

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

MILOS MARKOVIC, NATASA MARKOVIC and 1145959 ONTARIO LIMITED
carrying on business as MAESTRO PIZZA PLUS

Plaintiffs

-and-

MIKE ABBOTT, ROBERT CORREA, DANIEL ROSS, CHRIS HIGGINS, ANITA
MANCUSO, DARREN COX, MARK DENTON, PEDRO DIAZ, JOHN MACIEK,
TORONTO POLICE SERVICES BOARD, DAVID BOOTHBY, CHIEF OF THE
TORONTO POLICE SERVICE and THE TORONTO POLICE SERVICE

Defendants

PLAINTIFFS' FACTUM

On a motion to Amend a previously Amended Statement of Claim

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PART ONE: OVERVIEW

1. The plaintiffs seek to amend their pleading to particularize claims for aggravated and punitive damages arising from allegations of a cover up by employees and agents of the Toronto Police Services Board (hereafter the “defendants”) of corruption on the part of a TPS drug squad team of officers who are named as individual defendants in this action (referred to variously as either the “Ross Team” or “Team 2”). The proposed amendments allege that although the defendants knew that there was corruption on the part of the Ross team who are alleged to have beaten and robbed the plaintiffs, the defendants responded by interfering with an RCMP led “Special Task Force” and then actively and deliberately suppressing the Task Force’s opinions and conclusions. **For ease of reference, the proposed amendments are attached as Appendix B to this factum.**

Appendix B: Proposed Amended Amended Statement of Claim; Supplementary Motion Record (Vol II), Tab 1: Proposed Amended Amended Statement of Claim.

2. While the circumstances of the case at bar are unique and somewhat controversial, this is actually a simple amendment motion. The original action against the employees and employer for wrongs committed to the plaintiffs is being amended to incorporate “after-the-event” conduct of the defendants which was orchestrated to cover the tracks relating to the original incident. Respectfully, the notion that post incident bad faith conduct aimed at frustrating a plaintiff’s original action can support claims for aggravated or punitive damages is hardly a novel legal principle (see *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595). Even more to the point, such amendments can hardly be seen as “clearly impossible of success”.

3. While the first stage of this amendment motion (Stage 2 addresses discoverability and special circumstances) is based on the pleadings, for reasons explained below, it is submitted that there are facts that can be properly considered at the first stage of the motion. Key facts that this Honourable Court is entitled to consider at this stage (and are pled) spring from productions which should have been delivered years ago but were only recently revealed following a contested motion and court order in December 2008. As a result of documents produced by the TPS defendants on February 19, 2009 and May 7, 2009, the plaintiffs have learned, for the first time, that:

- (a) The defendants prematurely shut down an investigation into the Ross Team (Team 2) despite the fact that the lead investigator Neily had concluded that there was “no doubt” that there was a thief (or thieves) on the Ross Team. The defendant Board, through its agents and employees including Chief Fantino, publicly proclaimed that the drug squad misconduct was limited to a “few bad apples” on Team 3 despite active knowledge that the lead investigator was of the opinion that the pattern of theft and violence was also prevalent on Team 2 and the North West Field Command group of officers. As plead in the amendments, the intention of the exercise was to avert a public inquiry by assuring the public that corruption on the drug squad was limited to one team of officers, the “Schertzer team” (Team 3).
- (b) In addition to their failure to produce any of the “Final Reports” into the Markovic allegations (until recently), the Toronto Police Service Defendants also failed to reveal that there were documented Progress Reports from Investigator Neily to Chief Fantino over the work of the Special Task Force. These latter documents confirm that the Chief was receiving regular briefings on the conduct of the Special Task Force investigation. The Special Task Force recommended that an undercover operation be undertaken in respect of the Ross Team. However, the Special Task Force investigation, having been prematurely terminated by the Chief, never undertook such an operation. Instead, the presence of corruption on the Ross Team received different treatment than the corruption on the Schertzer team, the latter having been independently investigated. The Team 2 investigation was transformed into a purely internal TPS exercise by Internal Affairs and the undercover operation recommended by the Special Task Force was never undertaken. The Team 3 investigation led to charges. Whereas the Team 2 investigation and the concern over the presence of thieves on the Ross Team was shut down.

- (c) Publicly, the Toronto Police Service blamed the plaintiffs for the shutdown of the Team 2 investigation, citing the lack of cooperation of the plaintiffs. Privately, Chief Superintendent Neily advised counsel for the Markovics that the decision to shut down the investigation was not made by him and that he had been told to cite a lack of resources as the reason (see Peter Biro statement, filed). In fact, the Markovics were cooperative in the investigation having arrived at an agreement with Investigator Neily to furnish a statement. Neither the plaintiffs nor their counsel were ever told that the lead investigator was convinced beyond doubt there was a thief on the Ross Team or had recommended an undercover operation.

See Appendix A to the factum: Public vs. Private Statements About the Investigation

4. The defendants oppose the motion to amend on several grounds. It is alleged that the amendments constitute a new cause of action (“negligent investigation”) that is statute barred and that the amendments are not “legally tenable”. By court order, this motion has been bifurcated. This Honourable Court will first make a determination of whether the proposed amendments constitute a new cause of action and whether the pleadings are legally tenable. Should this Honourable Court conclude that the amendments are legally tenable but constitute a new cause of action, a second hearing date will be set in order to determine whether the proposed amendments are statute barred. As a result, legal argument in this factum will address only the questions of whether the proposed pleadings constitute a new cause of action and whether the proposed pleadings are “legally tenable”.

5. Far from being a new cause of action, the proposed amendments cite the newly disclosed information and elaborate on damages already pled. In this motion, the plaintiffs need only establish that “it is not impossible” for the proposed amendments to succeed. It is respectfully submitted that this threshold is easily met where the post-incident bad faith conduct is so closely connected to the original allegations. For reasons

of its own, the employer has covered for the employees and then falsely blamed the plaintiffs for the decision to shut down the investigation. Thus, the Board's response to the misconduct that is the subject of the underlying action both aggravated the damages sought and call out for retribution, deterrence and denunciation. Given that the proposed pleadings arise from documents that have been in the possession of the defendants but only recently produced, it cannot be said that the defendants would be prejudiced if leave to make the amendments is granted.

PART TWO: FACTUAL OVERVIEW

6. Given that motions to amend pleadings typically require little reference to facts beyond the pleadings themselves, in the unusual circumstances of this case detailed reference to background facts is necessary for several reasons. First, the defendants have taken the position that the proposed pleadings are "legally untenable". Jurisprudence referenced below establishes that documents upon which proposed amendments are based may be considered by a court in determining whether they are legally tenable. For this reason, this factum references portions of the new documents upon which the proposed amendments are based.

7. Second, the plaintiffs must rebut any claims of prejudice alleged by the defendants as a result of the passage of time before this motion was commenced. It is respectfully submitted that it is therefore appropriate to set out attempts made by the plaintiffs to obtain documents and the various examples of serious breaches in production obligations on the part of the defendants. Thus a detailed outline of the extraordinary production failures by the defendants in this case is set out including the materiality of these newly revealed documents to the amendments.

8. Finally, it is anticipated that the defendants will assert that the proposed amendments are "scandalous, frivolous or vexatious" and/or "an abuse of process." In order to rebut such a submission, it is necessary to lay an evidentiary foundation for the proposed amendments. It should also be noted that these same facts will be an integral part of any stage 2 analysis, should same be required.

A. Overview of the Action

9. The underlying action arises from an investigation conducted by the Toronto Police Service drug squad into false allegations that the plaintiffs were involved in the trafficking of narcotics. It is alleged that on October 28, 1999 the defendants unlawfully arrested and assaulted the plaintiffs, and that in the course of the execution of search warrants the defendants stole approximately \$250,000 in cash and valuables from the plaintiffs' home, business and safety deposit boxes.

10. The action was commenced on June 30, 2000.

B. Background concerning the production of investigative documents

11. In July 2001, then-Chief Julian Fantino created a Special Task Force to conduct a comprehensive investigation into allegations of corruption amongst officers within the drug squad, including the defendants. The Special Task Force was intended to be independent, and was headed by RCMP Chief Superintendent John Neily. Chief Fantino told the Special Task Force that they "should follow the truth."

Plaintiffs' Motion Record (Motion to Amend), Tab 2: Affidavit of Asha James, Exhibit A, Final Report of the Special Task Force, p. 52.

12. The allegations made by the Markovics centered on a squad lead by Detective Dan Ross (the "Ross Team"). The Markovic allegations against the Ross Team were investigated by the Special Task Force, as were similar allegations made against the same team by other complainants. However, the Special Task Force investigation of the Markovic allegations was terminated in April 2002. The investigation was then continued by Internal Affairs, who closed the investigation without laying any charges.

Plaintiffs' Motion Record (motion to amend SOC), Affidavit of Asha James, Tab 2A: Neily Report; Tab 2B: Letter from Chief Blair to the Toronto Police Services Board, March 7, 2006.

13. In conducting investigations of allegations of corruption as against the Ross Team, inevitably documents were created and/or gathered by the Toronto Police Service that were directly relevant to the Markovic action, and would thus lead to the requirement

that they be produced pursuant to the disclosure obligation set out in rule 30.02 of the *Rules of Civil Procedure*.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 30.02 (1).

14. As explained by counsel to the defendants, the defendants were made explicitly aware sometime between 2002 and 2004 that relevant documents created in the course of the investigation of the Markovic allegations by the Special Task Force would need to be produced as part of the civil action.

2 However, I think received a telephone
3 call, maybe more, from one of the investigators on the
4 Special Task Force and I can't recall who it was, but I
5 remember very distinctly being told that they wanted to
6 interview Mr. and Mrs. Markovic, but they were refusing
7 to be interviewed. And the reason that was given was
8 that--they were not dealing with Mr. and Mrs. Markovic
9 directly. They were dealing with Peter Biro. And the
10 reason that was being given for the failure to submit to
11 an interview was because of the civil action and that we
12 would be required in the civil action to produce back to
13 Mr. and Mrs. Markovic any statements that they gave. And
14 that is why the Markovics would not give a statement.
15 When that occurred, that was fairly early on, I
16 believe, and I was asked whether that, in fact, was true,
17 that we would have to produce the statements. And I
18 said, "Yes, to the extent that the documents have
19 anything to do with this lawsuit, we have to produce
20 them..."

14 A. Yes, I don't--I don't think I heard from them
15 again. So, I obviously knew that they were doing
16 something with the Markovic investigation and from my
17 past experience, I know that when officers investigate or
18 try to investigate, they make documents, they create
19 documents in that regard. So, you asked me when I was
20 first aware of there being documentation. I'm assuming
21 that that's when I became aware.

22 56. Q. And can you help me with the year that would
23 be?

24 A. I can't. It was--it was very early on. It
25 was probably--I'd be guessing, but somewhere, I would
1 think, between 2002 and 2004.

15. The defendants and their counsel took the position that the Special Task Force was independent from the Toronto Police Service and that any documents arising from the Markovic investigations were in the possession of the Special Task Force for the duration of the investigation, and thus were not producible while the investigation was ongoing.

Transcript of Examination of Edward Ayers, p. 35. See also, 17-18, 37, 40-41, 189-190.
Plaintiffs' Motion Record (refusals motion), Tab 3, answers to undertakings (question 540).

16. Moreover, the defendants assert that investigative privilege precluded producing the investigative documents until the investigation was concluded:

1 151. Q. And I just want to understand. It was your
2 position that in addition to the technical answer about
3 the Board, that there was an ongoing investigation, so
4 that precluded producing the documents; is that right?
5 A. Yes.

Transcript of Examination of Edward Ayers, p. 37.

17. Despite their knowledge that their production obligation would be triggered by the conclusion of the investigation, the defendants neither discussed nor turned their minds to the need to either preserve or produce the investigation documents at the conclusion of the investigation:

10 881. Q. Sure. Do you have any knowledge as to what
11 advice or what position the Special Task Force was taking
12 vis-à-vis their obligations to preserve and produce their
13 investigation information in the context of the
14 litigation? Do you have any information about that?
15 A. I don't think they were taking any position
16 at all. I don't think it ever crossed their mind,
17 frankly.
18 882. Q. And did it ever cross your mind?
19 A. No, not at that time because it was an active
20 investigation and I wouldn't have produced the material.
21 There would have to be a motion fought over it and if the
22 court ordered me to produce it, then the courts ordered
23 me to produce it, but I wouldn't have produced it
24 voluntarily at that point in time because of the

25 sensitive nature of it.

