

BETWEEN:

KEVIN ALEXANDER MCLEAN

APPLICANT

AND:

TORONTO POLICE SERVICES BOARD, ANTHONY ROMANO, MICHAEL KOLANKOWSKI,
SERGEANT CASSIDY, GOLDVIEW PROPERTY MANAGEMENT LTD., LATOYA FERGUSON,
AND APHRODITE ARTOPOULO

RESPONDENTS

IN THE MATTER of an Application under the Human Rights Code, RSO 1990, c H.19 (the “Code”) and
HUMAN RIGHTS TRIBUNAL OF ONTARIO SPECIFIC RULES (the “Specific Rules” or “**HRTO Rules**”) along with the Common Rules of **Tribunals** Ontario (the “Common Rules”)

IN THE MATTER of a respectful request of the **Tribunal** to order expedited proceedings on the timelines particularized below pursuant to **HRTOS Specific Rule 21**

Applicant’s Comprehensive Submissions in support of the hearing of his NOCQ and HRTO Specific Rule 21 motion herein

Applicant Mr. Kevin A. McLean (B.A., J.D., CIM) 410-775 King Street West Toronto, Ontario, M5V 2K3 Email: mcleansettlement@gmail.com	Respondents TPS Board 40 College Street, Toronto, Ontario M5G 2J3 TPS Respondents TPS 14th Division 350 Dovercourt Avenue Toronto, Ontario M6J 3E5
	Goldview

	51 Toro Road North York, Toronto, Ontario M3J 2A4
	Afrodite Artopoulos 64 Roosevelt Road East York, Toronto, Ontario M4J 4T7

NOTICE OF CONSTITUTIONAL QUESTION Pursuant to Rule 4¹ of the **HRTO Specific Rules** and section 24 of the *Charter* and binding decisions, pursuant to vertical *stare decisis*, of the SCC

The **Applicant** intends to question the constitutionality of the acts, conduct, or omissions of the **TPS** and **TPS** respondents, known to him at this time and to be known, from on or around September 21, 2024 to October 2, 2024 (with particular emphasis on the events, conduct and incidents that occurred on the date of October 2, 2024) (the “**Material Time**”) and the ongoing violations of the **Applicant**’s *Charter* rights as a consequence of the same, and which sections of the below the **TPS**, **TPS** respondents and any **HRTO** determined or declared non-governmental individuals or persons who are determined to have been **TPS** agents, violated or infringed the following rights of the Applicant:

1. Section 9 of the *Charter*;
2. Section 8 of the *Charter*;
3. Section 7 of the *Charter*;
4. Section 10 of the *Charter*;
5. Section 11 of the *Charter*;
6. Section 12 of the *Charter*;
7. Section 15 of the *Charter*;

(collectively, the “*Charter* Violations”)

and each of those *Charter* Violations cannot be saved by section 1 of the *Charter*.

The **Applicant** seeks remedies under section 24(1) and 24(2) of the *Charter* to seek redress regarding some or all of the *Charter* Violations and to prevent the infringement of his *Charter* rights on an interim, interlocutory and permanent basis as detailed below.

Appropriate remedies may be fashioned under section 24(1) and (2) of the *Charter* to nullify and invalidate the *Charter* Violations of the **Applicant** and to prevent the infringement of the **Applicant**’s *Charter* rights that could or would occur if the continued unlawful arrest, unlawful searches, unlawful seizures *et al* were utilized in any way against him in the future.

The constitutional questions are to be argued on a date and time to be fixed or as proposed herein, at Toronto, Ontario before the **HRTO**.

NOCQ: Material Facts

The following, including the **HRTO Application** and **Declaration #1** of the **Applicant** on November 5, 2024, are the material facts giving rise to the constitutional question.

NOCQ: Legal Bases

The following includes some of the legal bases for the constitutional questions.

In addition to the above-noted remedies being sought, such further and other relief as the **Applicant** may advise and this **HRTO** may permit.

To:

Attorney General of Ontario Constitutional Law Branch
720 Bay Street,
4th Floor
Toronto, Ontario
M7A 2S9
Fax: (416) 326-4015
Email:

AND TO:

Attorney General of Canada
Suite 3400, Exchange Tower Box 36,
First Canadian Place
Toronto, Ontario M5X 1K6
fax: (416) 952-0298

120 Adelaide Street, Suite 400
Toronto, Ontario
Toronto, Ontario M5H 1T1

AND TO:

Ontario Human Rights Commission
180 Dundas St W,
Toronto, ON M7A 2G5

AND TO:

Crown Counsel (potential) (Office and assigned Crown (if any))
361 University Ave, Toronto, ON M5G 1T3

VOLUME #1: Orders Sought, Overview, Structure of the Written Argument and Material Facts

VOLUME #1(A): ORDERS SOUGHT IN THE SECTION 21 MOTION

1. Mr. McLean (“**Applicant**” or “Mr. McLean”) seeks the following orders pursuant to *Rule 21* of the **HRT0 Specific Rules** with respect to the relief sought and obligatory tailored orders for an order of an expedited proceedings (with all dates being subject to the availability of an HRT0 adjudicator and the time constraints of the Attorneys General
 - a. An order of an expedited proceedings herein with the following timelines by either continued confirmation or by abridgement:
 - i. An Order that Sergeant Cassidy provide his first name and the style of cause shall be amended accordingly without need for a formal motion;
 - ii. An Order dispensing with the need for any filing of “bound documents”;
 - iii. The hearing of the constitutional questions on December 20, 2024, or the first available date thereafter for an adjudicator of the **HRT0** in written format;
 1. The **Applicant** is to provide his finalized written factum, argument, memorandum or brief to the Respondents by November 20, 2024;
 2. The Respondents shall provide their responsive briefs (where applicable) by November 30, 2024;
 3. The **Applicant** shall provide any reply submissions by December 8, 2024;
 - iv. A confirmatory order that any and all document exchange, production and listing between the **Applicant**, Respondents, Attorneys General, OHRC and/or non-parties is subject to a statutory implied undertaking rule² and no document shall be disclosed outside of this **HRT0 Proceeding** absent the consent of the author and an order of the **Tribunal**;
 - v. An Order sealing the record of this proceeding from the public and dispensing with any right or need for a reported decision;
 - vi. Document production:
 1. An order that the **TPS** respondents list and produce, to the **Tribunal**, **Applicant**, and Attorneys General, and OHRC any and all documents, records, or evidence in their control or possession that relate to the **Material Time** involving the **Applicant**, and other respondents by October 27, 2024;
 2. An order that the **Goldview** Respondents list and produce, to the **Tribunal**, **Applicant**, and Attorneys General, and OHRC any and all documents, records, or

- evidence in their control or possession that relate to the **Material Time** involving the **Applicant**, and other respondents by October 27, 2024;
3. An order that the **Landlord** list and produce, to the **Tribunal**, **Applicant**, and Attorneys General, and OHRC any and all documents, records, or evidence in their control or possession that relate to the **Material Time** involving the **Applicant**, and other respondents by October 27, 2024;
- vii. Specific Document Production for **TPS** by October 25, 2024 (see: (i) alleged criminal complaint; (ii) sworn information under oath to obtain an arrest warrant (“ITO”); (iii) submission of materials in support of obtaining an arrest warrant involving Mr. McLean; (iv) arrest warrant for Mr. McLean; and (iv) others
1. An Order that **TPS** produce a copy of any and all documents that evidence warnings that it, including but not limited to DC Kolankowski’s representation that he warned Mr. McLean about unspecified and unparticularized contact with an unspecified person, warned Mr. McLean about alleged harassment of an individual;
 2. An Order that **TPS** produce a copy of any records that evidence a complaint made against Mr. McLean involving the allegation of criminal harassment under section 264(b) of the *Criminal Code*;
 3. An Order that **TPS** produce a copy of an “information to obtain” an arrest warrant involving Mr. McLean on or before his arrest on or around 8:15 p.m. on Wednesday, October 2, 2024;
 4. An Order that **TPS** produce a copy of its delivery of an ITO to a justice or a justice of the peace involving the represented warrant to arrest Mr. McLean that it had at the time of his arrest on or around 8:15 p.m. on Wednesday, October 2, 2024;
 5. An Order that **TPS** produce a copy of its receipt of the represented warrant to arrest Mr. McLean (if any) that it received from a justice of the ONSC or justice of the peace;
 6. An Order that **TPS** produce a copy of the signed warrant by a justice of the peace or ONSC justice in the requisite Form 7 under the *Criminal Code*;
 7. An Order that to the extent that the **TPS** does not produce all of the above by October 25, 2024, Mr. McLean is entitled to proceed and the **Tribunal** is entitled to determine the issues herein on the basis that there was no duty to warn Mr. McLean about any alleged harassment and there was no warrant obtained involving arresting Mr. McLean prior to his arrest, search, seizure, detention, and imprisonment,
- viii. Pleadings
1. An Order that the Respondents file and serve their Responses by October 29, 2024;
 2. An Order that the **Applicant** file his Reply within three business days of receipt;

- ix. An Order that the hearing proper of this **HRTO Proceeding** shall be heard within 30 calendar days following the release of the decision involving the constitutional questions;
- b. The **Applicant**, Respondents, Attorneys General and/or OHRC are at liberty to seek enforcement of this order and/or directions to the extent any party does not comply with such orders above;
- c. The **Applicant**, Respondents, Attorneys General and/or OHRC are at liberty to seek any interim orders, including non-substantive or substantive injunctive or interlocutory relief, on five days' notice to other parties, intervenors and non-parties;
- d. Any party that fails to comply with the **HRTO** Common Rules and **HRTO Specific Rules**, including any orders herein or in the future, will not be entitled to further notice in this **HRTO Proceeding**;
- e. Any non-compliance with any provision of the *Code* and associated regulations and/or **HRTO Specific Rules** shall be deemed to be non-compliance with an order of the **Tribunal** and the **Tribunal** shall be entitled to draw an adverse inference in accordance with section 43(9) of the *Code*;

VOLUME #1(B): CONSTITUTIONAL RELIEF PURSUANT TO NOCQ

2. Mr. McLean seeks the following relief, orders, findings, declarations or determination with respect to the constitutional questions:

VOLUME #1(B)(I): Unlawful seizure (and potentially search) prior to Constable Romano's email

- a. A declaration, order, determination and/or finding that **TPS** and some of all of the **TPS** respondents and some unknown **TPS** employees or agents, engaged in an unauthorized, unlawful or illegal seizure of Mr. McLean's property by its delivery to it or by its picking up of the same from his residential rental unit, particularized as Unit 410-775 King Street West, Toronto, Ontario, M5V 2K3 ("**Rental Unit 410**") on or around October 2, 2024;

VOLUME #1(B)(I): Generalized Relief Sought

- b. A declaration, order, determination and/or finding that the **TPS** and **TPS** respondents, as a direct consequence of them not having a warrant for the arrest of Mr. McLean and Mr. McLean not being subject to any potential charge of an indictable offence in relation to the allegation and unproven charge pursuant to section 264(b) of the *Criminal Code*, that the **TPS** and **TPS Respondents** cannot rely upon section 25, 493, 495 et al of the *Criminal Code* as an exemption to a warrantless arrest, and thereby breached the following rights of the **Applicant** including but not limited to:
 - i. Section 9 of the *Charter*;
 - ii. Section 8 of the *Charter*;
 - iii. Section 7 of the *Charter*;
 - iv. Section 10 of the *Charter*;

- v. Section 11 of the *Charter*;
- vi. Section 12 of the *Charter*;
- vii. Section 15 of the *Charter*;

(collectively, the “*Charter* Violations”)

1. More specifically, the **TPS** and **TPS Respondents** cannot meet any aspects of the disjunctive element of the *Collins* test that involved conduct in that while sections 25 and 495 of the *Criminal Code* are reasonable, their acts or omissions (which remain ongoing) were:
 - a. The arrest was not authorized by statute, and thereby all searches, seizures, detentions, imprisonment and conduct thereafter was not authorized by statute or the common law powers incident to arrest; and
 - b. The arrest, searches, seizures, imprisonment, detentions *et al* were all not reasonable in their fact and in substance.

VOLUME #1(B)(II): Specific Findings, Relief, Orders and Determinations

- c. A declaration, order, determination and/or finding that the Constable Romano email contained misrepresentations, mistruths, and/or omissions and amounted to a “false pretense”;
- d. A declaration, order, determination and/or finding that **TPS** and **TPS** respondents conducted a warrantless arrest of the **Applicant**;
- e. A declaration, order, determination and/or finding that **TPS** and **TPS** respondents conducted a warrantless detention and imprisonment of the **Applicant**;
- f. A declaration, order, determination and/or finding that **TPS** and **TPS** respondents conducted warrantless searches or seizures of the **Applicant**;
- g. A declaration, order, determination and/or finding that **TPS** and **TPS** respondents’ retention of any seized or searched information on October 2, 2024, prior to Mr. McLean attending **TPS 14th Division** or thereafter, constitutes an unreasonable seizure and is contrary to section 7 and 8 of the *Charter*;
- h. A declaration, order, determination and/or finding that that the **TPS**, including the recorded arresting officer DC Kolankowski, did not have reasonable grounds to believe that the **Applicant** was committing an indictable offence or had committed an indictable offence in relation to the charge of section 264(b) of the *Criminal Code*;
- i. A declaration, order, determination and/or finding that Mr. McLean, at the time (or ever for that matter), was NOT subject to:
 1. any of the discretionary provisions of the *Criminal Code* for the Crown to proceed (if he or she wished) by indictment as opposed to summary processes:
 - a. **while at large** under s. 515 [bail release], 679 or 680 [release pending appeal or review of appeal] (s. 515(6)(a)(i));
 - b. "for the benefit of, at the direction of, or in association" with a **criminal organization** (s. 515(6)(a)(ii));
 - c. where the **offence involved a weapon**, being a firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition,

- prohibited ammunition or explosive substance, while the accused was subject to a prohibition order preventing possession of these items (s. 515(6)(a)(viii)); or
- d. where the accused is **not "ordinarily a resident in Canada"** (s. 515(6)(b)).
- ii. Was NOT subject to any of the necessary *Criminal Code* requirements or conditions that an allegation and charge of section 264(b) of the *Criminal Code*
1. where the offence was an allegation of violence against an **"intimate partner"** and the accused had been previously convicted of an offence of violence against an **"intimate partner"** (s. 515(6) (b.1));
 2. where the **offence alleged is a breach** under s. 145(2) to (5) [i.e. escaped from lawful custody] while (s. 515(6)(c)); or
 3. where the offence committed (or conspired to commit) was an **offence under s. 5 to 7 of the CDSA** that is punishable by life imprisonment (s. 515(6)(d));
- j. A declaration, order, determination and/or finding that the **TPS** and TPS respondents did not have any reasonable grounds to believe, even taking the ss. 264(b) of the *Criminal Code* charge at its highest, that the **Applicant** had committed an indictable offence at all or in relation to the above;
- k. A declaration, order, determination and/or finding that any consent provided by Mr. McLean, whether in writing, orally or by conduct (in showing up to the **TPS 14th Division** on October 2, 2024) was vitiated and of no force and effect due to duress, coercion, misrepresentation, false pretence, and/or fraud;
- l. A declaration, order, determination and/or finding that **TPS** shall destroy any and all fingerprints, pictures or records in its database in relation to any potential or future investigations involving Mr. McLean but for segregating the same for exclusive use in this **HRTO Proceeding**;

