

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**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  
RATHBURN, ROBERT FLINDALL, PETER BUTORAC, RONALD CAMPBELL,  
COLLEEN KOHEN, HUGH STEVENSON AND MIKE ARMSTRONG AND ITS  
RETIREES MIKE JOHNSTON AND CHRIS NEWTON**

**Moving Party/Defendants**

---

**FACTUM**

---

January 17, 2014

**MINISTRY OF THE ATTORNEY GENERAL**  
Legal Services Branch  
Ministry of Government Services  
9th Floor, Ferguson Block  
77 Wellesley Street West  
Toronto, ON M7A 1N3

**Lisa Compagnone, LSUC# 42823P**  
Lisa.Compagnone@ontario.ca  
Tel: (416) 327-6916  
Fax: (416) 325-9404

**Counsel for the Crown Defendants**



**TO: Michael Jack**  
KK”L 53/3, 77471  
Ashdod, Israel

Telephone: +972-8-864-4496  
Email: mikhailjacques@gmail.com

Self-Represented Plaintiff

**TO: Michael Jack**  
c/o Lloyd Tapp  
252 Angeline Street North  
Lindsay, ON K9V 4R1

Telephone: (705) 878-4240  
Email: dmclaugh@bell.net

Self-Represented Plaintiff

**TO: Investigation Counsel  
Professional Corporation**  
Barristers and Investigation Consultants  
350 Bay Street, Suite 1000  
Toronto, ON M5H 2S6

**Norman Groot**  
LSUC# 43721V

Telephone: (416) 637-3141  
Fax: (416) 637-3445  
Email: ngroot@investigationcounsel.com

Lawyer for the Defendants, Ontario Provincial  
Police Association and its representatives  
Shaun Filman, Karen German, Jim Styles and  
Marty McNamara



## **PART I: OVERVIEW**

1. Based on a generous read of the claim it is apparent that the only possible conclusion is that the subject matter of the claim is an overarching allegation that during the course of his approximate 11 month probationary employment as a police constable the Plaintiff was subjected to various forms of discrimination and harassment.

2. This is a motion brought on behalf of the Defendant Employer Her Majesty the Queen in Right of Ontario, improperly styled as "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", as well as the named Defendants Employees cited above (The Defendants) (except employee S. Filman who is being represented by the Defendant Association) for an order dismissing Plaintiff's action on any or all of the following grounds: i. it is plain and obvious that it was filed and served approximately three years after the last alleged incident of discrimination and harassment, ii. this Honourable Court has no jurisdiction over the subject matter of this claim as it is a matter for final and binding labour arbitration, iii. it is plain and obvious that a stand-alone claim for discrimination that includes an allegation of libel and slander under the *Criminal Code of Canada* is not a recognizable cause of action and thus, cannot succeed or alternatively, it is plain and obvious the legal elements of any recognizable cause of action that could be inferred by looking behind the pleadings have not been proven and thus, cannot succeed, iv. the claim is scandalous, frivolous, vexatious and/or an abuse of process.

3. Finally, given that an Application with similar subject matter has proceeded to hearings before the Human Rights Tribunal of Ontario (HRTO) the Defendants request this Honourable Court stay the court proceedings until a decision has been rendered by the HRTO.

## **PART II: FACTS**

### **A. Chronology of Proceedings**

#### **December 2012 – First Statement of Claim and Statutory Notice to the Crown**

4. In December 2012 a Statement of Claim (Court File No. CV-12-470815) was filed naming the Crown as the Defendant Employer and naming Defendant Employees. This statement was a nullity as against the Crown for lack of notice as prescribed by s. 7(1) of the *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27. As well, it was not properly served on the named Defendant Employees.

Affidavit of Jeffrey Bagg, Defendant Employer's Motion Record,<sup>1</sup> Tab 3.

5. On December 21, 2012 the Crown as Defendant Employer accepted Notice of Intent to commence a Claim and thus, a Statement of Claim could be filed as against the Crown on or after February 25, 2013.

Affidavit of Jeffrey Bagg, Defendant Employer's Motion Record, Tab 3.

---

<sup>1</sup> Note: all references to the Defendant Employer's Motion Record relate to the Moving Party's motion record on the motion for consolidation in Superior Court Action No. CV-13-476321.

6. The Defendant Association has moved to dismiss the first Statement of Claim filed in December 2012, Court File No. CV-12-470815, on the grounds that it was filed and served after the expiry of the statutory limitation. The Defendants support this motion.

Notice of Motion, Defendant Association Motion Record, Tab 1.

7. A second Statement of Claim was served on the Defendant Employer and its named Defendant Employees (except S. Filman and C. Newton) on March 15, 2013, Court File No. CV-13-476321. The Defendant Employer has successfully moved to consolidate Court File No. CV-13-476321 and Court File No. CV-12-470815, which were consolidated by the Order of Justice Brown on April 22, 2013.

Order of Justice Brown of the Superior Court of Justice, dated April 22, 2013, Defendant Employer's Motion Record, Tab 6.

8. On August 5, 2013 the second Statement of Claim (Court File No. CV-13-476321) was served on the Defendant Employee, retired OPP Officer Chris Newton

Supplemental Affidavit of Charles Barnard, Defendant Employer's Motion Record, Tab 4.

9. In addition to supporting the Defendant Association's motion to dismiss the Defendants provided Notice of Motion to dismiss on additional grounds: this Honourable Court has no jurisdiction over the subject matter of this claim as it falls within the exclusive jurisdiction of final and binding arbitration; there is no recognizable cause of action or alternatively, any recognizable cause of action that could be inferred by

looking behind the pleadings has not been proven; the claim is scandalous, frivolous, vexatious and/or an abuse of process.

Notice of Motion, Defendant Employer's Motion Record, Tab 1, 2.