1 883. Q. Yes, but no such discussion or organization
 2 happened where, you know, an example, there was
 3 communication that said, "All right. You're doing an
 4 ongoing investigation, but when you conclude it, we have
 5 to do the following three or four things"? That never
 6 happened?

7 A. No, no.

Transcript of Examination of Edward Ayers, p. 189-190. See also, 17-18, 37, 40-41.

Plaintiffs' Motion Record (refusals motion), Tab 3, answers to undertakings (question 540).

18. On September 26, 2003, counsel for the plaintiffs requested production of documents from the Markovic investigations. At the time, the defendants refused to produce the requested documents. Consistent with the foregoing analysis, the defendants took the position that the documents were not in their possession, were irrelevant to the action and in any event, could not be produced as the investigation was ongoing.

Defendants' Motion Record (motion to amend SOC), Affidavit of Edward Ayers, Tab 2E: Letter from Peter Biro to Cheryl Woodin (September 26, 2003); Tab 2F: Letter from Cheryl Woodin (October 15, 2003); Tab 2G: Letter from Peter Biro to Edward Ayers (December 6, 2006); Tab 2H: Letter from Edward Ayers to Peter Biro (December 12, 2006); Tab 2I: Letter from Peter Biro to Edward Ayers (December 18, 2006)

19. Despite the above evidence, as recently as December 12, 2006, Mr. Ayers was suggesting that the Special Task Force may not have investigated the Markovic allegations. By correspondence of December 6, 2006 Mr. Biro again requested documents arising from the Special Task Force investigation. By response letter of December 12, 2006 Mr. Ayers advised the plaintiffs that he would try to determine whether there were any documents concerning the Markovic case that had not been produced, although he claimed that it was his understanding that **"the issues in the Markovic case were never part of the task force, nor where they ever intended to be."** This response (never retracted – though Mr. Biro left the file in April 2007) is to be read along with Mr. Ayers' other evidence (cited above) that he was contacted sometime between 2002 and 2004 about concerns being raised by counsel for the Markovic about providing a statement to the Special Task Force.

Defendants' Motion Record (motion to amend SOC), Affidavit of Edward Ayers, Tab 2E: Letter from Peter Biro to Cheryl Woodin (September 26, 2003); Tab 2F: Letter from Cheryl Woodin

(October 15, 2003); Tab 2G: Letter from Peter Biro to Edward Ayers (December 6, 2006); Tab 2H: Letter from Edward Ayers to Peter Biro (December 12, 2006); Tab 2I: Letter from Peter Biro to Edward Ayers (December 18, 2006)

20. Despite Mr. Ayers' assertion that he would determine whether there were any documents to be produced, no documents were produced to the plaintiffs at that time. Mr. Ayers does not recall when he made inquiries about the status of the investigation. However, the plaintiffs now know that the investigation was concluded on February 26, 2006. Thus, at the time that Mr. Ayers was advising Mr. Biro that he would try to determine whether there were any documents concerning the Markovic case, the bar to producing investigative documents no longer existed.

Transcript of Examination of Edward Ayers, p. 40.

Plaintiffs' Motion Record (refusals motion), Tab 3, Ayers answers to undertakings, Items 15 and 16 at p. 18.

21. On December 3, 2008, after multiple requests by the plaintiffs for the investigative documents commencing in May 2008, the defendants served a supplementary affidavit of documents with some, but not all, documents from the Special Task Force and Internal Affairs investigations. By this time, almost three years had passed since the conclusion of the investigation, and two years had elapsed since Mr. Ayers agreed to determine whether there were any new documents to be produced. In light of their difficulties in obtaining documents, on December 10, 2008, the plaintiffs brought a motion seeking production of documents pertaining to the various investigations into the Markovic allegations, as well as the two similar cases involving allegations against the Ross Team. The defendant Toronto Police Services Board and Boothby were ordered to produce all documents in relation to the three investigations within 60 days.

Plaintiffs' Motion Record (motion to amend SOC), Affidavit of Asha James, Tab 2C: Production Order (December 10, 2008).

Exhibit 4 to examination of Edward Ayers.

22. The defendants have since produced three additional draft affidavits of documents – a “Second”, “Third” and “Fourth” draft Supplementary Affidavits of Documents. The Second Supplementary was received on January 6, 2009. The Third Supplementary was received on February 13, 2009. The Fourth Supplementary was received on May 7, 2009.

Cross-examination of Edward Ayers, List of Exhibits 4-7 at p. 2.

23. The documents in the third and fourth supplementary affidavits of documents came from a database maintained by the Special Task Force. The existence of a Special Task Force data base was never revealed until Mr. Ayers' examination on September 14, 2009.

Transcript of Examination of Edward Ayers, p. 77.

Plaintiffs' Motion Record (refusals motion), Tab 3: Edward Ayers, answers to undertakings (question 336).

24. Prior to the December 10, 2008 motion for production, the defendants had not advised their counsel of the existence of a database containing the Special Task Force investigative documents. Although Mr. Ayers did not have actual knowledge of the database, he would have "assumed that it probably was on a database." Nonetheless, he took no steps to ascertain the nature and existence of databases for storing information with the Special Task Force, and simply assumed that Internal Affairs had all the relevant documents:

17 363. Q. And so what steps did you take to ascertain
18 the nature and existence of databases for storing that
19 information with the Special Task Force? What steps?

20 A. I didn't take any steps.

21 364. Q. And it's fair to say that, in fact, even as
22 of December 8th, 2008, you still had not ascertained the
23 nature of the storage or information storage system that
24 this Special Task Force had; am I right?

25 A. No, the nature of it, no, I did not ascertain
1 it.

2 365. Q. And so---

3 A. I had guessed at it, as I said, but I didn't
4 make a call to find out exactly what it was.

5 366. Q. And in fact, when you did paragraph 22 of the
6 affidavit dated December 8th, 2008, you referred to
7 nothing about those guesses; am I right?

8 A. Well, no, because I didn't even know the
9 documents existed.

10 367. Q. Right, well, because you didn't ask.

11 A. No, no, but you have to understand, Mr.
12 Falconer, one of the problems I had, part of the Special
13 Task Force material was in the boxes I was getting from
14 Professional Standards. I had assumed that when the

15 Special Task Force dropped the investigation and turned
 16 it back to Internal Affairs, they gave the fruits of
 17 their investigation to Internal Affairs because a lot of
 18 it was there.

Transcript of Examination of Edward Ayers, p. 85-86.

25. The defendants did not correct their counsel's mistaken assumption, nor did they take steps to advise him of the content of the database until in and around December 2008, following the court order requiring production:

4 A. ---think now looking back on it, the main
 5 reason we had to track down the people on the Special
 6 Task Force was because of the order that we produce the
 7 investigative material for the other two or three
 8 individuals, "Aba Dabi" (sic) and Paryniuk.

Transcript of Examination of Edward Ayers, p. 93. See also, 82, 85-88, 93-94.

26. When asked why, once the investigation concluded, he did not produce the documents, Mr. Ayers provided the following explanations:

12 490. Q. Yes. But there's no real explanation on why
 13 the Internal Affairs report takes until January '09 to
 14 get produced when it was authored in February of 2001?
 15 That's the part I'm trying to get to the bottom of.

16 A. It's because the documents didn't come into
 17 my possession until December of 2008.

18 491. Q. Did you ask for them earlier?

19 A. No, no.

20 492. Q. All right. Do you agree with me that upon
 21 reflection, the more prudent course might have been to
 22 ask for them?

23 A. No.

24 493. Q. Okay.

25 A. In the first place, in the early days when
 1 the investigation was still outstanding, they wouldn't
 2 have even given me the documents if I had requested them.
 3 The file--the investigation ended, as I said, sometime
 4 in, I think, late 2006 or early 2007 and by that time,
 5 that action had become completely dormant. I hadn't
 6 heard from Mr. Biro in three years and then it was
 7 shortly after that that I got a notice that his clients

8 were acting for themselves. And I never heard from them
 9 in that whole period of time until your firm then came on
 10 the record.

Transcript of Examination of Edward Ayers, p. 109-110.

18 562. Q. So, what you're really saying is that you
 19 didn't ask and no one told you?
 20 A. That's right.

Transcript of Examination of Edward Ayers, p. 123.

10 764. Q. Well, yes, we have information it was
 11 suppressed. It wasn't given until February '09. We have
 12 conclusions---
 13 A. For all of the reasons which I told you.
 14 765. Q. I get it, but, frankly, with great respect,
 15 you were kept in the dark and I don't know why, so---
 16 A. I was kept in the dark because I never asked
 17 the questions.
 18 766. Q. Right, and no one gave it to you.
 19 A. No one gave it to me because the case after
 20 the investigation was completed went completely dormant.

Transcript of Examination of Edward Ayers, p. 165.

27. Mr. Ayers' reference to the file going “completely dormant” bears some clarification. In evidence, Mr. Ayers conceded that the fact that the Markovics were self-represented between April 2007 and May 2008 does not obviate production obligations. **Further, these defendants have taken the position on examination that the TPS investigation of the Markovic allegations was concluded in February 2006.** Leaving aside any alleged inactivity on the file in early 2007, the investigation had already concluded and the production obligation had been triggered in February 2006 – at a time when the action could not be described as “dormant.”

28. Moreover, it is not sufficient to explain a failure to comply with disclosure obligations by saying “I never asked and they never told me.”¹ In light of the above narrative, it appears that the defendants have engaged in “stonewalling” both in how they

¹ Reminiscent of Kipling: “Them that asks no questions isn’t told a lie” (Kipling, *A Smuggler’s Song*, st. 6).

instructed counsel and in responses to the plaintiffs. As set out below, such conduct is consistent with the defendants' approach to the investigation of the alleged misconduct by the Ross Team.

C. Newly produced information about the Special Task Force investigation

29. The documents that were improperly concealed are of great significance. The vast majority of the documents produced in the supplementary affidavits of documents had never before been seen by the plaintiffs, and included such clearly relevant and producible documents as confidential "progress reports" to Chief Fantino on the Markovic allegations, and three "final reports" from the Markovic investigations.

Plaintiffs' Motion Record (refusals motion), Tab 3: Edward Ayers, answers to undertakings (questions 275, 276, 314, 411); Tab 5, Affidavit of Odi Dashesambuu, Exhibit A: Statement of Chief Fantino, January 7, 2004.

Plaintiffs' Motion Record (motion to amend SOC), Affidavit of Asha James, Tab 2I (Markovic Internal Investigation Report), 2J (Internal Affairs Final Report – Property Bureau), 2R (Final Report of Markovic Investigation – Internal Affairs), 2S (Briefing of Chief Fantino, May 2, 2002), 2V (Briefing of Chief Fantino, July 30, 2002), 2W (Neily, "Notes from the Wall").

30. As a result of these productions, the plaintiffs became aware for the first time of details concerning the manner in which the investigations were conducted and their conclusions. The plaintiffs are now aware of serious inconsistencies as between the public and private statements made about the investigations. The submissions below as well as a chart attached as "Appendix A" provide a detailed overview and citations, but in sum the inconsistencies are as follows:

- (a) Publicly, the Toronto Police Service claimed that the Special Task Force investigation was a thorough and independent investigation of corruption within the Central Drug Squad (e.g. Statement by Chief Fantino, January 7, 2004, Supplementary Motion Record, Tab 4). Privately, the Special Task Force was created in order to avert a public inquiry by proving that corruption was limited to one "team" (e.g. TPS Professional Standards Business Case, Supplementary Motion Record, Tab 3).
- (b) Publicly, the Toronto Police Service claimed that criminal misconduct was limited and confined to the "Schertzer team" (e.g. Statement by Chief

Fantino, January 7, 2004, Supplementary Motion Record, Tab 4). Privately, the head of the Special Task Force communicated the view that there was no doubt that there was a thief on the Ross team (e.g. Briefing Note to Chief Fantino, July 30, 2002, Motion Record, Tab 2, Affidavit of Asha James, Exhibit V).

