

Norman Groot  
Direct Line: (416) 637-3141  
ngroot@investigationcounsel.com

April 9, 2013

**VIA COURIER**

Michael Jack  
c/o Lloyd Tapp  
✓ 252 Angeline Street North  
Lindsay, ON K9V 4R1  
Tel: 1-705-878-4240  
Email: [dmclaugh@bell.net](mailto:dmclaugh@bell.net)

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

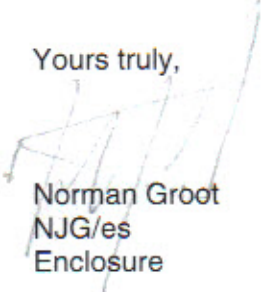
Dear Mr. Jack and Ms. Compagnone:

**Re: OPPA et al. ats Jack**  
**Court File No. : CV-12-470815**

---

Please find enclosed our client's updated Motion Record, as well as the Factum and Book of Authorities, for the Motion returnable April 22, 2013, which is served upon you pursuant to the *Rules of Civil Procedure*.

Yours truly,



Norman Groot  
NJG/es  
Enclosure

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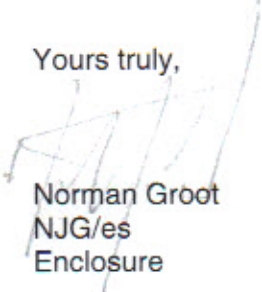
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**ONTARIO  
SUPERIOR COURT OF JUSTICE**

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

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

Defendants

**FACTUM OF THE DEFENDANTS,  
THE ONTARIO PROVINCIAL POLICE ASSOCIATION, SHAUN FILMAN,  
KAREN GERMAN, JIM STYLES and MARTY MCNAMARA  
(for their motion returnable April 22, 2013)**

**DATE: April 8, 2013**

**Investigation Counsel  
Professional Corporation**

Barristers  
350 Bay Street, Suite 1000  
Toronto, ON M5H 2S6  
Norman Groot  
LSUC # 43721V

Telephone: (416) 637-3141  
Facsimile: (416) 637-3445

[ngroot@investigationcounsel.com](mailto:ngroot@investigationcounsel.com)  
Lawyers for the Defendants,  
The Ontario Provincial Police Association,  
Shaun Filman, Karen German,  
Jim Styles and Marty McNamara

## PART II – FACTS

<b>Background Events to this Motion</b>	2
<b>A. Allegations against the OPPA Defendants</b>	4
<u>Allegations against Sergeant Jim Styles</u>	4
<u>Allegations against Constable Marty McNamara</u>	4
<u>Allegations against Detective Constable Karen German</u>	5
<u>Allegations against Constable Shaun Filman</u>	6
<u>Allegations against the OPPA</u>	8
<i>The Duties owed by the OPPA to the Plaintiff</i>	8
<i>Relationship between the OPPA and the OPP</i>	9
<i>Harry Allen Chase file</i>	9
<i>Labour Relations Act</i>	10
<i>Damages</i>	10
<b>B. Limitation Period: The Chronology of the Actions</b>	11

## PART III – THE LAW & ANALYSIS

<b>A. No Cause of Action against the OPPA Defendants</b>	15
<u>The Law and Applicable Rules of Civil Procedure</u>	15
<u>Analysis</u>	16
<i>Dismissal of Claim as against Sergeant Styles and Constable McNamara</i>	16
<i>Dismissal of Claim as against Detective Constable German, Constable Filman and the OPPA</i>	17
1. <i>Failure to Represent/Assist</i>	17
2. <i>Breach of Legal Duty to Assist/"Accommodate"</i>	18
3. <i>Conspiracy</i>	18
4. <i>Negligence</i>	19
(i) <i>No Duty of Care</i>	20
(ii) <i>No Breach of the Standard of Care</i>	20
(iii) <i>No Damage/Loss</i>	20
<i>Violations of the Labour Relations Act</i>	21

<i>Bad Faith/Malice</i>	21
<b>B. Limitation Period: The Claim is Statute-barred</b>	23
<u><i>The Law Governing Limitation Periods</i></u>	23
<u><i>The Applicable Rules of Civil Procedure</i></u>	24
<u><i>Analysis</i></u>	25
<i>The Limitation Period Issue may be Decided Although no Statement of Defence</i>	25
<i>No Facts in Dispute that bar this Court from Deciding the Limitation Period Issue</i>	26
<i>No Discretion to Extend the Limitation Period or to Consider Special Circumstances</i>	27

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## PART I – OVERVIEW

1. The defendants, the OPPA, Shaun Filman, Karen German, Jim Styles and Marty McNamara (collectively, the “OPPA Defendants”) bring this motion to dismiss the claims against them.
2. The OPPA Defendants submit that there are two grounds on which this Court should find that the actions against them cannot continue. They submit that: (1) the claims should be struck in their entirety as against the OPPA Defendants as they disclose no reasonable cause of action against them; or (2) in the alternative, they should be dismissed on the grounds that they are statute-barred by virtue of being commenced after the expiry of the limitation period. The grounds for these requested orders are set out herein.

## PART II – FACTS

### Background Events to this Motion

3. On December 21, 2012, the Plaintiff commenced this Action under Court File No. CV-12-470815 (the “2012 Action”) for damages for defamation based on events that allegedly occurred during his employment with the Ontario Provincial Police from January to December 2009. To date, the OPPA Defendants have not defended the 2012 Action.

**Reference:** 2012 Statement of Claim, Motion Record of the OPPA Defendants, Tab 1A.

4. On January 10, 2013, Mr. Groot sent a letter by courier to the Plaintiff’s representative, Lloyd Tapp. In this letter, Mr. Groot advised that he had been retained to represent the OPPA Defendants in this matter. Included with the letter was a copy of the Notice of Motion returnable April 22, 2013. Mr. Groot advised Mr. Tapp that if his client failed to consent to the dismissal or discontinuance of the 2012 Action as against the OPPA Defendants, they would seek costs against the Plaintiff payable forthwith.

**Reference:** Affidavit of E. Stoik, para. 3, Motion Record of the OPPA Defendants, Tab 2.

5. On January 14, 2013, Ms. Compagnone, counsel for Her Majesty the Queen in right of Ontario (the "Crown") sent Mr. Tapp a letter advising that the 2012 Action was a nullity as against the Crown as service had not been effected pursuant to s. 7 of the *Proceedings Against the Crown Act* ("PACA"). Ms. Compagnone advised that the Crown would accept the Statement of Claim served on December 27, 2012, as a Notice of Claim under s. 7 of PACA. She further advised that the usual procedure for plaintiff's counsel in these circumstances is to discontinue the existing action as against the Crown and commence another action against the Crown after the expiry of the sixty day notice period set out in PACA and consolidate the new action with the existing action against the other defendants.

**Reference:** *ibid.*, para. 4.

6. On February 8, 2013, Mr. Tapp delivered to the OPPA Defendants the Plaintiff's responding Motion Record, as well as the Plaintiff's Motion Record for his motion seeking orders permitting amendments to the style of cause, a fee waiver and an order permitting Mr. Tapp to act as his representative.

**Reference:** *ibid.*, para. 5.

7. On March 17, 2013, Mr. Tapp sent an e-mail to Mr. Groot advising that he had filed a discontinuance of the claim against the OPP and its employees (the "OPP Defendants") in order to comply with Ms. Compagnone's instructions about service on the Crown (it does not appear to have been filed). Mr. Tapp also advised that on March 15, 2013, he had a new claim issued against the OPP Defendants. On March 18, 2013, Mr. Groot advised Mr. Tapp by return e-mail that he would accept service of the new claim on behalf of the defendant Shaun Filman. On March 25, 2013, Mr. Groot sent a further e-mail to Mr. Tapp asking that he send the new pleading and advising that he was drafting the factum for OPPA Defendants' motion to strike the claim.

**Reference:** *ibid.*, para. 6.

8. On April 1, 2013, Mr. Groot sent by e-mail a letter to the Plaintiff's agent enclosing a letter dated February 13, 2013. In the letter dated February 13, 2013, Mr. Groot advised Mr. Tapp that the OPPA Defendants would take no position to him acting as the Plaintiff's representative, but that the Plaintiff himself was required to attend the April 22, 2013 motion. In

this letter Mr. Groot also advised Mr. Tapp of the costs being incurred by his clients due to the Plaintiff's refusal to consent to striking the claim against them. Mr. Groot advised that the OPPA Defendants would be seeking a cost order against the Plaintiff for the preparation of their motion materials, factum, reviewing the Plaintiff's materials and attending the motion.

**Reference:** *ibid.*, para. 7.

9. On April 2, 2013, the new Statement of Claim bearing Court File No. CV-13-476321 (the "2013 Action") was served on the OPPA Defendants.

**Reference:** *ibid.*, para. 8.

#### **A. Allegations against the OPPA Defendants**

10. The Plaintiff has issued two claims dealing with essentially the same events and the same defendants. In the 2012 Action he named the OPPA, Shaun Filman, Karen German, Jim Styles and Marty McNamara as Defendants. The OPPA Defendants have been removed from the style of cause in the subsequent claim issued in March 2013, however, the body of the claim still contains allegations about Detective Constable German, Constable Filman and the OPPA.

##### *Allegations against Sergeant Jim Styles*

11. The defendant Sergeant Styles is mentioned only once in the 2012 Action, in an early paragraph where is he simply listed as a defendant to the claim. There are no allegations against Sergeant Styles in the body of either the 2012 or 2013 Statements of Claim.

**Reference:** 2012 Statement of Claim, para. 7, Motion Record of the OPPA Defendants, Tab 1A.

**Reference:** 2013 Statement of Claim, Motion Record of the OPPA Defendants, Tab 1B.

##### *Allegations against Constable Marty McNamara*

12. The defendant Constable McNamara is mentioned only once in the 2012 Statement of Claim, in an early paragraph where is he simply listed as a defendant to the claim. There are no allegations against Constable McNamara in either the 2012 or 2103 Statements of Claim.



Reference: *Ibid.*

Allegations against Detective Constable Karen German

13. In both claims the defendant Detective Constable German is generally presented in a very favourable light. The Plaintiff was put in touch with Detective Constable German when he initially contacted the OPPA, and on August 4, 2009, she advised him that she was going to look into his case. The Plaintiff describes this defendant as someone who assisted him in dealing with the unwelcome and unsupportive work environment caused by other officers in Platoon "A". The Plaintiff states that it was Detective Constable German's investigation "that revealed that he had been specifically targeted by members of his shift," and he was subsequently transferred to a different platoon with a new shift supervisor and coach officer. When the Plaintiff felt he was being given negative Performance Evaluation Reports as a result of seeking assistance from the OPPA, he once again contacted Detective Constable German who advised him not to sign the documents at issue and to have them reviewed by an OPPA representative.

Reference: 2012 Statement of Claim, para. 33(e), 24, 41, Motion Record of the OPPA Defendants, Tab 1A.

Reference: 2013 Statement of Claim, paras. 37(e), 44, 46, Motion Record of the OPPA Defendants, Tab 1B.

14. The Plaintiff raises one criticism of Detective Constable German – namely that although she allegedly discovered that the Plaintiff was treated in a way that violated the Ontario *Human Rights Code* and Police Orders:

she did not include this information in her e-mail to the Plaintiff other than state in the e-mail that she had spoken with the Acting Superintendent ... about the Plaintiff's issues at length and it was the [Acting Superintendent's] decision to move the Plaintiff to another platoon. To wilfully omit to mention the existence of such violations ultimately reflects the OPPA's willingness and desire to just cover it up and not do anything about it.

The result of this omission, he alleges, is that the OPPA failed to fulfil its legal obligation "to protect the Plaintiff and ensure that the appropriate action was taken."

Reference: 2012 Statement of Claim, para. 44, Motion Record of the OPPA Defendants, Tab 1A.

**Reference:** 2013 Statement of Claim, para. 47,121, Motion Record of the OPPA Defendants, Tab 1B.

15. Following the termination of his employment, Detective Constable German allegedly told the Plaintiff "that he had started at a very bad detachment within the OPP." The Plaintiff goes on to state:

Unfortunately, she was unwilling to put this down in writing and unfortunately this did little to ease the emotional trauma that the Plaintiff suffered as a result of his experience with the OPP. The Plaintiff's job was not just a paycheck; it was an essential component of his sense of identity, self-worth and emotional well-being.

**Reference:** 2012 Statement of Claim, para. 71, Motion Record of the OPPA Defendants, Tab 1A.

**Reference:** 2013 Statement of Claim, para. 75, Motion Record of the OPPA Defendants, Tab 1B.

*Allegations against Constable Shaun Filman*

16. In the 2012 Statement of Claim the Plaintiff has named Constable Filman twice in the style of cause – first as an OPP officer, and second as a representative of the OPPA. While there are numerous allegations against this defendant in both claims, all but one of these allegations are against him in his capacity as an OPP coach officer in the workplace, as opposed to as an OPPA representative. In light of this, the OPPA Defendants submit that both actions against Constable Filman in his capacity as an OPPA representative should be struck.

17. The Plaintiff describes Constable Filman as his coach officer in Platoon "A".

**Reference:** 2012 Statement of Claim, para. 23, Motion Record of the OPPA Defendants, Tab 1A.

**Reference:** 2013 Statement of Claim, para. 27, Motion Record of the OPPA Defendants, Tab 1B.

18. The Plaintiff provides an extensive list of examples of the "differential" and "derogatory" treatment he received while working at the Peterborough OPP Detachment. A number of these allegations are against Constable Filman and his shortcomings as a coach officer in training and mentoring a probationary officer. For example, the Plaintiff alleges that Constable Filman:

- a. displayed a very noticeable lack of interest in his training and development as an officer;

- b. was not willing to sit beside him to teach and assist him in the preparation of his reports;
- c. exhibited a noticeable lack of desire and or an unwillingness to train the Plaintiff or share his knowledge with the Plaintiff, which was his duty. The Plaintiff states that Constable Filman's persistent refusal to properly train the Plaintiff made him feel that he was not welcome and actually a burden to Constable Filman;
- d. on one occasion, ordered the Plaintiff to lay a charge that was not properly substantiated by the evidence at the time. Once the matter was thrown out of court the Plaintiff was left to then suffer the humiliation and shame of having laid the unsubstantiated charge.

**Reference:** 2012 Statement of Claim, para. 29, Motion Record of the OPPA Defendants, Tab 1A.

**Reference:** 2013 Statement of Claim, para. 33, Motion Record of the OPPA Defendants, Tab 1B.

19. In the 2013 Action, the Plaintiff makes a further allegation against Constable Filman in his capacity as a coach officer:

In another example of contempt and hatred towards the Plaintiff, Constable Filman and Constable Payne, just a few days after the Plaintiff's internal investigation complaint becoming public knowledge, use[d] an old occurrence report that documents the Plaintiff's involvement in a call that members of the Detachment attended in 2005 when the Plaintiff was employed as a security guard.

Although the content of this report is not included, presumably it is something that paints the Plaintiff in a poor light.

**Reference:** 2013 Statement of Claim, para. 145, Motion Record of the OPPA Defendants, Tab 1B.

20. In both claims the Plaintiff makes only one allegation that against Constable Filman in his capacity as an OPPA representative. He states:

Being that Cst. Filman was also the Detachment's OPPA representative, the Plaintiff advised him of his concerns with respect to the derogatory remarks that were being made by other officers. However, the OPPA and/or Cst. Filman did nothing to intervene or put an end to the conduct.

**Reference:** 2012 Statement of Claim, para. 33, Motion Record of the OPPA Defendants, Tab 1A.

**Reference:** 2013 Statement of Claim, para. 37, Motion Record of the OPPA Defendants, Tab 1A.

Allegations against the OPPA

*The Duties owed by the OPPA to the Plaintiff*

21. Most of the Plaintiff's allegations against the OPPA Defendants are directed at the OPPA and the alleged failure of the organization to effectively address the problems experienced by the Plaintiff. The Plaintiff states that despite raising his concerns with the OPPA, "unfortunately the discriminatory conduct itself was never addressed by the OPPA ... even though they knew it was occurring."

**Reference:** 2012 Statement of Claim, para. 33, Motion Record of the OPPA Defendants, Tab 1A.

**Reference:** 2013 Statement of Claim, para. 37, Motion Record of the OPPA Defendants, Tab 1B.

22. It is the position of the Plaintiff that the OPPA had "an obligation imposed by law to protect the Plaintiff and ensure that the appropriate action was taken should any preliminary investigations reveal violations of the [Human Rights] Code." He claims that although Detective Constable German's investigation revealed violations of both the Code, as well as Police Orders, "the OPPA chose not to intervene and put an end to the treatment the Plaintiff was experiencing at Peterborough Detachment." Therefore, the Plaintiff concludes that "[a]s a cumulative effect the OPPA did fail in its duty to accommodate the Plaintiff when such conclusions were brought to their attention."

**Reference:** 2012 Statement of Claim, paras. 44, 113, 115, 117, 118, Motion Record of the OPPA Defendants, Tab 1A.

**Reference:** 2013 Statement of Claim, paras. 47, 118, 123, 124, Motion Record of the OPPA Defendants, Tab 1B.

23. The Plaintiff alleges that the OPPA's refusal to effectively represent or assist him "added to his feelings of despair and hopelessness that to try to argue what was being done to him would bring on further reprisals." Further, he characterizes the OPPA's "neglect" to prevent

discrimination against the Plaintiff by members of the OPP as "wilful and deliberate" and claims that "these acts further exacerbated his injuries".

**Reference:** 2012 Statement of Claim, paras. 158, 162, Motion Record of the OPPA Defendants, Tab 1A.

*Relationship between the OPPA and the OPP*

24. The Plaintiff alleges there is a relationship between the OPPA and the OPP that is arbitrary, discriminatory and a relationship in which the OPPA acts in bad faith in the representation of any of the employees in the unit.

**Reference:** 2012 Statement of Claim, para. 162, Motion Record of the OPPA Defendants, Tab 1A.

**Reference:** 2013 Statement of Claim, para. 84, Motion Record of the OPPA Defendants, Tab 1B.

25. The Plaintiff also asserts that the actions of "the OPP and the OPPA were egregious and malicious especially in light of the e-mails between management at the Peterborough Detachment that the OPP were aware of Human Rights violations being committed against the Plaintiff and callously chose to ignore the violations."

**Reference:** 2012 Statement of Claim, para. 165, Motion Record of the OPPA Defendants, Tab 1A.

*Harry Allen Chase file*

26. To support his allegations, the Plaintiff refers to the case of Harry Allen Chase, and claims that the OPPA's closure of this file on the grounds that there was no evidence of any human rights violations by the OPP is further evidence of the OPPA's "negligence." The Chase file is also referenced to support the Plaintiff's claim "that the actions of the OPPA were wilful and deliberate thereby exacerbating his injuries."

**Reference:** 2012 Statement of Claim, paras. 158, 162, Motion Record of the OPPA Defendants, Tab 1A.

*Labour Relations Act* of the Actions

27. The Plaintiff alleges that the OPPA is subject to the Ontario *Labour Relations Act*, and asserts that pursuant to s. 107 is vicariously responsible for the actions of its representatives.

**Reference:** 2012 Statement of Claim, para. 119, Motion Record of the OPPA Defendants, Tab 1A.

**Reference:** 2013 Statement of Claim, para. 125, Motion Record of the OPPA Defendants, Tab 1B.

28. The Plaintiff further believes that the defendant OPPA has violated s. 71 (which prohibits unions from interfering with employers' organizations), and s. 74 (which imposes a duty of fair representation upon a trade union).

**Reference:** 2012 Statement of Claim, para. 162, Motion Record of the OPPA Defendants, Tab 1A.

*Damages*

29. The Plaintiff is not claiming general damages against the OPPA, but rather punitive damages in the amount of \$250,000.00. The basis for the punitive damages is the OPPA's failure to represent and protect him, the fact that this lack of response exacerbated his injuries, and the OPPA's alleged violations of the *Labour Relations Act*.

**Reference:** 2012 Statement of Claim, para. 163, Motion Record of the OPPA Defendants, Tab 1A.

30. The Plaintiff is also seeking \$250,000 in aggravated damages jointly from the OPP and the OPPA for the emotional pain and other psychological consequences caused by the events at issue. "The Plaintiff asserts that the actions of the Defendants, especially the OPP and the OPPA were egregious and malicious especially in light of the e-mails between management at the Peterborough Detachment that the OPP were aware of Human Rights violations being committed against the Plaintiff and callously chose to ignore the violations."

**Reference:** 2012 Statement of Claim, para. 172, Motion Record of the OPPA Defendants, Tab 1A.

**Reference:** 2013 Statement of Claim, para. 175, 182, Motion Record of the OPPA Defendants, Tab 1B.

## B. The Chronology of the Actions

31. The Plaintiff filed an Application in the Human Rights Tribunal of Ontario ("HRTO") on December 14, 2010. The hearing commenced on May 22, 2012 and ran until May 24, 2012, with another block of dates set for November 1 to 7, 2012. When the hearing resumed on November 1, 2012, the Vice Chair suggested that the parties canvass mediation before resuming the hearing. During mediation the Plaintiff claims that he learned for the first time that the damages being claimed of \$100,000 were unreasonable and had never been awarded in the history of the Tribunal.

**Reference:** 2012 Statement of Claim, paras. 186, 194-196, 199, Motion Record of the OPPA Defendants, Tab 1A.

32. Based on this recommendation, as well as other statements made by the adjudicator, the Plaintiff decided to commence the present civil action.

**Reference:** *Ibid.*, para. 204.

33. The Plaintiff claims that his intention originally was to go through the hearing process at the HRTO and hopefully obtain a successful result, which he would use as the basis for launching a civil action. At the hearing on November 1, 2012, he learned that if he were to file a civil action while the HRTO hearing was pending, the latter would be "frozen" pending the disposition of the civil action.

**Reference:** *Ibid.*, paras. 203-4.

34. On December 21, 2012, three years after his dismissal and more than two years after becoming aware of the alleged consequences of that dismissal, the Plaintiff commenced this action as against the OPPA Defendants, and served the Statement of Claim on those Defendants on or about December 27, 2012.

35. On March 15, 2013, the Plaintiff issued a second action, which repeats many of the allegations against the OPPA Defendants in the 2012 Action.

36. There are many statements in the Plaintiff's claim that indicate he was fully aware of the alleged losses and damages and the prospective defendants in this claim in the latter half of 2009 and by mid-2010 at the latest. For example:

- a. as a result of the "specific targeting and discriminatory behaviour" he allegedly experienced while in Platoon "A" from January to August 2009, on August 4, 2009, the Plaintiff contacted the OPPA and was told they would look into his case. Further to this investigation he was transferred to Platoon "D";
- b. the Plaintiff had further problems with his supervising officer in this platoon, which he summarized in a memo dated October 19, 2009;
- c. the Plaintiff was diagnosed with Post-Traumatic Stress Disorder in August 2010;
- d. in mid-2010 the Plaintiff started keeping a diary to chronicle "some of his sufferings";
- e. the Plaintiff states that "after the termination of his employment he struggled to get his health back and though he knew ... what happened to him over the course of his brief employment ... he felt helpless due to the effects of Post-Traumatic Stress disorder that eroded his self-esteem and his self-confidence."

**Reference:** 2012 Statement of Claim, 33, 45, 60, 87, 90, 184 [emphasis added], Motion Record of the OPPA Defendants, Tab 1A.

37. Further evidence is the fact that in December 2010, the Plaintiff filed an application with the Human Rights Tribunal of Ontario ("HRTO") seeking damages for the various violations of his human rights that he alleges were caused by the Defendants to this action. The contents of this application are substantially the same as those of the 2012 and 2013 Statements of Claim.

**Reference:** *Ibid.*, para. 186.

**Reference:** HRTO Application, Responding Motion Record of the Plaintiff, Tab 3.

38. In this application he states that the date of the last event at issue in his application was December 15, 2009.

**Reference:** HRTO Application, p. 6, Responding Motion Record of the Plaintiff, Tab 3.

39. The Plaintiff acknowledges the applicability of the *Limitations Act, 2002*, to his claim, but states that it should not apply to him and goes on to plead that he had no knowledge of this law.



**Reference:** 2012 Statement of Claim, paras. 181, 182, Motion Record of the OPPA Defendants, Tab 1A.

40. Further, the Plaintiff blames his counsel at the time for choosing to make an application to the HRTO instead of having a claim issued by the court:

Being that the Plaintiff was ignorant of the appropriate administration of law to pursue he relied on the advice of his counsel and filed an Application before the Human Rights Tribunal of Ontario (HRTO) on December 14th, 2010.

**Reference:** *Ibid.*, para. 186.

41. The Plaintiff claims the information contained in paragraphs 182 to 204 of the 2012 Statement of Claim is sufficient to rebut the presumption in s. 5(2) of the *Limitations Act, 2002*. The information in these paragraphs concerns the Plaintiff's lack of knowledge about the law and administrative/judicial processes, his Post-Traumatic Stress Disorder, and his reliance on the advice of counsel that the HRTO was the proper forum in which to bring his claim.

**Reference:** *Ibid.*, para. 205.

42. The Plaintiff states:

Though the Defendants might very well argue that the Statute of Limitations has expired, the Plaintiff prays that consideration be given due his lack of knowledge, his vulnerability status (termination of employment, deterioration of his health, feelings of being worthless, hopelessness and despair at all the failed attempts in seeking employment as a police officer with other police services and feelings of being all alone in a foreign country that let him down) and the fact that he was led astray by his counsel with respect to which judicial process to initiate and then basically dumping him. The Plaintiff further prays that consideration be given in light of the offences under the *Criminal Code of Canada* that were committed against him.

**Reference:** *Ibid.*, para. 206.

43. In his Reply to this motion, the Plaintiff states:

the psychological trauma he incurred as a result of the actions of the Defendants left him in a vulnerable and suicidal state of mind. It was this state of mind that

caused him to genuinely believe that the judicial process, the Human Rights Tribunal of Ontario that was chosen by a learned counsel was his only recourse. When his previous counsel vacated herself from the Application, his feelings of vulnerability were exacerbated and it was not until November 1, 2012, that he was made aware that a Claim would have been the appropriate place to seek a remedy.

**Reference:** Reply to Notice of Motion, para 44, Responding Motion Record of the Plaintiff, Tab 1.

44. The Plaintiff learned in a case management conference call on May 2, 2012, that the HRTO was not going to make any findings with respect to the claims of malicious prosecution, negligence or negligence under the *Police Services Act*.

**Reference:** 2012 Statement of Claim, para 28, Motion Record of the OPPA Defendants, Tab 1A.

45. While the Plaintiff was aware of his claim long before November 1, 2012, he states that it was on this date that he learned from the Vice Chair presiding at the hearing of his HRTO application that he did not have to wait for the disposition of his application to file a civil claim for damages in tort.

**Reference:** *Ibid.*, para 29.

46. The Plaintiff recognizes that the primary reason why his civil action may be "barred" from proceeding is if he is not able to overcome "a perceived breach of the Limitations Act."

**Reference:** *Ibid.*, para. 214.

47. The Plaintiff claims that some of the information pertaining to defamation was only obtained in the spring of 2012 through disclosure in the HRTO matter. However, he acknowledges that the OPPA Defendants are "correct" to state that the Plaintiff's civil action was commenced three years after his dismissal and more than two years after becoming aware of the alleged consequences of that dismissal, although he maintains that there are extenuating circumstances which should permit the limitation period to be extended in his case.

**Reference:** Reply to Notice of Motion, para. 27, 58, Responding Motion Record of the Plaintiff, Tab 1.

### PART III – THE LAW & ANALYSIS

48. The OPPA Defendants submit law to support their request for the dismissal of these actions against them. The law provided herein is organized under the following headings reflecting the discussion of the facts above:

- a) the claims disclose no cause of action against the OPPA Defendants; and,
- b) the claims are statute-barred due to expiry of the limitation period

#### A. No Cause of Action against the OPPA Defendants

##### The Law and Applicable Rules of Civil Procedure

49. A party may move before a judge to strike out a pleading on the ground that it discloses no reasonable cause of action. The test for making an order under Rule 21.01(1)(b) is settled and well-known. Such an order should be granted if it is “plain and obvious” that the plaintiff’s Statement of Claim cannot succeed because it discloses no reasonable cause of action.

**Reference:** Rule 21.01(1)(b) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Book of Authorities of the OPPA Defendants, Tab 12

**Reference:** *Hunt v. Carey Canada*, 1990 CarswellBC 216 at para. 36 (S.C.C.), Book of Authorities of the OPPA Defendants, Tab 7

50. Ordinarily a statement of claim will be held to be “insufficient” or “inadequate” in one of two circumstances; (1) the plaintiff’s allegations simply do not amount to a recognized cause of action, or (2) the plaintiff has failed to plead all the necessary elements of a recognized cause of action. It has been held by Ontario’s courts that, at a minimum, a plaintiff must plead each of the substantive elements of a recognized cause of action, and must do so with precision. It is trite law that “vague allegations that make it impossible for an opposing party to reply should be struck.”

**Reference:** *Aristocrat Restaurants Ltd. v. Ontario*, 2003 CarswellOnt 5574 at para. 18 (Sup. Ct.). Book of Authorities of the OPPA Defendants, Tab 1

51. In addition to pleading each of the substantive elements of a recognized cause of action, a plaintiff must also plead all the material facts necessary to establish that cause of action. If any fact material to the establishment of the cause of action is omitted, the statement of claim should be struck out. It has been held by the Ontario courts that "it is improper to allow conclusions to be pleaded baldly and without any supporting facts."

**Reference:** *Balanyk v. University of Toronto*, 1999 CarswellOnt 1786 at para. 29 (Sup.Ct.), Book of Authorities of the OPPA Defendants, Tab 2

52. It has further been held by the Ontario courts that a court may strike out portions of the pleading where the portion to be struck constitutes a separate and distinct cause of action which cannot succeed.

**Reference:** *Montgomery v. School-Plough Canada Inc.*, 1989 CarswellOnt 1019 at para. 8 (Sup. Ct.), Book of Authorities of the OPPA Defendants, Tab 8

53. While the facts alleged should be taken to be true, the court should not look beyond the pleading to determine if the action has any chance of success. It is only the facts pleaded which may be relied upon in defending the claim against a motion brought under Rule 21.

**Reference:** *Prete v. Ontario*, 1993 CarswellOnt 810 at paras. 16, 21 (C.A.), Book of Authorities of the OPPA Defendants, Tab 9

### Analysis

#### *Dismissal of Claim as against Sergeant Styles and Constable McNamara*

54. As noted in paragraphs 11 and 12 above, the Plaintiff has simply named Sergeant Styles and Constable McNamara in the style of cause and in one paragraph of the claim and has not made any allegations against them in either the 2012 or 2013 Actions. For these reasons, the OPPA Defendants submit that the claims against these defendants should be struck as it is plain and obvious that there is no cause of action against them.

55. More particularly, it is submitted that paragraph 7, insofar as it relates to the defendants Styles and McNamara, should be struck out.

*Dismissal of Claim as against Detective Constable German, Constable Filman and the OPPA*

56. The Statements of Claim are lengthy and verbose and many of the allegations against these OPPA Defendants are unclear. However, a generous reading of both claims seems to articulate the following allegations against the remaining OPPA Defendants:

1. Failure to represent/assist;
2. Breach of legal duty to assist/"accommodate";
3. Conspiracy;
4. Negligence/Negligent Investigation;
5. Violations of *Labour Relations Act*;
6. "Bad faith"/Malice.

*1. Failure to Represent/Assist*

57. Central to the Plaintiff's claims against these OPPA Defendants is their alleged failure to effectively represent and assist him while he was experiencing discriminatory treatment at the Peterborough Detachment of the OPP.

58. As noted above, the Plaintiff alleges that this failure to represent is demonstrated by Detective Constable German's decision to "willfully omit" an account of the violations against the Plaintiff from her e-mail to him, as well as her unwillingness to commit to writing the fact that the Plaintiff had started at a bad OPP detachment. The Plaintiff also points to Constable Filman's failure to intervene or put an end to the conduct against the Plaintiff, as well as the OPPA's failure to address or intervene with respect to the discriminatory conduct experienced by the Plaintiff.

59. The OPPA submits that "Failure to Represent or Assist" is not a cause of action known to law. The failure to represent or assist is an issue that arises in an organized labour context. It is not a tort upon which the Plaintiff can seek relief in this action.

## 2. Breach of Legal Duty to Assist/"Accommodate"

60. At one point, the Plaintiff goes as far as claiming that the OPPA actually owes him a legal duty of assistance, and that the organization breached this duty by failing to address or intervene with respect to the discriminatory conduct experienced by the Plaintiff.

61. Similar to the discussion above, the OPPA submits that "Breach of Legal Duty to Assist or Accommodate" is not a cause of action known to law. The failure to assist is an issue that arises in an organized labour context. It is not a tort upon which the Plaintiff can seek relief in this action.

## 3. Conspiracy

62. The Plaintiff alleges that Detective Constable German's failure to provide the Plaintiff with a written account of the violations against him is a reflection of the OPPA's desire to cover up these types of workplace occurrences, and is a sufficient basis for alleging the tort of conspiracy.

63. The Supreme Court of Canada has defined the tort of conspiracy as follows:

- a. there is an agreement between two or more persons to perform specific acts to injure the plaintiff;
- b. the defendants acted in furtherance of that agreement;
- c. the predominant purpose of the agreement is to injure the plaintiff or the defendant's conduct is unlawful, directed towards the plaintiff alone, or with others, and the defendant should know that injury to the plaintiff is likely; and
- d. the plaintiff is injured as a result of the conspiracy.

**Reference:** *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452 (S.C.C.), cited in *Aristocrats Restaurants Ltd. v. Ontario*, 2003 CarswellOnt 5574 at para. 39 (Sup. Ct.), Book of Authorities of the OPPA Defendants, Tab 1

40 Further, the pleadings in an action for conspiracy must include, with clarity and precision, particulars of:

- a. the parties and their relationship;
- b. an agreement to conspire;
- c. the precise purpose or objects of the alleged conspiracy;
- d. the overt acts that are alleged to have been done by each of the

- conspirators; and
- e. the injury and particulars of the special damage suffered by the plaintiffs by reason of the conspiracy.

**Reference:** *Aristocrats Restaurants* at para. 40.

64. "One further important aspect about pleading the tort of conspiracy must be kept in mind. The plaintiff cannot simply plead that the defendants entered into a conspiracy to commit a tort and then committed the tort. In such a case, the doctrine of merger provides that the agreement merges with the tort. The pleading must allege damages resulting from the conspiracy that are separate and distinct from those allegedly suffered as a result of the tort itself."

**Reference:** *D.G. Jewelry Inc. v. Cyberdium Canada Ltd.*, [2002] O.J. No. 1465 (Ont. Sup. Ct.), cited in *Aristocrats Restaurants* at para. 41. Tab 1

65. The OPPA Defendants submit that the facts as pleaded do not disclose a cause of action for the tort of conspiracy against Detective Constable German, or any of the other OPPA Defendants, and accordingly should be struck.

#### 4. Negligence

66. The Plaintiff states that the OPPA "neglected" to prevent discrimination against the Plaintiff. He further alleges that the OPPA's closure of Harry Allen Chase's file on the grounds that there was no evidence of human rights violations by the OPP is "further evidence of the OPPA's negligence."

67. The Plaintiff appears to be alleging that the OPPA is liable to him in negligence because:

- a. it owed a duty of care to him to take additional action regarding his allegations of discriminatory conduct towards him in the workplace;
- b. it breached this duty of care by not preventing the continuation of such discrimination; and
- c. this breach of duty by this defendant caused harm to the Plaintiff.

68. It is the position of the OPPA that, based on the facts as alleged, it cannot, in law, owe the Plaintiff a duty of care. Further, the Plaintiff has failed to plead the particular facts required to support the existence of a duty of care, or to support the allegations that these Defendants

breached any such duty. Furthermore, the Plaintiff has failed to plead the particular facts required to support his allegation that his damages were caused by the alleged breach or how these Defendants' alleged breach was the proximate cause of his loss.

*(i) No Duty of Care*

69. The OPPA defendants submit they did not owe a duty of care to the Plaintiff in the context of a private professional association to a member. It is the position of the OPPA that there is not a sufficiently close and direct relationship between it and the Plaintiff to justify imposing a duty of care in these circumstances, and the Plaintiff has failed to plead the material fact and particulars to support such an allegation.

*(ii) No Breach of the Standard of Care*

70. Even if a duty of care was owed by the OPPA to the Plaintiff, he has failed to plead sufficient or proper facts that the association, its employees, agents or representatives acted improperly or breached their standard of care. In fact, as is stated in his claims, the Plaintiff has plead that the OPPA was responsive to the Plaintiff's complaints about his workplace, and Detective Constable German conducted an investigation that resulted in his being transferred to a different platoon. There are no facts pleaded to indicate that the investigation on the Plaintiff's behalf was carried out in anything but a reasonable, respectful manner and in compliance with the law. The Plaintiff has failed to plead the material facts and particulars to support the allegation that the Investigator Defendants breached any standard of care owed as alleged. The claims simply contain bald allegations that the OPPA failed to intervene or effectively assist the Plaintiff.

*(iii) No Damage/Loss*

71. Even if facts were pleaded alleging that the OPPA Defendants did owe a duty of care to the Plaintiff and breached it, there is a failure to plead the required facts that their conduct contributed to or caused any loss or damage to the Plaintiff.

72. Implicit in the Plaintiff's claims about the OPPA Defendants' failure to investigate/negligence is his allegation that these defendants bear some responsibility for the alleged discrimination he experience in the workplace. The OPPA can not, in law, be



responsible for the alleged discrimination. It is submitted that the claims against these defendants should accordingly be struck pursuant to Rule 21.01(1)(b). The OPPA Defendants further rely on the decision of the Supreme Court of Canada in *Seneca College v. Bhaduria*:

not only does the Code foreclose any civil action based directly upon a breach thereof but it also excludes any common law action based on an invocation of the public policy expressed in the Code.

**Reference:** *Seneca College v. Bhaduria*, 1981 CarswellOnt 117 at para. 27 (S.C.C.), Book of Authorities of the OPPA Defendants, Tab 10

73. The OPPA Defendants submit that the facts alleged against the OPPA are insufficient to support the elements of causation and damages as required for the purposes of pleading the tort of negligence.

#### 5. *Violations of the Labour Relations Act*

74. The Plaintiff also identifies various obligations of the OPPA under the Ontario *Labour Relations Act*, and cites alleged violations of these obligations as further grounds for the relief he seeks. The Plaintiff relies on s.107 of the Act to assert that the OPPA is vicariously liable for the actions of its representatives. He also alleges that the OPPA has violated sections 71 and 74 of the Act, which have to do with interactions between trade unions and employers organizations.

75. It is the position of the OPPA that it is not subject to this legislation, and even if it were, the Act provides different forum for resolution of disputes arising under Act. For this reason, the claims against the OPPA Defendants based on alleged violations of the *Labour Relations Act* disclose no reasonable cause of action, and must be struck from the claims.

#### 6. *Bad Faith/Malice*

76. The Plaintiff makes the bald allegation that the OPPA acts in bad faith in its representation of OPP employees generally. More specifically he alleges that the OPPA acted maliciously insofar as the association knew about the discriminatory conduct against the Plaintiff but did nothing about it.

77. Canadian courts have held that "bad faith" is not a tort known to law. For this reason, this aspect of the Plaintiffs claim is not tenable and the allegations of bad faith on the part of the OPPA Defendants should be struck from the Claim.

**Reference:** *Aristocrat Restaurants Ltd. v. Ontario*, 2003 CarswellOnt 5574 at paras. 63 and 64, Book of Authorities of the OPPA Defendants, Tab 1

78. Further, like bad faith, malice is not an independently actionable tort. If conduct is lawful apart from the motive, a bad motive will not make the defendant liable. Malice, such as that alleged by the Plaintiff is only taken into account when considering damages. In particular, aggravated damages provide compensation for the injured feelings of the plaintiff where such injury has been caused by the tortfeasor's malice or outrageous conduct.

**Reference:** Canadian Encyclopedic Digest, "Torts – II: Principles of Liability – 3: Motive" at §24, citing, *Allen v. Flood* (1897), [1898] A.C. 1 (U.K. H.L.); *Sorrell v. Smith* (1925), [1925] A.C. 700 (U.K. H.L.); Winfield and Jolowicz on Tort, 14th ed. (1994), p. 52, Book of Authorities of the OPPA Defendants, Tab 5

**Reference:** S.M. Waddams, *The Law of Damages* (1983), at pp. 562-63, para. 979, cited in *Vorvis v. Insurance Corp. of British Columbia*, 1989 CarswellBC 76 at para. 16 (S.C.C.), Book of Authorities of the OPPA Defendants, Tab 11

79. As such, the OPPA Defendants submit that:

- a. paragraphs 7, 24, 33(e), 41, 43, 44, 45, 71, 115 and 117 insofar as they relate to the defendant German, should be struck out;
- b. paragraphs 7 and 33 of the Statement of Claim, insofar as they relate to the defendant Filman in his capacity as an OPPA representative, should be struck out;
- c. paragraphs 7, 31, 33, 44, 45, 115, 117, 118, 119, 158, 162, 163, 171, 172 of the Statement of Claim, insofar as they relate to the defendant OPPA, should be struck out.

**B. Limitation Period: The Claim is Statute-Barred**

The Law Governing Limitation Periods

80. Section 4 of the Ontario *Limitations Act, 2002*, states: "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."

**Reference:** *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B., s. 4, Book of Authorities of the OPPA Defendants, Tab 13

81. A claim is discovered on the earlier of,
- (a) the day on which the person with the claim first knew,
    - (i) that the injury, loss or damage had occurred,
    - (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
    - (iii) that the act or omission was that of the person against whom the claim is made, and
    - (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
  - (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

**Reference:** *Ibid.*, s. 5(1).

82. The *Limitations Act, 2002*, clearly states that a person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

**Reference:** *Ibid.*, s. 5(2) [emphasis added].

83. For the purposes of subclause (1) (a) (i), the day on which injury, loss or damage occurs in relation to a demand obligation is the first day on which there is a failure to perform the obligation, once a demand for the performance is made.

**Reference:** *Ibid.*, s. 5(3).

The Applicable Rules of Civil Procedure

84. Subrule 21.01(1)(a) of the *Rules of Civil Procedure* permits a party to bring a motion before a judge for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may, *inter alia*, dispose of all or part of the action.

**Reference:** Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 - Rule 21.01(1)(a), Book of Authorities of the OPPA Defendants, Tab 12

85. This rule requires that the question of law at issue be "raised by a pleading." In addition, rule 21.01(2)(a) provides that no evidence is admissible on such a motion, except by leave of a judge or on consent of the parties.

**Reference:** *Ibid.*, Rule 21.01(2)(a).

86. In light of the foregoing aspects of these rules, the issue of a limitation period is not commonly addressed using these rules. However, the OPPA Defendants submit that:

- a. the present case is one in which the limitation issue can be decided in the absence of a Statement of Defence;
- b. there is no dispute that the present claim was brought outside the limitation period;
- c. it is established law that courts do not have the discretion to extend a limitation period or to consider special circumstances when deciding whether a limitation period has expired.

87. For the reasons outlined in the remainder of this section, it is the position of the OPPA Defendants that the Plaintiff's claim must be struck in its entirety as it is statute-barred.

Analysis

*The Limitation Period Issue may be Decided Although no Statement of Defence*

88. The Ontario Court of Appeal has stated that the expiry of a limitation period on its own does not render a cause of action a nullity, but rather is a defence and must be pleaded. However, the Court went on to note:

that it would be unduly technical to require delivery of a statement of defence in circumstances where it is plain and obvious from a review of a statement of claim that no additional facts could be asserted that would alter the conclusion that a limitation period had expired, a plain reading of the rule requires that the limitation period be pleaded in all other cases.

**Reference:** *Beardsley v. Ontario*, 2001 CarswellOnt 4137 at para. 21 (C.A.), Book of Authorities of the OPPA Defendants, Tab 3. [emphasis added]

89. The Court in *Beardsley* went on to note that:

[The] Plaintiffs would be deprived of the opportunity to place a complete factual context before the court if limitation defences were determined, on a routine basis, without being pleaded. Adherence to rules that ensure procedural fairness is an integral component of an appearance of justice. The appearance of justice takes on an even greater significance where claims are made against those who administer the law. The limitation defence to the claims for false arrest, false imprisonment, and negligence should not therefore be determined, without being pleaded, and the pleadings being completed. That portion of the order that dismisses the claims for false arrest, false imprisonment, and negligence will accordingly be set aside.

**Reference:** *Beardsley v. Ontario*, 2001 CarswellOnt 4137 at para. 22 (C.A.), Book of Authorities of the OPPA Defendants, Tab 3.

90. The OPPA Defendants have not delivered a Statement of Defence and submit that this is one of the "plain and obvious" cases contemplated by the Court of Appeal where all of the facts upon which the determination of the limitation issue can be assessed are set out in the Statement of Claim. In fact, in this case the Plaintiff himself has admitted the Limitations Act bars his action; the issue is whether his excuse for missing the limitation period as plead is legitimate.

91. The Plaintiff is not making any of the claims that would preclude this Court from considering the legal issue of the limitation period.

*No Facts in Dispute that bar this Court from Deciding the Limitation Period Issue*

92. It has been held that Rule 21.01(1)(a) may be used to determine the legal issue of a limitation period in cases which do not depend on findings of fact, or where the assessment of the limitation period is plain and obvious.

**Reference:** *Charlton v. Beamish*, 2004 CarswellOnt 4565 at para. 29 (Sup. Ct.), Book of Authorities of the OPPA Defendants, Tab 6

93. This is not a case where there is dispute over the limitation period. In these claims, the Plaintiff repeatedly acknowledges that he is bringing his claims outside the limitation period, but asks the Court to make an exception in his case.

94. For the purposes of this motion, there are no disputed material facts regarding the chronology of these claims. In this case, the application of the limitation period does not depend on findings of fact for its resolution. As is outlined above, it is obvious from the Statement of Claim that the Plaintiff was aware of the material facts underlying this claim for more than two years before the action was commenced.

95. The most compelling and undisputed fact is the clear admission by the Plaintiff that he is bringing his claim outside of the two-year limitation period.

**Reference:** 2012 Statement of Claim, paras. 181, 182, Motion Record of the OPPA Defendants, Tab 1A.

**Reference:** Reply to Notice of Motion, para. 58, Responding Motion Record of the Plaintiff, Tab 1.

96. In his application to the HRTO, the Plaintiff indicated that the date of the last event at issue in his application was December 15, 2009, which is the date of his termination from the OPP. The Plaintiff provides no facts in his claim to rebut the statutory presumption that he had knowledge of the matters referred to in his claim as of that date.

*No Discretion to Extend the Limitation Period or to Consider Special Circumstances*

97. In his claim the Plaintiff acknowledges that he commenced the civil action after the expiry of the limitation period, but argues that an exception should be made for various reasons. As is outlined in paragraphs 14 to 18, the Plaintiff claims that factors such as his lack of knowledge of the law and administrative/judicial processes, his Post-Traumatic Stress Disorder, his reliance on the advice of counsel that the HRTO was the proper forum in which to bring his claim and his belief that he could not commence a civil action until the HRTO matter was concluded should be considered by this Court as a basis for exempting him from the limitation period.

98. However, it has been made clear in a recent decision by the Ontario Superior Court of Justice (which was affirmed by the Court of Appeal) that courts do not have the discretion to modify statutory limitation periods. For example, in *Boyce v. Toronto Police Services Board*, in September 2004 the plaintiff was allegedly assaulted by police officers while in police custody. The police defendants were subsequently prosecuted and convicted of assault in April 2007. The plaintiff brought a claim for damages for assault and battery in April 2009. The defendants brought a motion for summary dismissal of the plaintiff's action. In response to the motion, the plaintiff filed an affidavit stating that he did not bring the action sooner because he was not aware that a limitations period existed until so advised by his lawyers. He also stated that he was waiting for the resolution of the criminal proceedings and that he was afraid of what the defendants might do to him if he brought a civil suit before they were convicted. The Court granted the defendants' motion and noted:

Section 5(1)(a)(iv) [of the *Limitations Act, 2002*], does not import an idiosyncratic limitation period calibrated by the claimant's familiarity with or ignorance of the law. The test is an objective one.

It is well established that ignorance of a limitation period does not toll the limitation period.

**Reference:** *Boyce v. Toronto Police Services Board*, 2011 CarswellOnt 4 at paras. 23, 37 (Sup. Ct.); aff'd 2012 CarswellOnt 4146 (C.A.), Book of Authorities of the OPPA Defendants, Tab 4

99. The plaintiff in *Boyce* presented an argument similar to that made by Mr. Jack – namely, that it was reasonable for him to wait for the resolution of one proceeding prior to commencing a civil proceeding, and that the limitation period should be extended accordingly:

The plaintiff submits that s. 5(1)(b) [of the *Limitations Act, 2002*] in combination with s. 5(1)(a)(iv) applies to extend the limitations period to a date to years following the criminal convictions on the grounds that a reasonable person in the particular circumstances and with the particular abilities of the plaintiff would have waited for the criminal conviction prior to bringing an action. It is submitted that the plaintiff only knew that a proceeding was an appropriate way of proceedings once the conviction was entered.

**Reference:** *ibid.*, at para. 33.

100. In dismissing this argument, the Court stated:

the effect of s. 5(1)(a)(iv) is not to create a limitation period that varies with the state of legal knowledge of the claimant. One of the chief purposes of any limitations regime is to foster certainty. The construction of s. 5(1)(a)(iv) urged on behalf of the plaintiff would have the exact opposite effect as the limitation period would lengthen proportionately with the degree of ignorance of the claimant.

**Reference:** *ibid.*, at para. 35.

101. The Court in *Boyce* also made it clear that the doctrine of special circumstances is no longer viable in the law of limitations in Ontario and that the court does not have the discretion to extend the limitation period where the Plaintiff asserts special circumstances. (para. 43).

**Reference:** *ibid.*, at para. 43.

102. This claim is statute-barred having been issued more than two years following the expiry of the limitation period.

#### **PART IV – ORDERS SOUGHT**

103. The OPPA Defendants seek the following orders:

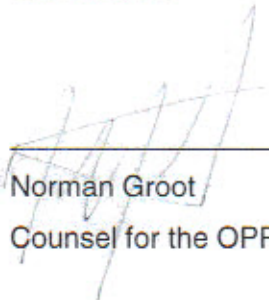
- a. an Order to strike all claims against the OPPA Defendants in the 2012 and 2013 Actions, on the grounds that they disclose no reasonable cause of action against these defendants;



- b. alternatively, an Order dismissing the Plaintiff's claims on the grounds that they are statute-barred; and,
- c. an Order for costs of the motion payable forthwith.

