Court file No.: CV-12-470815 / CV-13-476321

ONTARIO
SUPERIOR COURT OF JUSTICE

(Court seal)
B E T W E E N

MICHAEL JACK

Plaintiff

- and –

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTRY OF COMMUNITY SAFETY AND CORRECTIONAL SERVICES OPERATING AS THE ONTARIO PROVINCIAL POLICE AND ITS EMPLOYEES MARC GRAVELLE, JOHN POLLOCK, SHAUN FILMAN, JENNIFER PAYNE, JAMIE BROCKLEY, MELYNDA MORAN, MARY D'AMICO, RICHARD NIE, BRAD RATHBUN, ROBERT FLINDALL, PETER BUTORAC, RONALD CAMPBELL, COLLEEN KOHEN, HUGH STEVENSON, AND MIKE ARMSTRONG AND ITS RETIREES MIKE JOHNSTON AND CHRIS NEWTON

ONTARIO PROVINCIAL POLICE ASSOCIATION AND ITS REPRESENTATIVES SHAUN FILMAN, KAREN GERMAN, JIM STYLES AND MARTY MCNAMARA

Defendants

PLAINTIFF'S RESPONDING FACTUM

(Returnable: April 2nd, 2014)

Date: Friday, February 28, 2014

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PART ONE – INTRODUCTION

1. The overarching issue on these motions is to what extent defendants may rely on limitation periods to preclude meritorious claims such as the plaintiff's against one of the Ministries of this government operating as the Ontario Provincial Police (OPP).

2. It is a single plaintiff action involving a request by the plaintiff for special representation by a friend who has experienced similar treatment as alleged in this action from the same Crown defendant and from the same location as that of the plaintiff.

3. The plaintiff brings this action under the discoverability rule of section 5 of the *Limitations Act*, 2002, S.O. 2002, c. 24, and also states that pursuant to section 15(4)(c)(i) of the said *Act*, the Crown defendant and the named defendants did wilfully conceal from the plaintiff that the allegations as alleged in the claim were caused by or contributed to by an act or omission or that the act or omission was that of the person against whom the claim is made.

Reference: Limitations Act, 2002, S.O. 2002, c. 24, Plaintiff's Responding Factum, Tab 1

4. Motions to strike out the plaintiff's claim CV-13-476321 are brought by the Ontario Provincial Police (OPP) and its employees and retirees (OPP defendants) under rules 21.01, 25.06, 25.11 and 57 of the *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194*.*

Reference: Defendant OPP's Motion, Reply Record 2014, Tab 1

5. Motions to strike out the plaintiff's claim CV-12-470815 are also brought by the Ontario Provincial Police Association (OPPA) and its representatives under rules 21.01, 25.11 and 57 of the Rules of Civil Procedure and sections 106 and 138 of the Courts of Justice

Act, R.S.O. 1990, c. 43.

Reference: Defendant OPPA's Motion, Reply Record 2014, Tab 2

6. Motions to strike the claim by the Defendant Employer and the Defendant Association are also brought pursuant to section 4 of the *Limitations Act*.

7. These motions to strike the claim must fail:

   a. The test to strike out a claim as disclosing no cause of action is stringent. A claim will only be struck when it is plain, obvious and beyond doubt that it cannot succeed at trial.

   b. The claim sets out in sufficient detail acts of the defendants that are contrary to Federal Statues (*Criminal Code of Canada*) and Provincial Statutes and Regulations (*Ontario Human Rights Code, Ontario Regulation 268* of the *Police Services Act, Labour Relations Act,* the *Public Services Act of Ontario*, and the *Ontario Provincial Police Collective Bargaining Act*) and the civil torts of defamation by libel and slander, conspiracy, negligence and malicious prosecution.

Reference:Claim CV-12-470815, Reply Record dated April 22, 2013 (Reply Record 2013), Tab 2

Claim CV-13-476321, Reply Record dated March 3, 2014 (Reply Record 2014), Tab 3

Ontario Human Rights Code, Plaintiff's Responding Factum, Tab 2

Ont. Reg. 268/10 of the Police Services Act, Plaintiff's Responding Factum, Tab 3

Labour Relations Act, 1995, Plaintiff's Responding Factum, Tab 4

OPP Collective Bargaining Act, 2006, Plaintiff's Responding Factum, Tab 5

OPPA Policies and Procedures, Plaintiff's Responding Factum, Tab 9

Criminal Code of Canada, Plaintiff's Responding Factum, Tab 11

c. The claims also set out violations of policies and guides namely the *OPP Orders*, *Probationary Constable Evaluation Report Guidelines* and the *Ontario Public Service Guide to Ethics and Conduct*.

Reference: OPP Orders – Member Note Taking, Plaintiff's Responding Factum, Tab 6
OPP Orders – Values and Ethics, Supervision, Human Resources, Professionalism, Plaintiff's Responding Factum, Tab 7
OPP Probationary Constable Evaluation Report Guidelines, Plaintiff's Responding Factum, Tab 8
OPS Guide to Public Service Ethics & Conduct, Plaintiff's Responding Factum, Tab 10

d. In any event, the court should not consider important and complex matters of policy on a motion to strike out the claim. That should only be done at trial, based on more complete evidence.

e. Motions under rule 25.11 should only be granted in the clearest of cases.

f. The evidence that is contained in the pleadings that are being objected to via rule 25.06 and 25.11 are material to the portion of the claim for punitive damages and aggravated damages and more so the plaintiff's assertion that a plan appeared to have been put into place to have him dismissed from employment. Passing Ontario Police College (OPC) and the Provincial Police Academy was easy, but his permanent status of employment was also conditional on him passing his probationary term. By including evidence of this assertion in the pleadings the plaintiff is giving advance and fair warning to the defendants and/or fair notice that they will form part of the discovery and will be part of the case at trial.

Reference: Analysis of Disclosure, September 2008, pg. 6, Reply Record 2014, Tab 8

g. The plaintiff states that all of his comments in his claims are merely his subjective response to the proven facts that he has learned through the disclosure provided to him between January 16, 2012, and May 22, 2012. They are presented as fact. There are no phrases such as “in the opinion of regional staff”. Rather they are positive assertions of matters that are subject to proof – proof that he is willing to provide this court in the course of a trial.

h. The plaintiff anticipated the defendants bringing motions to dismiss his claims pursuant to section 4 of the Limitations Act and had his claims drafted with enough supportive information pursuant to rule 25.06(8) of the *Rules of Civil Procedure*.

i. The impugned paragraphs or portions that give rise to this motion are relevant to the causes of action as they deal with a duty of care owed to the plaintiff.[1]

j. Furthermore and in the alternative the plaintiff claims that the material facts supporting his pleadings that are the subject of the motions are there also to support the conclusions he has made.

Reference: Rules of Civil Procedure (*RCP*), R.R.O. 1990, Reg. 194, r. 21.01, 25.06, 25.11 and 57, Plaintiff’s Responding Factum, Tab 13

[1] 776094 Ontario Inc. v. Miller, 2006 CanLII 31199 (ON SC), Plaintiff’s Book of Authorities, Tab 1

Issues Requiring Trial

A. Has the limitation period expired or has it been postponed by operation of the "discoverability rule"?

B. In the alternative, does the plaintiff have grounds to claim that the Statement of Claim should proceed pursuant to section 15(4)(c)(i) of the *Limitations Act*?

C. If the limitation period has expired, should the court exercise its discretion to permit the Claim to continue on the grounds that the plaintiff has shown:

(i) That there really is no prejudice to the defendants since they knew their precise liability to broader allegations other than those restricted within the judicial process of the HRTO which is why they sought case assessment direction to restrict the HRTO hearing to allegations contrary to the Human Rights Code only; and

(ii) Special circumstances

PART TWO – SUMMARY OF FACTS

8. The plaintiff, Michael Jack, is a trilingual Canadian with a Russian-Jewish heritage. He speaks English with a thick Russian accent. He immigrated to Canada from Israel in June 2000 at the age of 27 with the intentions of pursuing a higher education and a meaningful career.

9. Residing in Peterborough, Ontario since September 2000 he attended Trent University for six years, graduating with two degrees – Bachelor of Science in Computer Science and Master of Science in the Application of Modelling in the Natural and Social Sciences. Based on his exemplary academic performance he was offered a position as a Lecturer in Computer Science and did work as a Computer Science course instructor for a year and a half.

10. After several discussions in August 2007 at the Trent University's weight lifting room with then active Chief of York Regional Police Service, Armand LaBarge, the plaintiff was inspired and decided to pursue a career in policing.

11. In May-July 2008, having fast-tracked his application he was offered employment by the Ontario Provincial Police (OPP). He graduated from the Ontario Police College (OPC) with the same standards of excellence as at Trent University and went for further training at the Provincial Police Academy (PPA) prior to his posting at the Peterborough Detachment in January 2009.

Issue 'A' - Application of the 'Discoverability Rule' and the hatching of the 'Conspiracy to terminate his Employment'

12. It was on his first day at the PPA, August 25, 2008, that he began realizing something was not right. Having successfully completed a psychological evaluation and a complete background check he was subjected to yet another psychological assessment with an OPP psychologist, Dr. Denis Lapalme, to see if there was anything wrong with him.