**i) Prior to December 15, 2009 the Alleged Facts, Incidents and/or Acts Relied Upon to Support the Claim had all Occurred**

10. By January 9, 2009 the Plaintiff commenced his probationary employment as a police constable. He was assigned to the Peterborough Detachment as a Probationary Constable in the bargaining unit represented by the Defendant Association.

Statement of Claim at paras. 7, 9, 20, Defendant Employer's Motion Record, Tab 5.

11. By December 2009 the Plaintiff pleads the following alleged facts, incidents and/or acts occurred:

- The Plaintiff alleges from January 2009 to December 2009 "he was immediately subjected to numerous acts of harassment and discrimination due to his status as a foreign born individual and ...heavy Russian accent.";
- The Plaintiff claims that from October 2009 to December 2009 as a result of his thick accent he was unfairly reprimanded and treated differentially;



- The Plaintiff claims that from January 2009 to December 2009 coach officers(s) treated him differently;
- The Plaintiff claims that from early on he was subjected to unfair charges/reprimand and internal complaints;
- The Plaintiff alleges that early on his performance evaluations were unfair as they failed to credit his work, relied on unsubstantiated charges/reprimand and that such evaluations continued up to December 2009;
- The Plaintiff pleads that after making a workplace dispute in August 2009 he was subject to reprisal that continued up to December 2009;
- The Plaintiff pleads that even after he was re-assigned in September 2009 his workplace continued to be "poisoned", he continued to be subject to nick names and the ongoing differential treatment.

Statement of Claim at paras. 9, 23, 26, 28,29, 31(b) to (e), 33(a) to (c)(e) to (o)(s)(u), 34, 35(i)(ii)(viii)(ix), 36, 38 to 50, 54, 55, 58 to 60, 64, 66 to 71, 97, 101, 114, 126, 153, 160, 166, Defendant Employer's Motion Record, Tab 5.

12. By May 2009 the Plaintiff advanced the workplace disputes set out below:
- The Plaintiff pleads that in May 2009 he raised a number of workplace disputes alleging amongst other things discrimination, harassment and false accusations;
  - The Plaintiff also pleads in August 2009 he brought forward a workplace dispute alleging amongst other things discrimination to the Defendant Association;

- The Plaintiff pleads that in August 2009 upon the advice of the Defendant Association he refused to sign performance evaluations;
- The Plaintiff pleads in October 2009 he provides a memorandum to the Defendant Employer raising complaints.

Statement of Claim at paras 33(dd), 37 (b) to (e), 38 to 45, 51, 63, 123, Defendant Employer's Motion Record, Tab 5.

13. By October 2009 according to the claim the Plaintiff's health commenced deteriorating, and according to the claim by December 2009 he was "experiencing chronic fatigue."

Statement of Claim paras. 61, 62, 63, 99, Defendant Employer's Motion Record, Tab 5.

#### **ii) Human Rights Tribunal**

14. By December 14, 2010, approximately one year after the employment the relationship ended, an application was filed with the HRTO. Legal Counsel assisted the Plaintiff with this application.

Statement of Claim at paras 199, 200, Defendant Employer's Motion Record, Tab 5.

15. As part of the pre-hearing disclosure the Plaintiff was provided with disclosure. Contrary to the implied undertaking rules at the HRTO the Plaintiff is attempting to rely on e-mails to rebut the presumption that he knew of his alleged claim on the days of the incidents.

Ontario Human Rights Tribunal rule 3.3

Statement of Claim at paras. 11, 151(ii), 155, 159, 163, 194, 225,  
Defendant Employer's Motion Record, Tab 5.

16. The Plaintiff pleads that to date at the HRTO the parties have exchanged pleadings and completed pre-hearing disclosure. As well, a number of hearing dates have been held (May 22 to May 24, 2012; November 1 to 7, 2012).

Statement of Claim at para. 204, 210 to 218, Defendant Employer's  
Motion Record, Tab 5.

17. The Plaintiff pleads that this civil action was commenced after learning during mediation from a Vice-Chair at the HRTO that the monetary award being requested had never been issued by the HRTO previously.

Statement of Claim at para. 210 to 218, Defendant Employer's Motion  
Record, Tab 5.

**A. Bold Allegations that fail to establish a recognizable cause of action within this Honorable Court's jurisdiction.**

18. It is very difficult, if not impossible, to make out the legal dispute. Given that the Plaintiff is unrepresented the most generous read of the pleadings seems to support that the overarching allegation in the claim is that the Defendants in varying degrees discriminated and harassed the Plaintiff during the course of his probationary employment as a police constable. There is also reference to unspecified offences under the *Criminal Code of Canada* and specifically slander under s. 298.

19. The pleadings do not identify allege facts relied on to prove legal requirements of any recognizable cause of action. Again, based on a generous read of the over 100

page pleadings it appears that the below alleged facts are pled to support what at best is an overarching allegation of a stand-alone claim of discrimination and harassment:

- The Plaintiff admits that the alleged acts or comments of the named Defendant Employees occurred during the course of their employment duties.
- The Plaintiff pleads the alleged fact a Defendant Employee requested he speak in a Canadian accent.
- The Plaintiff admits shortly after commencing his probationary employment he improperly read a road sign and made an improper u turn, resulting in the nose of a cruiser going into a ditch. The Plaintiff takes issue with a Defendant Employee issuing a negative internal document related to inadequate operation of a police vehicle.
- It is alleged that the Plaintiff's first coach officer while assigned to Platoon A was disinterested in training and mentoring the Plaintiff. Some of the alleged facts plead to support this claim include the alleged fact that the coach officer, unlike other coach officers, rarely sat beside the Plaintiff when completing reports, and performance review documents contained numerous spelling mistakes. It is also alleged that the coach officer did not review the Plaintiff's work when requested. Rather, the coach officer specifically stated he could review the work on the Defendant Employer's record management system. As well, it is alleged that the coach officer failed to provide feedback in regards to the above incident in which the Plaintiff admits making an improper U turn which resulted in driving of the

nose of a police cruiser into a ditch. Finally, it is alleged that the coach officer failed to recognize work completed by the Plaintiff (i.e. Break and Entry report dated August 6, 2009), and that performance review documents were unfair and included an unsubstantiated charge under the *High Traffic Act*.