All of the above is respectfully submitted,

April 8, 2013



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Norman Groot

Counsel for the OPPA Defendants

**MICHAEL JACK**

Plaintiff

- and -

**ONTARIO PROVINCIAL POLICE ASSOCIATION et. al.**

Defendants

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
PROCEEDING COMMENCED AT  
TORONTO**

**FACTUM**  
(for motion returnable April 22, 2013)

**Investigation Counsel  
Professional Corporation**  
Barristers & Investigation Consultants  
350 Bay Street, Suite 1000  
Toronto, Ontario M5H 2S6

**Norman Groot**  
LSUC No.: 43721V

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

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

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

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

Defendants

**MOTION RECORD  
(for April 22, 2013)**

April 8, 2013

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

**Norman Groot**  
LSUC No.: 43721V

Telephone: (416) 637-3141  
Facsimile: (416) 637-3445  
[ngroot@investigationcounsel.com](mailto:ngroot@investigationcounsel.com)

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

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

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

Self-Represented Plaintiff

**AND TO: MINISTRY OF THE ATTORNEY GENERAL**

Legal Services Branch  
Ministry of Government Services  
9th Floor, Ferguson Block  
77 Wellesley Street West  
Toronto, ON M7 A 1N3

**Lisa Compagnone**  
Senior Counsel  
LSUC No. 42823P  
Email: lisa.compagnone@ontario.ca  
Tel: (416) 327-6916 / Fax: (416) 325-9404

Counsel for the Crown Defendants

*ONTARIO*  
SUPERIOR COURT OF JUSTICE

BETWEEN:

**MICHAEL JACK**

Plaintiff

-and-

**HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO  
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SAFETY AND CORRECTIONAL SERVICES OPERATING AS THE  
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HUGH STEVENSON AND MIKE ARMSTRONG**

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

Defendants

**INDEX**

Tab	Document
1	Notice of Motion, dated January 9, 2013
A	Statement of Claim, Issued December 21, 2012
B	the Statement of Claim, Issued March 15, 2013
2	Affidavit of E. Stoik, sworn April 8, 2013
A	Letter from Mr. Groot, dated January 10, 2013
B	Letter from the Crown, dated January 14, 2013
C	E-mail correspondence between Mr. Tapp and Mr. Groot, dated March 17, 18 and 25, 2013
D	Letters from Mr. Groot to Mr. Tapp, dated April 1 and February 13, 2013

1

B

C

D

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**MICHAEL JACK**

Plaintiff

-and-

**HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO  
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CAMPBELL, MIKE JOHNSTON, CHRIS NEWTON, COLLEEN KOHEN,  
HUGH STEVENSON AND MIKE ARMSTRONG**

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

Defendants

**NOTICE OF MOTION**

The defendants the Ontario Provincial Police Association ("OPPA"), Shaun Filman, Karen German, Jim Styles and Marty McNamara (collectively, the OPPA Defendants) will make a motion to a judge, on **Monday, April 22, 2013**, at the **Superior Court of Justice, 393 University Avenue, Toronto, Ontario**.

**PROPOSED METHOD OF HEARING:** The motion is to be heard orally.

**THE MOTION IS FOR:**

1. an order that the Statement of Claims bearing Court File Numbers CV-12-470815 (the 2012 Claim) and CV-13-476321 (the 2013 Claim) be struck in their entirety as against the OPPA Defendants as they disclose no reasonable cause of action pursuant to Rule 21.01(1)(b);

2. in the alternative, an order dismissing both actions pursuant to Rule 21.01(1)(a) due to expiry of the limitation period;
3. costs on a substantial indemnity basis, or in the alternative, on a partial indemnity basis.
4. such further and other relief as this Honourable Court deems just.

**THE GROUNDS FOR THE MOTION ARE:**

1. the Plaintiff's claims deal with events that occurred during his employment with the Ontario Provincial Police ("OPP") during the period from January 2009 until the termination of his employment in December 2009;
2. the Plaintiff alleges that various negative financial, emotional and physical consequences of his termination became evident to him in the months following his termination;
3. therefore on December 14, 2010, the Plaintiff filed an application with the Human Rights Tribunal of Ontario ("HRTO") seeking damages for the various violations of his human rights that he alleges were caused by the Defendants to this action;
4. the hearing at the HRTO commenced on May 22, 2012 and continued until May 24, 2012, at which time it was adjourned until November 1, 2012. When the hearing resumed, the adjudicator recommended that the parties go to mediation;
5. based on this recommendation, as well as other statements made by the adjudicator, the Plaintiff decided to commence the present civil action;
6. on December 21, 2012, three years after his dismissal and more than two years after becoming aware of the alleged consequences of that dismissal, the Plaintiff commenced the 2012 Claim as against the OPPA Defendants, and served the Statement of Claim on those Defendants on or about December 27, 2012;
7. upon being advise that this action was a nullity against the Crown due to improper service pursuant to s. 7 of the *Proceedings Against the Crown Act*, the Plaintiff issued a



second claim on March 15, 2013. This claim bears Court File No. CV-13-476321 (the 2013 Claim);

8. while the OPPA Defendants have been removed from the style of cause in the 2013 Claim, the body of the claim still contains allegations against these defendants;
9. neither of the Statement of Claims disclose a cause of action against the OPPA Defendants and so both must be struck in their entirety as against these defendants;
10. in the alternative, the actions against the OPPA Defendants are statute-barred by reason of being commenced outside the two-year limitation period pursuant to s.4 of the *Limitations Act*.
11. Rules 21.01, 25.11 and 57. of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended;
12. Section 4 of the *Limitations Act*, S.O. 2002, c.24, Sch. B;
13. Such further and other grounds as counsel may advise and as this Honourable Court may permit.

**THE FOLLOWING MATERIAL** will be relied on at the hearing of the motion:

1. this form;
  - a. the Statement of Claim, issued with the court on December 21, 2012;
  - b. the Statement of Claim, issued with the court on March 15, 2013;
2. the affidavit of Erin Stoik, sworn April 8, 2013;
3. such further and other material as this Honourable Court deems fit.

**DATE:** April 8, 2013

**Investigation Counsel  
Professional Corporation**  
350 Bay Street, Suite 1000

Court File No.: CV 12-17328

Toronto, ON M5H 2S6

**Norman Groot**  
LSUC No.: 43721V

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

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

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

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

Self-Represented Plaintiff

**AND TO: MINISTRY OF THE ATTORNEY GENERAL**  
Legal Services Branch  
Ministry of Government Services  
9th Floor, Ferguson Block  
77 Wellesley Street West  
Toronto, ON M7 A 1N3

**Lisa Compagnone**  
Senior Counsel  
LSUC No. 42823P  
Email: lisa.compagnone@ontario.ca  
Tel: (416) 327-6916 / Fax: (416) 325-9404

Counsel for the Crown Defendants

**MICHAEL JACK**  
Plaintiff

v.

**THE ONTARIO PROVINCIAL POLICE ET AL.**  
Defendants

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
  
PROCEEDING COMMENCED AT  
TORONTO

**NOTICE OF MOTION**

**INVESTIGATION COUNSEL  
PROFESSIONAL CORPORATION**

Barristers  
350 Bay Street, Suite 1000  
Toronto, ON M5H 2S6

**Norman Groot**  
LSUC No.: 43721V

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

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

A

B

C

D



(Court seal)

FORM 14A  
Courts of Justice Act

CV-12-470815

(Court file No.)

STATEMENT OF CLAIM (GENERAL)

Michael Jack

BETWEEN

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, Mike Johnston, Chris Newton, Colleen Kohen,  
Hugh Stevenson and Mike Armstrong

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

Defendants

STATEMENT OF CLAIM

TO THE DEFENDANT

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

B

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CV-13-476321

Court file No.:

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 Rathbun, Robert Flindall, Peter Butorac,  
Ronald Campbell, Colleen Kohen, Hugh Stevenson and Mike Armstrong  
and its retirees Mike Johnston and Chris Newton**

*Defendants*

**STATEMENT OF CLAIM**

**TO THE DEFENDANT**

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff.  
The Claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for  
you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil  
Procedure, serve it on the Plaintiff's lawyer or, where the Plaintiff does not have a  
lawyer, serve it on the Plaintiff, and file it, with proof of service in this court office,

2

C

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

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

Defendants

**AFFIDAVIT OF ERIN STOIK**

(in support of the motion of the OPPA Defendants returnable April 22, 2013)

I, **ERIN STOIK**, of the City of Toronto, in the Province of Ontario, **MAKE OATH AND SAY:**

1. I am a lawyer at the law firm of Investigation Counsel Professional Corporation ("ICPC"), lawyers for the defendants the Ontario Provincial Police Association, Shaun Filman, Karen German, Jim Styles and Marty McNamara (collectively the "OPPA Defendants"). I provide information in this affidavit based upon my own knowledge, information, and belief, and upon my personal involvement with this matter, Court File No. CV-12-470815 (the "Action"). Where my evidence is provided on the basis of information and belief, I provide my sources.
2. On December 21, 2012, the Plaintiff commenced this Action for damages for defamation based on events that allegedly occurred during his employment with the Ontario Provincial Police from January to December 2009. To date, the OPPA Defendants have not defended the

Action. The Statement of Claim is attached as Schedule A to the Notice of Motion at Tab 1 of this Motion Record.

3. On January 10, 2013, Mr. Groot sent a letter by courier to the Plaintiff's representative, Lloyd Tapp. In this letter, Mr. Groot advised that ICPC had been retained to represent the OPPA Defendants in this matter. Included with the letter was a copy of the Notice of Motion returnable April 22, 2013. Mr. Groot advised Mr. Tapp that if his client failed to consent to the dismissal or discontinuance of this action as against the OPPA Defendants, they would seek costs against the Plaintiff payable forthwith. Attached as **Exhibit "A"** to this my Affidavit is a true copy of the letter from Mr. Groot, dated January 10, 2013.

4. On January 14, 2013 Ms. Compagnone, counsel for Her Majesty the Queen in right of Ontario (the "Crown") sent Mr. Tapp a letter advising that the Action was a nullity as against the Crown as service had not been effected pursuant to s. 7 of the *Proceedings Against the Crown Act* ("PACA"). Ms. Compagnone advised that the Crown would accept the Statement of Claim served on December 27, 2012 as a Notice of Claim under s. 7 of PACA. She further advised that the usual procedure for plaintiff's counsel in these circumstances is to discontinue the existing action as against the Crown and commence another action against the Crown after the expiry of the sixty day notice period set out in PACA and consolidate the new action with the existing action against the other defendants. Attached as **Exhibit "B"** to this my Affidavit is a true copy of the letter from the Crown, dated January 14, 2013.

5. On February 8, 2013, Mr. Tapp delivered to ICPC the Plaintiff's responding Motion Record, as well as the Plaintiff's Motion Record for his motion seeking orders permitting amendments to the style of cause, a fee waiver and an order permitting Mr. Tapp to act as his representative.

6. On March 17, 2013, Mr. Tapp sent an e-mail to Mr. Groot advising that he had filed a discontinuance of the claim against the OPP and its employees (the "OPP Defendants") in order to comply with Ms. Compagnone's instructions about service on the Crown. Mr. Tapp also advised that on March 15, 2013, he had a new claim issued against the OPP Defendants. On March 18, 2013, Mr. Groot advised Mr. Tapp by return e-mail that he would accept service of the new claim on behalf of the defendant Shaun Filman. On March 25, 2013, Mr. Groot sent a further e-mail to Mr. Tapp asking that he send the new pleading and advising that he was drafting the factum for OPPA Defendants' motion to strike the claim. Attached as **Exhibit "C"** to

this my Affidavit is a true copy of the e-mail correspondence between Mr. Tapp and Mr. Groot, dated March 17, 18 and 25, 2013.

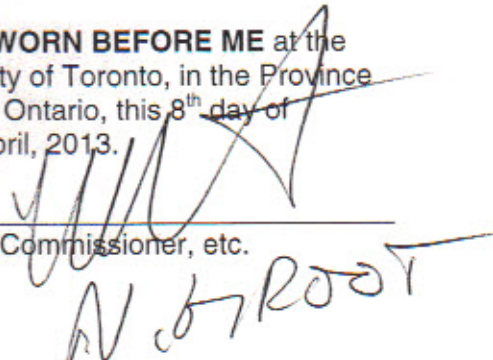
7. On April 1, 2013, Mr. Groot sent by e-mail a letter to the Plaintiff's agent enclosing a letter dated February 13, 2013. In the letter dated February 13, 2013, Mr. Groot advised Mr. Tapp that the OPPA Defendants would take no position to him acting as the Plaintiff's representative, but that the Plaintiff himself was required to attend the April 22, 2013, motion. In this letter Mr. Groot also advised Mr. Tapp of the costs being incurred by his clients due to the Plaintiff's refusal to consent to striking the claim against them. Mr. Groot advised that the OPPA Defendants would be seeking a cost order against the Plaintiff for the preparation of their motion materials, factum, reviewing the Plaintiff's materials and attending the motion. Attached as **Exhibit "D"** to this my Affidavit are true copies of the letters dated April 1 and February 13, 2013, from Mr. Groot to Mr. Tapp.

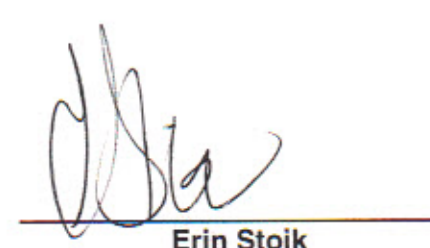
8. The new Statement of Claim was delivered to ICPC on April 2, 2013. The new Statement of Claim with Court File No. CV-13-476321 is attached as Schedule B to the Notice of Motion at Tab 1 of this Motion Record. As far as is know, the Plaintiff has not filed his Discontinuance for the 2012 Claim, and accordingly the factum and motion record indicate the OPPA's request to seek that both the 2012 and 2013 actions be struck.

9. This Affidavit is submitted in support of the OPPA Defendants' motion seeking orders to strike the claims against them, and for no other or improper purpose.

SWORN BEFORE ME at the  
City of Toronto, in the Province  
of Ontario, this 8<sup>th</sup> day of  
April, 2013.

A Commissioner, etc.

  
N. GROOT

  
Erin Stoik

A

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C

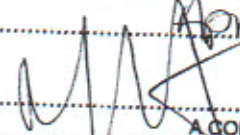
D

**Norman Groot**  
Direct Line: (416) 637-3141  
ngroot@investigationcounsel.com

January 10, 2012

**VIA COURIER**

Michael Jack  
c/o Lloyd Trapp  
252 Angeline Street North  
Lindsay, ON K9V 4R1

This is Exhibit ..... <u>A</u> ..... referred to in the affidavit of <u>E. Stoik</u> sworn before me, this <u>8<sup>th</sup></u> day of <u>April</u> , 20 <u>13</u>   A COMMISSIONER, ETC.
--

Dear Mr. Jack:

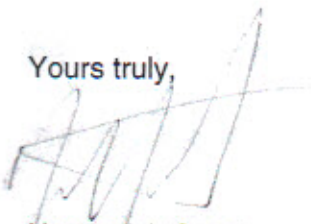
**Re: Ontario Provincial Police Association et al. ats Michael Jack**  
**Court File No.: CV-12-470815**  
**Our File No.: 0269-10468**

Please be advised that we have been retained to represent the Ontario Provincial Police Association ("OPPA"), Shaun Filman, Karen German, Jim Styles and Marty McNamara (collectively, the OPPA Defendants) in the above action.

Please find enclosed our Notice of Motion returnable April 22, 2013, brought under Rule 21 seeking an order to strike your claim as against our clients on the basis of failure to disclose a known cause of action as against our clients, and on the basis of being statute barred by the Limitations Act. Please advise whether you will consent to the dismissal or discontinuance of your action as against our clients. If you fail to consent, we will be seeking costs as against you payable forthwith.

As this is a Rule 21 motion, we request you do not take any steps to note our clients in default prior to the hearing of the motion.

Yours truly,



Norman J. Groot  
NJG/es  
Enclosure

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

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

Defendants

**NOTICE OF MOTION**

The defendants the Ontario Provincial Police Association ("OPPA"), Shaun Filman, Karen German, Jim Styles and Marty McNamara (collectively, the OPPA Defendants) will make a motion to a judge, on **Monday, April 22, 2013**, at the **Superior Court of Justice, 393 University Avenue, Toronto, Ontario**.

**PROPOSED METHOD OF HEARING:** The motion is to be heard orally.

**THE MOTION IS FOR:**

1. an order that the Statement of Claim be struck in its entirety as against the OPPA Defendants as it discloses no reasonable cause of action pursuant to Rule 21.01(1)(b);
2. in the alternative, an order pursuant to Rule 21.01(3)(c) that the Statement of Claim be dismissed or stayed as against the OPPA Defendants as another proceeding is pending

- in Ontario before the Human Rights Tribunal of Ontario between the same parties in respect of the same subject matter;
3. in the further alternative, an order dismissing the action pursuant to Rule 21.01(1)(a) due to expiry of the limitation period;
  4. in the alternative, an order staying this action;
  5. costs on a substantial indemnity basis, or in the alternative, on a partial indemnity basis.
  6. such further and other relief as this Honourable Court deems just.

**THE GROUNDS FOR THE MOTION ARE:**

1. the Plaintiff's claim deals with events that occurred during his employment with the Ontario Provincial Police ("OPP") during the period from January 2009 until the termination of his employment in December 2009;
2. the Plaintiff alleges that various negative financial, emotional and physical consequences of his termination only became evident to him in the months following his termination;
3. therefore on December 14, 2010, the Plaintiff filed an application with the Human Rights Tribunal of Ontario ("HRTO") seeking damages for the various violations of his human rights that he alleges were caused by the Defendants to this action;
4. the hearing at the HRTO commenced on May 22, 2012 and continued until May 24, 2012, at which time it was adjourned until November 1, 2012. When the hearing resumed, the adjudicator recommended that the parties go to mediation;
5. based on this recommendation, as well as other statements made by the adjudicator, the Plaintiff decided to commence the present civil action;
6. on December 21, 2012, three years after his dismissal and more than two years after becoming aware of the alleged consequences of that dismissal, the Plaintiff

commenced this action as against the OPPA Defendants, and served the Statement of Claim on those Defendants on or about December 27, 2012;

7. the Statement of Claim does not disclose a cause of action against the OPPA Defendants and so must be struck in its entirety;
8. in the alternative, the claim against the OPPA Defendants must be stayed or dismissed because the Plaintiff has already commenced an application at the HRTO in December of 2010 against the same parties in respect of the same subject matter. In fact, the HRTO proceeding had advanced to the hearing stage when the Plaintiff commenced the present action;
9. further, by initiating this proceeding the Plaintiff has violated the rule that, as far as possible, multiplicity of legal proceedings shall be avoided. The OPPA Defendants submit that this is an additional factor for the Court to consider in deciding whether to dismiss or stay this action and order that the claims advanced within this action be dealt with by way of the HRTO application;
10. in the further alternative, the action against the OPPA Defendants is statute-barred by reason of being commenced outside the two-year limitation period pursuant to s. 4 of the *Limitations Act*.
11. Rules 21.01, 25.11 and 57 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended;
12. Sections 106 and 138 of the *Courts of Justice Act*, R.S.O. 1990, c.43, as amended;
13. Section 4 of the *Limitations Act*, S.O. 2002, c.24, Sch. B;
14. Such further and other grounds as counsel may advise and as this Honourable Court may permit.

**THE FOLLOWING MATERIAL** will be relied on at the hearing of the motion:

1. the Statement of Claim, filed with the court on December 21, 2012;



2. such further and other material as this Honourable Court deems fit.

**DATE:** January 9, 2013

**Investigation Counsel  
Professional Corporation**  
350 Bay Street, Suite 1000  
Toronto, ON M5H 2S6

**Norman Groot**  
LSUC No.: 43721V

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

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

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

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

Self-Represented Plaintiff

**AND TO: Ontario Provincial Police**  
General Headquarters  
Lincoln M. Alexander Building  
777 Memorial Avenue  
Orillia, ON L3V 7V3

Telephone: (705) 329-6111  
Facsimile: (705) 329-6600

Employer of Ronald Campbell, Mike Johnston, Chris Newton, Colleen Kohen,  
Hugh Stevenson and Mike Armstrong Marc Gravelle, John Pollock, Shaun  
Filman, Jennifer Payne, Jamie Brockley, Melynda Moran, Mary D'Amico, Richard  
Nie, Brad Rathbun, Robert Flindall and Peter Butorac

**MICHAEL JACK**  
Plaintiff

v.

**THE ONTARIO PROVINCIAL POLICE ET AL.**  
Defendants

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
PROCEEDING COMMENCED AT  
TORONTO

**NOTICE OF MOTION**

**INVESTIGATION COUNSEL**  
**PROFESSIONAL CORPORATION**

Barristers  
350 Bay Street, Suite 1000  
Toronto, ON M5H 2S6

**Norman Groot**  
LSUC No.: 43721V

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

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

B

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Ministry of the  
Attorney General

Legal Services Branch  
Ministry of Government Services

Ferguson Block  
77 Wellesley Street West, 9<sup>th</sup> Floor  
Toronto ON M7A 1N3

Facsimile: 416 325-9404

Ministère du  
Procureur général

Direction des services juridiques  
Ministère des Services gouvernementaux

Édifice Ferguson  
77, rue Wellesley Ouest, 9<sup>e</sup> étage  
Toronto ON M7A 1N3

Télécopier: 416 325-9404



Direct Line: 416-327-3661  
E-mail: lisa.compagnone@ontario.ca

January 14, 2013

VIA COURIER

Michael Jack  
c/o Lloyd Tapp  
252 Angeline Street North  
Lindsay, Ontario  
K9V 4R1

This is Exhibit .....	B	referred to in the
affidavit of .....	E. Stik	
sworn before me, this .....	8 <sup>th</sup>	
day of .....	April	2013.
		A COMMISSIONER, ETC.

Dear Mr. Tapp:

**RE: CV-12-470815 Michael Jack –and- Her Majesty the Queen in Right of Ontario as represented by the Ministry of Community Safety and Correctional Services**

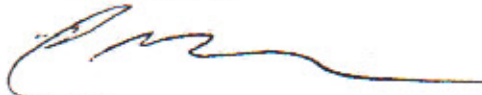
Please be advised that I am counsel for Her Majesty the Queen in right of Ontario (the "Crown") in respect of the above civil matter. Please direct all future correspondence and documentation in this matter to myself.

We were served with the Statement of Claim on December 27, 2012. Please be advised that pursuant to section 7 of the *Proceedings Against the Crown Act*, plaintiffs are required to serve a Notice of Claim on the Crown at least sixty days before the commencement of any action. We do not have a record of service of a Notice of Claim on the Crown. If one was served on the Crown, please provide us with a copy of the Notice along with particulars as to where and when it was served.

In the absence of a properly served Notice of Claim under the *Proceedings Against the Crown Act*, the courts have held that the action is a nullity as against the Crown. We are therefore not able to waive or abridge the Notice of Claim requirement even if inclined to do so. We are prepared to accept the Notice of Action and Statement of Claim served on December 27, 2012 as a Notice of Claim under section 7 of the *Proceedings Against the Crown Act*. The usual procedure plaintiff's counsel follow in these circumstances is to discontinue the existing action as against the Crown and commence another action against the Crown after the expiry of the requisite sixty days and consolidate the new action with the existing action against the other defendants.

We trust having regard to the above that you will not note the Crown in default. If you have any questions regarding the foregoing, please do not hesitate to contact me.

Yours very truly,



Lisa Compagnone  
Senior Counsel

- c Ashton, Nicole (JUS)
- Weafer, Carolyn (JUS)

1

C

D

**Erin Stoik**

**From:** Norman Groot  
**Sent:** Monday, March 25, 2013 10:23 AM  
**To:** 'Lloyd Tapp'  
**Cc:** 'Compagnone, Lisa (MGS)'; Erin Stoik  
**Subject:** RE: OPPA ats Jack / acceptance of serice of an amended Statement of Claim CV-13-476321

Please provide us your amended leading. We are drafting our factum to strike your claim.

**From:** Norman Groot  
**Sent:** Monday, March 18, 2013 9:06 AM  
**To:** 'Lloyd Tapp'  
**Cc:** Compagnone, Lisa (MGS); Erin Stoik  
**Subject:** OPPA ats Jack / acceptance of serice of an amended Statement of Claim CV-13-476321

Dear Mr. Jack,

You may email us your Amended Statement of Claim and upon our review of it we will advise whether we will accept service.

Please be advised that we are maintaining our motion date as scheduled, if for no other purpose than to seek a cost order against Mr. Jack. If the claim has not changed substantively towards our clients, we will re-file our motion materials to strike this claim.

Yours truly,

Norman Groot

This is Exhibit C referred to in the affidavit of E. Stoik sworn before me, this 8<sup>th</sup> day of April, 2013  
  
A COMMISSIONER, ETC.

**From:** Lloyd Tapp [mailto:dmclaugh@bell.net]  
**Sent:** Sunday, March 17, 2013 10:22 PM  
**To:** Norman Groot  
**Cc:** Compagnone, Lisa (MGS)  
**Subject:** Statement of Claim CV-13-476321

Dear Mr. Groot:

Recently, I had filed a discontinuance of the claim against the OPP and its named defendant employees (not the OPPA and its representatives). This was done as per the suggestion from counsel for Her Majesty the Queen in Right of Ontario operating as the OPP and its named employees, Lisa Compagnone, so as to meet the requirements of section 7 of the Proceedings Against the Crown Act.

On March 15, 2013, I filed the new Claim against the OPP and its named employees and counsel has accepted service of the claim for the OPP and its named employees with the exception of Chris Newton who is retired and Shaun Filman who is represented by you. As indicated by counsel Compagnone, she cannot accept service of the Claim for Mr. Filman because he is already represented by counsel.

Being that you are counsel on record for the OPPA and its representatives would you be willing to accept service of the new claim (CV-13-476321) on OPP employee Shaun Filman? I am hopeful that you will accept service once you canvass it with Mr. Filman for I do not want to have to utilize his personal address for service and the affidavit of service.

Sincerely,

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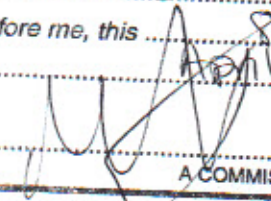


Norman Groot  
Direct Line: (416) 637-3141  
ngroot@investigationcounsel.com

April 1, 2013

**VIA EMAIL AND REGULAR MAIL**

Michael Jack  
c/o Lloyd Tapp  
252 Angeline Street North  
Lindsay, ON K9V 4R1  
Tel: 1-705-878-4240  
Email: [dmclaugh@bell.net](mailto:dmclaugh@bell.net)

This is Exhibit <u>D</u> referred to in the affidavit of <u>E. Strik</u> sworn before me, this <u>1st</u> day of <u>April</u> , 20 <u>13</u>  A COMMISSIONER, ETC.
---

Dear Mr. Jack:

**Re: OPPA et al. ats Jack  
Court File No. : CV-12-470815**

It has come to our attention that our Motion Record previously delivered to you had a typo on the cover page regarding who we were representing. Enclosed is the correct version of our Motion Record cover page. Please also find enclosed a copy of our letter dated February 13, 2013, which according to our records, may not have come to your attention. Our Factum for the April 22, 2013 motion will follow shortly.

Yours truly,

  
Norman Groot  
NJG/es  
Enclosure

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

**VIA FACSIMILE 416-325-9404**



investigationcounsel.com

Norman Groot  
Direct Line: (416) 637-3141  
ngroot@investigationcounsel.com

February 13, 2013

**VIA EMAIL AND REGULAR MAIL**

Michael Jack  
c/o Lloyd Tapp  
252 Angeline Street North  
Lindsay, ON K9V 4R1  
Tel: 1-705-878-4240  
Email: [dmclaugh@bell.net](mailto:dmclaugh@bell.net)

Dear Mr. Jack:

**Re: OPPA et al. ats Jack  
Court File No. : CV-12-470815**

---

Please accept this letter as notice that we are counsel for the Ontario Provincial Police Association, Shaun Filman, Karen German, Jim Styles, and Marty McNamara, and have accepted service of the Statement of Claim on behalf of these defendants.

As you know, we have scheduled a motion before the Court on April 22, 2013. Although you have asked Mr. Tapp to assist you with this matter, he is not a lawyer, and you must also attend the motion. It will be the decision of the presiding judge as to whether Mr. Tapp may address the Court on your behalf. If you are present, our clients will take no position to Mr. Tapp acting as your representative, but rather leave it to the presiding judge to determine what is appropriate. If you fail to appear at the motion, and the Court declines to permit Mr. Tapp to speak on your behalf, we will oppose any request for an adjournment, present the Court with a copy of this letter, and ask the Court to strike your claim on the basis as set out in our Motion Record.

As you have filed a Responding Motion Record and are not consenting to the striking of your claim against our clients, our clients are now incurring the cost of preparing a Factum. Please accept this letter that our clients will be seeking a cost order against you for the preparation of our motion materials, factum, reviewing your volumes of materials, and attending the motion. We estimate our cost outline will indicate that our clients are seeking a \$20,000 cost order against you in addition to the striking of your claim. It may be a greater amount by the time this is over. Given this information, we request you reconsider your current opposition to the motion of our clients.

Yours truly,

  
Norman Groot  
NJG/es

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

**VIA FACSIMILE 416-325-9404**

**ONTARIO PROVINCIAL POLICE ASSOCIATION et. al.**

- and -

Defendants

**MICHAEL JACK**

Plaintiff

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
PROCEEDING COMMENCED AT  
TORONTO**

**MOTION RECORD  
(for motion returnable April 22, 2013)**

**Investigation Counsel  
Professional Corporation  
Barristers & Investigation Consultants  
350 Bay Street, Suite 1000  
Toronto, Ontario M5H 2S6**

**Norman Groot  
LSUC No.: 43721V**

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

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

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

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

Defendants

**BOOK OF AUTHORITIES OF DEFENDANTS  
THE ONTARIO PROVINCIAL POLICE ASSOCIATION, SHAUN FILMAN,  
KAREN GERMAN, JIM STYLES and MARTY MCNAMARA  
(for the motion returnable April 22, 2013)**

April 8, 2013

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

**Norman Groot**  
LSUC No.: 43721V

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

Lawyers for the Defendants,  
The Ontario Provincial Police Association,  
Shaun Filman, Karen German,  
Jim Styles and Marty McNamara

**TO:**

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

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

Self-Represented Plaintiff

**AND TO:**

**MINISTRY OF THE ATTORNEY GENERAL**

Legal Services Branch  
Ministry of Government Services  
9th Floor, Ferguson Block  
77 Wellesley Street West  
Toronto, ON M7 A 1N3

**Lisa Compagnone**  
Senior Counsel  
LSUC No. 42823P  
Email: lisa.compagnone@ontario.ca  
Tel: (416) 327-6916 / Fax: (416) 325-9404

Counsel for the Crown Defendants

## INDEX

TAB	DESCRIPTION
<b>CASE LAW</b>	
1	<i>Aristocrat Restaurants Ltd. v. Ontario</i> , 2003 CarswellOnt 5574 (Sup. Ct.)
2	<i>Balanyk v. University of Toronto</i> , 1999 CarswellOnt 1786 (Sup.Ct.)
3	<i>Beardsley v. Ontario</i> , 2001 CarswellOnt 4137 (C.A.)
4	<i>Boyce v. Toronto Police Services Board</i> , 2011 CarswellOnt 4 (Sup. Ct.); aff'd 2012 CarswellOnt 4146 (C.A.)
5	Canadian Encyclopedic Digest, "Torts – II: Principles of Liability – 3: Motive" at §24, citing, <i>Allen v. Flood</i> (1897), [1898] A.C. 1 (U.K. H.L.); <i>Sorrell v. Smith</i> (1925), [1925] A.C. 700 (U.K. H.L.); Winfield and Jolowicz on Tort, 14th ed. (1994), p. 52
6	<i>Charlton v. Beamish</i> , 2004 CarswellOnt 4565 at para. 29 (Sup. Ct.)
7	<i>Hunt v. Carey Canada</i> , 1990 CarswellBC 216 at para. 36 (S.C.C.)
8	<i>Montgomery v. School-Plough Canada Inc.</i> , 1989 CarswellOnt 1019 at para. 8 (Sup. Ct.)
9	<i>Prete v. Ontario</i> , 1993 CarswellOnt 810 at paras. 16, 21 (C.A.)
10	<i>Seneca College v. Bhadauria</i> , 1981 CarswellOnt 117 at para. 27 (S.C.C.)
11	<i>Vorvis v. Insurance Corp. of British Columbia</i> , 1989 CarswellBC 76 at para. 16 (S.C.C.)
<b>LEGISLATION</b>	
12	21.01 of the <i>Rules of Civil Procedure</i> . R.R.O. 1990, Reg 194
13	<i>Limitations Act, 2002</i> , S.O. 2002, c. 24, Sched. B., ss. 4, 5

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2003 CarswellOnt 5574,

2003 CarswellOnt 5574

2003 CarswellOnt 5574

2003 CarswellOnt 5574

2003 CarswellOnt 5574

Aristocrat Restaurants Ltd. v. Ontario

Aristocrat Restaurants Ltd. o/a Tony's East, Plaintiff and Her Majesty the Queen in Right of Ontario, the Attorney General (Ontario), the Solicitor General, Metropolitan Toronto Police Service Board, Regional Municipality of Durham Police Service Board, City of Barrie Police Service Board, Regional Municipality of Peel Police Service Board, the Minister of Consumer and Business Services, Alcohol and Gaming Commission of Ontario, Defendants

1280858 Ontario Inc. o/a Diamonds Cabaret, 1223984 Ontario Ltd. o/a Charlie T's and Sorin Cohn, Plaintiffs and Her Majesty the Queen in Right of Ontario, the Attorney General (Ontario), the Solicitor General, Metropolitan Toronto Police Service Board, Regional Municipality of Durham Police Service Board, City of Barrie Police Service Board, Regional Municipality of Peel Police Service Board, the Minister of Consumer and Business Services, Alcohol and Gaming Commission of Ontario, Defendants

728654 Ontario Inc. o/a Locomotion Tavern, 972101 Ontario Ltd. o/a Cabaret Cannonball, 1210436 Ontario Ltd. o/a Million Dollar Restaurant, Café at the Park Inc., and Pak Hon Sit, Plaintiffs and Her Majesty the Queen in Right of Ontario, the Attorney General (Ontario), the Solicitor General, Metropolitan Toronto Police Service Board, Regional Municipality of Durham Police Service Board, City of Barrie Police Service Board, Regional Municipality of Peel Police Service Board, the Minister of Consumer and Business Services, Alcohol and Gaming Commission of Ontario, Defendants

Ontario Superior Court of Justice

Epstein J.

Heard: August 27-28, 2003

Judgment: November 20, 2003

Docket: 02-CV232341 CM2, 01-CV-220922 CM3, 01-CV-220921 CM2

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Counsel: Joseph W. Irving, Neil Searles, for Plaintiffs

Kevin McGivney, Kathryn Kirkpatrick, for Defendant, Metropolitan Toronto Police Service Board

John P. Zarudny, James Kendik, for Defendants, Her Majesty the Queen in Right of Ontario, Ministry of the Attorney General (Ontario), Ministry of the Solicitor General, The Minister of Consumer and Business Services, Alcohol and Gaming Commission of Ontario

Crystal O'Donnell, for Defendant, Regional Municipality of Peel Police Service Board

2003 CarswellOnt 5574,

Barry Marta, Meg Kawasaki, for Defendant, City of Barrie Police Service Board

C. Kirk Boggs, Stuart E.E. Wright, for Defendant, Regional Municipality of Durham Police Service Board

Subject: Civil Practice and Procedure; Public; Torts

Civil practice and procedure --- Pleadings — General requirements — Material facts

Four police services joined forces to conduct investigation of alleged prostitution and sexual exploitation of women in adult entertainment industry — Police obtained search warrants to enter adult entertainment venues and question patrons — Police laid several charges against plaintiff businesses operating three adult entertainment parlours, which were subsequently withdrawn, dismissed or stayed — Plaintiffs brought action against police services, Attorney General, Solicitor General and others for malicious prosecution, conspiracy, abuse of process, bad faith and other intentional torts — Defendants brought application to strike Statements of Claim for failure to plead material facts — Leave to amend Statements of Claim within 30 days was granted, except as against Crown defendants and except in relation to claim of bad faith — Statements of Claim contained little more than bald allegations and failed to identify which of defendants were allegedly involved in which conduct or to establish their intentions — Plaintiffs failed to demonstrate damages suffered and to particularize involvement of defendants in elements of torts claimed — Plaintiffs failed to allege damages resulting from conspiracy that were separate and distinct from those allegedly suffered as result of tort itself — As striking out pleadings would only result in plaintiffs commencing another proceeding, it was preferable to grant leave to amend, despite serious inadequacies of pleadings.

Crown --- Principles of tort regarding Crown — Liability of Crown for torts of servants — Liability for specific torts — Action for malicious prosecution by Crown officers

Four police services joined forces to conduct investigation of alleged prostitution and sexual exploitation of women in adult entertainment industry — Police obtained search warrants to enter adult entertainment venues and question patrons — Police laid several charges against plaintiff businesses operating three adult entertainment parlours, which were subsequently withdrawn, dismissed or stayed — Plaintiffs brought action against police services, Minister of Consumer and Business Services, Alcohol and Gaming Commissioner and others for malicious prosecution, conspiracy, abuse of process, bad faith and other intentional torts — Defendants brought application to strike Statements of Claim — Application was granted in part and claim against crown defendants was struck — Plaintiffs failed to plead facts in support of allegations of tortious acts by persons for whom Crown was vicariously liable — Police officers were not sued directly and pleadings contained no allegations of wrongful acts by specific officers — Since Statements of Claim contained no specific allegations of tortious conduct against any of Ministers and since they could not be held vicariously liable for actions of other crown servants, Ministers were not proper parties to actions — Alcohol and Gaming Commissioner, as statutory and corporate entity, could be held vicariously liable for torts of employees, but Statements of Claim contained no facts connecting Commission employees to tortious acts.

**Cases considered by Epstein J.:**

*Andersen Consulting Ltd. v. Canada (Attorney General)* (2001), 2001 CarswellOnt 3139, 150 O.A.C. 177, 13 C.P.C. (5th) 251 (Ont. C.A.) — followed

*Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.* (1983), [1983] 1 S.C.R. 452, 145 D.L.R. (3d) 385, 47 N.R. 191, [1983] 6 W.W.R. 385, 21 B.L.R. 254, 24 C.C.L.T. 111, 72 C.P.R. (2d) 1, 1983 CarswellBC 734, 1983 CarswellBC 812 (S.C.C.) — considered

*Canada (National Harbours Board) v. Langelier* (1968), 2 D.L.R. (3d) 81, (sub nom. *Canada (Conseil des ports nationaux) v. Langelier*) [1969] S.C.R. 60, 1968 CarswellQue 44 (S.C.C.) — referred to

2003 CarswellOnt 5574,

*Central Canada Potash Co. v. Saskatchewan (Attorney General)* (1978), [1979] 1 S.C.R. 42, [1978] 6 W.W.R. 400, 23 N.R. 481, 6 C.C.L.T. 265, 88 D.L.R. (3d) 609, 1978 CarswellSask 100, 1978 CarswellSask 132 (S.C.C.) — considered

*Cishecki v. IBM Canada Ltd.* (2003), 2003 CarswellOnt 402, 7 R.P.R. (4th) 23 (Ont. C.A.) — considered

*D.E. & J.C. Hutchison Contracting Co. v. Windigo Community Development Corp.* (1998), 1998 CarswellOnt 4538 (Ont. Gen. Div.) — referred to

*D.G. Jewelry Inc. v. Cyberdium Canada Ltd.* (2002), 2002 CarswellOnt 1382, 21 C.P.C. (5th) 174 (Ont. S.C.J.) — referred to

*Daishowa Inc. v. Friends of the Lubicon* (1998), 39 O.R. (3d) 620, 1998 CarswellOnt 1401, 158 D.L.R. (4th) 699, 18 C.P.C. (4th) 272, 52 C.R.R. (2d) 7, 41 C.C.L.T. (2d) 193, 27 C.E.L.R. (N.S.) 1 (Ont. Gen. Div.) — referred to

*Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 111 O.A.C. 201, 164 D.L.R. (4th) 257, 1998 CarswellOnt 3202, 20 R.P.R. (3d) 207, 26 C.P.C. (4th) 1 (Ont. C.A.) — referred to

*Edgeworth Helicopters Ltd. v. Salmon Arm (District)* (1990), 1 M.P.L.R. (2d) 261, 1990 CarswellBC 531 (B.C. S.C.) — referred to

*H.A. Imports of Canada Ltd. v. General Mills Inc.* (1983), 42 O.R. (2d) 645, 36 C.P.C. 296, 74 C.P.R. (2d) 257, 150 D.L.R. (3d) 574, 1983 CarswellOnt 475 (Ont. H.C.) — referred to

*Hicks v. Faulkner* (1878), 8 Q.B.D. 167 (Eng. Q.B.) — referred to

*Hughes v. Sunbeam Corp. (Canada)* (2002), 2002 CarswellOnt 2919, 28 B.L.R. (3d) 1, 165 O.A.C. 68, 61 O.R. (3d) 433, 25 C.P.C. (5th) 230, 219 D.L.R. (4th) 467 (Ont. C.A.) — referred to

*Hunt v. T & N plc* (1990), 4 C.C.L.T. (2d) 1, 43 C.P.C. (2d) 105, 117 N.R. 321, 4 C.O.H.S.C. 173 (headnote only), (sub nom. *Hunt v. Carey Canada Inc.*) [1990] 6 W.W.R. 385, 49 B.C.L.R. (2d) 273, (sub nom. *Hunt v. Carey Canada Inc.*) 74 D.L.R. (4th) 321, [1990] 2 S.C.R. 959, 1990 CarswellBC 759, 1990 CarswellBC 216 (S.C.C.) — considered

*Lido Industrial Products Ltd. v. Exbar Properties Inc.* (1988), 28 O.A.C. 385, 1988 CarswellOnt 802 (Ont. Div. Ct.) — followed

*Metropolitan Separate School Board v. Taylor* (1994), 21 C.C.L.T. (2d) 316, 1994 CarswellOnt 934 (Ont. Gen. Div.) — referred to

*Nelles v. Ontario* (1989), 69 O.R. (2d) 448 (note), [1989] 2 S.C.R. 170, 60 D.L.R. (4th) 609, 98 N.R. 321, 35 O.A.C. 161, 41 Admin. L.R. 1, 49 C.C.L.T. 217, 37 C.P.C. (2d) 1, 71 C.R. (3d) 358, 42 C.R.R. 1, 1989 CarswellOnt 963, 1989 CarswellOnt 415 (S.C.C.) — followed

*Normart Management Ltd. v. West Hill Redevelopment Co.* (1998), 155 D.L.R. (4th) 627, 37 O.R. (3d) 97, 1998 CarswellOnt 251, 17 C.P.C. (4th) 170, 113 O.A.C. 375, 41 C.C.L.T. (2d) 282 (Ont. C.A.) — referred to

*Norris v. Lloyd's of London* (1998), 1998 CarswellNB 321, 205 N.B.R. (2d) 29, 523 A.P.R. 29, 25 C.P.C. (4th) 276, 8 C.C.L.I. (3d) 216 (N.B. C.A.) — not followed

2003 CarswellOnt 5574,

*Odhavji Estate v. Woodhouse* (2000), 2000 CarswellOnt 4742, (sub nom. *Odhavji Estate v. Metropolitan Toronto Police Force*) 194 D.L.R. (4th) 577, 3 C.C.L.T. (3d) 226, 52 O.R. (3d) 181, 142 O.A.C. 149 (Ont. C.A.) — followed

*Odhavji Estate v. Woodhouse* (2001), 2001 CarswellOnt 3081, 2001 CarswellOnt 3082, 276 N.R. 199 (note), 154 O.A.C. 199 (note) (S.C.C.) — referred to

*R. v. Cooper* (2000), 2000 CarswellOnt 844 (Ont. C.J.) — referred to

*R. v. DiGiuseppe* (2000), 2000 CarswellOnt 2944, 38 C.R. (5th) 83 (Ont. C.J.) — referred to

*R. v. DiGiuseppe* (2002), 2002 CarswellOnt 62, 161 C.C.C. (3d) 424, 155 O.A.C. 62, 91 C.R.R. (2d) 124 (Ont. C.A.) — referred to

*Region Plaza Inc. v. Hamilton-Wentworth (Regional Municipality)* (1990), 12 O.R. (3d) 750, 1990 CarswellOnt 701 (Ont. H.C.) — referred to

*Ross v. Scottish Union & National Insurance Co.* (1920), 47 O.L.R. 308, 53 D.L.R. 415 (Ont. C.A.) — referred to

*Scintilore Explorations Ltd. v. Larche* (1999), 1999 CarswellOnt 2345, 48 B.L.R. (2d) 248 (Ont. S.C.J.) — referred to

*Senechal v. Muskoka (District Municipality)* (2003), 2003 CarswellOnt 854, 37 M.V.R. (4th) 122, 37 M.P.L.R. (3d) 131 (Ont. S.C.J.) — referred to

*Sinclair v. Ontario* (1996), 1996 CarswellOnt 3358 (Ont. Gen. Div.) — referred to

*Sun Life Assurance Co. of Canada v. 401700 Ontario Ltd.* (1991), 3 O.R. (3d) 684, 1991 CarswellOnt 895 (Ont. Gen. Div.) — referred to

*Wilson v. Toronto Police Service* (2001), 2001 CarswellOnt 2226 (Ont. S.C.J.) — referred to

*Wilson v. Toronto Police Service* (2002), 2002 CarswellOnt 335, 156 O.A.C. 374 (Ont. C.A.) — referred to

#### Statutes considered:

*Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

s. 7 — referred to

*Criminal Code*, R.S.C. 1985, c. C-46

Generally — referred to

s. 210 — referred to

2003 CarswellOnt 5574,

*Immigration Act*, R.S.C. 1985, c. I-2

Generally — referred to

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

Generally — referred to

s. 5 — referred to

s. 5(2) — referred to

**Rules considered:**

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

Generally — pursuant to

R. 1.04 — referred to

R. 21.01(1)(b) — pursuant to

R. 21.01(3)(d) — pursuant to

R. 25.06 — referred to

R. 25.11 — pursuant to

APPLICATION by defendants to strike Statement of Claim.

***Epstein J.:***

1 Three groups of plaintiffs, all of which are businesses licensed to operate adult entertainment parlours, have commenced these three actions against a number of police services boards, Her Majesty the Queen in Right of Ontario and various Crown Ministers and agencies. The subject matter of the claims is a joint forces investigation known as "Project Almonzo", an investigation focused on criminal activity involving alleged prostitution and sexual exploitation of women in the adult entertainment industry. Each of the virtually identical actions involves the plaintiffs' complaints about the purpose behind and the execution of the project.

2 The defendants bring these motions to dismiss all or part of the actions primarily under rules 21.01(1)(b), 21.01(3)(d) and 25.11. They contend that none of the actions give rise to a reasonable cause of action and that they are frivolous and vexatious and an abuse of the process of the court. Further, Her Majesty the Queen in Right of Ontario ("HMQ") and the Ministers of the Crown (the "Crown defendants") argue that they are not proper parties to the actions. The defendants also complain that the allegations in the statements of claim violate a number of the *Rules of Civil Procedure* relevant to pleading.

**The Facts**

2003 CarswellOnt 5574,

3 On a motion to attack pleadings, the facts set out in the statements of claim, which are capable of proof, are to be taken as true. The following pleaded facts will therefore form the basis of my analysis.[FN1]

4 The plaintiffs are individuals or corporations carrying on business as adult entertainment parlours. The defendants, other than HMQ, include four municipal police services boards, the Attorney General for Ontario, the Solicitor General, the Minister of Consumer and Business Services and the Alcohol and Gaming Commission of Ontario.

5 Generally, in each of the three actions, the plaintiffs allege that in bad faith and for an improper purpose, the defendants conspired together to create and execute Project Almonzo. The plaintiffs plead that such conduct amounted to wrongs including malicious prosecution, intimidation and unlawful interference with economic relations.

6 More specifically, the plaintiffs plead that each of the defendants, in various ways, participated in Project Almonzo, a project not initiated for any proper law enforcement purpose but rather for the purpose of causing financial harm to the adult entertainment industry and ultimately to put the plaintiffs out of business. The plaintiffs allege that all of the defendants, except HMQ, conspired against them and targeted their businesses, intimidated their staff and caused damage to their reputations by improperly portraying them as brothels.

7 The claims contain allegations that agents of the defendants delivered notices to the plaintiffs advising that investigations of the businesses were being conducted. The notices indicated that certain police officers possessed specific information linking the plaintiffs to violations of relevant bawdyhouse provisions under the *Criminal Code of Canada*.

8 It is alleged that following a period of investigation, the police sought search warrant authorizations for the express purpose of harming the plaintiffs. The police were "disingenuous" before Justices of the Peace by purporting to need the warrants to obtain corporate records when, in reality, they were being sought to enter the businesses at the busiest times.

9 Where search warrants were obtained police stormed into the various premises, detained patrons and made them complete questionnaires. The police withheld evidence of the occasions where a Justice of the Peace denied search warrants, when they subsequently re-applied for a warrant.

10 The plaintiffs say that the police took advantage of vague legislation that defined the constituent elements of bawdyhouse and prostitution offences. They further plead that this legislation allowed the police to pursue criminal charges when they knew that conduct of the same type as that being investigated, had been dealt with in other instances through by-law charges.[FN2]

11 The statements of claim also contain allegations that the defendants contravened federal legislation by improperly requiring foreign performers to stay in or return to Canada to appear in criminal prosecutions that arose as a result of the project.

