**Tribunal File No.: 2010-07633-I**

**HUMAN RIGHTS TRIBUNAL OF ONTARIO**

**MICHAEL JACK**

**Applicant**

**- 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**

**Respondent**

**REPLY SUBMISSIONS OF THE RESPONDENT**

## NO REASONABLE PROSPECT OF SUCCESS

## INTRODUCTION

1. The Respondent will reply to the Applicant’s submissions using the same headings as the Applicant. In addition, the Respondent will introduce sub-headings to assist in replying directly to the specific points relied upon by the Applicant in each section.[[1]](#footnote-1)

### RACIALIZED MINORITY

1. The Applicant claims to be “a member of a racialized minority group” because he is a “Russian-Jew who speaks English with a thick Russian accent.” [para. 1]
2. Of course it is important to note at the outset that even if this characterization of the Applicant is accepted, it does not support any conclusion that the Applicant’s failure to achieve permanent status as an OPP Constable was connected to any prohibited ground under the *Human Rights Code* (the “*Code*”).
3. If it were otherwise, every claim of discrimination in failing to achieve employment or promotion would be required to proceed through all the stages of a hearing through mere membership in a ‘racialized minority group’. In the case of  *Marshall* v. *Dufferin-Peel Catholic District School Board* [2013 HRTO 256] (hereinafter referred to as *Marshall* and located in Appendix “B” hereto), the Tribunal states at para 39:

“The applicant identifies with a prohibited ground under the *Code*, race and colour, and it is clear that the applicant believes he experienced mistreatment in the form of a suspension.  However, the applicant has to do more than point to his membership in a racialized group to establish a case of discrimination.”

1. In addition, although the Applicant apparently believes that “[h]is thick Russian accent forms much of the basis for the protected grounds” relied upon [para. 2]; however, the evidence offered could never support a finding of discrimination on this basis, which has already been addressed in the Respondent’s initial submissions and will not be repeated here [see paragraphs 24-27 of the Respondent’s initial submissions].
2. The Respondent submits that it is plain and obvious on the evidence (already given or reasonably available to the Applicant) that:

* the Applicant’s failure to achieve permanent status was solely related to the deficiencies in his performance as a Probationary Constable [see Appendix A];
* the limited evidence about references to “Crazy Ivan” (which the Applicant was unaware of at the time) or comments on his accent, neither of which have been linked to his evaluation as a Probationary Constable, could never support a finding of discrimination under the *Code* [see Respondent’s initial submissions, para. 28-34].

## ESTABLISHING A PRIMA FACIE CASE

1. The Applicant seeks to resist a dismissal of his complaint at this stage, and require the Respondent to present evidence, on the basis that “in some cases of alleged discrimination information about the reasons for the actions taken by the respondent is within the sole knowledge of the respondent.” [para. 16]
2. What this ignores is that in *this* case the Respondent’s reasons for its actions were fully documented at the time and that on the un-contradicted and admitted evidence it is plain and obvious that the Applicant failed to meet the requirements of a Probationary Constable in, not merely a few but, the vast majority of the criteria required to pass his probationary period. [See Appendix A]
3. Furthermore, the Applicant seeks to rely upon the proposition that the Respondent can be liable for taking action against the Applicant in reprisal for asserting Code rights [para. 20]. However, this ignores the fact that there is no evidence that the Respondent intended to take action against the Applicant for asserting his rights under the *Code* [see infra at para 44-46]; and, in any event the evidence is clear that the action taken i.e. not granting the Applicant permanent status as an OPP Constable, was based on his failure to meet the requirements for permanent status. [See Appendix A]

## APPLYING THE EVIDENCE TO THE LEGAL FRAMEWORK

### JULY 2008 TO JANUARY 2009

1. The first point to note is that this time period is before he began work at the Peterborough detachment and the incidents complained of had nothing to do with his failure to meet requirements as a Probationary Constable, which only began in January 2009.

