly in an allegation of a breach of human rights legislation or the public policy expressed therein. If a claim for discrimination is founded directly upon a breach of the Code, or invokes the public policy expressed in the Code, that claim cannot be brought in the courts, but rather is subject to the comprehensive enforcement scheme of the Code for a violation of its substantive terms. The Supreme Court of Canada recognized the

2010 ONCA 654 (CanLII)

comprehensiveness of human rights legislation, its administrative and adjudicative function and its remedial focus.

[38] In *Honda Canada Inc. v. Keays*, [2008] 2 S.C.R. 362, at para. 63, the Supreme Court of Canada concluded that a breach of the Code is neither an actionable tort, nor an "independently actionable wrong" for the purposes of awarding punitive damages.

[39] To recognize a common law duty of care that required the university to provide reasonable accommodations would, in my view, undermine the comprehensive dispute resolution mechanisms established by the Code in precisely the ways that the Supreme Court has cautioned against in cases such as *Bhadauria* and *Keays.* The Code contemplates more flexible remedial measures in addition to compensation. A civil action based upon the allegation that a university breached its duty of care to its student by failing to accommodate disabilities (or in its process related to that duty) cannot be based solely upon the duty created by the Code. To do so would be to recognize the independent tort that was specifically rejected in *Bhadauria*.

[40] Thus, in the absence of a specific contractual provision, the duty to accommodate in the provision of education does not exist independently from the Code. There is no free-standing duty of care to provide accommodation that can ground a claim in negligence. The motion judge was therefore correct in his view that whether or not the university failed to comply with its duty to accommodate under the Code was a matter for the OHRC.

2010 ONCA 654 (CanLII)

[41] It may be however that breach of the Code is relevant to a cause of action that is otherwise based upon breach of contract or negligent misrepresentation.

[42] For example, this court has expressly upheld pleadings that contained allegations of discrimination in constructive dismissal claims. In *L'Attiboudeaire v. Royal Bank of Canada* (1996), 131 D.L.R. (4th) 445, this court was satisfied that the cause of action alleged was not based upon a breach of human rights legislation or on an invocation of the public policy expressed in that legislation. Morden A.C.J.O. explained that in order to prove conduct that amounted to constructive dismissal, the plaintiff did not need to invoke the public policy of the *Canadian Human Rights Act*. This did not mean that the Act's terms could not be relevant factors to take into account in assessing the defendant's conduct. See also *Andrachuk v. Bell Globe Media Publishing Inc. (c.o.b. Globe and Mail)* (2009), 71 C.C.E.L. (3d) 224 (Ont. S.C.).

[43] Section 46.1 of the Code provides:

> (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

2010 ONCA 654 (CanLII)

> 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.

2010 ONCA 654 (CanLII)

[44] Although a person may not commence an action based solely on an infringement of a right under Part I of the Code, breach of the Code may be properly raised in an action if the claim is otherwise properly before the court. Thus, whether or not a claim for breach of the duty to accommodate disabilities can proceed in the Superior Court depends upon whether or not the pleading discloses a reasonable cause of action that does not arise solely from a breach of the Code.

3. Do the pleadings disclose a reasonable cause of action for breach of contract?

[45] In *Gauthier*, Rouleau J.A. cautioned at para. 48 that in a claim for breach of contract, a student will have to demonstrate that the university breached an implied or express term of the contract to which it became a party in accepting the student's enrolment. By enrolling in the university, the student agrees to be subject to the institution's discretion in resolving academic matters, including the assessment of the quality of the student's work and the organization and carrying out of university programs: para. 47. He also stressed at paras. 47-48 that simply asserting that a mark was incorrect or a professor was incompetent will not normally be sufficient to establish a

cause of action, but that a plaintiff must plead specific facts to demonstrate the terms of the contract and how they were breached.

[46] The pleadings in the present case contain a bald statement that it was an implied term of the contract between the parties that the university would accommodate Jaffer's disability. It does not identify the nature or source of the term requiring accommodation in the contract between Jaffer and York, nor does it plead the circumstances to support such a conclusion.

[47] There is no basis in the facts pleaded upon which to find that accommodation was an implied term of the contract assumed by the institution in approving the student's enrolment. For example, even on a generous reading of the pleadings there is no suggestion that the university was aware of any disabilities when it accepted him as a student. In fact, the pleadings suggest the opposite – that it was only after Jaffer's acceptance into York that the appellant's mother "contacted student services to advise that [the appellant] was a student with a disability and required accommodation". In oral argument, counsel for Jaffer asserted that York knew or ought to have known about Jaffer's needs for accommodation prior to accepting him, as that acceptance was based on his high school record and the IEP formed part of that record. This circumstance could support Jaffer's claim if it was included in the pleadings. Moreover, there is no suggestion that York's policies provided for accommodation independently of York's obligations under the Code or that York intended to bind itself to such an obligation.