12 The actions that caused harm to the plaintiffs are described as follows. In action number 01-CV-220921CM2 (the "Locomotion Tavern" action) the plaintiffs were charged criminally and the plaintiffs principal was incarcerated for two days and the businesses' liquor licenses were temporarily suspended. The pleading states that two weeks later, the Divisional Court quashed the license suspension and the Crown later withdrew the criminal charges. In action number 01-CV-232341CM2, (the "Aristocrat Action") it is alleged that police first raided the plaintiffs' premises and laid criminal charges. A few months later they attended at the plaintiffs business in full riot gear and detained staff members and confronted patrons as they left the premises. Subsequently, the criminal charges were withdrawn. In action number 01-CV-220922CM3, (the "Diamonds Cabaret" action) criminal charges were laid against the principal of one of the corporate plaintiffs. These charges were later dismissed. Criminal charges against the other corporate plaintiffs were stayed due to the Crown's failure to provide disclosure.

2003 CarswellOnt 5574,

13 The plaintiffs say that these actions caused economic loss to the businesses and emotional and mental distress to their principals.

#### The Issues

1. Should the pleadings be struck for failure to disclose a reasonable cause of action in the following seven causes of action that are referred to in the statements of claim?

- a. Malicious prosecution;
- b. Conspiracy;
- c. Abuse of Public Office;
- d. Unlawful Interference with Economic Relations;
- e. Intimidation;
- f. Bad Faith; and
- g. Abuse of Process.

2. Should the pleadings be struck in relation to HMQ and the Crown defendants for failure to plead any material facts that could support either personal liability for the crown defendants or vicarious liability of Ontario?

3. Should the pleadings be struck for failure to comply with, the Rules of Civil Procedure?

#### The Legal Framework

14 The legal framework is clear.

15 The importance of pleadings cannot be overemphasized. They define the issues in dispute. They give notice to the other side of the case to be met. They inform the court of the matters in issue. They provide a permanent record of the issues raised in deciding the action so as to prevent further litigation upon matters already judicially determined. They also play a key role in defining the scope of discovery. See: *D.E. & J.C. Hutchison Contracting Co. v. Windigo Community Development Corp.*, [1998] O.J. No. 4884 (Ont. Gen. Div.) at para. 26 and *Senechal v. Muskoka (District Municipality)*, [2003] O.J. No. 885 (Ont. S.C.J.) at para. 51.

16 Rule 21.01(1)(b) is designed to ensure that the court's process is not abused. It provides that a judge may strike out a pleading if it discloses no reasonable cause of action. The purpose of the rule is to test whether a plaintiff's allegations state a legally sufficient or substantively adequate claim. Where the alleged facts fail to disclose such a claim, it should be struck. However, the Supreme Court of Canada in *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.) made it clear that before a statement of claim is struck out, it must be plain and obvious that it discloses no cause of action. Justice Wilson expressed the test as follows at page 980.

2003 CarswellOnt 5574,

Assuming that the facts as stated in the statement of claim can be proved, is it 'plain and obvious' that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be 'driven from the judgment seat'. Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect should the relevant portions of a plaintiff's statement of claim be struck out.

17 Recent authority from the Ontario Court of Appeal affirms the validity of the 'plain and obvious' test. In *Cishecki v. IBM Canada Ltd.*, [2003] O.J. No. 364 (Ont. C.A.) the Court of Appeal overturned the motions judge's decision to strike out the statement of claim. At para. 4 of the brief reasons, the Court, citing *Hunt*, *supra*, held:

The authorities are clear that before a claim can be struck out on the ground that it discloses no reasonable cause of action, it must be plain and obvious that the claim does not disclose a reasonable cause of action. Moreover, the statement of claim is to be read generously with allowance for inadequacies due to drafting deficiencies.[FN3]

18 The failure to properly establish a cause of action can occur in one of two ways. A claim will be found to be legally insufficient when either the allegations it contains do not give rise to a recognized cause of action or it fails to plead the necessary legal elements of an otherwise recognized cause of action. See: *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.) at pg. 264.

19 In order to survive the second type of rule 21.01(1)(b) motion, a plaintiff must, at minimum, plead the basic elements of a recognized cause of action pursuant to which an entitlement to damages is claimed. Vague allegations that make it impossible for an opposing party to reply should be struck. This court is permitted to strike out less than the entire pleading where the portion being struck is distinct.

20 Pleadings must contain material facts. Rule 25.06 provides that every pleading must contain a concise statement of the material facts on which the party relies for the claim or defence. Furthermore, a party must plead all of the facts that it must prove to establish a cause of action that is legally complete.

21 A pleading that shows a complete absence of material facts is considered frivolous and vexatious. Bare allegations should be struck as scandalous. This is particularly so where allegations of intentional or malicious conduct are made. See: *Wilson v. Toronto Police Service*, [2001] O.J. No. 2434 (Ont. S.C.J.) at paras. 66-67, *aff'd.*, [2002] O.J. No. 383 (Ont. C.A.). Rule 25.11 empowers the court to strike out pleadings on the ground that the pleading is scandalous, frivolous or vexatious. See: *Wilson v. Toronto Police Service*, [2001] O.J. No. 2434 (Ont. S.C.J.) at paras. 66-67, *aff'd.*, [2002] O.J. No. 383 (Ont. C.A.)

22 Against this background, I now turn to a consideration of the pleadings in the three actions involved in these motions.

## Analysis

### 1. Do the pleadings disclose a reasonable cause of action?

#### (a) Malicious prosecution and abuse of process [FN4]

23 In *Nelles v. Ontario*, [1989] 2 S.C.R. 170 (S.C.C.), the Supreme Court of Canada, considered a motion to strike a claim of malicious prosecution as disclosing no cause of action. The court observed that to advance a claim for malicious prosecution was "no easy task". To succeed, the plaintiff must prove:



2003 CarswellOnt 5574,

- (i) The defendant initiated the proceeding;
- (ii) The proceeding was terminated in favour of the plaintiff;
- (iii) The absence of reasonable and probable cause; and
- (iv) Malice, or a primary purpose other than that of carrying the law into effect.

24 The defendants argue [that the plaintiffs have failed to] plead sufficient facts relating to malicious prosecution. With respect to the initiation of the proceedings, they have failed to set out in detail, who exactly was prosecuted, who initiated each of the prosecutions that have been identified in the claims, when each of the prosecutions was initiated and the nature of the charges.

25 Farther, they have failed to plead specific facts relating to the termination of the proceedings in their favour, namely, when, how or why any of the proceedings were terminated.

26 The test for reasonable and probable cause requires the prosecutor to have an honest belief in the accused's guilt, founded on reasonable grounds of the existence of circumstances which, assuming them to be true, would reasonably lead any ordinary prudent individual to conclude that the person charged was probably guilty of the identified crime. See: *Hicks v. Faulkner* (1878), 8 Q.B.D. 167 (Eng. Q.B.).

27 The defendants submit that the plaintiffs have failed to set out details relating the defendants to the prosecutions or indicating that any of them had knowledge that would preclude their having an honest belief in the probable guilt of those who were prosecuted.

28 Finally, I turn to the element of malice. The test for malicious prosecution, as determined by the Supreme Court of Canada in *Nelles*, *supra*, requires that the plaintiff show that the actual motive was improper or demonstrate that the prosecution can only be explained by imputing a wrong motive. The law is clear that it is no longer sufficient to make a bald allegation of malice in a statement of claim. When the process of the court is invoked and public allegations are made of intentional wrongdoing, it is important that the alleged wrongdoer be able to understand what is alleged against him or her.

29 The defendants argue that the plaintiffs have not pleaded any specific facts in support of their allegations that the prosecutions were motivated by an improper purpose.

30 The pleadings set out details relating to the laying of criminal charges and the withdrawal or dismissal of the charges. In terms of malice, the plaintiffs plead that the defendants' motive was to intimidate the plaintiffs and those associated with them, for the purpose of causing harm to them. With respect to the element of lack of reasonable and probable cause, the plaintiffs plead that there was not a "scintilla of evidence" to suggest that sex slaves were working in the establishments, that "no specific evidence of criminal conduct was within the knowledge of the defendants" and that the defendants "took advantage" of vague laws with respect to what would constitute an act of prostitution.

31 In my view, the statements of claim could have set out the tort of malicious prosecution with a good deal more particularity. For the most part the defendants are being asked to respond to little more than bald allegations. The pleadings completely fail to set out which of the defendants are alleged to have been involved in what aspects of the conduct that the plaintiffs say constitute the tort of malicious prosecution. As the pleadings now stand it would be virtually impossible for the defendants, short of a general denial, to respond to this aspect of the claims.

32 Accordingly, the pleadings, insofar as they relate to the tort of malicious prosecution are defective.

2003 CarswellOnt 5574,

33 I now turn to the somewhat narrower tort of abuse of process. To be successful, the plaintiff must demonstrate that:

- (i) The defendant has subjected him or her to a legal process;
- (ii) This has been done predominantly to further some indirect, collateral and improper purpose;
- (iii) Some definite act or threat has been made in furtherance of that purpose; and
- (iv) Some measure of special damage has resulted.

34 A bad or vindictive motive on the part of the defendants will not suffice. overt and definitive action on the defendant's part is essential. Moreover, there is no liability where a defendant employs the legal process to its proper conclusions, regardless of the nature of the defendant's intentions. See: *Metropolitan Separate School Board v. Taylor*, [1994] O.J. No. 1870 (Ont. Gen. Div.) and *Scintilore Explorations Ltd. v. Larche*, [1999] O.J. No. 2847 (Ont. S.C.J.)

35 The defendants submit that the plaintiffs have failed to plead any specific facts concerning the nature of the legal processes to which they have been subjected. Furthermore, they have failed to plead any specific facts alleging that the predominant purpose for any impugned legal proceeding was improper or that the defendants took any definite steps against the plaintiffs in furtherance of any improper purpose. Finally, the defendants argue that the plaintiffs have failed to plead that they have suffered special damages as a result of the impugned proceedings,

36 Again, the elements of this tort could have been pleaded with greater particularity and clarity, but, subject to two concerns, the pleadings do contain the necessary elements. As previously set out, the plaintiffs have alleged that the defendants participated in various ways in devising and carrying out Project Almonzo, a project that involved prosecutions and related proceedings against the plaintiffs. These proceedings were terminated for various reasons, all in favour of the plaintiffs. The statements of claim contain allegations suggesting that the defendants never had any reasonable belief in the plaintiffs' guilt. Rather the steps were taken for the purpose of intimidating and harming the plaintiffs.

37 The first of the concerns mentioned above relates specifically to the damage claim. The law is clear that to establish the tort of abuse of process, the plaintiff must demonstrate that he or she has suffered some measure of special damages. In their claims all the plaintiffs say is that they have suffered damages as a result of the defendants' conduct. The statements of claim are therefore deficient in this respect. The second concern relates to a more general problem similar to that expressed in relation to the tort of malicious prosecution. Once again, the pleadings contain little more than bald allegations and conclusions. The plaintiffs have utterly failed to particularize the involvement of the various defendants in the elements of the tort of abuse of process. This, in my view, puts the defendants in an impossible position in terms of defending the actions.

38 As a result of these deficiencies the tort of abuse of process has not been properly pleaded.

(b) Conspiracy

39 The Supreme Court of Canada in *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452 (S.C.C.) identified the test for tortious conspiracy as follows:

- (i) There is an agreement between two or more persons to perform specific acts injure the plaintiff;

2003 CarswellOnt 5574,

- 39 (ii) The defendants acted in furtherance of that agreement;
  - 40 (iii) The predominant purpose of the agreement is to injure the plaintiff or the defendant's conduct is unlawful, directed towards the plaintiff alone, or with others, and the defendant should know that injury to the plaintiff is likely; and
  - 41 (iv) The plaintiff is injured as a result of the conspiracy.
- 42 Further, the pleadings in an action for conspiracy must include, with clarity and precision, particulars of:
- 43 (i) the parties and their relationship;
  - 44 (ii) an agreement to conspire;
  - 45 (iii) the precise purpose or objects of the alleged conspiracy;
  - 46 (iv) the overt acts that are alleged to have been done by each of the conspirators; and
  - 47 (v) the injury and particulars of the special damage suffered by the plaintiffs by reason of the conspiracy.

See: *Normart Management Ltd. v. West Hill Redevelopment Co.* (1998), 37 O.R. (3d) 97 (Ont. C.A.) and *D.G. Jewelry Inc. v. Cyberdiam Canada Ltd.*, [2002] O.J. No. 1465 (Ont. S.C.J.).

48 One further important aspect about pleading the tort of conspiracy must be kept in mind. The plaintiff cannot simply plead that the defendants entered into a conspiracy to commit a tort and then committed the tort. In such a case, the doctrine of merger provides that the agreement merges with the tort. The pleading must allege damages resulting from the conspiracy that are separate and distinct from those allegedly suffered as a result of the tort itself. See: *D.G. Jewelry Inc.*, *supra*.

49 The defendants argue that the plaintiffs have failed to provide the required facts and elements in support of the claim for conspiracy. Specifically, they have not pleaded the overt acts that are alleged to have been done by each of the conspirators and the injury the plaintiffs suffered as a result of the conspiracy. Moreover, the damage claim is deficient as any damages claimed are subsumed by the other torts and the doctrine of merger applies. It follows, the defendants argue, that the conspiracy claim is improperly pleaded and in any event redundant. As a result it should be struck.

50 I agree that the statements of claim do not properly plead conspiracy. The pleadings set out nothing more than that the defendants agreed upon and participated in the planning of Project Almonzo for the improper purpose of putting licensed adult entertainment parlours out of business and that the Crown defendants conspired with the other defendants to pursue criminal charges against the plaintiffs to intimidate them and those associated with the plaintiffs.

51 It is simply not sufficient to say that the defendants conspired together intentionally to harm the plaintiffs. The statements of claim should describe the parties to the conspiracy and their relationship with each other, the agreement between them to conspire, and state precisely what the purpose or what were the objects of the alleged conspiracy. They must also clearly set out the overt acts that are alleged to have been done, and have been done by each of the co-conspirators in pursuance and in furtherance of the conspiracy. Lastly they must allege the injury and damage the plaintiffs suffered. See: *H.A. Imports of Canada Ltd. v. General Mills Inc.* (1983), 42 O.R. (2d) 645, 150 D.L.R. (3d) 574 (Ont. H.C.) and *Normart Management Ltd.*, *supra*.

2003 CarswellOnt 5574,

45 The statements of claim fail to meet these requirements.

46 Since I have found that the tort of conspiracy has not been pleaded adequately it follows that there can be no merger. However, if the plaintiffs choose to serve amended pleading pursuant to the leave I have given, it may be that merger will become a problem that must then be faced.

#### Abuse of public office

47 The core of this tort is the intentional abuse of power. It involves the intentional rather than a negligent or inadvertent, malicious abuse of power: by a public official that damages the plaintiff. In the Court of Appeal decision of *Odhavji Estate v. Woodhouse* (2000), 52 O.R. (3d) 181 (Ont. C.A.) [FN5] To succeed, the plaintiff must establish:

(i) that the defendant is a public officer;

(ii) the defendant exercised his or her power as a public officer;

(iii) the defendant was acting with malice or improper purpose;

(iv) the plaintiff has sufficient legal interest to sue;

(v) there is a causal connection between the wrongful exercise of power by the defendant and the plaintiff's harm; and

(vi) the plaintiff must prove his or her damages.

48 The defendants contend that the plaintiffs have failed to plead sufficient facts to support their allegations with respect to the defendants' purported abuses of power. Specifically, the plaintiffs have failed to plead facts dealing with which of the defendants has committed such abuses what specific powers were abused, how and when; such powers were abused or that the plaintiffs were the objects of the impugned conduct. Further, the plaintiffs have failed to plead any facts alleging that the defendants acted with malice or other improper purpose, with the knowledge that their conduct lacked statutory authority and with the knowledge or intention that such conduct would hurt the plaintiffs.

49 The plaintiffs argue that their pleadings satisfy conditions (iii) through (vi). They then state, in paragraph 47 of their factum, that each of the Crown defendants are public officers and that by engaging in Project Almonzo, these defendants exercised significant powers that go beyond the legal duties entrusted to them. Further, the plaintiffs say in their factum that "the actions of the police services and the AGCO [Attorney General Ontario] amount to conduct involving the exercise of power because each entity was developing policy on how to intentionally harm legal businesses that otherwise would be permitted to continue carrying on a business." First, I observe that the plaintiffs themselves concede that there are deficiencies in the manner in which they have pleaded this tort. They have attempted to overcome three deficiencies in their factum. This, of course, is totally unsatisfactory.

50 Moreover, as with the other causes of action, the pleading is unclear particularly in addressing which of the defendants participated in the activities that the plaintiffs say amounted to committing the tort of abuse of public office and what it is, specifically, that each defendant did. Once again the pleadings leave the defendants in the position where they cannot respond adequately to the claims.

51 As in the case of the plaintiffs' attempt to plead malicious prosecution and abuse of process, the basic elements of the tort of abuse of public office can be found in the pleadings. However, the pleadings, in this respect are defective

2003 CarswellOnt 5574,

for the reasons set out in this section.

(c) *Unlawful interference with economic relations*

52 To establish the tort of interference with economic relations, the following elements must be established:

- (i) The defendant intended to injure the plaintiff;
- (ii) The plaintiff suffered economic loss or related injury directly as a result of the defendant's conduct; and
- (iii) The means the defendant employed were unlawful.

See: *Daishowa Inc. v. Friends of the Lubicon* (1998), 39 O.R. (3d) 620 (Ont. Gen. Div.) and *Edgeworth Helicopters Ltd. v. Salmon Arm (District)* (1990), 1 M.P.L.R. (2d) 261, [1990] B.C.J. No. 2969 (B.C. S.C.).

53 The defendants argue that the plaintiffs have failed to plead any facts that would support the conclusion that any of the defendants intended to injure the plaintiffs. Furthermore, the plaintiffs have failed to plead any specific facts relating to economic loss or any direct causal relationship between the defendants' conduct and any economic loss. The defendants also say that the plaintiffs have failed to plead details of any of the impugned conduct including which of the defendants intended to injure the plaintiffs, which of the plaintiffs were the object of any such intention, what the impugned conduct consisted of, how any particular conduct caused any loss and that any of the conduct was unlawful.

54 The plaintiffs argue that the pleadings contain the requisite elements of this tort and point to the intentional misuse of the criminal justice system, the Immigration Act and of the process associated with obtaining search warrants and the resulting loss of such warrants.

55 Once again, this is simply insufficient. I entirely agree with the defendants' submissions. This cause of action is inadequately pleaded in that the pleadings fail to set out specific material facts to establish the necessary elements of the tort. The individual defendants cannot defend this aspect of the claims because they have not been provided with an understanding of which actions the plaintiffs allege amounted to the tort of intentional interference with economic relations.

(d) *Intimidation*

56 The decision in *Central Canada Potash Co. v. Saskatchewan (Attorney General)* (1978), [1979] 1 S.C.R. 42 (S.C.C.) establishes that the tort of intimidation requires:

- (i) the defendant "A" deliver a threat to the person, "B" stating that "A" will commit an act or use unlawful means against "B";
- (ii) person "B", as a result, does or refrains from doing some act that he or she is entitled to do;
- (iii) "B" thereby causes damage to him or herself or another person "C" and
- (iv) that the plaintiff ("B" or "C") be a person who the defendant "A" intended to injure.

57 It is clear from *Central Canada Potash Co.*, *supra*, that the tort of intimidation is not committed if the defendant followed a course of action that he or she believed to be lawful. For a cause of action in intimidation to exist, the

2003 CarswellOnt 5574,

threat involved must be one to commit an illegal act.

58 The defendants say that the pleadings do not contain any facts to support their allegations of intimidation. In particular, the plaintiffs have failed to plead:

- (i) which of the defendants delivered any alleged threats;
- (ii) which of the plaintiffs were threatened;
- (iii) what the defendants threatened to do;
- (iv) when or where any alleged threats were made;
- (v) what acts any alleged threats caused the plaintiffs to do or refrain from doing;
- (vi) how such acts caused damage to any of the plaintiffs; and
- (vii) the nature and extent of the resulting damage.

59 Furthermore, they say, the plaintiffs have failed to plead any facts that support the contention that any of the defendants threatened to commit an illegal act as opposed to simply enforcing the law.

60 The plaintiffs argue that the pleadings set out that the defendants caused intrusive and unnecessary searches to be conducted of the plaintiffs' premises. The purpose of the searches was to intimidate the plaintiffs' patrons and agents. The unlawful means was the unfounded criminal prosecutions. Patrons heeded these threats, stopped patronizing the plaintiffs and the defendants thereby caused the plaintiffs damage.

61 Once again, the claims contain, in bald terms, the necessary elements of the tort. However, the defendants' complaint about the lack of particularity has considerable merit. There is insufficient specificity in the statements of claim to allow the individual defendants to understand the complaints made against them and therefore to defend this charge.

62 For these reasons, the portions of the claims containing the allegations in support of the tort of intimidation are deficient.

*(e) Bad faith*

63 The defendants submit that bad faith is not a tort known to law and for this reason should be struck. I agree.

64 I am not aware of any Canadian authority that recognizes the tort of bad faith as an independent tort. In argument, the plaintiffs attempted to support the existence of bad faith as an independent tort by relying on insurance cases such as *Norris v. Lloyd's of London*, [1998] N.B.J. No. 351 (N.B. C.A.). These cases are unique in that the law recognizes a special relationship between the insurer and the insured. They have no application to the facts involved in the instant cases.

**2. The Claims against Ontario and the Various Ministries and the Alcohol and Gaming Commission**

65 Subject to the provisions of the Proceeding, 1) Against the Crown of Ontario ("PACA") HMQ enjoys all

2003 CarswellOnt 5574,

of the immunities historically enjoyed by the Crown. The purpose of the PACA enables a party to bring a claim against HMQ without proceeding by way of petition of right or royal fiat. By virtue of s. 5 of the PACA, HMQ's liability in tort is limited to vicarious liability for the conduct of her servants. Furthermore, ss. 5(2) provides that no proceedings shall be brought against the Crown pertaining to its vicarious liability unless proceedings may be brought against that servant or agent personally. It follows that proper pleadings require that facts in support of allegations of tortious behaviors be pleaded against persons for whom HMQ would be vicariously liable.

66 In the pleadings in issue, names of certain police officers form part of a list in the body of each of the amended claims. The plaintiffs allege that the individuals listed were involved in Project Almonso. The defendants argue that the pleadings are deficient in that they fail to set out any alleged tortious behaviors of these individuals. The officers have not been sued directly and the pleadings contain no allegations that they committed any wrongful acts. It follows, say the defendants, that since there are no claims for which HMQ could be vicariously liable, the claims against HMQ ought to be dismissed.

67 I agree. Proper pleading requires that facts in support of allegations of tortious behaviour be pleaded as against persons for whom HMQ would be vicariously liable. Here the plaintiffs fail to provide material facts in relation to which specific tortious acts were committed by each of the police officers and when they are alleged to have committed the torts.

68 Since there are no claims for which HMQ could be vicariously liable pursuant to the PACA, the claims against HMQ are ill founded.

69 With respect to the Attorney General and the Solicitor General and the Minister of Consumer and Business Services, the defendants submit that a claim against a Minister of the Crown is a claim against the Minister, personally. Ministers are Crown servants for whom the Crown may be held vicariously liable. However, Ministers are not masters of other Crown servants, including their direct subordinates. Consequently, Ministers may not be held vicariously liable for the tortious conduct of their Crown servants. In support of these propositions, counsel for the Minister defendants relies upon *Sinclair v. Ontario*, [1996] O.J. No. 3192 (Ont. Gen. Div.) at para. 5 and *Canada (National Harbours Board) v. Langelier* (1968), [1969] S.C.R. 60 (S.C.C.)

70 Since the statements of claim contain no specific allegations of tortious conduct against any of the Ministers and since the Ministers cannot be held vicariously liable for the actions of other Crown servants, the Ministers are not proper parties to the actions.

71 The Alcohol and Gaming Commission is a statutory and corporate entity that may be held vicariously liable for torts of employees. The problem is that the statements of claim do not contain any facts connecting the commission members to any tortious conduct.

72 On the facts as pleaded, there is no cause of action against the Alcohol and Gaming Commission.

### 3. The Failure to Comply with the Rules of Civil Procedure

73 The defendants submit that the pleadings are seriously defective as they fail to meet the requirements of the Rules of Civil Procedure.

74 The crux of this aspect of the defendants' complaint about the claims is essentially the same as their arguments in support of their contention that the statements of claim failed to set out causes of action. The defendants argue that they are facing nothing more than bald allegations. In argument, counsel for the defendants pointed to a number of specific paragraphs in the claims and argued that they contained nothing more than vague assertions, arguments and conclusions. The defendants' position is therefore that the pleadings are frivolous and vexatious and on this basis

2003 CarswellOnt 5574,

alone, should be struck.

75 I agree with many of the defendants' criticisms of the specific paragraphs in the pleadings, I will refer to the amended statement of claim in the Diamonds Cabaret action but my findings concerning the defects apply equally to the same or similar paragraphs contained in the, other two statements of claim. Simply by way of example, tie portions of paragraphs and where ite plaintiffs allege that the responsibilities of certain defendants are "including but not limited to" to" are vexatious in that the pleading is open ended and impossible to respond to. In other paragraphs such as it12, 13, 14, 17, 28 and 33, 47, 53, the allegations are balcLand conclusory in nature. The "collateral purpose" pleaded in paragraph 20 is not defined, and is therefore vague and scandalous. Paragraph 26 is argumentative and totally improper as the allegations about the participation of the police are embarrassing. Paragraph 34 is similarly problematic as it is in the nature of argument as opposed to a material fact. Paragraph 37 is evidence. As the actions are currently cast, paragraph 39 and 40 are irrelevant. I have pointed out only some of the problems associated with the way in which these actions have been pleaded Given my conclusion that all three of the pleadings should be struck in their entirety, it would serve no useful purpose for me to analyze in detail the problems associated with each paragraph in each of the three pleadings.

76 The real problem appears to be this. Certain words Eire used in the pleadings to suggest that the plaintiffs had in mind the various causes of action that have been examined in these reasons. However, the plaintiffs have failed to organize the facts that have been pleaded so that the causes of action are clearly identifiable and are supported by facts material to the establishment of those causes, Moreover, the pleadings do not adequately connect the plaintiffs to many of the events pleaded nor do they adequately identijy the roles allegedly played by the individual defendants. Finally, the claims do not properly set out how rhe individual defendants are alleged to have caused harm to the plaintiffs and the specific nature of that harm.

77 In reading the statements of claim one has the image of the plaintiffs throwing jelly at a wall with the hope that something will stick, Such an approach does not comply with the rules of pleading. It also explains why I have found the various causes of action to have been, improperly pleaded.

### The Remedy

78 I now turn to what is frequently the most difficult determination in motions of this nature, namely, the consequences of a deficient pleading. If I conclude that the cause of action is one that is not known in law then the consequences are obvious: the pleading in relation to that part of the claim must be struck, But what is the appropriate course if the cause of action is known in law but the constituent elements are not properly pleaded? In such a situation the law is clear that where a pleading fails ro meet the minimum level of material fact disclosure, the statement of claim is bad and the appropriate remedy is to strike the claim. See: *Region Plaza Inc. v. Hamilton-Wentworth (Regional Municipality)* (1990), 12 O.R. (3d) 750 (Ont. H.C.) and *Sun Life Assurance Co. of Canada v. 401700 Ontario Ltd.* (1991), 3 O.R. (3d) 684 (Ont. Gen. Div.).

79 Given the conclusions to which I have come about the deficiencies in these claims, there is no question but that an order should issue that they all be struck.

80 This takes me to the question of whether the order striking the claim should be accompanied by a term giving the plaintiffs leave to amend.

81 Counsel for the defendants submit chat given the history of these actions, the plaintiffs should not be given another "kick at the can". Master Birnbaum ordered the parties 10 follow a strict process that contemplated pleadings would be finalized by the end of June of 2003. JEor many months, the plaintiffs have been aware of the defendants' intention to bring motions to strike and the nature of their concerns about the pleadings. Significantly, the plaintiffs had the defendants joint factum for two months prior to the argument of the motions. Since the plaintiffs failed to



2003 CarswellOnt 5574,

respond other than by defending the motion, I should assume that the three statements of claim as they are currently framed are the best they are going to be.

82 Counsel for the plaintiffs argued that he did not know the true nature of the defendants' concerns about the pleadings until shortly before the hearing and that he is fully prepared to provide particulars and/or amend the pleadings.

83 To address the issue of whether to strike the pleadings or strike them with leave to amend, I return to *Hunt*, *supra*, where at para. 24, Wilson J. quoted with approval Magee J.A. in an early Ontario Court of Appeal decision, *Ross v. Scottish Union & National Insurance Co.* (1920), 47 O.L.R. 308 (Ont. C.A.), at 317 where he adopted the 'plain and obvious' test from English authority and stated:

To justify the use of [what is now r. 21.01(1)(b)], a statement of claim should not be merely demurrable, but it should be manifest that it is something worse, so that it will not be curable by amendment, (my emphasis)

84 Amendment can often cure a deficient statement of claim. In *Andersen Consulting Ltd. v. Canada (Attorney General)*, [2001] O.J. No. 3576 (Ont. C.A.) the motions judge, in considering a motion for leave to amend the pleading, denied the request and struck out the statement of claim. On appeal, Moldaver J. A. writing for the court, set aside the decision of the motions judge and granted leave to amend the pleading. At para. 37 Justice Moldaver found it was well-established that:

amendments ... should be presumptively approved unless they would occasion prejudice that cannot be compensated by costs or an adjournment; they are shown to be scandalous, frivolous, vexatious or an abuse of the court's process; or they disclose no reasonable cause of action.

85 While the relief sought in *Andersen Consulting Ltd.* was for leave to amend a pleading, the Court of Appeal was considering the matter in the context of the court below having decided to strike out the statement of claim. In my view therefore, the approach set out in the above quotation is relevant to the issue of whether on a motion to strike a pleading a court should exercise its discretion and grant leave to amend. It is also consistent with the authorities on motions to strike pleadings where courts have held that leave to amend can properly be given where a pleading can be put right or improved by amendment and no injustice is done thereby, I agree with Callaghan J. when in *Lido Industrial Products Ltd. v. Exbar Properties Inc.* (1988), 28 O.A.C. 385 (Ont. Div. Ct.) he said that leave to amend should only be refused in the clearest of cases.

86 In my view, in the circumstances of this case striking out a pleading based on the types of deficiencies present here<sup>[FN6]</sup> without granting leave to amend does little to advance the ends of justice. In such a situation the logical next step for the plaintiff would be to commence another proceeding. The results of such a course of action are obvious; the needless consumption of time and money. Accordingly, in disposing of a motion to strike when a recognized cause of action has been improperly pleaded but can be put right without non-compensable prejudice to the defendants the preferred route is to afford the plaintiff the opportunity, upon appropriate terms, to plead the cause properly within the action before the court. This approach makes practical sense and is in keeping with the objectives set out in rule 1.04.

#### Disposition

87 For these reasons, the three statements of claim are struck in their entirety. Based on the above analysis I am prepared to exercise my discretion and allow the plaintiffs to amend their pleadings except that leave is not given to amend the claim for bad faith.

88 Furthermore, the actions against the Ministers are struck with no leave to amend given my finding that there are

2003 CarswellOnt 5574,

not proper parties to these actions.

89 Given the extent of amendments necessary to respond to the numerous deficiencies in the claims, the plaintiffs must serve fresh statements of claim. They must be served within 30 days of the date of these reasons,

90 I have found the pleadings to be seriously defective. I have given the plaintiffs an opportunity to correct these deficiencies. In the circumstances, the defendants are entitled to their costs. If the parties are not able to resolve the issue of quantum they may make written submissions to me within 30 days.

*Application allowed in part.*

FN1 The three statements of claim are very similar, I will therefore analyze them together and will draw distinctions only where necessary.

FN2 According to the plaintiffs the defendants were aware that laws relating to prostitution were vague and therefore any attempt to enforce them was malicious, discriminatory and an abuse. The allegations in this regard appear to have been based on the decision in *R. v. DiGiuseppe*, [2000] O.J. No. 3128 (Ont. C.J.) and *R. v. Cooper*, [2000] O.J. No. 896 (Ont. C.J.). In these decisions the trial judge stayed criminal charges on the basis that s. 210 of the *Criminal Code* was void for uncertainty and thus offended section 7 of the Charter of Rights and Freedoms. However, I note that the Court of Appeal allowed the appeals and the stays were set aside. See: *R. v. Cooper*; *R. v. DiGiuseppe* (2002), 161 C.C.C. (3d) 424 (Ont. C.A.)

FN3 See also *Hughes v. Sunbeam Corp. (Canada)* (2002), 61 O.R. (3d) 433 (Ont. C.A.), at 438 [leave to amend was also granted by the Court of Appeal in this case]

FN4 Since these causes of action are similar, I will deal with them together.

FN5 Pursuant to leave granted September 5, 2001 [*Odhavji Estate v. Woodhouse*, 2001 CarswellOnt 3081 (S.C.C.)], this case was argued before the Supreme Court of Canada on February 17, 2003. The decision is under reserve.

FN6 I am referring to the numerous defects, other than the improper claims of bad faith and those advanced against the ministers.

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1 C.P.R. (4th) 300, [1999] O.J. No. 2162

1999 CarswellOnt 1786

Balanyk v. University of Toronto

Thomas E. Balanyk, Plaintiffs and The Governing Council of the University of Toronto, Barry J. Sessle, Richard Ten Cate, H. James Sandham, The University of Toronto Innovations Foundation, Edward J. Kenney, APO Diagnostics Inc., Apotex Inc., Max Marmel, The Oralife Group, Inc. (formerly Knowell Therapeutic Technologies Inc.), Ross Perry, Howard Rocket, Mark Pinvidic, Mark J. Bortolotti, John J. Connelly, and John B. Houston, Defendants

Ontario Superior Court of Justice

Cameron J.

Heard: April 26, 1999  
Judgment: June 11, 1999  
Docket: 94-CQ-53555CM

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Counsel: Eric Polten, for Thomas E. Balanyk.

Patricia Jackson and Paul Michell, for Defendants, Oralife.

David G. Merner, for Defendants, University of Toronto.

Mark Adilman, for Defendants, Apotex.

Bradley Teplitsky, for Howard Rocket.

Subject: Intellectual Property; Property; Contracts; Torts; Restitution; Civil Practice and Procedure; Civil Practice and Procedure

Practice --- Pleadings -- Statement of claim -- Form and content -- Sufficiency

Plaintiff co-invented drug while university student -- University policy required that plaintiff assign invention -- Plaintiff brought action against university and drug companies which received licences, on ground that assignments were void and for breaches of contracts and numerous frauds -- Defendants brought application to strike statement of claim -- Application granted in part -- Plaintiff did not plead that any contract existed between him and drug companies -- Plaintiff had no right of action in contract against drug companies as there was no privity of contract or allegations of trust, agency or other relationship -- Claims against drug companies based in contract struck from pleadings -- Plaintiff claimed that drug companies breached fiduciary duty by mismanaging marketing of drug -- Statement of claim did not contain claim for declaration of fiduciary duty or for damages resulting from breach of

1 C.P.R. (4th) 300, [1999] O.J. No. 2162

duty -- Claim for breach of fiduciary duty struck from pleadings -- Plaintiff claimed that improper marketing of drug by drug companies resulted in their unjust enrichment -- Pleadings did not give particulars of marketing activities, financial benefits obtained by drug companies or corresponding deprivation suffered by plaintiff -- Pleading was vague and lacking in particulars sufficient to enable defendants to know claims against them to respond to claims -- Claim for unjust enrichment struck from pleadings -- Plaintiff made bald claim that his economic interests were interfered with but did not provide particulars -- Plaintiff pleaded intent and loss of goodwill but did not plead means employed -- Claim for unlawful interference with economic interests struck from pleadings -- Plaintiff claimed that drug companies made misleading and unsubstantiated claims about drug prior to receiving approvals as required by Food and Drugs Act -- Act did not create private right of action for violations of Act -- Pleading did not give particulars of facts supporting participation of individual defendants in commission of alleged offences -- Claims under Food and Drugs Act against individual defendants struck for failure to disclose cause of action against individual defendants.

Fraud and misrepresentation --- Pleadings -- Pleading innocent or negligent misrepresentation -- Sufficiency -- General

Plaintiff co-invented drug while university student -- University policy required that plaintiff assign invention -- Plaintiff brought action against university and drug companies which received licences, on ground that assignments were void and for breaches of contracts and numerous frauds -- Defendants brought application to strike statement of claim -- Application granted in part -- Plaintiff claimed that directors and officers of drug companies were liable for negligent misrepresentation by failing to state in publications that plaintiff was co-inventor of drug -- Plaintiff did not plead that he was representee, that it was intended he should rely on representation or that he relied on representation to his detriment -- Pleading was deficient as it lacked particularity required for pleading misrepresentation by Rule 25.06(8) -- Claim in negligent misrepresentation struck from pleadings -- Ontario, Rules of Civil Procedure, R.R.O. 1990, Reg. 194, R. 25.06(8).

Conspiracy --- Practice and procedure -- Pleadings

Plaintiff co-invented drug while university student -- University policy required that plaintiff assign invention -- Plaintiff brought action against university and drug companies which received licences, on ground that assignments were void and for breaches of contracts and numerous frauds -- Defendants brought application to strike statement of claim -- Application granted in part -- Plaintiff claimed that defendants conspired against him by allowing others to proceed with patent applications that should have been in his name -- Plaintiff did not plead particulars of agreements between defendants, acts in furtherance of conspiracy or injury caused by conspiracy -- Claims in conspiracy struck from pleadings.

Intellectual property --- Trade marks -- Passing off and unfair competition -- Practice and procedure -- Pleadings

Plaintiff co-invented drug while university student -- University policy required that plaintiff assign invention -- Plaintiff brought action against university and drug companies which received licences, on ground that assignments were void and for breaches of contracts and numerous frauds -- Defendants brought application to strike statement of claim -- Application granted in part -- Plaintiff claimed that defendants passed off drug as sole invention of plaintiff's co-inventor and that plaintiff suffered damages -- Plaintiff claimed that defendants' published literature to industry and public but did not state what was contained in literature -- Pleadings confused simple misappropriation or conversion of property with passing off -- Plaintiff was not pleading that defendants were unfairly appropriating to themselves and their product plaintiff's reputation in marketplace -- Claim for passing off struck from pleadings.

Fraud and misrepresentation --- Pleadings -- Pleading fraud and fraudulent misrepresentation -- Sufficiency -- General

Plaintiff co-invented drug while university student -- University policy required that plaintiff assign invention -- Plaintiff brought action against university and drug companies which received licences, on ground that assignments

1 C.P.R. (4th) 300, [1999] O.J. No. 2162

were void and for breaches of contracts and numerous frauds -- Defendants brought application to strike statement of claim -- Application granted in part -- Plaintiff claimed that defendants were guilty of fraudulent misrepresentation -- Plaintiff did not plead that he relied on was induced by fraudulent misrepresentations to act to his prejudice, nor did he state particulars of fraudulent conduct of each defendant -- Claim for fraudulent misrepresentation struck from pleadings.

Trade and commerce --- Consumer protection -- Public health legislation -- Pure food and drugs -- Regulation of new drugs

Plaintiff co-invented drug while university student -- University policy required that plaintiff assign invention -- Plaintiff brought action against university and drug companies which received licences, on ground that assignments were void and for breaches of contracts and numerous frauds -- Defendants brought application to strike statement of claim -- Application granted in part -- Plaintiff claimed that drug companies made misleading and unsubstantiated claims about drug prior to receiving approvals as required by Food and Drugs Act -- Act did not create private right of action for violations of Act -- Pleading did not give particulars of facts supporting participation of individual defendants in commission of alleged offences -- Claims under Food and Drugs Act against individual defendants struck for failure to disclose cause of action against individual defendants -- Food and Drugs Act, R.S.C. 1985, c. F-27, s. 9(1).

Trade and commerce --- Competition and combines legislation -- Practice and procedure -- Pleadings

Plaintiff co-invented drug while university student -- University policy required that plaintiff assign invention -- Plaintiff brought action against university and drug companies which received licences, on ground that assignments were void and for breaches of contracts and numerous frauds -- Defendants brought application to strike statement of claim -- Application granted in part -- Plaintiff claimed that drug companies made false representation to public about efficacy of drug contrary to Competition Act -- Plaintiff did not give particulars of conduct sufficient to constitute conduct prohibited by Act -- Plaintiff did not plead that he suffered damages as result of conduct contrary to Act -- Claim for breach of Competition Act struck from pleadings.

Intellectual property --- Trade marks -- Passing off and unfair competition -- Practice and procedure -- Pleadings

Plaintiff co-invented drug while university student -- University policy required that plaintiff assign invention -- Plaintiff brought action against university and drug companies which received licences, on ground that assignments were void and for breaches of contracts and numerous frauds -- Defendants brought application to strike statement of claim -- Application granted in part -- Plaintiff claimed that defendants engaged in unfair competition contrary to Trade Marks Act -- Claim for violation of s. 7(e) of Act invalid as section was declared ultra vires -- Claim under s. 7(c) of Act struck as plaintiff did not plead that defendants appropriated plaintiff's reputation as required by Act -- Claim under s. 7(d) of Act struck as plaintiff pleaded no facts which would take matter out of common law of deceit or misrepresentation, into legislative authority of Parliament -- Pleading was vague and contained no particulars of facts which would support breach of Act -- Trade-marks Act, R.S.C. 1985, c. T-13, s. 7(c), (d), (e).

Intellectual property --- Copyright -- Practice and procedure -- Pleadings -- Application to strike -- Insufficient facts

Plaintiff co-invented drug while university student -- University policy required that plaintiff assign invention -- Plaintiff brought action against university and drug companies which received licences, on ground that assignments were void and for breaches of contracts and numerous frauds -- Defendants brought application to strike statement of claim -- Application granted in part -- Plaintiff claimed that defendants infringed plaintiff's moral rights as inventor under Copyright Act -- Plaintiff argued that defendants violated contractual obligation to recognize his role as co-inventor of drug -- Moral rights not applicable to invention as invention has character different from artistic, literary or other work which can be subject of copyright -- Patent Act did not offer protection for integrity of patent or for inventor's right to be associated with it -- Plain and obvious that claim disclosed no reasonable cause of action in respect of moral rights -- Copyright Act, R.S.C. 1985, c. C-42, s. 14.1.

1 C.P.R. (4th) 300, [1999] O.J. No. 2162

Practice --- Pleadings -- Statement of claim -- Striking out for absence of reasonable cause of action -- Cause not known in law

Plaintiff co-invented drug while university student -- University policy required that plaintiff assign invention -- Plaintiff brought action against university and drug companies which received licences on ground that assignments were void and for breaches of contracts and numerous frauds -- Defendants applied to strike statement of claim -- Application granted in part -- Plaintiff made bald claim that defendants breached duty to protect his reputation as inventor -- Plaintiff did not plead authority for proposition that defendants were required to protect his reputation as inventor -- Claim for breach of duty to protect reputation struck from pleadings.

Defamation --- Practice -- Pleadings -- General principles -- General

Plaintiff co-invented drug while university student -- University policy required that plaintiff assign invention -- Plaintiff brought action against university and drug companies which received licences, on ground that assignments were void and for breaches of contracts and numerous frauds -- Defendants brought application to strike statement of claim -- Application granted in part -- Plaintiff claimed that defendants slandered title -- Plaintiff did not identify words published in disparagement of his property nor did he plead malice on part of defendants -- Claim for slander of title struck from pleadings -- Plaintiff claimed damages for injurious falsehood -- Particulars in pleading sufficient -- Claim for injurious falsehood not struck from pleadings.

Cases considered by Cameron J.:

Abramovic v. Canadian Pacific Ltd., (1991), 6 O.R. (3d) 1, 39 C.C.E.L. 195, 85 D.L.R. (4th) 587, 52 O.A.C. 1 (Ont. C.A.) -- referred to

ADGA Systems International Ltd. v. Valcom Ltd., (1999), 39 C.C.E.L. (2d) 163, 168 D.L.R. (4th) 351, 41 B.L.R. (2d) 157, 117 O.A.C. 39, 44 C.C.L.T. (2d) 174, 43 O.R. (3d) 101 (Ont. C.A.) -- considered

Almas v. Spenceley, [1972] 2 O.R. 429, 25 D.L.R. (3d) 653 (Ont. C.A.) -- applied

Apple Bee Shirts Ltd. v. Lax, (1988), 27 C.P.C. (2d) 226 (Ont. H.C.) -- referred to

Aspiotis v. Coffee Time Donuts Inc., (February 21, 1995), Doc. 92-CU-51828 (Ont. Gen. Div.) -- applied

Berger v. Willowdale A.M.C., (1983), 41 O.R. (2d) 89, 23 B.L.R. 19, 145 D.L.R. (3d) 247, C.E.S.H.G. 95,063 (Ont. C.A.) -- considered

Bousquet v. Barmish Inc., (1993), 46 C.P.R. (3d) 510, 150 N.R. 234, 61 F.T.R. 4 (note) (Fed. C.A.) -- referred to

Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd., [1983] 1 S.C.R. 452, 145 D.L.R. (3d) 385, 47 N.R. 191, [1983] 6 W.W.R. 385, 21 B.L.R. 254, 24 C.C.L.T. 111, 72 C.P.R. (2d) 1 (S.C.C.) -- applied

Cheticamp Fisheries Co-operative Ltd. v. Canada (1995), 139 N.S.R. (2d) 224, 397 A.P.R. 224, 123 D.L.R. (4th) 121, 26 C.C.L.T. (2d) 40 (N.S. C.A.) -- applied

Cheticamp Fisheries Co-operative Ltd. v. Canada (1995), 26 C.C.L.T. (2d) 40 (note), 126 D.L.R. (4th) vii, (sub nom. Cheticamp Fish Co-Operative Ltd. v. Canada) 145 N.S.R. (2d) 240 (note), (sub nom. Cheticamp

1 C.P.R. (4th) 300, [1999] O.J. No. 2162

Fish Co-Operative Ltd. v. Canada 418 A.P.R. 240 (note), (sub nom. Cheticamp Fish Co-Operative Ltd. v. Canada) 197 N.R. 80 (note) (S.C.C.) -- referred to

Ciba-Geigy Canada Ltd. v. Apotex Inc., 95 D.L.R. (4th) 385, 58 O.A.C. 321, [1992] 3 S.C.R. 120, 143 N.R. 241, 44 C.P.R. (3d) 289 (S.C.C.) -- applied

City National Leasing Ltd. v. General Motors of Canada Ltd., 93 N.R. 326, [1989] 1 S.C.R. 641, 58 D.L.R. (4th) 255, 32 O.A.C. 332, 43 B.L.R. 225, 24 C.P.R. (3d) 417, 68 O.R. (2d) 512 (note) (S.C.C.) -- referred to

Compo Co. v. Blue Crest Music Inc. (1979), [1980] 1 S.C.R. 357, 45 C.P.R. (2d) 1, 105 D.L.R. (3d) 249, (sub nom. Blue Crest Music Inc. v. Compo Co.) 29 N.R. 296 (S.C.C.) -- considered

Datile Financial Corp. v. Royal Trust Corp. of Canada (1991), 5 O.R. (3d) 358 (Ont. Gen. Div.) -- referred to

Falloncrest Financial Corp. v. Ontario (1995), (sub nom. Nash v. Ontario) 27 O.R. (3d) 1 (Ont. C.A.) -- referred to

Figgie International Inc. v. Schoettler (1994), 53 C.P.R. (3d) 450, 75 F.T.R. 299 (Fed. T.D.) -- referred to

Frame v. Smith, 78 N.R. 40, [1987] 2 S.C.R. 99, 42 D.L.R. (4th) 81, 23 O.A.C. 84, 42 C.C.L.T. 1, [1988] 1 C.N.L.R. 152, 9 R.F.L. (3d) 225 (S.C.C.) -- referred to

Hedley Byrne & Co. v. Heller & Partners Ltd. (1963), [1964] A.C. 465, [1963] 1 Lloyd's Rep. 485, [1963] 2 All E.R. 575, 107 Sol. Jo. 454, [1963] 3 W.L.R. 101 (U.K. H.L.) -- referred to

Hunt v. T & N plc, 4 C.C.L.T. (2d) 1, 43 C.P.C. (2d) 105, 117 N.R. 321, 4 C.O.H.S.C. 173 (headnote only), (sub nom. Hunt v. Carey Canada Inc.) [1990] 6 W.W.R. 385, 49 B.C.L.R. (2d) 273, (sub nom. Hunt v. Carey Canada Inc.) 74 D.L.R. (4th) 321, [1990] 2 S.C.R. 959 (S.C.C.) -- considered

International Airport Industrial Park Ltd. v. Tanenbaum (1976), [1977] 2 S.C.R. 326, 11 N.R. 248, 69 D.L.R. (3d) 1 (S.C.C.) -- referred to

Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police (1990), (sub nom. Jane Doe v. Board of Police Commissioners of Metropolitan Toronto) 40 O.A.C. 161, (sub nom. Doe v. Metropolitan Toronto (Municipality) Commissioners of Police) 1 C.R.R. (2d) 211, 5 C.C.L.T. (2d) 77, (sub nom. Doe v. Metropolitan Toronto (Municipality) Commissioners of Police) 74 O.R. (2d) 225, (sub nom. Doe v. Metropolitan Toronto (Municipality) Commissioners of Police) 72 D.L.R. (4th) 580, 50 C.P.C. (2d) 92 (Ont. Div. Ct.) -- referred to

Key Property Management (1986) Inc. v. Middlesex Condominium Corp. No. 134 (1991), 50 C.P.C. (2d) 255 (Ont. Gen. Div.) -- referred to

Lana International Ltd. v. Menasco Aerospace Ltd. (1996), 28 O.R. (3d) 343, 1 O.T.C. 298 (Ont. Gen. Div.) -- considered

London Drugs Ltd. v. Kuehne & Nagel International Ltd. (1992), [1993] 1 W.W.R. 1, [1992] 3 S.C.R. 299, (sub nom. London Drugs Ltd. v. Brassart) 143 N.R. 1, 73 B.C.L.R. (2d) 1, 43 C.C.E.I. 1, 13 C.C.L.T. (2d) 1, (sub nom. London Drugs Ltd. v. Brassart) 18 B.C.A.C. 1, (sub nom. London Drugs Ltd. v. Brassart) 31 W.A.C. 1, 97 D.L.R. (4th) 261 (S.C.C.) -- referred to



1 C.P.R. (4th) 300, [1999] O.J. No. 2162

Montreal Trust Co. of Canada v. ScotiaMcLeod Inc. (1995), 129 D.L.R. (4th) 711, 9 C.C.L.S. 97, 23 B.L.R. (2d) 165, 87 O.A.C. 129, (sub nom. ScotiaMcLeod Inc. v. Peoples Jewellers Ltd.) 26 O.R. (3d) 481 (Ont. C.A.) -- referred to

National Trust Co. v. Furbacher (October 12, 1994), Doc. 93-CQ-41889, B-152/94 (Ont. Gen. Div. [Commercial List]) -- considered

Peter v. Beblow, [1993] 3 W.W.R. 337, 23 B.C.A.C. 81, 39 W.A.C. 81, 101 D.L.R. (4th) 621, [1993] 1 S.C.R. 980, 150 N.R. 1, 48 E.T.R. 1, 77 B.C.L.R. (2d) 1, 44 R.F.L. (3d) 329, [1993] R.D.F. 369 (S.C.C.) -- applied

Prete v. Ontario (1993), 18 C.C.L.T. (2d) 54, 18 C.R.R. (2d) 291, 16 O.R. (3d) 161, (sub nom. Prete v. Ontario (Attorney General)) 110 D.L.R. (4th) 94, 68 O.A.C. 1, (sub nom. Prete v. Ontario (Attorney General)) 86 C.C.C. (3d) 442 (Ont. C.A.) -- referred to

Procter & Gamble Pharmaceuticals Canada Inc. v. Novopharm Ltd. (1996), 116 F.T.R. 99, 68 C.P.R. (3d) 461 (Fed. T.D.) -- applied

Queen v. Cognos Inc., 45 C.C.E.L. 153, 93 C.L.L.C. 14,019, 99 D.L.R. (4th) 626, 60 O.A.C. 1, 14 C.C.L.T. (2d) 113, [1993] 1 S.C.R. 87, 147 N.R. 169 (S.C.C.) -- applied

Rahn v. McNeill (1987), 19 B.C.L.R. (2d) 384 (B.C. S.C.) -- applied

Reckitt & Colman Products Ltd. v. Borden Inc., [1990] 1 All E.R. 873, [1990] R.P.C. 341 (U.K. H.L.) -- referred to

Region Plaza Inc. v. Hamilton-Wentworth (Regional Municipality) (1990), 12 O.R. (3d) 750 (Ont. H.C.) -- referred to

Roman Corp. v. Peat Marwick Thorne (1992), 11 O.R. (3d) 248, 8 B.L.R. (2d) 43, 12 C.P.C. (3d) 192 (Ont. Gen. Div. [Commercial List]) -- applied

Searle Canada Inc. v. Novopharm Ltd. (1990), 31 C.P.R. (3d) 1, 37 F.T.R. 177 (Fed. T.D.) -- applied

Siopiolosz v. Taylor, [1944] O.R. 195, [1944] 2 D.L.R. 92 (Ont. C.A.) -- referred to

Ten-Ichi Japanese Restaurant Inc. v. Fred T. Reisman & Associates Ltd. (1996), 4 C.P.C. (4th) 130 (Ont. Gen. Div.) -- referred to

Vapor Canada Ltd. v. MacDonald (1976), (sub nom. MacDonald v. Vapor Canada Ltd.) [1977] 2 S.C.R. 134, 22 C.P.R. (2d) 1, 66 D.L.R. (3d) 1, 7 N.R. 477 (S.C.C.) -- referred to

Web Offset Publications Ltd. v. Vickery (1998), 40 O.R. (3d) 526 (Ont. Gen. Div.) -- referred to

Statutes considered:

Competition Act, R.S.C. 1985, c. C-34

Pt. VI -- referred to

1 C.P.R. (4th) 300, [1999] O.J. No. 2162

s. 36 -- referred to

s. 52(1)(a) -- referred to

s. 52(1)(b) -- referred to

s. 52(3) -- referred to

Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

s. 91 -- referred to

Copyright Act, R.S.C. 1985, c. C-42

Generally -- referred to

s. 14.1 [en. R.S.C. 1985, c. 10 (4th Supp.), s. 4] -- considered

s. 14.1(1) [en. R.S.C. 1985, c. 10 (4th Supp.), s. 4] -- considered

s. 28.1 [en. R.S.C. 1985, c. 10 (4th Supp.), s. 6] -- referred to

s. 28.2 [en. R.S.C. 1985, c. 10 (4th Supp.), s. 6] -- considered

s. 28.2(1) [en. R.S.C. 1985, c. 10 (4th Supp.), s. 6] -- considered

Food and Drugs Act, R.S.C. 1985, c. F-27

s. 9(1) -- considered

Patent Act, R.S.C. 1985, c. P-4

Generally -- referred to

Trade-marks Act, R.S.C. 1985, c. T-13

s. 7(c) -- considered

s. 7(d) -- considered

s. 7(e) -- considered

s. 53 -- considered

Rules considered:

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

1 C.P.R. (4th) 300, [1999] O.J. No. 2162

- R. 20 -- considered
- R. 21.01(1)(a) -- considered
- R. 21.01(1)(b) -- considered
- R. 21.01(2) -- considered
- R. 21.01(3)(c) -- considered
- R. 21.01(3)(d) -- considered
- R. 25.06 -- considered
- R. 25.06(1) -- considered
- R. 25.06(4) -- considered
- R. 25.06(7) -- considered
- R. 25.06(8) [rep. & sub. O. Reg. 61/96] -- considered
- R. 25.11 -- considered
- R. 26.01 -- considered
- R. 37.15 -- referred to
- R. 51.05 -- considered

APPLICATION by defendants to strike statement of claim.