#### “GUN HAPPY”

1. Although the Applicant attributes the appellation “gun-happy” to the Respondent it is significant to note that in the contemporary written record it appears in the narrative of events only in *denials* by two of his references (not by an OPP officer) that the Applicant is “gun happy” [page 17].
2. Although the Applicant repeatedly refers to “lies” in the report of Cst. Gravelle’s concerns arising out of the Applicant’s gun collection; the investigation by the OPP had nothing to do with the alleged lies i.e. whether the Applicant stated that he served in the Israeli army [para. 31, 1st bullet]; whether the Applicant stated he had killed people while in the Israeli Army [para. 31, 2nd bullet]; or whether the Applicant had 22 guns as opposed to 32 [para. 31, 3rd bullet].
3. Although the Applicant is apparently eager to cross-examine the officers involved [see para. 26 – 31], nothing turns on whether these were ‘lies’ or simply misunderstandings; and a hearing to decide who is correct on these matters, even assuming it were possible at this time, would not advance the Applicant’s case.
4. In particular, there is nothing to support the Applicant’s wild speculations and the conclusions he seeks to draw from the internal documents relating to this concern e.g.:
   * that the “lies…stereotyped him as possible being ‘crazy’, crazy due to his race, ancestry and place of origin” [para. 40], where there is no connection between the two;
   * that Sgt. Rathburn was motivated to raise this concern because of these “lies” [para. 42] ; rather than from a concern about the Applicant’s interest in guns as demonstrated in his interaction with Cst. Gravelle;
   * that Sgt. Rathburn’s email was somehow “defamatory” of the Applicant [para. 50], without specifying how;
   * that the observation of two senior officers that they felt the situation showed “some evidence of awkwardness [in the Applicant] relating to Canadian social cues” as evidence of “racial discrimination” [para. 56]; when in context it is clear as stated in the briefing note that it was “the opinion [of the two officers] that JACK is experiencing some awkwardness as he begins to socialize himself into the police culture” [page 30];
   * that Sgt. Flindall’s interest in knowing about the Applicant in light of the concern raised turned into an “insatiable desire to get rid of him as quickly as he could” [para. 61]; and that the concern which led to a need to “keep an eye” on the Applicant “ref his love of guns” [page 31]; “coupled with the derogatory nick names of “Crazy Ivan” (crazy Russian) and “Loose Cannon” (although there is no evidence of such ‘coupling’) “formed the foundation of the racial hatred and prejudice that poisoned the work environment of the location he was soon to be posted at in turn led to his demise on December 15, 2009” [para. 63] (which completely ignores the events of the intervening year and a half in which the Applicant failed to meet the requirements of a Probationary Constable to attain permanent status with the OPP [see Appendix A]).
5. In *Marshall*, the Tribunal states at para. 34 that “[t]he applicant bears the burden of proving discrimination on a balance of probabilities.  Mere speculation as to the existence of discrimination is not sufficient nor, is the possibility of discrimination: See *Peel Law Association* v. Pieters, 2012 ON, SC 1048.”
6. As already addressed in the Respondent’s initial submissions [see paragraph 15, first bullet] the concern raised by the Applicant’s apparent enthusiasm for guns, and his eagerness to make this interest known on his first encounters with officers from the detachment, was legitimately addressed and resolved before he ever commenced duties at the detachment. The facts of the ‘investigation’ of this concern by the OPP (speaking to his references and having a further psychological evaluation) bear no relationship to the facts of the case of *J. Nassiah v. Peel Regional Police Service* which is evident from the summary of relevant facts in the Applicant’s response [para. 45].
7. Despite being cleared of any concern by the OPP, the Applicant gives the OPP no credit for responsibly addressing and resolving the concern; instead he seeks to connect this incident to his claim of discrimination by misstating the evidence, as set out below.