Reference: Dr. Denise LaPalme's email August 11, 2008, pgs. 11-12, Analysis of Disclosure, August 2008, Reply Record 2014, Tab 7

13. Little did he know that, subsequent to his two ride-alongs that he had with two of the defendants from the Peterborough Detachment in August of 2008, those officers committed some serious acts of defamation against the plaintiff, acts that he would only learn of through '**discovered materials**' gleaned between the period of January 16, 2012, and May 14, 2012. [2]

Reference: Email from Sgt. Rathbun dated Aug. 5, 2008, pgs. 1-5, Analysis of Disclosure, August 2008, Reply Record 2014, Tab 7

14. The plaintiff went for his first ride along in the end of July 2008 and the next one on August 5, 2008. These officers that took him out on the two ride alongs defamed him slanderously to their sergeant who in turn defamed the plaintiff libellously by sending an email (referred to in the previous paragraph) to OPP Headquarters insinuating that the OPP may have made a mistake in granting employment to the plaintiff. The officers making the slanderous remarks that generated the defamatory libel from their sergeant knew the remarks to be untrue and those remarks had a snowball effect that culminated

[2] D.S. Park Waldheim Inc. v. Epping, 1995, 7091 ONSC, pg. 5, Plaintiff's Book of Authorities, Tab 2

to promote hatred and contempt towards the plaintiff in the ensuing months of his probationary period. Being a Russian-Jew, the plaintiff felt this contempt towards him the first day he started working at the detachment and later experienced the hatred. [3],[4],[5],[6]

15. The officers lied to their sergeant by telling him that the plaintiff talked about his time with the Israeli Army which was simply not true. The plaintiff served three years with the Israeli Navy and not the Army. Then the sergeant lies by stating in his email to management that his concerns about the plaintiff are "hair-raising" being that he apparently has 32 registered firearms. The sergeant has a computer on his desk and could have easily accessed the Canadian Firearms Registry Online (CFRO) and seen that the plaintiff actually had 22 registered firearms. Whether it was the sergeant who embellished his recollection of what was relayed to him or it were the officers that embellished what the plaintiff told them, is immaterial since it ought to have been incumbent upon the sergeant (who references the plaintiff with his date of birth in the email that he sends to management) to verify the information from the officers.

16. Should the defendants try to raise a defense of 'qualified privilege' it ought to be negated by the malice of the defendants in lying to their sergeant that the plaintiff also talked about his time in the army and the number of people he has shot and killed. The plaintiff, as stated earlier was in the Israeli Navy and his three years of duty consisted of providing technical support within the confines of Israel without any exposure to any form of combat duty.

Reference: Ibid., pgs. 2 to 6,

[3] R. v. Keegstra, (1990) 3 SCR 697, Plaintiff's Book of Authorities, Tab 3
[4] Hodgson v. Canadian Newspaper Co., 1998 CanLII 14820 (OCSC), Plaintiff's Book of Authorities, Tab 4
[5] Hill v. Church of Scientology of Toronto, (1995) 2SCR 1130, Plaintiff's Book of Authorities, Tab 5
[6] Alleslev-Krofchak v. Valcom Limited, 2009 CanLII 30446 ONSC, Plaintiff's Book of Authorities, Tab 6

17. However, nowhere in the motions by the ‘defendant employer’ and the ‘defendant association’ is the defense of qualified privilege raised regarding the allegations of defamation by libel and slander.

18. Behind his back and without any way of him knowing about it, a plan was put in place by management at the OPP Headquarters to keep a close eye on him and document every move of his during his probationary term. This plan was a wilful action that was, in all probability, put in place after his second interview with the psychologist based on an email (dated September 23, 2008) from his future defendant supervisor to detachment management asking if the plaintiff was the one they were supposed to keep an eye on. This plan was in essence a conspiracy fostered and fanned by that defamatory email from the defendant sergeant (Brad Rathbun).

Reference: Email from Sgt. Robert Flindall to management, pgs. 8-9, Analysis of Disclosure, Sept. 2008, Reply Record 2014, Tab 8

Email from Insp. Sandy Thomas dated Aug. 5, 2008, pg. 5, Reply Record 2014, Tab 7

19. Though he wondered why this additional psychological examination was necessary all he was told by the psychologist was that certain people at the detachment made comments about him to their supervisor based on the two occasions when he attended the detachment in August 2008 for ride-alongs. That information was reported to the PPA and hence the second psychological examination. The plaintiff was the **only** recruit in his class of 110 to undergo a second personal psychological examination with the OPP’s psychologist.

20. It was identified to the OPP while they arranged to have him examined a second time by the psychologist that his employment was conditional on him graduating from the OPC

and PPA and passing his probationary term. Having passed the first two the defendants finally had him at a place and in an environment where they could have complete control over. This was the vehicular means by which the defendants could realize their goal of the conspiracy – the termination of the plaintiff's employment during his probationary term. This was discovered in the disclosure received between January 16, 2012, and May 14, 2012.

21. The final phase of this conspiracy was brought to pass by the transfer of the plaintiff during the latter half of his probationary period. His new coach officer would be none other than the defendant, Richard Nie (Mr. Nie) who had successfully demonstrated his ability to carefully document every move of his trainee through the use of intimidation, belittling comments, vexatious comments and variouis forms of direct discrimination. He had demonstrated these skills of his in the successful termination of probationary recruit, Harry Allen Chase.

22. Also discovered during this disclosure period was the request by management from another detachment that was located a few hours away from the Peterborough Detachment for the services of Mr. Nie for another probationary recruit that apparently needed to be terminated.

Reference: Analysis of Disclosure, December 2009, pg. 60, Reply Record 2014, Tab 10

Issue 'B' - Application of Section 15(4)(c) of the Limitations Act

23. Even after having passed this second psychological examination the plaintiff still felt something was not right the very first day he arrived at his assigned detachment for duty. Though he could not understand why at that time he hoped things would change and that he would feel more at ease when members got to know him.

Reference: Claim, para.19, Reply Record 2013, Tab 2

Claim, para. 23, Reply Record 2014, Tab 2

Statement of Michael Jack, pg. 6, para. 3, Reply Record 2013, Tab 11

24. Unknown to him at the time he was given a very racial and derogatory nickname of ***'Crazy Ivan'*** by the defendants before he even started working at the detachment. It was so secretive that he did not know about the existence of this nickname until 10 months after the termination of his employment having been advised of the nickname by an employee who wrote it on a napkin in a coffee shop they were at and who was sympathetic to how the plaintiff was treated yet was afraid to openly testify about it.

Reference: Claim, para. 21, Reply Record 2013, Tab 2

Claim, para. 25, Reply Record 2014, Tab 3

25. However, on January 4, 2012, another officer came forward who was willing to provide testimony about the existence of this derogatory nickname.

Reference: Email from Jason Postma, Reply Record 2014, Tab 25

26. Only the plaintiff knows how derogatory such a nickname is, for being Russian by birth, he knew that the history of such a name was from the dehumanizing atrocities of 'Ivan the Terrible' dating back in the 1500's.

Reference: Claim, para. 125(a)(iii), Reply Record 2013, Tab 2

Claim, para. 133(1)(c), Reply Record 2014, Tab 3

History of Ivan the Terrible, Reply Record 2014, Tab 26

27. The criminal acts, the derogatory nickname and the decision of management to keep him under surveillance were part of the 'discovered material' that he gleaned in early 2012. This material, upon reflection helped him answer the puzzlement he had when he was made to undergo the second psychological examination. It was this 'discovered material' that laid a foundation of disdain, contempt and hatred towards the plaintiff that cumulatively made it possible for the defendants and/or made the defendants feel comfortable to commit the various violations of the *Human Rights Code, Criminal Code of Canada, Police Services Act, Ontario Provincial Police Orders*, the civil torts of defamation by libel and slander, negligence and malicious prosecution against the plaintiff.

Reference: Analysis of Disclosure, Sept. 2008, Reply Record 2014, Tab 8

Statement of Michael Jack, pg. 6, para. 2, Reply Record 2013, Tab 11

28. The Limitations Act also introduces an ultimate limitations period of 15 years, after which a claim may be barred, even if the material facts have not been discovered. The time in relation to the ultimate limitation period would run from the day the act or omission on which the claim is based takes place. No proceeding can be commenced once the ultimate limitation period has run, irrespective of when the claim was discovered. As an exception to the absolute imposition of the ultimate period, the period does not run during any time in which the person against whom the claim is made **wilfully concealed essential facts or misled the person with the claim.**

Reference: Limitations Act, 2002, S.O. 2002, c. 24, s. 15(4)(c)(i), (ii), Sch. B,

Plaintiff's Responding Factum, Tab 1

29. The plaintiff states that the defendants knew that they had committed serious violations of various statutes against him, namely, but not limited to, the *Human Rights Code* and the *Criminal Code of Canada* and did wilfully conceal essential facts from the plaintiff and/or deliberately misled the plaintiff.