- (c) Publicly, the Toronto Police Service claimed that the reason that the independent investigator decided to conclude the Markovic investigation due to the non-cooperation of the plaintiffs (e.g. Neily's Final Report, Motion Record, Tab 2, Affidavit of Asha James, Exhibit A). Privately, the independent investigator acknowledged that the decision had not been made by him, and that the real reason was because of a lack of resources and a desire to focus on the Schertzer team. In fact the Markovics had been cooperative throughout the investigation (e.g. Statement of Peter Biro, Supplementary Motion Record, Tab 1, p. 7-8).

31. At the time that the Special Task Force was formed, the focus was on allegations of corrupt behavior by drug squad officers associated with the "Schertzer" team. It was intended that the assignment of a full time investigative team provide the appearance that the police service was committed to getting to the bottom of issues of corruption within the drug squad. However, privately, concerns were expressed that "if many more cases are revealed there is the potential for a massive lack of trust in Police Officer testimony and also greater problems in CI use and obtaining Search Warrants." It was recommended that a sample audit take place of other units to attempt to provide assurance that corruption was limited to just one team. It was hoped that in taking these steps, a public inquiry could be averted.

Supplementary Motion Record, Tab 3, "TPS Professional Standards Business Case", p. 26.

32. Thus, public knowledge about corruption on other squads was viewed as undesirable and inconsistent with the message that corruption was limited to one team.

33. However, in the course of its investigation of the “Ross Team”, the Special Task Force uncovered information that led investigators to conclude that there was “no doubt” that “there was a thief” on the Ross Team.

Motion Record (motion to amend), Tab 2, Affidavit of Asha James, Exhibit S, p. 345: Briefing Note to Chief Fantino, May 2, 2002; Exhibit V at p. 414: Briefing Notes to Chief Fantino, July 30, 2002; Exhibit W at p. 423-424: Neily, Notes from the Wall.

34. In the course of the investigation of the Ross Team, the Special Task Force focused its attention on three cases: Markovic, Abu-Taha and Paryniuk. A review of the documents produced to the plaintiffs pursuant to the December 10, 2009 production order revealed numerous similarities between these three cases. As a means for setting out this information for this Honourable Court, the affiant, Asha James, has set out a summary of the alleged similarities at para. 60 of her affidavit:

- (a) They involve allegations of thefts of large sums of money from safety deposit boxes;
- (b) They involve the same officers (particularly Abbott, Ross, Cox and Denton);
- (c) Bank staff were not permitted to witness the searches of safety deposit boxes, with warnings about potential dangers that were without foundation;
- (d) Established procedures were not followed in counting and storing money;
- (e) Large amounts of cash were improperly stored in office safes or gun lockers for lengthy periods before being given to proper authorities;
- (f) The Abu-Taha and Markovic cases involved officers handing money over and then taking it back several times without reasonable explanation;
- (g) Confidential informants were used in both the Abu-Taha and Markovic cases;
- (h) There were irregularities in the information provided by Abbott in his applications to obtain search warrants of the various safety deposit boxes.

Plaintiffs’ Motion Record, Tab 2: Affidavit of Asha James, para. 60. See also the following exhibits from the James Affidavit: Exhibit G: Undated Paryniuk Final Report; Exhibit H: Abu Taha Special Task Force Final Report (April 31, 2002); Exhibit I: Markovic Internal Investigation (September 2001/2002); J: Internal Affairs Final Report re: Missing Money Property Bureau; Exhibit K: Uniform Disciplinary Report re: Detective Ross; Exhibit L: Property Report; Exhibit M: Undated document authored by C/Supt Neily; Exhibit R: Final Report of Markovic Investigation; Exhibit S: Briefing of Chief Fantino (May 2, 2002); Exhibit T: Affidavit of John Neily; Exhibit U: Information to obtain a search warrant; Exhibit V: Confidential Briefing of Chief Fantino, July 30, 2002; Exhibit W: Neily, “Notes from the Wall”.

35. Special Task Force investigators noted the similarities between the Abu-Taha, Paryniuk and Markovic cases. No allegations have been made of collusion as between the three complainants. They each had separate counsel, nor were the complainants known to one another.

See for example the following exhibits from the affidavit of Asha James: Exhibit S: Briefing of Chief Fantino (May 2, 2002); Exhibit T: Affidavit of John Neily; Exhibit U: Information to obtain a search warrant; Exhibit V: Confidential Briefing of Chief Fantino, July 30, 2002; Exhibit W: Neily, "Notes from the Wall".

36. Chief Fantino was apprised of the progress of the Special Task Force investigation through regular briefings. There were 18 such briefings in which the Markovic investigation was specifically discussed.

Plaintiffs' Supplementary Motion Record, Tab 2: Ayers answers to undertakings previously refused, Q. 651 at p. 10.

37. It is apparent from the documents now produced, that serious concerns about the conduct of the Ross Team were communicated to Chief Fantino. A May 2, 2002 briefing note to Chief Fantino included the following observations:

The most significant of the nine cases involve the cases of Paryniuk, Markovic and Abu Taha. The service and police officers have been sued by Markovic alleging theft of over \$100,000.

In all three cases, the subjects refuse to be interviewed by the police.

Therefore, these cases are unsubstantiated albeit that there are significant similarities between the cases and the manner in which they suggest that thefts were carried out.

DOJ at the end of 2001 stayed most of the cases involving Ross' team and I am pleased to tell you that the DOJ are now reviewing all of these cases to determine if there is any chance to re-institute them.

I temper that excitement however by telling you that there is very good reason to suspect that someone on that team is a thief." [emphasis added].

Plaintiffs' Motion Record, Tab 2: Affidavit of Asha James, Exhibit S, Briefing of Chief Fantino, May 2, 2002 at p. 344-345.

38. In a subsequent briefing to Chief Fantino on July 30, 2002, two officers from the Ross Team were identified as suspected thieves:

That while the Paryniuk matter is currently underway at preliminary and the challenges to the investigation integrity postponed, we have learned a great deal. One such point is that while I have ordered the 9 cases of interest no longer investigated involving the team of Danny Ross, as reported to you in May there is no doubt in my mind that there was a thief on that team and it is my belief so far that it could have been one or both of DC Mark Denton and/or Mike Abbott. In that regard I may order a further proactive investigation to target these two specifically based upon our current information.

Plaintiffs' Motion Record, Tab 2: Affidavit of Asha James, Exhibit V, Briefing of Chief Fantino, July 30, 2002 at p. 414.

39. Based on his knowledge of the results of the investigation, Chief Superintendent Neily concluded that the Ross Team was responsible for serious criminal thefts and illegal drug possession. He concluded that the Ross Team was better organized than the Schertzer team. In his notes, dated approximately November 5, 2002, Chief Superintendent Neily was of the view that an undercover operation should be undertaken in respect of the Ross Team.

Plaintiffs' Motion Record, Tab 2: Affidavit of Asha James, Exhibit W, "Notes from the Wall" at p. 423-425; Email from C. Woodin to J. Esmonde dated October 16, 2009.

40. Throughout the investigation, the Markovics expressed their desire to cooperate with the investigation, and their willingness to submit to interviews, provided that concerns about their procedural rights in their criminal and civil proceedings were respected. On at least two occasions, interviews were in fact scheduled, but were cancelled by investigators.

Plaintiffs' Supplementary Motion Record, Tab 1: Statement of Peter Biro, p. 6-9.

41. Chief Superintendent Neily personally contacted then-counsel for the plaintiffs, Peter Biro, to advise of the second cancellation. According to Mr. Biro, Chief Superintendent Neily's tone was apologetic and uncomfortable. He told Mr. Biro that the Markovic investigation was being closed. At least twice in the course of the conversation, Chief Superintendent Neily explicitly stated that the decision to close the investigation was not his. He stated that the "official" reasons he had been given were that there was a lack of resources and that they were out of time and had to wrap up the whole investigation and bring it to a close. Chief Superintendent Neily did not state who made

the decision. Relying upon the documents provided to date, it does not appear that the undercover operation recommended by Chief Superintendent Neily took place.

Plaintiffs' Supplementary Motion Record, Tab 1: Statement of Peter Biro, p. 6-7.

42. According to Mr. Biro, prior to this telephone call from Chief Superintendent Neily, there had been no suggestion in any of his communications with members of the Special Task Force that there was an insufficient basis to proceed with the investigation.

Plaintiffs' Supplementary Motion Record, Tab 1: Statement of Peter Biro, p. 6-7.

43. Mr. Biro was later advised that Internal Affairs would be continuing the Markovic investigation. The investigation was thereby transformed from one conducted by an independent investigator, to a purely internal exercise by the very police service that was the subject of civil litigation in respect of the allegations being made by the complainants.

Plaintiffs' Supplementary Motion Record, Tab 1: Statement of Peter Biro, p. 6-7.

Plaintiffs' Motion Record, Tab 2: Affidavit of Asha James, p. 21, para. 51.

Plaintiffs' Motion Record, Tab 2: Affidavit of Asha James, Exhibit R.

44. The Markovics were interviewed by investigators from Internal Affairs. However, the outcome of the investigation was not communicated to them. The details of the investigation and its conclusion were not known by the plaintiffs until they received a copy of the Final Report by way of productions dated May 7, 2009.

Plaintiffs' Motion Record, Tab 2: Affidavit of Asha James, p. 21, para. 51.

Plaintiffs' Motion Record, Tab 2: Affidavit of Asha James, Exhibit R: Markovic STF Final Report.

45. Statements made about the conduct and findings of the Special Task Force are not consistent with the history that is now apparent from the documents. Firstly, it has been claimed that the investigation was stymied by a lack of cooperation from the plaintiffs. For example, in his Final Report to Chief Fantino, Chief Superintendent Neily states: "The attorney of record for the Markovics, in a civil action against the TPS and the Chief has expressed displeasure with my decision to sign away that investigation. What he fails to point out to the listener is that his client at that point refused to cooperate at his insistence." It is now apparent that not only was the decision to "sign away" the investigation not made by Chief Superintendent Neily, but that the decision was made on

the eve of interviews being conducted with the Markovics, who had been cooperative throughout.

Plaintiffs' Motion Record, Tab 2: Affidavit of Asha James, Exhibit A, Neily Final Report, p. 71.
Plaintiffs' Supplementary Motion Record, Tab 1: Statement of Peter Biro, p. 6-7.

46. Second, at the conclusion of the Special Task Force investigation, Chief Fantino made public comments that allegations of criminal conduct were limited to the Schertzer Team. However, it is now apparent that Chief Fantino was personally aware of serious allegations of theft by the Ross Team. These allegations were never addressed and the involved officers have been permitted to continue their careers with the Service, potentially placing members of the public at risk.

Supplementary Motion Record, Tab 4-9: Statement by Toronto Police Chief Julian Fantino (January 7, 2004); Globe and Mail "Probe results in 22 charges filed against Six officers" (January 8, 2004); Toronto Star "Veteran Officers face 40 charges" (January 8, 2004)
Winnipeg Free Press "Six officers facing charges in Toronto Allegedly forged notes, Records" (January 8, 2004); Toronto Sun "6 Cops, 40 Charges; Arrests follow RCMP Investigation (January 8, 2004); Toronto Sun "Fantino a hero for his actions" (January 9, 2004).

47. By shutting down the investigation into the Ross Team prematurely, the Toronto Police Service has ensured that the original goal of the Special Task Force was achieved: allegations of corruption beyond the Schertzer Team were kept from the public.

48. Following receipt and review of the documents produced due to the court order, the plaintiffs brought a motion to amend the Statement of Claim to include particulars of pleadings of negligent supervision and aggravated and punitive damages. The particulars of the aggravated and punitive damages pleading relate to the manner in which the Toronto Police Service responded to the Markovic allegations. It is alleged in the proposed amendments that the defendants acted in bad faith by intentionally covering up wrongdoing by the individually-named officers.

Supplementary Motion Record (Vol II), Tab 1: Proposed Amended Amended Statement of Claim.

PART THREE: ISSUES

49. The issues to be determined are:
- a) Whether the proposed amendments to the Amended Statement of Claim constitute a new cause of action;

- b) Whether the proposed amendments to the Amended Statement of Claim are “legally tenable.”