#### RUSSIAN ACCENT

1. The Applicant alleges that the Applicant’s accent “had to have had an impacting factor in Cst. Gravelle’s concluding disposition towards the applicant” [para. 31, 6th bullet]; when there is no evidence to support this speculation.
2. The Tribunal in *Marshall* states at para. 36 that:

t]he applicant’s own feeling or suspicion are not sufficient to meet the test for establishing an application has a reasonable prospect of success.  In *Wondimagnehu* v. *Algonquin College*, 2012 HRTO 276 the Tribunal stated at para. 10:

I find that there is no reasonable prospect that the applicant can prove discrimination on the basis of race and sex.  The applicant was unable to point to anything that suggests that there was discrimination on the grounds specified by the applicant.  At best, the applicant has his own feeling that he was treated unfairly because of race and sex.  He was unable to point to any evidence beyond his own suspicions to support his allegations of discrimination.

1. In the same vein, the Applicant’s attempt to link this incident to the comments of the instructing Sergeant at the Provincial Police Academy in Orillia that he has a thick accent and needs to speak slowly [para. 51] is unsupportable. Firstly, it predated and did not have any connection to his treatment as a Probationary Constable at the Peterborough detachment. More importantly, her comments are clearly justified by the context since the Applicant was attempting to introduce himself to 109 recruits in an auditorium and he does have an accent which in that environment could well make it difficult for everyone to hear him.
2. In *Marshall*, the Tribunal states at para. 37 that

…the Tribunal has indicated that the applicant’s own certitude that there was no other possible explanation than discrimination does not satisfy the applicant’s burden in establishing discrimination.  In *Dwyer* v. *Intact Insurance Company*, 2011 HRTO 314 at para. 11, the Tribunal stated:

When he was asked what evidence he had to support his allegations of discrimination, his position was that there could be no other possible explanation for the respondent’s conduct.  In his view, the people he interacted with were biased and he was certain that the reason behind this conduct was discrimination.  The applicant provided no evidence beyond his own certitude to support his allegations.

The applicant is required to demonstrate a reasonable prospect that he can prove, on a balance of probabilities that his *Code* rights were violated.  Specifically, he must show a link, a connection or nexus between his race and colour and the differential treatment being claimed, that is, the suspension.

#### CRAZY IVAN

1. The Applicant further misstates the evidence when he alleges that the will say of Mr. Mark Greco states that Cst. Gravelle referred to the Applicant as a “Crazy Russian” [para. 38]; when the will say states that Cst. Gravelle stated that the Applicant was crazy (not Crazy Ivan or Crazy Russian) much later and in an entirely different context [see Respondent’s initial submissions para. 31(c)].
2. There is nothing to connect the allegation that the Applicant was referred to as “Crazy Ivan” to the OPP’s concern regarding the Applicant’s interest in guns.
3. The Applicant further seeks to make much of the Respondent’s initial denial that the Applicant was referred to as ‘Crazy Ivan’ at the Peterborough detachment [para. 47 – 49]. However, given the unspecific evidence offered by the Applicant [see Respondent’s initial submissions, para. 31-32] it would not be surprising if the Respondent was unaware of its use, as was the Applicant at the time he was at the detachment. In fact the evidence is clear that if the Respondent had been aware at the time it would have taken steps to address that and see that it ceased [see e.g. infra at para 45].
4. In any event, even though this denial of the Respondent appears to have been in error, to some unknown extent, it is difficult to understand how it supports the Applicant’s complaint of discrimination in respect of this incident.
5. Although this incident occurred before he began his probationary period the Applicant spends 27 pages attempting to portray it, not only as the basis for his failure to pass his probationary period, but as the foundation for his ‘belief’ that his failure was as a result of discrimination against the Applicant and not the Applicant’s failure to meet the requirements of a Probationary Constable.
6. It beggars belief that some months before he began his probationary period the Respondent OPP had not only made a decision to terminate the Applicant’s employment because of prejudice against the Applicant and that the OPP then embarked and a year and a half charade to justify the termination of the Applicant’s employment.