VOLUME #1(B)(III): Section 9 of the <i>Charter</i>

- m. A declaration, order, determination and/or finding that **TPS** and **TPS** respondents breached the **Applicant's** *Charter* right to not be arbitrarily detained or imprisoned under section 9 of the *Charter*;
- n. An declaration, order, determination and/or finding that **TPS** and **TPS** respondents breached the **Applicant's** guaranteed right to be free from unreasonable search or seizure;
- o. A declaration, order, determination and/or finding that **TPS** and the **TPS** respondents breached the **Applicant's** to life, liberty and security of the person and the **TPS** and the **TPS** respondents breached the same while not being in accordance with the principles of fundamental justice;

VOLUME #1(B)(IV): Section 24(1): Remedies (see: Section 24(1) provides remedies against unconstitutional government <i>action</i>)

Actual and apprehended fear of <i>Charter</i> breach

"Appropriate and just" (equitable in nature)

- p. Damages in favour of the **Applicant** and against **TPS** and the **TPS** respondents;

- q. Declaratory relief as follows to be determined;
- r. Injunctive relief in favour of the **Applicant** to be determined or advanced on an interim basis;

VOLUME #1(B)(V): Section 1 of the *Charter* ³

- s. A declaration, order, determination or finding that section 1 of the *Charter* has no applicability and cannot save any of the infringements upon the **Applicant**'s *Charter* rights because the limits only apply when they are prescribed by law⁴;

VOLUME #1(C): Express adoption of definitions, emphasis and references to Mr. McLean's quintuplet of cases with the soon-to-be-defunct LSBC and the singular constitutional challenge (now moot) to the LPA (with the AGBC)

- 3. Mr. McLean adopts the definitions from the filed pleading (**HRTO** Application) and they have the same meaning therein as they do herein. Where Mr. McLean has utilized "double underlining," the emphasis is his and for ease of reference.
- 4. Throughout, and at the appendices, Mr. McLean has referenced and cross-referenced various aspects of his experiences and cases (court proceedings at all levels, including a leave application to the SCC) involving the LSBC and individual defendants. He has not done so to highlight any success in that matter but for comparison purposes in relation to *Charter* rights when the public body is an "administrative tribunal" or "regulatory body" versus the "STATE" or "POLICE".
- 5. As may be known to the **HRTO**, the LSBC will soon be defunct, along with the Society of Notaries Public of BC ("**SNP**"), as the NDP government in BC was successful in bringing forward its Bill 21 in February 2024 and having it pass all three readings and receive Royal Assent. This process commenced by public consultation in 2021. It was not without contention from the opposition government (now defunct itself ironically in the BC United Party (on similar party lines to the Liberal government or liberal party) but the NDP obtained the same.
- 6. The soon-to-be-defunct LSBC was clearly incensed and angered by the same and filed a NOCC (as opposed to a petition *per se* which is apparently based on a change in law from the SCC) against the BC government and the AGBC). The LSBC moved expediently with its claim and then an injunction motion seeking interlocutory relief against the Bill 21, which was entitled the "Legal Professions Act" (2024). Although the repealed act of the Legal Profession Act (1998) is only separated by one letter *per se*, they are vastly different in scope, language, authority and duties. The definition of the current and binding

legislation in BC is that of the “Single Regulator Legislation” (or “SRL”). The repealed LPA will be referred and defined as the “**Repealed LPA**”.

7. It is trite and settled law that the analytical lens from which *Charter* questions are answered is distinct depending on whether they are determined to be a state actor or a regulatory body actor. *Charter* rights are more strictly construed in favour of an applicant or individual when it involves a criminal matter. Mr. McLean is uniquely situated in many different respects to argue these constitutional questions, with the benefit of the submissions of the AGBC, AGC, OHRC and TPS, as a result of his **Protected Characteristicss** (physical and mental) in these Protected Areas, some of level of quasi-familiarity (authority) yet some new in the context of “accommodation”, and his experience in litigating against the LSBC and AGBC in challenging the constitutionality not only of conduct but also of enactments. Moreover, he has a unique background in arguing (and being successful) against the LSBC in the privacy sphere – some by reported decisions and others by confirmatory findings, determinations or decisions of the BC Privacy Commissioner. As will be seen below, Mr. McLean, as a result of exercising his PIPEDA rights, has a unique set of experiences in analyzing the Criminal Code as a result of the LSBC’s undisclosed criminality in engaging in a “RAM Dump” of his CPU (with the exact time remaining unknown) on June 4, 2014, absent any judicial warrant, statutory authority or otherwise. This unique discovery by Mr. McLean occurred in 2021. From there, he developed a further set of unique experiences, relevant by analogy, in learning that the LSBC had by way of RAM Dump seizure, then, in unauthorized fashion, disclosed and stored his personal information in 2015 (way ahead of its time) to the Ethereum blockchain by way of smart contracts. As these discoveries unfolded for Mr. McLean, they are without question beyond surreal, and yet they fit with chronological times almost like “puzzle pieces” into a retrospective investigative “puzzle”. For example, the unauthorized, surreptitious and clandestine disclosures and storage of McLean personal information (and others by way of RAM Dump as it is a “capture” or “dump” whereby a “mirror copy” cannot be made and it obtains “memory” and not “storage” *per se* like a hard drive disk (“HDD”) in November 2015 into some of the “early” and “native” blocks in the Ethereum block chain (with smart contracts) (based out of Switzerland) were slightly before a hearing, set by the BC Supreme Court, in November 2015, after Mr. McLean filed a motion for, *inter alia*, striking of the LSBC and LSBC Defendants responses to civil claim (here in Ontario, a “**Statement of Defence**”), document listing, document production, attendances at examinations for discovery et al, because, after

Madam Justice Gerow's decision, some LSBC Defendants did not attend their examinations for discovery on two repeated times and LSBC had not listed a single document at that stage. Moreover, the LSBC had yet to even inform Mr. McLean where, which he and the Court relied upon, was the location of the "forensic copy" of his "Hard Drive". As the hearing approached in November 2015, Mr. McLean marshalled his evidence forward and submissions, and was then successful on all of the relief that was heard and argued (with some adjourned for a later date). The LSBC was required to list and produce documents in two stages: December 2015 and January 2016. Mr. McLean then discovered Mr. Riddell (the decision maker of the warrantless administrative search and seizure order). However, when measuring the purported RAM dump record from the LSBC, through its counsel in NST LLP (Ms. Lockhart (former U of T gold medalist)), it was anything but exclusively a RAM Dump. It required technological expertise in the form of experts and software to analyze. The dates of those unauthorized disclosures and storage to the Ethereum blockchain were (when measuring *Charter* analysis and BC Supreme Court Civil Rules on document production and discovery with respect to "domestic control") were an unlawful method to purportedly claim that such documents and records from the RAM Dump were not in the "country" or "province".

8. Through some happenstance in May and June 2021, Mr. McLean learned, through some discussions with lawyers (with whom he was acquainted and/or long-time friends) in being sparked by a case of *Anonymous Lawyer v. LSBC* that the LSBC may have done more than it represented to the court. Mr. McLean was shocked by such a comment as his view remained that they certainly went far enough and considering the potential resetting of hearings by Mr. McLean in various matters with them, he gave attention to those comments. Over a two-week span, he went through each and every listed document by the LSBC (as they were provided on multiple USBs) and found one email where one Mr. McCartney (a LSBC investigator) wrote to Mr. Bussanich (lawyer) and Mr. Caldwell (his manager) at the Investigations, Monitoring and Enforcement of the LSBC that on or around June 4, 2014, that they had just finished the RAM Dump of Mr. McLean's CPU (not HDD) and would THEN commence with the forensic copying. As the Attorneys General can imagine, one of the most shocking experiences of anyone's life is to read such language in writing but particularly when the LSBC never even disclosed the same to Mr. McLean, the "independent solicitor adjudicator" (which Mr. McLean selected as part of the regulatory process to have privileged information excluded from the forensic copying of his CPU – which was one Mr. Robert Deane of BLG LLP (Vancouver office), then the Courts and then also the BC Privacy Commissioner.

9. Of course, all of these submissions herein can be further fact-checked and cross-referenced by the record of proceeding S-1401156 in the BC Supreme Court.
10. Mr. McLean respectfully submits that there is no dispute that this **HRTO** Proceeding is a “public interest proceeding” as it engages issues that transcend himself and matters of national importance along with specific societal importance for disabled individuals particularly in the GTA but also the GTAJ.

VOLUME #1(D): Multi-purposed submissions and comprehensiveness

11. The motion submissions herein are comprehensive as they are to be read together with the **HRTO** Application. Moreover, they will be heavily and specifically relied upon by Mr. McLean in future motions and the hearing proper.
12. Further, the comprehensive nature of these submissions will be in the similar format for Mr. McLean’s written argument before the **HRTO** in the Hearing Proper.

VOLUME #1(E): Overview

13. The Respondents then have the burden to demonstrate that they had reasonable and probable grounds for the conduct they undertook in the form of an arrest, detention, imprisonment, search, seizure *et al*, and it is impossible for them to meet that burden. It is impossible as a matter of law. With the benefit of much legal advice and assistance, without any waiver of privilege or confidentiality, but solely for context, a new potential theory has emerged as to why the **TPS** behaved the way it did. It may be that they realized that they were not legally allowed to have received the **McLean Property** and McLean medication, and they needed to attempt to sanitize their breaches. It may have been dropped off by the **Landlord**, the **Landlord** making some false complaint about Mr. McLean, not on her own behalf as she would know that they should be subject to the response of it being before the LTB but throwing her daughter under the proverbial bus (*nota bene* a consistent tactic of the **Landlord**), and then departing. She may have falsely claimed that Mr. McLean somehow was harassing her daughter, as she was copied on certain emails, and was worried that Mr. McLean had the legal right to send those emails. As such, the criminal complaint that may not have been made by Nicole does not even meet the first part of the statutory test under the Criminal Code. Moreover, if Nicole did not make the criminal complaint,

14. There is an easy way out for the **TPS** which will not sanitize their breaches or absolve them of the *Charter* breaches but it will fully indemnify them for any monetary amounts along with providing context to their actions. It is quite rudimentary and Mr. McLean will grant them that opportunity by way of two independent sworn declarations or affidavits to charge the following:
- a. Ms. Ferguson for her “threat” or “extortion” on September 23, 2024; and
 - b. the **Landlord** for her likely conduct on October 2, 2024.
15. To the extent that the **Applicant** is wrong on the second aspect and it was his former spouse who made the complaint, then such complaint by him will be considered withdrawn. It would be improper for him to do so as that would be seen to be somewhat abusive of the process. The **Applicant** will obviously exhaust any and all other remedies, with the benefit of criminal defence counsel, in vociferously denying the charges and putting the Crown (to the extent the Crown has any predilection to approve the charges and/or continue with such a matter) to prove each and every element including the *actus reus* and the *mens rea* of the applicant and for the alleged complainant to have had a reasonable fear for her safety (not monetary or otherwise). Of course, the burden of proof rests with the Crown and it must be beyond a reasonable doubt. It is a terribly high standard for the Crown to meet considering these facts. The **Applicant**, if put to further expense and loss in that domain, will bring a claim against all those that caused the criminal complaint to be set in motion and those who continued the same to the tort of malicious prosecution and the tort of malfeasance in public office (where applicable).
16. The most important definition is that of a warrant. The reason for the same is that if there was no warrant, as Constable Romano represented that there was, then the arrest was an unlawful arrest or false arrest. If the arrest was a false arrest, then the searches, seizures, detention, imprisonment and ongoing loss and damage to Mr. McLean flows from the same. Moreover, as there is no dispute that Mr. McLean has multiple protected characteristics, involving multiple protected social areas, then the only issue regarding the *HR Code* was whether the **Applicant**’s protected characteristics were a factor in the adverse decisions, adverse treatment and/or adverse impact. It is self-evident that they were.
17. **Warrant:** a judicial order directing a peace officer to do something such as arrest someone, search or seize something, or enforce a judicial order.⁵

18. The same applies, pursuant to Form 7 and section 493 of the *Criminal Code*, involving an arrest warrant.
19. There are few values more important to the individual in a free society such as Canada than the right not to be unlawfully: (i) arrested and; (ii) detained. It is trite that the arrest occurs at the time a person is placed under arrest. In the area of torts, the tort of false arrest is subsumed in the tort of false imprisonment. It is made out when one is prevented from going where one has a lawful right to be where there was no reasonable alternative. False imprisonment can occur with physical force, threat of force or psychological coercion. The apparent authority to detain and request that another person remain to answer questions, it is reasonable to assume that an ordinary person would feel compelled to comply and remain. In regards to imprisonment, the Alberta Court of Queen's Bench wrote, in *Chopra v. T. Eaton Co. Ltd.*, 1999 ABQB 201, at ¶94:

"Imprisonment is defined as the detention of a person contrary to his will, the restraint of a person's personal liberty, coercion exercised upon a person to prevent the free exercise of his powers of locomotion. It may take place without the actual application of any physical agencies of restraint, such as locks or bars, as by verbal compulsion and the display of available force. Every confinement of the person is an imprisonment, whether it be in a prison, in a private home, or even by forcibly detaining one in the public streets, any unlawful exercise or show of force by which a person is compelled to remain where he does not wish to be."