PART FOUR: LAW AND ARGUMENT

A. General principles permitting amendments of pleadings

50. Rule 26.01 states:

R. 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.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 26.01.

51. The test for amending pleadings was summarized in *Plante v. Industrial Alliance Life Insurance Company*:

- (a) **The amendments must not result in irreparable prejudice.** The onus of proving prejudice is on the party alleging it unless a limitation period has expired. In the latter case, the onus shifts and the party seeking the amendment must lead evidence to explain the delay and to displace the presumption of prejudice;
- (b) **The amended pleading must be legally tenable.** It is not necessary to tender evidence to support the claims nor is it necessary for the court to consider whether the amending party is able to prove its amended claim. The court must assume that the facts pleaded in the proposed amendment (unless patently ridiculous or incapable of proof) are true, and the only question is whether they disclose a cause of action. Amendments are to be granted unless the claim is clearly impossible of success. For this purpose amendments are to be read generously with allowance for deficiencies in drafting;
- (c) **The proposed amendments must otherwise comply with the rules of pleading.** For example, the proposed amendments must contain a “concise statement of material facts” relied on “but not the evidence by which those facts are to be proved (rule 25.06(1)), the proposed amendments are not “scandalous, frivolous or vexatious” (rule 25.11(b)), the proposed amendments are not “an abuse of the process of the court” (rule 25.11(c)), the proposed amendments contain sufficient particulars – for example of fraud and misrepresentation (rule 25.06(8)).

Plante v. Industrial Alliance Life Insurance Company, [2003] O.J. No. 3034 at para. 21.

52. In short, the rules permitting the amendment of pleadings are liberal. 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. The threshold for establishing legal tenability is very low.

Anderson Consulting Ltd. v Canada (Attorney General), [2001] O.J. No. 3576 (Ont. C.A.) at para. 36-37.

53. The court is not to concern itself with the credibility of the case set forth by the moving party seeking the amendment. Unless the facts alleged are based on assumptive or speculative conclusions that are incapable of proof, they must be accepted as proven and the court should not look beyond the pleadings to determine whether the action can proceed. A motion to amend a pleading should not become a summary judgment motion.

Plante v. Industrial Alliance Life Insurance Company, [2003] O.J. No. 3034 at para. 17; *Anderson Consulting Ltd. v Canada (Attorney General)*, [2001] O.J. No. 3576 (Ont. C.A.) at para. 34.

54. In considering the tenability of the claim, a Court may have regard not only to the proposed amended statement of claim, but may also examine documentary evidence upon which the amendments are based as providing "particulars to the general pleading in the statement of claim."

Hopwood Estate v. Young, 2009 CanLII 1378 (Ont. S.C.) at para. 10.

55. The concept of "prejudice" referred to in rule 26.01 is something more than the prejudice of having to defend the action or incur additional costs. The prejudice must be such that it would be unfair to now have to respond to the claim even if it would have been legitimate in the first instance.

Plante v. Industrial Alliance Life Insurance Company, [2003] O.J. No. 3034 at para. 34; *Anderson Consulting Ltd. v Canada (Attorney General)*, [2001] O.J. No. 3576 (Ont. C.A.) at para. 35.

B. The Proposed Amendments

56. The original claim seeks damages for the following claims:

- a. Damages in the amount of \$250,000 for conversion, fraud, negligence and breach of fiduciary duty in connection with the misappropriation by the defendants of monies belonging to the plaintiffs (para. 1(a));

- b. Damages in the amount of \$500,000 for intimidation, assault and battery causing physical injury and emotional anguish and mental distress and for infringement of the Charter (para. 1(b));
- c. Damages in the amount of \$100,000 for loss of business and injury to reputation (para. 1(c));
- d. Punitive, exemplary and aggravated damages in the amount of \$500,000 (para. 1(d));

Plaintiffs' Motion Record (Motion to Amend) Tab 4: Amended Statement of Claim.

57. As currently plead, the statement of claim does not provide any further particulars of the claim for punitive, exemplary and aggravated damages.

58. As currently pled, the statement of claim alleges liability on the part of the defendant Chief Boothby arising from any failure to train, supervise, oversee, monitor, instruct or discipline the individual defendants. (para. 48). It is pled that the Toronto Police Services Board is vicariously liable for torts committed by Toronto Police Service officers (para. 46, 47, 49). However, particulars of the failure on the part of the Chief to supervise – and where appropriate to discipline – the individual defendants was not particularized.

59. The proposed amendments particularize the prior pleading in two ways. First, further particulars of the pleading in respect of Chief Boothby's failure to supervise and discipline are provided at paragraph 48. The proposed amendments include a pleading that: "this Defendant knew or ought to have known that the individual Defendants had breached applicable policies and procedures concerning the seizure of monies and valuables, but failed to take steps to institute discipline or otherwise investigate the misconduct" (para. 48(g) of the proposed amended pleading).

60. The Plaintiffs were advised on October 14, 2009 that the Defendants do not challenge the foregoing amendments to paragraph 48.

61. Second, particulars are proposed to the pleading of aggravated and punitive damages in order to capture conduct by agents of the Toronto Police Services Board after the allegations of criminal conduct by the individual Defendants were made. The proposed amendments are as follows:

45A. The Defendant, the Toronto Police Services Board, is liable for aggravated and punitive damages in respect of the manner in which its employees, agents and/or representatives (hereinafter “Board representatives”) responded to the individual Defendants’ misconduct after October 2000. Between October 2000 and 2006, the Toronto Police Services Board either directly or through Board representatives conducted a number of investigations of the individual Defendants’ misconduct in relation to the Plaintiffs. In undertaking these responses to the drug squad allegations, Board representatives gave assurances to the public, including these Plaintiffs, that the allegations against the CFC drug squads (including the Schertzer Team 3 and the Ross Team 2) were being independently and fully investigated by an RCMP-led task force (the “Special Task Force” or “STF”); and further that the results of those investigations would be honestly and accurately disclosed. Board representatives acted in bad faith in prematurely terminating the work of the Special Task Force as it pertained to the Plaintiffs’ allegations and in suppressing the Task Force’s investigative findings that there were “thieves” on Team 2 as led by the Defendant Ross. Without limiting the generality of the foregoing, deficiencies in the Board responses include the following:

- (a) Then Toronto Police Chief Julian Fantino and/or those acting on his instructions improperly interfered in the work of the Special Task Force by prematurely terminating STF’s investigation of Ross Team 2 and transforming the investigation of Ross Team 2 into a purely internal exercise by Toronto Police Service Internal Affairs;
- (b) Civilian witnesses to the individual Defendants’ misconduct were not interviewed promptly, or at all;
- (c) Employees of the defendant Toronto Police Services Board who were witness officers were not interviewed promptly, or at all;
- (d) There was a lack of continuity with respect to the investigators assigned to investigation of the individual Defendants;
- (e) The defendant Toronto Police Services Board failed to allocate sufficient resources to fully and competently investigate the individual Defendants;
- (f) The financial background and affairs of the individual Defendants were not investigated;

- (g) Strikingly similar allegations of misconduct on the part of the individual Defendants against other members of the public were not adequately investigated;
- (h) The investigators failed to consider the impact of the pattern of misconduct on the part of the individual Defendants in determining whether there were adequate grounds to substantiate the Plaintiffs' allegations;
- (i) The investigators failed to offer adequate protections to the Plaintiffs and other members of the public to facilitate their cooperation in the investigations.
- (j) The investigators issued false and misleading reports suggesting, *inter alia*, that the investigations were terminated because of a lack of cooperation from the Plaintiffs; and,
- (k) The investigators issued false and misleading reports suggesting, *inter alia*, that there was insufficient evidence to commence criminal proceedings against the individual Defendants, in circumstances in which they honestly believed on reasonable grounds that the individual Defendants had committed criminal misconduct in relation to the Plaintiffs.

45B. Having intentionally responded to the allegations against the Ross Team 2, as described above, Chief Fantino and/or other Board representatives, as a means of damage control, deliberately conveyed a distorted picture to the public in stating in January 2004 and on other occasions that the illegal actions of drug squad members were "isolated" to one team (the Schertzer Team 3) when they knew that STF investigators were of the opinion that there were thieves on the Ross Team 2. The Toronto Police Services Board, through its employees and/or agents, solicited the cooperation of the Plaintiffs in the investigations based on the promise, express or implied, that the investigations would be conducted in a competent and unbiased fashion, regardless of how the results of the investigation would portray the Toronto Police Service. The Plaintiffs cooperated in these investigation based on this implied or express promise. In proceeding in the fashion as described above, this Defendant's employees and/or agents failed to reach truthful and objective conclusions regarding the misconduct of the individual Defendants, and indeed deliberately misrepresented the truth with respect to their misconduct.

45C. The Toronto Police Services Board and its employees and/or agents involved in the investigations knew or ought to have known that all of the Plaintiffs herein were victimized by the defendant police officers acting unlawfully by their resort to violence and theft. In proceeding as outlined above, this Defendant and Board representatives completely breached the trust and confidence they sought to create with the public including the Plaintiffs as a result of the bad faith exhibited in how they responded to the Plaintiffs' allegations.

45D. Without limiting the generality of the foregoing, the Plaintiffs state that conduct of the investigations of the individual Defendants by the employees and agents of the Toronto Police Services Board, as plead aforesaid, represents bad faith by members of the Toronto Police Service for which this Defendant is at law responsible. The Plaintiffs state that the conduct of the employees and agents of the Toronto Police Services Board was high-handed, malicious, arbitrary and highly reprehensible and departed to a marked degree from ordinary standards of decent behaviour, which had the effect of increasing the Plaintiffs' mental distress. The Plaintiffs are thus entitled to aggravated and punitive damages.

62. The above amendments derive from the newly produced documents summarized in the James affidavit. The essence of the proposed amendments is that far from engaging in a good faith and independent effort to uncover corruption on the Ross team, the defendants responded to the allegations raised by the plaintiffs by seeking to cover up the truth. All of the behaviour referenced in the amendments is alleged to have been intentional.

C. The proposed amendments do not constitute a new cause of action

63. The plaintiffs seek to amend their claim to particularize bad faith and intentional misconduct on the part of the Board, its agents and employees (hereafter "defendants") in relation to their respective acts and omissions in the aftermath of the individual defendants' malfeasance.

64. The plaintiffs submit that the proposed amendments do not constitute a new cause of action. Rather, the plaintiffs submit that the proposed amendments plead particular modes of malicious, oppressive, and high-handed conduct that are capable of supporting claims for both aggravated and punitive damages.

65. The plaintiffs' motion can be contrasted with the motion that was before this Honourable Court in *Ascent v. Foxcroft et al.* Like this case, the plaintiff in *Ascent* took the position that its proposed amendments did not constitute a new cause of action. Unlike in this case, the plaintiff in *Ascent* submitted that his proposed amendments were

mere particulars of the cause of action already pleaded in its original statement of claim. The plaintiff was required to take this position in order to sustain his claims against the individual officers and directors.

Ascent Incorporated v. Fox 40 International Inc., 2009 CanLII 36994 (ON S.C.).

66. What the plaintiffs seek in this motion is very different. The plaintiffs here also submit that no new cause of action is pleaded. However, unlike in *Ascent*, the plaintiffs deny that the proposed amendments form part of the elements of any of the causes of action pleaded in the original statement of claim. Rather, the plaintiffs submit that their proposed amendments particularize the existing claim for punitive and aggravated damages. The amendments address forms of misconduct that arise from and post-date the original malfeasance by the individual defendants, and as such both aggravate the damages sought and call out for retribution, deterrence and denunciation.

i. The nature of claims for aggravated and punitive damages

67. Aggravated damages and punitive damages are doctrinally distinct; however there may be an overlap with respect to the kinds of misconduct that these heads of damages may apply to.

68. Aggravated damages are a species of compensatory damages. They are intended to compensate the plaintiff for additional injury caused by particularly egregious misconduct which accompanies the tortious acts. The Ontario Court of Appeal described the nature of aggravated damage awards (in the context of a defamation case) as follows:

Where the defendant is guilty of insulting, high-handed, spiteful, malicious or oppressive conduct which increases the mental distress – the humiliation, indignation, anxiety, grief, fear and the like – suffered by the plaintiff as a result of being defamed, the plaintiff may be entitled to what has come to be known as “aggravated damages”.