30. The plaintiff makes these assertions about the defendants based on the following facts:

    a. His Human Rights application was filed on December 14, 2010, by his then counsel, Kimberley Wolfe, shortly before removing herself from the record. The plaintiff's friend was subsequently allowed to represent the plaintiff pursuant to the HRTO rules on representation.

       Reference: Application to HRTO, Reply Record 2013, Tab 3

    b. Prior to removing herself from the record she sent an electronic copy of the application to the Law Offices of the Crown for the OPP situated at 655 Bay Street, Toronto.

       Reference: Confirmation of OPP receiving HRTO application, Reply Record 2014, Tab 14

    c. The application was formally shared with the OPP via the Rules of Procedure of the HRTO on or about March 11, 2011.

       Reference: HRTO Notice of Application, Reply Record 2014, Tab 23

    d. All of the provided disclosure arrived at the plaintiff friend's residence between January 16, 2012, and May 14, 2012. However, much of the 'discovered material' including incriminating evidence (documents/emails) that gave rise to the plaintiff's

assertion of the discoverability rule with the exception of copies of individual officers' notes was time stamped in the months of January and February 2011 at the bottom of the pages. Much of this disclosure was shared with the plaintiff well beyond the disclosure deadline date imposed by the HRTO.

Reference: Analysis of Disclosure, Emails with January and February 2001 timestamps, Reply Record 2014, Tab 13

HRTO Disclosure Deadline Obligations, Reply Record 2014, Tabs 16, 17

e. Sections 17 and 18 of the HRTO application formally requested that the defendants provide copies of all emails, occurrences and memo books (all internal notes and emails not otherwise recorded in the personnel file) of the plaintiff's brief employment with the Crown defendant.

Reference: Section 17 and 18 of HRTO Application, Reply Record 2014, Tab 19

f. While the defendants did provide some of these documents prior to the deadline date of January 16, 2012, imposed by the HRTO, the defendants continued to provide the requested documents in dribs and drabs between January 16, 2012, and May 14, 2012. The last bit of disclosure arrived May 14, 2012, just eight days prior to the commencement of the HRTO hearing.

Reference: Indices of the Respondent's Disclosure, Reply Record 2014, Tab 27

g. Still some of the requested documents failed to be included in the disclosure at all, namely all of the plaintiff's emails for the time he was employed with the defendant employer. When requested on two separate occasions via requests for an order to produce these documents, the defendants advised the plaintiff and the HRTO that it was impossible to provide all of the documents and accused the plaintiff of going on a fishing expedition.

Reference: Letter from the Ministry accusing plaintiff of going on a fishing expedition, Reply Record 2014, Tab 20

h. It was upon examination of this 'discovered material' during this period that the plaintiff discovered other incriminating evidence to support the alleged torts in claims CV-12-470815 and CV-13-476321 and hence his assertions of the discoverability rule.

i. Furthermore, this delay (being provided in dribs and drabs), their accusation of the plaintiff embarking on a fishing expedition and their complete denials of the allegations as contained in his HRTO application do serve, as alleged in paragraph 23, one purpose only: **the Crown defendant was trying and did wilfully conceal incriminating evidence and thereby mislead the plaintiff.**

Reference: Response to HRTO Application, Reply Record 2014, Tab 15

j. Upon receiving the defendants' response to his application the plaintiff had no notion of even suspecting that almost a year later he would be learning of this concealed incriminating evidence.

k. It was counsel for the defendants that requested the OPP gather all files regarding the plaintiff based on the email contained in the disclosure.

Reference: Analysis of Disclosure, January 2011, pg. 1, Reply Record 2014, Tab 11

l. These files were gathered as requested by that email and they were gathered in the months of January and February 2011. Counsel for the defendants did use these documents to prepare a statement in response to the application. Even though these documents did reveal incriminating evidence, the defendants via their

counsel denied all allegations in their response to the application adding they were frivolous, false and made in bad faith.

m. All of these denials regarding the allegations in the application were simply not true and could not be true. They could not be true because based on the incriminating emails between the Staff Sergeant and the Inspector of Peterborough Detachment in August 2009 it was clearly stated that they both felt the plaintiff was targeted, that there were Human Rights violations being committed against the plaintiff and that his work environment might have been poisoned.

Reference: Analysis of Disclosure, August 2009, Reply Record 2014, Tab 9

n. The defendants did wilfully conceal and mislead the plaintiff into suspecting that there was no incriminating evidence based on their declaration of truth in section 21 of the HRTO response form, via their counsel.

Reference: Analysis of Disclosure, August 2009, pg. 8, Reply Record 2014, Tab 9

o. Upon discovering this material with the incriminating evidence and realizing that both counsel for the defendants were misleading the HRTO and the plaintiff in section 21 of the response form, the plaintiff immediately filed a complaint with the Law Society of Upper Canada against both counsels.

Reference: LSUC Complaints case nos.: 2012-105468 and 2012-105469,
Reply Record 2014, Tab 18

p. This ‘discovered material’ with the incriminating evidence did show that the management knew they were committing serious violations against the plaintiff and kept it secret to themselves, but did share it with their counsel in the months of January and February 2011. The response that was filled with denials concealing

the existence of these incriminating documents along with the defendants' accusation against the plaintiff of going on a fishing expedition (para. 'i') are congruent with section 15(4)(c) of the *Limitations Act.*

q. August 12, 2010, was the day the plaintiff's false charges under the *Highway Traffic Act* by his supervisor were disposed of in court in his favour. If this action was for the tort of malicious prosecution alone then the limitation period would have started on that date.

r. That is why the plaintiff states in his claim that when he had mediation conversations with the HRTO Vice Chairman on November 1, 2012, he and his friend agreed with the Vice Chairman that an action via the *Superior Courts of Justice* was the appropriate place to go.

s. However, though the defendants may not have expected the plaintiff and his friend to scrutinize the disclosure containing more than 3,000 pages of documents that arrived jumbled up in dribs and drabs, the documents and incriminating evidence that gave rise to the torts of defamation by libel and slander and negligence were identified and pursuant to the discoverability rule these two Statement of Claims were filed and later consolidated.

Reference: Consolidation Order, Reply Record 2014, Tab 30

Indices of the Respondent's Disclosure, Reply Record 2014, Tab 27

Placement with the Peterborough Detachment

31. The plaintiff was one of four rookies from his graduating class that were posted at the Peterborough Detachment of the OPP (Detachment) as a Probationary Constable beginning January 12, 2009. Of these four rookies the plaintiff was the only minority.

32. Once placed at the Detachment, it became readily apparent that he was not welcome. The plaintiff was immediately subjected to numerous acts of harassment and discrimination.

Reference: Claim, para. 19, Reply Record 2013, Tab 2

Claim, para. 23, Reply Record 2014, Tab 3

33. The plaintiff later learned that prior to even reporting for active duty at the detachment, some of the officers had already assigned him a racially derogatory nickname of ***'Crazy Ivan'*** as they had learned in advance of his arrival that he was from Russia. He first learned of the nick name in October 2010, from a meeting with Constable Duignan while at a Tim Horton's coffee shop in Peterborough. Constable Duignan wrote the nick name on a paper napkin, but advised the plaintiff that he was afraid and unwilling to openly testify about it. Later on, the plaintiff got further corroboration of the existence of this nick name from Constable Jason Postma who provided him with an email dated January 4, 2012. Constable Postma was willing to provide testimony about it.

Reference: Ibid., paras. 19, 20, 21

Ibid., paras. 24, 25

34. The plaintiff states that Constable Postma was interviewed by the OPP sometime prior to that date and sometime after the OPP was notified about the plaintiff's HRTO application The HRTO application was filed on December 14, 2010, disclosure of which was received

by the plaintiff in dribs and drabs between January 16, 2012, and May 22, 2012.

Reference: Indices of the Respondent's Disclosure, Reply Record 2014, Tab 27

35. Throughout the duration of his employment at the detachment, as described in the Claims, the plaintiff was subjected to differential treatment, contrived negative performance reviews, overt discrimination and harassment, artificial and unsubstantiated complaints against him, unsubstantiated charge under the Highway Traffic Act filed by his supervising officer, reprisals for asserting his rights or voicing any objection whatsoever to the unequal and oppressive treatment he was receiving.

Reference: Claim, paras. 22 to 67, Reply Record 2013, Tab 2

Claim, paras. 26 to 71, Reply Record 2014, Tab 3

36. Between January 16, 2009, and August 20, 2009, the plaintiff was assigned to the Platoon 'A' shift. The plaintiff's shift supervisor was Sergeant (Sgt.) Robert Flindall (Flindall) and his coach officer was Constable Shaun Filman (Filman) who was also the detachment OPPA (Ontario Provincial Police Association) representative.

Reference: Ibid., para. 23

Ibid., para. 27

37. The plaintiff was transferred to the Platoon 'D' shift on or about August 21, 2009, based on the investigation of the OPPA 8th Branch President, Detective Constable Karen German (German) that revealed that he had been specifically targeted by members of his shift. As a result of his transfer to platoon D, his new shift supervisor was Sgt. Peter Butorac (Butorac) and his new coach officer was Constable Richard Nie (Nie).