VOLUME #1(F): Charter Rights

20. The *Charter* rights at issue are below.

Section 1 of the <i>Charter</i>

The *Charter* guarantees certain rights to everyone and persons. Rights and freedoms in Canada

1. The Canadian *Charter* of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. Everyone is guaranteed the following rights in Canada: Life, liberty and security of person

Life, Liberty and Security

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Search or seizure

8. Everyone has the right to be secure against unreasonable search or seizure.

Detention or imprisonment

9. Everyone has the right not to be arbitrarily detained or imprisoned.

Arrest or detention

10. Everyone has the right on arrest or detention

- (a) to be informed promptly of the reasons therefor;
- (b) to retain and instruct counsel without delay and to be informed of that right; and
- (c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

General: legal rights applying to those with an offence

11. Any person charged with an offence has the right:

- a. to be informed without unreasonable delay of the specific offence;
- b. to be tried within a reasonable time;
- c. not to be compelled to be a witness in proceedings against that person in respect of the offence;
- d. to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
- e. not to be denied reasonable bail without just cause;
- f. except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;
- g. has the right not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;
- h. if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again;
- i. if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

Cruel or Unusual Punishment

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Equality rights

“Provision

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Section (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

VOLUME #1(F)(I): Aggravating Factor

21. The aggravating factor herein was that the **TPS** was representing to Mr. McLean that he may need to stay overnight, then go before a judge, and it was debatable whether he would get bail. If that is not a shock to the system for someone with mental health issues, mental impairment and physical disabilities, then it is hard to imagine what else would be a shock. As will be discussed infra, Mr. McLean respectfully submits

VOLUME #1(G): Material Facts

22. The material facts to this notice of constitutional question and expedited proceedings are denoted in the **HRTO** Application and the declaration #1 of Mr. McLean, made on October 14, 2024.
23. The overriding issue to be answered by this **Tribunal** in this **Application** is whether any of the **Applicant’s Protected Characteristics**⁶ were *a* factor in how the **Applicant** was adversely⁷ treated by the **Respondents**, at different times, from⁸ September 20, 2024, to October 2, 2024 (and ongoing) in protected areas under sections 1 and 2 of the *Code* (collectively, the “**Protected Areas**”) (the “**Adverse Treatment**”), and/or they [**Protected Characteristics** in Protected Areas] had and continue to have an adverse impact upon him (the “**Adverse Impact**”).⁹

24. The **Applicant** has suffered from a mental disorder known as “ADHD” since he was on or around the age of 11 but it was only formally and medically diagnosed at age 16 by one of the globally leading adolescent psychiatrists based out of Children’s Hospital in Vancouver.
25. The **Applicant** is currently physically disabled and designated as “CAT impaired” as of 2023 as a result of the confluence between his pre-existing issues in the form of ADHD (mental disorder) pursuant to section 10(1)(d) of the *Code* and potentially a psychosocial disorder or disability, and the impact of the automobile accident causing functional full body disability and a mild traumatic brain injury (the “**TBI**”). The **Applicant**’s physical disabilities, mental disorders, and mental impairments are defined as the “**Protected Characteristicss**” [three] wherein the discrimination occurred in two distinct yet interrelated protected social areas pursuant to section 1 and 2 of the *Code* (the “**Protected Areas**”). The **Applicant** has experienced and continues to experience procedural and substantive inequality, along with discrimination, wherein his distinct yet interwoven **Protected Characteristicss** were a factor¹⁰ in the previous **Adverse Treatment** which has and will have an ongoing **Adverse Impact** upon him, at least, until amends, restitution and rectification of the **Adverse Treatment** are attempted and consummated by the **Respondents**. Discrimination is easily provable, on a balance of probabilities herein, as the **Applicant** has **Protected Characteristicss** in Protected Areas, and upon the unauthorized delivery and disclosure by the **Landlord** to the **TPS (14th Division)** on October 2, 2024, his mental disorder was put front and center for the **TPS** in two socially protected areas. The way in which he was treated by the **Landlord** was clearly adverse and certainly **TPS** usurping the role of the **Applicant**’s physicians to determine when he could take his medication albeit all under the following, were distinct forms of adverse treatment: (i) false pretenses (to lure or entice him to the **TPS 14th Division**) email (Constable Romano) (see: Appendices) (the “**False Pretense Email**”); (ii) the misrepresentation by DC Kolankowski that he had contacted the **Applicant** and warned him about harassment of unknown individuals (at the time) (the “**Fabricated Warning**”)¹¹ (iii) the misrepresentation by Constable Romano that there was a warrant for the arrest of the **Applicant** (the “**Non-Existent Warrant**”) (iv) unlawful arrest (absent grounds under section 495 of the *Criminal Code*) (“**Unlawful Arrest**”); (v) unlawful detention (the “**Unlawful Detention**”); (vi) unlawful search and/or seizure (“**Section 8 Breaches**”); (vii) unlawful imprisonment (“**Unlawful Imprisonment**”); and (vii) Sergeant Cassidy demeaning, humiliating, and injuring the **Applicant**’s feelings, dignity and self-respect by representing to him that he was required to remain at his address and

then upon further review, Sergeant Cassidy had included the address of “*NFA*”. The **Applicant** later learned, without explanation to him at the time, that **NFA** meant “no fixed abode”. This **Tribunal** can take judicial notice that the **TPS 14th Division** was not focused on the validity or invalidity of the allegations but rather having the means justify the ends and/or assisting the **Landlord** and **Goldview**¹² have the means justify the ends along with the circumventing the lawful delegated authority of the LTB that has found that the **Applicant**’s circumstances justified an extraordinary order of shortening time and setting of the hearing proper.

26. **Unit 410** is a unit in one of the Minto buildings (the “**Minto Residential Complex**” or “**Minto Complex**”) which comprise the 775 King Street building (the “**King Street Building**”) and the 78 Tecumseth building (the “**Tecumseth Building**”), which are connected to each other. The **Minto Complex** share common areas.¹³ The **Minto Complex** is owned by a condo corporation, created under the *Condominium Act* (Ontario), particularized as the Toronto Strata Condominium Corporation 2320 (the “**TSCC 2320**” or “**Condo Corporation**”).
27. The **Toronto Police Service Board** (“**TPS**”) is a municipal body in the municipal government of the City of Toronto that supervises and oversees the services provided by the Toronto police. The division at issue is the *14th Division*, which is located at 350 Dovercourt Avenue, Toronto. The employees at issue are, as known to the **Applicant**, and potentially further to be added subject to pre-hearing procedures are at Appendix #1. Upon extensive review into the law (see: Appendices), certain individual employees are named in their personal capacities. Without an oversimplification of the same, with respect to whether the **TPS** conducted itself in accordance with the law and the *HR Code*, and its core values, one only need read the email from Constable Romano, the email in reply from the **Applicant**, and then the facts thereafter, and ask one question from the **TPS** website, which appears as “*Have I lived up to my word and values?*”¹⁴
28. The **Applicant** further alleges that the aforementioned known and unknown employees of the **TPS (14th Division)** knew that the **Applicant** was without medication for some time, had to obtain a temporary refill whilst explaining the underlying reasons for such a need (all catalyzed by the unlawful conduct of the **Landlord** and **Goldview** on September 20, 2024, and the Threat and **Extortion** by **Goldview** and Ms.

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Ferguson on September 23, 2024), and that he would be in need of his medication. The email from Constable Romano (see: Appendix #2) further enticed the **Applicant** to attend on an expedient basis or his medication, along with identification, would be sent elsewhere. It remains unclear why the *14th Division* would accept property of the **Applicant** when he did not consent to the same. It is all the more troubling considering the conduct of Officer Salerno in not wanting to receive a package of documents on September 21, 2024, when the **Applicant** was locked out by the **Landlord** and **Goldview** contravening the law. The unauthorized delivery by persons known to **TPS**, in the face of the **Applicant**'s demands and notices for the **Landlord** and **Goldview** to NOT engage in any such acts, coupled with a **False Pretense Email** were such that the **TPS** utilized the **Applicant**'s disabilities against him to entice him to the *14th Division*. If there was, in fact, a warrant (issued by a justice or JOP *at the time*), Constable Romano had a duty to inform the **Applicant** of the same. If the **Applicant** was going to be charged, Constable Romano had a duty to inform him of the same so he could exercise his rights accordingly.¹⁶ The actual interplay between the cast of characters will be known at a later date.¹⁷

29. The **Applicant** is physically disabled as a result of a motor vehicle accident (the "MVA") on August 31, 2022, wherein he continues, which has been corroborated by multiple MRIs in 2022 and 2023, and independent medical evidence regarding his impairments, to suffer from: (i) grade 2 retrolisthesis [rare backwards slippage of the vertebrae themselves between of the L5 and S1]; (ii) degenerative disc disease; (iii) bilateral foramina narrowing; (iv) marked disc protrusion (v) mild traumatic brain injury and (vi) post concussional syndrome ("**TBI**") ("**PC #3**") with premature signs of "white matter disease," which is scientifically known as *microangiopathy*. In October 2023, he was found to be, based upon all the independent medical evidence as of that date, by a neurosurgeon to be CAT impaired pursuant to the requirements of an OCF-19¹⁸. The recipient insurer of the duly completed and double executed OCF-19 did not dispute the same.
30. Pursuant to section 16 of the *SPPA*, the **Tribunal** can take judicial notice that those with ADHD are subject to the *thin-skull rule* in that they do not recover with the same rapidity as others who have been in a similar type of motor vehicular accident. Further, those like the **Applicant** may not recover to pre-accident state at all. Further traumas, mental and physical, during rehab and recovery are more aggravating for those with intersectional physical and mental disabilities.

31. The **Landlord** is the registered owner of **Unit 410** is Mrs. Aphrodite Artopoulos (the “**Landlord**”). The **Landlord** is also the mother of the **Applicant**’s former spouse of approximately 6.25 years in Ms. Nicole Artopoulos (the “**Former Spouse**” or “**Nicole**”). Nicole vacated **Unit 410** on June 23, 2024, and did not return. Nicole is not named as a respondent as she was a co-tenant, by way of common law marriage, or the former sole tenant and the **Applicant** was the “spouse” to her. As of August 22, 2024, the **Applicant**, if he was not a co-tenant (as he the primary payor of rent to the **Landlord** over the relevant temporal periods) with Nicole, became the sole and remaining tenant of **Unit 410** pursuant to either ss. 104(4) of the *RTA* and/or subsection 3(2) of *Reg 516*.
32. TSCC 2320 (or “**Condo Corporation**”), at all material times, had retained **Goldview** Property Management Ltd. (“**Goldview**”) as it is **Condominium Management Provider**¹⁹. Mr. Michael Goldrich is the **Principal Condominium Manager**²⁰ of **Goldview**. From on or around summer of 2019, Ms. Latoya Ferguson, who is licensed as a general condo manager (with a “general license”) has been the **Condominium Manager**²¹ (“**Condo Manager**”) of the **Condo Corporation**. As represented to the **Applicant** in September and October 2024, by legal counsel (Lash Condo Law) to the **Condo Corporation**, and purportedly responding on behalf of **Goldview** and Ms. Ferguson, albeit not retained formally, **Goldview** is retained as the “Manager”, pursuant to the by-laws of the Condo Corporation and it is only the *de jure* agent for TSCC 2320 [not an agent of the **Landlord**]. While the **Applicant** does not disagree with the *de jure* status of **Goldview** and Ms. Ferguson, as an employee of **Goldview**, the **Applicant** avers that **Goldview** and Ms. Ferguson, were at material times relevant to this Application also acting as an agent of the **Landlord** (the “**Dual Agency Role**” or “**Multi-Agency Role**”).
33. Despite the **Applicant** being the majority payor, if not exclusive (when compared to Nicole) to the **Landlord** of any and all consideration directly to her since 2019 and in favour²² of her in Unit 410, and believing he was a tenant from at least the end of 2019 to present, the **Landlord**, **Goldview** and Ms. Ferguson (in proportions known to them), without notice and contrary to the *RTA*, on Friday, September 20, 2024, altered or caused the alteration of the Unit 410 locking system without providing him with a replacement key. The **Applicant** is seeking compensation for the same pursuant to the *RTA* before the LTB. The **Landlord** did so while she knew that the **Applicant** would be at his physiotherapy and medical appointments on account of his physical disabilities and his mental impairments. Later in the afternoon or

evening of Friday, September 20, 2024, the **Landlord, Goldview** and Ms. Ferguson, without notice to the **Applicant** and without lawful authority, deactivated the **Applicant's** FOB without providing him with a replacement FOB. The **Applicant** is seeking practical remedies in relation to the same before the LTB (see: **LTB-T-063554-24**). For clarity, the **Applicant** is seeking narrow remedies and pursuant to the RTA in relation to the same whilst reserving his rights to seek relief and compensation under the *Code* before the **HRT0**.

34. After following the guidance from the LTB about what to do in the event of an unlawful lockout or illegal eviction, as the **Applicant** filed his T2 Application with the LTB in early August 2024 and the **Landlord's** early motion had failed, the **Applicant** delivered materials to the *14th Division* (Officer Solermo) on Saturday, September 21, 2024. With the benefit of hindsight, Officer Solermo was not particularly helpful and at one point referred to shredding his documents and materials that he had spent time to complete all while being unlawfully displaced. The **Applicant** then emailed the RHEU to traverse to the “second step”. The **Applicant** emailed the **Condo Manager** in Ms. Ferguson but she did not work on weekends. On Monday, September 23, 2024, the **Applicant** delivered materials to the **RHEU's** head office after the **Condo Manager** engaged in threatening and extortionary conduct towards him (see: “....if you are seen on the property, we will call the police”).²³ The **Applicant** alleges a poisoned environment was created by **Goldview** and the Condo Manager since the time of the flood in Unit 410 and this environment continued to the time of the Threat and **Extortion** on September 23, 2024, and remain.

VOLUME #1(G): Failure to Investigate

35. the material times herein and prior to, the **Landlord** and **Goldview (Landlord Agents)** was aware of the **Applicant's Protected Characteristics**. The **TPS (14th Division)** was likely not aware of his Mental Disorder (ADHD) on September 21, 2024, but was aware of the same on Wednesday, October 2, 2024, as the **Applicant** presumes that the **Landlord**, all without notice or his consent, collected, disclosed and delivered his medication, which had been stored in a secret place in Unit 410, to the **TPS 14th Division**. At one point the **Applicant** requested access to his medication but was denied the same as the **Applicant** had to go through more protocols with the warrantless arrest, detention and imprisonment.²⁴

36. In the **Applicant's** declaration #2 in December 2023 before the LTB, after having seen text messages between Nicole and the **Landlord**, the **Landlord** had texted the following²⁵

“Change the locks (without order of LTB): I became aware through various sources in the **Minto Buildings** and/or others known to me²⁶, that the **Landlord** represented to them that she was intending to change the locks to **Unit 410; Deactivation of FOB:** encouraging her **Daughter** to deactivate my **FOB** or do so when the **Landlord** says so; **Pejorative language about me:** I note the following despite payments before and after the **“Unlawful Rent Increase,”** which the **Landlord** accepted, to provide or demonstrate that the **Landlord** *may* act erratically (*nota bene:* I am using quotations herein to reference language I heard, saw, or became aware of that the (i) **“Wacko,”** **“Asshole”** and other **“bad words”**; (ii) **“Let him go crazy”**: Let him or make him *go crazy* (when my **FOB** was deactivated or at other times when she had demanded keys back and to be given to her daughter)²⁷; (iii) **“He can stay in a shelter”**: he can stay in a **“shelter”** or **“homeless shelter”**; (iv) **Deserving of a loss in his family:** I deserved a loss in my family and lack of reference to me in an obituary²⁸; (v) **Nothing else:** as nothing else but the **“condo”** (referring to **Unit 410**)²⁹; (vi) **Encouraging my Spouse to turn on the alarm to Unit 410 so I would be hesitant to enter:** Turn the alarm on or have the superintendent reset it (referring to **Unit 410**); (vii) **Lock devices inside Unit 410:** Set up a **“lock device”** so I cannot open the door; (viii) **Tenant should return to Vancouver:** I should simply leave and return to Vancouver (where I was born and raised, and spent a decade after graduating from law school); (ix) **Refusing to respond to my overtures of a written lease agreement but then relaying to others known to me:** *“he wants to live in the condo indefinitely or be a “squatter”*³⁰; (x) **In communicating with others:** *“tell him the condo is not yours (or not his) and discuss with me [Landlord]”; not his condo and he cannot control what I [Landlord] will do and when I do it; tell him I am fed up with him and going to sell it any day now;* (xi) **Consistent with forcing me to stay in a “shelter” and timing of deactivation of FOBS**³¹: He (me) will not have time to get a new condo lease, or purchase a condo, and will not *“qualify”* for a lease;³² and (xii) **“RENT-FREE”**: *“He stayed at the condo “rent free” for a year.”*³³

37. So why lure the **Applicant** on false pretenses or intentional misrepresentations to the 14th Division instead of arresting him out in public if there was a warrant for arrest? There was no warrant for the **Applicant**'s arrest. The **Applicant** had not committed any crime and certainly not an indictable crime. Why was Constable Romano so concerned about the **Applicant** not being on the premises of the **TPS 14th Division** as they were "deep diving" in that so-called temporary locker? There is an argument that **TPS 14th Division** is not a "public space". If the **TPS** did not have a warrant to arrest the **Applicant**, then it could only arrest the **Applicant** if the allegations of criminal harassment were indictable by discretion or by necessity. None of the unproven and groundless vague allegations had any connection to an indictable offence by election or discretion or by necessity. Therefore, a warrantless arrest had to be grounded in subsection 495(b) of the *Criminal Code* in that Constable Romano and DC Kolankowski had to be observing the **Applicant** committing the criminal offence at on or around 8:00 p.m. on Wednesday, October 9, 2024. Was the **Applicant**'s performing of stretching exercises in the parking lot of the **TPS 14th Division** the commission of a crime; namely criminal harassment under the *Criminal Code*? Without being flippant, the question answers itself.
38. In order to restore the **Applicant** in a non-monetary restitutionary manner, this, in turn, means that all of the steps taken from the time of the **False Pretense Email** including the **Applicant**'s detrimental and discriminatory reliance on the same and all steps from the **Unlawful Arrest** must be unwound. The longer the **TPS** takes in that regard, the **Applicant** notes the language from the ONCA in Nissen as the irremediable and unalterable state of a victim.³⁴ Audaciously presuming that this was an *inexplicable* departure from usual practices of the **TPS 14th Division**, discrimination has been established by filing herein.
39. The relief sought in relation to the **TPS** and the **TPS** individual respondents, including but not limited to the other respondents if they were acting as agents of municipal government in the **TPS**, are important remedies on a symbolic level and monetary (where applicable).