Walker v. CFTO Ltd. (1987), 59 O.R. (2d) 104 at 111; *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1150 at para. 188-89.

69. Aggravated damages are not to be assessed separately from non-pecuniary general damages. General damages should be assessed after taking into account the aggravating features of the defendants' conduct, and to that extent increasing the amount awarded. While the court may separately identify the aggravated damages in its reasons, in principle they are not to be assessed separately.

TW v. Seo (2005), 199 O.A.C. 172 (C.A.); *Norberg v. Wynrib*, [1992] 2 S.C.R. 226.

70. Punitive damages, by contrast, are not compensatory in nature. Rather, punitive damages are intended to penalize, deter and condemn reprehensible and malicious misconduct on the part of the defendant. In *Whiten v. Pilot Insurance Company*, the Supreme Court established the following principles applicable to punitive damages:

Punitive damages are the exception rather than the rule and should be imposed only if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour. When awarded, punitive damages should be assessed in an amount reasonably proportionate to such factors as the harm caused, the degree of misconduct, the relative vulnerability of the Plaintiff, and any advantage or profit gained by the defendant, having regard for any other fines or penalties suffered by the defendant for the misconduct in question. Punitive damages are generally given only where the misconduct would otherwise be unpunished or where other penalties are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation. The purpose of punitive damages is not to compensate the Plaintiff, but to give a defendant retribution, to deter the defendant and others from similar misconduct in the future, and to mark the community's collective condemnation of what has happened.

Whiten v. Pilot Insurance Company, [2002] S.C.J. No. 19; *McIntyre v. Grigg*, 2006 CanLII 37326 (Ont. C.A.); *Gerula v. Flores*, 1995 CanLII 1096 (Ont. C.A.).

71. The plaintiff must ordinarily prove misconduct that constitutes an independent "actionable wrong" in order to justify a punitive damage award. While an "actionable wrong" does not have to amount to an independent tort, there can be significant overlap between the two. It is submitted that, given this potential overlap, misconduct pleaded in support of a claim for punitive damages could very well constitute an independent tort.

Whiten, supra at paras.79-82.

72. In assessing aggravated and punitive damages, the entire conduct of the defendant from the original tortious act until the end of trial may be considered. In *Hill*, for example, the conduct of the defendants in their conduct of the lawsuit and eventually the trial were held to have aggravated the plaintiff's damages.

Hill v. Church of Scientology, [1995] 2 S.C.R. 1150 at para. 185, 189.

ii. *Vicarious Liability and Aggravated and/or Punitive Damages*

73. An employer who is liable only vicariously, as opposed to directly, can be liable to a plaintiff for all non-pecuniary damages that an employee has caused, including aggravated damages.

Doe v. O'Dell, 2003 CanLII 64220 (Ont. S.C.) at para. 279.

74. Such liability can derive simply from an employer's status as the employer, and not by virtue of any independent action. For example, in *Evans v. Sproule*, the Toronto Police Services Board was held to be vicariously liable for a sexual assault committed by an officer on a motorist. The defendant officer had been named, but his defence was struck when he did not appear at trial. The trial proceeded as against the Board alone.

Evans v. Sproule, 2008 CanLII 58428 (Ont. S.C.).

75. The judgment sets out the strong policy reasons for imposing vicarious liability on the Board for the misconduct of its officers:

[98] Fairness dictates that the enterprise that introduces or enhances the risk to the community bear the cost of the resulting harm. As for deterrence, the imposition of liability on the employer Board may well serve to prevent a recurrence of the wrongful conduct. It may, for example, provide an incentive for vigilance and the imposition of preventative measures, such as ensuring that no police officer be on night patrol without a partner and that vigilant reporting measures are in place for suspicious circumstances or infractions involving one of them. In any event, the imposition of liability upon the Board might well provide an incentive to initiate measures designed to minimize the risk of harm to citizens. Thus, the finding of vicarious liability in this case also meets the policy objectives set out in *Bazley*, being fair and sufficient compensation for wrong and deterrence of future harm.

[99] Section 24(1) of the *Police Act*, states that the chief of police (or his designate) is liable in respect of torts committed by members of the

police force under his or her direction and control in the performance or purported performance of their duties and they shall, in respect of any such torts, be treated for all purposes as a joint tortfeasors.

[100] In this case, I have no difficulty in finding the Board, both under the statute and the common law, vicariously liable for the wrong and resulting harm occasioned to the plaintiff by Sproule, on January 7, 1979.

Evans v. Sproule, 2008 CanLII 58428 (Ont. S.C.) at paras. 98-100.

76. In that case, the Court concluded that the Board was jointly and severally liable for aggravated damages in the amount of \$50,000.

77. In addition to liability flowing from an employee's conduct, a vicariously liable employer may also be responsible for aggravated and punitive damages flowing from their own conduct that is not separately pled as a cause of action. For example, an employer's inadequate response to allegations of wrongdoing by its employees can be a basis for an award of aggravated damages. In *P.D. v. Allen*, a plaintiff was abused by a priest. The plaintiff sued the priest and the Diocese. The plaintiff had reported the abuse to the Diocese. The Court concluded that the Diocese was not directly liable, but was vicariously liable. In addition, the Court ordered the Diocese to pay aggravated damages flowing from its inadequate response when the abuse was disclosed:

326 I award aggravated damages not only for the childhood period but also for the somewhat thoughtless treatment by the Diocese after PD reported her abuse to the Bishop in May 1992. PD's condition probably could have been helped if she had received considerate and kind treatment by the Diocese after disclosure (although not to the point that she could return to teaching). I find the Diocese treatment of PD after disclosure as indifferent almost to the extent of callousness and indicative of the Diocese's attitude of no liability.

P.D. v. Allen, [2004] O.J. No. 3042 (Sup. Ct.) at para. 326.

78. Punitive damages were not ordered against the Diocese because "actual knowledge" of the Bishop's wrongdoing had not been proven.

P.D. v. Allen, [2004] O.J. No. 3042 (Sup. Ct.) at para. 326-327.

79. As in the *P.D v. Allen* case, it is the employer's inadequate response to allegations of wrongdoing by its employee police officers that is the essence of the proposed amendments in this case.

iii. Claims for aggravated and punitive damages do not constitute a new cause of action

80. The courts have recognized in the pleadings motion context that claims for aggravated or punitive damages do not constitute a "cause of action", nor does the further particularization of a damages claim create a "new cause of action".

Rowe v. Unum Life Insurance Co. of America, [2006] O.J. No. 1897 at paras. 258 and 262; *Hopwood*, *supra* at para.14.

81. In *Atlantic International Trade Inc. v. Georgian College*, the plaintiff sought (among other things) to amend his defamation pleading to add claims for aggravated and punitive damages. In permitting the amendment, the court held as follows:

A claim for aggravated or punitive damages is not a cause of action in and of itself. The proposed amendment reflects a change in the damages alleged to have arisen as a result of the conduct complained of. The cause of action itself has not changed.

As such, I can see no non-compensable prejudice to the Defendant in allowing that part of the amendment.

Atlantic International Trade Inc. v. Georgian College, [2008] O.J. No. 2385 (Ont. S.C.) at para. 43-44.

82. In *Plante*, the leading case on amending pleadings, a plaintiff was permitted to amend a claim to include aggravated and punitive damages arising from the manner in which her insurance benefits claim was investigated by the insurer. The action was brought for breach of contract. Negligent investigation was not pled. The aggravated and punitive damages were alleged to arise from bad faith in the manner in which the claim was investigated. For example, the particulars of the aggravated and/or punitive damages were that: the insurers acted with negligence, arrogance and high handedness, had shown a callous disregard and complete lack of care for the Plaintiffs and had breached the duty of good faith; They took an adversarial and hostile approach and treated the claim with

suspicion from the outset; They failed to devote proper time and attention to the plaintiff's claim, failed to respond in a timely manner or at all to questions from the plaintiff; They failed to follow their own manuals and guidelines or accepted industry practices; They relied on inaccurate and irrelevant information and considerations in denying the claim; They failed to fully and fairly consider all of the evidence before them; They failed to treat the plaintiffs fairly; They hired incompetent employees to handle claims and failed to provide proper training; They were or ought to have been aware of the probable consequences of their conduct.

Plante v. Industrial Alliance Life Insurance Company, [2003] O.J. No. 3034 at para. 32.

83. The Court held that the proposed amendments must be permitted:

Read broadly and generously, however, and assuming the truth of the allegations in the pleading, the amendments disclose a tenable claim for aggravated damages and punitive damages. In the absence of prejudice, the amendment of the claim – as opposed to the amendments adding parties which I will address in a moment – must be allowed pursuant to rule 26.01.

Plante v. Industrial Alliance Life Insurance Company, [2003] O.J. No. 3034 at para. 32.

84. As indicated above, subsequent actions by defendants can form a basis for an award of aggravated and/or punitive damages. For example, in *Civin*, the Court concluded that a second independent act of defamation can be a basis upon which aggravated and punitive damages are awarded, even where a plaintiff has not plead a cause of action arising from the second defamation.

Hill v. Church of Scientology, [1995] 2 S.C.R. 1150 at para. 185, 189; *Civin v. Schwartz*, [1999] O.J. No. 2971 (Ont. Sup. Ct.) at para. 10.

85. The fact that new material facts are pled does not render a pleading a “new cause of action.” To the contrary, pleadings based on subsequent actions by defendants can properly be made without resulting in a new cause of action. For example, in *Robinnson Motorcycle*, the plaintiffs commenced an action against a supplier of motorcycles after the supplier refused to renew their contract. After legal proceedings had commenced, the supplier sent a letter to all its Canadian retailers prohibiting them from selling to the plaintiffs. After they learned of the existence of the letter, the plaintiffs sought to amend

the statement of claim to claim damages for wrongful interference with economic interests. The original claim had also sought damages for that tort, but the factual basis and legal theory of liability was distinctly different in the proposed new pleading. The Court concluded that the amendments did not constitute a “new cause of action”, even though they pertained to facts arising subsequent to the commencement of the claim and raised a different legal theory of liability. The new pleading arose “out of the same set of material facts pled in the original claim, that is, the historical relationship between the parties and Deeley’s refusal to renew the agreement.”

Robinson Motorcycle Ltd. v. Fred Deeley Imports Ltd., [2009] O.J. No. 401 (Ont. Sup. Ct.) at para. 32-35.

86. It is submitted that the following applicable principles can be distilled from the above summary of the law

- a) Conduct by defendants subsequent to the commencement of an action can form the basis for an award of aggravated and/or punitive damages. In addition, a separate actionable wrong, quite apart from the underlying cause of action, can form the basis of an award for punitive damages.
- b) An employer who is liable only vicariously for an employee’s misconduct can be liable for aggravated and/or punitive damages for the manner in which they respond to reports of that employee’s misconduct.
- c) A plaintiff is obligated to particularize claims for punitive and aggravated damages.
- d) Claims for punitive and aggravated damages do not constitute new causes of action where they arise out of the same set of materials facts including the historical relationship between the parties.

iv. Application to the case at bar

87. As elaborated below, the plaintiffs need only establish that it is not “clearly impossible” for the proposed amendments to succeed. The proposed amendments fall well within the principles guiding awards for aggravated and punitive damages:

- a) The proposed particulars relate to conduct by the defendants subsequent to the commencement of the action.
- b) The plaintiff had not previously particularized the basis for claiming punitive and aggravated damages. Thus amendments to particularize these claims are required.
- c) The proposed particulars assert that the Board is liable for aggravated and/or punitive damages arising from the bad faith manner in which they responded to reports of employees for which they are vicariously liable.
- d) The proposed particulars arise from the same set of material facts in the underlying action, in that they flow from the misfeasance of the individually-named officers and the failures by the Office of the Chief to supervise, detect and punish such misfeasance.