***Cameron J.:***

1 Motions by the defendants to strike out the Statement of Claim without leave to amend and stay or dismiss the action.

**Background**

2 Dr. Thomas Balanyk ("Balanyk") is a dentist and dental consultant. In 1981-82, while doing post-graduate work in the Faculty of Dentistry at the University of Toronto ("U. of T.") he and his supervisor Dr. H. James Sandham ("Sandham") invented a dental varnish with disease preventing properties (the "Invention"). The policy of U. of T. required that an invention developed in these circumstances be assigned to U. of T., and shortly thereafter to the University of Toronto Innovations Foundation ("Innovations"). The Invention was assigned to Innovations in 1984, although Balanyk now attacks the validity of the assignment. In 1986 Innovations granted a licence to APO Diagnostics Inc., later merged into Apotex Inc. ("Apotex"), to manufacture, use and sell products incorporating or using the Invention ("Products") which by then had received a U.S. patent and had applications for patent in several other countries.

3 In the late 1980's the trademark "Chlorzoin" was registered for use in connection with the Products.

4 In 1992 Apotex granted an exclusive world wide licence to Knowell Therapeutic Technologies Inc., later to become the Oralife Group Inc. ("Oralife"), to distribute the Chlorzoin, subject to first obtaining regulatory approval in each market.

#### Motions

5 These proceedings consist of Motions under Rules 21.01(1)(b), 25.06, 25.11, 26.01 and 51.05 by:

1. The Governing Council of the University of Toronto ("U. of T. Council"). The University of Toronto Innovations ("Innovations"), Sessle, Ten Cate, Sandham and Kenney ("U. of T. Defendants")

and

2. The Oralife Group, Inc. ("Oralife"), Perry, Pinvidic, Bortolotti, Connelly and Houston ("Oralife Defendants")

and

3. APO Diagnostics Inc., Apotex Inc. and Marmel ("Apotex Defendants")

and

4. Howard Rocket ("Rocket")

to:

(a) strike out all or portions of the Statement of Claim without leave to amend; and

(b) to dismiss this action against them.

6 The U. of T. Defendants, Oralife Defendants and Rocket also move to dismiss or stay action 98-CV-3557CM ("98CV") under Rules 21.01(3)(c) and (d) and 25.11.

#### *Request for Adjournment*

7 Balanyk moved to adjourn these motions for the following reasons:

(a) Balanyk and the U. of T. Defendants are discussing settlement of the action;

(b) the other defendants would be affected by such settlement since it would reduce the claims against Apotex and fundamentally alter the nature of the claims against the Oralife Defendants and Rocket, which would in turn require yet another amendment of the pleadings;

(c) in any event, the Amended Fresh Statement of Claim must be amended because it was prepared and served without Balanyk's approval because of (i) the TTC strike from Monday April 19, to Wednesday April 21, (ii) inadequate time to prepare the Amended Fresh Statement of Claim and (iii) Balanyk was too

1 C.P.R. (4th) 300, [1999] O.J. No. 2162

ill to give instructions on the amendments; and

(d) Mr. Polten, Balanyk's counsel has not had sufficient time to prepare for this hearing, having devoted the past week to other matters, including the settlement discussions.

8 The Oralife Defendants and Rocket opposed the motion for adjournment on the following grounds:

(a) the date for this hearing had been agreed over 3 weeks ago;

(b) the basis of the litigation was the alleged undue influence which the U. of T. asserted over Balanyk;

(c) the statement of claim has already been amended at least 4 times in the past 5 years;

(d) any settlement agreement with U. of T. does not affect this motion; and

(e) while sympathizing with counsel's stress, the defendants have been under the prejudice of the cloud of this litigation for five years.

9 All the other defendants also opposed the adjournment.

#### **History of the Litigation**

10 The history of this action and related litigation follows:

##### **July 12, 1994**

Balanyk commences Action No. 94-CQ-53555 against Oralife

##### **December 1994**

Balanyk amends statement of claim and adds defendants

##### **1995**

Statements of Defence filed

Balanyk commences action against U. of T. and Apotex ("95 Action")

Statements of Defence filed

##### **1996**

94-CQ and 95 Action consolidated into 94-CQ

##### **1997**

Fresh Statement of Claim in 94-CQ

##### **June 1997**

Defendants' motions re pleadings adjourned *sine die* at Balanyk's request.

**September 2, 1998**

Mr. Polten becomes Balanyk's fourth lawyer.

**September 18, 1998**

New action 98-CV-155357CM ("98-CV") largely duplicative of causes of action in 94-CQ, though adds some individual defendants

**October 28, 1998**

Amended Statement of Claim in 98-CV consisting of 63 pages with 60 causes of action against 16 defendants, most of whom are defendants in 94-CQ. Based on same events as 94-CQ and highly duplicative of 94-CQ.

**January 1999**

94-CQ referred to me under Rule 37.15.

**January 21, 1999**

Case conference. Mr. Polten given an opportunity to prepare a timetable with a view to continuing one of 94-CQ and 98-CV, amending the pleadings therein and ceasing the other action.

**January 27, 1999**

Balanyk and two other shareholders of Oralife, Messrs. Brigham and Tomicic, represented by Mr. Polten, commenced Commercial List action 98-CL-3257 ("98-CL") against Oralife Defendants and Rocket (excluding Bartolotti) and others.

**February 1, 1999**

98CL served on some of Oralife Defendants and Rocket at special meeting of shareholders.

**February 5, 1999**

***Case Conference:***

The following timetable was set:

- (a) Amended Fresh Statement of Claim in 94-CQ action combining 94-CQ and 98-CV to be served by March 15, 1999.
- (b) Defendants' motion on pleadings or Statement of Defence by April 15, 1999.
- (c) Replies by May 15, 1999.

Once 94-CQ Statement of Claim settled, 98-CV to be dismissed.

**February 9, 1999**

98-CL assigned to me by Commercial List judge under Rule 37.15.

**February 18, 1999**

*Case Conference.*

Plaintiffs announce intention to move for an injunction in 98-CL to prevent Oralife making a capital distribution to its shareholders on February 26 Oralife gave notice of the distribution to its shareholders on January 5, 1999 and its shareholders approved of the distribution February 1, 1999.

Revised timetable to accommodate injunction motion by extending time 3 weeks:

- (a) Amended Statement of Claim in 98-CL by March 8.
- (b) Defendants' pleadings motion or Statements of Defence in 98-CL by March 15.
- (c) Fresh Amended Statement of Claim in 94-CQ by April 6, 1999.
- (d) Defendants' pleadings motion or Statements of Defence in 94-CV by May 7, 1999
- (e) Reply in 94-CV by June 7, 1999.

**February 23, 1999**

*Case Conference*

Plaintiffs' motion for summary judgment and other relief in 98-CL to be heard Tuesday March 2. Motion to be limited to injunction to prevent distribution set for February 26.

Oralife to file responding material on the motion for injunction by Thursday February 25.

Oralife to cross examine plaintiff on the morning of Friday February 26

Plaintiffs to cross examine Oralife on the afternoon of Friday, February 26

Factums to be filed with the court by Monday, March 1, 1999 at 4:00 p.m.

Oralife later undertook to withhold distribution until after the hearing on Tuesday, March 2.

**Friday, February 26, 1999 4:00 p.m.**

*Case Conference*

Plaintiffs declined to cross examine Oralife on Friday afternoon because they wanted to file further

affidavit evidence on Monday, March 1 before cross examining. Court suggested Oralife was under no present obligation to withhold distribution. Plaintiffs declined to state scope and nature of additional evidence. Oralife offered to make officer available for cross-examination over weekend.

**Monday, March 1, 1999**

Plaintiffs' counsel advised he and Balanyk sick and want adjournment of hearing set for next day and interim injunction preventing distribution.

Oralife objected to any adjournment.

**Tuesday, March 2, 1999**

Plaintiffs in 98CL formally moved for interim injunction and adjournment.

Motion dismissed for reasons stated at time and confirmed by written reasons issued March 31.

**March 17, 1999**

Plaintiffs in 98-CL represented by Mr. Polten commence 99-CL-3313 against Oralife Defendants, Rocket, two of the individuals in the U. of T. Defendants (but not U. of T. or Innovations), and Yorkton Securities Ltd. and others.

**March 19, 1999**

Action 99-CL-3302 commenced by P. Dowell, D. Milroy and K.F. Moore, represented by Mr. Polten against Oralife, Yorkton Securities, a number of individuals, including some of the defendants in this action, and the firm of Wildeboer Rand Thomson Apps and Dellece.

**March 31, 1999**

*Case Conference*

New Schedule Agreed:

- (a) 98-CL Statement of Claim by Monday April 12
- (b) Defendants' pleadings motion or Statement of Defence in 98-CL by April 19, 1999
- (c) Fresh Amended Statement of Claim in 94-CQ by April 19, 1999 and withdraw 98-CV.
- (d) Defendants' pleadings motion in 94-CQ April 26, 1999. One day to be set aside. Plaintiff's counsel complained of overwork and I again encouraged him to obtain help.

Plaintiff said nothing about action 99-CL-3313

**April 12, 1999**

Plaintiff missed deadline for filing new Statement of Claim in 98-CL This required cancellation of the one



1 C.P.R. (4th) 300, [1999] O.J. No. 2162

day hearing date set aside for April 19, 1999.

**Tuesday, April 20 1999**

Plaintiff files Amended Fresh Statement of Claim in 94-CQ.

**Thursday, April 22, 1999**

Oralife files Notice of Motion and Motion Record to strike out Fresh Amended Statement of Claim in 94-CQ

Plaintiff seeks adjournment of hearing set 3 weeks earlier for Monday, April 26 because:

- (a) Time consumed in talking settlement with U. of T.
- (b) Mr. Polten's physical exhaustion from workload.

**Friday, April 23, 1999**

Oralife objects to adjournment.

Mr. Polten advises he has further facts and wants to further amend Amended Fresh Statement of Claim. Mr. Polten advises that the Plaintiff was sick and unable to instruct him on the Amended Fresh Statement of Claim before it was sent out.

Plaintiff suggests hearings be adjourned to May 10, 1999.

I was advised on Monday, April 26, 1999 late in the afternoon that Mr. Polten filed a substantial Application record in No. 99-CL-3376 on Friday April 23, 1999 on behalf of Messrs. Dowell, Milroy and Moore (the plaintiffs in 99-CL-3302) against Oralife, Yorkton Securities, Oralife's solicitors, Tory, Tory, DesLauriers and Binnington and 3 of its partners involved in this litigation, and numerous individuals, including some of the individual defendants herein.

***Motion for Adjournment***

11 Mr. Polten agreed on March 31 that this motion be heard Monday, April 23. He has had ample time to amend the Statement of Claim and prepare to defend it. It appears he chose instead to commence another proceeding, being an application on behalf of Balanyk and others on the Commercial List. Mr. Polten filed nothing on this hearing, not even the requisite factum. This failure has deprived the defendants and the court of the benefit of focussing on the material issues in dispute and the relevant pleadings. It has forced the court to spend substantially greater time considering and analyzing the Statement of Claim.

12 Mr. Polten's written request Thursday, April 22 for an adjournment was not agreed to by any of the defendants and was opposed by the Oralife Defendants and Rocket. Mr. Polten offered to attend, but did not arrange, a case conference on Friday, April 23 to deal with the issue. Friday was too late for me and other counsel to reschedule Monday, April 26.

13 I had no time available to hear this matter before June, unless a cancellation arose.

14 The defendants have been under the cloud and the burdens of the cost, prejudice and stress of this litigation

1 C.P.R. (4th) 300, [1999] O.J. No. 2162

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1 C.P.R. (4th) 300, [1999] O.J. No. 2162

since it arose in 1994 and 1995. There comes a point when they become entitled to a resolution of the matter. They ought not to be forced to endure Balanyk's delays, indecision and numerous amendments of the Statement of Claim until he finally, if ever, decides he's "got it right".

15 Based on evidence I received in the injunction motion, I was concerned that Balanyk may be unable to pay any material amount of costs or damages to compensate for the prejudice to the defendants of further delay of these claims against them.

16 The value of Oralife to its shareholders will decrease substantially with the loss of the potential tax benefit of \$2,000,000 of non-capital loss carry forwards at the end of its fiscal year on July 31, 1999 and further losses every year thereafter until the corporation can be sold. A sale of the shares for any price is a practical impossibility until all outstanding claims against Oralife are withdrawn.

17 It was with these considerations in mind that I ordered on April 26, 1999 that:

- (a) the pleadings motions would proceed today to the extent they involve the individual defendants;
- (b) the motion to stay or dismiss 98-CV will proceed today;
- (c) the motions respecting the corporations, U. of T. and Innovations would be adjourned to a date to be arranged with the trial co-ordinator on the following conditions:
  - (i) Balanyk to pay \$10,000 into court within 7 days as security for the defendants' costs of today thrown away because of Balanyk's failure to proceed today, such costs to be fixed or assessed on application of the defendants;
  - (ii) If Balanyk fails to make the payment into court, the defendants may bring this motion on 2 clear days' notice before any judge of this court, including me, if the trial coordinator determines that my time has become free;
  - (iii) Such adjourned or renewal date is peremptory to Balanyk.

#### *Withdrawal of Some Claims*

18 Balanyk then agreed to withdraw all claims against the individual defendants Marmel, Pinvidic, Bortollotti and Houston.

19 Counsel for Marmel was excused from the hearing. Counsel for the U. of T. Defendants, Mr. Merner, asked to be excused, reserving his objections on behalf of the individuals among his clients to the adjourned date.

#### *Pleadings Motions*

20 The motions proceeded with respect to the individual defendants Rocket, Perry and Connelley.

#### *Rules of Pleading*

21 The motions to strike out pleadings in the Statement of Claim are brought under Rule 21.01(1)(b)

...on the ground that it discloses no reasonable cause of action....

1 C.P.R. (4th) 300, [1999] O.J. No. 2162

22 No evidence is admissible on a motion to strike a pleading on the grounds it discloses no reasonable cause of action or defence: Rule 21.01(2).

23 The motions to dismiss or stay the action are brought under Rule 21.01(3)(c) and (d).

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

(d) the action is frivolous, vexatious or otherwise an abuse of the process of the court.

Rule 25.06 provides:

25.06(1) Every pleading shall contain a concise statement of material facts on which the party relies for the claim or defence.

.....

(4) A party may make inconsistent allegations in a pleading where the pleading makes it clear that they are being pleaded in the alternative.

(8) Where fraud, misrepresentation, breach of trust, malice or intent is alleged, the pleading shall contain full particulars...

Rule 25.11 provides:

25.11 The court may strike out or expunge all or part of a pleading ... with or without leave to amend, on the ground that the pleading

.....

(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.

In considering the motion to refuse leave to amend Rule 26.01 provides:

26.01 On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

24 There are several bench marks for a motion to strike pleadings in addition to the rules noted above.

25 The test to be applied is whether, assuming the facts pleaded are true, it is plain and obvious that the plaintiff's statement of claim discloses no reasonable cause of action. Only if the action is certain to fail because the pleading contains a radical defect should the relevant portions be struck out. If the pleading has some chance of success, it should remain. An arguable point of law or a novel cause of action should be left to the trial judge or a motion for judgment based on the point after exchange of pleadings. The motion for judgment may be under Rule 21.01(1)(a) on the basis of some question of law or under Rule 20 where a factual context is required for its resolution: see *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.); *Prete v. Ontario* (1993), 16 O.R. (3d) 161 (Ont. C.A.); *Falloncrest Financial Corp. v. Ontario* (1995), 27 O.R. (3d) 1 (Ont. C.A.); *Abramovic v. Canadian Pacific Ltd.* (1991), 6 O.R.

1 C.P.R. (4th) 300, [1999] O.J. No. 2162

(3d) 1 (Ont. C.A.).

26 When a statement of claim sufficiently pleads a document in accordance with Rule 25.06(7) it is necessary for the court to have the document in order to assess the substantive adequacy of the impugned statement of claim. By making reference to the document the plaintiff is asserting its contents as facts: see *Web Offset Publications Ltd. v. Vickery* (1998), 40 O.R. (3d) 526 (Ont. Gen. Div.) at 531-2.

27 In assessing the adequacy of pleadings under Rules 21.01, 25.06 and 25.11 I must bear in mind their purposes. These are:

- (a) define clearly and precisely the questions in controversy between the litigants;
- (b) give fair notice of the precise case which is required to be met and the precise remedies sought; and
- (c) assist the court in its investigations of the truth of the allegations made

See *National Trust Co. v. Furbacher* (October 12, 1994), Doc. 93-CQ-41889, B-152/94 (Ont. Gen. Div. [Commercial List]) at paras 9 and 10.

28 The full particulars of allegations of fraud, breach of trust or misrepresentation required by Rule 25.06(8) must set out precisely what each allegation of such wrongful act is, and the when, what, by whom and to whom of the relevant circumstances: see *Lana International Ltd. v. Menasco Aerospace Ltd.* (1996), 28 O.R. (3d) 343 (Ont. Gen. Div.).

29 The plaintiff must plead all the material facts on which it relies and all of the facts which it must prove to establish a cause of action which is legally complete. If any fact material to the establishment of a cause of action is omitted, the statement of claim is bad and the remedy is a motion to strike the pleadings, not a motion for particulars. If the plaintiff does not, at the time of pleading, have knowledge of the facts necessary to support the cause of action, then it is inappropriate to make the allegations in the statement of claim. It is improper to allow conclusions to be pleaded baldly and without any supporting facts: see *Region Plaza Inc. v. Hamilton -- Wentworth (Regional Municipality)* (1990), 12 O.R. (3d) 750 (Ont. H.C.).

30 A pleading should be read generously, with the foregoing principles in mind, so as to not unfairly deny a party the benefit of the pleading: see *Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1990), 74 O.R. (2d) 225 (Ont. Div. Ct.).

#### *Withdrawal of Admission*

31 In considering the proposed withdrawal of the admission in the earlier drafts of the statement of claim that Balanyk was a co-inventor in order that Balanyk can assert claims on the basis that he is the sole inventor, I must consider Rule 51.05:

...an admission in a pleading may be withdrawn on consent or with leave of the court.

#### **Consideration of the Statement of Claim**

##### *Overview*

32 The Amended Fresh Statement of Claim ("Statement of Claim") is 76 pages long containing 206 paragraphs.

1 C.P.R. (4th) 300, [1999] O.J. No. 2162

33 Paragraph 1 contains on 5 pages claims for 19 separate declarations, some of which refer to more than one matter.

34 Paragraph 2 consists of claims for accountings by the corporate defendants.

35 Paragraph 3 contains 4 1/2 pages of claims for general, aggravated, special and punitive damages and restitution for breaches of contract, breaches of statutory and fiduciary duties, breach of trust and numerous torts, including fraud, fraudulent misrepresentation, conversion, misappropriation and conspiracy.

36 Paragraph 4 is a claim for injunctions and other collateral relief.

37 Paragraph 203 contains a pleading that were allegations of fact and law are already stated in the prayers for relief, they are not repeated in the Statement of Claim.

38 Paragraph 200 alleges civil conspiracies based on "facts as particularized beforehand". This apparently refers to unspecified portions of the preceding 199 paragraphs and 75 pages.

#### *Agreements Referenced*

39 The Statement of Claim refers, in paragraph 3(a)(iii) and elsewhere to the assignments of the invention titled "Benzoin Antimicrobial Dental Varnishes" by H. James Sandham and Balanyk, as inventors, to Innovations on October 19, 1984 and again on December 10, 1984. The operative language in the assignment dated October 19, 1984 signed by each of Balanyk and Sandham, in the presence of two witnesses, states:

...do hereby sell, assign and transfer unto the said University of Toronto Innovations Foundation the full and exclusive right to the said invention in the United States of America and all other countries and we hereby sell assign and transfer unto the said University of Toronto Innovations Foundation the entire right, title and interest in and to any and all Letters Patent which may be granted therefor, and the entire right, title and interest in and to said application...

40 The operative language in the assignment by Sandham and Balanyk to Innovations in the presence of two witnesses on December 10, 1984 is the same.

41 Both assignments include a covenant for further assurances in the filing and prosecution of any patent application.

42 The Statement of Claim also refers to the agreement between Innovations to Apotex dated the 10<sup>th</sup> day of April 1986 whereby Innovations granted to Apotex, as licensee, a non-exclusive, world-wide licence to manufacture, use and sell products incorporating or using the Invention (being the dental varnish described in a specific U.S. patent and specific patent applications in other countries) ("Products") and to grant sub-licences to manufacture, use and sell Products. The Licensee was obliged to pay Innovations a royalty of the greater of the minimum royalty stipulated therein or an amount based on sales and licensing fees. Recitals in the licence acknowledge Balanyk and Sandham are the inventors, recite the assignments of the inventions by the inventors and U. of T. to Innovations, and the desire of the Licensee to enter into a contract with Innovations to have U. of T. carry out a government funded R & D program using the inventors. This licence was amended most recently in 1992 to provide for an exclusive licence, and acknowledge an exclusive worldwide licence to Oralife's predecessor Knowell and the consent of Innovations to that licence.

43 In September 1992 Apotex agreed to appoint Oralife's predecessor Knowell exclusive distributor of Chlorzoin worldwide, subject to first obtaining regulatory approval in each particular market. This Apotex-Knowell agreement is referred to frequently in the Statement of Claim. The agreement recites Balanyk and Sandham as the inventors of

1 C.P.R. (4th) 300, [1999] O.J. No. 2162

Chlorzoin. It then recites the assignment of all rights in Chlorzoin by Sandham and U. of T. to Innovations. Balanyk's assignment is not recited. The agreement then recites the licence agreement by Innovations to Apotex. Knowell agrees to use all reasonable endeavours to diligently obtain regulatory approval for each market within the regulatory timetable. Oralife also agrees to develop the production of all marketing and sales literature, technical and professional literature and scientific publications and presentations required in connection with the sale and marketing of Chlorzoin. It goes on to provide that Knowell

...shall, where economically reasonable to do so, in Knowell's sole direction, include recognition of the inventors, the University of Toronto and [Innovations] with respect to the Product.

44 Apotex has the right to terminate the distributorship agreement if Knowell fails to commence the process for regulatory approval or fails to meet minimum sales levels as therein provided.

#### *Thrust of Complaints*

45 The thrust of Balanyk's complaints in the Statement of Claim are based on an allegation that his assignments to U. of T. and Innovations were void for duress and so Oralife's rights are non-existent, and on alleged breaches of contracts, being the assignments to which he was a party and the licence to Apotex and sub-licence to Oralife, to which he was not a party, breach of fiduciary duty or trust and numerous torts, including fraud, because he has not received:

- (a) the publicity to which he says he is entitled as a co-inventor of Chlorzoin and any goodwill that may attach to such reputation;
- (b) the royalties that would flow to him as a co-inventor under his contractual arrangements with U. of T. or Innovations had the defendants obtained regulatory approvals and achieved greater sales of Chlorzoin;
- (c) the opportunity to participate in the development and research of Chlorzoin.

#### *Vague Incorporation by Reference*

46 The caveats such as those in paragraphs 200 and 203 cannot oust the paramountcy of Rule 25.06 and the applicable case law requiring clarity and precision to achieve the purposes of pleadings. Neither the opposite party nor the court should be forced to nit-pick their way through a long, complex and sometimes redundant and split pleading, parsing each paragraph and each sentence with a view to extracting the claims and related material facts and redrafting them into a clear and precise pleading. It is the responsibility of the party pleading to plead in accordance with the requirements of our law and the purposes of pleading. Bearing in mind *National Trust Co. v. Furbacher* those purposes are:

- (a) to give precise notice to the opposite party of the case which is to be met, sufficient to enable the opposite party to plead;
- (b) to assist the court in understanding the material facts alleged and the factual and legal issues in dispute between the parties;
- (c) to establish a benchmark against which the parties and the court may determine the relevance of evidence on discovery and at trial and the scope of the evidence which will be required to fairly and efficiently address the issues in dispute.

This requires the party pleading to understand the facts and the law as to what is required to support or defend a cause of action and to then state its position clearly and concisely.

*Consideration of the Claims**Claim for Breach of Contract*

*Paragraphs 1(p), 3(a)(iii) 49, 59-60, 73, 75-76, 78-80, 85, 89-90, 92, 94-95, 100-102, 107, 109-111, 128, 152, 156-168, 170, 173-176, 189.*

47 A person who is not a party to a contract cannot, subject to some limited exceptions, enforce the contract or be made subject to the terms of the contract. Those limited exceptions, such as intention to create a trust for the claimant as beneficiary, agency and collateral contract, are not pleaded here: see Waddams, *The Law of Contracts*, 4<sup>th</sup> ed. Canada Law Book, 1999, paras. 281 to 292; Fridman, *The Law of Contract*, 3<sup>rd</sup> ed. 1994, Carswell, at p. 185 - 194; *Datile Financial Corp. v. Royal Trust Corp. of Canada* (1991), 5 O.R. (3d) 358 (Ont. Gen. Div.); *International Airport Industrial Park Ltd. v. Tanenbaum* (1976), 69 D.L.R. (3d) 1 (S.C.C.), at 8 and 12.

48 Balanyk has pleaded the licence agreement from Innovations to Apotex and the sub-licence agreement from Apotex to Knowell. The only references in these agreements to Balanyk is that in the first recital of each agreement that he is stated to be a co-inventor and (a) in paragraph 25 of the Licence Agreement between Innovations and Apotex wherein Apotex agreed to give recognition where possible to the inventors and (b) in paragraph 5.6 of the sub-licence agreement between Apotex and Knowell wherein Knowell agreed that it would, where economically reasonable and in its sole discretion, include recognition of the inventors in the marketing and sales literature.

49 Balanyk has not pleaded in the Statement of Claim any contract which exists between him and any of either the Apotex Defendants or the Oralife Defendants or Rocket. He asserts claims in respect of the licence agreements between Innovations and Apotex and between Apotex and Knowell, now Oralife, but he does not assert, or make any reference to a fact which would make him a party so as to entitle him to sue any of the Apotex Defendants, Oralife Defendants or Rocket in contract. There is no allegation that he is the beneficiary of a trust in which one of the parties is the trustee or that he is the principal of a party who signed as his agent.

50 During argument it became clear, and Mr. Polten acknowledged, that Balanyk has no right of action in contract against either the Apotex Defendants or the Oralife Defendants, there being neither a privity of contract nor allegations of a trust, agency or other relationship sufficient to give Balanyk a right to sue on the licence agreement between Innovations and Apotex or the sub-licence agreement between Apotex and Knowell.

51 I order struck from the pleadings all claims against Perry, Connelly and Rocket based in contract.

*Liability of Officers, Directors and Employees for Torts of the Corporation*

*Paragraphs 25-26, 60, 72, 75-80, 94-96, 100-104, 120-127, 129-130, 145, 152, 154-155, 169-170, 178-179.*

52 Perry is described as a "a past president and founding director of Oralife, until his removal on May 20, 1997" and now a consultant to Oralife.

53 Connelly is described as a dentist in Ottawa and director of Oralife from 1992 until May 20, 1997.

54 Rocket is described as Oralife's marketing director at all material times until March 29, 1996.

55 In paragraph 77 it is alleged that Perry, Rocket and others as

director, advisor or senior officer of [Oralife] individually and jointly, have ordered, directed, authorized



1 C.P.R. (4th) 300, [1999] O.J. No. 2162

*Consideration of the Claims*

*Claim for Breach of Contract*

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director, advisor or senior officer of [Oralife] individually and jointly, have ordered, directed, authorized

and condoned each and all of the tortious activities of [Oralife] as pleaded herein.

56 Corporations can act only through their directors, officers, employees and other agents. These individuals cannot be held civilly liable for the actions of their corporation unless there is some conduct of the individual that is either tortious in itself or exhibits a separate identity of interest from that of the corporation such as to make the act that of the individual personally: *Montreal Trust Co. of Canada v. ScotiaMcLeod Inc.* (1995), 26 O.R. (3d) 481 (Ont. C.A.) at 491. In the circumstances of that case the court declined to discuss the nature of the conduct which would be sufficient to cause the directors to shed their identity with the corporation and expose themselves to personal liability.

57 The directors and officers cannot be held personally liable for a breach of contract by their corporation where they are not party to the contract and there is no suggestion that they were doing anything other than acting in the normal course of their employment in the ordinary business of the corporation: *Aspiotis v. Coffee Time Donuts Inc.* (February 21, 1995), Doc. 92-CU-51828 (Ont. Gen. Div.).

58 In *Berger v. Willowdale A.M.C.* (1983), 41 O.R. (2d) 89 (Ont. C.A.) the court was prepared to find a director and senior officer of a corporation personally liable in negligence where a duty of care was owed to the plaintiff by the officer, the officer was in breach of that duty and the damages resulted from a breach of that duty.

59 An employee was found liable in tort in performing his job and personally liable to his employer's customers: *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299 (S.C.C.).

60 In *ADGA Systems International Ltd. v. Valcom Ltd.* (1999), 168 D.L.R. (4th) 351 (Ont. C.A.) the sole director and two senior employees of the defendant corporation were sued by a competitor of the defendant corporation for interference with economic interests and inducing breaches of fiduciary duty arising out of alleged raiding of the plaintiff's employees to service a contract for which the parties had competed. The court concluded at para 43 that there is no principled basis for protecting directors and officers from liability for their alleged conduct on the basis that such conduct was in pursuance of the interests of the corporation. Until some limits are placed on the scope of this liability, the courts can only be scrupulous in weeding out claims that are improperly pleaded or where the evidence does not justify an allegation of a personal tort.

61 It is open to the plaintiff to plead specific elements of a tort against an individual director, officer or employee provided the plaintiff specifies the material facts giving rise to the independent liability in respect of each individual. It is improper to plead against a number of individual defendants as a group in the hope some liability may attach to one or more of them.

#### *Tort Claims*

62 In view of the possible personal liability in tort of a corporate director, officer or employee to the plaintiff, each of the tort claims against each of Perry, Connelly and Rocket must be examined. The paragraphs noted are those where the defendants suspect there may be some allegation of the tort alleged.

#### *Misrepresentation*

*Paragraphs 3(a)(vii) & (viii), 3(g), 36(b), 69-80, 96, 117-120, 125-127, 129-131, 145, 150-152, 155, 177-179, 185-186, 189 and 201*

63 Balanyk alleges Perry, Connelly and Rocket are liable to him for damages arising out of negligent misrepresentation by failing to state in publications to third parties respecting Chlorzoin that Balanyk was a co-inventor of Chlorzoin.

1 C.P.R. (4th) 300, [1999] O.J. No. 2162

64 The tort of misrepresentation requires that all the following elements be pleaded and proved:

- (1) there must be a duty of care based on a "special relationship" between the representor and the representee;
- (2) the representation in question must be untrue, inaccurate, or misleading;
- (3) the representor must have acted intentionally or negligently in making the misrepresentation;
- (4) the representee must have relied, in a reasonable manner, on the misrepresentation; and
- (5) the reliance must have been detrimental to the representee in the sense that damages resulted to the representee from the representation.

See *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 (S.C.C.), at 110 following a review of Canadian cases based on *Hedley Byrne & Co. v. Heller & Partners Ltd.* (1963), [1964] A.C. 465 (U.K. H.L.).

65 The pleading is deficient because it lacks the particularity required for pleading misrepresentation by Rule 25.06(8) and *Lana International Ltd. v. Menasco Aerospace Ltd.*, noted earlier, namely those noted in *Rahn v. McNeill* (1987), 19 B.C.L.R. (2d) 384 (B.C. S.C.), at 392:

1. The alleged misrepresentation itself.
2. When, where, how, by whom and to whom it was made.
3. Its falsity.
4. The inducement
5. The intention that the plaintiff should rely upon it.
6. The alteration by the plaintiff of his or her position relying on the representation
7. The resulting loss or damage to the plaintiff
8. If deceit is alleged, an allegation that the defendant knew of the falsity of his statement.

66 The cause of action in misrepresentation also fails here because there is no pleading that the plaintiff was the representee, that it was intended he should rely on the representation and that he relied on it to his detriment and, as a result, suffered damage.

67 There is a pleading in paragraph 201 under the heading "Civil Conspiracy" of a false representation by the Oralife Defendants and Rocket to their shareholders. There is no allegation of the representation being made to Balanyk or his reliance on it to his detriment.

*Conspiracy*

*Paragraphs 1(n), 3(a)(x), 3(g), 200-201*

1 C.P.R. (4th) 300, [1999] O.J. No. 2162

68 Balanyk claims a declaration that "any or all of the defendants [including the Oralife Defendants and Rocket as a group] have conspired against Balanyk by encouraging and/or allowing "Oralife, Sandham and Connelly to proceed with patent applications in various countries which should have been obtained in Balanyk's name.

69 Balanyk alleges in paragraph 200 that

...the University defendants, the Apotex defendants and the Oralife Defendants [and Rocket] or any combination of individual defendants to this action not yet further ascertained have engaged in a civil conspiracy or conspiracies to exclude Balanyk from protecting his rights and interests with respect to his invention Chlorzoin, and relies upon the facts as particularized beforehand. The defendants in question have agreed to injure by way of unlawful acts, or lawful acts by unlawful means, and have committed the overt acts causing damages to the plaintiff, all as specified in this Statement of Claim.

70 A tortious conspiracy exists where:

- (1) there is an agreement between the defendant and one or more others,
- (2) the defendant acted in furtherance of the agreement,
- (3)
  - (a) the predominant purpose of the agreement is to injure the plaintiff or
  - (b)
    - (i) the conduct of the defendants is unlawful;
    - (ii) the conduct is directed towards the plaintiff, alone or with others; and
    - (iii) the defendant should know in the circumstances that injury to the plaintiff is likely,
- (4) injury to the plaintiff results.

See *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452 (S.C.C.), at 471; *Hunt v. T & N plc*, above, at p.985.

71 The statement of claim in an action for conspiracy should describe concisely the material facts respecting the following:

- (a) the specific parties to the conspiracy and their relation to each other;
- (b) the agreement between the defendant and one or more others;
- (c) the precise purpose or objects of the conspiracy;
- (d) the overt acts alleged to have been done in pursuance and furtherance of the conspiracy by each of the alleged conspirators;
- (e) the injury and special damage occasioned to the plaintiff by reason of the conspiracy.

1 C.P.R. (4th) 300, [1999] O.J. No. 2162

72 It is not sufficient to allege that the particulars are solely within the knowledge of the defendants. See *Ten-Ichi Japanese Restaurant Inc. v. Fred T. Reisman & Associates Ltd.* (1996), 4 C.P.C. (4th) 130 (Ont. Gen. Div.), at 132; *Key Property Management (1986) Inc. v. Middlesex Condominium Corp. No. 134* (1991), 50 C.P.C. (2d) 255 (Ont. Gen. Div.), *Apple Bee Shirts Ltd. v. Lax* (1988), 27 C.P.C. (2d) 226 (Ont. H.C.) (at 235-6).

73 Balanyk has not pleaded facts respecting:

- (1) particulars of the agreements and the parties;
- (2) the overt act or acts in furtherance of the conspiracy;
- (3) the injury and special damage caused by the conspiracy.

74 The pleading here is merely

- (1) a broad allegation against all the defendants;
- (2) a purpose and intent to injure; and
- (3) a restatement of the legal principles.

75 The pleading in paragraph 200 is not concise in that it pleads reliance upon the facts as particularized beforehand, being 199 paragraphs and 74 1/2 pages containing many allegations of fact irrelevant to conspiracy.

76 I would strike out the claims in conspiracy against Perry, Rocket and Connelly.

#### *Breach of Fiduciary Duty*

##### *Paragraph 172*

77 Paragraph 172 of the Statement of Claim contains an allegation of a breach by the Oralife Defendants and Rocket as a group, of their fiduciary duty not to mismanage the marketing of Chlorzoin. A fiduciary duty arises where:

- (1) the fiduciary has scope for the exercise of some discretion or power;
- (2) the fiduciary can exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and
- (3) the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

See *Roman Corp. v. Peat Marwick Thorne* (1992), 11 O.R. (3d) 248 (Ont. Gen. Div. [Commercial List]) at p.262 citing *Frame v. Smith*, [1987] 2 S.C.R. 99 (S.C.C.).

78 The proposition that an *exclusive* licensee has a fiduciary duty to the inventor to exploit the invention holds some attraction. The proposition was not argued before me but the elements necessary to find a fiduciary duty appear, on the surface, to be present.

79 The scope of the duty is not pleaded although Mr. Polten presented an oral argument that an exclusive licensee has a duty to the inventor to exploit the licence in good faith and to use due care where it knows the inventor is entitled to royalties based on sales. He further argued that where the licensee has an obligation, subject to the licensee's contrary decision, to mention the inventor's name in association with the invention, the licensee has a fiduciary duty to do so in the absence of good reason to the contrary.

80 The Statement of Claim contains no claim against the Oralife Defendants or Rocket in paragraphs 1 to 4 for a declaration of such a fiduciary duty, nor any claim for an accounting or damages resulting from the breach of such fiduciary duty or for an injunction based thereon.

#### *Unjust Enrichment*

##### *Paragraphs 1(c), 3(d), 178 and 179*

81 There are no claims against the individuals among the Oralife Defendants or Rocket under this cause of action.

82 Paragraphs 178-9 of the Statement of Claim states that:

the [Oralife Defendants' and Rocket's] negligent, premature, and/or improper marketing of Chlorzoin by Oralife, including suppression of scientific data and scientific reports on Chlorzoin, has resulted in their improper and unmerited acquisition of both financial and reputational benefits ... the [Oralife Defendants and Rocket] and in particular Sandham, have been unjustly enriched as a result of this financial and reputational gain. The plaintiff states that he has suffered a corresponding deprivation because the integrity of Chlorzoin has suffered as a result of Knowell/Oralife's improper marketing.

83 The elements of a claim for unjust enrichment are set out in *Peter v. Beblow*, [1993] 1 S.C.R. 980 (S.C.C.), at 987:

- (1) an enrichment;
- (2) a corresponding deprivation;
- (3) absence of a juristic reason for the enrichment.

84 No particulars are given of either the marketing activities or the suppression of scientific reports and data. No particulars are given of the financial and reputational benefits to any of the defendants, let alone the individuals.

85 No particulars are given of the deprivation to Balanyk from the pleading of "corresponding". There is no allegation of fact to suggest that the deprivation is corresponding to the alleged improper and unmerited acquisition of benefits.

86 There is no allegation of absence of juristic reasons.

87 Sandham is not one of the Oralife Defendants.

88 I find the pleading vague and lacking in particulars sufficient to enable the defendants to know the claims against them to respond to the claims. The court is unable to determine the scope of the claim so as to determine the relevance of any evidence which might be produced or sought.

1 C.P.R. (4th) 300, [1999] O.J. No. 2162

*Passing Off*

*Paragraphs 1(t)(iii), 3(a)(vi), 117-120, 124, 127, 130 and 185-186.*

89 Balanyk claims a declaration that the defendants misappropriated his title and/or passed off Chlorzoin as the sole invention of Sandham rather than the invention of Balanyk which resulted in damage to Balanyk's reputation. He also claims damages for passing off.

90 In that portion of the Statement of Claim headed "Passing Off" Balanyk alleges he had a good reputation as a dental researcher and inventor of Chlorzoin from which he derived revenue and goodwill. He then alleges Oralife published literature to the dental profession and industry and to the public and caused other sub-licensed distributors to act similarly. However, the pleading does not state what was contained in the literature.

91 Balanyk then alleges he suffered actual and/or potential harm to his reputation, goodwill and revenues and he holds Oralife liable for such damages.

92 Balanyk then states that prior to the grant of the sub-licence to Oralife in September 1992, Perry and Rocket, in preparing and printing offending promotional literature, made repeated misrepresentations to the dental industry that Sandham was the sole inventor of Chlorzoin. Balanyk then alleges Perry and Rocket are liable for passing off Chlorzoin as the invention of Sandham and for complicity in conversion and/or misappropriation of title.

*Paragraphs 124 to 151 are headed "Intellectual Property Rights"*

93 In paragraph 124 Balanyk alleges that he is the originator and the owner of the trademark Chlorzoin prior to its registration in 1988. There is no claim in this paragraph against the individual defendants.

94 In paragraph 127 he alleges that the Oralife Defendants and Rocket knew that by consenting to the release of advertising materials they had converted and/or misappropriated Balanyk's title to Chlorzoin and passed off Chlorzoin as the sole invention of Sandham.

95 There is no claim in paragraph 130 against the individual defendants.

*Paragraphs 185 to 189 are headed "Misappropriations and Conversions"*

96 In paragraphs 185 and 186 Balanyk denies the legality of his assignment to U. of T., alleging that he has retained title to the invention. He then claims damages against each defendant for the misappropriation, passing off or conversion of Chlorzoin as the invention of Sandham. Balanyk makes no allegation that the defendants, other than U. of T., knew or ought to have known that his assignment was a nullity or otherwise ineffective.

97 The pleadings seem to confuse simple misappropriation or conversion of property with passing off.

98 Passing off is an economic tort based on the principle that no man may pass off his goods as those of another. Three elements must be proved to establish the tort:

(1) the existence of goodwill in the goods or services being supplied, by association with the identifying get up, such as brand name, trade description or features of labeling or packaging, which the public recognizes as distinctive;

(2) misrepresentation by the defendant, intentional or otherwise, deceiving the public into believing that the goods or services offered by the defendant are those of the plaintiff;

1 C.P.R. (4th) 300, [1999] O.J. No. 2162

(3) actual or potential damage to the plaintiff will likely result by reason of the erroneous belief engendered by the misrepresentation.

*Ciba-Geigy Canada Ltd. v. Apotex Inc.*, [1992] 3 S.C.R. 120 (S.C.C.), at 131- 132, citing *Reckitt & Colman Products Ltd. v. Borden Inc.*, [1990] 1 All E.R. 873 (U.K. H.L.) at 880.

99 The purpose of the tort is to protect both manufacturers and customers: *Ciba-Geigy Canada Ltd.* at p.133-136.

100 The defendants argue that Balanyk's complaint is not that the defendants have appropriated his name or other identifying "get up" to themselves and their products. His assertion in the pleadings is to the contrary, namely, that the Oralife Defendants and Rocket have omitted any reference to his name in connection with the invention or its development. Balanyk cannot complain that the defendants were unfairly appropriating to themselves and their product Balanyk's reputation in the marketplace.

101 In the absence of allegations of appropriation of Balanyk's name or other unique "get up" as their own, these pleadings must be struck.

#### *Fraud and Fraudulent Misrepresentation*

*Paragraphs 1(c), 3(a)(vii), 3(a)(viii), 121-123, 126, 127 and 130-131 and 179.*

102 Fraud is a serious charge carrying with it the allegation of not only an actionable wrong but also an allegation of moral turpitude. The allegation alone, if publicized, could severely and irremediably damage a defendant's reputation. In view of the absolute privilege enjoyed by pleadings, Rule 25.06(8) requires that full particulars of the material facts alleged to constitute the claim be pleaded. This is the reason unproved allegations of fraud will have severe adverse cost consequences to the plaintiff. When potentially extraneous parties are included in the litigation, and possibly for merely tactical purposes, the pleadings must be even more closely scrutinized to ensure the requisite elements have been adequately pleaded.

103 The following elements must be proved to establish fraudulent misrepresentation:

- (1) That the misrepresentations complained of were made by the defendants;
- (2) They were false in fact;
- (3) The defendant knew when making the statement, that it was false or was recklessly uncaring whether it was true or false; and
- (4) That the representations induced the plaintiff to act to his prejudice.

104 As noted earlier, there is no allegation in any of the pleadings of fraudulent misrepresentation that the plaintiff Balanyk relied on or was induced by the alleged representations, fraudulent or otherwise, to act to his prejudice.

105 The pleading in paragraph 122 is a broad allegation that representation in a prospectus issued by Oralife on March 19, 1996 respecting Oralife's licence to a trademark was false. There is no suggestion Balanyk relied on the representation.

106 The pleadings in paragraphs 122, 123, 126, 127 and 179 are bald allegations of fraud as against the Oralife



1 C.P.R. (4th) 300, [1999] O.J. No. 2162

Defendants and Rocket as a group. They do not state the particulars of the alleged fraudulent conduct by each defendant. They do not state the nature or date of the advertising materials referred to in paragraph 127 or the misrepresentation alleged in paragraph 179. There is no indication that these pleadings refer to any of the documents referred to in paragraphs 69 and 70 and the broadcast in paragraph 71. They do not state the person to whom these materials were given or to whom the misrepresentations were made. The mere fact that each of these defendants was a director, officer or employee of, or consultant to, Oralife is not sufficient to make them liable individually for Oralife's tortious conduct.

107 These pleadings shall be struck as against the defendants Perry, Connelly and Rocket.

*Unlawful Interference with Economic Interests*

*Paragraphs 49 and 104*

108 There is no claim for relief based specifically on interference with economic interests.

109 Paragraph 49 contains no pleading against any of the individual defendants and only a bald claim, with no particulars as to the facts supporting this claim, against Oralife.