VOLUME #1(H): Definitions: used throughout – highly material

The other definitions that Mr. McLean is utilizing herein, by way of meaning and interpretation, in the plain English sense of those words, are defined herein:

“Arbitrary” based on random choice or personal whim, rather than any reason or system. unrestrained and autocratic in the use of authority.

“Cruel”: causing pain and suffering to another

“Reprehensible” is defined and means: extremely bad and unacceptable.

“Outrageous” is defined and means: shockingly bad or excessive.

“Excessive” is defined and means: more than is necessary, normal, or desirable; immoderate.

“High handed” is defined and means: using power or authority without considering the feelings of others.

“Oppressive” is defined as: unjustly inflicting hardship and constraint, especially on a minority or other subordinate group.

“Dignity”: the state or quality of being worthy of honor or respect.

“Humiliation”:

make (someone)
feel ashamed and foolish by injuring their dignity and self-respect,
especially publicly.

“Rights” are defined as: something to which one has a just claim: such as the power or privilege to which one is justly entitled

“Violate is defined: “break or disregard”

Unusual: not usual, uncommon, or rare

Unjustified: not justified, not warranted, or not appropriate

VOLUME #1(I): Brief Primer: The Law of Search and/or Seizure in Canada; and The Law of Consent

40. Everyone has the right to be secure against unreasonable search or seizure. The words are disjunctive unlike our US counterparts with its constitution. There has been much debate over what constitutes a seizure and that of a search. However, over time, the case law has evolved such that even a demand for production of documents is a seizure (see: Mulgrew, 2016 BCSC as per Justice Butler). Even Mr. McLean's case against the soon to be defunct LSBC sheds light on the same although the LSBC attempted to argue at first instance that copying was not a seizure. It was all the more deceitful, albeit through counsel for the LSBC in McCarthy Tetreault LLP against the Vancouver Sun and journalist Mr. Mulgrew, did not even dispute that a demand (in that case *subpoena duces tecum*) was a seizure.

VOLUME #1(I)(a) People are protected (not places); and the purpose of section 8 of the Charter

41. Section 8 of the *Charter* protects people, not places, against unjustified intrusions on their privacy interest.
42. The purpose of section 8 of the *Charter* is to prevent unjustified searches before they happen, not simply to determine after the fact whether they ought to have occurred in the first place.
43. It is here, parenthetically, that Mr. McLean respectfully submits that the law should be, if it is not, the same when it comes to an arrest or detention.

VOLUME #1(I)(b): Overlap with the *HR Code* (the word dignity)

44. The values underlying the privacy interest protected by section 8 are: (i) dignity; (ii) integrity and (iii) autonomy.

VOLUME #1(I)(c): Different zones of privacy: personal, territorial, and informational

45. Section 8 guarantees protection for privacy with respect to: (1) personal; (2) territorial; and (3) informational.

46. Section 8 protects a sphere of individual autonomy within which people have the right “to be let alone” and on which the state CANNOT intrude WITHOUT permission. The same applies to **Landlords** in Ontario, Condo Managers (under the CMSA), and the police.

VOLUME #1(I)(d): Search

47. A search is the right to inspect a person, area or thing. If there is no right to arrest, then there is no right to search.

VOLUME #1(I)(e): Inspection: search

48. An inspection is a search. A search is also the right to copy or make a copy of a record. Any state activity that interferes with a reasonable expectation of privacy. It includes looking for things that are tangible or intangible, such as spoken words and electronic data or scent.

VOLUME #1(I)(f): Seizure: Forced production of records; and the power to make copies of documents

49. The following are seizures at law in Canada:
- a. the forced production of records is a seizure; and
 - b. the power to make copies of documents is analogous to a requirement for production of documents and constitutes a seizure within section 8 of the *Charter*.

VOLUME #1(I)(g): Does it matter whether the police actually take documents or compel the person to hand them over?

50. The answer is that it does not. Whether the public authority "takes" the documents or compels the person to hand them over or demands entry into the private PROPERTY, the impact on the person's right to privacy is the same (see: sections 17(1) and (4) of the *Combines Investigation Act*, therefore, constitute a seizure within the meaning of s. 8; *Thomson Newspapers Ltd. v. Canada*, 1990 CanLII 135 (SCC)).

51. The most crude, obscene or offensive type example is that of a strip search. One often thinks of that in the airport setting with the likes of “drug mules”. Sometimes, law enforcement misidentifies the “drug mule” but makes a demand upon the individual (often marginalized females from less-developed countries who are coerced into smuggling by chauvinistic male criminals) to strip search them for any drugs that may be in cavities of their bodies. Whether the border law enforcement officials actually conduct the strip search or make the demand and explain what they intend to do, the impact upon privacy, at law, is the same.

VOLUME #1(I)(h) Seizure: ongoing state of affairs – unreasonable retention

52. A seizure is also an ongoing state of affairs so long as the seizing party continues to deprive someone of control over something.
53. It is unclear whether the **McLean Property**, which included his valid passport, other identification, bank cards, credit cards, *et al*, was photocopied and retained.
54. Unreasonable retention has been found to be covered by section 8 of the *Charter* in Alberta (see *R. v. Villaroman* [2012] A.J. No. 1425 (Q.B.)) and even in British Columbia, in spite of the fact that in *R. v. Arason* (1992).
55. It cannot be forgotten that retention is often ordered or undertaken to enable ongoing investigation relating to seized items, investigating that can constitute an ongoing search or utilize against an individual at a later date. As the ONCA and the SCC has found it is not in keeping with the section 8’s purpose of protecting reasonable expectations of privacy to hold that those interests are protected only until physical control is assumed.
56. If the continuation of a seizure is not lawful, the seizure becomes unreasonable contrary to section 8 of the *Charter* even if the initial seizure was lawful.
57. This aspect of privacy “derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit.

VOLUME #1(I)(i): Private Dwellings

58. Private dwellings, in contrast to other premises, carry heightened privacy expectations. The perimeter around these dwellings carries similar constitutional protection.
59. It must be noted with emphasis that the **TPS**, by the False Premise Email, lured Mr. McLean away from a zone of privacy and into the *14th Division*. Mr. McLean avers, as there has not been any dispute from the **TPS** in this regard, that this was by design.

VOLUME #1(I)(j): Continued possession of a piece of property is irrelevant

60. One may continue to have a reasonable expectation of privacy with respect to PROPERTY or a thing even when it is no longer in one's possession (*Mills* (1999) at paragraph 108; *Colarusso* at paragraph 74; *Marakah* at paragraph 37).
61. However, control is not an absolute indicator of a reasonable expectation of privacy, nor is lack of control fatal to a privacy interest (*Marakah* at paragraph 38).

VOLUME #1(I)(k): Mr. McLean confirmed nothing in the Rental Unit 410 was abandoned

62. The determination of whether a thing has been abandoned — i.e., whether a person has relinquished a privacy interest in it — will have to be determined on the particular facts of the case. An item that is stolen is not, by virtue of that fact alone, abandoned.
63. Accordingly, a person may have a residual and continuing privacy interest protecting against the subsequent use and disclosure - and potentially retention — of information that has been divulged for a specific or limited purpose (*Law* at paragraph 23; *Dyment* at pages 432- 435; *Mills* (1999) at paragraph 94; *R. v. Dore* (2002), 166 C.C.C. (3d) 225 (Ont. C.A.); *Wakeling* at paragraph 39).

VOLUME #1(J): Damage and Loss Presumed

64. In *Shaw v. Lewis* [1948] 2 D.L.R. 189 (BCCA), the plaintiff alleged that she had been excommunicated from the Rosicrucian Order as a result of a conspiracy. The trial judge removed the case from the jury on the basis that pecuniary damages had not been proven. The Court of Appeal said the trial judge erred in doing so because “if a right is invaded, damage is presumed.”
65. There is often an error in nomenclature by even the premier lawyers, and sometimes judges, to conflate “damage” with damages. Damage is the loss and damages is the monetary remedy for the loss.
66. The *Shaw v. Lewis* case is one that stands for the proposition that loss need not be considered as not having occurred as it is self-evident that if a right is invaded, particularly a *Charter* right, that damage and loss are presumed. It does not stand for the legal proposition as to a higher or lower amount of damages as that will vary from case to case.

VOLUME #1(K): *Thompson Newspapers*: whether the government takes the documents or demands to take them: impact on privacy is the same

67. The SCC found: Applying a purposive interpretation of s. 8, the compulsory production of documents in a criminal or *quasi*-criminal law context falls within that definition. Whether the public authority “takes” the documents or compels the person to hand them over, the impact on the person's right to privacy in the documents is the same. Sections 17(1) and 17(4) of *Combines Investigation Act*, therefore, constitute a seizure within the meaning of s. 8, and this seizure is unreasonable because it does not meet the test of reasonableness set forth in *Hunter*. The possibility of an individual's challenging the s. 17 order before a judge, prior to giving up possession of the documents, either by way of an application for review or by way of s. 17(3) does not meet the concerns underlying the *Hunter* criteria.

VOLUME #1(L): Law of Consent

68. The law of consent is analyzed *infra*. In the interim, the legal test was enunciated and articulated in *R. v. Wills*, 1992 (ONCA):

“The application of the waiver doctrine to situations where it is said that a person has consented to what would otherwise be an unauthorized search requires that the Crown establish on the balance of probabilities that: (1) there was a consent, express or implied; (2) the giver of the consent had the authority to give the consent in question; (3) the consent was voluntary and was not the product of police oppression, coercion or other external conduct which negated the freedom to choose whether or not to allow the police to pursue the course of conduct requested; (4) the giver of the consent was aware of the nature of the police conduct to which he or she was being asked to consent; (5) the giver of the consent was aware of his or her right to refuse to permit the police to engage in the conduct requested; and (6) the giver of the consent was aware of the potential consequences of giving the consent.”

69. Mr. McLean has obviously revoked consent if any were even considered to have been given even though he was arrested, which he says falsely, and all other *Charter* violations, breaches, infringements, and limits were a natural consequence of that false arrest. Put another way, Mr. McLean would not have voluntarily attended the 14th Division of **TPS** to be searched, seized and imprisoned.

VOLUME #1(M): Compensation under the <i>HR Code</i>

VOLUME #1(M)(I): <i>Sanford v. Koop</i>, 2005 HRTO53

“Ongoing impact”

70. In *Sanford*, the **HRTO** found that compensation is based upon the following factors which are non-exhaustive: (i) that the immediate impact of the discrimination and/or harassment on the complainant's emotional and/or physical health — e.g. distress during employment, episodes of crying, sleeplessness, fearfulness, inability to pursue or resume regular activities; (ii) the ongoing impact of the discrimination and/or harassment on the complainant's emotional and/or physical health, i.e., impact on personal and professional life, lack of trust in employment relationships; (iv) Vulnerability of the complainant — e.g., age; (v) Objections to the offensive conduct; (vi) knowledge on the part of the respondent that the conduct was not only unwelcome but viewed as harassment or discrimination; (vii) Anxiety caused by the conduct; and (viii) frequency and intensity of the conduct.
71. Against that backdrop, it is important to note that the longer any of the criminal proceedings against Mr. McLean, ongoing unequivocally remains and he has to relive the same. The benefit and attraction of tribunal processes, specifically the HRTO, which it and the Ontario government must be commended for,

is that an individual can put the other side on notice of the issues that he or she is facing and imbue the other side with immediate knowledge.

72. This is juxtaposed to what is seen by the internal discipline cases involving those impugned police officers in the declaration #1 of Mr. McLean herein.

VOLUME #1(M): Intangible losses

73. In *S.E. v. 2474489 Ontario Inc. (o/a Opa! Souvlaki)*, 2024 HRTO343 (CanLII), the HRTO found and cited:

“Intangible Losses

[63] The Divisional Court has set out factors to consider when determining an appropriate amount of compensation which include: the applicant’s experiences of “humiliation; hurt feelings; the loss of self-respect, dignity and confidence by the applicant, the vulnerability; and the seriousness and duration of the offensive treatment.” The Court emphasized that the amount should not be so low as to “trivialize the social importance of the *Code* by effectively creating a ‘licence fee’ to discriminate”. See *ADGA Group Consultants Inc. v. Lane* (2008), 2008 CanLII 39605 (ON SCDC), 91 O.R. (3d) 649 (Div. Ct.) at paras 152-153.

[65] The **Tribunal** has ordered awards for injury to dignity, feelings, and self-respect in the context of sexual harassment and related issues in the area of employment in the wide range of 12,000 to \$200,000. “

VOLUME #1(N): Charter Damages

74. Charter damages are analyzed under ss. 24(1) and they are submitted with the facts and law in the below.

Volume # 1(N)(I): A unique issue – which appears not to have been addressed – police lying and deceit PRIOR to the detention – investigative questioning – arrest – imprisonment – search – seizure – et al

VOLUME #1(N)(ii): the history of police lying and deceit as witnesses

75. Mr. McLean addresses the issue of police deceit as witnesses and the right of police to lie during the investigative questioning by reference to a former law professor of his in Mr. David Tanovich, “Judicial and Prosecutorial Control of Lying by the Police David M. Tanovich”, *Criminal Law Reports*, 2013 (the “Tanovich Article”). Mr. McLean quotes from the relevant parts:

“The issue appears to have skyrocketed to the top of the concerns of the criminal justice system in Ontario. This is as a result of a significant number of recent cases, almost all involving Black or racialized accused, where judges have courageously concluded that the evidence of the police was either an outright lie, deliberately misleading, or was tailored.

(see: 2013 ONSC 1527 (Ont. S.C.J.) (Hill J.) (loaded handgun excluded under s. 24(2)) African-Canadian accused) [Thompson]

R. v. Thompson “Sergeant Ceballo was not a credible witness. . . . [T]he witnesses was clearly struggling, not to recall precisely what had occurred or why he acted as he had, but rather on account of what I find to have been an effort, when pressed in questioning, to plug constitutional gaps with whatever occurred to him at the moment. This type of mental scramble had the effect of misleading the court... [T]he sergeant’s evidence was transparently and deliberately misleading . . .”

(see: *Ibid.* at paras. 173, 175, 203 (emphasis added). Ceballo, who is also African Canadian, has been involved in a number of cases alleging racial profiling. See *Peart v. Peel (Regional Municipality) Police Services Board* (2006), 43 C.R. (6th) 175 (Ont. C.A.); and *R. v. Singh* (2003), 15 C.R. (6th) 288 (Ont. S.C.J.).