- The Plaintiff admits that when requested a Defendant Employee provided assistance and that he found his second coach officer provided an educational experience.
- The Plaintiff pleads that any assistance provided by a Defendant Employee was not voluntary.
- The Plaintiff alleges that a Defendant Employee "orchestrated" the laying of charges under the *Highway Traffic Act* for which it is plead he was later not found guilty of by a Justice of the Peace.
- The Plaintiff admits that prior to his employment with the Defendant Employer he was employed as a security guard and that the provincial police was called in to investigate a theft he had been investigating. It is alleged that a Defendant Employee forwarded the old police report relating to this incident, which was ultimately forwarded to a Defendant Employee who sent an internal e-mail commenting that this report had been missed in any background check and it spoke to the Plaintiff's character.
- The Plaintiff alleges that a Defendant Employee falsely accused him of disliking women and videotaping her. It is also alleged that a Defendant Employee wrongly accused the Plaintiff of winking at her.

- It is also alleged that a Defendant Employee advised the Plaintiff to be quiet when a senior officer was speaking so as to not come across as knowing too much.
- The Plaintiff admits that he discussed and showed two Defendant Employees his vintage gun collection totalling 22 guns. He also pleads that he shared with these Defendants that he served three years of mandatory training in the Israeli Navy. It is alleged that these Defendants inaccurately reported to a Defendant Employee that the Plaintiff owned 32 guns, and it is alleged that these Defendants falsely reported that the Plaintiff told them that he had shot and killed while serving in the Israeli Army. It is also alleged in the pleadings that in response a Defendant Employee sent an e-mail that resulted in the Plaintiff undergoing a second interview with a psychologist.
- The Plaintiff alleges that he sought advice relating to what he considered were unfair performance reviews from a Defendant Employee who worked in the Defendant Employer's Career Development Bureau. The Defendant Employee is alleged to have told the Plaintiff that her role was to work with coach officers, not probationary officers, and that he should go to his bargaining agent the Defendant Association.
- The Plaintiff also pleads that a Defendant Employee failed to respond to the Plaintiff's phone call to the defendant's house requesting that he hold an initial meeting, and during performance reviews this Defendant Employee subjected the Plaintiff to unfair negative comments. It is also

alleged that the same Defendant Employee belittled the Plaintiff. For example, he was given the nickname "cream puff" because he purchased cream puffs and éclairs on occasion.

- The Plaintiff admits that 6 years prior to joining the Defendant Employer he was photographed with five individuals, and that he was suspicious that two of the five individuals were involved in illegal activities. The Plaintiff admits that he showed this dated photograph to a Defendant Employee. The Plaintiff also admits that he was informed on September 11, 2009 the picture formed the basis of an internal investigation by the Defendant Employer's Professional Standards Bureau. A Defendant Employee advised the Plaintiff of the investigation initiated by the Defendant Employer. The Plaintiff also admits that weeks after the investigation was initiated (November 19, 2009) he was notified the complaint was unsubstantiated.
- It is alleged that towards the end of October 2009 the Plaintiff raised concerns with a Defendant Employee, who responded by informing the Plaintiff that "They did not like whiners" but did not provide the Plaintiff with the degree of independence he was requesting. It is also alleged that this Defendant Employee supported the coach officers comments as set out in the November 13, 2009 performance review document.
- It is alleged on December 13, 2009 the Plaintiff was notified of a meeting with a Defendant Employee to address any concerns prior to the Defendant Employer making a decision to terminate his employment. It is

claimed that this Defendant Employee gave the Plaintiff the choice of signing a resignation letter or being released from employment with the OPP.

Statement of Claim at para. 6, 24, 28, 31(c), 33(a)(c)(e)(f)(l)(m)(q)(s)(u)(v)(y)(aa)(bb), 31(ii) to (vi), 34 , 35(i) to (ix), 37(b)(c)(d), 38 to 43,48, 55, 62 to 64, 66 to 73, 111, 128, 132, 133 (1a)(2a)(2c), 136, 138 to 140, 143, 145, 148 to 152, Defendant Employer's Motion Record, Tab 5.

### **PART III: ISSUES**

20. The Defendants move to dismiss this claim on any or all of the below grounds:

i. It is plain and obvious that the claim was filed and served approximately three years after the last alleged incident of discrimination and harassment.

ii. The subject matter of this claim is solely within the jurisdiction of final and binding labour arbitration.

iii. This Honourable Court has no jurisdiction over a stand-alone claim for discrimination that includes an allegation of libel and slander under the *Criminal Code of Canada* and thus, it cannot succeed. Alternatively, the substantive elements of any recognizable cause of action that could be inferred by looking behind the pleadings have not been proven and thus, cannot succeed.

iv. The claim is scandalous, frivolous, vexatious and/or an abuse of process.



21. Finally, the Defendants request this Honourable Court stay the civil proceedings until the completion of the proceedings before the HRTO.

#### **PART IV: LAW AND ANALYSIS**

- i) It is plain and obvious that the claim was filed and served approximately three years after the last alleged incident of discrimination and harassment.**

22. The Defendants support the motion pursuant to rule 21.01(1)(a) for an Order, before trial, dismissing this action in its entirety against the each of the Defendants on the grounds that it is plain and obvious that the two year statutory limitation period has expired.