110 Paragraph 104 contains a pleading against Oralife Defendants and Rocket, as a group, of intentional interference with Balanyk's economic or business relations "through their tortious acts described above with intent to injure Balanyk" or "were recklessly indifferent to injury to Balanyk". The pleading then continues:

In particular, through their willful or reckless indifference to ensuring the publicity to which Balanyk was entitled as the inventor or co-inventor of Chlorzoin, the [Oralife Defendants and Rocket] ... have diminished the goodwill in Balanyk's business as a dental researcher and dentist.

111 The tort of unlawful interference with economic interests has these elements:

- (a) the deliberate intent of the defendants to injure the claimant;
- (b) the means employed by the defendant were unlawful;
- (c) economic loss to the plaintiff as a result of such intent and unlawful conduct.

*Cheticamp Fisheries Co-operative Ltd. v. Canada* (1995), 123 D.L.R. (4th) 121 (N.S. C.A.) at 126-131; leave to appeal refused by S.C.C. October 12, 1995 [reported (1995), 126 D.L.R. (4th) vii (S.C.C.)].

112 Balanyk has pleaded the intent and loss of goodwill but has not pleaded the means employed.

113 The allegation of unlawful acts is vague and bald. There is no precision as to specifically what the unlawful acts by each individual were, only a reference to the pleadings in the preceding 103 paragraphs and 48 pages.

114 These pleadings should be struck.

*Food and Drugs Act Claim*

*Paragraphs 1(t)(i), 169 and 171*

115 There is a claim for a declaration in paragraph 1 but no claim for damages in paragraph 3.

1 C.P.R. (4th) 300, [1999] O.J. No. 2162

116 In paragraphs 169 and 171 Balanyk claims that the Oralife Defendants and Rocket made materially misleading and unsubstantiated claims respecting Chlorzoin prior to obtaining requisite regulatory approvals and in the absence of supportive clinical evidence and in doing so violated s.9(1) of the *Food and Drugs Act*.

117 This section creates a criminal regulatory offence. The Act does not create a private right of action for violations of the Act. See *Searle Canada Inc. v. Novopharm Ltd.* (1990), 31 C.P.R. (3d) 1 (Fed. T.D.) at 10-11.

118 The pleading does not give particulars of the facts supporting the participation of Perry, Connelly or Rocket in the commission of such alleged offences.

119 I would strike out these claims for failure to disclose a cause of action against Perry or Connelly.

#### *Competition Act Claims*

##### *Paragraphs 3(a)(ii)(4) and 171*

120 Balanyk claims damages against the Oralife Defendants and Rocket for a false representation to the public regarding the efficacy of Chlorzoin which constituted a breach of sections 52(1)(a) and (b) and (3) of the *Competition Act*. The pleading in paragraph 1 states that making a false representation to the public regarding the efficacy of Chlorzoin was a breach of the prohibition of misleading advertising.

121 Balanyk has not given particulars of conduct sufficient, if proved, to constitute conduct prohibited by this statute.

122 In order to advance such a civil claim Balanyk must rely on s.36 of that Act which requires that the claimant suffered loss or damages as a result of conduct contrary to Part VI of that Act. Balanyk has not alleged any such loss or damages: see *City National Leasing Ltd. v. General Motors of Canada Ltd.* (1989), 24 C.P.R. (3d) 417 (S.C.C.) at 448.

123 This claim should be struck.

#### *Trade Marks Act Claims*

##### *Paragraphs 1(t)(I) and (iv), 3(a)(iv)(2) 122 and 171.*

124 In paragraphs 1, 3 and 171 Balanyk seeks declarations and damages for unfair competition by the Oralife Defendants and Rocket for

(a) making false descriptions which are likely to mislead the public as to the proper indications for the use of Chlorzoin and/or the "character and quality" of Chlorzoin, contrary to section 7(d) of the *Trade Marks Act*; and

(b) business practices that are "contrary to honest industrial or commercial usage in Canada" or condoned or was recklessly indifferent to such dishonest business practices, pursuant to s.7(e) of the *Trade Marks Act*.

125 In paragraph 122 only, Balanyk claims damages against Oralife Defendants and Rocket as a group for misrepresentation in a prospectus dated March 19, 1996 and for misappropriation of title and/or breach of statutory duty, specifically s.7(c) of the *Trade Marks Act*, for passing off the trademark "Chlorzoin Therapy" as their own and

1 C.P.R. (4th) 300, [1999] O.J. No. 2162

for negligent and/or fraudulent misrepresentation.

126 Section 53 of the *Trade Marks Act* grants jurisdiction to a court to grant relief by way of injunction and damages for any act done contrary to the *Trade Marks Act*.

127 A claim relying on s.7(e) of the *Trade Marks Act* is a nullity because that section has been declared *ultra vires* of Parliament: *Figgie International Inc. v. Schoettler* (1994), 53 C.P.R. (3d) 450 (Fed. T.D.) at 458 citing *Bousquet v. Barmish Inc.* (1993), 150 N.R. 234 (Fed. C.A.) at 512-13 which cites *Vapor Canada Ltd. v. MacDonald* (1976), [1977] 2 S.C.R. 134 (S.C.C.); see pp.149, 172 and 175-6.

128 Section 7(c) of the *Trade Marks Act* is directed at prohibiting the substitution of "wares and services as and for those ordered or requested". That subsection requires the plaintiff to establish that:

- (a) the get-up of its product has acquired a reputation;
- (b) the defendant's similar get up has produced confusion in the minds of members of the public; and
- (c) the defendant has induced, or enabled others, to pass off its formulations as those of the plaintiff:

See *Procter & Gamble Pharmaceuticals Canada Inc. v. Novopharm Ltd.* (1996), 116 F.T.R. 99 (Fed. T.D.) at 103 citing *Searle Canada Inc.*, *supra*.

129 This claim must fail for the same reason that the passing off claims fail. On the facts pleaded neither the Oralife Defendants nor Rocket have represented Chlorzoin as being associated with Balanyk and so they cannot be said to have appropriated Balanyk's reputation as their own or to have otherwise taken advantage of that reputation in supplying other wares or services. Balanyk claims that he is the owner of Chlorzoin. That does not support a cause of action under section 7(c).

130 Section 7(d) of the *Trade Marks Act* is directed to protecting the purchaser or consumer of wares or services from being misled or deceived as to:

- (a) the character, quality, quantity or composition;
- (b) the geographical origin; or
- (c) the mode of the manufacture production or performance

of the wares or services.

131 The Supreme Court of Canada has said in *obiter* that s.7(d) depends for its validity on being applied to a subject matter coming within federal legislative authority under s.91 of the *Constitution Act, 1867*; *Vapor Canada Ltd. v. MacDonald*, above, at pp.148 and 157. Balanyk has pleaded no facts in relation to these causes of action which takes the matter out of the common law of deceit or misrepresentation, which is within the legislative authority of the provinces, into the legislative authority of Parliament, such as trademarks.

132 These pleadings are again vague, even if one turns to paragraphs 169 of the Statement of Claim. There is particularity given to only one statement, namely a "No Cavities Guaranteed" warranty program, which was allegedly made to the public by Oralife effective after January 1995.

133 In paragraph 171 there is an allegation that the Oralife Defendants and Rocket, as a group, made false

1 C.P.R. (4th) 300, [1999] O.J. No. 2162

representation to the public regarding the efficacy of Chlorzoin and breached sections 7(d) and (e) of the *Trade Marks Act*. No particulars are given of facts which would support such a breach such as when, where, how, etc.

134 I would strike out the claims based on alleged breaches of the *Trade Marks Act*.

*Claims Based on Moral Rights*

*Paragraphs 1(t)(ii), 3(a)(iv)(1), 101, 103 and 121*

135 Balanyk claims a declaration against each defendant for infringement of his moral rights as an inventor under the *Copyright Act*, and damages for breach of his moral rights under the *Copyright Act*.

136 Paragraphs 101 to 103 of the Statement of Claim are headed "Infringement of Moral Rights".

137 In paragraph 101 Balanyk alleges an express and implied contractual obligation to recognize his role as inventor which "would by operation of law have flowed to" Oralife and its principals, Perry and Rocket.

138 In paragraph 102 he alleges that all the defendants have violated the contractual obligations which arise from his assignment to Innovations and his moral rights to be credited as a co-inventor of the invention in promotional materials. Alternatively, Balanyk alleges Rocket and Perry have participated in the infringement by the other defendants of Balanyk's common law moral rights or have been indifferent to such infringement by the Oralife Defendants and Rocket generally.

139 In paragraphs 103 and 121 Balanyk pleads that the Oralife Defendants and Rocket have infringed Balanyk's moral rights pursuant to sections 28.1 and 28.2 of the *Copyright Act*, particularly his right pursuant to s.14.1 of that Act to be associated by name, when reasonable in the circumstances, as the author or co-author of various published works, when such works are used or referred to in preparing promotional materials for Chlorzoin.

140 Balanyk's role as inventor and his assignment of the invention to Innovations is recited in the licence and sub-licence. However this does not constitute notice to the licencees that he has some undefined right in the invention and its use beyond rights provided in the *Patent Act* or applicable Conventions.

141 Firstly, the mere reference to the contract of assignment in the licence does not constitute notice of its terms to the licensee or put the licensee on its inquiry as to its terms. Such reference does not constitute an incorporation of the terms of the assignment by reference into the licence or make the licensee subject to the obligations of the assignee in the assignment or force the licensee to fulfill the rights of Balanyk under the assignment.

142 Balanyk then argues that these rights can arise either by reason of the contract of assignment to Innovations or as inherent moral rights which accrue to the creator of an invention and are similar to those granted under s.14.1 of the *Copyright Act*. He suggests they are rights *in rem* which of necessity they run with the invention and merge with any patent, assignment or licences granted with respect to the invention, not unlike a right to real or personal property. He offers no authority for the proposition.

143 In *Compo Co. v. Blue Crest Music Inc.*, (1979), [1980] 1 S.C.R. 357 (S.C.C.) at 372-375 the court stated:

Copyright law is neither tort law nor property law in classification, but is statutory law. It neither cuts across existing rights in property or conduct nor falls between rights and obligations heretofore existing at common law. Copyright legislation simply creates rights and obligations upon the terms and in the circumstances set out in the statute.

144 Moral rights in a work covered by the *Copyright Act* exist solely because of that statute and do not arise at

1 C.P.R. (4th) 300, [1999] O.J. No. 2162

common law. That Act addresses the products of creative authorship such as literary and other writings, photographs, dramatic works, music, films, artistic works such as paintings, drawings and sculpture, plans and designs and sound recordings.

145 The *Copyright Act* s.14.1

(1) The author of a work has, subject to s.28.2, the right to the integrity of the work and, in connection with an [assignment of copyright], the right where reasonable in the circumstances to be associated with the work as its author by name...

146 Section 28.2 provides

(1) The author's right to the integrity of a work is infringed only if the work is, to the prejudice of the honour or reputation of the author,

(a) distorted, mutilated or otherwise modified, or

(b) used in association with a product, service, cause or institution

147 I do not see in the nature of an invention characteristics which would justify extending the rights of a moral right to an invention. An invention has a character wholly different from that of an artistic, literary or other work which can be the subject of copyright. In the absence of statutory patent rights the public would have immediate access to the invention for the purpose of manufacturing and selling the products of the invention. A patent is an exclusive statutory right for exclusive use of the invention for a limited period to enable the owner or assignee to make a profit from the manufacture and sale of the products of the invention. A copyright protects works more closely associated with the creator's persona and skills which impact on the reputation of the creator.

148 The *Patent Act* offers no protection for the integrity of a patent or the inventor's right to be associated with it. The *Copyright Act* is an exception to the common law rights to freely copy and reproduce works of others. The author's right of having his name associated with a work is a creature of that statute.

149 Neither Thomas Edison nor Alexander Graham Bell nor any other person has the right to have his or her name mentioned in connection with the marketing or sale of the products incorporating their inventions. In the absence of juristic reason to the contrary, Balanyk's counsel challenges me to allow the claim as this is an unexplored and novel area of law notwithstanding the absence of caselaw in support of the submission. I find the rationale offered by Balanyk for his allegation totally without merit.

150 In my analysis, and in the absence of any common law or provisions in the *Patent Act* supporting a moral right of any sort, I am obliged to say that it is plain and obvious that the Statement of Claim discloses no reasonable cause of action in respect of moral rights.

151 It would be unfair to subject the Defendants to the costs and trouble of an action which clearly has no chance of success.

152 These pleadings should be struck.

*Bald Claims*

*Paragraphs 25, 26, 36(b), 49, 50, 59, 77, 90, 94, 95 and 110 and 202.*

1 C.P.R. (4th) 300, [1999] O.J. No. 2162

153 Balanyk makes a number of allegations which are general, broad, bald or vague and lack the requisite particularity of supporting material facts.

*Duty to Protect or Promote the Reputation of an Inventor or an Invention*

154 No specific claim or pleading.

155 Balanyk argues, again without legal authority, that assignees and licencees of inventions have a duty of care to protect the reputation of both the invention and the inventor and that breach of this duty constitutes a tort.

156 The argument first analogizes inventions to copyright and the statutory protection for moral rights. I have dealt with that issue.

157 Then Balanyk argues that a person who knows of an invention, the name of the inventor, and the obligation in the licence agreement to recognize the inventor "where economically reasonable to do so, in the licensee's sole discretion", has a duty to protect and promote the reputation of the inventor and the invention. He offers no authority for the proposition. I have noted earlier that Balanyk has no remaining moral rights in the invention. After assigning the invention, his only remaining rights to it are in contract.

158 Balanyk has pleaded neither the duty to protect and promote nor the breach of duty nor facts which constitute the breach by the defendants individually. I am not prepared to extend the law of tort to encompass a positive duty to promote an individual's reputation. This sort of positive obligation is contractual. No contract is pleaded as between Balanyk and any of the Oralife Defendants and Rocket and he pleads no facts which would bring him within the narrow exceptions to the rule that he must be party to the contract to sue on the contract: see *London Drugs Ltd. v. Kuehne & Nagel International Ltd.* (1992), 97 D.L.R. (4th) 261 (S.C.C.) at 368.

159 Balanyk then suggests, although the pleadings are silent on the issue, that the alleged duty of care to the inventor extends to protection of the reputation of the invention. He offers no authority for the proposition. If the inventor has no rights to the invention except as provided by the *Patent Act* one should look to that Act for any duty and remedy.

160 To the extent such alleged causes of action may be found by a meticulous parsing of the 206 paragraphs in the Statement of Claim, I would dismiss them because they have not been properly pleaded.

*Slander of Title*

161 Balanyk has offered, uninvited, written submissions on this subject but does not tell the court the specific pleadings to which the submissions relate. The Oralife Defendants have responded to the submissions on the assumption that they refer to paragraphs 3(a)(ii), 3(a)(iv)(5) and 4(a)(I)(2).

162 A cause of action based on slander of title requires four elements to be pleaded:

- (a) the defendants published words in disparagement of the plaintiffs property;
- (b) the words were false;
- (c) the words were published with actual malice;
- (d) the plaintiff suffered special damage

1 C.P.R. (4th) 300, [1999] O.J. No. 2162

See *Almas v. Spenceley*, [1972] 2 O.R. 429 (Ont. C.A.) at 432.

163 This suggestion assumes that the assignment of the Invention to the U. of T. and Innovations was a nullity.

164 Balanyk has not identified any instance of words published in disparagement of his property or made any allegation that the words were false.

165 Balanyk has failed to plead malice on the part of the Defendants, that is, the direct intention to injure him and the material facts which support the allegation: see *Siopiolosz v. Taylor*, [1944] O.R. 195 (Ont. C.A.) at 204- 205.

166 Balanyk makes no allegation of facts which would support the personal liability of any of the Oralife Defendants or Rocket.

### *Injurious Falsehood*

167 Counsel for Perry acknowledges that the claim for damages for libel, slander or injurious falsehood and an injunction in paragraphs 3(a)(ii), 3(a)(iv)5 and 4(a)(i)(2) and the particulars given in paragraphs 190 to 195 are a sufficient pleading of this alleged cause of action against him.

### *Claims Against Connelly*

#### *Paragraphs 1(p), (q) and (r) and 187 - 188*

168 Balanyk claims against Sandham and Connelly in paragraphs 1(p) and (q) declarations that specific patent applications in Canada, Australia, U.S.A. and the Patent Cooperation Treaty constitute a violation of the University's Inventions Policy and that a certain U.S. Patent in Connelly's name infringes the U.S. Chlorzoin patents of Balanyk and Sandham and "is a violation of Balanyk's original rights under the same policies and contractual agreements".

169 Paragraph 1(r) seeks a declaration that Sandham and/or Connelly swore a false affidavit stating Connelly was the sole inventor of two Canadian patents, an Australian patent and a Patent Co-operation Treaty application.

170 There is no claim for damages against Connelly in respect of these matters. This court has no jurisdiction over patent infringements in other countries.

171 There is no recognized cause of action in Balanyk in the allegation of violation by others of the University's policy or that a false affidavit was sworn where there is no allegation that it affects Balanyk's interest. The pleading is vexatious.

172 These claims should be struck

### *Amendment of Pleadings to Remove an Admission.*

*Fresh Statement of Claim dated July 12, 1994 -- paragraphs 1(xix)(d), 2, 24, 25, 29, 32, 54, 58, 62, 63, 78 and 86.*

*Statement of Claim paragraphs 1(a), 3(a)(i), 56(g), 57, 58 and 185.*

173 In the 1994 Fresh Statement of Claim dated July 12, 1994 Balanyk acknowledges in paragraphs 1(xix)(d), 54, 63, 78 and 86 that he is a co-inventor. In paragraph 2 of the 1994 Fresh Statement of Claim he alleges, in describing himself that "He is the sole inventor or a co-inventor with the defendant H. James Sandham ("Dr. Sandham") of Chlorzoin".

1 C.P.R. (4th) 300, [1999] O.J. No. 2162

174 Balanyk alleges in the 1999 Statement of Claim that he is the sole inventor or alternatively, co-inventor: paragraphs 1(a) ("sole owner"), 3(a)(i) "plaintiff's invention Chlorzoin", 3(a)(vii) ("sole or primary inventor"), 29, 32 ("At the request of Sandham, Balanyk disclosed Chlorzoin to the University"), 56(g) ("sole or primary inventor"), 57 ("sole owner of all rights and title to Chlorzoin"), and 58 ("sole or primary inventor").

175 The claim for an injunction in paragraph 4(a)(i)(1) is limited to Balanyk being a sole inventor or primary co-inventor.

176 In other paragraphs he pleads in the alternative, e.g. paragraph 80 pleads "an inventor or co-inventor".

177 The pleading of sole inventor is clearly contrary to the apparent parties to the assignments to Innovations.

178 I am not satisfied that there is a material change here which prejudices the Oralife Defendants or Rocket. I would permit the revised pleading to stand subject to any necessary changes to make it clear that such pleadings are in the alternative.

### Conclusion

179 In reflecting on the Statement of Claim generally, bearing in mind Balanyk's basic complaints, I find a breadth of bald allegations against the Oralife Defendants and Rocket as a group without particulars of factual allegations as to the involvement of each of them.

180 I would strike out all claims made in the Statement of Claim against Perry, Connelly and Rocket except for the claims for libel and injurious falsehood against Perry.

181 In view of the history of these proceedings and the fact the Statement of Claim is Balanyk's fifth attempt in almost five years to get it right, I would allow no further amendment against these defendants.

182 I allow the amendments to the pleadings that allege that Balanyk was the sole inventor provided it is made clear that such pleading is in the alternative to his pleading as a co-inventor.

183 The purpose of allowing the amendments resulting in the Statement of Claim was to incorporate any claims in 98-CV that were not already in the statement of claim in 94-CQ. I assume this was done. Accordingly, I dismiss action 98-CV-3557CM as against Perry, Connelly and Rocket.

*Application granted in part.*

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DATE: 20011128  
DOCKET: C35452

**COURT OF APPEAL FOR ONTARIO**

**RE: GORDON BEARDSLEY (Plaintiff (Appellant)) – and –  
THE CROWN IN RIGHT OF ONTARIO on behalf of the  
ONTARIO PROVINCIAL POLICE, OPP PROVINCIAL  
CONSTABLE MARK RADKE, OPP PROVINCIAL  
CONSTABLE DAN KUNSKEN, AND BONA LAMARCHE  
(Defendants (Respondents))**

**BEFORE: ABELLA, GOUDGE AND SIMMONS J.J.A.**

**COUNSEL: Lawrence Greenspon  
For the appellant**

**D. Thomas H. Bell and Sonal Gandhi  
For the Crown and Police respondents**

**Michael A. Chambers  
For the respondent Bona Lamarche**

**HEARD: October 24, 2001**

**On appeal from the order of Justice Paul F. Lalonde dated October 23, 2000.**

**ENDORSEMENT**

[1] The appellant appeals from an order of Lalonde J. dated October 23, 2000 striking out a statement of claim.

[2] The appellant issued a statement of claim on July 13, 1999 claiming damages against the Crown in right of Ontario, and two Ontario Provincial Police constables, for false arrest, false imprisonment, malicious prosecution, negligence and breach of his Charter rights; and against those same defendants and his ex-wife, for conspiracy. He alleges that these torts were committed when he was investigated, arrested, and prosecuted for charges that included breaking and entering his ex-wife's home, possession of stolen property, and criminal harassment.

[3] All of the charges were withdrawn on April 6, 1999 after the appellant entered into a common law peace bond prohibiting him from initiating contact or association with his ex-wife for a period of one year.

[4] On a motion brought pursuant to rule 21.01 (1) (a) and (b) of the rules of Civil Procedure, the motions judge held that the claims against the Crown and the police officers are void, having been instituted without the appropriate notice under s. 7(1) of the *Proceedings Against the Crown Act*, R.S.O. 1990, c. P-27; and that the six-month limitation period under s. 7(1) of the *Public Authorities Protection Act*, R.S.O. 1990, c. P-38 is a bar to the appellant's claims against the O.P.P. officers for false imprisonment, false arrest, and negligence.

[5] The motions judge also determined that entering the peace bond precluded satisfaction of two of the requirements for successful prosecution of a malicious prosecution claim, first, that the proceedings were instituted without reasonable cause, and second, that they were terminated in his favour; and that it precluded the existence of a cause of action for breach of Charter rights.

[6] Finally, the motions judge held that the conspiracy claim as pleaded disclosed no reasonable cause of action.

[7] The appellant raises several issues on appeal.

**Did the motions judge err in finding proceedings void for lack of notice under s. 7(1) of the *Proceedings Against the Crown Act*?**

[8] The statement of claim was silent on the issue of whether notice had been given in compliance with s. 7(1) of the *Proceedings Against the Crown Act*. The motions judge permitted the respondents to rely on a formal notice letter sent by appellant's counsel on July 14, 1999, after the statement of claim was issued, to assert that s. 7(1) had not been complied with, and that the claims against the Crown and the police officers were therefore a nullity. The motions judge relied on *Montreal Trust Co. of Canada v. Toronto-Dominion Bank*, (1992), 40 C.P.C. (3d) 389 (Ont. Ct.(Gen. Div.) as authority for the proposition that the letter did not constitute evidence within the meaning of the prohibition contained in rule 21.01(2) against adducing evidence on a rule 21.01(1)(b) motion.

[9] We agree that the motions judge erred in ruling that admission of the July 14, 1999 letter would not contravene the rule 21.01(2) prohibition against adducing evidence. The letter was not referred to in the statement of claim. Its contents could not therefore be viewed as an integral component of that pleading.

[10] Nevertheless, in our view, evidence of the notice was properly admissible pursuant to the discretion contained in rule 21.01(2) to permit evidence on a motion under rule 21.01(1)(a). Proper notice is a necessary pre-condition to the right to sue the Crown. It would defeat the interests of justice to restrict a defendant's right to adduce evidence that proper notice was not given.

[11] The appellant relies on the July 14, 1999 letter, as well as a letter of complaint against the individual police officers sent by his counsel soon after the charges were withdrawn, to assert that proper notice was given.

[12] We reject these submissions. None of the authorities relied on by the appellant establish that the period of 60 days notice "before the commencement of the action" set out in s. 7(1) can be abridged in any way. The notice period must run *before the action is commenced*.

[13] This court's determination in *Mattick v. Ontario (Minister of Health)* [11] that a potential claimant against the Crown need not expressly state in any notice that he "intends to take legal action to recover damages or other relief" does not mean that every letter of complaint delivered to a provincial agency will fulfil the notice requirements under s. 7(1) of the *Proceedings Against the Crown Act*. Rather, at page 228 this court explicitly stated:

Not every complaint to the Province must be treated as a s. 7(1) notice. The complaint must be such that, in the circumstances, it could reasonably be anticipated by the Crown that if not resolved, litigation could result. [2]

[14] The *Police Services Act*, R.S.O. 1990, c. P-15 provides a mechanism for citizens to file complaints against police officers. However, its focus is on discipline of police officers rather than providing remedies to aggrieved citizens. Accordingly, as a general matter, a letter of complaint against a police officer should not be taken as notice of a possible civil claim.

[15] Here, the existence of the earlier complaint against the officers was not apparently before the motions judge. The actual letter of complaint is not before us. Without determining whether a complaint against a police officer could ever constitute compliance with s. 7(1) of the *Proceedings Against the Crown Act* absent an express reference to the possibility of litigation, we are not satisfied the motions judge erred in finding there had been no sufficient notice in this case.

[16] The respondents do not contest the appellant's submission that the notice requirements of the *Proceedings Against the Crown Act* do not extend to

individual defendants. We agree. The motions judge's finding on this basis that the claims against the police officer defendants are a nullity is accordingly set aside.

[17] The appellant's contention that s. 7(1) does not extend to claims for vicarious liability has no merit. S. 7(1) is clear in requiring that "*no action* for a claim shall be commenced against the Crown" [emphasis added] unless the appropriate notice is given. It is necessary to name the Crown as a defendant to maintain an action for vicarious liability, and the appellant's claim on this ground fails.

**Did the motions judge err in finding the appellant is barred from proceeding with his claims for false imprisonment, false arrest, and negligence because the six-month limitation period had expired?**

[18] The appellant pleaded that he was arrested on July 28, 1998, and September 9, 1998, and held in custody immediately following both arrests. He asserted, as an alternative pleading, that the police officers actions were "such as to place them outside the scope and authority of their duties as OPP Provincial Constables". He also asserted that they prosecuted him when they knew he had not committed a criminal offence, and that they participated in the prosecution maliciously, with an intent to harm him, motivated by a sexual relationship with his ex-wife in the case of one officer, and by a desire to cover-up that relationship and protect his brother officer on the part of the other officer. The appellant further alleged that the officers were negligent in their investigation.

[19] The appellant concedes that causes of action for false arrest and false imprisonment accrue as of the date of arrest or imprisonment based on *Nicely v. Waterloo Regional Police Force* (1991), 2 O.R. (3d) 612 (Div. Ct.), but questions the policy rationale for this rule. We reject his contention that we could somehow abrogate a standard rule pertaining to accrual of those causes of action based on his hypothetical assertion that the rule may give police officers, who have wrongfully arrested or detained an individual, an incentive to persist in a wrongful prosecution.

[20] In our view, however, the trial judge erred in dealing with the motion to strike portions of the statement of claim based on the expiry of a limitation period, prior to delivery of a statement of defence, and prior to the appellant having an opportunity to reply.

[21] The motion to strike based on the expiry of a limitation period could only be made pursuant to Rule 21.01(1)(a), which provides that a party may move for the determination of a question of law "*raised by a pleading*". The expiry of a limitation period does not render a cause of action a nullity; rather, it is a defence

and must be pleaded. Although we agree that it would be unduly technical to require delivery of a statement of defence in circumstances where it is plain and obvious from a review of a statement of claim that no additional facts could be asserted that would alter the conclusion that a limitation period had expired [3], a plain reading of the rule requires that the limitation period be pleaded in all other cases. See *Pollakis v. Corner* (1975), 9 O.R. (2d) 691 (H.C.J.).

[22] Plaintiffs would be deprived of the opportunity to place a complete factual context before the court if limitation defences were determined, on a routine basis, without being pleaded. Adherence to rules that ensure procedural fairness is an integral component of an appearance of justice. The appearance of justice takes on an even greater significance where claims are made against those who administer the law. The limitation defence to the claims for false arrest, false imprisonment, and negligence should not therefore be determined, without being pleaded, and the pleadings being completed. That portion of the order that dismisses the claims for false arrest, false imprisonment, and negligence will accordingly be set aside.

[23] In this case, we agree that the appellant's pleadings are sparse and vague, and we also agree that allegations he relies on to justify these claims are in some instances, set out only in relation to other torts. Nevertheless, this court's decision in *Vaillancourt v. Watson* (1994), 111 D.L.R. (4<sup>TH</sup>) 729 makes it clear that although allegations such as malice or acting for an improper purpose, standing alone, would be insufficient to deprive officers otherwise apparently acting within the scope of their duty of the protection afforded by s. 7(1) of the *Public Authorities Protection Act*, situations may exist where the protection will not apply to egregious conduct by police. If necessary, the question of whether the bald pleading of malice in the claim is enough to escape the limitation period in s. 7(1) can be decided once the pleadings are complete.

**Did the motions judge err in striking the appellant's claims for malicious prosecution and for breach of his Charter rights?**

[24] As with the July 14, 1999 letter we agree that the peace bond transcript was inadmissible on a rule 21.01(b) motion, however, the motion was also made pursuant to rule 21.01(1)(a). Again, it would defeat the interests of justice not to admit the transcript for the purpose of a motion under that rule. The transcript provides an essential factual context, which was omitted from the statement of claim, concerning the withdrawal of the criminal charges.

[25] The appellant's assertions that his comments on entering the peace bond should colour its significance are without merit. The order for a peace bond reflects a finding by the court that there was a basis for apprehending that the appellant would commit a breach of the peace: *R. v. White*, [1969] 1 C.C.C. 19

(B.C.S.C.). The appellant is not entitled to challenge the validity of that finding, except by means of an appeal. Hence this ground of appeal fails.

#### **Did the motions judge err in striking the appellant's claim for conspiracy?**

[26] The motions judge concluded that the appellant failed to plead whatever agreement he says existed, the relationship between the alleged conspirators, and any overt acts performed in furtherance of the conspiracy. We can see no error in these findings. We would not interfere with the motions judge's exercise of discretion in determining the appropriate remedy.

#### **Conclusion**

[27] For the reasons given, the appeal is allowed in part, and the order striking the statement of claim and dismissing the action against all defendants is set aside with respect to the claims for false arrest, false imprisonment, and negligence against the police officer defendants. This order is without prejudice to any further motions which may be made, either to strike, or for dismissal, once the pleadings are complete.

[28] Success on this appeal is significantly divided. Moreover, it is far from clear that any tenable cause of action exists. Costs of the appeal will therefore be in the cause.

“R.S. Abella J.A.”

“Janet Simmons J.A.”

“S.T. Goudge J.A.”

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[1] (2001), 52 O.R. (3d) 221 at 226

[2] *Mattick*, *supra*, at para 18.

[3] For example expiry of the two-year limitation period under the Highway Traffic Act R.S.O. 1990, c. H-8, in connection with a claim for property damage only, in circumstances where it is clear the discoverability rule does not apply.

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2011 CarswellOnt 4, 2011 ONSC 53

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2011 CarswellOnt 4, 2011 ONSC 53

Boyce v. Toronto Police Services Board

Dexter Boyce, Plaintiff and Toronto Police Services Board, John Feeney, Thomas Findlay, Kamaljeet Kang, Jeffrey Martin, Donald Herbert, Aaron Rodrigues, Donovan Smith, Anne-Marie Garisto, Mark McCullagh and various John Does, Defendants

Ontario Superior Court of Justice

Low J.

Heard: October 22, 2010

Judgment: January 5, 2011

Docket: CV-09-376697

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Counsel: Roy Wise, Leora Wise, for Plaintiff

Doug O. Smith, for Defendants, Toronto Police Services Board, Donald Hebert, Aaron Rodrigues, Donovan Smith, Anne-Marie Garisto, Mark McCullagh

Gary R. Clewley, for Defendants, John Feeney, Thomas Kindlay, Kamaljeet Kang, Jeffrey Martin

Subject: Civil Practice and Procedure; Torts; Public

Civil practice and procedure --- Limitation of actions — Actions in tort — Statutory limitation periods — Extension of time to bring action — General principles

Plaintiff was allegedly assaulted by police officers while in police custody on September 30, 2004 — Police defendants were prosecuted and convicted of assaulting shackled prisoner on April 17, 2007 — Plaintiff brought claim for damages for assault and battery on April 16, 2009 — Defendants brought motion for summary dismissal of plaintiff's action — Motion adjourned until determination of constitutionality of sections of Limitations Act — Action was commenced over 4-and-a-half years after day on which cause of action accrued — Statutory presumption was that

*plaintiff knew he had claim on September 30, 2004 and there was no evidence to rebut presumption — Claim was statute-barred having been issued more than 2 years following expiry of limitation period — Plaintiff consciously delayed commencing proceeding until after criminal proceeding — There was no evidence of disability following assault — While there was nexus of duties of care between defendants and plaintiff, there was no relationship of dependence — Ignorance of limitation period did not toll limitation period — There was no exemption for claims of damages resulting from state violence similar to exemption for sexual assault — Court did not have discretion to extend limitation period where plaintiff asserted special circumstances.*

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**Cases considered by Low J.:**

*Basarsky v. Quinlan* (1971), 1971 CarswellAlta 99, [1972] S.C.R. 380, [1972] 1 W.W.R. 303, 24 D.L.R. (3d) 720, 1971 CarswellAlta 135 (S.C.C.) — referred to

*Coutanche v. Napoleon Delicatessen* (2004), 72 O.R. (3d) 122, 2004 CarswellOnt 2655, 49 C.P.C. (5th) 34, 188 O.A.C. 15, 8 M.V.R. (5th) 193 (Ont. C.A.) — considered

*Frohlick v. Pinkerton Canada Ltd.* (2008), 2008 ONCA 3, 62 C.C.E.L. (3d) 161, 49 C.P.C. (6th) 209, 232 O.A.C. 146, 88 O.R. (3d) 401, 2008 CarswellOnt 66, 289 D.L.R. (4th) 639 (Ont. C.A.) — referred to

*Hill v. South Alberta Land Registration District* (1993), (sub nom. *Hill v. Alberta (South Alberta Land Registration District Registrar)*) 100 D.L.R. (4th) 331, (sub nom. *Hill v. Registrar of South Alberta Land Registration District*) 135 A.R. 266, 33 W.A.C. 266, [1993] 5 W.W.R. 47, 8 Alta. L.R. (3d) 379, (sub nom. *Hill v. Alberta (Registrar, South Alberta Land Registration District)*) 30 R.P.R. (2d) 186, 1993 CarswellAlta 307 (Alta. C.A.) — referred to

*Joseph v. Paramount Canada's Wonderland* (2008), 2008 CarswellOnt 3495, 2008 ONCA 469, 90 O.R. (3d) 401, 294 D.L.R. (4th) 141, 56 C.P.C. (6th) 14, 241 O.A.C. 29 (Ont. C.A.) — considered

*Luscar Ltd. v. Pembina Resources Ltd.* (1994), 24 Alta. L.R. (3d) 305, (sub nom. *Luscar Ltd and Norcen v. Pembina Resources Ltd.*) 162 A.R. 35, 83 W.A.C. 35, [1995] 2 W.W.R. 153, 1994 CarswellAlta 251 (Alta. C.A.) — referred to

*R. v. Groot* (2000), 2000 CarswellOnt 2973 (Ont. S.C.J.) — considered

**Statutes considered:**

*Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

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

Generally — referred to

s. 2 — considered

s. 2(1)(a)-2(1)(f) — considered

s. 4 — considered

s. 5 — considered

s. 5(1)(a) — considered

s. 5(1)(a)(iv) — considered

2011 CarswellOnt 4, 2011 ONSC 53

s. 5(1)(b) — considered

s. 10(1) — considered

s. 10(2) — considered

s. 16 — considered

s. 16(1)(h) — considered

MOTION by defendants for summary dismissal of plaintiff's action for being statute-barred.

**Low J.:**

1 The defendants have brought motions for summary dismissal of Mr. Boyce's action for damages resulting from an assault on him. Initially, the motion was brought by the defendants Toronto Police Services Board, Donald Hebert, Aaron Rodrigues, Donavan Smith, Anne-Marie Garisto and Mark McCullagh only. At the conclusion of argument, and on consent of the plaintiff, a parallel motion was brought by the other defendants on the basis that they adopt and rely on all of the arguments advanced by the original moving parties.

2 The central issue is whether the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B., applies to the plaintiff's claim.

3 This action arises out of an incident which took place on September 30, 2004. On that day, the plaintiff entered a guilty plea to a charge of failure to comply with his recognizance prohibiting him from possessing a cell phone. After the court appearance at Old City Hall, he was being held in the cells awaiting transport back to the Mimico Correctional Institution.

4 The statement of claim, which was issued on April 16, 2009, alleges that a number of the individual defendants assaulted the plaintiff, causing him personal injury. The plaintiff was taken to hospital where he remained for one week. He remained under a doctor's care until November 19, 2004.

5 There is no allegation in the statement of claim that the plaintiff was incapacitated for any period of time and there was no evidence adduced on this motion to the effect that the plaintiff was incapacitated for any period of time.

6 The plaintiff claims damages for assault and battery and for breach of his rights under the *Canadian Charter of Rights and Freedoms*.

7 The following are the salient facts alleged in the statement of claim.

8 After the plaintiff refused to clean up some juice that he had accidentally spilled in the holding cell, the defendants Feeney, Findlay, Kang, Martin, Hebert, Rodrigues, Smith and a number of unidentified officers knocked the plaintiff to the ground and collectively beat him. It is alleged that the defendant Findlay kicked him in the face, that the defendant Martin kicked him in the chest, and that both continued to beat him, leaving him in leg irons and handcuffs on the cell floor. It is alleged that the plaintiff asked the defendant Garisto to call the ambulance or the police and that she called neither. Instead, the defendants Kang, Rodrigues and other officers entered the cell and Kang punched the plaintiff, after which he was taken to the wagon for transport back to the Mimico Correctional facility.

2011 CarswellOnt 4, 2011 ONSC 53

9 It is alleged that on the trip to Mimico, the plaintiff was in pain, that he believed his ribs to be broken and that he could not walk, and that the defendant Hebert sank his fingers into the plaintiff's shoulder to deliberately cause pain and to force the plaintiff to walk.

10 During the trip to Mimico, the plaintiff called out for someone to call the police at traffic lights and stop signs.

11 After arrival at Mimico, the plaintiff was taken to the Trillium Health Centre, the Mimico hospital unit, for treatment.

12 At the hospital, the plaintiff gave a statement to a police officer at his own request.

13 There are a number of additional facts which are not in dispute.

14 The plaintiff is a 41 year old immigrant from Guyana who arrived in Canada in 1991.

15 After the incident of September 30, 2004, the defendants Feeney, Findlay, Kang and Martin were prosecuted and were convicted of assaulting a shackled prisoner. The findings of the court were handed down on April 17, 2007 after 14 days of trial. The convicted officers were sentenced to conditional sentences and were discharged from the police service. The defendants Hebert, Rodrigues and Smith were prosecuted and acquitted. The Crown appealed the conditional sentences imposed by the trial court on the four convicted officers and sought custodial sentences. The court of appeal varied the sentences by adding a custodial term to each of the sentences.

16 In response to the motion for summary dismissal, the plaintiff filed an affidavit which states, at paragraph 38:

I did not bring this action sooner because:

(i) I was not aware that a limitations period existed until I was so advised by my lawyers;

(ii) I was waiting until the criminal proceedings ended successfully to bring an action to ensure that I had a cause of action as I believed that the Defendants would lie and might be acquitted. If that occurred there would be little hope for me in an action; and

(iii) I was afraid of the Defendants and what they or their friends might do to me if I brought a civil law suit before they were convicted.

17 The legislation relevant to the disposition of the motion is found in sections 2, 4 and 5 of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B.

18 Section 2 provides:

2. (1) This Act applies to claims pursued in court proceedings other than,

(a) proceedings to which the *Real Property Limitations Act* applies;

(b) proceedings in the nature of an appeal, if the time for commencing them is governed by an Act or rule of court;

(c) proceedings under the *Judicial Review Procedure Act*;

- (d) proceedings to which the *Provincial Offences Act* applies;
- (e) proceedings based on the existing aboriginal and treaty rights of the aboriginal peoples of Canada which are recognized and affirmed in section 35 of the *Constitution Act, 1982*; and
- (f) proceedings based on equitable claims by aboriginal peoples against the Crown.

**Exception, aboriginal rights**

(2) Proceedings referred to in clause (1) (e) and (f) are governed by the law that would have been in force with respect to limitation of actions if this Act had not been passed.

19 The plaintiff's claim is a "claim pursued in court proceedings" and is not one of the classes of proceedings exempted under s. 2(1)(a) through (f).

20 Section 4 of the Act provides:

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.

21 Section 5 of the act provides:

5. (1) A claim is discovered on the earlier of,

- (a) the day on which the person with the claim first knew,
  - (i) that the injury, loss or damage had occurred,
  - (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
  - (iii) that the act or omission was that of the person against whom the claim is made, and
  - (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
- (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

**Presumption**

(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

**Demand obligations**

(3) For the purposes of subclause (1) (a) (i), the day on which injury, loss or damage occurs in relation to a demand obligation is the first day on which there is a failure to perform the obligation, once a demand for the per-

formance is made.

### Same

(4) Subsection (3) applies in respect of every demand obligation created on or after January 1, 2004.

22 This action was commenced on April 16, 2009, over 4 1/2 years after the day on which the cause of action accrued. On the day of the incident, September 30, 2004, the plaintiff himself complained that he had been assaulted, complained of injury, sought the police, and gave a statement to the police while in hospital.

23 Section 5(1)(a)(iv) does not import an idiosyncratic limitation period calibrated by the claimant's familiarity with or ignorance of the law. The test is an objective one. While it is possible to envisage that a new kind of right might arise that has not been hitherto protected, thus making it arguable that a civil proceeding might not be seen objectively as an appropriate means to seek to remedy, a battery causing personal injury is a classic example of the kind of wrong that is appropriate for redress by court action. A citizen is presumed to know the law of the land.

24 The statutory presumption is that the plaintiff knew he had a claim on September 30, 2004, and there is no evidence that rebuts the presumption.

25 Nor does s. 5(1)(b) assist. Section 5(1)(b) is the codification of the common law exception from the rigor of the limitation period based on lack of discoverability, with reasonable diligence, of the cause of action. It has no application in the absence of displacement of the presumption of knowledge of the existence of a claim.

26 *Prima facie*, the claim is statute barred, having been issued more than two years following the expiry of the limitation period.

27 The plaintiff argues that the limitation period should not be applied to his claim.

28 The plaintiff asserts that the provisions of s. 10(1) and (2) of the Act apply to him.

29 Section 10(1) and (2) provide:

10. (1) The limitation period established by section 4 does not run in respect of a claim based on assault or sexual assault during any time in which the person with the claim is incapable of commencing the proceeding because of his or her physical, mental or psychological condition.

### Presumption

(2) Unless the contrary is proved, a person with a claim based on an assault shall be presumed to have been incapable of commencing the proceeding earlier than it was commenced if at the time of the assault one of the parties to the assault had an intimate relationship with the person or was someone on whom the person was dependent, whether financially or otherwise.

30 In my view, neither s. 10(1) nor 10(2) applies to the plaintiff. Although the claim is based on assault, there is no evidence that the plaintiff was at any time incapable of commencing the proceeding because of a physical, mental or psychological condition. To the contrary, it appears that the plaintiff consciously delayed commencing his proceeding until after the criminal proceeding was concluded and some of the defendants were convicted. There is no evidence, however, of any disability at any time following the assault, and to the contrary, it is apparent that the plaintiff gave a statement to police concerning the incident, subsequently testified at the criminal proceedings and was prepared to

2011 CarswellOnt 4, 2011 ONSC 53

testify at the appeal from discharge proceedings.

31 Section 10(2) is not engaged because the plaintiff was neither in an intimate relationship with any of the defendants nor was he a dependent on any of them. The fact of physical custody in the particular circumstances described in the statement of claim does not render the relationship between that of the plaintiff and the defendants one of dependence. For a short period of time, there is a nexus between the plaintiff and those required to transport him from the court house cells to the correctional institute. That nexus may give rise to certain duties of care and other duties to refrain from the kinds of action of which certain of the defendants were convicted (as in *R. v. Groot*, 2000 CarswellOnt 2973 (Ont. S.C.J.), at 33 ). It is not sufficient, however, to create a relationship of dependence.

32 I therefore cannot accept the argument that s. 10(1) or (2) exempts the plaintiff's claim from the two year limitation period.

33 The plaintiff submits that s. 5(1)(b) in combination with s. 5(1)(a)(iv) applies to extend the limitation period to a date two years following the criminal convictions on the grounds that a reasonable person in the particular circumstances and with the particular abilities of the plaintiff would have waited for the criminal conviction prior to bringing an action. It is submitted that the plaintiff only knew that a proceeding was an appropriate way of proceeding once the conviction was entered.

34 I am not able to accede to this argument. First, it is unsupported by the evidence. The plaintiff's evidence, as reproduced above and read as a totality is not that he believed that a conviction was a precondition of the existence of a cause of action but rather that he did not think that he had a chance of succeeding unless the officers were convicted.

35 Second, as I have stated above, the effect of s. 5(1)(a)(iv) is not to create a limitation period that varies with the state of legal knowledge of the claimant. One of the chief purposes of any limitations regime is to foster certainty. The construction of s. 5(1)(a)(iv) urged on behalf of the plaintiff would have the exact opposite effect as the limitation period would lengthen proportionately with the degree of ignorance of the claimant.

36 Third, the submission that the plaintiff's situation engages the discoverability exemption in s. 5(1)(b) by reason of any or a combination of his fear of the defendants or their friends, of the plaintiff's ignorance of the limitation period, or of his belief that in the absence of a conviction there "would be little hope for me in an action" is untenable. Section 5(1)(b) is engaged only when that date is earlier than the date under s. 5(1)(a). Here, it is apparent that the date under s. 5(1)(a) is September 30, 2004.

37 It is well established that ignorance of a limitation period does not toll the limitation period. Citing *Luscar Ltd. v. Pembina Resources Ltd.* (1994), [1995] 2 W.W.R. 153 (Alta. C.A.) and *Hill v. South Alberta Land Registration District* (1993), 100 D.L.R. (4th) 331 (Alta. C.A.), the Court of Appeal reconfirmed in *Coutanche v. Napoleon Delicatessen* (2004), 72 O.R. (3d) 122 (Ont. C.A.) that error or ignorance of the law does not postpone the limitation period:

[18] The plaintiffs' ignorance of the limitation period is referred to three times in the Reasons and submissions were made to us that the motion judge had erred in giving any weight to this fact. Reference was made to the decision of the Alberta Court of Appeal in *Hill* where the point was made that error as to, or ignorance of the law did not postpone the running of a limitation period. A slightly fuller discussion of the point is found in *Luscar* at paragraph 127:

What is it that must be discovered? Discovery applies to the facts, not the law. This point is made in the recent decision of this court in *The Royal Canadian Legion Norwood (Alberta) Branch 178 v. The City of Edmonton* (1994), 149 A.R. 25, 16 Alta. L.R. (3d) 305 (C.A.). In that case, the issue of whether s. 4(1)(e) of the *Limitations Act* refers to discovery of the facts or the law was directly addressed at p. 9 where Lieberman J.A.



adopted the reasoning of an earlier decision in the same court:

The issue of whether "discovery" applies to the facts or to the law or to both was addressed by this court in *Hill v. South Alberta Land Registration District* (1993), 135 A.R. 266, 33 W.A.C. 266, 8 Alta. L.R. (3d) 379. In that decision Côté, J.A., delivering the unanimous judgment of the court, referred to a case comment on the trial judgment then under appeal and said at p. 385:

Discoverability relates to facts, not law. Error or ignorance of the law, or uncertainty of the law, does not postpone any limitation period.

[19] Thus, to the extent that the motion judge relied on the plaintiffs' unawareness of the limitation period in her analysis of the discoverability issue, she was in error. Nevertheless, the plaintiffs' ignorance of the existence of a limitation is a possible factor in the good faith analysis under s. 2(8) of the FLA.

38 The plaintiff next raises s. 16 as a source of relief from the limitation period. Section 16 provides:

16. (1) There is no limitation period in respect of,

- (a) a proceeding for a declaration if no consequential relief is sought;
- (b) a proceeding to enforce an order of a court, or any other order that may be enforced in the same way as an order of a court;
- (c) a proceeding to obtain support under the Family Law Act or to enforce a provision for support or maintenance contained in a contract or agreement that could be filed under section 35 of that Act;
- (d) a proceeding to enforce an award in an arbitration to which the Arbitration Act, 1991 applies;
- (e) a proceeding under section 8 or 11.2 of the Civil Remedies Act, 2001;
- (f) a proceeding by a debtor in possession of collateral to redeem it;
- (g) a proceeding by a creditor in possession of collateral to realize on it;
- (h) a proceeding arising from a sexual assault if at the time of the assault one of the parties to it had charge of the person assaulted, was in a position of trust or authority in relation to the person or was someone on whom he or she was dependent, whether financially or otherwise; [Emphasis added.]
- (i) a proceeding to recover money owing to the Crown in respect of,
  - (i) fines, taxes and penalties, or
  - (ii) interest that may be added to a tax or penalty under an Act;
- (j) a proceeding described in subsection (2) that is brought by,
  - (i) the Crown, or

(ii) a delivery agent under the *Ontario Disability Support Program Act, 1997* or the *Ontario Works Act, 1997*; or

(k) a proceeding to recover money owing in respect of student loans, medical resident loans, awards or grants made under the *Ministry of Training, Colleges and Universities Act*, the *Canada Student Financial Assistance Act* or the *Canada Student Loans Act*.

**Same**

(2) Clause (1) (j) applies to proceedings in respect of claims relating to,

(a) the administration of social, health or economic programs; or

(b) the provision of direct or indirect support to members of the public in connection with social, health or economic policy.