Reference: Ibid., para. 24

Ibid., para. 28

38. The transfer actually made it worse for the plaintiff as it turned out that Constable Nie and Sgt. Flindall were next door neighbours and as was the case among many of the officers of the Detachment, close friends. Furthermore, the plaintiff's new platoon was made to feel like a laughing stock at the detachment. The plaintiff's work environment was poisoned regardless of which shift he was transferred to. The shift that preceded Sgt. Butorac's shift was supervised by Sgt. Banbury who was the brother-in-law of Sgt. Flindall. The plaintiff was watched no matter where he went by the close relationships of everyone at the detachment and talks about terminating him were already being discussed as early as August 2009.

Reference: Ibid., paras. 24, 100

Ibid., paras. 29, 104

Analysis of Disclosure, August 2009, pgs. 9-10, Reply Record 2014, Tab 9

Affidavit of Mark Greco, Reply Record 2014, Tab 31

39. With respect to the unsubstantiated charge that forms the substance of the tort of malicious prosecution:

- The charge was initiated by one of the named defendants and based solely on observations made while operating a vehicle and keeping an eye, via the rear view mirror on the plaintiff who was following some distance behind.
- The charge lacked reasonable grounds.
- The charge was disposed of in favour of the plaintiff.

40. The plaintiff had 9 Performance Evaluation Reports (PERs) prior to his termination of employment. Some of these PERs were wrought with fraudulence and had an alarming amount of categories with specific examples and ratings of 'DOES NOT MEET

REQUIREMENTS'. These categories had no new information, but the specific examples used in these categories were copied over from the same categories in previous evaluations that had ratings of 'MEETS REQUIREMENTS.' The defendants even went to the extent of marking some of these PERs with an 'X' mark in areas indicating that the plaintiff's supervisor and/or coach officer had reviewed the PER with him. Most blatant of all these high-handed actions by the defendants were that two of these PERs when shared with the plaintiff were forged with the wording "**REFUSED**" in the area where he was supposed to sign the PER.

Reference: Ibid., paras. 34 to 56, 61, 62, 144, 145

Ibid., paras. 38 to 59, 65, 153, 154

Analysis of Disclosure, September 2009, pgs. 9-11, Reply Record 2014, Tab 22

41. The plaintiff filed a rebuttal to his 5th PER with his supervisors, but his rebuttal was never discussed with the plaintiff.

Reference: Analysis of Disclosure, September 2009, pgs. 12-13, Reply Record 2014, Tab 22

42. The plaintiff contacted the OPPA and was advised to fax his PERs to them. The plaintiff did so, but the OPPA never got back to the plaintiff.

Reference: Fax Cover Sheets to OPPA, Reply Record 2013, Tab 7

43. The plaintiff pleaded his concerns with his employer via his supervisor, but was blatantly told that they did not like whiners.

Reference: Claim, paras. 59 to 60, Reply Record 2013, Tab 2

Claim, paras. 62 to 63, Reply Record 2014, Tab 3

44. Though the collective agreement between the OPP and the OPPA by its terms provides for a workplace free from discrimination and harassment, it is far from the truth in reality.

Reference: Analysis of Disclosure, August 2009, Reply Record 2014, Tab 9

Analysis of Disclosure – Conclusion, Reply Record 2014, Tab 12

Termination of Employment

45. Of the four recruits that the plaintiff started with at the Peterborough Detachment, the plaintiff was the only one who was the minority, the only one (in the whole detachment) who spoke English with an accent, the only one who was not originally from the Peterborough area, the only one to have the highest level of education, being that he spoke fluently in three totally different languages and held a Master's degree in science, the only one who had a racially derogatory nickname 'Crazy Ivan' secretly assigned to him and the only one not to secure permanent employment with the OPP.

46. Furthermore, though the OPP was mandated by their Orders to ensure the plaintiff as a probationary constable was given an orientation day at his respective Provincial Communications Centre, the plaintiff was not even worthy of this simple compliance during his entire probationary period of 11 months.

Reference: OPP Orders, pg. 8, Plaintiff's Responding Factum, Tab 7

47. It was the duty of the OPP and the OPPA by the Statutes of Ontario and the collective agreements in place to protect the plaintiff from discrimination and his assertion of a wrongful dismissal. However, they did not and that had devastating effects on his health and his overall life.

Reference: Claim, paras. 68 to 120, Reply Record 2013, Tab 2

Claim, paras. 72 to 127, Reply Record 2014, Tab 3

48. He experienced and continues to suffer from, among other things, anxiety, depression, sleeping disorders, poor concentration. In August 2010, he was diagnosed with Post Traumatic Stress Disorder (PTSD) by his family physician and his depression was so strong that he contemplated committing suicide. Unable to get a job because he was black-balled by the OPP along with increasing depression and thoughts of suicide, he feared going crazy and so he decided to leave Canada and return to his parents in Israel.

Reference: Ibid., paras. 85 to 91

Ibid., 89 to 95

49. Ironically and only when preparing this response the plaintiff recalled the comment Sergeant Peter Butorac made to him while driving him back from Lindsay Detachment of the OPP on December 13, 2009, after he was served with the notice of proposed release from employment. Sgt. Butorac told him that the following, 'OPP can only do this so long until someone comes along with a lot of money and sues them.' Though the plaintiff did not understand the significance of this comment at the time he certainly does now. Although he is poor and does not have money he does have the strong will and determination to see this action to the end.

Similar Fact Evidence

50. As mentioned earlier Constable Nie was also the coach officer of the former probationary officer, Mr. Harry Allen Chase, who was terminated from his employment through repeated negative performance evaluation reports. Mr. Chase was a visible minority being that he was an African Canadian with a Native American heritage.

51. Though Mr. Chase had served with the Canadian Armed Forces for over twenty years and been in charge of a squadron and personnel and though he was held in high regard at the Ontario Police College and the Provincial Police Academy, the Detachment claimed that he had a learning disability with regards to his communication. Ironically, John Dawson, a white Canadian probationary recruit who arrived at the Detachment around the same time as Mr. Chase did and who spoke with a severe stutter managed to pass his probationary period.

Reference: Affidavit of Harry Allen Chase, Reply Record 2014, Tab 32

Harry Allen Chase's OHRC Complaint, Reply Record 2013, Tab 8

52. Furthermore, the plaintiff is aware that Constable Lloyd Tapp, having served almost fifteen years with Toronto Police Service (TPS) without having the need to file any complaints with the Human Rights Tribunal of Ontario (HRTO) found himself having to do so shortly after arriving at the Peterborough Detachment.

Reference: Ibid., paras. 74 to 84

Ibid., paras. 78 to 88

Affidavit of Lloyd Tapp, Reply Record 2014, Tab 33

Lloyd Tapp's HRTO Decision, Reply Record 2014, Tab 34

53. The propensity in this evidence of Mr. Chase and Mr. Tapp is focused and specific to circumstances similar to the plaintiff's complained of activity, and so the probative value of the propensity does sufficiently outweigh the prejudice, if any, to the defendants.

54. The plaintiff had come to Canada to create a meaningful life for himself and he had great respect for this country that advocates Human Rights. However, in light of what he experienced and what he learned later on he was absolutely shocked at how blatant the OPP was in violating the laws and statues of this land.

PART THREE – ISSUES AND THE LAW

55. The courts can see that this claim (consolidated claims) is not drafted by an experienced lawyer, but by an ordinary citizen with the assistance of a friend. It is a fact that is recognized by Supreme Court of Canada, Chief Justice Beverley McLachlin that there are more and more self-represented plaintiffs going through the courts these days due to lack of finances. Hence, any procedural mistakes are probably common amongst such claims.

Reference: Access to Justice in Canada 'abysmal', Reply Record 2014, Tab 35

Issues Raised in the Motion - Rules: 21.01, 25.06 and 25.11

56. The moving parties have commenced the herein motions under Rule 21.01 of the Rules of Civil Procedure, seeking to strike the statement of claim. The standard to be applied on a Rule 21 motion is set out by the Supreme Court of Canada in *Hunt v. Carey* Canada Inc.:[7]

    a. the facts of the pleading are to be taken as proven and true and unless they are patently ridiculous or incapable of proof;
    b. it must be "plain and obvious" that the pleading is unfounded or contains no reasonable cause of action in order for the motion to succeed;
    c. the threshold for sustaining a pleading is not high - a "germ" or "scintilla" of a cause of action will be sufficient;
    d. the pleading will only be struck if the allegation does not give rise to a recognized cause of action or the claim fails to plead the necessary elements of another to recognize the cause of action;

[7] Hunt v. Carey Canada Inc.,1990, 2 S.C.R. 959, Plaintiff's Book of Authorities, Tab 7

e. the pleading is to be read generously;

f. the novelty of the claim is not a bar to proceeding; and

g. the motion stage is not to determine the strength of the case or the likelihood of success. [8]

57. Although no evidence is permitted on a motion to strike, brought under Rule 21.01, the plaintiff believes that this is, in substance, a motion under Rule 25.11, on which the court is permitted to receive evidence in order to determine whether that evidence is scandalous, frivolous or vexatious. [9]