*Limitations Act, 2002, S.O. 2002, c. 24, Sched. B, s. 4.*

*Rules of Civil Procedure, R.R.O 1990, Reg. 194, r. 21.01(1)(a).*

23. Section 4 of the *Limitations Act, 2002* sets out that "...a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered."

*Limitations Act, supra, s. 4.*

24. Unless rebutted it is assumed that the Plaintiff knew of the material facts of his claim, the acts or omissions on which the claim is based, on the day of the incident. To rebut this presumption the Plaintiff must prove that he did not discover and could not with due diligence discover his claim on the day of the incident.

*Alexis v. Toronto Police Service Board*, [2009] O.J. No. 376 at paras. 35, 41-44 (Sup. Ct.), Defendant Employer's Book of Authorities, Tab 1.

*N.J. v. Ontario (Ministry of Community, Family and Children's Services)*, 2013 ONSC 1290 at paras. 22, 23, Defendant Employer's Book of Authorities, Tab 2.

*Panther Film Services Inc. v. Tayar*, 2012 ONSC 7226 at paras. 12, 20, Defendant Employer's Book of Authorities, Tab 3.

*Zapfe v. Barnes* (2003), 66 O.R. (3d) 397 at para 24 (C.A.), Defendant Employer's Book of Authorities, Tab 4.

25. Ignorance of the law is not a defence to expiry of limitation period.

*Webster v. Almore Trading*, 2010 ONSC 3854 at para 9, Defendant Employer's Book of Authorities, Tab 5.

*Boyce v. Toronto Police Services Board*, 2011 ONSC 53 at para. 37, Defendant Employer's Book of Authorities, Tab 6.

26. This limitation period cannot be extended or abridged.

*Alexis, supra* at paras. 28-30, Defendant Employer's Book of Authorities, Tab 1.

*Joseph v. Paramount Canada's Wonderland*, 2008 ONCA 469 at paras 23 to 27, Defendant Employer's Book of Authorities, Tab 7.

27. Even though a statement of defence has not been filed it is appropriate to dismiss the action pursuant to rule 21.01(1)(a) as the Plaintiff admits the claim is outside the limitation period, and it is "plain and obvious" from a review of the statement of claim that no additional facts could be asserted that would alter the conclusion that a limitation period [has] expired. Thus, summary judgment based on expiry of the limitation period is appropriate in this case.

*Beardsley v. Ontario Provincial Police* (2001), 57 O.R. (3d) 1 at para 21 (C.A.), Defendant Association's Book of Authorities, Tab 8.

28. The Plaintiff has admitted on several occasions that he is bringing this claim outside the two year limitation period.

Statement of Claim at paras. 181,182, Defendant Employer's Motion Record, Tab 5.

29. From January 2009 to December 2009 the Plaintiff pleads he experienced ongoing acts and incidents that he alleges supports what is in essence his overarching claim of ongoing harassment and discrimination. By his own actions it is clear he had knowledge of these acts or incidents relied upon; prior to the last incident (dated December 2009) relied upon he advances workplace disputes (disputes advanced in May 2009 and August 2009), and he filed an Application with the Human Rights Tribunal of Ontario in December 2010.

Statement of Claim at paras. 7, 9, 20, 23, 26, 28, 29, 31(b) to (e), 33(a) to (c)(e) to (o)(s)(u) (dd), 34, 35(i)(ii)(viii)(ix), 36, 37(b) to (e), 38 to 50, 51, 54, 55, 58 to 60, 63, 64, 66 to 71, 97, 101, 114, 123, 126, 153, 160, 166, Defendant Employer's Motion Record, Tab 5.

30. The Plaintiff has not provided a viable defence to dismissing this claim on the ground of expiry of the limitation period. In light of this courts jurisprudence the plaintiff's defence of "ignorance of the law" must be rejected.

Statement of Claim paras. 198, 200, 220, Defendant Employer's Motion Record, Tab 5.

31. Plaintiff's attempt to rely on disclosure obtained during the Human Rights proceedings to rebut the statutory presumption set out in rule 6 should be dismissed solely on the grounds of injustice.

32. Alternatively, it is respectfully submitted that the discoverability rule is not an issue and it is plain and obvious that the Plaintiff was aware of the alleged material facts to support his claim prior to December 15, 2009. The Plaintiff did not discover after the expiry of the limitation period new material facts to support his underlying claim.

33. The Statement of Claim against the Defendants should be dismissed as it is plain and obvious that the statutory limitation period expired at a minimum three years prior to any of the below steps taken to commence these legal proceedings:

- On December 27, 2012 the Plaintiff provided notice of his intent to bring a claim against the Crown; and/or
- On March 15, 2013 the Plaintiff filed and served a Statement of Claim against the Defendant Employer and its Defendant Employees properly served, except Defendant Employee Chris Newton who was served on August 5, 2013.

34. Having regard to the foregoing, this Honourable Court should dismiss this action as the limitation period has elapsed; as it is plain and obvious that the statutory period has expired.

**ii) The subject matter of this claim falls within the sole jurisdiction of final and binding labour arbitration.**

35. The Defendants bring a motion pursuant to Rule 21.01(3) (a) of the *Rules of Civil Procedure* requesting this action be dismissed on the grounds that this Honourable Court has no jurisdiction over the subject matter of this claim (discrimination and harassment that is alleged to have occurred during the Plaintiff's probationary period of employment with the Defendant Employer) which is properly a matter for final and binding labour arbitration.

*Rules of Civil Procedure, supra, r. 21.01(3)(a).*

36. It is the Defendants position that in its essential character the dispute of discrimination and harassment during the course of the Plaintiff's probationary employment arises from the collective agreement between the Defendant Employer and Defendant Association and as such, this Honourable Court has no jurisdiction over the action. There is no concurrent or overlapping jurisdiction.