### JANUARY 2009 TO SEPTEMBER 2009

#### DIFFERENTIAL TREATMENT

1. The Applicant argues that he was subject to differential treatment and asks the Tribunal to draw an inference of discrimination, all the while ignoring the facts which will show that any differential treatment was due to the Applicant’s performance deficiencies.
2. As stated by the Tribunal in *Marshall* at para. 35

[t]he *Code* has not been crafted to remedy all instances of differential treatment.  The Tribunal stated in *Villella* v. *Brampton (City)*, 2011 HRTO 1085 at paragraph 10:

The *Code* is not designed to remedy all instances of differential treatment, poor service delivery or professional misconduct.  The alleged treatment must be linked in a substantive way to a *Code* ground.  The Applicant must show more than mere subjective suspicion to establish a link between the respondent’s alleged conduct and the grounds pleaded.  There must be at least some objective facts and circumstances to support the theory linking the respondents’ action with the *Code*.  Here, I do not see that the applicant has alleged any facts that would be capable of establishing such a link.

##### LATE PERS

1. The Applicant complains of late PERs in the period of January to August 2009 [para. 64 – 65]. However, in asking the Tribunal to draw an inference of discrimination from this fact, the Applicant ignores the fact that PERs 1 to 5 were generally favourable and, for the most part, the Applicant was rated as meeting requirements. This hardly supports his belief that they were late because he was being discriminated against on a prohibited ground.
2. When it came to the period June to August 2009, which was addressed in PER 6/7 it is clear, as summarized in Appendix A, that the Applicant’s performance had taken a decidedly negative turn.
3. This continued for the period August to September 2009, again as set out in Appendix A.
4. The delay in preparing these reports was undoubtedly affected by this turn of events and the Respondent’s decision in light of these developments to transfer the Applicant to a new platoon so as to give him a fresh opportunity to demonstrate his ability to meet requirements (which unfortunately the Applicant was unable to do as demonstrated in PERs 9 – 11, as set out in Appendix A).
5. The Applicant is apparently of the view that it is the late PERs that put his job in jeopardy [para. 77]. This ignores the significant performance issues identified in PERs 6/7 and 8, which continued into the period September to November, 2009, after the Applicant had been transferred to a new platoon. It is the Applicant’s failure to meet the requirements of a Probationary Constable which put his job in jeopardy.

##### NEGATIVE 233-10

1. The Applicant complains that he was the only Constable to receive a negative 233-10 in respect of the Break and Enter Investigation at the School [para. 79].
2. The Applicant was treated ‘differently’ in this respect because of his conduct in failing to follow directions and in shopping for answers from other officers in an attempt to justify his failure.
3. This is not differential treatment; this is treatment arising out the Applicant’s own conduct, as set out in Appendix A.

##### DEVELOPMENTAL OPPORTUNITY

1. The Applicant alleges differential treatment because in August 2009 he was denied the opportunity to take advantage of a developmental opportunity in October, 2009 [para. 82].
2. However, what the Applicant chooses to ignore is that in this time period it is clear that unless his performance significantly improved he would not pass his probationary period.
3. In those circumstances it is entirely reasonable that he would not be recommended for a course on “At Scenes Collision Investigation Course”.
4. Although as the Applicant suggests, this specialized course “would have been beneficial to the Applicant’s policing career” [para. 83]; this could only be so if he passed his probationary period, which was seriously in doubt at this point.

##### DENIED OVERTIME OR COVERING FOR OTHER OFFICERS

1. Once again the Applicant’s complaint of differential treatment ignores the serious concerns with respect to his performance which would justify these restrictions.

#### AUTHOR OF PER 6/7

1. Even if the Applicant were to be successful in establishing his suspicion that Cst. Filman did not prepare this PER and that Sgt. Flindall (together with Cst. Payne) did, this does not change the facts on which the Applicant was found not to meet requirements in several categories [see Appendix A].