**Same**

(3) Without limiting the generality of subsection (2), clause (1) (j) applies to proceedings in respect of claims for,

(a) the recovery of social assistance payments, student loans, awards, grants, contributions and economic development loans; and

(b) the reimbursement of money paid in connection with social, health or economic programs or policies as a result of fraud, misrepresentation, error or inadvertence.

**Conflict with s. 15**

(4) This section and section 17 prevail over anything in section 15.

39 The plaintiff argues that his situation should be treated as analogous to that of victim of sexual assault by a person who was in a position of trust or authority in relation to the person or was someone on whom he or she was dependent, whether financially or otherwise. It is argued that shackled prisoners in police custody are at the mercy of court officers who exercise discretion that affects their welfare and that the administration of justice and the rule of law are wholly contingent on the preservation of an honest police force in whom the public trusts to act in the best interest of the public. The plaintiff submits that the policy reasons for exempting victims of sexual assault by persons upon whom they are dependent are equally applicable to victims of state violence and that the policy should be so extended.

40 I am unable to accept this argument. Had the legislature intended to exempt claims for damages resulting from state violence, that class of claim would have been enumerated under the various types of claims set out in s. 16. The policy underlying the exemption for victims of sexual assault by persons in a position of trust or authority or by persons upon whom the victim is a dependent is grounded in the likelihood that the dynamic of the relationship will impede the autonomy of the victim. In my view, there is no ambiguity in the legislation that would militate in favour of adding a class of claim to s. 16 that the drafters of the Act did not include.

41 The plaintiff's final argument is that the common law doctrine of special circumstances should override the two year limitation period in the Act. It is said that the plaintiff was a member of a class of vulnerable persons while in custody, and a victim of abuse of power by an organ of the state. The plaintiff's factum argues that "allowing court officers who abuse their authority to evade liability will corrupt public confidence in the justice system, encourage

2011 CarswellOnt 4, 2011 ONSC 53

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2011 CarswellOnt 4, 2011 ONSC 53

officers to delay criminal proceedings and encourage criminals to resist arrest. Without the threat of meaningful civil liability, no sufficient deterrence existed to prevent other officers from abusing their authority. Society is prejudiced by providing impunity to public servants who abuse their power. The plaintiff submits that such constitutes special circumstances."

42 The plaintiff relies on *Basarsky v. Quinlan* (1971), [1972] S.C.R. 380 (S.C.C.) at paras. 11 - 13, and *Frohlick v. Pinkerton Canada Ltd.* (2008), 88 O.R. (3d) 401 (Ont. C.A.) at para. 28.

43 The doctrine of special circumstances is no longer viable in the law of limitations in Ontario. In *Joseph v. Paramount Canada's Wonderland*, [2008] O.J. No. 2339, 2008 ONCA 469, 294 D.L.R. (4th) 141, 56 C.P.C. (6th) 14, 2008 CarswellOnt 349590 O.R. (3d) 401, 241 O.A.C. 29 (Ont. C.A.), the Court of Appeal had occasion to consider the application of special circumstances under the *Limitations Act, 2002*. At paragraph 13 *et seq.* the Court stated:

The question to be answered now is whether the legislature intended to preserved the court's common law discretion to extend limitation periods under the new Act by applying the doctrine of special circumstances. As a matter of statutory interpretation, I have concluded that the answer must be no.

The motion judge in this case did not refer to s. 20 of the new Act, but instead, relied on the special circumstances doctrine developed at common law and applied under Rule 26.01 and Rule 5.04(2). In fairness to the motion judge, the parties did not address the effect of the new Act on the special circumstances doctrine and appeared to assume that it was applicable. Instead, the parties focused on whether the doctrine could be applied to relieve against the expiry of a limitation period where no action had been commenced in time, in contrast to case where a new claim or a new party is sought to be added to an existing action that was commenced in time.

Because s. 4 of the new Act mandates a two -year limitation period "[u]nless this Act provides otherwise", the court must look in the Act for the authority to derogate from the application of the two-year limitation period. These opening words compel the conclusion that the new Act is intended to be comprehensive.

No specific provision in the new Act refers to the doctrine of special circumstances, or specifically allows a court to extend or suspend the running of the limitation period based on special circumstances. To the contrary, s. 21 of the Act precludes the addition of parties to an existing action after the expiry of a limitation period. The late addition of parties to an existing action was one of the main situations where the doctrine of special circumstances was traditionally applied at common law and under Rule 5.04(2).

44 As the court does not have a discretion under the *Limitations Act, 2002* to extend the limitation period where plaintiff asserts special circumstances, it is unnecessary to consider whether special circumstances have been shown in this case.

45 For the foregoing reasons, I have come to the conclusion that the *Limitations Act, 2002* does apply to the plaintiff's claim.

46 Because of lack of time on the day this motion was heard, the plaintiff's challenge to the constitutionality of ss. 4 and 5 of the *Limitations Act, 2002* was not argued. The matter was left on the basis that I would rule first on whether the *Limitations Act, 2002* applied. If the answer was no, the plaintiff's constitutional question would be moot. If the answer was yes, the parties, and counsel for the Attorney General, would return to argue the constitutional issue.

47 I therefore defer for the time being either granting or dismissing the defendants' motion for summary dismissal.

48 The parties may contact my assistant to arrange a date for the hearing of the balance of the matter.

2011 CarswellOnt 4, 2011 ONSC 53

*Motion adjourned.*

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## CED Torts II.3

Canadian Encyclopedic Digest  
Torts  
II — Principles of Liability  
3 — Motive

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## II.3

See Canadian Abridgment: [TOR.XXII](#) Torts — Miscellaneous; [TOR.XIV.2.b.iv](#) Torts — Malicious prosecution and false imprisonment — Establishing elements — **Malice** — Motive imputing **malice**

**§23** Motive is distinct from intention. Intention refers to the defendant's desire to bring about certain consequences; motive is the underlying reason for the conduct.[\[FN1\]](#) Except in cases of malicious prosecution, injurious falsehood, abuse of process, maintenance, abuse of public office and conspiracy, the motive for a tortious act is irrelevant. An act that is legal in itself is not made illegal because the motive of the individual committing the act is bad, that is, done with the intent to injure or to effect some ulterior purpose.

**§24** If conduct is tortious, a good motive will not excuse the defendant. If conduct is lawful apart from the motive, a bad motive will not make the defendant liable.[\[FN2\]](#) Where the defendant's conduct is tortious, liability can be imposed, even where the plaintiff actually benefits from the defendant's actions[\[FN3\]](#) or where the defendant merely intends to play a practical joke.[\[FN4\]](#)

**§25** A bad intent may render illegal an act done in combination with others which would have been legal if committed by one person only.[\[FN5\]](#) A bad or wrongful motive will defeat the defence of privilege in an action for defamation.[\[FN6\]](#)

[FN1](#). Linden, *Canadian Tort Law*, 6th ed. (1997), pp. 35-37.

[FN2](#). *Allen v. Flood* (1897), [1898] A.C. 1 (U.K. H.L.); *Sorrell v. Smith* (1925), [1925] A.C. 700 (U.K. H.L.); Winfield and Jolowicz on Tort, 14th ed. (1994), p. 52.

[FN3](#). *Mulloy v. Sang* (1935), [1935] 1 W.W.R. 714 (Alta. C.A.) (surgeon amputating plaintiff's hand to prevent blood poisoning).

[FN4](#). *Wilkinson v. Downton* (1897), [1897] 2 Q.B. 57 (Eng. Q.B.) (defendant informing plaintiff that her husband seriously injured); **but see** *Klein v. Jenoves* (1932), [1932] O.R. 504 (Ont. C.A.) (absence of evil intent being considered in mitigation of damages).

[FN5](#). *Sorrell v. Smith* (1925), [1925] A.C. 700 (U.K. H.L.) (citing effect of decisions in *Allen v. Flood* and *Quinn v. Leatham*); **see also** Conspiracy.

[FN6](#). See Defamation.



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2004 CarswellOnt 4565, 73 O.R. (3d) 119



2004 CarswellOnt 4565, 73 O.R. (3d) 119

Charlton v. Beamish

Paul Charlton (Applicant) and Patricia Ellen Beamish (Respondent)

Ontario Superior Court of Justice

Wein J.

Heard: June 7, 2004  
Judgment: November 8, 2004  
Docket: 03BN-7552

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Counsel: Timothy Lowman for Applicant

Amani Oakley for Respondent

Subject: Civil Practice and Procedure; Torts; Public

Civil practice and procedure --- Limitation of actions — Actions in tort — Specific actions — Actions against particular parties — Doctors and hospitals

Plaintiff was patient of defendant, doctor of chiropractic medicine — On February 10, 2001, plaintiff attended for appointment and felt sharp pain after chiropractic procedure — After plaintiff left office she continued to feel pain in her lower back — After physical exam on July 12, 2002, specialist concluded that plaintiff had chronic mechanical low back pain that had been aggravated by chiropractic manipulation in February of 2001 — Statement of Claim was filed on August 25, 2003 and served on defendant on January 23, 2004 — Defendant moved under Rule 21.01(1)(a) of Rules of Civil Procedure for determination whether action was statute-barred by operation of one-year limitation period set out in Regulated Health Professions Act, 1991 — Motion granted — By July 12, 2002, plaintiff was aware of material facts required to base action — Limitations period had commenced by July 12 and action was statute-barred in law.

**Cases considered by Wein J.:**

*Aguonie v. Galion Solid Waste Material Inc.* (1998), 156 D.L.R. (4th) 222, 107 O.A.C. 114, 1998 CarswellOnt 417, 38 O.R. (3d) 161, 17 C.P.C. (4th) 219 (Ont. C.A.) — referred to

*Beardsley v. Ontario* (2001), 2001 CarswellOnt 4137, 151 O.A.C. 324, 57 O.R. (3d) 1, 17 C.P.C. (5th) 94 (Ont. C.A.) — considered

2004 CarswellOnt 4565, 73 O.R. (3d) 119

*Boutin v. Co-Operators Life Insurance Co.* (1999), 1999 CarswellOnt 18, [1999] I.L.R. I-3660, 42 O.R. (3d) 612, 118 O.A.C. 245, 8 C.C.L.I. (3d) 47, 31 C.P.C. (4th) 17 (Ont. C.A.) — considered

*Findlay v. Holmes* (1998), 1998 CarswellOnt 2848, 111 O.A.C. 319 (Ont. C.A.) — referred to

*Geo. A. Kelson Co. v. Ellis-Don Construction Ltd.* (1998), 1998 CarswellOnt 1169, 38 C.L.R. (2d) 215 (Ont. Gen. Div.) — referred to

*Ioannidis v. Hawkings* (2001), 2001 CarswellOnt 3238, 32 C.C.L.I. (3d) 72, 16 M.V.R. (4th) 282 (Ont. S.C.J.) — referred to

*Ioannidis v. Hawkings* (2003), 2 C.C.L.I. (4th) 169, 2003 CarswellOnt 1717 (Ont. C.A.) — referred to

*MacDonald v. Ontario Hydro* (1994), 19 O.R. (3d) 529, 6 C.C.P.B. 305, C.E.B. & P.G.R. 8196, 38 C.P.C. (3d) 378, 1994 CarswellOnt 1073 (Ont. Gen. Div.) — referred to

*MacDonald v. Ontario Hydro* (1995), 10 C.C.P.B. 1, 26 O.R. (3d) 401, (sub nom. *C.U.P.E. - C.L.C., Ontario Hydro Employees Union, Local 1000 v. Ontario Hydro*) 86 O.A.C. 37, (sub nom. *C.U.P.E. - C.L.C., Ontario Hydro Employees Union, Local 1000 v. Ontario Hydro*) C.E.B. & P.G.R. 8243, 1995 CarswellOnt 1271 (Ont. Div. Ct.) — referred to

*MacMillan v. McDermid* (2003), 66 O.R. (3d) 632, 2003 CarswellOnt 3297, 42 C.P.C. (5th) 246 (Ont. S.C.J.) — referred to

*MacMillan v. McDermid* (2004), 70 O.R. (3d) 252, 2004 CarswellOnt 948 (Ont. C.A.) — considered

*McSween v. Louis* (2000), 2000 CarswellOnt 1934, 187 D.L.R. (4th) 446, 132 O.A.C. 304 (Ont. C.A.) — referred to

*Peixeiro v. Haberman* (1997), 217 N.R. 371, 1997 CarswellOnt 2928, 1997 CarswellOnt 2929, 151 D.L.R. (4th) 429, 103 O.A.C. 161, 30 M.V.R. (3d) 41, [1997] 3 S.C.R. 549, 12 C.P.C. (4th) 255, 46 C.C.L.I. (2d) 147 (S.C.C.) — considered

*Salvador v. Mather* (1998), 1998 CarswellOnt 3111, 23 C.P.C. (4th) 20, 41 O.R. (3d) 289, 39 M.V.R. (3d) 247 (Ont. Gen. Div.) — referred to

*Smyth v. Waterfall* (2000), 2000 CarswellOnt 3324, 50 O.R. (3d) 481, 136 O.A.C. 348, 4 C.P.C. (5th) 58 (Ont. C.A.) — considered

*Soper v. Southcott* (1998), 111 O.A.C. 339, 1998 CarswellOnt 2906, 39 O.R. (3d) 737, 43 C.C.L.T. (2d) 90 (Ont. C.A.) — considered

*Tizard Estate v. Ontario* (2001), 2001 CarswellOnt 3686, 41 E.T.R. (2d) 149 (Ont. S.C.J.) — referred to

*Toronto Dominion Bank v. Deloitte, Haskins & Sells* (1991), 8 C.C.L.T. (2d) 322, 5 O.R. (3d) 417, 1991 CarswellOnt 768 (Ont. Gen. Div.) — referred to

**Statutes considered:**

2004 CarswellOnt 4565, 73 O.R. (3d) 119

*Regulated Health Professions Act, 1991*, S.O. 1991, c. 18

s. 89 — considered

s. 89(1) — considered

**Rules considered:**

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

Generally — referred to

R. 20 — referred to

R. 21 — referred to

R. 21.01 — referred to

R. 21.01(1)(a) — considered

R. 21.01(2) — referred to

R. 21.01(2)(a) — referred to

R. 22 — referred to

MOTION by defendant to dismiss action as time-barred.

**Wein J.:**

1 The Defendant moved under Rule 21.01 (1)(a) for a determination of the issue of whether this action is statute-barred by operation of the one year limitation period set out in the *Regulated Health Professions Act*, S.O. 1991, Ch. 18, s. 89(1).[FN1] Two issues arise: first, the issue of the scope of Rule 21.01(1)(a) and its application to consideration of a limitation period, and secondly the substantive issue of whether the action should be held to be statute-barred.

**Facts**

2 The Plaintiff, Ms. Beamish, was a patient of the Defendant Paul Charlton, a doctor of chiropractic medicine. Ms. Beamish had attended at Mr. Charlton's office on several occasions for treatment of chronic intermittent low back pain.

3 The relevant facts are set out in the Statement of Claim. These facts are accepted as accurate by the Defendant for the purposes of the motion. No reply was made to the Statement of Defence or Amended Statement of Defence filed.

4 On February 10, 2001 Ms. Beamish attended for a chiropractic appointment. Mr. Charlton manipulated her

2004 CarswellOnt 4565, 73 O.R. (3d) 119

lower back using considerably more force than he had used in the past. He used body weight to increase the force of the manipulation. He repeated the manipulation three times. Ms. Beamish heard a very loud crack after the third manipulation and experienced pain.

5 After she left the office she continued to feel pain in her lower back. She took pain medication. Her back felt unstable. The following day, — February 11, 2001, — while crossing the street Ms. Beamish collapsed and drove herself to the emergency department of Toronto Western Hospital. There, she was given morphine and other pain killers and advised to see an orthopaedic specialist. An x-ray revealed no fracture but showed a fusion of the L5 vertebrae with the sacrum.

6 As directed by the hospital doctors, Ms. Beamish was seen by an orthopaedic surgeon shortly thereafter, on February 15th. The surgeon, Dr. Chapman, relied on the x-rays taken four days earlier, and noted that Ms. Beamish had only four lumbar vertebrae with the fifth having been assimilated into the sacrum. He indicated that she did not need a CT scan and did not believe that she had a disc herniation. He indicated that she most likely had facet joint synovitis, triggered by the chiropractic manipulation.

7 On February 20<sup>th</sup> Ms. Beamish went to her family doctor still complaining about pain in her lower back. She expressed concerns about the pain and was advised that with rest and time the condition would improve. She attended physiotherapy two to four times a week. At some point during treatment the physiotherapist expressed concern that she might have a herniated disc and recommended that she speak to other health providers and get other tests such as a CT scan or MRI. Ms. Beamish continued to attend doctor's appointments and was told that a combination of exercise, rest, and painkillers would be sufficient to resolve the condition.

8 Subsequently, in about January of 2002, Ms. Beamish also began to report to her family doctor that she was experiencing pain in her buttocks, leg and foot on the right side. In June of 2002 she indicated to her doctor that the level of pain from her back was impacting on her ability to perform normal activities of daily living. She was referred to an orthopaedic surgeon who declined to see her. She was subsequently referred to a specialist in physical medicine and rehabilitation.

9 After a physical exam on July 12, 2002, the specialist concluded that Ms. Beamish had chronic mechanical low back pain which had been aggravated by the chiropractic manipulation in February of 2001. No prognosis or treatment regime was set up: A CT scan was scheduled. The CT scan on July 25, 2002 revealed that Ms. Beamish had a large broad-based disc projecting posteriorly on the right side at the L4-L5 level: a disc herniation. Ms. Beamish was told about these results approximately a week after the test.

10 The Statement of Claim suggests that it was at this time, early August of 2002, that Ms. Beamish learned for the first time the nature of the injury, that it was permanent, that treatment options were limited, and that she might require surgery to correct the damaged disc. In August, a foot specialist provided a summary of foot and leg problems that were said to have resulted from compensating for the pain in her back and right leg. Orthotics were prescribed.

11 In October 2002, the orthopaedic surgeon who had originally declined to see Ms. Beamish saw her. He advised her that her injury was permanent and that a disctomy would have only a fifty percent chance of success. He scheduled her for an MRI. The MRI testing was done on January 3, 2003. In February 2003, an assessment was given confirming, among other things, the disc herniation.

12 The Notice of Action was filed on July 25, 2003. The Statement of Claim was filed on August 25, 2003 and served on the Defendant on January 23, 2004.

#### Scope of Rule 21.01(1)(a)

2004 CarswellOnt 4565, 73 O.R. (3d) 119

13 *The Rules of Civil Procedure* provide 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.

14 The Defendant argues that a motion under Rule 21.01(1)(a) for determination of a limitations issue before trial is permitted when the determination does not rely on disputed facts. In this case, for the purposes of the motion, the Defendant accepts the allegations in the statement of claim as factually correct. The pleadings in the action were closed on March 23, 2004. The Plaintiff delivered no Reply to the amended Statement of Defence served on March 12, 2004 and accordingly, all of the facts upon which the determination of the limitations issue can be assessed are as set out in the Statement of Claim.

15 In *Boutin v. Co-Operators Life Insurance Co.* (1999), 42 O.R. (3d) 612 (Ont. C.A.), the Ontario Court of Appeal held that the issue whether the limitation period was a bar to the Plaintiff's action was not a question of law which should have been resolved on a Rule 21.01(1)(a) motion because the issue had a significant factual component and was therefore a matter to be addressed at trial. In *Boutin*, additional evidence, including medical information and correspondence, the Plaintiff's affidavit, and a transcript of her examination for discovery was before the motions judge on the Rule 21.01(1)(a) motion, apparently notwithstanding the restrictive provisions of subsection 2(a) of the Rule. The Court briefly analyzed the difference among Rules 20, 21 and 22, all of which seek to shorten or eliminate trials and thus reduce the cost of litigation. While the Rules are clearly related in their function, the Court noted that they are not randomly interchangeable.

16 Under Rule 20, if the only genuine issue for trial is a question of law, the motions judge may determine the question and grant judgment accordingly. However, this is to be done only where there are no facts in dispute which may give rise to a genuine issue for trial. Motions under Rules 21 and 22 by contrast focus on questions of law raised by the pleadings or stated by agreement. In general, there will be no need for evidence on a Rule 21.01(1)(a) motion since the question of law must be raised by the pleadings itself.

17 In ruling that the decision concerning limitation periods ought not to have been made on a Rule 21.01(1)(a) motion, the Court held that:

The application of the limitation period *in this case* depends upon findings of fact for its resolution.

18 The Court went on to say that the inferences to be drawn from the evidence were not so clear as to permit the question of law in issue to be resolved on a Rule 21.01(1)(a) motion. Accordingly, it appears that there is some residual scope under this rule to determine a limitation period issue if the determination does not depend on disputed facts.

19 In a subsequent case under Rule 20, where the legal issue of the application of the limitation period in s. 89(1) of the *Regulated Health Professions Act* was also raised, the Court of Appeal, in a brief endorsement reiterated that:

"this court has made it clear that it is generally not appropriate to grant summary judgment when the rule of discoverability is central to the resolution of the limitation issue. In our view, the evidence is not clear. There are facts in dispute that constitute a genuine issue for trial." *MacMillan v. McDermid*, [2004] O.J. No. 937 (Ont. C.A.), rev'g [2003] O.J. No. 3429 (Ont. S.C.J.).

20 In *MacMillan*, affidavit material and cross-examinations formed part of the record before the learned motions judge. The motions judge noted that the principle in *Aguonie v. Galion Solid Waste Material Inc.*, [1998] O.J. No. 459 (Ont. C.A.), confirmed in *Smyth v. Waterfall*, [2000] O.J. No. 3494 (Ont. C.A.) is that:

generally speaking, it is not appropriate for a motions judge, hearing a motion for summary judgment where the application of the discoverability rule is central to its resolution, to resolve this issue.

2004 CarswellOnt 4565, 73 O.R. (3d) 119

21 However, the motions judge found a clear and unequivocal admission by the Plaintiff of his knowledge of the facts in support of his claim against the Defendant. There is no issue that the motions judge correctly applied the burden on a Rule 20 motion: the Court of Appeal simply found that in their view the evidence was not clear because there were facts in dispute that constituted a genuine issue for trial.

22 It may be noted that in both of these cases, affidavit evidence was before the motions judge, underlying the finding in the Court of Appeal that there was a factual component to the decision that barred a decision being made under either Rule 20 or 21 prior to trial.

23 Subsequent to the argument on the motion before me counsel for the Plaintiff filed with the court, without leave and by way of an unsolicited letter, a number of cases dealing with the issue of the test under Rule 21.01. These cases were filed in support of the argument previously made orally that the onus on the moving party was to show that it is plain, obvious and beyond doubt that the claim could not succeed. These cases included *Toronto Dominion Bank v. Deloitte, Haskins & Sells*, [1991] O.J. No. 1618 (Ont. Gen. Div.), *MacDonald v. Ontario Hydro*, [1994] O.J. No. 1670 (Ont. Gen. Div.) at page 5, *MacDonald v. Ontario Hydro*, [1995] O.J. No. 3048 (Ont. Div. Ct.) at page 5, *Tizard Estate v. Ontario*, [2001] O.J. No. 4087 (Ont. S.C.J.) at page 6, paragraph 18 and *Geo. A. Kelson Co. v. Ellis-Don Construction Ltd.*, [1998] O.J. No. 1172 (Ont. Gen. Div.), pages 11-12, paragraphs 41 and 42.

24 Counsel for the Defendant disputed the propriety of the manner in which these submissions had been received, correctly in my view. However on invitation to reply in writing or by way of further oral argument, the Defendant declined in the interests of expediency.

25 In rare circumstances it is appropriate for counsel to approach the court with additional argument or caselaw prior to a reserve decision being reached. However, in my view that practice should only be undertaken in exceptional circumstances, such as where a subsequent appellate authority is released, or where both counsel agree to the filing of additional caselaw. This was not such a case. Nonetheless, in light of the nature of the relief being sought and the effect of an adverse ruling on the plaintiff's rights, I have considered these additional cases.

26 It is clear from its wording and as noted in the cases that Rule 21.01(1)(a) is a discretionary rule. The determination of whether an issue is a question of law, a question of fact, or a question of mixed law and fact is not always easy to determine. Obviously the Court of Appeal has given clear direction that where there is any factual component to the issue relating to the application of the discoverability principle to the limitation period, the matter must be dealt with at trial.

27 However, in some circumstances the question of whether a limitation period has expired has been held to be a pure question of law. In *Beardsley v. Ontario* (2001), 57 O.R. (3d) 1 (Ont. C.A.), the Court of Appeal noted that the expiry of a limitation period is a defence that must be pleaded before it can be concluded under Rule 21.01(1)(a) that the case should be struck.

28 In *Soper v. Southcott*, [1998] O.J. No. 2799 (Ont. C.A.), the Court of Appeal considered the dismissal of an action that was found to be statute-barred on a motion under Rule 20. The Court affirmed that the test under Rule 20 had been met, and there was no genuine issue for trial, notwithstanding the application of the discoverability principle to the limitation period.

29 Accordingly, while it is generally not appropriate to grant summary judgment or determine the legal issue of the impact of a limitations period in a case where the assessment of the limitations period is affected by the discoverability rule, there are cases where there is no factual component, or where the result is plain and obvious. The motion must be assessed in that context.



### Limitations Issue

30 For the purposes of the motion, there are no disputed material facts. The Defendant relies on the facts set out in the Statement of Claim. It is clear from the Statement of Claim that the issue of discoverability is contemplated and that the Plaintiff was aware of the potential problem with respect to the limitation period. The limitations defence is pleaded. It is the position of the Defendant that the Plaintiff knew all of the material facts more than a year before the claim was filed in July of 2003.

31 It is acknowledged that the limitation period applicable to the issue in this case is set out in s. 89(1) of the *Regulated Health Professions Act*, S.O. 1991, c. 18, s. 89(1). That section reads as follows:

No person who is or was a member is liable to any action arising out of negligence or malpractice in respect of professional services requested of or rendered by the person unless the action is commenced within one year after the date when the person commencing the action knew or ought to have known the fact or facts upon which the negligence or malpractice is alleged.

32 The Amended Statement of Defence pleads that the limitation period commenced on February 15, 2001, because as of that date Ms. Beamish alleges that she knew she had suffered damage and that her medical specialist had identified the chiropractic treatment of Dr. Charlton as the cause of that damage.

33 It is pleaded in the alternative that the limitation period commenced on or before July 12, 2002, because:

(a) Ms. Beamish indicates in the Statement of Claim that the back pain she experienced in February, 2001, was identified as being aggravated by chiropractic adjustments continued through 2001 and became exacerbated in 2002;

(b) in the Statement of Claim it is acknowledged that Ms. Beamish's physiotherapist suspected a herniated disc and that in June, 2002 Ms. Beamish knew she had chronic back pain which was seriously affecting her daily living activities; and

(c) it is also acknowledged in the Statement of Claim that on July 12, 2002 Ms. Beamish was advised that she had "chronic mechanical low back pain that had been aggravated by chiropractic manipulation in February, 2001."

34 It is clear from the Statement of Claim that the issue concerning the limitation period was anticipated prior to the action being launched, and that the question of discoverability was accordingly addressed. The Statement of Claim sets out in detail the medical history. Events concerning what is termed "The Injury and Subsequent Treatment" cover events from the causative incident on February 5, 2001 through to the increase in pain in January of 2002. Events from February 11, 2001 to February 28, 2003 are set out under the heading "Discovery of Nature and Extent of Injuries". Specifically, it is noted that:

a) on February 15, 2001 the Plaintiff was advised that she "most likely had a facet joint synovitis problem triggered by chiropractic manipulation, and she would require a month to recover".

b) in January of 2002 she also began to report pain in her buttocks, leg and foot.

c) in June of 2002 she indicated that the pain was "seriously impacting on her ability to perform activities of daily living".

d) on July 12, 2003 a specialist concluded that she had "chronic low back pain aggravated by the chiropractic

2004 CarswellOnt 4565, 73 O.R. (3d) 119

manipulation of February 2001."

e) on February 28, 2003, after ongoing testing and treatment she was advised of the results of the MRI.

35 The Plaintiff submits that the last of these dates should be considered as the commencement date of the running of the limitation period, or alternatively, one week after July 25, 2002 when she learned the results of the CT scan ordered on July 12, 2002 and done on July 25, 2002.

#### Additional Evidence

36 At the end of the Plaintiff's submissions in response to the Defendant's arguments, counsel for the Plaintiff sought leave, presumably pursuant to Rule 21.01(2), to file additional evidence by way of affidavit. Despite the timing of the application I received the affidavit for consideration on the leave application. The affidavit is by another lawyer in the Plaintiff's counsel's office and simply indicates that Ms. Beamish first contacted her current counsel regarding the lawsuit on or about April 30, 2003. Subsequently her counsel requested relevant medical records. There is no indication in the affidavit that a further medical opinion was sought to assist the Plaintiff in determining whether to institute an action or if so, when it was received. The Plaintiff does not argue that it was not until after consulting legal counsel that material facts became known that were necessary to the decision to commence the action. This is not, therefore, argued to be a case such as described in *Soper v. Southcott* (supra) or *McSween v. Louis* (2000), 187 D.L.R. (4th) 446 (Ont. C.A.) as the limitation period was not triggered by an event at or after the time period referred to in the affidavit. It is not argued that such was the case here. Rather, this is a case where any subsequent medical opinion is simply evidence in the litigation. The time of receipt of any later medical opinion is immaterial to the commencement of the running of the limitation period.

37 As I do not find that this material was either necessary to or relevant on the issues on the motion, leave to introduce it is denied.

#### Assessment of Limitation Issue

38 As noted by the Defendant, where a Defendant pleads a limitation period the onus at trial is on the Plaintiff to prove that the cause of action arose within the limitation period. This principle has been restated by the Ontario Court of Appeal in *Findlay v. Holmes* (1998), 111 O.A.C. 319 (Ont. C.A.) and more recently in *McSween v. Louis* (supra). However, on a motion under Rule 21.01, the key onus is that on the Applicant, in this case the Defendant, to show that it is obvious that the Plaintiff was aware of the material facts more than a year before the action was commenced.

39 Since the decision of the Supreme Court of Canada in *Peixeiro v. Haberman* (1997), 217 N.R. 371 (S.C.C.), it has been clear that "the discoverability principle" postpones the commencement of the running of a statutory limitation period until the Plaintiff knows, or by reasonable diligence could have known, the material facts on which the action is based. This principle is set out in s. 89 of the *Regulated Health Professions Act*, in the words "within one year after the date when the person commencing the action knew or ought to have known the fact or facts upon which the negligence...is alleged."

40 The rationale underlying the discoverability principle is grounded in concerns of fairness to a Plaintiff who has been unaware that his or her injuries met the conditions precedent to commencing an action. This principle must be counterbalanced against the three principles embodied in the "certainty, evidentiary and diligence" rationales underlying the statutory imposition of a limitation period. It is a question of fact, depending on the circumstances of the case as a whole, as to when knowledge of the material fact or facts was acquired by the Plaintiff.

41 Obviously while the discoverability principle operates to provide fairness to a Plaintiff who was not fully apprised of the material facts upon which a negligence claim could be based, the Plaintiff is nonetheless required to act

2004 CarswellOnt 4565, 73 O.R. (3d) 119

with due diligence once the basic facts are known, including requesting and receiving a medical opinion so as not to delay the commencement of the limitation period: See *Soper v. Southcott* (supra), referred to in *McSween v. Louis*, (supra), at paragraph 46.

42 A Plaintiff need not know the precise cause of the injury before the limitation period starts to run, or the extent of the loss. In *Peixeiro*, (supra), it was said:

Once the Plaintiff knows that some damage has occurred and has identified the tortfeasor, the cause of action has accrued. Neither the extent of damage nor the type of damage need be known. To hold otherwise would inject too much uncertainty into cases where the full scope of the damages may not be ascertained for an extended time beyond the general limitation period.

43 In this case it is clear that on February 10, 2001, the Plaintiff knew she had been injured by the forceful treatment of Dr. Charlton. The manipulation caused her pain and instability at the time of treatment. By the following day, she was aware that the injury had resulted in extreme and continuing pain. A few days later, on February 15, her medical specialist confirmed that the continuing pain was triggered by the treatment of Dr. Charlton. On these facts, a trial judge might well find that the limitation period commenced on February 15, 2001.

44 Even if the facts concerning that time period might not be considered to be sufficient to overwhelm the discoverability argument, it is clear from the Statement of Claim that by June of 2002 the debilitating effect of the pain had continued such that it interfered with the Plaintiff's daily living activities. On July 12, 2002, a second medical specialist confirmed that the continuing pain was chronic and had been caused by the chiropractic manipulation of Dr. Charlton on February 10, 2001. By that time, there is no doubt on these pleadings that the Plaintiff knew that she had suffered ongoing injury as a result of the treatment by the Defendant. With those facts she had yet another firm basis of an allegation of negligence against the Defendant. Later treatment in August and October 2000 simply confirmed the precise nature and extent of the injury.

45 It is argued that it was not until the seriousness and permanence of the injuries was known to Ms. Beamish, after the CT scan revealed a disc herniation, that the extent and prognosis of the injury was actually known. While it is acknowledged that *Peixeiro* dealt with a different legal requirement of material facts under a no fault insurance scheme, that an injury be permanent and/or serious, the Plaintiff argues that identical logic should be applied in this case, since litigation is not to be undertaken lightly given its costs, duration and toll on all parties. Therefore, it is argued that only a serious or permanent injury could ground a successful and worthwhile personal injury action. While it is true that the extent of the injury may impact on the cost benefit analysis of continuing an action, it is simply incorrect that *Peixeiro* is directly analogous, since permanent or serious injury is not a prerequisite to an action under s. 89 of the *Regulated Health Professions Act*.

46 The Plaintiff contends that the revelation that the Defendant's treatment had resulted in a herniation and destruction of a spinal disc rather than a temporary condition speaks to the issue that the treatment fell below the applicable standard of care. However, the breach of a standard of care does not require anything beyond a temporary condition. This condition was known to Ms. Beamish by February 15 of 2001. Certainly by July 12 of 2002 Ms. Beamish was well aware of the material facts required to base the action. In that sense, the subsequent test results were not material in that they were not facts upon which the outcome of the litigation depended. Cases relied on by the Plaintiff, including *Peixeiro*, as well as a more recent case from the Ontario Court of Appeal, *Ioannidis v. Hawkings*, [2001] O.J. No. 3788 (Ont. S.C.J.), aff'd [2003] O.J. No. 1799 (Ont. C.A.), deal with the permanence requirement in motor vehicle injury cases. Similarly in *Salvador v. Mather*, [1998] O.J. No. 3135 (Ont. Gen. Div.), the emphasis on prognosis as delaying the running of the limitation period arose in a motor vehicle case in which permanence of the injury was a prerequisite to the action.

47 In *Smyth v. Waterfall*, (supra), the Court of Appeal stressed that when construing a limitation period, the

Plaintiff's concerns must be considered together with the Defendant's need to be protected from stale claims brought by dilatory Plaintiffs. A strict interpretation of the limitation period will not always best further these conflicting goals. However, in this case, it is patently clear from the undisputed facts that even if the limitation period were not held to run from February 15, 2001, all of the material facts on which the Plaintiff relies were known to her by July 12, 2002 at the latest.

### Conclusion

48 As noted above, there will only be rare cases where the facts are so clearly undisputed as to justify the making of a discretionary order under Rule 21.01(1)(a) on the legal issue of the application of a limitation period where the discoverability principle applies. However, it cannot simply be said that as there is an issue of discoverability, the discretion under Rule 21.01(1)(a) should never apply. On the pleadings in this case it is palpably untenable to say that by a date more than a year before the Notice of Action the Plaintiff did not have all of the facts required.

49 In summary, applying the very narrow and high test applicable in this situation, it may not be clear and obvious on the facts that the limitation period commenced to run on February 15, 2001. That is a determination that might well be made by a trial judge, but not one that can be made on a motion under Rule 21.01(1)(a). However, it is clear and obvious, on undisputed facts set out in the Statement of Claim, that by July 12, 2002 the limitations period had commenced to run. The action is accordingly statute-barred in law. This is a rare case where an Order under Rule 21.01(1)(a) should be granted despite the existence of the discoverability principle, as that principle could not extend the time so far as necessary for the survival of the Plaintiff's case.

50 The order requested is granted. If the Respondent seeks costs in all of the circumstances, I will entertain written submissions on the issue, in accordance with the following schedule: The Respondent will have until November 18 to serve submissions on the Applicant. The Applicant will have ten days to respond and the Respondent will have until December 6 for reply. Submissions should not be longer than five pages, plus attachments, from either the Applicant or the Respondent.

*Motion granted.*

EN1 Since amended. It has not been argued that the amendment had any effect on the current case.

END OF DOCUMENT

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49 B.C.L.R. (2d) 273, 4 C.C.L.T. (2d) 1, 117 N.R. 321, 43 C.P.C. (2d) 105,  
[1990] 6 W.W.R. 385, 74 D.L.R. (4th) 321, [1990] 2 S.C.R. 959, 4 C.O.H.S.C. 173



1990 CarswellBC 216

Hunt v. T & N plc

CAREY CANADA INC. (CAREY-CANADIAN MINES LTD.) et al. v. HUNT, T & N plc and  
FLINTKOTE MINES LIMITED; FLINTKOTE MINES LIMITED et al. v. HUNT, T & N plc and  
CAREY CANADA INC.

Supreme Court of Canada

Lamer C.J.C.[FN\*], Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier and  
Cory JJ.

Heard: February 22, 1990  
Judgment: October 4, 1990  
Docket: Nos. 21508, 21536

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Counsel: J. Giles, Q.C., and R. McDonell, for Carey Canada Inc.

D.M.M. Goldie, Q.C., for Lac d'Amiante du Québec Ltée.

M. Koenigsberg, for National Gypsum Co.

D. Martin and M.P. Maryn, for Atlas Turner Inc., Asbestos Corporation Limited and Bell Asbestos Mines Limited.

J.A. Macaulay and K.N. Affleck, for T & N plc.

R. Ward and S.E. Fraser, for Flintkote Mines Limited.

J.J. Camp, Q.C., and P.G. Foy, for Hunt.

Subject: Torts; Civil Practice and Procedure; Labour and Employment

Practice --- Pleadings -- Statement of claim -- Striking out for absence of reasonable cause of action -- Cause not known in law.

Practice --- Pleadings -- Statement of claim -- Striking out for absence of reasonable cause of action -- Facts pleaded not supporting claim.

49 B.C.L.R. (2d) 273, 4 C.C.L.T. (2d) 1, 117 N.R. 321, 43 C.P.C. (2d) 105,  
[1990] 6 W.W.R. 385, 74 D.L.R. (4th) 321, [1990] 2 S.C.R. 959, 4 C.O.H.S.C. 173

33 While this court has had a somewhat limited opportunity to consider how the rules regarding the striking out of a statement of claim are to be applied, it has nonetheless consistently upheld the "plain and obvious" test. Justice Estey, speaking for the court in *A.G. Can. v. Inuit Tapirisat of Can.*, [1980] 2 S.C.R. 735 at 740, 115 D.L.R. (3d) 1, 33 N.R. 304 [Fed.], stated:

As I have said, all the facts pleaded in the statement of claim must be deemed to have been proven. On a motion such as this a court should, of course, dismiss the action or strike out any claim made by the plaintiff only in plain and obvious cases and where the court is satisfied that "the case is beyond doubt": *Ross v. Scottish Union and National Insurance Co.*

34 I had occasion to affirm this proposition in *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441, 12 Admin. L.R. 16, 13 C.R.R. 287, 18 D.L.R. (4th) 481, 59 N.R. 1 [Fed.]. At pp. 486-87 I provided the following summary of the law in this area (with which the rest of the court concurred):

The law then would appear to be clear. The facts pleaded are to be taken as proved. When so taken, the question is do they disclose a reasonable cause of action, *i.e.* a cause of action "with some chance of success" (*Drummond-Jackson v. British Medical Association*, [1970] 1 All E.R. 1094) or, as Le Dain J. put it in *Dowson v. Government of Canada* (1981), 37 N.R. 127 (F.C.A.), at p. 138, is it "plain and obvious that the action cannot succeed?"

And at p. 477 I observed:

It would seem then that as a general principle the Courts will be hesitant to strike out a statement of claim as disclosing no reasonable cause of action. *The fact that reaching a conclusion on this preliminary issue requires lengthy argument will not be determinative of the matter nor will the novelty of the cause of action militate against the plaintiffs.* [emphasis added]

35 Most recently, in *Dumont v. Can. (A.G.)*, [1990] 1 S.C.R. 279, [1990] 4 W.W.R. 127, 67 D.L.R. (4th) 159, I made clear at p. 280 that it was my view that the test set out in *Inuit Tapirisat* was the correct test. The test remained whether the outcome of the case was "plain and obvious" or "beyond reasonable doubt".

36 Thus, the test in Canada governing the application of provisions like R. 19(24)(a) of the British Columbia Rules of Court is the same as the one that governs an application under R.S.C., O. 18, r. 19: assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in R. 19(24) of the British Columbia Rules of Court should the relevant portions of a plaintiff's statement of claim be struck out under R. 19(24)(a).

37 The question therefore to which we must now turn in this appeal is whether it is "plain and obvious" that the plaintiff's claims in the tort of conspiracy disclose no reasonable cause of action or whether the plaintiff has presented a case that is "fit to be tried", even though it may call for a complex or novel application of the tort of conspiracy.

**(2) Should Mr. Hunt's Allegations Based on the Tort of Conspiracy Be Struck from his Statement of Claim?**

38 In the last decade the tort of conspiracy has received a considerable amount of attention. In England, for example, both the House of Lords and the Court of Appeal have recently had occasion to review the tort in some detail. These decisions have made clear that the tort of conspiracy may apply in at least two situations: (i) where the

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70 O.R. (2d) 385, 40 C.P.C. (2d) 128

▷1989 CarswellOnt 1019

Montgomery v. School-Plough Canada Inc.

Montgomery v. Scholl-Plough Canada Inc.[FN\*]

Ontario Supreme Court

Potts J.

Judgment: October 18, 1989

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Counsel: Jeffrey S. Leon, for plaintiff.

Harry Freedman and Timothy Murphy, for defendant (moving party).

Subject: Civil Practice and Procedure

Practice --- Pleadings -- Statement of claim -- Striking out for absence of reasonable cause of action -- Facts pleaded unlikely to be proven.

Ont. R. 1.04(1), 21.01(1)(b), 25.11(a), 126, 540.

Plaintiff bringing action against defendant for termination of employment -- Action framed in contract and tort -- Defendant moving to strike out paragraphs pleading alternative cause of action based on "tort of bad faith" -- Motion dismissed -- Rules permitting Court to strike out less than entire pleading where portion to be struck constituting separate and distinct cause of action -- However, onus on defendant to demonstrate claim cannot succeed -- Defendant failing to satisfy onus.

Potts J.:

- 1 This was a motion brought by the defendant Scholl-Plough Canada Inc. for an order striking out paras. 1(b), 1(c), 1(c)(i), 13, 14, 15 and 15a of the amended statement of claim.
- 2 On October 6, 1989, I dismissed the motion with written reasons to follow. These are those reasons.
- 3 The action arises out of the termination of an employee and is primarily framed in breach of contract. The disputed paragraphs fall, roughly speaking, into three categories: those claiming punitive damages, those claiming aggravated damages, and those pleading an alternative cause of action based on the "tort of bad faith".
- 4 With respect to the last category of paragraphs, the defendant sought to rely on rules 21.01(1)(b) and 25.11(a).

70 O.R. (2d) 385, 40 C.P.C. (2d) 128

Rule 25.11(a) provides that:

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;

(Emphasis added.) Rule 21.01(1)(b) provides that:

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

.....

(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.

(Emphasis added.) The plaintiff took the position that the court had no jurisdiction to grant the relief sought in this motion under rule 21.01(1)(b), as it appears on its face, particularly when contrasted with rule 25.11(a), to apply only where a party seeks to dispose of an entire pleading.

5 Rule 21.01(1)(b) has its roots in the former rule 126, which provided that:

126. A judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer, and in any such case, or in case of the action or defence being shown to be frivolous or vexatious, may order the action to be stayed or dismissed, or judgment to be entered accordingly.

Rule 261 [1897], which preceded Rule 126, was worded in a virtually identical manner. In *Smith v. Traders Bank* (1905), 11 O.L.R. 24, (C.A.), Anglin J. considered the application of Rule 261, and stated at p. 29:

The jurisdiction conferred by Rule 261 may not be invoked for the excision of portions of a pleading. It is only where the entire pleading "discloses no reasonable cause of action or answer" that this Rule applies.

*Smith, supra*, was, however, distinguished by the Ontario Court of Appeal in *French v. Law Society of Upper Canada* (1975), 9 O.R. (2d) 473, 61 D.L.R. (3d) 28 (C.A.), as barring only the excision of part of a single cause of action. Lacourcière J.A. stated at p. 478, with respect to Rule 126:

The Court accepts Mr. Robinette's submission that where a pleading discloses several causes of action, as in the present case, it was open to the learned Judge of first instance to strike out one or more causes of action without affecting the remainder. In this particular case the paragraphs excised, or the cause of action struck out, constituted the whole of the pleading with respect to one cause of action.

6 Subsequent cases attempted to more clearly define the circumstances in which part of a pleading should be struck under Rule 126. In *York Condominium Corp. No. 161 v. Deltan Realty Ltd.* (1976), 3 C.P.C. 27 (Ont. H.C.), two condominium corporations and two unit owners had brought an action in respect of defects in the condominiums. The unit owners had framed their claims as class actions on behalf of the other corporation members. The defendant moved to strike out the claims in respect of defects in individual units, as opposed to the common elements, on the basis that they were not properly brought either by the corporations or by way of class action, but should have been brought by the individual owners. Southey J. refused to strike the claims, saying at p. 30:

70 O.R. (2d) 385, 40 C.P.C. (2d) 128

Where it is clear, however, that a substantial part of the plaintiff's claim is actionable against the defendant, R. 126, in my judgment, should not be used to strike out a part of the plaintiff's claim which is not sustainable in law. If the action must go to trial in any event because of the properly triable claims in the statement of claim then it is not desirable to take the time of the Court to excise other parts of the claim even if they are clearly not supportable in law.

7 On the other hand, in *City National Leasing Ltd. v. General Motors of Canada Ltd.* (1984), 45 C.P.C. 174, 47 O.R. (2d) 653, 12 D.L.R. (4th) 273, 28 B.L.R. 41, 3 C.P.R. (3d) 262 (H.C.), Rosenberg J. granted an application to strike portions of a statement of claim alleging a breach of the *Combines Investigation Act*. Rosenberg J. observed that, while the necessity of going to trial in any event was an important consideration, the possibility of eliminating evidence and discoveries should also be taken into account. He concluded, at p. 663:

Because of the number of transactions alleged, the number of competitors alleged, the number of matters to be investigated and proven and over a six-year period, it is my opinion that in a case such as this, the matter should be disposed of before trial.

8 In attempting to draw these cases together, I was guided by the basic principle set out in rule 1.04(1), which states:

1.04(1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

In my view, rule 21.01(1)(b) permits the court to strike out less than an entire pleading, but this should normally only be done when the portion to be struck out constitutes, or purports to constitute, a separate and distinct cause of action. In exercising its discretion under rule 21.01(1)(b), the court should take a hard look at whether paring down the pleadings before trial will be of any real practical benefit, that is, whether it will actually result in savings of time or money for the parties.

9 In the result, I found that the defendant could properly pursue this motion under time rules 21.01(1)(b) and 25.11(a).

10 However, as counsel acknowledged, the onus on the defendant is a heavy one. In order to strike a claim under rule 21.01(1)(b), the court must be satisfied that it is "plain, obvious and beyond doubt" that it cannot succeed: *Air India Flight 182 Disaster Claimants v. Air India* (1987), 62 O.R. (2d) 130, 44 D.L.R. (4th) 317 (H.C.J.). Although I had serious doubts about the viability of the plaintiff's bad faith claim, I was not satisfied that the defendant had met its onus. In any event, I had reservations about excising the claim from the pleading at this stage, as it seemed clear to me that much of the evidence which is likely to be relied on to establish a duty of good faith will have to be adduced in any event to establish the extent of notice owed to the plaintiff. For this reason, the defendant failed under rule 25.11(a) as well.

11 In view of my finding that the bad faith claim should be permitted to stand, it would have been inappropriate to strike out the other disputed paragraphs, dealing with punitive and aggravated damages. While the defendant might have succeeded in striking out those damage claims in the context of a pure breach of contract action, given the limitations established by the Supreme Court of Canada in *Vorvis v. Insurance Corp. of British Columbia*, [1989] 4 W.W.R. 218, 36 B.C.L.R. (2d) 273, 94 N.R. 321, 58 D.L.R. (4th) 193, [1989] 1 S.C.R. 1085, 90 C.L.L.C. 14,035, 25 C.C.E.L. 81, there is much more room for such claims in an action framed in tort as well as contract.

12 Accordingly, the motion was dismissed. Under all the circumstances, costs were reserved to the trial judge.

FN\*. Application for leave to appeal to Ontario Divisional Court granted December 21, 1989, per Farley J.

70 O.R. (2d) 385, 40 C.P.C. (2d) 128

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18 C.C.L.T. (2d) 54, 16 O.R. (3d) 161, 68 O.A.C. 1, 18 C.R.R. (2d) 291, (sub nom. Prete v. Ontario (Attorney General)) 86 C.C.C. (3d) 442, 110 D.L.R. (4th) 94

1993 CarswellOnt 810

Prete v. Ontario

ANTONIO PRETE v. R. in Right of ONTARIO ATTORNEY GENERAL OF ONTARIO, WILLIAM McCORMACK, ROBERT CLARKE, JAMES CROWLEY, ROBERT MONTROSE, ERIC LIBMAN and DAVID FISHER

Ontario Court of Appeal

McKinlay, Carthy and Weiler J.J.A.

Heard: June 10-11, 1993  
Judgment: November 25, 1993  
Docket: Doc. CA C9963

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Counsel: Peter C. Wardle and Andrew K. Lokan, for appellant.

Thomas C. Marshall, Q.C. and Robert E. Charney, for respondents R. in Right of Ontario Attorney General of Ontario, Eric Libman and David Fisher.

George S. Monteith, for respondents McCormack, Clarke, Crowley, Montrose.

Subject: Torts; Criminal; Civil Practice and Procedure

Practice --- Pleadings -- Statement of claim -- Striking out for absence of reasonable cause of action -- Need for clearly unsustainable claim.