Reference: *RCP*, R.R.O. 1990, Reg. 194, r. 21.01 and 25.11, Plaintiff's Responding Factum, Tab 13

58. There is no mention in these sections of the wordings, "irrelevance, immaterial, embarrassing, argumentative or containing the pleading of evidence, opinion or unsupported legal conclusion."[10]

59. In 876502 Ontario Inc. Justice Dambrot agreed with the appellant's argument that similar fact evidence is admissible in the determination of the issues and also the evidence of character and reputation is relevant and admissible in respect of credibility. In analyzing rule 25.11 Justice Dambrot stated:

> I note that while this rule plainly applies to affidavits, it is found under the heading "Pleadings", in a rule entitled "Pleadings in an Action", and

[8] 1597203 Ontario Limited v. Ontario, [2007] CanLII 21966 ONSC, at para.12, Plaintiff's Book of Authorities, Tab 8
[9] Khan v. Lee, 2012 ONSC 4363, Plaintiff's Book of Authorities, Tab 9
[10] 876502 Ontario Inc. v. I. F. Propco …, 1997, pg. 6, Plaintiff's Book of Authorities, Tab 10

clearly has pleadings as its main focus. I further note that "irrelevance" is not listed in the rule as a ground for striking a document.[11]

60. In Meuwissen v. Perkin dealing with rule 25.06 in a medical malpractice case heard in the Ontario Superior Court of Justice, Master Lou Ann M. Pope stated in paragraph 36:

> " … I find that there is a sufficient connection between the plaintiff's allegations in this action against Dr. Perkin and the allegations against him in the other five lawsuits. I also find that the probative value of the allegations of seminal facts set out in paragraphs 35 of the statement of claim is sufficient to outweigh the prejudice and therefore they will be allowed."[12]

61. Unless the plaintiff is mistaken in his interpretation of the *Rules of Civil Procedure* he notes that the defendant employer has failed to meet the requirements of rule 25.07(1) and (3), and rule 25.09 (1).

62. The plaintiff claims that since the defendants have not denied any of the allegations and have not pleaded having no knowledge in respect of the allegations the defendants are deemed to be admitting to the allegations.

Reference: *RCP*, r. 25.07 (2) Plaintiff's Responding Factum, Tab 13

63. The plaintiff believes that the defendants' non-compliance with these subsections are of material importance when bringing a motion to strike a claim under rule 25.11

[11] Ibid., pg. 7
[12] Meuwissen v. Perkin, 2008 , para. 36, Plaintiff's Book of Authorities, Tab 11

64. In the alternative the plaintiff states that his claim against the defendant employer and defendant association is complete with pleadings of fraud in relation to his PERs, misrepresentation, malice and intent and hence his pleadings do contain full particulars. Where the defendants are alleging bald assertions, frivolous, scandalous and vexatious assertions they are actually confirming that the pleadings do contain full particulars and are thereby congruent with rule 25.06(8).[13],[14]

Reference: Ibid., r. 25.06(8)

65. In the absence of the pleadings containing full particulars when dealing with allegations of "dishonesty" or "fraud" or "malice" the plaintiff would run the risk of having his claim struck.[15]

66. In the further alternative, the plaintiff submits that pursuant to the exceptions of rule 30.1.01(3) he is not prohibited from using the incriminating evidence obtained in one proceeding, or information obtained from such evidence to impeach the testimony of a witness in another proceeding.[16] His submission is in accordance with sub-rule (7) and rule 31.11(8) which states:

> Where an action has been discontinued or dismissed and another action involving the same subject matter is subsequently brought between the same parties or their representatives or successors in interest, the evidence given on an examination for discovery taken in the former action may be read into or used in evidence at the trial of the subsequent action as if it had been taken in the subsequent action.

[13] Economical Insurance Co. v. Fariview Assessment Centre, 2013, paras. 1, 5, 6, 10, Plaintiff's Book of Authorities, Tab 12
[14] Century Services Inc. v. Borden Ladner Gervais LLP, 2007 ONSC, paras. 6 & 10, Plaintiff's Book of Authorities, Tab 13
[15] Fruchter v. Allied International Credit Corp., 2004 ONSC, pg. 3, Plaintiff's Book of Authorities, Tab 14
[16] 2054476 Ontario Inc. v. 514052 Ontario Ltd., 2006 ONSC, at paras. 30 – 32, Plaintiff's Book of Authorities, Tab 15

Reference: Ibid, r. 31.11(8)

67. The plaintiff believes that the use of the wording 'discontinued or dismissed' is congruent with 'deferred pending complete withdrawal' since they mean the same in so much that two separate judicial processes are not proceeding at the same time.

Reference: Request to Defer HRTO Application, Reply Record 2013, Tab 12

HRTO Interim Decision, Reply Record 2014, Tab 29

68. The deemed undertaking rule at sub-rule 30.01(3) of the Rules of Civil Procedure is the codification of the common law implied undertaking in Ontario. It states:

> All parties and their lawyers are deemed to undertake not to use evidence or information to which this Rule applies for any purposes other than those of the proceeding in which the evidence was obtained.

69. There is no prejudice to the OPP defendants by the plaintiff's use of the '**discovered materials'** because they were respondents in the HRTO application. The OPP defendants themselves are the authors of the 'discovered materials'. The OPPA defendants cannot cite prejudice since they were not named as respondents in the HRTO application. Being that the plaintiff now has the opportunity (with the discoverability rule) to have his true damages realized he can now also hold the OPPA defendants accountable as well. Hence, the prejudice is non-existent and outweighed by the public interest.[17]

70. Therefore, if this Honourable Court finds that the deemed undertaking also applies to self-represented plaintiff, it should order that pursuant to Rule 30.01(8) of the Rules of Civil

[17] Raul Lince-Mancilla et al. v. Ricardo Garcia et al., 2013 ONSC, at paras. 19, 20, Plaintiff's Book of Authorities, Tab 16

Procedure, the deemed undertaking rule does not apply to bar the disclosure of the discovered materials gleaned from the previous proceeding which has been deferred.

Reference: Ibid., r. 30.01(8)

71. In *Juman v. Doucette*, the Supreme Court of Canada held that "the undertaking is imposed in recognition of the examinee's privacy interest, and the public interests in the efficient conduct of civil litigation, but those values are not, of course, absolute. They may, in turn, be trumped by a more compelling public interest.[18]

72. The Court continued and held that "an application to modify or relieve against an implied undertaking requires an applicant to demonstrate to the court on a balance of probabilities the existence of a public interest of greater weight than the values the implied undertaking is designed to protect, namely privacy and the efficient conduct of civil litigation.[19]

73. The deemed undertaking should give way to the "more compelling public interest'" goal of why the defendant employer refers to minority Canadians who happen to have dealings with the police as "**undesirables**." In fact this goal is profoundly in the public interest for such a reference by a Ministry of this Government to one of its citizens or some of its citizens are a reference that is abhorred in any civilized society anywhere in the world, let alone Canada.[20]

Reference: Claim, para. 140, Reply Record 2013, Tab 2

Claim, para. 144, Reply Record 2014, Tab 3

Analysis of Disclosure, January 2011, pg. 1, Reply Record 2014, Tab 11

[18] *Juman v. Doucette*, 2008 SCC 8, at para. 30, Plaintiff's Book of Authorities, Tab 17
[19] Ibid., at para. 32
[20] Ibid., at para. 30

74. It is profoundly in the public interest that this Honourable Court addresses this travesty by a member of the Ministry of this Government. The memorandum issued to the plaintiff by the defendant employer alleging he was associating with undesirables was libellously defamatory and does establish a prima facie case of defamation by libel as noted by Justice Leitch J. in the Ontario Superior Court of Justice case of Simpson v. Ontario at paragraph 262. [21]

75. Furthermore and for the purpose of rule 39.01 the plaintiff is prepared to provide viva voce evidence and allow the defendants to cross examine him all they want.

Issues Regarding the Collective Agreement

The motion argues that the plaintiff ought to have filed a grievance with the defendant association pursuant to the collective agreements in existence

76. As indicated in the claim and through the reference sections of this responding factum, the plaintiff did contact the defendant association and they had Constable Karen German (Ms. German) conduct an investigation. She reported her findings to the defendant association and they did nothing other than move the plaintiff from one platoon to another while leaving him in the same environment. Furthermore, Ms. German told the plaintiff that his sergeant had everyone watching him and that he started at a very bad detachment.

77. Her inactions plus the actions of his first coach officer who was also the detachment association representative along with the conduct of the defendant association with respect to Harry Allen Chase's HRTO application did unequivocally confirm the belief of

[21] Simpson v. Ontario, 2010 ONSC 2119, Plaintiff's Book of Authorities, Tab 18

the plaintiff that had he taken the same route that Mr. Chase ended up taking and allowed the defendant association to handle a grievance from him, it would have been resolved in the favour of the defendants.

