Be Careful What You File When Defending a Class Action

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We have previously written about a proposed class action that had been brought on behalf of current and former female officers with the Waterloo Regional Police Service, alleging gender-based discrimination on the part of the Waterloo Regional Police Services Board and the Waterloo Regional Police Association. That action was dismissed on the basis that the courts lacked jurisdiction as the result of the binding arbitration required by the *Police Services Act.* In opposing the class action, the Police Services Board filed an affidavit that set out information about female police officers who had made complaints to the Ontario Human Rights Tribunal, and the outcome of those complaints.

While the class action was dismissed, the way in which the Police Services Board had defended the case led to a further lawsuit against it. The self-represented plaintiff in this new action (which is not a class proceeding), is a former Waterloo police officer, who had previously settled her human rights complaint with the Board. In her new action, she alleges (among other things) that the Police Services Board and the Chief of Police (who swore the affidavit used in the class action) breached the terms of the Settlement Agreement, in respect of her human rights complaint, which included a confidentiality clause.

The defendants brought a motion to strike the claim for failing to disclose a reasonable cause of action pursuant to s. 21.01(1)(b) of the *Rules of Civil Procedure*. On hearing the motion, the judge agreed with the defendants and struck the plaintiff's claim without leave to amend. Specifically, the motion judge concluded that because Chief Larkin's affidavit was used in defending a class action in court, it was covered by absolute privilege and could not give rise to a cause of action. The Ontario Court of Appeal in *Donovan v. Waterloo Police Services Board* now has overturned the Superior Court of Justice's determination and held that it was not plain and obvious that the plaintiff's action could not succeed.

The Court of Appeal pointed to competing interests and privileges raised by the pleading. The Court noted the overriding public interest in favour of settlement (and of enforcing settlement agreements). The Court also questioned whether it was necessary for the defendants to have relied on the information contained in the affidavit, which allegedly breached the confidentiality clause, during their defence of the class action.

The Court of Appeal overturned the order of the motion judge, and allowed the plaintiff leave to amend the Amended Statement of Claim in relation to the claim against the Chief of Police. In doing so, the Court of Appeal afforded the self-represented plaintiff the opportunity to properly plead the facts necessary to establish a claim for misfeasance in public office, which the plaintiff had not done at first instance.

Overall, this case may act as a cautionary tale about the evidence defendants file in class actions and the way in which additional issues can arise even after a class action has been resolved.

By

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Class Action Defence

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