*Weber v. Ontario Hydro, [1995] 2 S.C.R. 929 at paras. 49-50, 58, Defendant Employer's Book of Authorities, Tab 9.*

37. The test, as laid down by the Supreme Court of Canada and consistently followed by Ontario courts, is whether the dispute, in its essential character, arises from the interpretation, application, administration or violation of the Collective Agreement.

*Weber v. Ontario Hydro, supra, at para. 52, Defendant Employer's Book of Authorities, Tab 9.*

*Chapman v. 3M Canada Inc., [1997] O.J. No. 928 at para. 3 (C.A.), Defendant Employer's Book of Authorities, Tab 10.*

*Giorno v. Pappas (1999), 42 O.R. (3d) 626 at para. 20 (C.A.), Defendant Employer's Book of Authorities, Tab 11.*

*Allen v. Alberta, 2003 SCC 13 at paras. 12-15, Defendant Employer's Book of Authorities, Tab 12.*

*Maynard v. Arvin Ride Control Products*, [2000] O.J. No. 937 at paras. 40-42 (Sup. Ct.), Defendant Employer's Book of Authorities, Tab 13.

*Pilon v. International Minerals and Chemical Corp. (Canada)* (1996), 31 O.R. (3d) 210 at paras. 14-15 (C.A.), Defendant Employer's Book of Authorities, Tab 14.

*Dayco (Canada) Ltd. v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada)*, [1993] 2 S.C.R. 230, Defendant Employer's Book of Authorities, Tab 15.

38. The Courts have held consistently that, in assessing which adjudicative forum should appropriately address a particular matter, one must look to the facts to determine the "essential character" of the dispute, "regardless of how [the dispute] may be characterized legally."

*New Brunswick v. O'Leary*, [1995] 2 S.C.R. 967 at para. 6, Defendant Employer's Book of Authorities Tab 16.

*Marinaki v. Canada*, 2001 FCT 1406 at para 31, Defendant Employer's Book of Authorities Tab 17.

*Weber v. Ontario Hydro*, *supra*, at paras. 43 and 52, Defendant Employer's Book of Authorities Tab 9.

*Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14 at paras. 25-26, Defendant Employer's Book of Authorities Tab 18.

*Giorno v. Pappas*, *supra*, at para. 28, Defendant Employer's Book of Authorities, Tab 11.

39. In *Giorno v. Pappas*, the Ontario Court of Appeal held that a dispute which arises under a collective agreement must be arbitrated and cannot be litigated in the courts. The Court found the following:

- i. the essential character of the conduct complained of by the plaintiff was covered by the collective agreement;
- ii. the dispute was one that arose under the collective agreement and had to be resolved through the arbitration process rather than in the courts; and
- iii. it was irrelevant that the relief sought was against a party or parties other than the employer.

*Giorno v. Pappas, supra*, at paras. 23 and 25, Defendant Employer's Book of Authorities Tab 11.

40. In considering the ambit of the applicable collective agreement, the decision maker must examine the provisions to determine whether the dispute explicitly or implicitly arises from the interpretation, application, administration or violation of the collective agreement.

*Regina Police Association Inc., supra* at para. 25, Defendant Employer's Book of Authorities Tab 18.

*Posner v. Ontario*, [1995] O.J. No. 2307 at para. 10 (Ct. J. (Gen. Div.)), Defendant Employer's Book of Authorities Tab 19.

*Burley v. Ontario Public Service Employees Union*, [2004] O.J. No. 4431 at para. 27, 38, 42, 44 (Sup. Ct.), Defendant Employer's Book of Authorities Tab 20.

*Toronto Transit Commission v. Amalgamated Transit Union (Stina Grievance)*, [2004] O.L.A.A. No. 565 at para. 240, Defendant Employer's Book of Authorities Tab 21.

41. Where an employee has sued another employee for a workplace wrong, the courts have held they do not have jurisdiction over the dispute if its "essential character" still arises under the collective agreement.

*Piko v. Hudson's Bay Company* (1998), 41 O.R. (3d) 729 (C.A.), leave to appeal dismissed [1999] S.C.C.A. No. 23, Defendant Employer's Book of Authorities Tab 22.

42. For example, in *Giorno v. Pappas, supra*, the Plaintiff claimed she had been defamed based on a memorandum prepared and circulated by a co-worker. Just as in the present case, the Plaintiff had named the co-worker as a defendant in the action.

The Court of Appeal characterized the Plaintiff's claim in this way:

Turning to the facts of this dispute, they are all workplace related. The October 5 memorandum was written and circulated in the workplace. It addressed a workplace problem, namely how Ms. Giorno did her work. Its author worked on the same team as Ms. Giorno. The recipients of the memorandum were all people who could have been expected to be informed of a problem in her working relationship with the respondent Pappas. Ms. Giorno's assertion in this dispute is that this memorandum caused her significant harm. The collective agreement places a broad obligation on the employer to provide a safe and healthy workplace. ... Indeed, I see no reason why it could not have sustained a claim for damages at arbitration, the very relief claimed in the litigation.

*Giorno v. Pappas, supra* at para. 21-22, Defendant Employer's Book of Authorities Tab 11.

43. In dismissing the Plaintiff's claim, the Court stated: "As to the respondent Pappas, while he is an employee of the respondent Crown, he had no managerial responsibility over Ms. Giorno. Nor was he an employee covered by the collective



agreement. Despite this, given that this dispute arises under the collective agreement the principle in Weber applies”.

*Giorno v. Pappas, supra* at para. 26, Defendant Employer’s Book of Authorities Tab 11.