Torts --- Malicious prosecution and false imprisonment -- Practice and procedure -- Pleadings.

Charter of Rights and Freedoms -- Limitation of actions -- Remedy in damages sought under s. 24(1) for infringement of rights under ss. 7 and 15 of Charter -- Alleged malicious preferment of direct indictment by prosecuting authorities -- Ruling upon defence motion declaring action statute-barred dismissed unanimously as erroneous in law -- Canadian Charter of Rights and Freedoms, ss. 7, 15, 24(1).

Eighteen months after being acquitted by a jury on a charge of first-degree murder, the plaintiff brought an action for damages under s. 24(1) of the Charter of Rights and Freedoms alleging that, in violation of s. 7 of the Charter, the Attorney General of Ontario had arbitrarily, maliciously and without reasonable grounds preferred a direct indictment of murder against him. Various Crown attorneys and police officers were also sued upon the same basis. Allegations of ethnic discrimination under s. 15 of the Charter were also made.

18 C.C.L.T. (2d) 54, 16 O.R. (3d) 161, 68 O.A.C. 1, 18 C.R.R. (2d) 291, (sub nom. Prete v. Ontario (Attorney General)) 86 C.C.C. (3d) 442, 110 D.L.R. (4th) 94

Defence motions were advanced to dismiss these claims as statute-barred, as being barred by Crown immunity, or as being frivolous and vexatious. The motions court judge dismissed the action in its entirety as barred by s. 11 of the Public Authorities Protection Act (Ont.). The action was, he held, indistinguishable from one for malicious prosecution and one covered by the six-month limitation period prescribed by the statute. The advancement of actions under the Charter, he held, could not be supposed to be timeless and untrammelled by the statutory limitation period. The plaintiff appealed.

Held:

The appeal was allowed.

Per Carthy J.A. (McKinlay J.A. concurring)

No mere statutory enactment could stand in the way of a constitutional entitlement. Hence those provisions of the Proceedings Against the Crown Act (Ont.) invoked in the present case as immunizing the Crown against liability were impotent to infringe upon a s. 24(1) Charter remedy.

Limitation periods, while treated in conflict of law jurisprudence as procedural rather than substantive in nature, must receive very cautious treatment in cases seeking Charter remedies under s. 24(1). In appropriate cases, a court should refuse relief upon the basis of laches, but the purpose of the Charter in controlling excesses by governments would be ill-served by allowing those same governments to decide when they would like those controls to end and the threat of litigation cease. There was no real comparison, in this regard, between ordinary procedural rules of court and statutory limitation periods, which in substance were calculated to grant immunities. Section 11 of the Public Authorities Protection Act should be construed as not being applicable to claims under s. 24(1) of the Charter.

The argument that the plaintiff's claim was truly one of malicious prosecution disguised in the garb of the Charter was ineffectual, since authority dictated that a plaintiff might pursue an unbarred claim even where an alternative basis for the same claim might be statute-barred.

Arguments that the plaintiff's claims should be struck out under R.21 or 25 of the Rules of Civil Procedure were unfounded. Nothing which transpired during the criminal proceedings involving the plaintiff was to be treated in law as *res judicata* or as an issue estoppel prejudicing the advancement of the civil claims now in issue. The evidence might strongly suggest that these actions were unlikely to succeed. But upon a motion such as that now in issue, the rule was clear that the pleadings should be deemed factually true for present purposes. That in turn precluded any striking out of the actions whether as presenting no triable issue or as an abuse of the process of the court. The plaintiff's pleading must stand. Nor were the defendants, under the governing rules, entitled to further particulars of the plaintiff's allegations.

Per Weiler J.A. (dissenting)

The plaintiff was not barred by the Public Authorities Protection Act from proceeding with a claim for a Charter remedy. However, it was plain that a proven absence of reasonable and probable cause for the prosecution complained of was an essential ingredient of any cause of action for malicious prosecution and that the rules governing the pleading of such claims required more than a bald assertion of this ingredient as a putative conclusion of law, but demanded also a concise statement of the facts upon which such an averment was based. Any cause of action in malicious prosecution was accordingly inadequately pleaded. Having regard to the manner in which the action was pleaded, any claim under s.7 of the Charter must be regarded as suffering the same fatal flaw.

Moreover, upon the evidence before the court, the preferment of the indictment and subsequent prosecution had been reasonably justified so that the plaintiff's action was likely to fail. The s.7 issue had not been raised during the

18 C.C.L.T. (2d) 54, 16 O.R. (3d) 161, 68 O.A.C. 1, 18 C.R.R. (2d) 291, (sub nom. Prete v. Ontario (Attorney General)) 86 C.C.C. (3d) 442, 110 D.L.R. (4th) 94

criminal trial -- a circumstance going to the bona fides of the present action. For all the foregoing reasons, the action had properly been struck out, and the appeal should be dismissed.

Cases considered:

Per Carthy J.A. (McKinlay J.A. concurring)

German v. Major (1985), 34 C.C.L.T. 257, 39 Alta. L.R. (2d) 270, 62 A.R. 2, 20 D.L.R. (4th) 703 (C.A.) -- distinguished

M. (K.) v. M. (H.), [1992] 3 S.C.R. 6, 14 C.C.L.T. (2d) 1, 142 N.R. 321, 96 D.L.R. (4th) 289, 57 O.A.C. 321 -- followed

Nelles v. Ontario, [1989] 2 S.C.R. 170, 49 C.C.L.T. 217, 37 C.P.C. (2d) 1, 71 C.R. (3d) 358, 60 D.L.R. (4th) 609, 98 N.R. 321, 35 O.A.C. 161, 42 C.R.R. 1, 41 Admin. L.R. 1 -- considered

R. v. Mills, [1986] 1 S.C.R. 863, 52 C.R. (3d) 1, 26 C.C.C. (3d) 481, 29 D.L.R. (4th) 161, 21 C.R.R. 76, 67 N.R. 241, 16 O.A.C. 81 -- considered

Per Weiler J.A. (dissenting)

Caterpillar Tractor Co. v. Babcock Allatt Ltd. (1982), [1983] 1 F.C. 487, 67 C.P.R. (2d) 135 (T.D.), affirmed (1983), 72 C.P.R. (2d) 286 (Fed. C.A.) -- considered

Foy v. Foy (1978), 20 O.R. (2d) 747, 9 C.P.C. 141, 3 R.F.L. (2d) 286, 88 D.L.R. (3d) 761 (C.A.) -- referred to

Garton v. Whelan (1984), 47 O.R. (2d) 672, 14 C.C.C. (3d) 449 (H.C.) -- referred to

German v. Major (1985), 34 C.C.L.T. 257, 39 Alta. L.R. (2d) 270, 62 A.R. 2, 20 D.L.R. (4th) 703 (C.A.) -- considered

Hodge's Case (1838), 2 Lewin 227, 168 E.R. 1136 -- referred to

R. v. Ertel (1987), 20 O.A.C. 257, 58 C.R. (3d) 252, 35 C.C.C. (3d) 398, 30 C.R.R. 209 (C.A.) [leave to appeal to S.C.C. refused (1987), 24 O.A.C. 320 (note), 30 C.R.R. 209n, 86 N.R. 266 (note), 61 C.R. (3d) xxix (note)] -- referred to

R. v. Jewitt, [1985] 2 S.C.R. 128, [1985] 6 W.W.R. 127, 61 N.R. 159, 21 C.C.C. (3d) 7, 47 C.R. (3d) 193, 20 D.L.R. (4th) 651 -- referred to

R. v. Keyowski, [1988] 1 S.C.R. 657, 83 N.R. 296, [1988] 4 W.W.R. 97, 65 Sask. R. 122, 40 C.C.C. (3d) 481, 62 C.R. (3d) 349, 32 C.R.R. 269 -- referred to

R. v. Monteleone, [1987] 2 S.C.R. 154, 78 N.R. 377, 59 C.R. (3d) 97, 23 O.A.C. 241, 35 C.C.C. (3d) 193, 41 D.L.R. (4th) 746 -- referred to

R. v. Paul (1975), [1977] 1 S.C.R. 181, 33 C.R.N.S. 328, 27 C.C.C. (2d) 1, 4 N.R. 435, 64 D.L.R. (3d) 491 -- referred to



18 C.C.L.T. (2d) 54, 16 O.R. (3d) 161, 68 O.A.C. 1, 18 C.R.R. (2d) 291, (sub nom. *Prete v. Ontario (Attorney General)*) 86 C.C.C. (3d) 442, 110 D.L.R. (4th) 94

*R. v. Potvin*, [1993] 2 S.C.R. 880, 23 C.R. (4th) 10, 155 N.R. 241, 83 C.C.C. (3d) 97, 105 D.L.R. (4th) 214, 16 C.R.R. (2d) 260 -- referred to

*R. v. Scott*, [1990] 3 S.C.R. 979, 116 N.R. 361, 2 C.R. (4th) 153, 61 C.C.C. (3d) 300, 43 O.A.C. 277, 1 C.R.R. (2d) 82 -- referred to

*Savarin Ltd. v. Fasken & Calvin* (March 21, 1990), Docs. Toronto 10719/83, 10721/83, 10837/83, Carruthers J. (Ont. H.C.), W.D.C.P. 4352, affirmed (March 1, 1993), Doc. CA C280/90, Brooke, Doherty and Weiler J.J.A. (Ont. C.A.), leave to appeal to S.C.C. refused (September 23, 1993), Docs. 23571, 23572, 23573, La Forest, Cory and Iacobucci J.J. (S.C.C.) -- referred to

*Temilini v. Ontario Provincial Police Commissioner* (1990), 73 O.R. (2d) 664, 38 O.A.C. 270 (C.A.) [leave to appeal to S.C.C. refused (1991), 1 O.R. (3d) xii (note), 46 O.A.C. 238 (note), 131 N.R. 153 (note)] -- referred to

*United States v. Shephard*, [1977] 2 S.C.R. 1067, 34 C.R.N.S. 207, 9 N.R. 215, 30 C.C.C. (2d) 424, 70 D.L.R. (3d) 136 -- considered

*Williams v. Webb*, [1961] O.R. 353, 27 D.L.R. (2d) 465, 130 C.C.C. 25 (C.A.) -- referred to

*Zurich Investments Ltd. v. Excelsior Life Insurance Co.* (1988), 59 Alta. L.R. (2d) 209, 28 C.P.C. (2d) 264, 89 A.R. 14 (C.A.) -- considered

#### Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11 --

s. 7

s. 15

s. 24(1)

s. 32(1)(b)

Proceedings Against the Crown Act, R.S.O. 1980, c. 393 [R.S.O. 1990, c. P.27] --

s. 5(6) [R.S.O. 1990, c. P.27, s. 5(6)]

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

s. 5(1)

s. 5(6)

Public Authorities Protection Act, R.S.O. 1980, c. 406 [R.S.O. 1990, c. P.38] --

s. 11 [R.S.O. 1990, c. P.38, s. 7]

18 C.C.L.T. (2d) 54, 16 O.R. (3d) 161, 68 O.A.C. 1, 18 C.R.R. (2d) 291, (sub nom. *Prete v. Ontario (Attorney General)*) 86 C.C.C. (3d) 442, 110 D.L.R. (4th) 94

s. 11(1) [R.S.O. 1990, c. P.38, s. 7(1)]

Public Authorities Protection Act, R.S.O. 1990, c. P.38 --

s. 7

Rules considered:

Ontario, Rules of Civil Procedure --

R. 20

R. 21

r. 21.01(1)

r. 21.01(1)(b)

r. 21.01(2)(b)

r. 21.01(3)(d)

R. 25

r. 25.06(1)

r. 25.06(2)

r. 25.06(8)

r. 25.11(c)

Appeal from judgment reported at (1990), 47 C.R.R. 307 (Ont. H.C.), dismissing as statute-barred action for damages as remedy under s. 24(1) of Canadian Charter of Rights and Freedoms.

**Carthy J.A. (McKinlay J.A. concurring):**

1 This appeal has its origins in motions by the defendants to dismiss the appellant's action as being limitation-barred, as statute-barred on the basis of Crown immunity, and as being frivolous and vexatious. Alternatively, particulars were sought. The appellant was found not guilty of first degree murder by a jury and 18 months later commenced this action for damages as a remedy under s. 24(1) of the *Charter of Rights and Freedoms* for an infringement of the appellant's rights under s. 7 of the *Charter*. In particular, the appellant alleges that the Attorney General of Ontario arbitrarily, capriciously and without reasonable grounds preferred a direct indictment of a charge of murder against him, that the defendants Libman and Fisher, as Crown attorneys, advised and recommended this action, and that they were assisted and encouraged by the police officer defendants Clarke, Crowley and Montrose. Police Chief McCormack is named a defendant as the person responsible for the conduct of the police officers. The statement of claim also complains that the prosecution of the indictment was conducted maliciously, breaching the appellant's rights under s. 7 of the *Charter* and that the appellant was discriminated against on the basis of his ethnic origin contrary to s. 15 of the *Charter*.

18 C.C.L.T. (2d) 54, 16 O.R. (3d) 161, 68 O.A.C. 1, 18 C.R.R. (2d) 291, (sub nom. *Prete v. Ontario (Attorney General)*) 86 C.C.C. (3d) 442, 110 D.L.R. (4th) 94

2 After hearing argument on all points, Carruthers J. found it necessary to deal with only one, and dismissed the action as statute-barred by s. 11 of the *Public Authorities Protection Act*, R.S.O. 1980, c. 406, now R.S.O. 1990, c. P.38, s. 7(1).

3 Section 11(1) reads:

11. -- (1) No action, prosecution or other proceeding lies or shall be instituted against any person for an act done in pursuance or execution or intended execution of any statutory or other public duty or authority, or in respect of any alleged neglect or default in the execution of any such duty or authority, unless it is commenced within six months next after the cause of action arose, or, in case of continuance of injury or damage, within six months after the ceasing thereof.

4 A short excerpt from the reasons of Carruthers J., released February 21, 1990 [reported 47 C.R.R. 307 (Ont. H.C.)], indicates the basis of his decision. At p. 6 [p. 311] he says:

For present purposes, it is my view that there is no difference between what the plaintiff describes his cause of action to be, that is, a breach of provisions of the *Charter*, and one for malicious prosecution. And, in any event, regardless of how one labels the cause of action, it is, as counsel for the plaintiff concedes, based upon "an act done in pursuance or execution or intended execution of any statutory or other public duty or authority" on the part of each and every defendant.

It has been recognized by the Supreme Court of Canada that, in dealing with the *Charter*, the existing framework within which justice is to be administered, whether predominantly provincial in nature, is to be recognized. In the absence of some constitutionally valid provision, either in the *Charter* or elsewhere, I cannot accept that a remedy sought under s. 24(1) of the *Charter* can be pursued on a timeless basis.

5 The comprehensive issue before this court is whether s. 11 of the *Public Authorities Protection Act* has any application to an action in which a remedy under s. 24(1) of the *Charter* is sought. If s. 11 does not stand in the way of the action, the court must consider whether the Crown is protected from suit by s. 5(6) of the *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27. For reasons which will become clear as the discussion develops I will deal first with the *Proceedings Against the Crown Act*. Sections 5(1) and 5(6) of that Act read as follows:

5. -- (1) Except as otherwise provided in this Act, and despite section 11 of the *Interpretation Act*, the Crown is subject to all liabilities in tort to which, if it were a person of full age and capacity, it would be subject,

(a) in respect of a tort committed by any of its servants or agents;

(b) in respect of a breach of the duties that one owes to one's servants or agents by reason of being their employer;

(c) in respect of any breach of the duties attaching to the ownership, occupation, possession or control of property; and

(d) under any statute, or under any regulation or by-law made or passed under the authority of any statute.

.....

(6) No proceeding lies against the Crown under this section in respect of anything done or omitted to be



18 C.C.L.T. (2d) 54, 16 O.R. (3d) 161, 68 O.A.C. 1, 18 C.R.R. (2d) 291, (sub nom. Prete v. Ontario (Attorney General)) 86 C.C.C. (3d) 442, 110 D.L.R. (4th) 94

done by a person while discharging or purporting to discharge responsibilities of a judicial nature vested in the person or responsibilities that the person has in connection with the execution of judicial process.

6 My analysis commences with the reasons in *Nelles v. Ontario*, [1989] 2 S.C.R. 170. In that case the plaintiff claimed damages from the Crown, the Attorney General, and some police officers for the common law tort of malicious prosecution with respect to murder charges. The incident pre-dated the *Charter* and the issue before the court was whether the Crown and the Attorney General had immunity from suit. It was held that the Crown does enjoy immunity by reason of s. 5(6) of the *Proceedings Against the Crown Act*, R.S.O. 1980, c. 393, now R.S.O. 1990, c. P.27, but the court was careful to observe that the constitutionality of that section remained "an open question" (see per Lamer J. at p. 178). A majority of the court held that the Attorney General was not protected by that section and enjoyed no immunity at common law.

7 The importance of *Nelles*, supra, to the present consideration of statutory limitations to be imposed on a *Charter* remedy is that Lamer J., writing for three of the six judges who participated in the judgment, placed heavy emphasis upon the availability of *Charter* remedies in his analysis of whether there is immunity from a common law cause of action. He states at pp. 195-196:

As I have stated earlier, the plaintiff in a malicious prosecution suit bears a formidable burden of proof and in those cases where a case can be made out, the plaintiff's *Charter* rights may have been infringed as well. Granting an absolute immunity to prosecutors is akin to granting a license to subvert individual rights. Not only does absolute immunity negate a private right of action, but in addition, it seems to me, it may be that it would effectively bar the seeking of a remedy pursuant to s. 24(1) of the *Charter*. It seems clear that in using his office to maliciously prosecute an accused, the prosecutor would be depriving an individual of the right to liberty and security of the person in a manner that does not accord with the principles of fundamental justice. Such an individual would normally have the right under s. 24(1) of the *Charter* to apply to a court of competent jurisdiction to obtain a remedy that the court considers appropriate and just if he can establish that one of his *Charter* rights has been infringed. The question arises then, whether s. 24(1) of the *Charter* confers a right to an individual to seek a remedy from a competent court. In my view it does. When a person can demonstrate that one of his *Charter* rights has been infringed, access to a court of competent jurisdiction to seek a remedy is essential for the vindication of a constitutional wrong. To create a right without a remedy is antithetical to one of the purposes of the *Charter* which surely is to allow courts to fashion remedies when constitutional infringements occur. Whether or not a common law or statutory rule can constitutionally have the effect of excluding the courts from granting the just and appropriate remedy, their most meaningful function under the *Charter*, does not have to be decided in this appeal. It is, in any case, clear that such a result is undesirable and provides a compelling underlying reason for finding that the common law itself does not mandate absolute immunity.

and at pp. 198-199:

And as has already been noted, it is quite discomfoting to realize that the existence of absolute immunity may bar a person whose *Charter* rights have been infringed from applying to a competent court for a just and appropriate remedy in the form of damages.

### III. Conclusion

A review of the authorities on the issue of prosecutorial immunity reveals that the matter ultimately boils down to a question of policy. For the reasons I have stated above I am of the view that absolute immunity for the Attorney General and his agents, the Crown Attorneys, is not justified in the interests of public policy. We must be mindful that an absolute immunity has the effect of negating a private right of action and in some cases may bar a remedy under the *Charter*. As such, the existence of absolute immunity is a threat to the individual rights of citizens who have been wrongly and maliciously prosecuted.

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8 The reasons of Lamer J., standing alone, are strongly persuasive that a statutory enactment cannot stand in the way of a constitutional entitlement. Section 32(1)(b) of the *Charter* provides that the *Charter* applies to the legislature and government of each province. The remedy section of the *Charter* would be emasculated if the provincial government, as one of the very powers the *Charter* seeks to control, could declare itself immune.

9 Therefore s. 5(6) of the *Proceedings Against the Crown Act* must be construed as limited to the causes of action that are permitted against the Crown under s. 5(1) of that Act, and cannot infringe upon a s. 24(1) *Charter* remedy.

10 This discussion of the application of s. 5(6) of the *Proceedings Against the Crown Act* to the *Charter* may appear to have been a digression from a consideration of the findings of Carruthers J. as to the statutory limitation period, but it is really a step along the way. The next issue to consider is, if absolute immunity from *Charter* relief cannot be afforded by less than constitutional enactments, can immunity be imposed after a period of time as set out in s. 11 of the *Public Authorities Protection Act*?

11 It is argued that the absence of a limitation period in the *Charter* implies that, in actions seeking a *Charter* remedy, the provincial and federal limitation statutes would be applied along with the network of procedural rules governing all actions. In *R. v. Mills* (1986), 29 D.L.R. (4th) 161 (S.C.C.) at 172, McIntyre J. said:

The task of the court will simply be to fit the application into the existing jurisdictional scheme of the courts in an effort to provide a direct remedy, as contemplated in s. 24(1). It is important, in my view, that this be borne in mind. The absence of jurisdictional provisions and directions in the *Charter* confirms the view that the *Charter* was not intended to turn the Canadian legal system upside down. What is required rather is that it be fitted into the existing scheme of Canadian legal procedure. There is no need for special procedures and rules to give it full and adequate effect.

12 The argument of the respondents proceeds to point out that many of our rules of practice permit the court to dismiss a claim for failure to comply with time requirements and the effect of a limitation period is simply a statutory provision to the same effect. It is true that in conflict of law jurisprudence, limitation periods have been considered procedural rather than substantive. However, in the context of the *Charter*, limitation periods are very different from the rules of procedure which effect a dismissal for failure to meet time requirements. First and foremost, the rules are subject to the discretion of the court, whereas the statute is not. In practice, a meritorious claim will be permitted to proceed, perhaps on terms, despite a breach of the rules. In the few cases where relief is denied, it is being denied by a court of competent jurisdiction to deal with s. 24(1) relief. The court is simply saying that in the circumstances presented this is not a case for a hearing and s. 24(1) relief is denied.

13 In *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6 at 29-30, La Forest J. describes the historic purposes of limitation periods as providing a time when prospective defendants can be secure that they will not be held to account for ancient obligations, foreclosing claims based on stale evidence, permitting destruction of documents, and assuring that plaintiffs do not sleep on their rights. Those purposes are best served, when *Charter* remedies are sought, by the court refusing relief on the basis of laches, in appropriate cases. The purpose of the *Charter*, in so far as it controls excesses by governments, is not at all served by permitting those same governments to decide when they would like to be free of those controls and put their houses in order without further threat of complaint.

14 Put in this *Charter* context, I see no valid comparison between procedural rules of court and statutory limitation periods. I do see identity between statutes granting immunity and those imposing limitation periods after the time when the limitation arises. Having found that immunity is not available under the *Proceedings Against the Crown Act* from a claim for *Charter* remedy, it therefore follows that in my opinion s. 11 of the *Public Authorities Protection Act* should be read as not applying to relief claimed under s. 24(1) of the *Charter*.

15 Nor does it avail the respondents to argue that the claim asserted is one for the tort of malicious prosecution hidden in the clothing of the *Charter*. *M. (K.) v. M. (H.)*, supra, is clear authority for the appellant's right to pursue a claim for relief which is not limitation-barred despite the fact that an alternative head for the same claim is statute-

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barred.

16 It is now necessary to deal with the alternative argument of the respondents that the statement of claim should be struck under Rule 21 or Rule 25 of the *Rules of Practice*. The factual information and judicial decisions in the earlier criminal proceedings have been fully canvassed in the reasons of Weiler J.A. and I will not repeat them herein. I do not agree with her disposition of this issue because, in my view, at this stage of the proceedings, the facts alleged in the statement of claim should be taken as true for the purpose of determining whether the claim discloses a reasonable cause of action. To do otherwise is to effectively conduct a summary judgment proceeding under Rule 20 without having the sworn evidence of the parties to this litigation as a basis for determining whether there is a genuine issue for trial.

17 The core paragraphs in the statement of claim read:

17. At all material times the prosecution of the direct indictment against the plaintiff was conducted by the defendants Libman and Fisher, assisted and encouraged by the defendants Clarke, Crowley and Montrose.

18. The preferral of the direct indictment was made arbitrarily, capriciously and without reasonable and probable grounds and therefore constituted an abuse of process and an infringement of the plaintiff's rights under Section 7 of the *Canadian Charter of Rights and Freedoms*.

19. The subsequent prosecution of the direct indictment was conducted maliciously and without reasonable and probable cause and therefore also breached the plaintiff's rights under Section 7 of the *Charter*.

20. Furthermore, in preferring the indictment and subsequently prosecuting the plaintiff the defendants discriminated against the plaintiff on the basis of his ethnic origin and therefore breached his rights under Section 15 of the *Charter*.

18 Not much attention was paid to para. 20 in the argument and, for my purposes, it can be ignored. One of the arguments put by the respondents is that the earlier judicial determinations in the criminal proceedings represent res judicata against the appellant of the issues raised in paras. 17 to 19 and that, as such, they can be looked at to determine if it is plain and obvious that the action cannot succeed. There is more than one reason that this argument cannot prevail. For one, res judicata is an appropriate pleading by way of defence but is not a basis for striking out a pleading which otherwise describes a proper cause of action. More fundamentally, the earlier determinations involved very different questions than that presented in this statement of claim. In one instance it was bail pending trial which involves much more than the likelihood of success in the prosecution of the charge. In the other, it was a question of whether the evidence against the co-accused at trial was sufficient to be put to the jury for a verdict. The fact that the appellant stood by and did not make such an application on his own behalf may be very telling evidence against him at a trial of the present action, but is not an issue estoppel as to all of the elements of the allegations in paras. 17 to 19 of the statement of claim. To the extent that these allegations may be likened to a claim of malicious prosecution, they must be treated as involving both subjective and objective elements (see *Nelles*, supra, per Lamer J. at p. 193). If the respondents knew that the appellant was not guilty and withheld evidence that was exculpatory, the fact that they presented evidence giving the appearance of reasonable and probable grounds for the prosecution would not assist them in this action.

19 In *Nelles*, supra, Lamer J. emphasized the difficulty facing a plaintiff seeking to meet the burden of establishing, in effect, that the Attorney General or Crown attorney perpetrated a fraud on the process of criminal justice. Lamer J. put aside concerns expressed by other courts that such actions have an intimidating effect upon those who administer justice, observing that there are safeguards in the rules for the early disposition of spurious claims. It is easy to infer from these comments that the court should, at the earliest stage of an action of this type, assess the reality of success and eliminate those cases that lack promise of success. In the present case, I have no hesitation in concluding that, on the basis of the entire record presented to us, the action is not likely to succeed. In fact, there is nothing to indicate that it will succeed, except the allegations in the pleading. But that is a very

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significant exception, and we should not depart from the rule that the pleadings must be taken as factually true simply because the allegations are serious and the case appears hopeless.

20 Do the pleadings disclose a reasonable cause of action? To the extent that the allegations rely on malice, Rule 25.06(8) provides that this may be alleged as a fact without pleading the circumstances from which it is to be inferred. This means that a court cannot treat this as a bald allegation and must assume that there is substance behind the allegation for purposes of testing the pleading. The allegation that the prosecution was conducted arbitrarily, capriciously, and without reasonable and probable grounds, may want for particulars, but if supported by evidence, clearly presents a triable issue. I would, therefore, not strike this pleading under Rule 21.

21 Weiler J.A. has concluded that Rule 25.11(c) which provides for striking out a pleading which is "an abuse of the process of the court" permits the court to look beyond the pleading and determine if the action has any chance of success. She finds support for that approach in *German v. Major* (1985), 20 D.L.R. (4th) 703 (Alta. C.A.). It is my opinion that you cannot escape Rule 21 in this case by looking at Rule 25.11(c) because if you consider this statement of claim to be an abuse of the process of the court it can only be because it discloses no reasonable cause of action. If that is the true complaint then it must be tested under the specific language of Rule 21.01(1)(b) and, as stipulated in that same rule, no evidence is admissible on the motion.

22 Further, the rules were different in Alberta when *German v. Major*, supra, was decided, as noted by Kerans J.A. at p. 706 of the reasons:

There are few reported decisions where hopeless-fact cases are struck. A plaintiff could and perhaps should move for summary judgment if faced with such a defence; in Alberta, however, a defendant cannot. He must rely on Rule 129.

23 In Ontario we have Rule 20 providing for summary judgment after delivery of the statement of defence and supported by affidavits of persons having knowledge of the contested facts. Judgment may be granted against the plaintiff if it is demonstrated that there is no genuine issue for trial. There is no difference that I can see between the Rule 20 test of no genuine issue for trial and the test suggested by Weiler J.A. of "no chance of success" or "plain and obvious that the action cannot succeed." Applying those tests under Rule 21 to a pleading undermines the purpose of Rule 20, and also avoids the safeguards under Rule 20 of having sworn testimony from both sides to assure the court that there truly is no issue for trial. In the present case that would include testimony from the defence to demonstrate that the defendants had no knowledge which could constitute a basis for an allegation that they improperly advanced the prosecution. I would therefore permit the pleading to stand.

24 The respondents asked that if the pleading is to stand that particulars be ordered of the allegations in paras. 17 to 20. As stated earlier, Rule 25.06(8) provides that malice, intent or knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred. That being so, the pleading as it stands can be taken as embracing the circumstance of the Crown holding back exculpatory evidence, which would feed the other allegations. Particulars of para. 20 have been given and it is my view that the rule permits the other two paragraphs to stand. In any event, there would not be much purpose in an order for particulars because if there is any substance in the appellant's claim it will come from production and discovery as to the subjective knowledge of the respondents and is thus not available to the appellant at this time.

25 I would therefore set aside the two orders of Carruthers J. of February 21, 1990 and in their place order that the two motions before Carruthers J. be dismissed without costs. Carruthers J. made no order as to costs in dismissing the action and reciprocal disposition seems appropriate. The appellant shall have his costs of the appeal.

**Weiler J.A. (dissenting):**

### **I Background**



18 C.C.L.T. (2d) 54, 16 O.R. (3d) 161, 68 O.A.C. 1, 18 C.R.R. (2d) 291, (sub nom. Prete v. Ontario (Attorney General)) 86 C.C.C. (3d) 442, 110 D.L.R. (4th) 94

26 Approximately sixteen months after the appellant and his co-accused Turchiaro were acquitted of the charge of first degree murder by a jury, the appellant gave notice of his claim for damages for the alleged violation of his rights pursuant to ss. 7 and 15 of the *Charter*. The respondents, who are alleged to have violated the appellant's rights, are William McCormack, Chief of Police of the Metropolitan Toronto Police Force, Crowley, Montrose and Clarke, police officers with the Metropolitan Toronto Police force (the "police defendants") and Libman and Fisher, assistant Crown attorneys appointed by the Lieutenant Governor in Council (the "prosecutors"). In addition, Her Majesty The Queen In Right of Ontario and the Attorney General of Ontario have been named as defendants.

27 Carruthers J. struck the appellant's statement of claim as being statute-barred due to the application of s. 7 of the *Public Authorities Protection Act*, R.S.O. 1990, c. P.38 (the "Act") which has a six-month limitation period. For the reasons given by Carthy J.A., I agree that the appellant is not barred from proceeding with a claim for a *Charter* remedy.

## II The Second Issue

28 In view of his conclusions that the action was statute-barred, Carruthers J. did not deal with the second issue raised by the respondents, namely, that the statement of claim should be struck: (a) because it disclosed no reasonable cause of action; and (b) because it is plain and obvious that the action cannot succeed. In the alternative, the respondents requested particulars of the allegations in paras. 18, 19 and 20 of the statement of claim.

## III Relevant Portions of Statement of Claim

29 The relevant portions of the statement of claim are as follows:

18. The preferral of the direct indictment was made arbitrarily, capriciously and *without reasonable and probable grounds* and therefore constituted an abuse of process and an infringement of the plaintiff's rights under Section 7 of the *Canadian Charter of Rights and Freedoms*.

19. The subsequent prosecution of the direct indictment was conducted maliciously and *without reasonable and probable cause* and therefore also breached the plaintiff's rights under Section 7 of the *Charter*.

20. Furthermore, in preferring the indictment and subsequently prosecuting the plaintiff the defendants discriminated against the plaintiff on the basis of his ethnic origin and therefore breached his rights under Section 15 of the *Charter*.

21. By reason of the preferral and prosecution of the direct indictment, the plaintiff was imprisoned for a period of approximately 13 months, was unable to work or to support his family, suffered mental and bodily pain and anguish, and was also greatly injured in his credit, character and reputation, and has thereby suffered damage.

[emphasis mine]

## IV Relevant Portions of Rules and Commentary

30 For ease of reference, the relevant portions of rules 21.01 and 25.11 are reproduced below:

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

.....

18 C.C.L.T. (2d) 54, 16 O.R. (3d) 161, 68 O.A.C. 1, 18 C.R.R. (2d) 291, (sub nom. *Prete v. Ontario (Attorney General)*) 86 C.C.C. (3d) 442, 110 D.L.R. (4th) 94

(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,

.....

(b) under clause (1)(b).

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

.....

(d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court, and the judge may make an order or grant judgment accordingly.

.....

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.

31 In a motion to strike out a pleading on the basis that it discloses no reasonable cause of action, no evidence is admissible, since the only issue is the sufficiency in law of the pleading attacked. The facts alleged in the statement of claim must be taken as proved. The transcripts of the prior proceedings are therefore irrelevant and cannot be relied upon by the respondents in support of the relief sought under this part of the rule. The test pursuant to rule 21.01(1)(b) is, assuming that the facts alleged in the claim are true, do they disclose a cause of action known to law?

32 In a motion for judgment by the defence to dismiss the action or have it stayed, or to strike the pleadings as being frivolous, vexatious or an abuse of process, pursuant to rule 21.01(3)(d), evidence is admissible. Here, the test is, is it plain and obvious that the action cannot succeed?

33 Frequently, both rule 21.01(1)(b) and 21.01(3)(d) are considered together, without differentiation. In such circumstances, no evidence is considered and the facts pleaded are taken as true. It has happened, however, that a court has proceeded to consider the matter solely on the basis that the action could not possibly succeed and is therefore an abuse of process. After considering the evidence, it has struck the claim. See, for example, *Foy v. Foy* (1978), 20 O.R. (2d) 747 (C.A.); *German v. Major* (1985), 20 D.L.R. (4th) 703 (C.A.); *Savarin Ltd. v. Fasken & Calvin* (March 21, 1990), Docs. Toronto 10719/83, 10721/83, 10837/83, Carruthers J. (Ont. H.C.); (March 1, 1993), Doc. CA C280/90 (Ont. C.A.) (unreported); leave to appeal to the Supreme Court dismissed (September 23, 1993), Docs. 23571, 23572, 23573.

34 The distinction between the two branches of the rules has been succinctly set forth by Côté J.A. in *Zurich*

18 C.C.L.T. (2d) 54, 16 O.R. (3d) 161, 68 O.A.C. 1, 18 C.R.R. (2d) 291, (sub nom. *Prete v. Ontario (Attorney General)*) 86 C.C.C. (3d) 442, 110 D.L.R. (4th) 94

(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.

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.....

(b) under clause (1)(b).

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*Investments Ltd. v. Excelsior Life Insurance Co.*, (1988), 89 A.R. 14 (Alta. C.A.) at p. 15:

The Alberta Court of Appeal in *German v. Major* stressed that where the defendant suggests that there is no such cause of action known to the law, i.e. that the plaintiff's lawsuit is bad in law or the defendant has a clear legal defence, then the court must assume the truth of the facts in the statement of claim. But the Court of Appeal said it was different where the defendants contend that the lawsuit is hopeless factually, and thus frivolous and vexatious. The test is whether it is "plain and obvious that the action cannot succeed."

35 The decision in *German v. Major*, supra, was approved by the Supreme Court in *Nelles v. Ontario*, [1989] 2 S.C.R. 170.

36 Accordingly, I will first deal with the question of whether the action should be struck as disclosing no cause of action, having regard only to the pleadings. Secondly, I will consider whether the defence is entitled to judgment or to have the statement of claim struck in whole or in part on the basis that the action is frivolous, vexatious or an abuse of process, having regard to the transcripts of judgments in other proceedings that have been filed.

#### V Does the Statement of Claim Disclose a Cause of Action?

(a) *Elements required for this cause of action: No reasonable and probable cause to proceed against the appellant*

37 The four necessary elements which must be proved for a plaintiff to succeed in an action for malicious prosecution, are recognized by the Supreme Court in *Nelles v. Ontario*, supra, per Lamer J. at pp. 192-193 are:

- (a) the proceedings must have been initiated by the defendant;
- (b) the proceedings must have terminated in favour of the plaintiff;
- (c) the absence of reasonable and probable cause;
- (d) malice, or a primary purpose other than that of carrying the law into effect.

38 Lamer J. stated at p. 193 that:

The existence of reasonable and probable cause is a matter for the judge to decide as opposed to the jury.

.....

To succeed in an action for malicious prosecution against the Attorney General or Crown Attorney, the plaintiff would have to prove both the absence of reasonable and probable cause in commencing the prosecution *and* malice in the form of a deliberate and improper use of the office of the Attorney General or Crown Attorney ... [Emphasis in original.]

39 Section 7 of the *Charter* states:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

40 It is not necessary for me to decide whether all four of the requirements of an action for malicious prosecution

18 C.C.L.T. (2d) 54, 16 O.R. (3d) 161, 68 O.A.C. 1, 18 C.R.R. (2d) 291, (sub nom. *Prete v. Ontario (Attorney General)*) 86 C.C.C. (3d) 442, 110 D.L.R. (4th) 94

must be met in order to bring an action for civil damages under s. 7 of the *Charter*. Suffice it to say that, having regard to the manner in which this action has been pleaded, lack of reasonable and probable cause to proceed against the appellant is an essential element of the cause of action.

41 It is helpful to recall the definition of reasonable and probable cause articulated by Lamer J. in *Nelles*, supra, at p. 193:

Reasonable and probable cause has been defined as "an honest belief in the guilt of the accused based upon a full conviction, founded on reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed" (*Hicks v. Faulkner* (1878), 8 Q.B.D. 167, at p. 171, Hawkins J.).

This test contains both a subjective and objective element. There must be both actual belief on the part of the prosecutor and that belief must be reasonable in the circumstances.

*(b) Does the statement of claim plead the necessary facts?*

42 After indicating who the parties are, all that is stated in the statement of claim, prior to para. 18, is that the appellant was charged with murder; a preliminary inquiry was held; the appellant was discharged; a direct indictment was preferred; the appellant was rearrested and held in custody until acquitted. The prosecution was conducted by the prosecutors assisted by the police defendants.

43 There is no allegation of misconduct by the police defendants of a breach of *Charter* rights for any act prior to the preferal of the direct indictment. It is not alleged that the police officers embarked on the investigation of the appellant without reasonable grounds, continued the investigation of the appellant when they knew it was without merit and disclosed no evidence of criminal conduct on his part, or that, when the original information charging the appellant with murder was sworn, those doing so knew it was without merit.

44 The appellant asserts, in para. 18, that "the preferal of the direct indictment was made arbitrarily, capriciously and *without reasonable and probable grounds*, and therefore constituted an abuse of process and an infringement of the plaintiff's rights under s. 7 of the *Canadian Charter of Rights and Freedoms*." No malice is alleged in this paragraph.

45 The mere preferment of a direct indictment against an accused, notwithstanding that he has been discharged following a preliminary inquiry, does not result in a deprivation of fundamental justice contrary to s. 7 of the *Charter*: *R. v. Ertel* (1987), 35 C.C.C. (3d) 398 (Ont. C.A.).

46 Paragraph 19 states that "The subsequent prosecution of the direct indictment was conducted maliciously and *without reasonable and probable cause* and therefore also breached the plaintiff's rights under s. 7 of the *Charter*."

47 Whether or not there was reasonable or probable cause for the laying of the charge or its prosecution is a question of law. The malice alleged in para. 19 is a question of fact and no particulars need be pleaded. Even in deciding the question of malice, however, a jury is not at liberty to decide for themselves that there is a want of reasonable and probable cause; they must take the judge's ruling upon that issue: *Williams v. Webb*, [1961] O.R. 353 (Ont. C.A.) at p. 362.

48 Paragraphs 18 and 19 merely repeat, rephrase, or restate part of the law relating to the tort. No other portion of the statement of claim touches upon the substance of these paragraphs.

49 Rule 25.06(1) and (2) states:

18 C.C.L.T. (2d) 54, 16 O.R. (3d) 161, 68 O.A.C. 1, 18 C.R.R. (2d) 291, (sub nom. Prete v. Ontario (Attorney General)) 86 C.C.C. (3d) 442, 110 D.L.R. (4th) 94

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

(2) A party may raise any point of law in a pleading, but conclusions of law may be pleaded only if the material facts supporting them are pleaded.

50 Subsection 2 makes it clear that stating a conclusion of law is not acceptable as a substitute for a statement of material facts. The paragraphs quoted above contain positive assertions which must be affirmatively proven by the respondent. In *Caterpillar Tractor Co. v. Babcock Allatt Ltd.* (1982), 67 C.P.R. (2d) 135 (Fed. T.D.), appeal to the Federal Court of Appeal dismissed (1983), 72 C.P.R. (2d) 286, Addy J. stated at pp. 138-139:

Rule 419 [of the Federal Court Rules of Practice] specifically provides that the court may "at any stage of an action order any pleading or anything in any pleading to be struck out" on, among other grounds, the grounds that it is frivolous or vexatious or may prejudice or embarrass a fair trial or may otherwise constitute an abuse of the court. If a party has no grounds for making an allegation in a pleading, then, there is no basis for maintaining the allegation. It is not an answer to an application to strike out, for the party to say that, if he had unrestricted discovery of his opponent, he might then be in a position to sustain the allegation.

.....

A court proceeding is not a speculative exercise and actions are not to be launched or continued nor are defences to be allowed to stand where it is clear that the person making the allegation has no evidence to support it and where the onus of proof rests on that person.

51 Addy J. then proceeded to strike the impugned paragraphs on the basis that they were frivolous and vexatious and constituted an abuse of process of the court.

52 Inasmuch as no objection is taken to the original decision to prosecute on the basis of lack of reasonable and probable grounds, a statement of fact as to why the subsequent decision to prosecute by direct indictment is without reasonable and probable grounds, is required. It is not, for example, alleged that, after the preliminary inquiry, the respondents discovered exculpatory evidence which they withheld. Nor is it alleged that any such discovery was made at trial.

53 This case is readily distinguished from *Temilini v. Ontario Provincial Police Commissioner* (1990), 73 O.R. (2d) 664 (C.A.), a case relied on by the respondents. In that case, Grange J.A. found that facts were alleged which, if proved, might result in the action for malicious prosecution and conspiracy succeeding. Here, no facts other than a conclusion in law is alleged with respect to a necessary element of the action.

54 Paragraph 20 of the statement of claim alleges that the defendants discriminated against Mr. Prete on the basis of his ethnic origin. No separate argument was addressed in respect of this pleading. Discrimination is also a conclusion. No facts in support of the conclusion have been pleaded.

55 In the result, the statement of claim does not plead facts which, if true, would satisfy a necessary element of the cause of action.

#### **VI Is the Action Frivolous, Vexatious or an Abuse of Process?**

56 For the purposes of my decision on this aspect of the rule, I will assess the evidence before the court to determine, as a matter of law, whether preferment of the indictment and the subsequent prosecution were justified. If

18 C.C.L.T. (2d) 54, 16 O.R. (3d) 161, 68 O.A.C. 1, 18 C.R.R. (2d) 291, (sub nom. Prete v. Ontario (Attorney General)) 86 C.C.C. (3d) 442, 110 D.L.R. (4th) 94

so, the action by the appellant is doomed to failure and cannot possibly succeed.

*(a) The evidence at the preliminary inquiry*

57 A summary of some of the evidence at the preliminary hearing contained in the evidence before the court is as follows.

58 The deceased, Aldo Citton, was shot twice in the head at close range on a dead-end street, Reading Court, in the area of the Skyline Hotel in Toronto on July 19, 1985. On the body were found expensive jewellery and \$400 in cash. Near the body, on the road, the police found two .22 calibre CCI make spent cases. A car leased by the deceased was found near Lloyd Manor Plaza. There is no dispute that a crime was committed. Nor is there any dispute that the homicide squad of the Metropolitan Toronto Police force was the appropriate police force to investigate the crime.

59 The deceased, Citton, had been acting as an intermediary between the appellant and his wife, Franca Prete, when they were having matrimonial difficulties. The appellant suspected that his wife was having an affair with a man named Rizzo. It was the Crown's position that, while acting as the trusted intermediary, Citton had started an affair with Franca Prete.

60 On May 18, 1985, Franca Prete left the matrimonial home, leaving the appellant and their two teen-aged children at that address. At a meeting at Citton's house she told him and Frank Emmanuel, her employer's husband, of the affair with Rizzo. Emmanuel went back and told the appellant of the affair. About this time, Franca Prete hired Stanley Sherr as her matrimonial lawyer and the appellant hired Antoni Graci as his matrimonial lawyer. The appellant's position with respect to the division of the matrimonial assets was that he should keep everything and that Franca Prete was to get nothing.

61 On May 25, 1985, the appellant, his brother-in-law, Turchiaro, and his father-in-law, surrounded Rizzo at the Lloyd Manor Plaza and accused him of breaking up the Prete household. They said that Rizzo should pay half of the value of Prete's house, namely, \$50,000. Rizzo denied the affair with Prete's wife.

62 Rizzo told Harrison, his superior at work, that he had been taken to a dead-end street and that he had denied the affair with Franca Prete, but had pointed to a wealthy businessman. At the preliminary hearing, Harrison testified that Rizzo told him that he, Rizzo, had pointed to Aldo Citton as the wealthy businessman who was having an affair with Franca Prete.

63 About two months prior to the May meeting, Citton's wife had let him. Mrs. Citton testified at the preliminary hearing that she left her husband because she suspected that he and Franca Prete were having an affair.

64 Howard "Mugsy" Dean testified at the preliminary inquiry that the appellant had approached him in May or June 1985, and that he wanted Dean to kill Rizzo. Franca Prete was to be beaten if she was found with Rizzo. Then, a few weeks later the appellant returned and told him, "I've got the wrong guy. I will look after it myself."

65 Mr. Sherr, the matrimonial lawyer for Franca Prete, testified at the preliminary hearing that on July 19, 1985, the day of the killing, he had a telephone conversation with the accused's matrimonial lawyer Graci, in which Graci told him that he and his client, the appellant, believed that Citton was having an affair with Franca Prete. Graci was also reported to have told Sherr that the appellant Prete believed that Citton needed money and that the reason Franca Prete wanted a lump sum property settlement was so that she could hand over the money to Citton. At the preliminary hearing, Graci denied ever having had such a conversation with Sherr.

66 In the early evening of July 19, Citton and Franca Prete were at a restaurant, after which they each apparently went to their respective residences. Graci went to the home of the appellant.

18 C.C.L.T. (2d) 54, 16 O.R. (3d) 161, 68 O.A.C. 1, 18 C.R.R. (2d) 291, (sub nom. Prete v. Ontario (Attorney General)) 86 C.C.C. (3d) 442, 110 D.L.R. (4th) 94

67 In a written statement to police on July 21, 1985, the appellant said that, after Graci left, Citton came to his home and was at his home as late as 10:30-11:00 p.m. on July 19. The appellant said that they talked and drank wine and that Citton had to leave because he had an appointment with a German man with regard to clocks. (Citton's partner was a German man who had a clock company. This man said that Citton had been told not to do any business until he returned from Germany and that was not until three days after the murder.) The appellant said that, after Citton left his house, he telephoned his cousin and was invited over to his cousin's place and had gone there. The cousin testified that Prete arrived unexpectedly at 11:15 p.m. that night, but that there had been no prior telephone call.

68 On the same day that he spoke with the police, the appellant Prete attended upon the widow Citton, brought her flowers, expressed condolences and said that he had not seen the deceased since Thursday night, that is, the night before his death.

69 The appellant Prete was subject to police surveillance and intercepts by wiretap both before and after his arrest. After his arrest on January 15, 1986, the appellant Prete is alleged to have said to the police in response to a question by Montrose:

Montrose: Tony, Franca your wife has told us about little bullets you had around the house.

Prete: You can search the house. I got no .22 bullets, no .22 rifle, no .22 nothing, never.

70 A search warrant was executed and a .22 calibre, long rifle, CCI manufactured bullet was found in the garage; in the house of the accused, a partial box of .22 calibre CCI make bullets was found on top of the water heater. It will be recalled that, at the scene when the body was found, two .22 long rifle, CCI manufactured spent cartridges were found on the road. No.22 rifle was found.

71 Angela Prete, the daughter of the appellant, gave several statements to the police. In the first interview on July 22, 1985, she said that the last time she saw Aldo Citton was on Tuesday, the night of the murder, at her residence. After the interviewing officers returned to their office, they received a telephone call from Angela Prete correcting her evidence, saying Friday was really the last time that she saw Aldo Citton. On April 30th, she acknowledged that, when initially interviewed, she had told the police that she saw Aldo Citton in a car with a man whom she thought was her father. Later, she changed her mind and said that she did not think the person was her father because her father did not have "shocking" white hair like the person in the car, and also because her father would not have driven off when she went towards the car, but would have spoken to her.

72 The Crown also had intercepted conversations which it contended showed, on the part of the appellant, guilty knowledge of the crime. The position of the defence was that a different interpretation should be put on these intercepts and that they were taken out of context.

*(b) The decision to discharge the appellant*

73 The preliminary inquiry judge concluded that:

the evidence of the excerpted segments of the intercepts could lead to two inferences: a positive and a negative. Applying the logic embraced within the rule in *Hodge's Case*, but not applying that rule per se, at best, when taken in context, the evidence could only be capable of supporting a neutral inference. A jury would have to be so instructed. I intend to go no further in any analysis of the intercepted communications.