Reference: Claim, paras. 32 to 120, Reply Record 2013, Tab 2

Claim, paras. 36 to 127, Reply Record 2014, Tab 3

Affidavit of Harry Allen Chase, Reply Record 2014, Tab 32

78. Though the OPPA contends in their factum that 'Failure to Accommodate' is not a cause of action known to law, the plaintiff submits that it is cause relevant to the cause of action of 'Negligence.'[22]

Reference: Labour Relations Act, 1995, S.O. 1995, C. 1, Plaintiff's Responding Factum, Tab 4

OPPA Policies and Procedures, Plaintiff's Responding Factum, Tab 10

79. The OPPA defendants contend that there is no reasonable cause of action for the tort of 'negligence' because the plaintiff has failed to support the existence of a duty of care that was breached and even if there was a duty of care owed to him, he has failed to plead sufficient or proper facts that the association, its representatives, agents or representatives acted improperly or breached their standard of care. However, the plaintiff submits that there are sufficient and proper facts.

80. The OPPA defendants are explicitly stating that there are insufficient facts in the action to support this tort. The plaintiff points out the following and asks if they are not sufficient enough facts to support this tort:

- The notice of proposed release from employment stated a recommendation was made that he be released from employment and that he has the opportunity to prepare a **written submission or to meet** with Chief Superintendent Armstrong at

[22] Connerty v. Coles, 2012 ONSC 2322, paras. 1, 3, 5, 7, 9 & 20, Plaintiff's Book of Authorities, Tab 19

Central Headquarters at 1330 hours on December 15, 2009, **before** a decision is made. **Though he had written submissions** to be addressed in person with the Chief Superintendent and **though the OPPA representatives were present and fully aware of the contents of the proposed release they failed to intervene or say anything when the plaintiff was denied the opportunity to make submissions.**

Reference: Notice of Proposed Release from Employment, Reply Record 2013, Tab 13

- The actual decision to terminate his employment was made weeks before December 15, 2009, and the termination letter on Mr. Armstrong's desk was already drafted which is why, when the plaintiff was ushered into his office, he did not offer the plaintiff an opportunity to make any submission, but just asked him for his phone number while telling him that the decision he is making is not taken lightly.

- The plaintiff sent an email to Cst. Karen German when he was served with the 'Notice of Internal Complaint', but she never responded.

- He faxed to the OPPA all of his Performance Evaluation Reports on October 1 and 2, 2009, as evidenced in the three cover pages in this reference, but the OPPA never responded.

Reference: Analysis of Disclosure, December 2009, Reply Record 2014, Tab 10

Email correspondences with Karen German, pg. 4, Reply Record 2013, Tab 6

Fax Cover Sheets to OPPA, Reply Record 2013, Tab 7

81. Though the motions of the defendants contend that the facts as pleaded do not disclosure a cause of action for the tort of conspiracy[23] and defamation by libel and slander[24], the plaintiff submits that were he to include all of his evidence to support each of his allegations then his claim would have been in excess of 1,000 pages in length. That is at least 1,000 pages from a self-represented plaintiff who does not have the knowledge or expertise as that of a lawyer. The plaintiff believes that he has provided sufficient information in his claim to support the violations of the *Criminal Code of Canada* and the torts of conspiracy, defamation, negligence and malicious prosecution.

Reference: Claim, paras. 121 to 146, Reply Record 2013, Tab 2

Claim, paras. 128 to 155, Reply Record 2014, Tab 3

Criminal Code of Canada, Plaintiff's Responding Factum, Tab 11

82. In the case of the plaintiff the tort of conspiracy is alleged wherein:

- Months before he commenced his employment at the Peterborough Detachment it was suggested to Headquarters that permanent status was conditional of him passing his probation period.

- An action was then put in place by the defendants to keep him under surveillance from the moment he arrived at the detachment as referenced earlier by the email from his future supervisor to management at the detachment.

- The defendants acted in furtherance to that agreement with actions that gave rise to the tort of 'malicious prosecution.'

[23] Cement LaFarge Ltd. V. B.C. Lightweight Aggregate, (1983) 1 SCR 452 (S.C.C.), Plaintiff's Book of Authorities, Tab 20
[24] Southam Inc. v. Chelekis, 1998 BCSC 4536, Plaintiff's Book of Authorities, Tab 21

- The emails from the Staff Sergeant to the Inspector of the detachment do show that the plaintiff's sergeant acted in furtherance of that agreement.

  Reference: Analysis of Disclosure, August 2009, Reply Record 2014, Tab 9

- The predominant purpose of the agreement was to justify the termination of the plaintiff's employment within his probationary period; the defendants conduct was unlawful (malicious prosecution, insinuating that the plaintiff was an undesirable by a formal investigation under the allegation of 'associating with undesirables', giving the plaintiff a racially derogatory nickname of 'Crazy Ivan' contrary to the *Human Rights Code*); the defendants ought to have known that such conduct would cause injury to the plaintiff.

- The plaintiff was injured as a result of that conduct (PTSD, anxiety, depression with suicidal thoughts, sleeping disorders to name a few).

  Reference: Claim, paras. 85 to 91, Reply Record 2013, Tab 2

  Claim, paras. 89 to 95, Reply Record 2014, Tab 3

83. As the plaintiff has stated in his claim the OPPA and the OPP are viewed by many employees as having a relationship wherein the OPPA tends to protect the image of the OPP even if it means protecting it at the expense of its members.

  Reference: Claim, para. 80, Reply Record 2013, Tab 2

  Claim, para. 84, Reply Record 2014, Tab 3

84. This pleading in his claim is evidenced by the fact that the OPPA, namely Jim Styles was notified by the OPP on December 1, 2009, that it has been decided that the plaintiff be released from employment. The OPP continued to correspond with the OPPA up until December 14, 2009. In all this correspondence between the OPP and the OPPA the plaintiff was never advised in advance of this termination from employment that was

already decided. The OPPA, knowing this in advance, could have, if they really wanted to assist the plaintiff in making any written submissions before the Chief Superintendent, made him aware that a proposed termination was coming his way and to start writing down any submissions that he wanted to make before the final decision was made. In any event there was no final decision to be made. It was already made on December 1, 2009.

Reference: Evidence of relationship between OPP and OPPA, Reply Record 2014, Tab 24

85. Furthermore, the plaintiff submits that Chief Superintendent Armstrong's opinion of the plaintiff was already poisoned by a defamatory email regarding the plaintiff which is why he did not bother wasting time in allowing the plaintiff an opportunity to make submissions but simply told the plaintiff to '**sign this letter of resignation or be fired**'. More high-handed and amounting to a complete lie is the fact that the Chief Superintendent stated in a memorandum to plaintiff dated December 15, 2009 (defendant OPP's motion record January 17, 2014, Tab 3E), that he reviewed all the submissions made by the plaintiff regarding his release from employment. This memorandum was never given to the plaintiff on December the 15, 2009 and he viewed it for the first time buried amongst the jumbled up disclosure that he received between January 16, 2012, and May 14, 2012.

Reference: Analysis of Disclosure, September 2009, pg. 5, Reply Record 2014, Tab 22

86. Using simple common sense one should ask the following question: If the association failed to defend the plaintiff from the prolonged targeting and if the association did absolutely nothing to prevent the termination of the plaintiff's employment why would they handle his grievance in a different manner after he had been terminated?

Issues Regarding Dual Proceedings

The motion argues, being that proceedings were commenced within the HRTO this matter should be dismissed

87. The plaintiff has addressed the motion of this point in paragraphs 33 and 34 of his reply to the motion and points out that the Case Assessment Direction from the HRTO made it very clear that the HRTO hearing was not going to be for: malicious prosecution, negligence or negligence under the Police Services Act and neither would similar fact evidence be allowed.

Reference: HRTO Case Assessment Direction, Reply Record 2014, Tab 28

Issue Regarding Section 4 of the Limitations Act

The motions request that the Claim CV-12-470815 and CV-13-476321 are statute barred pursuant to section 4 of the *Limitations Act*

88. As indicated in paragraphs 12 to 25 of this factum the plaintiff discovered this incriminating evidence and defamation (discovered material) between the period of January 16, 2012, and May 22, 2012, and for the purpose of Constable Postma's email the limitation period would have begun at the earliest, January 4, 2012.

89. There was absolutely nothing the plaintiff could have done in the form of exercising reasonable diligence to have discovered this incriminating evidence and defamation because he was terminated from employment on December 14, 2009, and based on what he knew happened to him within that year at the detachment he commenced his HRTO application in a timely manner. However, when he commenced those proceedings

he did not know that over a year later, pursuant to the HRTO disclosure obligations he would to learn of this incriminating evidence and defamation.[25]

90. The plaintiff's agreement of the application of the discoverability rule is not much different in the application of the discoverability rule in *Peixeiro v. Haberman* which involved a motor vehicle accident on October 11, 1990. As a result of a CT scan in June 1993 the plaintiff commenced an action against the defendant in July 1994. The court agreed with the Court of Appeal that to hold that the discoverability principle does not apply to s. 206(1) *HTA* would unfairly preclude actions by plaintiff's unaware of the existence of their cause of action.[26]

91. The court concluded that Mr. Peixeiro was injured in October 1990 and first discovered his injury was physical in nature in June 1993 and commenced his action in July 1994. Given the medical advice that Mr. Peixeiro had, and in spite of reasonable diligence by him, his injury was reasonable discoverable for the first time in June 1993.[27]

92. In yet another example Justice Gauthier of the Ontario Superior Court of Justice ruled in favour of the plaintiff who brought a statement of claim against the defendants four years after her accident under the discoverability rule.[28],[29]

93. Furthermore, the plaintiff states that the defendants have failed to establish that there is no genuine issue for trial as the plaintiff's claim is statute-barred. All the defendants have done merely are to allege that the plaintiff's action is statute-barred.