88. Liability for aggravated and punitive damages flowing from an inadequate response to employee's wrongdoing is consistent with the policy reasons for imposing vicarious liability that were identified in *Evans, supra*. Fairness dictates that the enterprise that enhances the risk to the community posed by corrupt officers should bear the cost of the resulting harm. As for deterrence, the imposition of liability on the employer Board may well serve to prevent a recurrence of the wrongful conduct. It may provide an incentive to vigilance and the imposition of protective measures. It may provide an incentive to initiate measures designed to minimize the risk of harm to citizens. Thus, liability for aggravated and/or punitive damages flowing from the cover up of misfeasance by its officers meets the policy objectives of vicarious liability by being fair and sufficient compensation for wrong and deterrence of future harm.

89. By engaging in a pattern of cover up in order to suppress their knowledge of wrongdoing by the defendant officers, the defendants have condoned the behavior of employees known to have engaged in wrongdoing, have blamed the plaintiffs for the decision to shut down the independent investigation, and thereby increased the damages suffered by the plaintiffs and placed the public at risk.

90. It is therefore respectfully submitted that the newly disclosed facts are properly pled as aggravated and/or punitive damages and do not constitute a new cause of action. As the proposed pleading does not constitute a new cause of action, limitation periods are not in issue.

D. The proposed amendments represent a tenable pleading of aggravated and punitive damages

91. As indicated above, a proposed amendment is legally tenable unless it is clearly impossible of success.

Plante v. Industrial Alliance Life Insurance Company, [2003] O.J. No. 3034 at para. 21.

92. A plaintiff is required to expressly plead and particularize the misconduct relied on to support a claim for punitive damages. The punitive damages pleading must permit the defendant to understand the scope of his or her jeopardy and to provide a meaningful opportunity to respond.

86 There is some case law that says a claim for punitive damages need not be specifically pleaded as it is included conceptually in a claim for general damages [citations omitted]. In my view, the suggestion that no pleading is necessary overlooks the basic proposition in our justice system that before someone is *punished* they ought to have advance notice of the charge sufficient to allow them to consider the scope of their jeopardy as well as the opportunity to respond to it. This can only be assured if the claim for punitive damages, as opposed to compensatory damages, is not buried in a general reference to general damages. This principle, which is really no more than a rule of fairness, is made explicit in the civil rules of some of our trial courts... Rule 25.06(9) of the Ontario *Rules of Civil Procedure* also has the effect of requiring that punitive damages claims be expressly pleaded. It is quite usual, of course, for the complexion of a case to evolve over time, but a pleading can always be amended on terms during the proceedings, depending on the existence and extent of prejudice not compensable in costs, and the justice of the case.

87 One of the purposes of a statement of claim is to alert the defendant to the case it has to meet, and if at the end of the day the defendant is surprised by an award against it that is a multiple of what it thought was the amount in issue, there is an obvious unfairness. Moreover, the facts said to justify punitive

damages should be pleaded with some particularity. The time-honoured adjectives describing conduct as “harsh, vindictive, reprehensible and malicious” (*per* McIntyre J. in *Vorvis, supra*, p. 1108) or their pejorative equivalent, however apt to capture the essence of the remedy, are conclusory rather than explanatory.

Whiten, supra at para.86 and 87

93. In view of *Whiten*, not only are the plaintiffs entitled to plead detailed particulars in respect of their claim for punitive damages, they are required to do so. The plaintiffs must plead factual particulars of the conduct alleged to be “harsh vindictive, reprehensible and malicious”, as opposed to making conclusory allegations of such misconduct.

94. With respect to the pleading of aggravated damages, while aggravated damages are to be assessed as part of general damages, the plaintiff may put forward any aggravating features of the defendants conduct to support an argument for increased general damages. Any such aggravating features may be specifically pleaded.

Hopwood v. Young, 2009 CanLII 1378 (Ont. S.C.).

95. The case law establishes that exemplary, aggravated and punitive damages may be awarded in circumstances of a failed police investigation if there is proof of bad faith or malicious intent.

496793 Ontario Ltd. v. City of Thunder Bay Police Services Board, 2007 CanLII 23177 (ON S.C.) at para. 6.

96. The plaintiffs submit that the proposed amendments plead bad faith and intentional misconduct that falls within the tests for both aggravated and punitive damages. The plaintiffs disavow any reliance on allegations of negligent or unintentional conduct to support their claims for aggravated and punitive damages. As such, the proposed amendments are tenable.

97. The proposed amendments in this case describe conduct that falls well within the parameters of bad faith and malicious intent. It is plead that the defendants, once on

notice of allegations of corruption by the Ross Team, engaged in conduct that was intended to suppress information about that corruption, that mislead the public and that blamed the plaintiffs for the decision to shut down the investigation. Detailed particulars are provided in the proposed pleading describing how the cover-up was conducted. Further particulars of the cover up are identified through the affidavit of Asha James and the exhibits thereto.

98. The allegations of bad faith and intentional misconduct with respect to the investigation of the Ross team's misconduct are capable of aggravating the plaintiffs' claim for general non-pecuniary damages. The defendants' conduct in relation to the investigation was high-handed, spiteful and malicious and has increased the plaintiffs' mental distress and anxiety. In *P.D. v. Allen*, an institutional response to wrongdoing that was merely "callous" was sufficient to ground an award for aggravated damages. The intentional conduct in the proposed amendments is even more serious. The cover up and "blame the victim" response had the effect of condoning the behavior of the officers and caused humiliation and distress to the plaintiffs. It is therefore submitted that the conduct pled constitutes a legally tenable claim for aggravated damages.

P.D. v. Allen, [2004] O.J. No. 3042 (Sup. Ct.).

99. Similarly, the allegations of bad faith and intentional misconduct in the proposed amendments fall well within the scope of bad faith and intentional conduct that may attract punitive damages. If proven, the defendants conduct was "high-handed, malicious, arbitrary or highly reprehensible" and "departs to a marked degree from ordinary standards of decent behaviour". In addition, the defendants' misconduct may well require retribution, deterrence and denunciation, particularly in light of the considerable imbalance of power between the plaintiffs and defendants. The defendants engaged in conduct that increased the risk to the community by permitting officers believed to be corrupt to continue in the police service. Unlike in *P.D. v. Allen*, the defendants had knowledge of the misconduct and chose to cover it up. A punitive award that denounces the defendants conduct and encourages the service to respond appropriately to corruption amongst its employees is appropriate.

100. It is therefore respectfully submitted that that proposed amendments are “legally tenable” as it is not “clearly impossible” that the proposed amendments can succeed.

E. Conclusion

101. In conclusion, it is submitted that the proposed amendments do not constitute a new cause of action, and rather represent a legally tenable pleading for aggravated and punitive damages.

102. The onus now rests upon the defendants to establish that they are prejudiced by the proposed amendments in a manner that cannot be addressed through costs or an adjournment. The only prejudice raised to date by the defendants relates to their claim that the amendments constitute a new cause of action that is time-barred. If it is determined that the amendments do not constitute a new cause of action, the limitation period is not in issue.

103. Moreover, the proposed amendments arise from documents that were improperly withheld by the defendants until they were ordered by this Honourable Court to produce them. This motion to amend the claim was brought in a timely manner once the documents had been produced. It is submitted that the defendants ought not to be able to now raise concerns about prejudice in order to defeat a legally tenable claim.

104. It is therefore respectfully submitted that leave to make the proposed amendments should be granted.

PART FIVE: ORDER SOUGHT

105. It is therefore respectfully requested that the following order be made:

- a) Granting leave to amend the Amended Statement of Claim as set out in the Supplementary Motion Record (Volume II).
- b) Costs of this motion;
- c) Such other relief as counsel may advise and this Honourable Court may permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

November 19, 2009

Falconer Charney LLP
Barristers at Law
8 Prince Arthur Avenue
Toronto, Ontario
M5R 1A9

Julian Falconer, Julian Roy
and Jackie Esmonde

Tel: (416) 964-3408
Fax: (416) 929-8179

Lawyers for the Plaintiffs

TO: Borden Ladner Gervais LLP
Barristers and Solicitors
Scotia Plaza – 40 King Street West
Toronto, Ontario
M5H 3Y4

E.A. Ayers, Q.C.

Tel: 416-367-6153
Fax: 416-361-2466

Lawyer for the Defendants, the Toronto
Police Services Board and David Boothby

TO: Gary Clewley
Barrister and Solicitor
111 Richmond Street West
Suite 1215
Toronto, Ontario
M5H 2G4

Tel: 416-601-1516
Fax: 416-867-9992

Lawyer for the Defendants Mike Abbott,
Robert Correa, Daniel Ross, Chris Higgins,
Anita Mancuso, Darren Cox, Mark Denton,
Pedro Diaz, and John Maciek

SCHEDULE A

1. *Plante v. Industrial Alliance Life Insurance Company*, [2003] O.J. No. 3034.
2. *Anderson Consulting Ltd. v Canada (Attorney General)*, [2001] O.J. No. 3576 (Ont. C.A.).
3. *Hopwood Estate v. Young*, 2009 CanLII 1378 (Ont. S.C.).
4. *Ascent Incorporated v. Fox 40 International Inc.*, 2009 CanLII 36994 (ON S.C.).
5. *Walker v. CFTO Ltd.* (1987), 59 O.R. (2d) 104.
6. *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1150.
7. *TW v. Seo* (2005), 199 O.A.C. 172 (C.A.).
8. *Norberg v. Wynrib*, [1992] 2 S.C.R. 226.
9. *Whiten v. Pilot Insurance Company*, [2002] S.C.J. No. 19.
10. *McIntyre v. Grigg*, 2006 CanLII 37326 (Ont. C.A.).
11. *Gerula v. Flores*, 1995 CanLII 1096 (Ont. C.A.).
12. *Doe v. O'Dell*, 2003 CanLII 64220 (Ont. S.C.).
13. *Evans v. Sproule*, 2008 CanLII 58428 (Ont. S.C.).
14. *P.D. v. Allen*, [2004] O.J. No. 3042 (Sup. Ct.).
15. *Rowe v. Unum Life Insurance Co. of America*, [2006] O.J. No. 1897.
16. *Atlantic International Trade Inc. v. Georgian College*, [2008] O.J. No. 2385 (Ont. S.C.).
17. *Civin v. Schwartz*, [1999] O.J. No. 2971 (Ont. Sup. Ct.).
18. *Robinnson Motorcycle Ltd. v. Fred Deeley Imports Ltd.*, [2009] O.J. No. 401 (Ont. Sup. Ct.).
19. *496793 Ontario Ltd. v. City of Thunder Bay Police Services Board*, 2007 CanLII 23177 (ON S.C.).