2010 ONCA 654 (CanLII)

[48] In my view, this claim does not have the specificity called for in *Gauthier*. There is no basis in the facts pleaded upon which to find that accommodation was an express or implied term of the contract between the university and Jaffer. Nor is it necessary to imply such a term in order to give effect to the agreement. In addition, the appellant has not given any detail as to what accommodations he was entitled to pursuant to his contract with the university or as to what accommodations he was offered. Rather, he simply asserts that the accommodations offered were not sufficient or appropriate. Without more, this does not establish a cause of action for breach of contract.

[49] Jaffer's pleadings suggest that York breached its duty of good faith. Such a duty is not a stand-alone duty that is independent from the terms expressed in the contract or from the objectives that emerge from the provisions: *Transamerica Life Canada Inc. v. ING Canada Inc.* (2003), 68 O.R. (3d) 457 (C.A.), at para. 53. In order for a claim for a breach of duty of good faith to survive, such a duty must be an express or implied term of the contract and there must be a tenable cause of action for breach of contract.

[50] While counsel suggested that it may be possible to amend the pleadings to include facts that allege York was aware of the student's disability and undertook to provide him with accommodations or that it bound itself to specific terms regarding accommodation independently from its obligations under the Code, the pleadings do not currently allege or support such a conclusion.

2010 ONCA 654 (CanLII)

[51] Accordingly, I conclude that the motion judge did not err in dismissing the claim for breach of contract as pleaded, although I do so for different reasons. I would vary his order, however, to strike the pleadings with respect to breach of contract and duty of good faith and permit an amendment to the pleadings (if available on the facts) to plead the specific term of the agreement that was allegedly breached and the supporting circumstances, as indicated above. In so amending the pleadings, the appellant may choose to include the facts on which he asserts the existence, contents, and breach of the obligation owed by the university to him.

2010 ONCA 654 (CanLII)

4. Do the pleadings disclose a reasonable cause of action for negligent misrepresentation?

[52] As discussed above, an allegation that the university was negligent based solely upon the breach of its duty to provide accommodation as required by the Code does not create an actionable tort. However, that failure may be part of a claim for negligent misrepresentation.

[53] A duty of care may exist between a university and its students based upon a “special relationship”: see *Olar v. Laurentian University* (2007), 49 C.C.L.T. (3d) 257 (Ont. S.C.), at para. 70, aff’d 2008 ONCA 699. In that case, a student reasonably relied on information set out in the university’s calendar and student guide that transferring to another university would be routine and without problems. The university had knowledge

that the representations were not accurate. The student recovered based upon the misrepresentation by the university.

2010 ONCA 654 (CanLII)

[54] As particulars of negligent misrepresentation, Jaffer alleges that in April of his first year, one of his professors offered him the opportunity to redo a paper over the summer and confirmed he would not be giving Jaffer a failed grade but would instead enter a deferred status. That paper was submitted in the summer of 2007. Although the professor confirmed receipt of the paper, Jaffer never received a grade for the paper. Jaffer pleads that he relied upon his professor's statements and understood that his status for all of his courses from the 2006-2007 term would be deferred because of the ongoing dispute over the failure to accommodate him. As a result, he was induced to agree to attend the university and to pay tuition and additional costs for his attendance, with the expectation that he would receive appropriate accommodations. This reliance was to his detriment as he was forced out of the university, which has resulted in delay in his entry into the workforce.

[55] The Statement of Claim also alleges at para. 53 that the misrepresentations were "made with the purpose of inducing Mr. Jaffer into refraining from pursuing further complaints or action against the professor" or others at York.

[56] I note that in *Gauthier*, Rouleau J.A. cautioned at para. 49 that to establish a breach by the university of its duty of care, a student must plead specific facts that could

demonstrate that the conduct constituted an intentional tort or fell outside the broad margin of discretion enjoyed by the university and its professors.

2010 ONCA 654 (CanLII)

[57] In my view, Jaffer has not made out a claim for negligent misrepresentation. The professor's offer to permit Jaffer to redo a paper in his course cannot reasonably found an action in negligent misrepresentation on the facts as pleaded. It is not clear that this was a misrepresentation or how it could result in the expectation that Jaffer would have a deferred standing in his other courses or that he would be accommodated in his other courses. The pleadings do not establish a causal link between the misrepresentation and the damages claimed. In other words, the pleadings do not establish that, but for the misrepresentation, Jaffer would have been able to continue his studies.

[58] Accordingly, as with the breach of contract claim, I conclude that the motion judge did not err in striking the claim for negligent misrepresentation, although I do so for different reasons. I would again vary his order, striking the negligent misrepresentation claim but permitting an amendment to the pleadings (if available on the facts) to plead specific facts demonstrating that the misrepresentation in question caused the damages pleaded.

DISPOSITION

[59] For these reasons, I would allow the appeal in part. I would strike the pleadings but vary the motion judge's order to permit Jaffer to amend the Statement of Claim in

accordance with these reasons. Costs to the respondent fixed at $7,500, inclusive of disbursements and taxes.

RELEASED: October 7, 2010 “KF”

“Karakatsanis J.A.”
“I agree K. Feldman J.A.”
“I agree J. MacFarland J.A.”

2010 ONCA 654 (CanLII)