94. Applying this case to that of the plaintiff's:

[25] Parker v. Chapman, 2007 CanLII 36 (ON SC), para. 16, Plaintiff's Book of Authorities, Tab 22
[26] Peixeiro v. Haberman, 1997, SCC, at para. 39, Plaintiff's Book of Authorities, Tab 23
[27] Ibid., at para. 42
[28] Burke-Smith v. Sun, 2003 ONSC CanLII 20391, Plaintiff's Book of Authorities,, Tab 24
[29] Irving Ungerman Ltd. V. Galanis (C.A.), 1991 ONCA, Plaintiff's Book of Authorities, Tab 25

- He was defamed, discriminated against and treated deplorably and did file an application before the HRTO regarding his one year at the Detachment.
- From the time he was hired to the time he was forced to resign (August 2008 to December 2009) he had no idea of the amount of and extent of the incriminating evidence that already existed in the files of the defendant employer and the amount of defamation that had gone on behind his back at the detachment and at the OPP's General Headquarters.
- Neither did he know of the plan that was put in place to keep a close eye on him when he arrived other than finding out through the investigation of Constable Karen German that his sergeant had everyone watching him.
- Were it not for the disclosure that he received between January 16, 2012, and May 22, 2012, including the email from Constable Postma dated January 4, 2012, he would not have learned of this incriminating evidence and defamation that caused a plan to be put into place by the defendant employer long before he commenced his employment at the detachment.

95. The defamatory statements about the plaintiff were serious and amounted to criminal actions. The statements did assassinate the character of the plaintiff to the extent that the defendant employer felt they had erred in conducting their background investigation of the plaintiff. The defamatory statements were instrumental in orchestrating his termination from employment, loss of a promising career and loss of future opportunities.[30]

Reference: Analysis of Disclosure, August 2008, pg. 1, Reply Record 2014, Tab 7

Analysis of Disclosure, September 2008, pgs. 8-9, Reply Record 2014, Tab 8

[30] Simpson v. Ontario, 2010 ONSC 2119, at para. 372, Plaintiff's Book of Authorities, Tab 18

Analysis of Disclosure, September 2009, pg. 5, Reply Record 2014, Tab 22

Claim, paras. 147-152, Reply Record 2014, Tab 3

Establishing Malice on the Part of the Defendants

96. Even after successfully passing a second psychological interview at the PPA after having been pulled from a classroom the defendant employer was not satisfied and had the plaintiff kept under close scrutiny.[31]

97. The plaintiff's supervisor specifically had his platoon keeping an eye on him with orders to report anything they felt was a problem involving him.[32] The email evidencing this was only discovered through the HRTO disclosure.

Reference: Analysis of Disclosure, August 2009, pgs. 1 & 5, Reply Record 2014, Tab 9

98. Some of the defendants went to the extent of keeping a separate officer's memo book dedicated solely to the observations of the plaintiff which was in dire violation of the OPP Orders. This is further evidenced by Staff Sergeant Ron Campbell's notes documenting his explicit directions to Constable Jennifer Payne regarding the importance of maintaining only one note book to comply with OPP Orders.

Reference: Analysis of Disclosure, July 2009, pgs. 1-3, Reply Record 2014, Tab 21

OPP Orders – Member Note Taking, Plaintiff's Responding Factum, Tab 6

99. Furthermore, some of the plaintiff's PERs were wrought with fraud in so much that when they were shared with him the plaintiff observed that the area wherein he was supposed to sign for them were already signed with the wording 'REFUSED'. Furthermore, the pre-printed statements that suggest that the PER was discussed with him were already

[31] Haas v. Davis, 1998 CanLII 14642 ONSC, pg. 2, Tab 26
[32] Ibid., pg. 5

marked as having been complied with. More aggravating and suggestive of malice was the fact that some of these PERs were signed off by the detachment manager and the detachment commander complete with their comments prior to the PERs even being shared with the plaintiff. Overall these actions of the defendants are evidence of malice towards the plaintiff that render these motions under rules 21.01, 25.06 null and mute.[33]

Reference: Analysis of Disclosure, September 2009, pgs. 9-11, Reply Record 2014, Tab 22

Issues Regarding the Courts of Justice Act

The motions by the defendants request that the claim be struck pursuant to sections 106 and 138 of the Courts of Justice Act

100. Section 138 of the *Courts of Justice Act* provides that: "as far as possible multiplicity of legal proceedings shall be avoided". The courts do have discretion herein where new allegations arise as a result of the proceedings already initiated in the HRTO application to have this action proceed at the same time as the other proceeding.[34]

Reference: Courts of Justice Act, Plaintiff's Responding Factum, Tab 12

101. In another case dealing with an action in the small claims court and the commencement of a class proceedings action in the Superior Courts the motion judge ruled that though motions were brought pursuant to sections 106, 107 and 138 of the Courts of Justice Act and rule 21.01(3) (c) of the Rules of Civil Procedure both actions can continue simultaneously and dismissed the motions.[35]

[33] Ibid., pg. 14
[34] 17122302 Ontario Inc. v. Dion, 2013 ONSC, at paras. 24, 28, 30, Plaintiff's Book of Authorities, Tab 27
[35] Vigna v. Toronto Stock Exchange, 1997 ONSC, Plaintiff's Book of Authorities, Tab 28

102. In yet another case, in his decision on the motion, Justice Echlin refused to strike out the plaintiff's claim and affirmed that the plaintiff was entitled to bring the claim even though the breach of the *Human Rights Code* and the civil claim for wrongful dismissal damages related to the same set of facts. Echlin J. took no issue with the fact that the same set of facts gave rise to all of the plaintiff's claims.[36]

103. Justice Echlin's endorsement appears to signal an increased willingness to allow claims for human rights damages in civil proceedings, even where the alleged human rights breach and the civil claim are inextricably linked. In fact Justice Echlin disagreed with the primary argument advance by the motion that this Court was without jurisdiction to hear a claim for a breach of a provision of the Ontario Human Rights Code.[37]

104. The plaintiff does agree that in his case the application before the HRTO and his action do overlap considerably. That is why he is prepared to suggest in the next section of this responding factum for an order from this court that would bring the HRTO application within the jurisdiction of this court. In any event he points out that the application is presently deferred pending complete withdrawal should this court decide that his action does meet the tests of the discoverability rule and that there is cause for action.

Reference: Request to Defer HRTO Application, Reply Record 2013, Tab 12

HRTO Interim Decision, Reply Record 2014, Tab 29

[36] Anderson v. Tasco Distributors, 2011 ONSC 269, Plaintiff's Book of Authorities, Tab 33
[37] Ibid., paras. 2 & 3

PART FOUR – ORDERS SOUGHT BY THE PLAINTIFF

Issue 'C': Special Circumstances

105. If the limitation period has expired, the plaintiff asks this court to exercise its discretion to permit the Claim to continue on the grounds that the plaintiff has shown:

    (i) That there really is no prejudice to the defendants since they knew their precise liability to broader allegations other than those restricted within the judicial process of the HRTO which is why they sought case assessment direction to restrict the HRTO hearing to allegations contrary to the Human Rights Code only; and

    (ii) Special circumstances.[38]

106. In the case of the plaintiff and this action:

- The HRTO application was commenced within the HRTO limitation period.[39]
- Were it not for the disclosure provided that gave rise to the 'discovered materials' and the discussions with the Vice Chairman during the mediation on November 1, 2012, this action would not have been commenced.
- The defendants did know of the factual allegations contained in this action or at least were able to reasonably foresee such allegation against them since the filing of the application which is why they sought direction from the HRTO via Case Assessment Direction to restrict the hearing solely to violations of the *Human Rights Code.*

[38] Guillemette v. Doucet, 2007 ONCA 743, pgs. 1, 3, 9 to 11, Plaintiff's Book of Authorities, Tab 35
[39] Trustees of the Millwright Regional Council of Ontario Pension Fund v. Celestica Inc., 2012 ONSC 6083, pgs. 1 & 2, Plaintiff's Book of Authorities, Tab 34

- That by reasons of the defendants' actions or inactions (as illustrated above) the defendants are estopped from relying upon the expiration of any limitation as against the OPP and OPPA.[40]
- There is no prejudice.

107. The plaintiff has already mentioned that the Vice Chairman of the HRTO already expressed his concerns that the application was the biggest he has ever dealt with and that the HRTO was not the appropriate place for it. The motions before this court suggest that the HRTO is the place for it.