R. v. Mattison (see: 82012 ONSC 1795 (Ont. S.C.J.) (Backhouse J.) (loaded firearm and ammunition excluded under s. 24(2)) (African-Canadian accused). “I find on a balance of probabilities that Officers Shin and Tremblay were untruthful about seeing Mr. Mattison using a cellphone when they drove by him and that Officer Tremblay was untruthful about seeing a cellphone in the vehicle when he conducted a search . . .” (see: at para 36. (emphasis added). See, further, at para. 37)

R. v. Salmon (see: 2013 ONCA 203 (Ont. C.A.) (emphasis added) (human trafficking and related offences stayed as an abuse of process). “The trial judge found that the police had fabricated evidence to make it appear that two pieces of false identification in the name of the complainant had been found in the respondent’s wallet at the time of his arrest, and that at least one police officer then lied about it in testimony.” (see: paragraph 1)

R. v. Dinh “They essentially colluded and then committed perjury, en masse.” (see: 2011 ONSC 5644 (Ont. S.C.J.) (Baltman J.) [Dinh] (2 kilograms of cocaine excluded under s. 24(2)).

R. v. Selvanayagampillai “P.C. [Scott Aikman] knew or ought to have known that he did not have the requisite grounds to detain the accused and search the van and either fabricated or concealed evidence in order to justify the search after the fact.”¹

R. v. McPhail “What can only be viewed as the attempted cover up of the strip search makes this conduct especially egregious. In my view, the conduct of the police both in conducting the strip search and in attempting to hide it at trial mitigates in favour of excluding the evidence obtained after the breach.”¹⁷ *R. v. Harrison*¹⁸ “I note that the trial judge found the officer’s in-court testimony to be misleading. While not part of the *Charter* breach itself, this is properly a factor to consider as part of the first inquiry under the s. 24(2) analysis given the need for a court to dissociate itself from such behaviour.”

76. In relation to the below topic, Mr. McLean copies the below from the **Tanovich Article**:

“Factoring Prior Cases of Deception by the Officer/Division into the 24(2) Analysis

In Thompson, Justice Hill opened the door for judicial consideration of a history of lying in court by a police officer, squad or force in assessing the seriousness of the breach under section 24(2): . . . while it is not strictly necessary to decide the point in this case, I am of the view that a trial court would not be foreclosed, in considering as a factor relating to the seriousness of a *Charter* breach, relevant history of a particular police officer, squad or force as unambiguously characterized by judicial officers in other cases.

Allowing a court to take into account a pattern of lying or institutional failure to take corrective action, in deciding whether to exclude the evidence, or as a basis for having a reasonable doubt (assuming Ghorvei is no longer followed), would encourage systemic change because it would put an onus on the police to address the problem or face the prospect of serious cases being thrown out of court.

Increase Prosecutorial Oversight

The issue of police lying has also been part of the public discourse as a result of a 2012 Toronto Star survey reporting over 100 cases across Canada involving false testimony and other deception by police officers.³⁴ One of the consequences of the Toronto Star series, and growing public and judicial concern on the issue, has been for the Attorney General of Ontario to implement a policy requiring prosecutors to report up-the-ladder cases where a police officer’s evidence has been questioned by a trial judge. According to a summary of the policy in the Toronto Star, the policy deals not only with deliberate dishonesty on the witness stand but in any situation where a police

officer is under oath, such as in an affidavit to get a wiretap or a search warrant. Under the new system, if a judge makes findings or comments that an officer was deliberately untruthful, or the Crown attorney has reasonable evidence that the officer was lying, the trial prosecutor must report it to his local manager. From there, the supervising Crown will review the case file and court transcripts to see if there are grounds to believe the officer deliberately lied. If there are grounds, the case gets forwarded to a regional director, who makes the decision whether to send the case to police for investigation. . . . Police would decide whether the officer will be charged with a criminal offence. The police force may also internally discipline the officer.

Investigating their own is a problem.”

77. While the issue of police lying in any proceeding is an issue, it appears that police are entitled to lie to witnesses in questioning them. However, that is during an investigative detention, arrest or otherwise, where the individual

Volume 1(N)(iii): Pre-arrest deceit, pre-detention deceit, pre-imprisonment deceit et al: the issue herein is whether the deceit (False Pretense Email) prior to any arrest, detention or imprisonment is allowed

78. As this comprehensive, multi-purposed and multi-faceted written brief explores and concludes that the warrantless arrest was not only presumptively unreasonable and a breach of the **Applicant’s Charter** rights, it was unlawful as a matter of the *Criminal Code*. That level of unlawfulness is not in of itself an offence by the **TPS** and the **TPS** respondents. However, the pre-detention **False Pretense Email** was as it was a violation of section 361 of the *Criminal Code*. While police officers have a level of immunity that immunity is qualified when they are acting in good faith and pursuant to their duties as officers.
79. As the BCSC explored, section 25 offers a defence to officers in the course of their discharging or purporting to discharge their duties. However, there is no duty (or right) to engage in false pretenses prior to any arrest and/or prior to an individual being under detention.
80. While the case of *R. v. Singh* dealt with the issue of the right of an accused to silence during an investigation, the obvious question arises what about when an individual relies on a representation to attend a police station to obtain items that are his property with no inkling or indication of any issue surrounding his life, liberty and security along with his *Charter* rights being at issue.

81. In *R. v. Singh*, the SCC found: “This appeal concerns the scope of a detainee’s pre-trial right to silence under s. 7 of the *Canadian Charter of Rights and Freedoms* and, in particular, the intersection between this *Charter* right as defined in *R. v. Hebert*, [1990] 2 S.C.R. 151, and the common law voluntary confessions rule as restated in *R. v. Oickle*, [2000] 2 S.C.R. 3, 2000 SCC 38. As in those cases, the discussion in this appeal focusses on the tension between the rights of the accused and society’s interest in the effective investigation and resolution of crime.
82. There is no issue herein about Mr. McLean confessing to anything as he did not break any section of the *Criminal Code*; particularly, section 264(b) of the *Criminal Code*.

VOLUME #1(O): What is a false pretense under the <i>Criminal Code</i> ?

83. A false pretense is as follows:

False pretence

- **361 (1)** A false pretence is a representation of a matter of fact either present or past, made by words or otherwise, that is known by the person who makes it to be false and that is made with a fraudulent intent to induce the person to whom it is made to act on it.

VOLUME #1(O): Civil Misrepresentations

84. In the civil realm, misrepresentations include omissions. A third party remaining silent in the face of a misrepresentation can attract liability upon that third party. In *Sugar Peat*, Southey J., writing for the Ontario High Court of Justice found, “the bank was guilty of fraud in remaining silent and permitting S. to rely on the statements of the receiver-manager acting as the bank’s **agent**, when employees of the bank knew the statements to be false.” *Sugar Peat Ltd.*’s negligence in failing to verify the statements was no defence; nor was her delay, since she did not learn of the bank’s knowledge until October, 1984. *Sugar Peat Ltd.* was entitled to recover the full amount of its investment before that date.

VOLUME #1(O): Criminal

85. In *R. v. Majeed et al.*, 2015 ONCJ 330

[16] Mr. Majeed is charged in count 1 with obtaining credit by a false pretence, contrary to s. 362(1)(b) of the *Criminal Code*. The Crown has proven beyond a reasonable doubt that Mr. Majeed did in fact “obtain credit” in the form of mortgage financing for his father and sister. The law is clear that an offence under this section can be made out whether the accused obtains credit for himself or for another person: *R. v. Dvornek*, [1962] B.C.J. No. 72 (B.C.C.A.); *R. v. Cohen*, [1984] Q.J. No. 316 (Que.C.A.).

[17] The definition of “false pretence” is found in s. 361(1) of the *Criminal Code*. The Crown argues that the “false pretence” occurred when Mr. Majeed provided MCAP (through the broker) with documents that he knew to be false, with the intention that these documents be relied upon in granting credit. The documents in question are the 2010 and 2011 notices of assessment for Ms. Khan, and the rental agreements for the two properties owned by Ms. Khan. (In fact, Mr. Majeed provided the broker with a third document containing false information: the mortgage application. However, this document was never forwarded to MCAP, and the false income information for Mr. Raja and Ms. Khan contained in that document was not given to MCAP, because Mr. Vaz chose to give MCAP the income information from the notices of assessment, not from the mortgage application form. Accordingly, the mortgage application does not constitute part of the “false pretence”.)

(b) The Difference Between the Offence of Fraud and the Offence of False Pretences

[41] As stated by M.B. Henderson in *Commercial Crime in Canada* (Toronto: Carswell, 1990) at 4-13, fraud is a broader concept than false pretences in two material aspects:

...In a false pretence, the false representation must relate to the past or present but not the future, whereas in fraud the dishonesty may relate to any point in time. In addition, the thing obtained by a false pretence must be capable of being stolen and the victim must part with it, but the victim of a fraud may be defrauded of any property, money, or valuable security merely by causing some deprivation of the victim. Fraud is a very broad offence that encompasses most other fraud-related offences, including false pretences. The phrase “whether or not it is a false pretence” in section 380 means simply that an accused who commits a false pretence in order to defraud the victim may be charged with either fraud or false pretences.

(c) The Interpretation of the False Pretence Section of the *Criminal Code*

[42] Section 361 of the *Criminal Code* defines false pretence. There are four requirements necessary to prove a false pretence:

- (1) the representation must be one of fact;
- (2) the representation must be by words or otherwise;
- (3) the representation must be known to be false; and

(4) the representation must have been made with intent to induce.

(1) False Representation of a Matter of Fact

[43] “At the core of false pretence is that the accused has pretended that something is so when it is not.” (A.W. Mewett and M. Manning, *Mewett & Manning on Criminal Law*, 3rd ed. (Toronto: Butterworths, 1994) at 849 [“Mewett & Manning”]). Proving knowledge does not require direct evidence. A court will look at the surrounding circumstances to decide whether an accused knew that the representation was false when it was made.

[44] In the case at bar, the defendant pretended that there was security for the LOC when she knew there was not. This constitutes a false representation as a matter of fact. *Toronto-Dominion Bank v. Cushing*, 2007 BCSC 1581

(4) The Representation Must Have Been Made with Intent to Induce

[49] The *mens rea* of the offence of false pretences requires that the accused intended at the time the false pretence was made “to induce the person to whom it is made to do or omit to do something in reliance on what has been misrepresented” (*Mewett & Manning* at 853). In order to meet this aspect of the definition of false pretence, “it is not necessary that there be intent to obtain something – merely an intent to induce the other person to do or omit to do something” (*Mewett & Manning* at 853-854).

VOLUME #1(P): Fraud

86. Section 380 of the *Criminal Code*:

Fraud

- **380 (1)** Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service,
 - **(a)** is guilty of an indictable offence and liable to a term of imprisonment not exceeding fourteen years, where the subject-matter of the offence is a testamentary instrument or the value of the subject-matter of the offence exceeds five thousand dollars; or
 - **(b)** is guilty
 - **(i)** of an indictable offence and is liable to imprisonment for a term not exceeding two years, or
 - **(ii)** of an offence punishable on summary conviction, where the value of the subject-matter of the offence does not exceed five thousand dollars.

VOLUME #1(P)(i): LSO (LSUC at the time) citing Theroux

87. In 2008, the Law Society **Tribunal** in *Kazman*, cited the cases of *R. v. Olan* and *R. v. Theroux* (the latter citing *Olan*):

More helpful for our purposes is the fraud case of *R. v. Th  roux*, 1993 CanLII 134 (SCC), [1993] S.C.J. No. 42. There, the Supreme Court of Canada had to determine, as set out in paragraph 4, “...whether a belief that, in the end, a dishonest practice will not result in loss to the victims of that practice, negates the guilty mind necessary to establish the offence of fraud.” In Sections IV and V of the decision (see Appendix B), McLachlin, J. (as she then was) analyzed the *actus reus* and *mens rea* for fraud in the context of criminal law; however, her analysis is of considerable assistance in the context of administrative law as well. We have summarized her analysis as follows:

Actus reus of Fraud

3. In *R. v. Olan*, 1978 CanLII 9 (S.C.C.), Dickson J. (as he then was) set out the following principles regarding the *actus reus* in fraud cases:
 - (i) the offence has two elements: dishonest act and deprivation;
 - (ii) the dishonest act is established by proof of (1) deceit, (2) falsehood, or (3) other fraudulent means;
 - (iii) the deprivation is established by proof of detriment, prejudice, or risk of prejudice to the economic interests of the victim, caused by the dishonest act.
4. “Other fraudulent means” may include the use of corporate funds for personal purposes, non-disclosure of important facts, exploiting the weakness of another, unauthorized diversion of funds, and unauthorized arrogation of funds or property.
5. Where it is alleged that the *actus reus* is “other fraudulent means”, the existence of such means will be determined by what reasonable people consider to be dishonest dealing.
6. Where deceit or falsehood are alleged, *actus reus* will be found where the accused, in fact, represented that a situation was of a certain character when, in reality, it was not.
7. Economic loss is not essential to the offence; imperiling an economic interest is sufficient.

8. To establish the offence, it is not necessary for the accused to have profited by the fraud.

Mens Rea of Fraud

9. The *actus reus* has its own mental element; the act must be the voluntary act of the accused. *Mens rea* refers to the guilty mind, the wrongful intention, of the accused. Its function is to prevent the conviction of the morally innocent – those who do not understand or intend the consequences of their acts.
10. Leaving aside offences where the *actus reus* is negligence or inadvertence and offences of absolute liability, the test for *mens rea* is subjective. The test is not whether a reasonable person would have foreseen the consequences of the prohibited act, but whether the accused subjectively appreciated those consequences at least as a possibility. In applying the test, the court looks to the accused's intention and the facts as he believed them to be.
11. An accused is not saved from conviction because he believed there was nothing wrong with what he is doing, or because he believed that what he was doing was honest, or because he hoped that the deprivation would not occur. The question is whether he subjectively appreciated that certain consequences would follow from his acts, not whether he believed the acts or their consequences to be moral. His system of values is irrelevant.
12. The Crown need not, in every case, show precisely what was in the accused's mind at the time of the criminal act. In certain cases, subjective awareness of the consequences can be inferred from the act itself, barring some explanation casting doubt on such inference. The fact that such an inference is made does not detract from the subjectivity of the test.
13. The prohibited act is deceit, falsehood, or some other fraudulent means or dishonest act. The prohibited consequence is depriving someone of what is or should be hers. The proper focus in determining the *mens rea* of fraud is to ask whether the accused intentionally committed the prohibited acts aware that deprivation, or risk of deprivation, could follow as a consequence. If this is shown, the offence is complete.
14. There appears to be no reason why recklessness as to consequences might not also attract criminal responsibility. Recklessness presupposes knowledge of the likelihood of the prohibited

consequences. Criminal responsibility is established when it is shown that the accused, with such knowledge, commits acts that may bring about the prohibited consequences, while being reckless as to whether or not they ensue.

Summary of How the Offence is Established

15. The *actus reus* of fraud is established by proof of:
 - i. the prohibited act, be it an act of deceit, a falsehood, or some other fraudulent means; and
 - ii. deprivation caused by the prohibited act, which may consist in actual loss or the placing of the victim's pecuniary interests at risk.
16. The *mens rea* of fraud is established by proof of:
 - i. subjective knowledge of the prohibited act; and
 - ii. subjective knowledge that the prohibited act could have as a consequence the deprivation of another (including knowledge that the victim's pecuniary interests are put at risk).
17. Where the conduct and knowledge required by these definitions are established, the accused is guilty whether he actually intended the prohibited consequence **or** was reckless as to whether it would occur.
18. The accused's belief that the conduct was not wrong or that no one would be hurt, and his contention that he did not profit from the fraud, afford no defence to a charge of fraud.