44. As previously set out the overarching allegation in the claim is that the Defendant Employer and the Defendant Employees in varying degrees discriminated and harassed the Plaintiff during the course of his approximate 11 month probationary employment as a police constable.

45. As per the pleadings the Plaintiff relies on alleged incidents or comments that occurred from January 2009 to December 2009. During this period of time the Plaintiff was a member of the bargaining unit represented by the Defendant Association.

Affidavit of Jeffrey Bagg, para.2, 3, Defendant Employer’s Motion Record Tab 3.

46. The terms and conditions of employment are set out in the collective agreement signed by the Defendant Employer and Defendant Association. The terms of the collective agreement include extensive provisions protecting employees from discrimination and harassment in the workplace. The collective agreement includes the right to grieve any alleged violation of the terms of the Collective Agreement and to have any unresolved grievance proceed to final and binding arbitration.

Affidavit of Jeffrey Bagg, para.4, 10 to 14 Defendant Employer’s Motion Record Tab 3.

47. The essential character of the dispute is an allegation of discrimination and harassment that arises arise from the interpretation, application, administration or

violation of the collective agreement and as such, this Honourable Court should dismiss the claim as it is within the exclusive jurisdiction of a labour arbitrator pursuant to the collective agreement. It is irrelevant that the Plaintiff is claiming relief against individually named employees for actions or comments made during the course of their employment with the Defendant Employer.

**iii) This Honourable Court has no jurisdiction over a stand-alone claim for discrimination that includes an allegation of libel and slander under the Criminal Code of Canada and thus, it cannot succeed. Alternatively, the substantive elements of any recognizable cause of action that could be inferred by looking behind the pleadings have not been proven and thus, cannot succeed.**

48. The Defendants move to have the Plaintiff's pleadings struck pursuant to Rule 21.01(1)(b) on the ground that it is plain and obvious that the Plaintiff's claim cannot succeed as it discloses no recognizable cause of action.

*Rules of Civil Procedure, supra, r. 21.01(1)(a).*

*Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at para.36 Defendant Employer's Book of Authorities, Tab 23.

*Aristocrat Restaurants Ltd. (c.o.b. Tony's East) v. Ontario*, [2003] O.J. No. 5331 at para. 18 (Sup. Ct.), Defendant Employer's Book of Authorities, Tab 24.

*Balanyk v. University of Toronto*, [1999] O.J. No. 2162 at para. 29 (Sup. Ct.), Defendant Employer's Book of Authorities, Tab 25.

49. In considering this motion the Court should take the facts alleged as true but it should not look beyond the pleadings to determine if the action has any chance of success.

*Prete v. Ontario* (1993), 16 O.R. (3d) 161 at para. 16 and 21 (C.A.),  
Defendant Employer's Book of Authorities, Tab 26.

50. It is the Defendants position that a very generous read of the allege facts support the conclusion that the claim alleges that the various Defendants in varying degrees discriminated and harassed the Plaintiff during the course of his approximate 11 month probationary employment as a police constable, and that each of the Defendant Employees were acting in the course of their employment duties. This claim includes an allegation of breach of s.298 (1) of the *Criminal Code of Code of Canada*. For the reasons set out below it is plain and obvious that the claim cannot succeed as it does not disclose a recognized cause of action within this Honorable Court's jurisdiction.

51. In terms of the claim of discrimination and harassment, there is no common law tort of discrimination and a breach of the *Human Rights Code* is not an independent actionable wrong.

*Blair v. ICI Canada Inc.*, 2010 ONSC 1321 at para. 20, Defendant  
Employer's Book of Authorities, Tab 27.

*Feuerwerker v. Watson*, [2000] O.J. No. 5197 at para. 21 (Sup. Ct.),  
Defendant Employer's Book of Authorities, Tab 28.

52. Given there is no stand-alone claim of discrimination and harassment it is plain and obvious that the claim cannot succeed as it does not identify a recognized cause of

action within this Honourable Courts jurisdiction. Consequently, the Defendants request the action be dismissed as against each of them.

53. In terms of the claim that s. 298(1) of the *Criminal Code of Canada* has been violated by specific Defendant Employees, clearly there is no recognizable common law tort that mirrors the definition of defamatory libel as set out in the *Criminal Code of Canada*, and clearly it is trite law that this Honourable Court has no jurisdiction over any alleged violation of the *Criminal Code of Canada*.

54. Based on the facts as pled from paragraph 128 to 144 it is plain and obvious that the Plaintiff's claim cannot succeed as against each of the Defendant's named in these paragraphs as it discloses no recognized cause of action within this Honorable Court's jurisdiction. Such bold unsubstantiated, improper allegations are highly offensive and clearly support that the entire claim should be dismissed as it is scandalous, frivolous, vexatious and/or an abuse of process and at the very least against those Defendants named in the cited paragraphs.

55. Alternative, it may be proposed to this Honourable Court that it look behind the pleadings to infer the tort of defamation or the tort of negligence prior to dismissing this claim on the grounds advanced by the Defendants.

56. It is the Defendant Employer and Defendant Employee's position that any such argument should be rejected as both the tort of defamation and the tort of negligence

have not been specifically pled and to consider these torts requires the Court to improperly look behind the pleadings.

57. Alternatively, it is the Defendants position that there are wholly insufficient facts alleged to establish either tort.

58. The tort of defamation requires proof of the following three elements:

(1) that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (2) that the words in fact referred to the plaintiff; and (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff.

*Grant v. Torstar Corp.*, 2009 SCC 61 at para. 28, Defendant Employer's Book of Authorities, Tab 29.

59. The law establishes that any comment made in the course of a performance review or workplace investigation is subject to "qualified privilege".

*Grant v. Torstar Corp.*, *supra* at para. 30, Defendant Employer's Book of Authorities, Tab 29.