108. The motions from the OPP defendants do not contain any denials of any of the allegations in the claims against the defendants. Rather the defendants are seeking to have the claims dismissed under rules and limitations. Hence, the defendants' motions, if granted would allow a Ministry of this Government to be free to continue in the state that existed prior to the action.

109. Consequently the plaintiff asks this court to consider the information provided and if it recognizes that indeed there are sufficient grounds to support the discoverability rule that the plaintiff is asserting, then to allow this action to proceed.

110. Should this action be allowed to proceed the next to be answered is whether or not there exists a reasonable cause for action against the defendants. If cause for action does exist then the plaintiff requests that this court dismiss the motions brought by the defendants and he will accordingly place a request to the HRTO withdrawing his application.

[40] Toneguzzo v. Corner, 2008 ONSC 14803, Plaintiff's Book of Authorities, Tab 36

111. In the alternative of withdrawing his deferred application before the HRTO, he leaves it to the discretion of the court and subject to any arguments from the defendants, to have the application brought under the jurisdiction of this court. The plaintiff submits that this might be a cost efficient procedure since disclosure has already been made under the HRTO process and hence this action can move on to the next stage.

112. The plaintiff has been robbed of his reputation, good health, steady income and a promising a career. His allegations are similar to Ali Tahmoupour's case and Nancy Shultz's cases. She being a former RCMP officer was discriminated against, targeted and bullied by her superiors. She filed an action in the British Columbia Superior Courts and was successful. Her success in the action has now generated a class action against the RCMP by more than one hundred officers. Ali Tahmoupour's was also a case involving the RCMP wherein he was discriminated, targeted and terminated from employment through false performance evaluation reports.[41],[42],[43],[44]

113. The plaintiff's life was ruined by the defendants. He has no job and was forced to return to Israel to live with his aging parents. Supreme Court of Canada Justice Beverly McLachlin commented on August 13, 2013, regarding a report from the Canadian Bar Association:

> "… that access to justice is a growing problem for many Canadian peoples' lives can be ruined if they can't get access to justice."
>
> **Reference**: Access to Justice in Canada 'abysmal', Reply Record 2014, Tab 35

[41] Nancy Sulz v. Attorney General et al (RCMP), 2006 BCSC, Plaintiff's Book of Authorities, Tab 29
[42] Nancy Sulz v. Minister of Public Safety and Solicitor General, 2006 BCCA, Plaintiff's Book of Authorities, Tab 30
[43] Ali Tahmourpour v. Attorney General of Canada (RCMP), 2010 CHRC, Plaintiff's Book of Authorities, Tab 31
[44] Ali Tahmourpour v. Attorney General of Canada (RCMP), 2010 FCA, Plaintiff's Book of Authorities, Tab 32

114. It is not costing the defendants anything in defending this action. The costs are covered by the taxpayers' money. The defendants' flagrant violations and high-handed actions are compounded with threats of costs towards the plaintiff who has nothing to lose, but everything to hope for. As such the plaintiff requests that this court exercise its discretion and allow the plaintiff to hold the defendants accountable for their actions at no cost to him.

115. The plaintiff asks this court that based on the information provided under parts two and three of this factum, the supporting affidavits, statements and analysis of the disclosure provided via the HRTO application, all of which is contained in Schedule A of his motion reply to weigh the evidence and issue an order for summary judgement for costs pursuant to rule 20.01(1) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Date: Friday, February 28, 2014

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Michael Jack
c/o Lloyd Tapp

SCHEDULE 'A' – LIST OF AUTHORITIES

TAB #	AUTHORITY
1	776094 ONTARIO v. MILLER, 2006 CanLII 31199 (ON SC)
2	D.S. PARK WALDHEIM INC. v. EPPING, 1995 CanLII 7091 (ON SC)
3	R. v. KEEGSTRA, [1990] 3 SCR 697 - HUMAN RIGHTS VIOOLATIONS AND CRIMINAL CODE 319(2) VIOLATIONS
4	HODGSON v. CANADIAN NEWSPAPER CO., 1998 CanLII 14820 (ON SC) - torts of defamation
5	HILL v. CHURCH OF SCIENTOLOGY OF TORONTO [1995] 2 SCR 1130 - DEFAMATION - 1.6 MILLION
6	ALLESLEV-KROFCHAK v. VALCOM LIMITED - 2009 ON SC- DEFAMATION - file on plaintiff - Awarded Damages for loss of income
7	HUNT v. CAREY CANADA INC., 1990 2 S.C.R.
8	1597203 ONTARIO LIMITED v. ONTARIO, [2007] CanLII 21966 ONSC
9	KHAN v. LEE, 2012 ONSC 4363
10	876502 ONTARIO INC. v. I.F. PROPCO HOLDINGS (ONTARIO) 10 LTD., 1997 CanLII 12196 (ON SC)
11	MEUWISSEN ET AL v. PERKIN ET AL, 2008, ON SC - RULE 25.06, 25.11 AND SIMILAR FACT EVIDENCE
12	ECONOMICAL INSURANCE CO. v. FARIVIEW ASSESSMENT CENTRE, 2013 ONSC 4037 (CanLII)
13	CENTURY SERVICES INC. v. BORDEN LADNER GERVAIS LLP., 2007 ONSC - RULE 25.06(8)
14	FRUCHTER v. ALLIED INTERNATIONAL CREDIT COPR., 2004 ONSC
15	2054476 ONTARIO INC. v. 514052 ONTARIO LTD., 2006 ONSC - RULE 31.11(8)
16	RAUL LINCE-MANCILLA ET AL v. RICARDO GARCIA ET AL, 2013 ONSC - RULE 30.1.01(3) AND (7)
17	JUMAN v. DOUCETTE, 2008 SCC 8, 193
18	SIMPSON v. ONTARIO, 2010 ONSC 2119 - DEFAMATION ACTION - EMPLOYER ACTED IN MANNER TO DISCREDIT PLAINTIFF,
19	CONNERTY v. COLES, 2012, ONSC, 2322 - LRA - CLAIM ALLOWED BECAUSE OF 'NEGLIGENCE'
20	CEMENT LAFARGE LTD. v. B.C. LIGHTWEIGHT AGGREGATE (1983) SCC
21	SOUTHAM INC. v. CHELEKIS, 1998 CanLII 5436 (BC SC) - DEFAMATION - $875,000.00
22	PARKER v. CHAPMAN, 2007 CanLII 36 (ON SC) - DISCOVERABILITY RULE
23	PEIXEIRO v. HABERMAN, SCC
24	BURKE-SMITH v. SUN, 2003 CanLII 20391 (ON SC) - DISCOVERED 4 YEARS LATER - DISCOVERIBILITY RULE - APPLIED AND ALLOWED
25	IRVING UNGERMAN LTD. v. GALANIS (C.A.), 1991 ONCA

26	HAAS v. DAVIS, 1992 ON SC 14642 - DEFAMATORY STMTS AFTER PLAINTIFF CLEARED OF CHASRGES
27	17122302 ONTARIO INC. v. DION, 2013 ONSC - SECTION 138 OF CJA
28	VIGNA v. TORONTO STOCK EXCHANGE, 1997 ONSC - REULE 21.01 RCP, S. 106, 138 CJA
29	BCSC - NANCY SULZ vs ATTORNEY GENERAL ET AL (RCMP) (January 2006)
30	BCCA - NANCY SULZ vs RCMP (December 2006)
31	CHRC - ALI TAHMOURPOUR vs RCMP (April 2008)
32	FCA - ALI TAHMOURPOUR vs CANADA (July, 2010)
33	ANDERSON v. TASCO DISTRIBUTORS, 2011 ONSC 269
34	TRUSTEES OF THE MILLWRIGHT REGIONAL COUNCIL OF ONTARIO PENSION FUND v. CELESTICA INC., 2012 ONSC 6083
35	GUILLEMETTE v. DOUCET, 2007 ONCA 743
36	TONEGUZZO v. CORNER, 2008 CanLII 14803 (ON SC)

SCHEDULE 'B' – RELEVANT STATUTES AND POLICIES

TAB #	STATUTES AND PROCEDURES
1	LIMITATIONS ACT, S.O. 2002, CH. 24 SCH. B
2	HUMAN RIGHTS CODE, R.S.O. 1990, C. H. 19
3	ONTARIO REGULATION 268-10 of the POLICE SERVICE ACT
4	LABOUR RELATIONS ACT, 1995, S.O. 1995, C. 1
5	OPP COLLECTIVE BARGAINING ACT, 2006, S.O. 2006, CH. 35 SCH. B
6	OPP ORDERS - MEMBER NOTE TAKING
7	OPP ORDERS - VALUES AND ETHICS, SUPERVISION, HUMAN RESOURCES, PROFESSIONALISM
8	OPP PROBATIONARY CONSTABLE EVALUATION REPORT GUIDELINES
9	OPPA POLICIES AND PROCEDURES
10	OPS GUIDE TO PUBLIC SERVICE ETHICS AND CONDUCT
11	CRIMINAL CODE OF CANADA, R.S.C., 1985, c. C-46
12	COURTS OF JUSTICE ACT, R.S.O. 1990, CH. C.43
13	RULES OF CIVIL PROCEDURE, R.R.O. 1990. 184