Pragmatic Considerations

19. Generally, the primary objective of fraudsters is to advantage themselves [or their preferred clients]. The detriment to their victims that results is secondary to that purpose, and incidental. It is "intended" only in the [actual or imputed] sense that it is a contemplated outcome of the fraud. The law of fraud must be sufficiently broad to catch this secondary incidence or it will be of little avail.

20. The question arises as to whether this definition of *mens rea*, which catches a broad range of dishonest commercial dealing, also catches conduct which, although not to be encouraged, should not be regarded as criminal, but rather left to civil sanction. The answer is no. The requirement of intentional fraudulent action excludes mere negligent misrepresentation, improvident business conduct, sharp conduct, innocent pranks, or statements that are not intended to be acted upon. Only deliberately fraudulent acts that, in the knowledge of the accused, actually put the property of others at risk may be appropriately criminalized.

[62] Thus, per *Théroux*, assuming the *actus reus* for fraud has been established, actual or imputed knowledge of a dishonest act establishes the *mens rea* for fraud, and a belief that a dishonest act will not result in loss or risk of loss does not negate the guilty mind necessary to establish fraud.

VOLUME #1(P)(ii): Application of the Law to the Facts

88. While this is not a commercial affair, the principles can be applied by analogy.

VOLUME #1(P)(ii)(a): Was the Constable Romano email a dishonest act? Were Constable Romano's acts and others, unknown to Mr. McLean at the time, including DC Kolankowski deceptive prior to arrest?

89. The **False Pretense Email** was dishonest because it omitted the true reason and purposes that Mr. McLean was to attend the 14th TPS Division. Mr. McLean did not obtain the **McLean Property** and **McLean Medication** until after he was arrested, detained, imprisoned, searched and “seized” (seizures occurring in relation to his property on him).
90. The **False Pretense Email** contained deceptive or “deceit elements”.
91. The **False Pretense Email** contained falsehoods.

92. Where deceit or falsehood are alleged, *actus reus* will be found where the accused, in fact, represented that a situation was of a certain character when, in reality, it was not.
93. Constable Romano represented the situation to be different than it was. The *actus reus*, by analogy, for fraud under section 380 of the *Criminal Code* is made out on those two grounds of: (i) deceit; or (ii) falsehood.

VOLUME #1(P)(ii)(b): Other Fraudulent Means (defined herein by acronym “OFM”)

94. The **False Pretense Email**, and the subsequent conduct after Mr. McLean responded by email in prompt fashion to Constable Romano, contained “other fraudulent means”.
95. “Other fraudulent means” may:
- a. include non-disclosure of important facts;
 - b. exploiting the weakness of another; and
 - c. unauthorized arrogation of funds or property.
96. The **TPS** had already engaged in unauthorized possession and control of the **McLean Property** and **McLean Medication**. It was unauthorized because a third party cannot waive another’s *Charter* rights. Mr. McLean did not consent to that course of action and conduct.
97. The **False Pretense Email** exploited Mr. McLean’s weakness and desperation to obtain his property and his medication, which he was required to take on a daily basis, all against the backdrop that **Goldview** had committed an act of extortion by representing to him on September 23, 2024, that if he was even seen on the property, it would call the police. Therefore, Mr. McLean’s property contained within **Rental Unit 410** had been constructively seized by **Goldview** and the **Landlord** and he was entirely helpless. If he exercised his rights to obtain his property, he could suffer a loss of his life, liberty and security.
98. The **False Pretense Email** included non-disclosure of important facts of which Mr. McLean was fully entitled to know. If Mr. McLean was going to be arrested at the **TPS 14th Division**, he could have arranged

for legal counsel to speak with the **TPS** regarding the same and accept service of a promise to appear. He could have done so himself. He or his agent could have discussed the matter to determine if there was any validity to a potential charge.

99. Justice is not free.
100. The **TPS** has the largest budget of all police services in the country as it exceeds one billion per year in an annual budget. From a pragmatic, rational and reasonable perspective, is this what Toronto tax payers want their tax dollars spent on? Or should these seasoned officers have been spending their time on that night assisting with actual crimes being committed and helping those in need? The question answers itself.
101. Constable Romano did nothing after receiving the email from Mr. McLean to correct or rectify any of the non-disclosure of important facts.
102. Moreover, Mr. McLean left his computer at a coffee shop, to be watched for a brief period of time, as a result of Constable Romano's email. On that ground alone, Constable Romano had a duty to notify Mr. McLean that he may be staying overnight at the **TPS 14th Division** and may need counsel.
103. A reasonable person would have considered the conduct of Constable Romano in the **False Pretense Email**, from the time of receipt of Mr. McLean's email, during the time Mr. McLean arrived at the **TPS 14th Division** and until the time of the arrest to be dishonest.
104. The *actus reus* under the sub-element of "other fraudulent means" is made out.

VOLUME #1(P)(ii)(c): Was there a deprivation to Mr. McLean?

105. This question answers itself.

106. Deprivation is established by proof of detriment, prejudice, or risk of prejudice to the economic interests of the victim, caused by the dishonest act. How severe the deprivation was is to be determined with the benefit of further documents, evidence, expert reports et al (either in this **HRT0** Proceeding or future proceedings where the **HRT0** does not have jurisdiction *per se*).

VOLUME #1(P)(ii)(d): Economic Loss to Mr. McLean

107. There was economic loss to Mr. McLean at the time. His economic interests continued to be imperiled by the conduct of the **TPS** and **TPS Respondents**, which were all predicted on two unlawful acts:
- a. unauthorized seizure of the **McLean Property** and **McLean Medication**; and
 - b. the **False Pretense Email**.

VOLUME #1(P)(ii)(e): Profit by the **TPS and **TPS Respondents****

108. Mr. McLean would not be so audacious to make a representation in that realm. Moreover, it is not necessary to prove the same.
109. However, it is concerning that the very acts of threats and extortion by **Goldview** turned out to be true, and rather prophetic with the benefit of hindsight, albeit not with Mr. McLean being ‘seen’ on the property of the Minto Complex.

VOLUME #1(P)(ii)(f): Were all of the acts of the **TPS and **TPS Respondents** prior to the arrest of a voluntary nature?**

110. They were of course voluntary acts by the **TPS** and **TPS Respondents** with a focus on Constable Romano and DC Kolankowski. Even right until the “end” or before the arrest, Mr. McLean was about to sign for the **McLean Property** and **McLean Medication** and they engaged in yet another act of deception.

111. The deception, falsehoods and other fraudulent means then continued with the conduct of DC Kolankowski and Constable Romano wherein DCK and CR misrepresented that DCK had warned Mr. McLean regarding harassment of some unknown individual and Constable Romano misrepresented that **TPS** had a warrant for Mr. McLean.
112. Mr. McLean can now responsibly submit that there was no warrant pursuant to section 29 of the *Criminal Code*. Mr. McLean was fastidious in asking to see a copy of that warrant.

<i>VOLUME #1(Q): THE LEADING CASE UNDER SECTION 29 OF THE CRIMINAL CODE – A QUARTER CENTURY LATER</i>

113. Without knowing at the time, the leading case under this section was and is that of *R. v. Bohn*, 2000 (BCCA). Madam Justice Ryan wrote the Reasons for Judgment for a unanimous BC Court of Appeal.
114. *Bohn* involved a case wherein Mr. Jeffery *Bohn* was accused and convicted of one count of theft of electricity, one count of unlawful cultivation of marijuana, and one count of possession of marijuana for the purpose of trafficking (see: paragraph 1). The appeal related to a second trial of the conviction relating to those offences in 1992. Some eight years later, the BCCA issued its decision after the second trial, in 1997, lead to his conviction. The BCCA set aside the convictions and entered acquittals on all three counts.
115. In *Bohn*, there was no dispute that the police had two search warrants to enter Mr. *Bohn*'s home. It is important to note the distinction between *Bohn* and *McLean v. TPS et al.* While Constable Romano represented that there was a warrant for Mr. McLean's arrest, distinct from a search warrant, none has ever been provided as of October 30, 2024, despite a request for the same.
116. In *Bohn*, the search warrants were prima facie valid. However, the trial judge found that Mr. *Bohn*'s *Charter* rights were violated but did not find that the administration of justice would be brought into disrepute by the inclusion of the incriminatory evidence against Mr. *Bohn*. Naturally, Mr. *Bohn* was convicted of the single count of those three offences. However, the BCCA overturned the decision on the ground of the cumulative effects of the breaches would bring the administration of justice into disrepute.

117. Mr. *Bohn* was clearly engaged in a form of marihuana grow-up system and the police received credible evidence had a hydro-bypass and a marijuana grow-operation in the residence.³⁵ Whether the combination of the Crime Stopper's tip and Mr. Kennedy's information would provide the police officers with sufficient grounds to obtain a search warrant for marijuana cultivation was not an issue before the trial judge. Constable Seward believed that he only had sufficient information to obtain a warrant to search for evidence of the theft of electricity [the "CC Warrant"].
118. An interesting morsel of how officers obtain search warrants when it is after business hours and it is included in the *Bohn* decision. They attended the home of the "justice of the peace" who was "on call" that night. In quoting from the same, as Mr. McLean was arrested in the evening and it was represented to him by **TPS 14th Division** that his property was dropped off at around 3 p.m., the BCCA conveyed the below as follows:
- "[8] Whether the combination of the Crime Stopper's tip and Mr. Kennedy's information would provide the police officers with sufficient grounds to obtain a search warrant for marijuana cultivation was not an issue before the trial judge. Constable Seward believed that he only had sufficient information to obtain a warrant to search for evidence of the theft of electricity.
- [9] Constable Seward advised his commanding officer, Corporal Schinkel, of the information he had gathered. A decision was made to search the Gilby Street house that night. While a team of officers waited near the Gilby Street residence Constable Seward attended the home of the Justice of the Peace, who was "on-call" that night, to obtain the **Criminal Code** warrant. Constable Seward testified that he arrived at the home of the Justice of the Peace at 9:20 p.m."
119. The steps taken by the officers in *Bohn* cannot be in dispute and they did so with a level of care and considering the privacy impacts of searching the outside of the home versus inside the home. One of the constables therein (Constable Steward) was attributed to having testified as follows:

[10] Constable Seward testified, as did Mr. Kennedy, that a hydro by-pass is almost always set up for the purposes of growing illicit drugs, usually marijuana. Anticipating that evidence of a marijuana grow-operation would be obtained in the search of the Gilby Street address, Constable Seward drafted an information to obtain a warrant under the **Narcotic Control Act**, R.S.C. 1985, c. N-1 (repealed S.C. 1996, c. 19, s. 94, May 14,

1997 SI/97-47 and replaced by the **Controlled Drugs and Substances Act**, S.C. 1996, c. 19). The information to obtain stated that Constable Seward was informed by Corporal Schinkel that “while executing the **Criminal Code** warrant he located a marijuana grow operation within the residence.”

[11] The Justice of the Peace granted a **Criminal Code** warrant to search for evidence of “theft of telecommunications services”. At 9:35 p.m. Constable Seward used his cell phone to call a member of the search team assembled outside the Gilby Street house to tell him that the search warrant had been obtained

120. Some ten minutes later, the police in BC executed the search warrant.

VOLUME #1(R): Distinction between Crime Stoppers tip and a complaint on behalf of another

121. In the case herein, self-evidently, the distinction about the need to arrest an individual on some trumped-up allegations by a bitter and lawless **Landlord**, masquerading as a former and *quasi* common law mother-in-law purportedly on behalf of her daughter, who is aggrieved by a decision of a Vice Chair of the LTB (**Tribunal**) was prima facie a bad faith complaint.

VOLUME #1(S): If Nicole did NOT file the complaint – then the criminal complaint is null and void

122. The following principle is well-known to the criminal justice system. To the question, can another individual file a criminal complaint on behalf of another? In general, no, you cannot report a crime to the police in Canada on behalf of someone else. The actual complainant, owner, or authorized representative must file the report.

123. For evidentiary and reference purposes, the following police websites in Ontario state the same. Due to the importance of the same, each are copied with images from each city’s police department website being at Appendices.

124. From the **TPS**, it states:

“Welcome to the Toronto Police Service Citizens Online Police Reporting System. If this is an Emergency please call 911.
Using the online system allows you to submit a police report immediately. Reports must be filed for yourself or you must be **authorized** to file on behalf of another person.”

125. If the online system requires an individual to file on his or her own behalf, then the in-person requirement would require even more stringent requirements. If the Landlord filed on behalf of her daughter, she is engaged in tendering hearsay evidence (if even accurate) and that is presumptively inadmissible. It certainly would not meet the requirement for reasonable and probable grounds that Mr. McLean committed an offence of harassment pursuant to section 264(b) of the *Criminal Code*.

126. The **Peterborough Police** website states similarly to the **TPS**:

“Please Note:

- **Filing a false police report is a criminal offence.**
- Reports filed on behalf of a third party, i.e. another person or for public property, will not be accepted. Reports must be filed by the actual complainant, owner or authorized representative.
- Upon review, if further investigation of your case is needed, you may be contacted by email.

<https://www.peterboroughpolice.com/en/report/a-non-emergency-crime.aspx#:~:text=Crime%20and%20Lost%20Property%20Reporting,may%20be%20contacted%20by%20email>.

127. The same is applicable in Sudbury with the **Sudbury Police** website:

- We do not accept reports filed on behalf of a third party, i.e. another person or for public property.
- **Reports must be filed by the actual complainant**, owner or authorized representative.
- Please make sure to turn off any pop-up blocking software before filing the report.
- Filing a false police report is a crime.

<https://www.gsp.ca/en/reporting/online-reporting-coplogic.aspx#Important-things-to-remember->

VOLUME #1(S)(i): Sudbury Police Department: condition precedent of when to make a criminal complaint for harassment

128. The Sudbury Police website has an excellent example of some of the common sense that goes into the filing of a harassment charge against another which is a serious allegation: Harassing Communications is

when someone continuously tries to communicate with you via phone, text message, email, social media, etc. after you have stated that the communication is unwelcome/unwanted.

VOLUME #1(T): Exceptions: another individual making a criminal complaint on your behalf: sexual assault and minors

129. Of course, minors will often have a parent or guardian make a complaint on their behalf. Minors who are involved in car accidents are stylized as “ad lit guardian”.
130. In the cases of sexual assault, the victim will often have another individual report on their behalf due to the intense trauma that the victim has suffered or for other particularized reasons to that victim.
131. It was abusive of the process of the criminal justice system and the police force to do so. The absence of particulars in the “information” is evidence of that lack of initial reasonable and probable grounds. It does not absolve the **TPS** because like searches or seizures simpliciter or searches and seizures, the purpose of section 8 of the *Charter* is to prevent unjustified searches or seizures before they occur.
132. The same can be said of arrests. On many levels, a search or seizure is often far less dehumanizing than an arrest. An arrest has the effect, particularly with handcuffs, to be the most traumatizing. One can think of an example of underage drinking and the seizure of alcohol from some alleged minors. Perhaps, without identification, the police thought they were minors when, in fact, they were not. However, being arrested for that alleged offence versus having their “Friday night buzz” taken away does not require further discussion as to which is more serious and has serious consequences from a psychological standpoint. Arrests that cause physical harm are few and far between. However, it is the feeling of helplessness, lack of knowing, and indefinite persecution and potential prosecution that sets a search or seizure apart from an arrest on its face. When a search and seizure is coupled with an arrest, then it is a different legal, psychological, sociological, and trauma-based lens that must view the same.