Appendix A
Public vs. Private Statements About the Investigation

	Public statements about the investigation	Private statements about the investigation
Intended outcomes of investigation	<p>A thorough and independent investigation of corruption within the Central Drug Squad</p> <p>“In August of 2001, I asked Chief Superintendent John Neily of the Royal Canadian Mounted Police to oversee an independent investigation into allegations of corruption involving a few officers within our Central Drug Squad. At that time, a dedicated Professional Standards Task Force was formed...The decision to call for such thorough and independent reviews was necessary to ensure objectivity and fairness.”</p> <p>(Supplementary Motion Record, Tab 4, Statement by Toronto Police Chief Julian Fantino, January 7, 2004 at p. 27.)</p>	<p>Avert a public inquiry by proving that corruption is limited to the one squad.</p> <p>“By assigning a full time team the Service will be seen to be making a commitment to getting to the bottom of all the issues. The faster the review is done the less chance there is of committing more damage. Taking these steps may avert a Public Enquiry. Every problematic case that is revealed has the potential for a lawsuit. The publicity surrounding this case will be very damaging for the organization. If many more cases are revealed there is the potential for a massive lack of trust in Police Officer testimony and also greater problems in CI use and obtaining Search Warrants. A sample audit must take place of other units to attempt to provide some assurance that it was just this one team.”</p> <p>(Supplementary Motion Record, Tab 3, “TPS Professional Standards Business Case, p. 26).</p> <p>“At the most I might suggest that if Gord [Sneddon] wants to put this to bed, to speak to Det. Kevin Hancock”</p> <p>(Email from John Neily to Roy Pilkington, September 24, 2003, Exhibit Q to James Affidavit, p. 328).</p>

<p>Investigative conclusions</p>	<p>Criminal misconduct was limited and confined to the Schertzer team.</p> <p>“In August of 2001, I asked Chief Superintendent John Neily of the Royal Canadian Mounted Police to oversee an independent investigation into allegations of corruption involving a few officers within our Central Drug Squad. At that time, a dedicated Professional Standards Task Force was formed...The decision to call for such thorough and independent reviews was necessary to ensure objectivity and fairness....As I stand here today with the news that 5 serving officers and 1 retired officer are now facing criminal charges, I am deeply saddened and disappointed....I can, however, tell you that the allegations are isolated and confined. The investigation has been independent, extremely exhaustive and thorough.”</p> <p>(Supplementary Motion Record, Tab 4, Statement by Toronto Police Chief Julian Fantino, January 7, 2004 at p. 27.)</p> <p>See also Supplementary Motion Record at p. 30, 35</p> <p>“Toronto Mayor Miller called the arrests ‘sad news for Toronto’. He said the chief has reassured him that he has taken steps to make sure the situation is being dealt with. ‘I respect his assurances. And if there are facts that come to light that suggest that the problem is more widespread, then we will have to look at them,’ he said.”</p> <p>(Supplementary Motion Record, Tab 5, Globe and Mail, “Probe results in 22 charges filed against six officers”, January 8, 2004, p. 29.)</p>	<p>There is no doubt there is a thief on the Ross team.</p> <p>“...there is very good reason to suspect that someone on that team [Ross team] is a thief.”</p> <p>(Briefing note to Chief Fantino from STF, May 2, 2002, Exhibit S to James Affidavit, p. 345).</p> <p>“One such point is that while I have ordered the 9 cases of interest no longer investigated involving the team of Danny Ross, as reported to you in May there is no doubt in my mind that there was a thief on that team and it is my belief so far that it could have been one of DC Mark Denton and/or Mike Abbott. In that regard I may order a further proactive investigation to target these two specifically based upon our current information.”</p> <p>(Briefing note to Chief Fantino from STF, July 30, 2002, Exhibit V to James Affidavit, p. 414).</p> <p>“Finally, it is my belief that the serious criminal thefts and illegal drug possession went beyond the team of John Schertzer and extended into the CFC Team 2 of Detective Danny Ross as well as to certain members of NWFC up to and into 2000. It is my belief that the number of involved officers is smaller and much better organized than we found with Schertzer’s team. It may, in the case of the NWFC, be focused around personal cocaine abuse by some members of that team....</p> <p>That the induced interview of Milos Markovic – et al. be done to attempt to verify or deny claims of criminal behavior as against the team of Detective Ross. If proven and the</p>
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	<p>“Fantino said he was ‘saddened and disappointed’ by the charges but called the charges ‘isolate’ and said they’re not reflective of any general corruption on the Toronto force. ‘Police officers everywhere strive for truth, duty and honour in whatever they do,’ he said. ‘However, we are similarly committed to confronting our failures and our weaknesses.’ Indeed, he added, the charges should stand as proof of that and serve to reassure the residents of Canada’s most populous city that their police force can still be trusted to uphold the law. ‘In all of this, we must maintain our faith in the system. I do today, as I have always done in the past.’”</p> <p>(Supplementary Motion Record, Tab 7, “Six officers facing charges in Toronto allegedly forced notes, records” at p. 34)</p> <p>“Miller said Fantino has assured him every step has been taken to ‘get out the rot’”.</p> <p>(Supplementary Motion Record, Tab 8, “6 cops, 40 charges; arrests follow RCMP investigation”, p. 37).</p> <p>“The Chief advised us in May that he would undertake a procedural review in response to the concerns raised by Sgt. Cassells....With respect to the need for a public inquiry, arising from the concerns raised by Sgt. Cassells, the Chief’s review makes no such recommendation. If, at the conclusion of all legal processes arising from the work of the Special Task Force, there remain any significant issues that undermine public confidence or trust in the integrity of the Service, the Board would support a call for a public inquiry.”</p>	<p>suspects isolated, then a proactive and covert UC operation, in concert with that in item 2, be mounted against the suspect officers to effectively deal with these problem officers on a timely basis.”</p> <p>(Notes from the Wall, by Neily, Exhibit W to James Affidavit, p. 423-424)</p>
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	(Supplementary Motion Record, Tab 9, Minutes of TPSB meeting, November 28, 2006, p. 41).	
<p>The reason the STF investigation into the Markovic allegations was terminated.</p>	<p>The STF investigation into the Markovic allegation was closed due to non-cooperation by the Markovic.</p> <p>“The PS STF reviewed the information available however we were unable to get off the ground on these matters [investigation into Ross Team] in 2002. The complainants would not cooperate or in the one case, gave information that was inaccurate. Therefore, we did not pursue this any further ... The attorney of record for the Markovics, in a civil action against the TPS and the Chief has expressed displeasure with my decision to sign away that investigation. What he fails to point out to the listener is that his client at that point refused to cooperate at his insistence”</p> <p>(Neily Report on the STF investigation, Exhibit A to James Affidavit, p. 71).</p>	<p>The STF investigation into the Markovic allegations was closed due to resourcing limitations and a desire to focus on Team 3.</p> <p>“As you recall, we initially looked at this matter and took no further action without the cooperation of the subject Markovic. At the time of that decision, there were charges outstanding against him and family members. The attorney for the civil action indicated both privately and later publicly that they wanted to cooperate but were unable to cooperate with the police service and give information that might otherwise be used against them in a civil action, etc. So, we addressed the concept of a limited immunity that would address this issue and also address any criminality arising from a statement so long as they told the truth and there were no crimes of violence. This document was vetted by Crown Law Office and relayed to Biro who agreed that it would work.</p> <p>Due to our resourcing limitations and our focus on Team 3, I did not give this a high priority however it was an outstanding task. With Dave and Roy’s permission, we agreed to relay this back to IA and Neal Ward would assist Gord Sneddon with the background and initial interview with a view to a clean hand-off. Whatever comes from this investigation is best handled separate from our larger package. All agreed and this has been initiated.”</p> <p>(Sealed Neily affidavit from Paryniuk matter, Exhibit N to James Affidavit, p. 316).</p>

		<p>“The investigation was returned to Internal Affairs in April 2003 by the Special Task Force as they wanted to turn it back so they could narrow their focus on other matters. I advocated that the matter after that passage of time should remain with the Special Task Force as although the Markovics had still not been interviewed, the Special Task Force had been negotiating with Peter Biro, Markovics civil counsel with a view to conducting interviews of both Markovics.”</p> <p>(Internal Correspondence Memorandum of Det/Sgt. Sneddon, April 1, 2004, Exhibit O to Affidavit of Asha James, p. 321).</p> <p>“On the eve of the interviews, Neily called Mr. Biro. Mr. Biro does not recall the date, but it was within a day or two of the time set for the Markovic interviews. Neily’s tone was apologetic and uncomfortable. He told Mr. Biro that the interviews were being cancelled and the Markovic investigation was being closed. At least twice in the course of the conversation, Neily explicitly stated that the decision to close the investigation was not his. He stated that the “official” reasons he had been given were that there was a lack of resources and that they were out of time and had to wrap up the whole investigation and bring it to a close. Neily did not state who made the decision.”</p> <p>(Supplementary Motion Record, Tab 1, Answer to Undertakings, p. 7-8).</p>
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**APPENDIX B
PROPOSED AMENDED AMENDED STATEMENT OF CLAIM**

Court File No. 00-CV-193186

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

**MILOS MARKOVIC, NATASA MARKOVIC
and 1145959 ONTARIO LIMITED carrying on business
as MAESTRO PIZZA PLUS**

Plaintiff(s)

-and-

**MIKE ABBOTT, ROBERT CORREA, DANIEL ROSS,
CHRIS HIGGINS, ANITA MANCUSO, DARREN COX, MARK DENTON,
PEDRO DIAZ, JOHN MACIEK, THE TORONTO POLICE SERVICES BOARD,
DAVID BOOTHBY, CHIEF OF POLICE OF THE TORONTO POLICE
SERVICE and THE TORONTO POLICE SERVICE**

Defendant(s)

AMENDED AMENDED STATEMENT OF CLAIM

Notice of action issued on (*June 30, 2000*)

CLAIM

1. The plaintiffs' claim is for:

(a) damages in the amount of \$250,000.00, or such other amount as may be proven at trial, for conversion, fraud, negligence and breach of fiduciary duty in connection with the misappropriation by the Defendants, or any of them, of certain monies belonging to the Plaintiffs or any of them at their residence, place of business and from their bank safety deposit boxes;

(b) damages in the amount of \$500,000.00, or such other amount as may be proven at trial and this Honourable Court deems just from the Defendants or any of them,

for intimidation, assault and battery causing physical injury and emotional anguish and mental distress, and for infringement of the *Canadian Charter of Rights and Freedoms*;

(c) damages in the amount of \$100,000.00 or such other amount as may be proven at trial for loss of business and injury to reputation;

(d) punitive, exemplary and aggravated damages in the amount of 500,000.00 or such other amount as, in its discretion, this Honourable Court deems just;

(e) pre-judgement and post-judgement interest, as applicable, pursuant to the provisions of the *Courts of Justice Act*, R.S.O. 1990, c.C.43;

(f) their costs of this action on a solicitor and client scale;

(g) such further and other relief as the Plaintiffs may request and this Honourable Court deems just;

2. The Plaintiffs, Milos and Natasha Markovic (“Milos” and “Natasha”) are spouses residing in Richmond Hill, in the Province of Ontario;

3. The Plaintiff, 1145959 Ontario Limited, carrying on business as Maestro Pizza Plus (“Maestro”), is a corporation incorporated pursuant to the laws of the Province of Ontario whose principal and directing mind is Milos.

4. The individual Defendants are police officers who are members of The Toronto Police Service and who, at all material times, worked in conjunction, association or co-operation with or under the supervision of Central Field Command.

5. The Defendant, The Toronto Police Services Board is a civilian board that oversees and is responsible for the Toronto Police Service. The Toronto Police Services

Board oversees the provision of police services, including law enforcement in the City of Toronto.

6. The Defendant, The Toronto Police Services, oversees, trains, supervises and directs the individual defendants.

7. The Defendant, David Boothby, was at all material times the Chief of Police of the Toronto Police Service, which trains, oversees and supervises the individual defendants.

8. At or about 7:30 p.m. on October 28, 1999, officers from Central Field Command executed search warrants at Maestro at 896 Wilson Ave in the City of Toronto, and the Markovic residence at 41 Kitsilano Crescent in the Town on Richmond Hill.

9. Natasha and Mila, her six year old daughter, were at the residence when police arrived to execute the search warrant.

10. Officer's Anita Mancuso ("Mancuso"), Darren Cox ("Cox"), Mark Denton ("Denton"), Pedro Diaz (Diaz), Mark Walsh ("Walsh"), Robert Correa ("Correa"), Daniel Ross ("Ross") and Mike Abbott ("Abbott") entered the residence.

11. Mancuso and other individual defendants seized bank documents and a safety deposit key from Natasha's purse. Mancuso also seized cash from Natasha's wallet. At the time, the wallet contained CDN \$330.00 and US \$500. Only the CDN \$330.00 was subsequently accounted for by police.

12. Officers Denton and Diaz and other individual defendants searched the basement area and located safety box keys, along with boxes of books and other items.

13. Officers Cox and Diaz and other individual defendants searched the residence and seized jewellery and a very large volume of personal and financial documents and

records, including various bank records, mortgage papers, receipts, calendars, income tax returns, business records, employment records and financial statements, some of which dated back to the late 1980s and early 1990s.

14. Included in the documents seized were meticulous records of the amounts of money stored in two safety deposit boxes. The Plaintiff's records indicated that \$100,000.00 was in a safety deposit box at the Toronto Dominion Bank and \$261,000.00 Canadian and some foreign currency, including Milos's unique foreign currency collection, was in a safety deposit box at the Royal Bank of Canada. The documents particularized the dates of deposits and the specific denominations of the currency deposited. These documents have never been accounted for by police.

15. During the course of the search in the basement, Natasha retrieved a box containing \$35,000.00 and placed it under blankets on a chair.

