

Be Careful What You File When Defending a Class Action

December 20, 2019

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

[Jonathan Thoburn](#)

Expertise

[Class Action Defence](#)

BLG | Canada's Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 800 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

blg.com

BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

The information contained herein is of a general nature and is not intended to constitute legal advice, a complete statement of the law, or an opinion on any subject. No one should act upon it or refrain from acting without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns. BLG does not warrant or guarantee the accuracy, currency or completeness of this publication. No part of this publication may be reproduced without prior written permission of Borden Ladner Gervais LLP. If this publication was sent to you by BLG and you do not wish to receive further publications from BLG, you may ask to remove your contact information from our mailing lists by emailing unsubscribe@blg.com or manage your subscription

preferences at [blg.com/MyPreferences](https://www.blg.com/MyPreferences). If you feel you have received this message in error please contact communications@blg.com. BLG's privacy policy for publications may be found at [blg.com/en/privacy](https://www.blg.com/en/privacy).

© 2026 Borden Ladner Gervais LLP. Borden Ladner Gervais LLP is an Ontario Limited Liability Partnership.