VOLUME #1(U): Bohn, all respondent parties served, HRTO process generally and specifically, and why Mr. McLean is uniquely and especially suited, a decade later, to unauthorized search and seizure – but this time with an unlawful arrest and unlawful imprisonment

133. In *Bohn*, the distinction of where an arrest is made has important implications to the outcome of this **HRTO** Proceeding but also the answering of the *Charter* questions based upon the *Charter* violations. Mr. McLean has provided ample time and an open email for the **TPS** to provide answers to his questions but they have neglected to do so.
134. The **TPS**, **TPS** Respondents, **Landlord** and **Goldview** have all been served and an SOD was tendered with the same.
135. They are all now on the proverbial clock as it relates to filing Responses *per se*. There is a nuance with **HRTO Specific Rules** and that is the distinction between the word “deliver” and “sent”. Sent relates to the **HRTO** sending out a copy of the **Applicant**’s Application after it has undertaken its jurisdictional review of the same.
136. There are unfortunately many **HRTO** litigants that do not seem to grasp some of the fundamental concepts and the **HRTO** is saddled with a bevy of “applications” where the likes of protected characteristics and/or protected grounds are not at issue. This “case” or perhaps “to be cases”, subject to any resolution discussions, is not one of them. It is the type of fact pattern that would likely be too daunting for even a law school student or young lawyer as it combines so many different areas of law, procedure, and facts. However, it is one that this **Applicant** (Mr. McLean) has some unfortunate experience in the area of *Charter* analysis in some complex areas. While disabled, he has been able to lean on that knowledge base. Of course, the *Criminal Code* is where he did not have any experience as nothing in his ten-year saga with the LSBC and LSBC Respondents engaged anything to do with criminal law *per se*. While the *Charter* cases in the criminal sphere were explored, Mr. McLean was often quick to point out, oddly in defence of the LSBC, that one could not equate the law of consent *per se* in the criminal sphere, or the requirements for search and seizure in the criminal sphere precisely with the facts at bar and the law at the time. Of course, over time the law evolved and the likes of cases like *Reeves* and *Arkinstall* provided further guidance. By the time, Mr. McLean was engaged with the AGBC on a challenge to the unconstitutionality of the Legal Profession Act, before its repeal in 2024, on the basis of some discrete language therein under section 36(b) versus (c) of the Legal Profession Act. Of course, Mr. McLean was quick to point out that

there was no possibility of “forensic copying” of a hard drive under the LSA as the requirement was reasonable grounds under oath.

137. Mr. McLean took obvious issue with being grabbed by a non-police investigator outside of the LSBC on June 2, 2024, and that defendant remained in the LSBC Proceedings despite a legislative defence of good faith. Moreover, Mr. McLean took issue with the likes of the “information” to obtain a warrantless search and seizure order of a “Chair of a Discipline Committee”. For context, as the examination for discovery transcript was filed in the SCC, Mr. McLean has provided some contextual snip-its from therein.
138. Moreover, unlike an information to obtain an arrest warrant or search warrant, the soon to be defunct LSBC’s method was to have an investigative lawyer (in Mr. McLean’s matter, one Mr. Mark P. Bussanich) provided a “privileged and confidential opinion” to the Chair of the Discipline Committee (at that time it was one Mr. Philip Riddell). By pure happenstance, Mr. Bussanich was a criminal defence lawyer (and after leaving the LSBC, he returned to that sphere as a Crown Counsel in Surrey) and Mr. Riddell was an experienced criminal defence counsel.
139. Of course, Mr. McLean was later declared ungovernable for his defiance and standing on his *Charter* rights. He turned out to be more correct than he could have imagined in the breaches of his *Charter* rights. In short, the LSBC did what not even the police could do in the circumstances. The usage of a RAM Dump has come up in three cases in the history of Canada and they were all in the context of child pornography.
140. The impugned attack on Mr. McLean was that of accounting records and of course nothing related to that level of disgusting conduct of those involved in pornography; let alone child pornography.
141. Mr. McLean does not provide the same to take shots or attack the LSBC while it is on its way out the door so to speak, but simply to provide some context as why the **Landlord** would use his “thin skull” and sensitivity to authority in certain regards against him. Moreover, it took many years of therapy for Mr. McLean to gain some level of peace with the same. Medication was an important part of that exercise. Mr. McLean has come to learn that not all persons at the LSBC were “bad individuals” but there were

some poor exercises in judgment that led to many people quitting, being fired, and/or leaving in some premature fashion.

142. The bad blood between them was at an all-time high in many regards. It is why Mr. McLean is approaching this, with caution and some level of discipline, to not respond with the same level of competitiveness, intensity and passion. While adrenaline has its place, this case, as he wishes, will stand for something like his cases with the LSBC did and will in perpetuity. Of course, juxtaposed to Mr. McLean, albeit under a different legal regime which had more protections than he had, was that of “Anonymous Lawyer” (later determined to be one Mr. MacDonald).
143. The **HRTO** occupies such a unique place in Ontario legislative and decision-making history considering the paramountcy, on a provincial level, of said statute. However, it is the primacy of the associated regulations and the **HRTO** Rules which is such a unique feature.
144. It represents that the power of the people and our democratic electorate’s choice to have a piece of legislation that empowers the **HRTO**, part of the SJTO cluster of tribunals, in such a different way than other tribunals.
145. It makes the *HR Code* a *quasi*-constitutional statute.
146. Moreover, the deliberate changes in shaping the common law in Canada where the SCC has found, perhaps paradoxically, that a court of competent jurisdiction, which includes statutory tribunals, grants the **HRTO** with even further powers to decide non-standalone constitutional questions.
147. It is the oddity of Mr. McLean’s DNA, makeup, and personal characteristics, along with his **Protected Characteristicss** (being recently physically disabled and having a mental impairment as a result of the MVA) along with a mental disorder (ADHD), that make this case such a unique one.

VOLUME #1(V): Returning to <i>Bohn</i>

148. In *Bohn*, the Surrey police officers, presumably RCMP, cannot be commended enough for their attention to detail. They obtained a *Criminal Code* search warrant for theft of electricity and then returned to the Justice of the Peace for a Narcotics Control Act warrant.
149. Mr. Bohn was arrested in his home and speaking from experience Mr. McLean would certainly prefer that as opposed to being all alone in a **TPS** detachment that he had only been to once. However, an arrest at home may be more debilitating to some than others. It is subjective.

VOLUME #1(W): A warrant would be obtained – insufficient [<i>nota bene</i> perhaps, Constable Romano believed that would occur but it is of no legal moment or consequence]

Feasibility with privacy – not a determination for police to make

150. The next paragraph in the *Bohn* decision is of note:

“[16] Earlier, when the appellant was arrested and taken into his living room, another member of the search team, Constable Wilson, advised the appellant that Constable Seward was in possession of a warrant to search for evidence of the theft of electricity. Constable Wilson told the appellant that a second warrant *would be obtained* as a result of what the police had observed in the house. Constable Wilson advised the appellant of his right to retain and instruct counsel pursuant to s. 10(b) of the **Charter**. Constable Wilson told the appellant that he would be provided with a telephone to contact a lawyer once the appellant arrived at the police detachment. Constable Wilson said that he did this because it was not feasible to provide appellant with privacy while the search was continuing.

[17] The appellant testified that after he was advised of the reason for the presence of the police he asked to see a copy of the search warrant but was not given one³⁶. He said after he was advised of his right to contact a lawyer he asked if he could do so and, “never got anywhere on that”.

[18] In his reasons for judgment the trial judge did not mention the appellant’s request to see the search warrant. Nonetheless, I am satisfied that the trial judge accepted that it was probable that the appellant did make such a request³⁷. The appellant testified that he made the request several times. There was no evidence contradicting him³⁸. There were two police officers who dealt with the appellant at his home. The first, Constable Ashford, testified that he could not recall whether the appellant had asked to see the warrants. The second, Constable Wilson, when asked whether the appellant had demanded to see the warrants said, “It’s possible, he might have.”

151. In the case at bar, there is no dispute that Mr. McLean asked for the same then and after. Nothing was provided in the context of a request of an arrest warrant.

152. The importance cannot be understated because for the last twenty-four years in this country, the law has been, consistent with section 29 of the *Criminal Code*, that if an individual subject to a process like a warrant (whether it be arrest, committal, search, seizure, or any other machination), REQUESTS to see a copy of the warrant, and it is feasible to provide the same, the police officer MUST do so. This is merely a copy from the language of the statute.
153. However, for the last 24 years, our courts have found that a failure of an officer to provide a warrant when arresting, searching or seizing, is a breach of section 8 rights of the individual. As our SCC has repeatedly found, it is almost possible

VOLUME #1(X): Invalid for police to have in their minds at the time – part of the plan to obtain a warrant – not take to the premises – corollary – if in the TPS detachment or division – no justifiable excuse that could override Parliament’s intent with “feasibility” and vertical <i>stare decisis</i>

Distinguishing between a CC Warrant and NCA Warrant

154. At paragraph 20, the BCC found as follows in relation to the above heading:

“[20] Constable Seward testified that it was part of the plan to obtain the warrant for theft of electricity and to execute it without taking it to the premises to be searched. Constable Seward said that after the first warrant was executed he expected to have evidence of the grow operation, and to then obtain the second warrant under the *Narcotic Control Act*. He said that it was not until both warrants were obtained that he planned to take them to the Gilby Street residence. He said that he did this for expedience and for the convenience of the appellant as well as the police. It was getting late. Constable Seward testified that if the first warrant was delivered to the home, executed, and evidence produced of a grow-operation, the police would have to “freeze” the premises while they returned to the Justice of the Peace to obtain the *Narcotic Control Act* warrant. He said that he understood that it was not necessary for the police to have the first search warrant with them on entry to the premises.”

BCCA: recitation of the trial judge’s findings and the BCCA’s interpretation of the same

155. The BCCA found at paragraphs 21 and 22, citing the trial judge’s reasons at paragraphs 13 to 14 and 11 respectively as follows in relation to the above heading:

“[21] The trial judge accepted the appellant’s argument that the search of the premises was not lawful and therefore unreasonable because, contrary to the requirements of s. 29(1) of the **Criminal Code**, the police officers entered the appellant’s home without the search warrant. He said:

[13] Section 29 of the **Criminal Code** requires that an officer executing a [search] warrant must have it with him where feasible to do so and produce it upon request. The JP’s residence was at most three miles distant from the Gilby Street address. There was no urgency. It was feasible for the other officers to have waited for Cst. Seward to have delivered the CC warrant before entering. The procedure adopted by the team was expedient but it did not comply with the Code requirements. Waiting for the CC warrant would simply have delayed the commencement of the search by the few minutes it would have taken Cst. Seward to drive to the premises.

[14] Entry was made pursuant to the CC warrant. No measures were taken to execute the NCA warrant until after Cst. Seward arrived with the warrant. While the failure of the entering officers to be in possession of the CC warrant was not inadvertent, as was the case in *R. v. B.(J.E.) [infra]*, I do not think it was a sufficiently egregious lapse to bring the administration of justice into disrepute and render the results of the search inadmissible. I do not think that the accused was prejudiced by the absence of the CC warrant on initial entry.

[22] The trial judge also concluded that the appellant had not been permitted to retain and instruct counsel within a reasonable time contrary to s. 10(b) of the **Charter**. In dealing with that issue he said:

[11] Counsel contended that the failure of the officers to allow the accused to call a lawyer promptly upon his request renders the results of the subsequent search and seizure inadmissible. He argued that arrangements could have been made to facilitate a call in privacy. I do not think the officers can be criticized for delaying the call in the circumstances here. The station provided the best facilities for the call in terms of privacy and the delay was not long. I do not think that the accused was prejudiced. The search was going to proceed irrespective of the call and no attempt was made to question the accused before he consulted counsel. There was no affront to the administration of justice in this respect which could justify exclusion of the evidence.

156. The corollary of the police having obtained a search warrant through a valid ITO and valid warrant issued by the JOP at his home, being the “on-call” JOP, but NOT having it with them was that the breach of ss. 29(1) rendered the search unlawful.
157. The extension of that corollary is that by Constable Romano misrepresenting, as a fact, that he had a warrant when the DCK Fictitious Warning Representation or criminal harassment warning

misrepresentation (defined herein as the “Criminal Harassment Warning Misrepresentation”) was palpably false, as Mr. McLean met DCK for the first time and he was introduced to Mr. McLean as DC Kolankowski, the **TPS 14th Division** was in a far inferior legal position to that of the police officers in *Bohn*. It is unclear if Constable Romano or any police officer at the **TPS 14th Division** even put “pen to paper” or “typed on their computers” (like Constable Romano had in his email to Mr. McLean) for an ITO.

158. If they did not, they were three steps removed from even presenting a warrant for Mr. McLean as follows:
- a. No ITO had been drafted and sent to a JOP (or ONSC Justice);
 - b. No JOP had reviewed and determined, acting independently and judicially, that an arrest warrant could be issued as a matter of law; and
 - c. None had been received by the **TPS** for the purposes of compliance with section 29 of the *Criminal Code*.

<i>VOLUME #1(Z): A Sole Unassailable Conclusion of Law that answers all of the constitutional questions, post unauthorized seizure (and potentially search of he McLean Property apparently in “temporary lockers) on October 2, 2024) in favour of Mr. McLean: (i) section 8 of the Charter was breached; (ii) cannot be saved under section 1; and (iii) all evidence must be excluded; and (iv) copies destroyed of the same and/or returned to Mr. McLean without copies being retained</i>

159. If non-compliance with the two requirements under section 29(1) of the *Criminal Code* of: (i) having it on him; and (ii) producing upon request, renders any warrant, particularly an arrest warrant or search warrant, unlawful and, thereby unreasonable under section 8 of the *Charter*, then the arrest was unreasonable pursuant to the *Charter*.
160. Many of the same *Charter* principles under section 7 and 8 apply to an unreasonable arrest, detention and imprisonment. In reverse order, if the arrest was unlawful, then everything thereafter that flowed or emanated from the unlawful and unreasonable arrest (defined as “False Arrest” or “Unlawful Arrest”) was all unlawful.
161. This is less a constitutional and human rights case about exclusion of evidence and more about the *Charter* breaches themselves and guidance for the public in relation to future handling of those with **Protected**

- Characteristics** in Protected Areas in Ontario where their protected characteristics may be a factor in their adverse treatment.
162. It is trite that unconstitutional conduct by the **TPS**, which emanated from a campaign of unlawful conduct behind Mr. McLean’s back, in the most cowardly and deceitful ways, by the **Landlord**, with attribution by the **Landlord** to Ms. Ferguson and *de facto* **Goldview**, meets the test of: (i) adverse treatment; (ii) adverse impact; and (iii) adverse decisions.
163. In order to have adverse treatment, there must have been a decision made – whether an honest one or a deceitful one. In order for there to be an adverse impact, that adverse decision leading to adverse treatment must be directed at an individual or person. Herein, it was Mr. McLean. He was not the first and will not be the last but hopefully the latter becomes “few and far between”. It is important to analogize that as a society, we will never be able to eradicate all bad apples. Murders will continue to happen but we hope as Ontarians and Canadians are numbers decrease to under a 100 per year while the likes of cities in the USA like Houston have years where the *city alone* has ten-fold all of Canada. It is beyond the scope of this initial memorandum to engage in a comparative analysis of the reasons why a city in the USA with approximately four million as its population and Canada with 7-fold would be 1/10th that of a city in the USA.
164. The issue in *Bohn* was that of exclusion of evidence. Mr. *Bohn*, and shame on him, was engaged in intentional unlawful conduct on a variety of fronts in breaching the *Criminal Code* and the NCA along with likely regulatory statutes relating to hydro and electricity.
165. The climate (pardon the pun) has drastically changed in relation to the personal usage of marihuana but the doctrine of retroactivity would not have saved Mr. *Bohn*.