16. Natasha was subsequently arrested and taken to 53 Division at approximately 10:30 p.m..

17. The purpose of the search and arrest was never explained to Natasha. She was never given her rights as guaranteed by the *Canadian Charter of Rights and Freedoms* ("Charter")

18. Upon being released from jail two days later and returning to her residence Natasha found the box that had contained the \$35,000.00 empty. This money has never been accounted for by police.

19. Natasha also discovered various personal effects were missing, including expensive designer clothing and a \$1,500.00 bottle of "Louis XIII Cognac". These items have never been accounted for by police.

20. At or about 7:30 p.m. a group of police officers, including Chris Higgins (“Higgins”) and John Maciek (“Maciek”), with guns drawn, entered Milos’s place of business, Maestro.
21. At the time, Milos was in a storage area of the establishment getting change. When police entered the basement Milos believed he was being robbed. He did not know that the individuals entering the establishment were police officers. He immediately handed over his cash box and placed his hands in the air.
22. The police officers immediately proceeded to tackle, kick, punch and slap him. Some time later, Milos was informed that he was being arrested. The force used to arrest him was excessive, unnecessary, unreasonable and abusive. In the course of executing the search warrants, Milos was assaulted and battered by certain individual Defendants and badly injured. At no time did Milos ever resist arrest.
23. After numerous blows to the head, Milos lapsed in and out of consciousness.
24. The Defendants conducted a search of one of Milos’s storage areas from which \$1,000.00 cash was taken and has never been accounted for by police.
25. After approximately two hours of being beaten, Milos was arrested and taken to 53 Division.
26. Upon arriving at 53 Division, officers were instructed to immediately take Milos to Sunnybrook Hospital as he was obviously in very poor physical condition as a result of the physical abuse that he had sustained at the hands of the defendants. He was then taken to Sunnybrook Hospital.
27. At Sunnybrook Hospital, Milos underwent a series of tests, including a CT scan. He received stitches to his head and was kept under observation over night due to his head injuries.

28. Milos asked to be permitted to make a telephone call. This request was denied contrary to his rights guaranteed by the *Charter*.
29. On October 29th, 1999 at or about 11:05 a.m. Abbott and Ross attended the Royal Bank of Canada at 8165 Yong Street, in Thornhill to execute search warrants on Natasha's safety deposit box.
30. A total of \$261,000.00 and an amount of foreign currency was in the safety deposit box. The entire contents were removed by Abbott.
31. At or about 11:53 a.m., October 29, 1999, Correa accompanied Abbott and Ross for the execution of the search warrant at the Toronto Dominion Bank located at 9350 Yong Street, Richmond Hill.
32. There was \$100,000.00 in this safety deposit box. All of the contents of the box were emptied by Correa.
33. On or about November 2, 1999, Abbott, Ross and Correa prepared reports on the contents of the safety deposit boxes. With respect to the contents at the Royal Bank, they reported the contents as follows:
- | | | |
|----|--------------|-----------------------|
| a) | \$127,000.00 | Canadian |
| b) | \$20.00 | United States |
| c) | 120 | Pesos |
| d) | 10 | Gulden |
| e) | 10,000 | Banco Central Uruguay |
34. With respect to the contents at the Toronto Dominion Bank, they reported that there were 500 one hundred dollar bills (Canadian) totalling \$50,000.00.

35. Therefore the Defendants have failed to account for the full \$361,000.00 and all of the foreign currency.

36. It was only in the course of other legal proceedings, sometime between mid-February 2000 and March 2000, that the discrepancy between what the Defendants claimed to remove from the aforementioned premises and safety deposit boxes, and what they actually took became known to the Plaintiffs.

37. At or about 7:30 p.m. on September 25, 2000 members of Central Field Command, including Higgins, again entered Milos' place of business, Maestro.

38. Milos, as well as the customers and staff in the store were immediately handcuffed. His request to phone his lawyer was denied contrary to his rights guaranteed by the Charter at that time.

39. The Defendants conducted a search of Maestro and in the process destroyed and damaged property of the business such as kitchenware.

40. The defendants removed \$160.00 Milos had in his pocket to purchase inventory for the store.

41. Milos was subsequently stripped and searched.

42. Milos was arrested and taken to 53 Division. It was only at the police station that Milos was informed of the charges against him.

43. Milos was incarcerated from September 25, 2000 to October 2, 2000.

44. In the course of the execution of the search warrants, the individual Defendants intimidated the individual Plaintiffs and abused and ignored their *Charter* rights (including ss. 7, 8, 9 and 10) and caused them extreme anxiety, mental anguish and distress.

45. As a result of the aforementioned actions of the Defendants, the Plaintiffs, and in particular, the corporate Plaintiff, suffered considerable loss of business and injury to reputation the particulars of which will be provided at or prior to trial.

45A. The Defendant, the Toronto Police Services Board, is liable for aggravated and punitive damages in respect of the manner in which its employees, agents and/or representatives (hereinafter “Board representatives”) responded to the individual Defendants’ misconduct after October 2000. Between October 2000 and 2006, the Toronto Police Services Board either directly or through Board representatives conducted a number of investigations of the individual Defendants’ misconduct in relation to the Plaintiffs. In undertaking these responses to the drug squad allegations, Board representatives gave assurances to the public, including these Plaintiffs, that the allegations against the CFC drug squads (including the Schertzer Team 3 and the Ross Team 2) were being independently and fully investigated by an RCMP-led task force (the “Special Task Force” or “STF”); and further that the results of those investigations would be honestly and accurately disclosed. Board representatives acted in bad faith in prematurely terminating the work of the Special Task Force as it pertained to the Plaintiffs’ allegations and in suppressing the Task Force’s investigative findings that there were “thieves” on Team 2 as led by the Defendant Ross. Without limiting the generality of the foregoing, deficiencies in the Board responses include the following:

- (a) Then Toronto Police Chief Julian Fantino and/or those acting on his instructions improperly interfered in the work of the Special Task Force by prematurely terminating STF’s investigation of Ross Team 2 and transforming the investigation of Ross Team 2 into a purely internal exercise by Toronto Police Service Internal Affairs;
- (b) Civilian witnesses to the individual Defendants’ misconduct were not interviewed promptly, or at all;
- (c) Employees of the defendant Toronto Police Services Board who were witness officers were not interviewed promptly, or at all;

- (d) There was a lack of continuity with respect to the investigators assigned to investigation of the individual Defendants;
- (e) The defendant Toronto Police Services Board failed to allocate sufficient resources to fully and competently investigate the individual Defendants;
- (f) The financial background and affairs of the individual Defendants were not investigated;
- (g) Strikingly similar allegations of misconduct on the part of the individual Defendants against other members of the public were not adequately investigated;
- (h) The investigators failed to consider the impact of the pattern of misconduct on the part of the individual Defendants in determining whether there were adequate grounds to substantiate the Plaintiffs' allegations;
- (i) The investigators failed to offer adequate protections to the Plaintiffs and other members of the public to facilitate their cooperation in the investigations.
- (j) The investigators issued false and misleading reports suggesting, *inter alia*, that the investigations were terminated because of a lack of cooperation from the Plaintiffs; and,
- (k) The investigators issued false and misleading reports suggesting, *inter alia*, that there was insufficient evidence to commence criminal proceedings against the individual Defendants, in circumstances in which they honestly believed on reasonable grounds that the individual Defendants had committed criminal misconduct in relation to the Plaintiffs.

45B. Having intentionally responded to the allegations against the Ross Team 2, as described above, Chief Fantino and/or other Board representatives, as a means of damage control, deliberately conveyed a distorted picture to the public in stating in January 2004 and on other occasions that the illegal actions of drug squad members were "isolated" to one team (the Schertzer Team 3) when they knew that STF investigators were of the opinion that there were thieves on the Ross Team 2. The Toronto Police Services Board, through its employees and/or agents, solicited the cooperation of the Plaintiffs in the investigations based on the promise, express or implied, that the investigations would be conducted in a competent and unbiased fashion, regardless of how the results of the

investigation would portray the Toronto Police Service. The Plaintiffs cooperated in these investigation based on this implied or express promise. In proceeding in the fashion as described above, this Defendant's employees and/or agents failed to reach truthful and objective conclusions regarding the misconduct of the individual Defendants, and indeed deliberately misrepresented the truth with respect to their misconduct.

45C. The Toronto Police Services Board and its employees and/or agents involved in the investigations knew or ought to have known that all of the Plaintiffs herein were victimized by the defendant police officers acting unlawfully by their resort to violence and theft. In proceeding as outlined above, this Defendant and Board representatives completely breached the trust and confidence they sought to create with the public including the Plaintiffs as a result of the bad faith exhibited in how they responded to the Plaintiffs' allegations.

45D. Without limiting the generality of the foregoing, the Plaintiffs state that conduct of the investigations of the individual Defendants by the employees and agents of the Toronto Police Services Board, as plead aforesaid, represents bad faith by members of the Toronto Police Service for which this Defendant is at law responsible. The Plaintiffs state that the conduct of the employees and agents of the Toronto Police Services Board was high-handed, malicious, arbitrary and highly reprehensible and departed to a marked degree from ordinary standards of decent behaviour, which had the effect of increasing the Plaintiffs' mental distress. The Plaintiffs are thus entitled to aggravated and punitive damages.

46. The Defendant, The Toronto Police Services Board is liable under statute and at law for the actions, omissions of and injuries and losses caused by the individual Defendants.

47. The Defendant, The Toronto Police Service, is liable for the wrongful actions of its members, including those of the individual Defendants.

48. The Defendant, David Boothby is liable, in his capacity as Chief of Police at all material times, for the wrongful actions of the other individual defendants to the extent that such actions resulted from any failure to adequately train, supervise, oversee, monitor, instruct or discipline those individual Defendants. This Defendant was negligent in his supervision of the individual Defendants, the particulars of which, without limiting the generality of the foregoing are as follows:

(a) this Defendant failed to administer any form of auditing procedure to properly account for seizures of monies and valuable made by specialized drug enforcement units of which the individual Defendants were members;

(b) this Defendant failed to implement and ensure compliance with appropriate policies and procedures for the seizure of monies and valuables by specialized drug enforcement units;

(c) this Defendant failed to ensure that members of specialized drug enforcement units, including the individual Defendants, were properly supervised by senior officers;

(d) this Defendant was aware, or ought to have been aware, that the individual Defendants had engaged in similar misconduct in relation to seizures of monies and valuables from other individuals who were the subject of investigations;

(e) this Defendant was aware or ought to have been aware that specialized drug enforcement units were susceptible to corruption, theft, and other forms of misconduct but failed to implement adequate procedures, policies and auditing mechanisms to identify and/or prevent wrongdoing;

(f) this Defendant knew or ought to have known that a specialized drug enforcement unit led by Detective John Shertzner (the Shertzner team) was engaged in course of conduct including theft, assault, and obstruction of justice, and that

there was a close working relationship between the Shertzer team and the individual Defendants;

(g) this Defendant knew or ought to have known that the individual Defendants had breached applicable policies and procedures concerning the seizure of monies and valuables, but failed to take steps to institute discipline or otherwise investigate the misconduct; and,

(h) this Defendant was aware that the individual Defendants were unsuitable to perform the duties of police officers.

48A. The Plaintiffs state that the injuries and losses suffered as pleaded aforesaid were caused by the negligence of the Defendant Boothby, and that this Defendant knew or ought to have known that such damages would be the result of his negligence.

49. The Plaintiffs plead and rely upon the provisions of the following statutes, as amended:

Police Services Act, R.S.O. 1990, c. P.15;

Canadian Charter of Rights and Freedoms, ss. 7, 8, 9, 10 and 24;

Negligence Act, R.S.O. 1990, c. N.1;

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

50. The plaintiffs propose that this action be tried in the City of Toronto.

FALCONER CHARNEY LLP
8 Prince Arthur Avenue
Toronto, Ontario
M5R 1A9

Tel.: (416) 964-3408

Fax: (416) 929-8179

Julian N. Falconer
(L.S.U.C. No. 29465R)

Lawyer for the Plaintiffs

~~Goodman and Carr LLP
Barristers and Solicitors
200 King St. W., Suite 2300
Toronto, M5H 3W5~~

~~Peter L. Biro
Tel: (416)595-2341
Fax: (416)595-0567
Solicitors for the Plaintiffs~~