#### PLATOON MOVE

1. The Applicant seeks to infer from a concern that his bad relations with his existing platoon and supervisor could give rise to a complaint by the Applicant that “he is in a poisoned work environment or a possible H.R. complaint”; into an admission that this is the case [para. 98]. However the Applicant ignores a later email by the same author [quoted in the Applicant’s submissions at page 55] in which the author recognizes that;
   * “To his [the Applicant’s] own demise he has alienated his shift by not being 100% truthful when shopping for answers” [which is supported by the facts set out in Appendix A];
   * “It is also apparent Cst. Jack is not following direction” [which is again supported by the facts set out in Appendix A].
2. Furthermore, the Applicant ignores the author’s response when the Applicant raised concerns about “inappropriate remarks and berating him in front of the shift as well” but “refused to name officers”:
   * “In other words work place harassment and discrimination policy…I assume it is in relation to his ethic origin. Anyway I stressed the importance of him coming forward and have also stressed this issue to his new coach [Cst. Nie]. I stressed in Rob’s [Sgt. Flindall] presence the duty of management to stop it if it occurred.”
3. The Applicant refuses to credit the fact that the concerns raised by the Applicant were part of the reason for his transfer to a new platoon and for giving him an opportunity to prove that he could meet requirements of a Probationary Constable with a new coach and supervisor.
4. The Applicant’s attack on the Respondent reaches a new low level when he accuses the Respondent counsel of violating her oath [para. 104] in denying the Applicant’s allegations of discrimination, which the Applicant (mistakenly) believes have been clearly established!
5. The Applicant continues his outrageous allegations by claiming that his new coach “was handpicked to finish the applicant off.” [para. 109].

#### CONCLUSION

1. As in the previous section the Applicant concludes this section by alleging that the movement to a new platoon was part of a conspiracy and charade by the Respondent, namely: “that the so called fresh start for the applicant was nothing more than providing a false sense of hope to him while getting set to execute the respondent’s plan to justify the termination of his employment.” [para. 110].
2. Apart from the improbabilities and putting aside that there is no evidence to support such a conspiracy throughout the whole OPP, this ignores the fully documented and supported failure of the Applicant to meet the requirements of a Probationary Constable [see Appendix A].

### SEPTEMBER 2009 TO DECEMBER 2009

#### ASSOCIATING WITH UNDESIRABLES

1. The Applicant casts doubt on the bona fides of Sgt. Flindall in raising the issue of whether the Applicant was associating with undesirables [para. 117].
2. Although the Applicant alleges that “this was a fabricated accusation and a blatant and malicious lie”, this ignores the fact that the concern was based on a photograph the Applicant took of himself and the (admittedly) undesirables together.
3. The photo was neither fabricated nor a lie.
4. The bona fides of the Respondent’s investigation of this matter have been dealt with in the Respondent’s initial submissions and will not be repeated here [para. 15, last bullet].
5. As an aside, the fact that Sgt. Flindall may have failed to correct the Applicant’s deficiencies in preparing Crown briefs (before they were forwarded on to the Crown Attorney) doesn’t excuse the Applicant’s failure to properly prepare them and his rating of Does Not Meet Requirements in respect thereto.

#### PERs 9 – 11

1. The Applicant baldly challenges the PERs in this period without specifics. However, the Respondent has analyzed these PERs and the Applicant’s responses and later produced rebuttals [see Appendix A].
2. The Does Not Meet Requirements ratings and not recommending the Applicant for permanent status are fully documented and justified in documents created at the time.
3. The Applicant has no evidentiary basis to challenge them; he merely alleges that they are based on discrimination without any evidentiary basis for doing so.
4. The apparent contradiction the Applicant finds between not recommending the Applicant for permanent status and saying that the officer only had the Applicant’s best interest at heart when coaching him [para. 125] is only a contradiction in the Applicant’s mind.
5. The Applicant simply ‘believes’ that the only explanation for his failing to achieve permanent status is discrimination and now, as then, refuses to either acknowledge or confront his many failings in his performance.