60. Clearly, the summary of the pleadings as set out above in paragraph 18 substantiates that the allege facts are wholly insufficient to establish if proven each of the elements required for the tort of defamation.

61. The tort of negligence requires the Plaintiff to prove that the Defendant Employer and/or the Defendant Employees owed him a duty of care, that the Defendant Employer and/or the Defendant Employees breached the standard of reasonable care, that the

Plaintiff suffered compensable damages and that it was the Defendant Employer and/or Defendant Employees breach that caused the Plaintiff's damages.

62. Clearly, the summary of the pleadings as set out above in paragraph 18 substantiates that the allege facts are wholly insufficient to prove the tort of negligence.

**iv) The Claim is scandalous, frivolous, vexatious and/or an abuse of process**

63. The Rules require plaintiffs to plead a concise statement of material facts and permit this Honourable Court to dismiss an action that is frivolous, vexatious or otherwise an abuse of process and to strike out or expunge all or part of a pleading on the grounds that it is scandalous, frivolous or vexatious or an abuse of process.

*Rules of Civil Procedure, supra, r. 21.01(3)(d), 25.06(1) and 25.11.*

64. The Plaintiff's claim is over 100 hundred pages and does not organize any of the alleged facts in a manner that could even if proven support a recognizable cause of action. Furthermore, the plaintiff recklessly references criminal offences and even concepts such as constitutionality without any regard to reputation or legal ramifications.

Statement of Claim at para. 84, 135,137, 181, Defendant Employer's Motion Record, Tab 5.

65. As explained above the Plaintiff admits entire claim for hundreds of thousands dollars was initiated because at mediation at the HRTO the Vice Chair advised that the monetary remedy requested had never been previously awarded. As well, contrary to the implied undertaking rules at the HRTO the Plaintiff relies on disclosure that was received during the pre-hearing disclosure provided by the Defendant Employer as part of the proceedings at the HRTO.

Ontario Human Rights Tribunal, rule 3.3.

Statement of Claim at para. 11, 151(ii), 150 to 142, 155, 159, 161, 163, 194, 213, 225, Defendant Employer's Motion Record, Tab 5.

*Georgareas v. Georgareas* (2006), 272 D.L.R. (4<sup>th</sup>) 574, Defendant Employer's Book of Authorities Tab 30.

66. The above facts substantiate a finding that this claim was brought in a scandalous, frivolous, vexatious and is an abuse of process. The Defendants request the entire claim be dismissed.

**v) Finally, the Defendants request this Honourable stay the civil proceedings until the completion of the proceedings before the HRTO**

67. The Defendants request that this Honourable Court stay its proceedings on the grounds that another proceeding is pending before the HRTO.

*Courts of Justice Act*, R.S.O. 1990, c. C.43, s.106.

68. An action ought to be stayed where the Plaintiff has brought an Application at the HRTO that is based on the same facts. In staying proceedings in similar circumstances, Ontario courts have granted a stay based on: (a) the possibility of inconsistent findings of fact; (b) the possibility of double recovery, which would be manifestly unfair to the Defendants; (c) the broader remedial powers of the Human Rights Tribunal of Ontario, including the power to order reinstatement of the Plaintiff; and (d) the delay that would occur to the human rights proceeding.

*Ghosh v. Domglas Inc.* (1986), 57 O.R. (2d) 710 (H.C.), Defendant Employer's Book of Authorities Tab 31.

*Meiklem v. Bot Quebec Ltée*, [1992] O.J. No. 893 (Ct. J. (Gen. Div.)), Defendant Employer's Book of Authorities Tab 32.

*McConnell v. Loomis Armored Car Service Ltd.*, [1993] O.J. No. 2768 (Ct. J. (Gen. Div.)), Defendant Employer's Book of Authorities, Tab 33.

69. It is undisputed that, prior to filing and serving his statements of claim in this proceeding, the Plaintiff filed an Application with the HRTO relating to the identical subject matter as this proceeding.

70. The Plaintiff in the pleadings admit that pre-hearing matters such as disclosure have been completed at the HRTO. As well, the Plaintiff admits that a number of hearing dates have been held (May 22 to May 24, 2012; November 1 to 7, 2012). He further pleads that as a result of a mediation at the HRTO and the Vice Chair's comment during these mediations that the monetary remedy being requested exceeded any remedy previously awarded by the HRTO that he decided to file and serve the claim presently before this Honourable Court.



Statement of Claim at para. 204, 208 to 218, Defendant Employer's Motion record, Tab 5.

**PART IV: ORDER SOUGHT**


71. The Defendants therefore respectfully requests that this Honourable Court make an Order dismissing this action in its entirety as against each of the Defendants.

72. Alternatively, the Defendants this Honourable Court stay its proceedings until the Application before the HRTO has been decided.

73. The Defendants request costs of the action and this motion to be paid by the Plaintiff.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

This 17<sup>th</sup> day of January, 2014.