74 In *Garton v. Whelan* (1984), 14 C.C.C. (3d) 449 (Ont. H.C.) Evans C.J. held that the same judge erred in law in applying the rule in *Hodge's Case* to a preliminary inquiry. Whether or not there is sufficient evidence to bind an



18 C.C.L.T. (2d) 54, 16 O.R. (3d) 161, 68 O.A.C. 1, 18 C.R.R. (2d) 291, (sub nom. *Prete v. Ontario (Attorney General)*) 86 C.C.C. (3d) 442, 110 D.L.R. (4th) 94

accused over for trial following a preliminary inquiry is a question of law. The test to be applied by the judge presiding over the preliminary inquiry is as set out in *United States v. Shephard*, [1977] 2 S.C.R. 1067 at 1080. It is whether or not there is any evidence upon which a reasonable jury, properly instructed, could return a verdict of guilty. Although the preliminary inquiry judge correctly stated the *Shephard* test and purported to follow it, in effect he did not do so. In concluding that he was entitled to "assess" the evidence and to apply the logic in the rule in *Hodge's Case*, namely, that in a case of circumstantial evidence the guilt of the accused must be the only rational conclusion, and in finding that the positive and negative inferences balanced each other and created a neutral inference, the preliminary inquiry judge erred in law. Even in circumstantial cases, the law now is that any determination as to compliance with the rule in *Hodge's Case* is to be left to the jury. See: *R. v. Paul* (1975), 27 C.C.C. (2d) 1 (S.C.C.); *R. v. Monteleone* (1987), 35 C.C.C. (3d) 193 (S.C.C.) at 198. Based on my review of the preliminary judge's reasons and the summary of the evidence at the preliminary inquiry, I believe that I am entitled to take judicial notice that his dismissal of the indictment against the appellant was not related to the evidence tendered at the preliminary inquiry. It was a failure to follow the injunction of this Court that he must not engage in weighing the evidence. The Attorney General chose not to appeal the preliminary judge's decision. A direct indictment was preferred.

**(c) Judicial notice may be taken of reasons for preferring a direct indictment**

75 In *R. v. Ertel*, supra, Lacourcière J.A. observed at pp. 422-423:

There are many reasons why direct indictments can be justified for the necessary protection of society. In Del Buono, *Criminal Procedure in Canada* (1982), p.323, Bruce MacFarlane and Judith Webster give the following reasons as justification for direct indictments:

(1) circumstances may be such that the security of the Crown's witnesses or the preservation of the Crown's case requires that the matter be brought to trial forthwith; the alleged offence may be so controversial or notorious that, in the interests of the public, the matter must be heard and determined as soon as possible;

(2) the preferring of a direct indictment may be the only way to remedy an unconscionable delay in bringing the matter to trial,

and

(3) the holding of a second preliminary inquiry (even if it was permissible) might cause unnecessary and unjustifiable delay and expense. For example, when a committal for trial is quashed on technical grounds not related to the evidence tendered at the preliminary inquiry; ...

*In my view, the court can take judicial notice of the above reasons, which are not an exhaustive list of the reasons that may justify a direct indictment ... It certainly cannot be said in considering its constitutionality, that the direct indictment permitted ... in circumstances which may have been rationally contemplated by Parliament, is fundamentally unfair. [emphasis mine]*

**(d) Judicial notice of reasons for preferring a direct indictment in this case**

76 (i) At the bail hearing following the appellant's arrest after the direct indictment was preferred, there was evidence before O'Driscoll J., which he accepted as credible, that the appellant had threatened at least one of the Crown's witnesses after his original arrest. In the circumstances, judicial notice may be taken that the security of the Crown's witnesses required the matter to be brought to trial forthwith.

77 (ii) Almost two years had elapsed between the date when Citton was killed and the end of the preliminary

18 C.C.L.T. (2d) 54, 16 O.R. (3d) 161, 68 O.A.C. 1, 18 C.R.R. (2d) 291, (sub nom. Prete v. Ontario (Attorney General)) 86 C.C.C. (3d) 442, 110 D.L.R. (4th) 94

inquiry. Preferment of the direct indictment avoided the delay inherent in appealing the preliminary judge's decision -- an appeal which was certain to succeed.

78 (iii) There had already been a full and complete preliminary inquiry. Preferment of the direct indictment avoided the unnecessary delay and expense of holding a second preliminary inquiry.

79 As a matter of law, therefore, preferment of the indictment was justified.

80 By way of summary:

(a) It is not alleged that there was a lack of reasonable and probable cause to initiate the original proceedings. Indeed, my review of the evidence led at the preliminary inquiry confirms that there was reasonable and probable cause.

(b) There was evidence before the judge conducting the preliminary inquiry which met the *Shepard* test and the judge erred in discharging the appellant.

(c) Judicial notice may be taken that it was reasonable for the Crown to prefer the direct indictment in order to protect the Crown's witnesses and to avoid the delay inherent in an appeal which was certain to succeed. Full disclosure of the Crown's case had been made at the previous preliminary inquiry and there was no suggestion that the Crown's case was not the same.

(d) The prosecution and trial followed as a result of the direct indictment and there are no facts alleged as to why this should not have been the case.

#### VII Striking Versus Granting Judgment

81 I have already found that the statement of claim discloses no facts with respect to an essential element of the cause of action and, as well, that any action could not possibly succeed. Should the court grant leave to amend or should it grant judgment in favour of the respondent and dismiss the action?

82 In his criminal trial, Mr. Prete did not bring a motion to quash the direct indictment on the basis of any alleged prosecutorial misconduct being a violation of his rights under s.7, nor for abuse of process, despite the fact that he was detained in custody, and that, if successful, such a motion would have afforded a complete defence to the charge. See: *R. v. Jewitt* (1985), 47 C.R. (3d) 193, 21 C.C.C. (3d) 7 (S.C.C.); *R. v. Scott* (1990), 2 C.R. (4th) 153 (S.C.C.); *R. v. Keyowski*, [1988] 1 S.C.R. 657; and *R. v. Porvin*, [1993] 2 S.C.R. 880.

83 The sole reason that the s.7 issue before this court was not determined in the criminal proceeding is that the appellant did not raise it during his trial. No explanation was proffered as to why this was so. This is a circumstance which goes to the bona fides of the action and militates against the exercise of the court's discretion to grant leave to amend. I would accordingly dismiss the action against the respondents.

84 Carruthers J. made no order as to costs in dismissing the action. I would also propose that there be no order as to costs.

*Appeal allowed.*

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1981 CarswellOnt 117, 14 B.L.R. 157, [1981] 2 S.C.R. 181, 22 C.P.C. 130, 17 C.C.L.T. 106, 124 D.L.R. (3d) 193, 2 C.H.R.R. D/468, 81 C.L.L.C. 14,117, 37 N.R. 455, 9 A.C.W.S. (2d) 262, J.E. 81-704



1981 CarswellOnt 117, 14 B.L.R. 157, [1981] 2 S.C.R. 181, 22 C.P.C. 130, 17 C.C.L.T. 106, 124 D.L.R. (3d) 193, 2 C.H.R.R. D/468, 81 C.L.L.C. 14,117, 37 N.R. 455, 9 A.C.W.S. (2d) 262, J.E. 81-704

Seneca College of Applied Arts & Technology v. Bhadauria

BOARD OF GOVERNORS OF THE SENECA COLLEGE OF APPLIED ARTS AND TECHNOLOGY v.  
BHADAURIA

Supreme Court of Canada

Laskin C.J.C., Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer JJ.

Heard: May 12 and 13, 1981

Judgment: June 22, 1981

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Counsel: *J.B. Pomerant*, Q.C. and *M.Z. Tufman*, for plaintiff-respondent.

*Douglas K. Gray* and *John C. Murray*, for defendant-appellant.

Subject: Corporate and Commercial; Civil Practice and Procedure; Torts; Labour and Employment

Actions --- Cause of action — General

Ontario Human Rights Code.

The plaintiff sued for damages for discrimination and for breach of s. 4 of the Ontario Human Rights Code alleging in her pleadings that the defendant had discriminated against her by reason of her ethnic origin in refusing to interview her for any of ten advertised positions although she possessed the requisite qualifications.

The defendant applied to strike out the statement of claim as disclosing no reasonable cause of action. The Ontario Court of Appeal allowed the plaintiff's appeal from the granting of the order requested by the defendant. The defendant appealed to the Supreme Court of Canada.

**Held, on appeal:**

The appeal was allowed.

A civil right of action could not spring from a breach of the Ontario Human Rights Code. The Code is comprehensive in its administrative and adjudicative features including rights of appeal to the courts on matters of fact and law. For the purposes of the application, the facts in the statement of claim were taken to be true.

1981 CarswellOnt 117, 14 B.L.R. 157, [1981] 2 S.C.R. 181, 22 C.P.C. 130, 17 C.C.L.T. 106, 124 D.L.R. (3d) 193, 2 C.H.R.R. D/468, 81 C.L.L.C. 14,117, 37 N.R. 455, 9 A.C.W.S. (2d) 262, J.E. 81-704

The Code is a culmination of a series of legislative efforts designed to eliminate discriminatory treatment of a person on grounds which the Legislature deemed to be irrelevant to the substantive considerations involved and violative of equality before the law.

The Supreme Court reviewed the history and structure of the Code. A board of inquiry appointed under the Code has "exclusive jurisdiction and authority to determine any question of fact or law or both required to be decided in reaching a decision as to whether or not any person has contravened this" Code. The board, on finding a contravention of the Code, also has power to make orders to rectify any injury, to make compensation and to ensure full compliance. Appeal rights to the Court are provided. In addition, the Code provides for summary conviction penalties for contravention and injunctive relief to restrain continued violation. The fact that the Minister has discretion under the Code whether to refer a matter to a board of inquiry, failing which there is a breakdown in enforcement, is not support for the argument that the Code gives or envisages civil causes of action.

The basis for a civil claim in this case was not similar to those causes of action in negligence based on breaches of statutory duties. These cases arise under legislation which, unlike the Code, does not prescribe a regulatory enforcement authority, although there may be a regulatory authority to prescribe standards enforceable by penal sanction. Insofar as they involve the law of negligence, they are distinguishable from the present case and insofar as they reflect strict liability for breach of statute they are inapplicable to the instant situation where there is elaborate enforcement machinery. It is not appropriate for the Court to create a new species of economic tort, in no sense analogous to a duty of care in the law of negligence, to confer an economic benefit upon certain persons solely on the basis of a breach of a statute which itself provides for comprehensive remedies for its breach.

The refusal to enter into contractual relations or even to consider the prospect of such relations has not been recognized at common law as a tort. The common law relevant to innkeepers' duties to receive travellers developed on different lines from that respecting restaurants and taverns. Similarly, cases where the Court sought a remedy in the face of breach of an acknowledged right are irrelevant to the issue in this case of whether a right existed at all.

The Legislature's purpose appears to be to encompass under the Code alone the enforcement of its substantive prescriptions. The legislative initiative expressed in the Code overtook the common law and established a different regime which did not exclude the Courts but made them part of the enforcement machinery.

The Code not only forecloses any civil action based directly on a breach of the Code but also excludes any common law action based on an invocation of the public policy expressed in the Code. The Code itself lays out the procedures for vindication of this public policy, which procedure the plaintiff did not see fit to use.

**Cases considered:**

*Ashby v. White* (1703), 2 Ld. Raym. 938, Holt. K.B. 524, 6 Mod. Rep. 45, 1 Salk. 19, 3 Salk. 17, 1 E.R. 417, 92 E.R. 126, reversed 1 Bro. Parl. Cas. 62 (H.L.) — *distinguished*

*Christie v. York*, [1940] S.C.R. 139, [1940] 1 D.L.R. 81 — *distinguished*

*Constantine v. Imperial Hotels Ltd.*, [1944] K.B. 693, [1944] 2 All E.R. 171 — *distinguished*

*Franklin v. Evans* (1924), 55 O.L.R. 349 *distinguished*

*Halifax & South Western Ry. v. Schwartz* (1913), 47 S.C.R. 590 — *distinguished*

*Loew's Montreal Theatres Ltd. v. Reynolds* (1919), 30 Que. K.B. 459 — *distinguished*

1981 CarswellOnt 117, 14 B.L.R. 157, [1981] 2 S.C.R. 181, 22 C.P.C. 130, 17 C.C.L.T. 106, 124 D.L.R. (3d) 193, 2 C.H.R.R. D/468, 81 C.L.L.C. 14,117, 37 N.R. 455, 9 A.C.W.S. (2d) 262, J.E. 81-704

*Monk v. Warbey*, [1935] 1 K.B. 75, [1934] All E.R. 373 (C.A.) — *distinguished*

*Noble and Wolf, Re.*, [1949] O.R. 503, [1949] 4 D.L.R. 375, reversed [1951] S.C.R. 64, [1951] 1 D.L.R. 321 (*sub nom. Noble and Wolf v. Alley*) — *referred to and considered*

*Paskivski v. C.P. Ltd.*, [1976] 1 S.C.R. 687, [1975] 5 W.W.R. 640, 5 N.R. 1, 57 D.L.R. (3d) 280 — *referred to*

*Rogers v. Clarence Hotel*, [1940] 2 W.W.R. 545, 55 B.C.R. 214, [1940] 3 D.L.R. 583 (C.A.) — *distinguished*

*Rothfield v. North Br. Ry.*, [1920] S.C. 805 — *distinguished*

*Wren, Re.*, [1945] O.R. 778, [1945] 4 D.L.R. 674 — *considered*

#### Statutes considered:

Fair Accommodation Practices Act, 1954 (Ont.), c. 28.

Fair Employment Practices Act, 1951 (Ont.), c. 24.

Female Employees' Fair Remuneration Act, 1951 (Ont.), c. 26.

Ontario Anti-Discrimination Commission Act, R.S.O. 1960, c. 270 [title am. Ontario Human Rights Commission Act, 1960-61, c. 63, s. 1].

Ontario Human Rights Code, 1961-62 (Ont.), c. 93.

Ontario Human Rights Code, R.S.O. 1970, c. 318 —

s. 1

s. 2

s. 3

s. 4

s. 4a

s. 6

s. 6a

s. 14b(6)[re-en. 1974, c. 73, s. 5]

s. 14c [re-en. 1974, c. 73, s. 5]

s. 14d(4) [re-en. 1974, c. 73, s. 5]

1981 CarswellOnt 117, 14 B.L.R. 157, [1981] 2 S.C.R. 181, 22 C.P.C. 130, 17 C.C.L.T. 106, 124 D.L.R. (3d) 193, 2 C.H.R.R. D/468, 81 C.L.L.C. 14,117, 37 N.R. 455, 9 A.C.W.S. (2d) 262, J.E. 81-704

s. 16

s. 19

Racial Discrimination Act, 1944 (Ont.), c. 51.

**Rules considered:**

Ont. R. 126.

**Authorities considered:**

Fleming, *The Law of Torts* (5th ed., 1977), pp. 122-23, 131-33. 24 Hals. (4th ed.), pp. 616 et seq. Salmond on Torts (17th ed., 1977), p. 247, c. 10. Williams, "The Effect of Penal Legislation in the Law of Tort" (1960), 23 Mod. L. Rev. 233 at 256.

APPEAL from a decision of the Ontario Court of Appeal, reported at 11 C.C.L.T. 121, 9 B.L.R. 117, 27 O.R. (2d) 142, 80 C.L.L.C. 14,003, 105 D.L.R. (3d) 707 (*sub nom. Bhadauria v. Seneca College of Applied Arts & Technology Bd. of Governors*), which allowed an appeal from an order striking out a statement of claim.

**The judgment of the Court was delivered by Laskin C.J.C. :**

1 The issue in this appeal is whether this Court should affirm the recognition by the Ontario Court of Appeal of a new intentional tort. The tort was recognized to protect a plaintiff against unjustified invasion of his or her interest not to be discriminated against in respect of a prospect of employment on grounds of race or national origin. The case was argued in the Ontario Court of Appeal on the alternative footing that a civil right of action flowed directly from a breach of The Ontario Human Rights Code, R.S.O. 1970, c. 318, as amended by 1971 (Ont.), c. 50, s. 63; 1972 (Ont.), c. 119 and 1974 (Ont.), c. 73. Wilson J.A. having found that the tort arose at common law through the invocation of the public policy expressed in the Code as supplying applicable standards, refrained from addressing the alternative argument [reported at 27 O.R. (2d) 142, 11 C.C.L.T. 121, 9 B.L.R. 117, 80 C.L.L.C. 14,003, 105 D.L.R. (3d) 707 (*sub nom. Bhadauria v. Seneca College of Applied Arts & Technology Bd. of Governors*)].

2 In this Court, considerable emphasis, pro and con, was laid on the question whether a breach of the Code could itself be sufficient to establish civil liability without calling in aid common law principles relating to intentional invasions of legally protected interests. It is common ground that there is no known case in this country, at least in common law jurisdictions, where such a tort is recognized on either of the two grounds on which it was posited by the plaintiff-respondent; nor were counsel able to produce any instance in a comparable foreign jurisdiction.

3 In my opinion, the attempt of the respondent to hold the judgment in her favour on the ground that a right of action springs directly from a breach of The Ontario Human Rights Code cannot succeed. The reason lies in the comprehensiveness of the Code in its administrative and adjudicative features, the latter including a wide right of appeal to the Courts on both fact and law. I will come to the provisions of the Code shortly. For the moment, and for the purposes of this case, it is enough to say that the naked legal question which is raised here came before the Courts below and is before this Court on a motion by way of demurrer under Ont. R. 126. The facts alleged in the statement of claim are to be taken, therefore, as provable according to their recitation. Of course, no statement of defence has as yet been delivered.

4 The facts alleged disclose that the plaintiff is a highly educated woman of East Indian origin with an earned Ph.D. degree in mathematics. She holds a valid Ontario teaching certificate and has had seven years' teaching expe-

1981 CarswellOnt 117, 14 B.L.R. 157, [1981] 2 S.C.R. 181, 22 C.P.C. 130, 17 C.C.L.T. 106, 124 D.L.R. (3d) 193, 2 C.H.R.R. D/468, 81 C.L.L.C. 14,117, 37 N.R. 455, 9 A.C.W.S. (2d) 262, J.E. 81-704

rience in the field of mathematics. In response to newspaper advertisements placed by the defendant College, the plaintiff made some ten separate applications for a teaching position in the period between June 28, 1974 and May 19, 1978. Although letters were sent to her by the College in response to her applications, telling her she would be contacted for an interview, she was never given an interview nor any reason for the rejection of her applications. She alleged that the positions for which she applied were filled by others without her high qualifications but who were not of East Indian origin. She claimed that there was discrimination against her because of her origin and that the College was in breach of a duty not to discriminate against her, and also in breach of s. 4 of The Ontario Human Rights Code, as amended. She claimed damages for being deprived of teaching opportunities at the College in which she was still interested and for being deprived of the opportunity to earn a teaching salary. Moreover, she suffered mental distress, frustration, loss of self-esteem and dignity, and lost time in repeatedly applying for advertised positions for which she was denied the opportunity to compete.

5 The Ontario Human Rights Code, in its present form, is the culmination of a successive series of enactments beginning with The Racial Discrimination Act, 1944 (Ont.), c. 51 and continuing with The Fair Employment Practices Act, 1951 (Ont.), c. 24 and with The Fair Accommodation Practices Act, 1954 (Ont.), c. 28. These enactments, addressed, respectively, to notices or signs or advertising, to employment, and to places of public accommodation were designed to eliminate discriminatory treatment of a person on grounds selected by the Legislature as being irrelevant to the substantive considerations involved and as being, objectively, criteria that were offensive and violative of equality before the law. In The Racial Discrimination Act, the prohibited criteria were race or creed; in The Fair Employment Practices Act, they were race, creed, colour, nationality, ancestry or place of origin; and the same prohibited criteria were specified in The Fair Accommodation Practices Act. In 1962, these Acts and some others (The Female Employees' Fair Remuneration Act, 1951 (Ont.), c. 26, The Ontario Human Rights Commission Act, [Ontario Anti-Discrimination Commission Act, R.S.O. 1960, c. 270; title am. 1960-61 (Ont.), c. 63, s. 1] and The Ontario Anti-Discrimination Commission Amendment Act, 1960-61 (Ont.), c. 63) were gathered up and incorporated into a code, entitled The Ontario Human Rights Code, 1961-62 (Ont.), c. 93. The present Code is a more elaborate version of the 1961-62 Code which did not contain any provisions for an appeal from a decision or order of a board of inquiry.

6 The present Ontario Human Rights Code contains a declaration of policy in its preamble [am. 1972, c. 119, s. 1] (being the same declaration that was in the original Code, as follows:

WHEREAS recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations;

AND WHEREAS it is public policy in Ontario that every person is free and equal in dignity and rights without regard to race, creed, colour, sex, marital status, nationality, ancestry or place of origin;

AND WHEREAS these principles have been confirmed in Ontario by a number of enactments of the Legislature;

AND WHEREAS it is desirable to enact a measure to codify and extend such enactments and to simplify their administration;

7 Part I of the Code sets out the prohibition of discrimination on the grounds of race, creed, colour, sex, marital status, nationality, ancestry or place of origin. The prohibitions are directed to (1) notices, signs, symbols, emblems or other representations (s. 1); (2) denial of or discrimination respecting access to accommodation, services or facilities in any place to which the public is customarily admitted (s. 2); (3) occupancy of commercial units and housing accommodation (each defined in s. 19), subject to an exception in respect of sex as to housing accommodation where occupancy, other than that of the owner or his family is restricted to those of the same sex (s. 3); (4) employment (and here age, defined to cover the span from age 40 to 64 inclusive, is added to the prohibited grounds of discrimination), whether it be a reference or recruitment for employment, or dismissal or refusal to employ or refusal to train or



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promote or transfer, or with respect to any term or condition of employment or with respect to discriminatory advertising or applications for employment, and employment agencies are also brought under the general ban of discrimination (s. 4). There are exceptions here (1) in respect of age, sex or marital status where this is a bona fide occupational classification; (2) in respect of exclusively religious, philanthropic, educational, fraternal or social organizations not operated for private profit; (3) in respect of domestic employment in a single family residence; and (4) in respect of bona fide superannuation or pension or insurance plans that make any distinction or exclusion or preference between employees because of age, sex or marital status. Special provision is made in s. 4a to prohibit trade unions from discriminating on any of the prohibited grounds (including age) in respect of membership therein or by expulsion or suspension and, similarly, as to self-governing professions. The Crown in right of the Province and its agencies are subject to the prohibitions of the Code (s. 6). There is also a special provision (s. 6a) under which the Ontario Human Rights Commission, to which administration of the Code is confided, may give approval to what may be called affirmative action programmes.

8 Part II of the Code deals with administration by the Ontario Human Rights Commission, composed of three or more members as determined by the government. The Commission is charged to promote the principles of the Code and to conduct research and educational programmes designed to eliminate discriminatory practices. Its main task of administration lies, however, in the investigation of complaints and to enforce the Code.

9 Part III of the Code deals with complaint procedures, and what is noteworthy is that the lodging of complaints is not limited to persons who allegedly suffer any prohibited discrimination, and the Commission too may initiate a complaint. Upon receipt of a complaint or its initiation, the first duty of the Commission or an officer thereof is to try to effect a settlement. Powers of entry into premises are given under a previous order obtainable on an ex parte application to a justice of the peace. If a settlement is not achieved, the Commission is required to make a recommendation to the Minister of Labour whether or not a board of inquiry should be appointed but whatever the recommendation it is in the discretion of the Minister to appoint such a board. Under s. 14b (6) [re-en. 1974, c. 73, s. 5], a board of inquiry (subject to the provisions of s. 14d respecting appeals), "has exclusive jurisdiction and authority to determine any question of fact or law or both required to be decided in reaching a decision as to whether or not any person has contravened this Act or for the making of any order pursuant to such decision".

10 Under s. 14c [re-en. 1974, c. 73, s. 5], a board of inquiry, on finding a contravention of the Code may order any offending party "to do any act or thing that, in the opinion of the board, constitutes full compliance ... and to rectify any injury caused to any person or to make compensation therefor". Section 14d provides for an appeal by any party to a hearing before a board from the board's decision or order to the Ontario Supreme Court in accordance with that Court's rules. The Minister has a right to be heard on the appeal. The scope of the appeal is set out in s. 14d (4) [re-en. 1974, c. 73, s. 5] in the following terms:

14d . . .

(4) An appeal under this section may be made on questions of law or fact or both and the court may affirm or reverse the decision or order of the board or direct the board to make any decision or order that the board is authorized to make under this Act and the court may substitute its opinion for that of the board.

It is difficult to envisage any wider appeal than that prescribed by the foregoing provision.

11 In addition to the complaint procedure and the possibility of a board of inquiry and judicial scrutiny thereafter, the Code in Pt. IV provides for summary conviction penalties for contravention of the Code and a conviction may be followed by an application to a Judge of the Ontario Supreme Court by the Minister for an injunction to restrain the continuance of the violation of the Code. However, under s. 16, prosecution depends upon the previous consent thereto in writing by the Minister.

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12 The comprehensiveness of the Code is obvious from this recital of its substantive and enforcement provisions. There is a possibility of a breakdown in full enforcement if the Minister refuses to appoint a board of inquiry where a complaint cannot be settled and, further, whether penalties on prosecution will be sought also depends on action by the Minister. I do not, however, regard this as supporting (and no other support was advanced by the respondent) the contention that the Code itself gives or envisages a civil cause of action, whether by way of election of remedy or otherwise. The Minister's discretion is simply an element in the scheme.

13 There is, in my view, a narrow line between founding a civil cause of action directly upon a breach of a statute and as arising from the statute itself and founding a civil cause of action at common law by reference to policies reflected in the statute and standards fixed by the statute. The cases that have dealt with situations of this kind have been in the field of negligence, with the legislation viewed as establishing standards of behaviour, and deviation, unless excused, amounting to a species of strict liability: see Fleming, *The Law of Torts* (5th ed., 1977), pp. 131-33, and see also pp. 122-23. The contention in the present case is, of course, based on strict liability, especially having regard to the way in which the issue herein arose, that is, on the basis of facts recited by the plaintiff and taken as provable.

14 A line of English cases dealing with statutory duties to employees respecting factory and mine safety illustrates judicial enforcement by civil action for damages, although the legislative prescription is enforcement by penal proceedings: see Salmond (17th ed., 1977), at p. 247. The same approach has been taken in this country in respect of statutory duties imposed under railway legislation: see, for example, *Halifax & South Western Ry. v. Schwartz* (1913), 47 S.C.R. 590. Such cases, and others like them have arisen, however, under legislation which (unlike The Ontario Human Rights Code) does not prescribe a regulatory enforcement authority, although there may be a regulatory authority to prescribe standards enforceable by penal sanction. Questions may arise whether the statutory duties are absolute or are qualified by required proof of want of due care, and this, again, turns on the construction of the legislation: c.f. *Paskivski v. C.P. Ltd.*, [1976] 1 S.C.R. 687, [1975] 5 W.W.R. 640, 5 N.R. 1, 57 D.L.R. (3d) 280. Insofar as such cases involve the law of negligence they are distinguishable from the present case, and insofar as they reflect strict liability for breach of a statute (see, for example, *Monk v. Warbey*, [1935] 1 K.B. 75, [1934] All E.R. 373 (C.A.)), they are inapplicable to a situation like the one here where there is elaborate enforcement machinery.

15 What we have here, if the Court of Appeal is correct in its conclusion, is a species of an economic tort, new in its instance and founded, even if indirectly, on a statute enacted in an area outside a fully recognized area of common law duty: see Williams, *The Effect of Penal Legislation in the Law of Tort* (1960), 23 Mod. L. Rev. 233, at p. 256. It is one thing to apply a common law duty of care to standards of behaviour under a statute; that is simply to apply the law of negligence in the recognition of so-called statutory torts. It is quite a different thing to create by judicial fiat an obligation — one in no sense analogous to a duty of care in the law of negligence — to confer an economic benefit upon certain persons, with whom the alleged obligor has no connection, and solely on the basis of a breach of a statute which itself provides comprehensively for remedies for its breach.

16 It was conceded that the relevant provisions in this case, if applicable, are in s. 4(1)(a) and (b) [re-en. 1972, c. 119, s. 5] which read as follows:

4. — (1) No person shall,

(a) refuse to refer or to recruit any person for employment;

(b) dismiss or refuse to employ or to continue to employ any person;

On the facts here, taken as provable, there was a refusal to recruit for employment and, certainly, a refusal to employ. However, a refusal to enter into contract relations or perhaps, more accurately, a refusal even to consider the prospect of such relations has not been recognized at common law as giving rise to any liability in tort.



1981 CarswellOnt 117, 14 B.L.R. 157, [1981] 2 S.C.R. 181, 22 C.P.C. 130, 17 C.C.L.T. 106, 124 D.L.R. (3d) 193, 2 C.H.R.R. D/468, 81 C.L.L.C. 14,117, 37 N.R. 455, 9 A.C.W.S. (2d) 262, J.E. 81-704

17 None of the cases considered in the Ontario Court of Appeal, all arising at common law and under the civil law of Quebec, relate to a refusal to recruit or to employ. They exhibit a strict laissez faire policy, even where the business or service whose facilities were denied on the ground of colour or race or ancestry was under government licence: see *Loew's Montreal Theatres Ltd. v. Reynolds* (1919), 30 Que. K.B. 459; *Franklin v. Evans* (1924), 55 O.L.R. 349; *Christie v. York*, [1940] S.C.R. 139, [1940] 1 D.L.R. 81; *Rogers v. Clarence Hotel*, [1940] 2 W.W.R. 545, 55 B.C.R. 214, [1940] 3 D.L.R. 583 (C.A.). In those cases where a plaintiff succeeded in his claim for damages for denial of services or accommodation on the ground of colour or race, recovery was based on an innkeeper's liability: see *Constantine v. Imperial Hotels Ltd.*, [1944] K.B. 693, [1944] 2 All E.R. 171, and cf. *Rothfield v. North Br. Ry.*, [1920] S.C. 805.

18 There are two observations to be made in connection with the cases referred to in the Court of Appeal and with the reasons of that Court delivered by Wilson J.A. In *Rogers v. Clarence Hotel*, supra, there was a dissenting judgment in the British Columbia Court of Appeal by O'Halloran J.A. and it would appear that his dissent, based on what that learned Judge said was a common law principle of equality, influenced the Ontario Court of Appeal. The dissent is, however, weakened somewhat by its reliance on an innkeeper case, the Scottish *Rothfield* case. The common law of innkeepers' liability had, historically, developed along different lines from that respecting restaurants and taverns; keepers of a common inn were under an obligation to receive travellers or intending guests, irrespective of race or colour or other arbitrary disqualification: see 24 Hals. (4th ed.) *Inns and Innkeepers*, pp. 616 et seq.

19 Secondly, and more obviously, Wilson J.A. relied on *Ashby v. White* (1703), 2 Ld. Raym. 938, Holt K.B. 524, 6 Mod. Rep. 45, 1 Salk. 19, 3 Salk. 17, 1 E.R. 417, 92 E.R. 126 [reversed 1 Bro. Parl. Cas. 62 (H.L.)] where Holt C.J., dealing with a denial of a right to vote, said (at p. 953 [Ld. Raym.]):

If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal.

There was a proprietary aspect to the right to vote, and among the questions that arose was whether material loss must be shown by the plaintiff, a question that, on the basis of the above-quoted principle was answered in the negative. Birkett J. invoked *Ashby v. White* in the *Constantine* case, an innkeeper case, where the plaintiff could not succeed if he was required to prove that he suffered special damage. He suffered none because he readily obtained accommodation at another of the defendant's hotels. However, nominal damages were awarded on the *Ashby v. White* principle but exemplary damages for the humiliation and indignity suffered by the plaintiff were refused.

20 It is neither here nor there whether the result in the *Constantine* case was correct because both there and in *Ashby v. White* the plaintiff had a legally protected interest. The present case is not concerned with whether a remedy can be provided for an admitted right but with whether there is a right at all, that is, an interest which the law will recognize as deserving protection.

21 Another support, perhaps the strongest support, for the result reached by the Ontario Court of Appeal lay in the approach taken by Mackay J. in *Re Wren*, [1945] O.R. 778, [1945] 4 D.L.R. 674, where a restrictive covenant in a deed of land, prohibiting the sale of the land to "Jews or persons of objectionable nationality", was struck down as offensive to public policy as expressed, inter alia, in the Ontario Racial Discrimination Act of 1944. As Wilson J.A. pointed out, Mackay J. invalidated the covenant not because it violated the Act but because it was contrary to the public policy expressed in the Act; and she added, "This is the distinction which underlies the alternate bases on which the plaintiff has put her claim."

22 I do not myself quarrel with the approach taken in *Re Wren*, but it is necessary to point out that a different view on public policy was taken by the Ontario Court of Appeal in *Re Noble and Wolf*, [1949] O.R. 503, [1949] 4 D.L.R.

1981 CarswellOnt 117, 14 B.L.R. 157, [1981] 2 S.C.R. 181, 22 C.P.C. 130, 17 C.C.L.T. 106, 124 D.L.R. (3d) 193, 2 C.H.R.R. D/468, 81 C.L.L.C. 14,117, 37 N.R. 455, 9 A.C.W.S. (2d) 262, J.E. 81-704

375, a case not mentioned by Wilson J.A. Moreover, when this last mentioned case came to this Court as *Noble and Wolf v. Alley*, [1951] S.C.R. 64, [1951] 1 D.L.R. 321, the obnoxious covenant in that case, similar to the one in *Re Wren*, was held unenforceable for uncertainty and as a restraint on alienation, property law grounds, and the Court made no pronouncement on public policy, although the Court of Appeal had done so, disagreeing therein with *Re Wren*.

23 Having canvassed the cases that I have mentioned, Wilson J.A. began her concluding reasons in these words [C.C.L.T., p. 131]:

Against this background of authorities, we are called on to decide the matter now on appeal before us, namely, assuming that the plaintiff can prove the allegations set forth in her statement of claim, do they give rise to a cause of action at common law and, if they do not, do they give rise to a civil cause of action under The Ontario Human Rights Code?

In my view, they give rise to a cause of action at common law. While no authority cited to us has recognized a tort of discrimination, none has repudiated such a tort. The matter is accordingly *res integra* before us.

She followed this by quoting the preamble of The Ontario Human Rights Code and continued as follows [pp. 132-33]:

I regard the preamble to the Code as evidencing what is now, and probably has been for some considerable time, the public policy of this province respecting fundamental human rights. If we accept that 'every person is free and equal in dignity and rights without regard to race, creed, colour, sex, marital status, nationality, ancestry or place of origin', as we do, then it is appropriate that these rights receive the full protection of the common law. The plaintiff has a right not to be discriminated against because of her ethnic origin and alleges that she has been injured in the exercise or enjoyment of it. If she can establish that, then the common law must, on the principle of *Ashby v. White*, *supra*, afford her a remedy.

I do not regard the Code as in any way impeding the appropriate development of the common law in this important area. While the fundamental human right we are concerned with is recognized by the Code, it was not created by it. Nor does the Code, in my view, contain any expression of legislative intention to exclude the common law remedy. Rather the reverse since s. 14(a) appears to make the appointment of a board of inquiry to look into a complaint made under the Code a matter of ministerial discretion.

24 I confess to some difficulty in understanding the basis of the learned Justice's observation that "while the fundamental human right we are concerned with is recognized by the Code, it was not created by it" (or, I assume, by its predecessors). There is no gainsaying the right of the Legislature to establish new rights or to create new interests of which the Court may properly take notice and enforce, either under the prescriptions of the Legislature or by applying its own techniques if, on its construction of the legislation, enforcement has not been wholly embraced by the terms of the legislation: see *Salmond on Torts* (17th ed., 1977), c. 10, *passim*.

25 In the present case, the enforcement scheme under The Ontario Human Rights Code ranges from administrative enforcement through complaint and settlement procedures to adjudicative or quasi-adjudicative enforcement by boards of inquiry. The boards are invested with a wide range of remedial authority including the award of compensation (damages in effect), and to full curial enforcement by wide rights of appeal which, potentially, could bring cases under the Code to this Court. The Ontario Court of Appeal did not think that this scheme of enforcement excluded a common law remedy, saying in the words of Wilson J.A. (which I repeat) [p. 133]:

... Nor does the Code, in my view, contain any expression of legislative intention to exclude the common law remedy. Rather the reverse since s. 14(a) appears to make the appointment of a board of inquiry to look into a complaint made under the Code a matter of ministerial discretion.

1981 CarswellOnt 117, 14 B.L.R. 157, [1981] 2 S.C.R. 181, 22 C.P.C. 130, 17 C.C.L.T. 106, 124 D.L.R. (3d) 193, 2 C.H.R.R. D/468, 81 C.L.L.C. 14,117, 37 N.R. 455, 9 A.C.W.S. (2d) 262, J.E. 81-704

I would have thought that this fortifies rather than weakens the Legislature's purpose, being one to encompass, under the Code alone, the enforcement of its substantive prescriptions. It is unnecessary to consider here how far the Minister's discretion is untrammelled, or whether a clue to its character is afforded by the ensuing provisions for appeal to the Courts from a decision or order of a board of inquiry.

26 The view taken by the Ontario Court of Appeal is a bold one and may be commended as an attempt to advance the common law. In my opinion, however, this is foreclosed by the legislative initiative which overtook the existing common law in Ontario and established a different regime which does not exclude the Courts but rather makes them part of the enforcement machinery under the Code.

27 For the foregoing reasons, I would hold that not only does the Code foreclose any civil action based directly upon a breach thereof but it also excludes any common law action based on an invocation of the public policy expressed in the Code. The Code itself has laid out the procedures for vindication of that public policy, procedures which the plaintiff respondent did not see fit to use.

28 The appeal is, accordingly, allowed, the judgment of the Ontario Court of Appeal is set aside and the judgment of Callaghan J. dismissing the action is restored. In the circumstances, there will be no order as to costs, either here or in the Courts below.

*Appeal allowed.*

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1989 CarswellBC 76, 36 B.C.L.R. (2d) 273, [1989] 4 W.W.R. 218, 94 N.R. 321, 58 D.L.R. (4th) 193, [1989] 1 S.C.R. 1085, 90 C.L.L.C. 14,035, 25 C.C.E.L. 81, 42 B.L.R. 111, 90 D.L.L.C. 14,035, J.E. 89-810, EYB 1989-66980



1989 CarswellBC 76, 36 B.C.L.R. (2d) 273, [1989] 4 W.W.R. 218, 94 N.R. 321, 58 D.L.R. (4th) 193, [1989] 1 S.C.R. 1085, 90 C.L.L.C. 14,035, 25 C.C.E.L. 81, 42 B.L.R. 111, 90 D.L.L.C. 14,035, J.E. 89-810, EYB 1989-66980

Vorvis v. Insurance Corp. of British Columbia

VORVIS v. INSURANCE CORPORATION OF BRITISH COLUMBIA

Supreme Court of Canada

Beetz, Estey[FN\*], McIntyre, Lamer, Wilson, Le Dain[FN\*\*] and L'Heureux-Dubé JJ.

Heard: October 20, 1987

Judgment: May 4, 1989

Docket: No. 18844

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Counsel: *F.A. Schroeder*, for appellant.

*R.H. Guile, Q.C.*, and *D.G. Cowper*, for respondent.

Subject: Labour and Employment; Corporate and Commercial; Public

Employment Law --- Termination and dismissal — Practice and procedure — Remedies — Damages — Pensions

Employment Law --- Termination and dismissal — Practice and procedure — Remedies — Damages — Punitive or exemplary damages

Employment Law --- Termination and dismissal — Action for mental distress arising from dismissal

Employment — Termination of employment — Wrongful dismissal — Damages — Mental distress — Plaintiff being subjected to offensive and objectionable conduct by immediate superior before being dismissed without cause — Conduct of superior neither independently actionable nor aggravating damages caused by wrongful dismissal — Plaintiff only entitled to damages arising out of failure to receive reasonable notice.

Employment — Termination of employment — Wrongful dismissal — Damages — Punitive damages — Plaintiff being subjected to offensive and objectionable conduct by immediate superior before being dismissed without cause — Conduct of superior neither independently actionable nor of such a nature to justify punitive damages — Plaintiff only entitled to damages arising out of failure to receive reasonable notice.

Employment — Termination of employment — Wrongful dismissal — Damages — Assessment — Loss of pension benefits — Plaintiff being wrongfully dismissed prior to vesting of pension benefits — Benefits not vesting during



1989 CarswellBC 76, 36 B.C.L.R. (2d) 273, [1989] 4 W.W.R. 218, 94 N.R. 321, 58 D.L.R. (4th) 193, [1989] 1 S.C.R. 1085, 90 C.L.L.C. 14,035, 25 C.C.E.L. 81, 42 B.L.R. 111, 90 D.L.L.C. 14,035, J.E. 89-810, EYB 1989-66980

The plaintiff makes a claim for mental distress, anxiety, vexation and frustration suffered by the plaintiff as a result of the termination of his contract of employment by the defendant.

Later, in the prayer for relief, in addition to asserting claims for general and special damages for breach of contract, he claimed punitive damages. In pursuit of his claim for mental distress, the appellant argued at trial that the offensive and unjustifiable conduct of Reid, a superior in his employment, was such that it caused great mental distress, anxiety, vexation and frustration as alleged in the pleadings, and in support of his claim he cited several cases. The trial judge reviewed the authorities, including *Tippett v. I.T.U.*, *Loc. 226*, [1976] 4 W.W.R. 460, 76 C.L.L.C. 14,026, 71 D.L.R. (3d) 146 (B.C.S.C.), where union members wrongfully dismissed from the union were awarded damages of \$500 for loss of social prestige and humiliation; *Jarvis v. Swans Tours Ltd.*, [1973] 1 Q.B. 233, [1972] 3 W.L.R. 954, [1973] 1 All E.R. 71 (C.A.), where a breach of contract by a travel agent caused the loss of a holiday with attendant distress, upset and frustration; *Cringle v. Nor. Union Ins. Co.* (1981), 124 D.L.R. (3d) 22 (B.C.S.C.), where Ruttan J. of the British Columbia Supreme Court recognized that damages could be awarded for mental distress in an action in contract, citing *Cox v. Philips Indust. Ltd.*, [1976] W.L.R. 638, [1976] 3 All E.R. 161 (Q.B.), and *Pilon v. Peugeot Can. Ltd.* (1980), 29 O.R. (2d) 711, 12 B.L.R. 227, 114 D.L.R. (3d) 378 (H.C.), but suggested that in such cases actual damage should be shown. The trial judge, at pp. 734-35, reached the conclusion upon a consideration of those and other authorities that:

The rule expressed in *Addis v. Gramophone Co. Ltd.* as restated in Canada in *Peso Silver Mines Ltd. (N.P.L.) v. Cropper* (1966), 58 D.L.R. (2d) 1 at p. 10, [1966] S.C.R. 673, 56 W.W.R. 641 (S.C.C.), and in *Harvey Foods Ltd. v. Reid* (1971), 18 D.L.R. (3d) 90 at 93-94, 3 N.B.R. (2d) 444 (C.A.), is unaffected by those decisions.

15 He, accordingly, refused the general damage claim for aggravated damages for mental distress, and in this he was supported by the Court of Appeal. The trial judge sought to distinguish between damages for mental distress which, as will be explained below, would include cases properly classified as aggravated damages, and punitive or exemplary damages. In respect of punitive damages, he said at p. 735: "If exemplary damages could be awarded in a wrongful dismissal case I would award them here". On his interpretation of *Addis v. Gramophone Co.*, [1909] A.C. 488 (H.L.), and *Peso Silver Mines Ltd. (N.P.L.) v. Cropper*, [1966] S.C.R. 673, 56 W.W.R. 641, 58 D.L.R. (2d) 1 [B.C.], he held that the sole measure of damages for wrongful dismissal was the salary which the plaintiff was entitled to during the period of reasonable notice. Therefore, he awarded neither aggravated nor punitive damages.

16 Before dealing with the question of punitive damages, it will be well to make clear the distinction between punitive and aggravated damages, for in the argument before us and in some of the materials filed there appeared some confusion as to the distinction. Punitive damages, as the name would indicate, are designed to punish. In this, they constitute an exception to the general common law rule that damages are designed to compensate the injured, not to punish the wrongdoer. Aggravated damages will frequently cover conduct which could also be the subject of punitive damages, but the role of aggravated damages remains compensatory. The distinction is clearly set out in Waddams, *The Law of Damages* (1983), at pp. 562-63, para. 979, in these words:

An exception exists to the general rule that damages are compensatory. This is the case of an award made for the purpose, not of compensating the plaintiff, but of punishing the defendant. Such awards have been called exemplary, vindictive, penal, punitive, aggravated and retributory, but the expressions in common modern use to describe damages going beyond compensatory are exemplary and punitive damages. "Exemplary" was preferred by the House of Lords in *Cassell & Co. Ltd. v. Broome*, but "punitive" has also been used in many Canadian courts including the Supreme Court of Canada in *H.L. Weiss Forwarding Ltd. v. Omnis*. The expression "aggravated damages", though it has sometimes been used interchangeably with punitive or exemplary damages, has more frequently in recent times been contrasted with exemplary damages. In this contrasting sense, aggravated damages describes an award that aims at compensation, but takes full account of the intangible injuries, such as distress and humiliation, that may have been caused by the defendant's insulting behaviour. The expressions vindictive, penal and retributory have dropped out of common use.

1989 CarswellBC 76, 36 B.C.L.R. (2d) 273, [1989] 4 W.W.R. 218, 94 N.R. 321, 58 D.L.R. (4th) 193, [1989] 1 S.C.R. 1085, 90 C.L.L.C. 14,035, 25 C.C.E.L. 81, 42 B.L.R. 111, 90 D.L.L.C. 14,035, J.E. 89-810, EYB 1989-66980

Aggravated damages are awarded to compensate for aggravated damage. As explained by Waddams, they take account of intangible injuries and by definition will generally augment damages assessed under the general rules relating to the assessment of damages. Aggravated damages are compensatory in nature and may only be awarded for that purpose. Punitive damages, on the other hand, are punitive in nature and may only be employed in circumstances where the conduct giving the cause for complaint is of such nature that it merits punishment.

17 The issue which is faced by this court is whether punitive damages may be awarded by the court in an action for breach of contract, based on wrongful dismissal of an employee, and, if so, whether the circumstances of this case would merit such an award. Also, before the court is a similar question with respect to aggravated damages. This question was not shown in the appellant's factum as a question in issue but much of the argument and many of the cases cited concerned the question, presumably on the theory that aggravated damages were included in the concept of punitive damages, and for that reason this issue will be addressed first.

18 Consideration of a claim for damages as a result of unlawful dismissal from employment usually commences with *Addis v. Gramophone Co.* and *Peso Silver Mines Ltd. (N.P.L.) v. Cropper*, both supra. In *Addis*, the plaintiff was held to have been wrongfully dismissed from his employment with the defendant. The contract of employment provided that he could be dismissed on six months' notice. The employer gave him the appropriate notice, but at once appointed his successor and effectively prevented him from performing his duties and earning his full remuneration during the notice period. The manner in which his dismissal was brought about was injurious to his business reputation and caused significant distress. He brought action for wrongful dismissal. The jury found that he had been wrongfully dismissed and fixed damages at £600 for wrongful dismissal and £340 for lost commissions in the period of notice. The damages of £600 greatly exceeded the salary which would have been payable to him in the notice period. On the appeal, the question was whether the jury could in law award the plaintiff such damages over and above the salary he would have earned had he been permitted to work during the six-month notice period. The majority of the House of Lords determined that the jury could not award more than salary lost during the notice period. This case has long stood as an authority for the proposition that in a case of wrongful dismissal damages are limited to the earnings lost during the period of notice to which the employee is entitled and cannot include damages for the manner of dismissal, for injured feelings, or for loss sustained from the fact that the dismissal makes it more difficult for the plaintiff to obtain other employment. In the *Peso Silver Mines* case, a decision of this court, a director of a corporation was wrongfully dismissed. In dismissing him, the corporation made unsubstantiated charges against him which impaired his reputation in the mining community. He brought action for wrongful dismissal and claimed, in addition to lost salary, damages for injury to his reputation. Damages were awarded at trial on this second heading. In the British Columbia Court of Appeal (1965), 54 W.W.R. 329, 56 D.L.R. (2d) 117, Bull J.A., speaking for the majority, disallowed the award of damages as it related to damage for loss of reputation with these words at p. 161:

As to the quantum awarded, I consider, with respect, that the learned trial Judge erred in two particulars. First, he increased the damages to \$10,000 (9 1/4 months' salary) from \$6,500 (6 months' salary) which he said he would have awarded had it not been for damage to the respondent's reputation among mining men. There is no evidence of such damage to reputation, and, in any event, I do not consider this that type of contract of employment which involves any collateral or implied agreement the breach of which justifies the awarding of damages for loss of reputation...

On the appeal to this court, Cartwright J. (as he then was) speaking for the full court, said at p. 684:

I agree with Bull J.A. that the claim being founded on breach of contract the damages cannot be increased by reason of the circumstances of dismissal whether in respect of the respondent's wounded feelings or the prejudicial effect upon his reputation and chances of finding other employment. I am also in agreement with Bull J.A. that in view of the respondent's evidence that he remained unemployed for only five months the award should be reduced to \$6,500.

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## RULE 21 DETERMINATION OF AN ISSUE BEFORE TRIAL

### WHERE AVAILABLE

#### *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. R.R.O. 1990, Reg. 194, r. 21.01 (1).

(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). R.R.O. 1990, Reg. 194, r. 21.01 (2).

#### *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;

#### **Capacity**

(b) the plaintiff is without legal capacity to commence or continue the action or the defendant does not have the legal capacity to be sued;

#### **Another Proceeding Pending**

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

#### **Action Frivolous, Vexatious or Abuse of Process**

(d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court,

and the judge may make an order or grant judgment accordingly. R.R.O. 1990, Reg. 194, r. 21.01 (3).



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

**Discovery**

5. (1) A claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a). 2002, c. 24, Sched. B, s. 5 (1).

**Presumption**

(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved. 2002, c. 24, Sched. B, s. 5 (2).

**Demand obligations**

(3) For the purposes of subclause (1) (a) (i), the day on which injury, loss or damage occurs in relation to a demand obligation is the first day on which there is a failure to perform the obligation, once a demand for the performance is made. 2008, c. 19, Sched. L, s. 1.

**Same**

(4) Subsection (3) applies in respect of every demand obligation created on or after January 1, 2004. 2008, c. 19, Sched. L, s. 1.

**MICHAEL JACK**

Plaintiff

- and -

**ONTARIO PROVINCIAL POLICE ASSOCIATION et. al.**

Defendants

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
PROCEEDING COMMENCED AT  
TORONTO**

**BOOK OF AUTHORITIES**  
(for motion returnable April 22, 2013)

**Investigation Counsel  
Professional Corporation**  
Barristers & Investigation Consultants  
350 Bay Street, Suite 1000  
Toronto, Ontario M5H 2S6

**Norman Groot**  
LSUC No.: 43721V

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

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