#### PERs 5, 6/7 and 8

1. The Applicant was rated as either Meeting Requirements or No Basis for Rating in PER 5. For PERs 6/7 and 8, the Respondent deals with these and how the facts justified the Applicant’s ratings in Appendix A.

### TERMINATION OF EMPLOYMENT

1. Although the Applicant simply signed the PERs 9 -11, without in any significant way challenging the ratings of Does Not Meet Requirements the Applicant’s evidence now is that he signed these PERs even though he did not agree with them.
2. In other words although he signed PERs 9-11, he did so with a mental reservation.
3. However, the Applicant’s mental reservation deprived the Respondent of the opportunity to address any issues that the Applicant had at the time.
4. If the Applicant had issues with the facts on which the ratings were based, the time to raise them was before he signed the PERs, not sometime later.
5. The Applicant now seeks to justify his failure to object at the time he was given the PERs as being fruitless in light of the lack of effect given to his prior responses in an earlier PER. Whatever comfort this provides the Applicant subjectively, objectively his failure to object indicated agreement. Moreover, the failure of his response to PER 8 to have any ‘effect’ is not because it was disregarded; it had no effect on the ratings because he failed to dispute the facts on which the rating were based and justified [see Appendix A].
6. Moreover, as can be seen from the Applicant’s after the fact rebuttals it is apparent that the Applicant’s response is not factual but full of rhetoric and unsubstantiated allegations of discrimination [see Appendix A].
7. That the Applicant was not afforded an opportunity in December to provide a rebuttal to his ratings is his own fault for not having done so when he had an opportunity and signing the PERs without objection.
8. In light of the Applicant’s failure to object at the time it could hardly be expected that he would have a sufficient explanation to offer at this late stage.
9. Furthermore, the Applicant chose to resign rather than have his employment terminated for his own reasons i.e. resigning might have a lesser impact on a future potential employer [para. 135]. No one forced him to resign.

## ADDITIONAL ISSUE – THE APPLICANT’S CREDIBILITY

1. The Respondent raises an additional issue in reply, namely the Applicant’s credibility.
2. Although the Applicant claims to have perfect recollection of the events, this recollection appears to be limited to favourable evidence.
3. Where the evidence is likely to be unfavourable the Applicant attempts to avoid answering the question and seeks to rely only on the written record: [see e.g. September 22 transcript pg. 21, l. 18 – p. 19, l. 23]; or can’t remember [see e.g. September 22 transcript p. 116, l. 21 -25; p. 124, l. 20 – p. 129, l. 4.]; or simply chooses to deny the obvious [September 22 transcript p. 133, l. 8 – p. 134, l. 20].
4. In other instances the Applicant’s present memory is in fact contrary to his written statements at the time: [see e.g. September 22 transcript p.45, l. 21 – p. 51, l. 20].
5. In one respect, the Respondent agrees with the Applicant, and that is that the resolution of this case should not depend on witnesses memories of the events but can be decided on the written record at the time.
6. It is for that reason that the Respondent submits that this is an appropriate case to determine at this stage that the Applicant has no reasonable chance of success in establishing discrimination under the *Code* and that the application should be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 9th DAY OF OCTOBER, 2015

**ATTACHMENTS**

APPENDIX “A” Chart reviewing PERs 6/7 to 11, inclusive where Applicant received a rating of “Does Not Meet Requirements”

APPENDIX “B” *Marshall* v. *Dufferin-Peel Catholic District School Board* [2013 HRTO 256]

1. Unless otherwise stated, all paragraph references in [ ] are to the Applicant’s Submissions on No Reasonable Prospect of Success submitted on October 2, 2015. [↑](#footnote-ref-1)