  
Lisa Compagnone  
Counsel for the Defendants, 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



**Schedule "A"**  
**List of Authorities**

1. *Alexis v. Toronto Police Service Board*, [2009] O.J. No. 376 (Sup. Ct.).
2. *N.J. v. Ontario (Ministry of Community, Family and Children's Services)*, 2013 ONSC 1290.
3. *Panther Film Services Inc. v. Tayar*, 2012 ONSC 7226.
4. *Zapfe v. Barnes (2003)*, 66 O.R. (3d) 397 (C.A.).
5. *Webster v. Almore Trading & Manufacturing Co.*, 2010 ONSC 3854.
6. *Boyce v. Toronto Police Services Board*, 2011 ONSC 53.
7. *Joseph v. Paramount Canada's Wonderland*, 2008 ONCA 469.
8. *Beardsley v. Ontario Provincial Police (2001)*, 57 O.R. (3d) 1 (C.A.).
9. *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929.
10. *Chapman v. 3M Canada Inc.*, [1997] O.J. No. 928 (C.A.).
11. *Giorno v. Pappas (1999)*, 42 O.R. (3d) 626 (C.A.).
12. *Allen v. Alberta*, 2003 SCC 13.
13. *Maynard v. Arvin Ride Control Products*, [2000] O.J. No. 937 (Sup. Ct.).
14. *Pilon v. International Minerals and Chemical Corp. (Canada) (1996)*, 31 O.R. (3d) 210 (C.A.).
15. *Dayco (Canada) Ltd. v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada)*, [1993] 2 S.C.R. 230.
16. *New Brunswick v. O'Leary*, [1995] 2 S.C.R. 967.
17. *Marinaki v. Canada*, 2001 FCT 1406.
18. *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14.
19. *Posner v. Ontario*, [1995] O.J. No. 2307 (Ct. J. (Gen. Div.)).
20. *Burley v. Ontario Public Service Employees Union*, [2004] O.J. No. 4431 (Sup. Ct.).
21. *Toronto Transit Commission v. Amalgamated Transit Union (Stina Grievance)*, [2004] O.L.A.A. No. 565 (Shime).
22. *Piko v. Hudson's Bay Company (1998)*, 41 O.R. (3d) 729 (C.A.).
23. *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.
24. *Aristocrat Restaurants Ltd. (c.o.b. Tony's East) v. Ontario*, [2003] O.J. No. 5331 (Sup. Ct.).
25. *Balanyk v. University of Toronto*, [1999] O.J. No. 2162 (Sup. Ct.).
26. *Prete v. Ontario (1993)*, 16 O.R. (3d) 161 (C.A.).
27. *Blair v. ICI Canada Inc.*, 2010 ONSC 1321.
28. *Feuerwerker v. Watson*, [2000] O.J. No. 5197 (Sup. Ct.).
29. *Grant v. Torstar Corp.*, 2009 SCC 61.
30. *Georgareas v. Georgareas*, [2006] O.J. No. 5316 (Sup. Ct.).
31. *Ghosh v. Domglas Inc. (1986)*, 57 O.R. (2d) 710 (H.C.).
32. *Meiklem v. Bot Quebec Ltée*, [1992] O.J. No. 893 (Ct. J. (Gen. Div.)).
33. *McConnell v. Loomis Armored Car Service Ltd.*, [1993] O.J. No. 2768 (Ct. J. (Gen. Div.)).



**Schedule "B"**  
**Relevant Statutory Provisions**

***Limitations Act, 2002, 2002, c. 24, Sch. B***

**Basic limitation period**

4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

***Rules of Civil Procedure, R.R.O. 1990, Reg. 194***

***To Any Party on a Question of Law***

**21.01** (1) A party may move before a judge,

- (a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or
- (b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly.

(2) No evidence is admissible on a motion,

- (a) under clause (1) (a), except with leave of a judge or on consent of the parties;
- (b) under clause (1) (b).

***To Defendant***

- (3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,

***Jurisdiction***

- (a) the court has no jurisdiction over the subject matter of the action;
- [...]

***Another Proceeding Pending***

- (c) another proceeding is pending in Ontario or another jurisdiction between the same parties in respect of the same subject matter;

[...]

and the judge may make an order or grant judgment accordingly

***RULES OF PLEADING — APPLICABLE TO ALL PLEADINGS***

***Material Facts***

**25.06** (1) Every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved.

[...]

***Nature of Act or Condition of Mind***

- (8) Where fraud, misrepresentation, breach of trust, malice or intent is alleged, the pleading shall contain full particulars, but knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred

### ***STRIKING OUT A PLEADING OR OTHER DOCUMENT***

- 25.11** The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,
- (a) may prejudice or delay the fair trial of the action;
  - (b) is scandalous, frivolous or vexatious; or
  - (c) is an abuse of the process of the court.

### **Human Rights Tribunal of Ontario: Rules of Procedure (effective July 1, 2010)**

#### **Confidentiality of Documents Disclosed Under These Rules**

- 3.3** Parties and their representatives may not use documents obtained under these Rules for any purpose other than in the proceeding before the Tribunal.

### ***Proceedings Against the Crown Act, R.S.O. 1990, c. P.27***

#### **Notice of claim**

7. (1) Subject to subsection (3), except in the case of a counterclaim or claim by way of set-off, no action for a claim shall be commenced against the Crown unless the claimant has, at least sixty days before the commencement of the action, served on the Crown a notice of the claim containing sufficient particulars to identify the occasion out of which the claim arose, and the Attorney General may require such additional particulars as in his or her opinion are necessary to enable the claim to be investigated.

### ***Courts of Justice Act, R.S.O 1990, c. C.43***

#### **Stay of proceedings**

**106.** A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

**MICHAEL JACK**

and

**HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO et al.**

**Plaintiff**

**Defendants**

**Court File No. CV-12-470815/CV-13-476321**

---

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**Proceeding commenced at Toronto**

**FACTUM OF THE MOVING PARTY, HER  
MAJESTY THE QUEEN IN RIGHT OF ONTARIO et  
al.**

**Ministry of the Attorney General  
Legal Services Branch  
Ministry of Government Services  
9<sup>th</sup> Floor, Ferguson Block  
77 Wellesley Street West  
Toronto, ON M7A 1N3**

**Lisa Compagnone – LSUC# 42823P  
Lisa.compagnone@ontario.ca  
Tel: (416) 327-6916  
Fax: (416) 325-9404**

**Counsel for the Defendants Her Majesty the Queen in  
Right of Ontario and its employees.**