Volume #:1(AA)(i): <i>Charter</i> analysis – violations – cumulative breaches is the test
“OR MAKING ARRESTS”
“WITHOUT A WARRANT – then “Reasons for Arrest”
DCK Reasons: Provided the Fictitious Harassment Warning Constable Romano’s Non-Reasons: “Well, we have a warrant”

166. Madam Justice Ryan³⁹, a BC appellate judge of the utmost legal acumen and a former lawyer at the DOJ in BC, then followed with (while citing all of the paragraphs as a finding of an Unlawful Arrest of Mr. McLean effectively ends the entirety of the **HRTO** Proceeding and because the charge followed the

Unlawful Arrest, it renders the nebulous, imprecise and unparticularized singular count of the summary unproven charge, pursuant to ss. 264(b) of the CC, to be likely devoid of any merit):

“Did the trial judge err in failing to find that the evidence of the search ought to be excluded because of the cumulative effects of the *Charter* breaches?”

1. The Section 8 Violation

[23] Section 29 of the ***Criminal Code*** defines the duties of peace officers when executing process or making arrests. It provides:

29. (1) It is the duty of every one who executes a process or a warrant to have it with him, where it is feasible to do so, and to produce it when requested to do so.

(2) It is the duty of every one who arrests a person, whether with or without a warrant, to give notice to that person, if it is feasible to do so, of

(a) the process or warrant under which he makes the arrest; or

(b) the reason for the arrest.

(3) Failure to comply with subsection (1) or (2) does not of itself deprive a person who executes a process or warrant, or a person who makes an arrest, or those who assist them, of protection from criminal responsibility.

[24] A form of this section has been included in the ***Code*** since its inception.

[25] Prior to amendments made in 1955, s. 40 of the ***Code*** (R.S.C. 1927, c.36) was the applicable section. It read:

40. (1) It is the duty of every one executing any process or warrant to have it with him, and to produce it if required.

(2) It is the duty of every one arresting another, whether with or without a warrant, to give notice, where practicable, of the process or warrant under which he acts, or of the cause of the arrest.

(3) A failure to fulfill either of the two duties last mentioned shall not of itself deprive the person executing the process or warrant, or his assistants, or the person arresting, of protection from criminal responsibility, but shall be relevant to the inquiry whether the process or warrant might not have been executed, or the arrest effected, by reasonable means in a less violent manner.

[26] In 1934 s. 40 was declared by this Court in ***R. v. George*** (1934), 63 C.C.C. 225, to be a restatement of the common law. Although the common law was not entirely clear (the

members of the Court in **George** could not agree as to what it was), there was a body of English case law and some Canadian authority which held that failure to produce an arrest warrant at the time of arrest was fatal to the validity of an arrest. (See **Gallaird v. Laxton** (1862), 2 B&S. 363, 31 L.J.M.C. 123, 9 Cox C.C. 127, 121 E.R. 1109; **Codd v. Cabe** (1876), 1 Ex. D. 352, 45 L.J.M.C. 101, applied in **R. v. Linder**, 1924 CanLII 480 (AB CA), [1924] 2 W.W.R. 646, 42 C.C.C. 289 (Alta C.A.).)

[27] In 1955 s. 40(1) was amended by the insertion of the words “where it is feasible to do so” after the words “to have it with him”. These amendments were likely intended to remedy the harshness of the operation of this section.

[28] It is common ground in this appeal, I think rightly, that s. 29(1) is imperative. Absent exigent circumstances, i.e. where it is not “feasible”, the section imposes a duty upon police officers which must be fulfilled. It is therefore one of the requirements for the lawful execution of a **Criminal Code** warrant.

[29] In determining the consequences of the failure to produce the warrant when requested, one might ask how important is it that the warrant be produced?

[30] In the 1989 Nova Scotia case, **R. v. B.(J.E.)** (1989), 1989 CanLII 1495 (NS CA), 52 C.C.C. (3d) 224 (N.S.S.C. (A.D.)), MacDonald J.A. speaking for the court made the following point, at p. 232:

A search by police officers under a search warrant of private premises is a derogation from common law rights of ownership. The necessary formalities in the execution of the warrant must therefore, be strictly observed. One of these formalities is that the officer executing the warrant must have it in his possession at the time he executes it.

MacDonald J.A. went on, however, to note in the facts of that case that the police officers conducting the search of the accused’s home had inadvertently left the warrant at the police station. Before the search took place one of the police officers obtained the consent of the accused to search his home without the warrant. The warrant was retrieved, brought to the house and shown to the accused before anything was seized. The court dismissed the challenge to the search as unreasonable. **R. v. B.(J.E.)** is therefore inapplicable to the case at bar, but the opening comments of MacDonald J.A. reproduced above are instructive.

[31] The authors of *Search & Seizure Law in Canada* say this about the purpose of s. 29(1), at p. 17 — 5:

The reason for the requirement that an officer executing the warrant have it available for production, is to allow the occupant of the searched premises to know: (1) why the search is being carried out, so as to enable the occupant to properly assess his or her legal position; and (2) that there is, at least, a colour of authority for the search and that forcible resistance is improper. This last rationale also plays a role in the second procedural requirement for a valid search, that the peace officers announce themselves before entering the premises to be searched.

[32] Section 29(1) has been given added significance by the interpretation by the Supreme Court of Canada of the rights preserved by s. 8 of the **Charter**. The seminal decision of **Hunter v. Southam Inc.**, 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145, shifted the focus of privacy rights analysis from things to people. By defining s. 8 rights as a positive right, an “entitlement to a reasonable expectation of privacy”, the Court moved privacy rights analysis from traditional notions of the preservation of property to the protection of the autonomy and dignity of the individual.

[33] The importance of the privacy rights of an individual in his or her home surfaced again in the judgment of the Supreme Court in **R. v. Feeney**, 1997 CanLII 342 (SCC), [1997] 2 S.C.R. 13. In **Feeney**, in spite of a long line of authority permitting police officers to enter a dwelling house without a warrant to effect an arrest, the majority held that, without prior authorization, such an entry constituted an infringement of the privacy rights of the resident.

[34] In my view these cases demonstrate the seriousness with which the privacy rights of the resident of a dwelling house must be treated. A breach of the s. 29(1) duty imposed on the police deprives the resident of the home to see the legal authority on which the invasion of his privacy is based. Although the police officers in this case advised the appellant of the existence of the warrant and the reason for their presence, they could not produce the warrant which confirmed that the search had prior authorization from an independent body. Failure to produce the warrant on request, without good reason, is in my view, a significant breach of s. 8.

[35] The Crown did not challenge the finding of the trial judge that it was feasible for the police to have the warrant with them when the warrant was executed. The finding is not unreasonable. The police decided to search the appellant’s home in the evening. There was no urgency to the situation. Unlike narcotics such as heroin or cocaine, hydro by-passes are not easily disposed of or moved. Constable Seward did not arrive at the home of the Justice of the Peace until 9:20 p.m. The reason to hurry the search along was created by the decision of the police to go ahead that night, rather than wait until the next day. Rather than deliver the first warrant to those ready to search, or have one of them pick it up before the search began, Constable Seward kept it while he waited for word that a marijuana grow-operation was, indeed, inside the Gilby Street residence. There was nothing wrong in waiting for word, for the purposes of obtaining the **Narcotic Control Act** warrant, it was sensible. What was wrong, however, is that by failing to ensure that the first warrant was in possession of those who were searching, the police breached the clear dictates of s. 29(1) of the **Code**. It was feasible to get the warrant to those who conducted the search before they entered the house. They should have had it and produced it on request.

[36] As a result, although he asked, the appellant did not have produced to him the evidence of the legal authority for the intrusive search of his home.”

VOLUME #1(AA)(ii): Disjunctive: either there are reasons absent a warrant or a warrant which are the justice’s reasons

167. The most elementary of syllogisms arising from Parliament's usage of the disjunctive: police officers, who fall under "every one", either have "their reasons", which must meet one or more of the requirements, excluding a warrant, under section 495 of the *Criminal Code*: (i) reasonable and probable grounds that the accused may have committed an indictable offence; (ii) the police officers saw (in the present tense) an accused committing a criminal offence; or (iii) the accused committed an indictable offence (in the present tense).
168. In relation to a criminal offence, which was not indictable at the time of commission, one can think of an individual, unknown to law enforcement, who is engaged in graffiti of a building. It may be that said vandalism of a building is not indictable *per se* but it is a criminal offence and the officers visibly see an individual vandalising a building. It is perfectly lawful and logical that the police officers have arrest powers so they can ascertain who is engaged in that defacing of the building and prevent further vandalism of buildings.
169. The same would be applicable to an individual who is driving their vehicle and openly drinking in the vehicle at a stop light. An individual may be so audacious that they do not even hide their drinking and driving and adopt a criminal style that takes those words to the most literal sense of the phrase "drinking and driving" and not "drinking and then driving". Again, police do not need a warrant, nor would it be feasible (particularly if there is an issue with stolen license plates or non-visible license plates) for the police to obtain one. Moreover, the police do not, nor should they, need time to consider whether they have reasonable and probable grounds to determine whether that meet the test of an indictable offence or whether they can search into their databases as to whether the individual may be engaged in the conduct on behalf of a criminal organization. By the time they conduct that research, the offender may be gone and have killed persons on the road. The police need not pull out the *Criminal Code* and determine whether the offence is summary, hybrid or indictable. In relation to hybrid, that is for the Crown to determine.
170. Leaving aside whether such conduct may amount to an indictable offence, the officers have the power to arrest right then and there, and that is absolutely how the law should be.
171. For purposes of seeing an individual commit an indictable offence, the obvious ones are murder, kidnapping, rape or extortion (i.e. seeing an individual openly extorting others).
172. With respect to "reasonable grounds to believe" that an individual has committed an indictable offence, with considering section 264(b) of the *Criminal Code*, it requires a little thing, not to be flippant, called "working the case" and "investigation".

173. It is here where Mr. McLean refers to the “text messages” of Nicole and the **Landlord** (see: Declaration #2).
174. It is also here where the **TPS** should take a hard look at whether they were duped by the **Landlord**. It also here where Mr. McLean predicts that they will not be the last to be duped by the **Landlord**.

VOLUME #1(AA)(iii): <i>Bohn</i> – section 10(b) of the <i>Charter</i> violation

175. At the outset of this subpart, Mr. McLean notes and admits that he was offered the right of counsel after he was arrested, and then detained and imprisoned in the “basement” of the *14th Division* of the **TPS**. He was required to be without socks, wallet, have his “crosses” removed, and other jewellery including a “vape” and a lighter. Mr. McLean readily admits that he smokes from time to time and he is a vaper. He cannot be found to be credible if he cherry picks facts. He also readily admits it is a habit that he picked up, some 12 years, post his *quasi*-pro and collegiate athletic career and after his first trip to Greece with Nicole in 2018. While drinking is a thing of the past for Mr. McLean, he has work to do in relation to his nicotine habit. No one else to be faulted in that regard except himself.
176. Mr. McLean readily admits that the **TPS** afforded him a room of privacy (so to speak) to speak with duty counsel. Mr. McLean does not denigrate duty counsel in any way, but he referenced knowing many lawyers generally and also in the criminal defence arena. He also wanted to leave and get back to his computer.
177. The issue of being afforded the right to counsel is somewhat of a red herring because this again is not about Mr. McLean being in possession of some contraband or incriminating evidence, so there was no “true fight” to be had on this front.
178. The issue is what predated the arrest in an unlawful seizure (and potentially) search and the only ability of the police to utilize those “carrots” to lure and induce Mr. McLean to attend the *14th Division* of **TPS**. But for having those “carrots”, there would have been no “dangling” possible.
179. If no “dangling”, Mr. McLean’s sole visit to the **TPS 14th Division** on his own volition (as no one can predict if they are somehow required in the future to report a crime or perhaps attend for different reasons) How then would have been that most curious and intriguing encounter with police office Salerno? Mr. McLean speculates, without reasonable grounds to believe, that it appears that the **Landlord**, Ms.

Ferguson and/or **Goldview** appeared to have had he **TPS 14th Division** on “speed dial” and/or were using his good faith and full disclosure emails to his detriment.

180. But when considering cumulative effects, the BCCA in *Bohn* found as follows in overturning the trial judge’s decision, when the section 8 breaches were likely sufficient:

2. The Section 10(b) Violation

[37] In dealing with the s. 10(b) violation, the trial judge found that Constable Wilson advised the appellant of his right to counsel but told him that he could not consult with a lawyer until he reached the police station. Constable Wilson testified that the reason for this, uncommunicated to the appellant, was because he could not afford him privacy on account of the nature of the on-going search. Counsel for the appellant argued strenuously in this Court that this was a serious violation of the appellant’s s. 10(b) rights. He suggested that the appellant could have, for example, been taken outside to call on a cell phone.

[38] In reply, counsel for the Crown respondent submitted that no call could be made at the time that the police officers advised the appellant of his rights because they were all engaged in the process of securing the home for the ensuing search. The evidence supports that submission.

[39] But the trial judge did find a breach of s. 10(b). In my view he must have concluded that at some point before he was taken to the police station the appellant could have been afforded an opportunity to telephone a lawyer. It was wrong then for the police to **precipitously** tell the appellant that he could not call a lawyer until he reached the police station and to deny him an opportunity to do so until they reached the station.

[40] In determining the consequences of the s. 10(b) breach under s. 24(2) of the **Charter**, the trial judge noted that the breach had not resulted in any statement to the police. In this Court, counsel for the appellant made much of the fact that before the appellant was taken to the police detachment he advised the police officers where he kept his identification in his bedroom. In my view nothing turns on this, proof that the appellant was who he was and lived at 355 Gilby was not a real issue in this trial.

[41] The trial judge was correct in noting that no statements (of any importance) were made as a result of the s. 10(b) breach. But, with respect, that did not end the matter. The s. 10(b) breach occurred while the police were conducting a search of the appellant’s home. The temporal link between the s. 10(b) breach and the discovery of the “real” evidence was sufficient to drive the trial judge to the conclusion that the fruits of the search had been obtained in a manner that infringed the **Charter**. (See **R. v. Strachan**, 1988 CanLII 25 (SCC), [1988] 2 S.C.R. 980.) Thus, the s. 10(b) breach should have been considered by the trial judge when determining whether the admission of the evidence could bring the administration of justice into disrepute under s. 24(2) of the **Charter**.”

181. Mr. McLean’s belief, which is obviously a form of speculation and belief (which he says is reasonable but not “reasonably grounded” *per se*), is that Constable Romano, with due respect, could not arrest Mr. McLean on his home. With due respect, neither could Constable DCK. If Mr. McLean was at full strength

and not disabled, it would have likely taken three to four officers to do so if Mr. McLean believed that the represented arrest was unlawful.

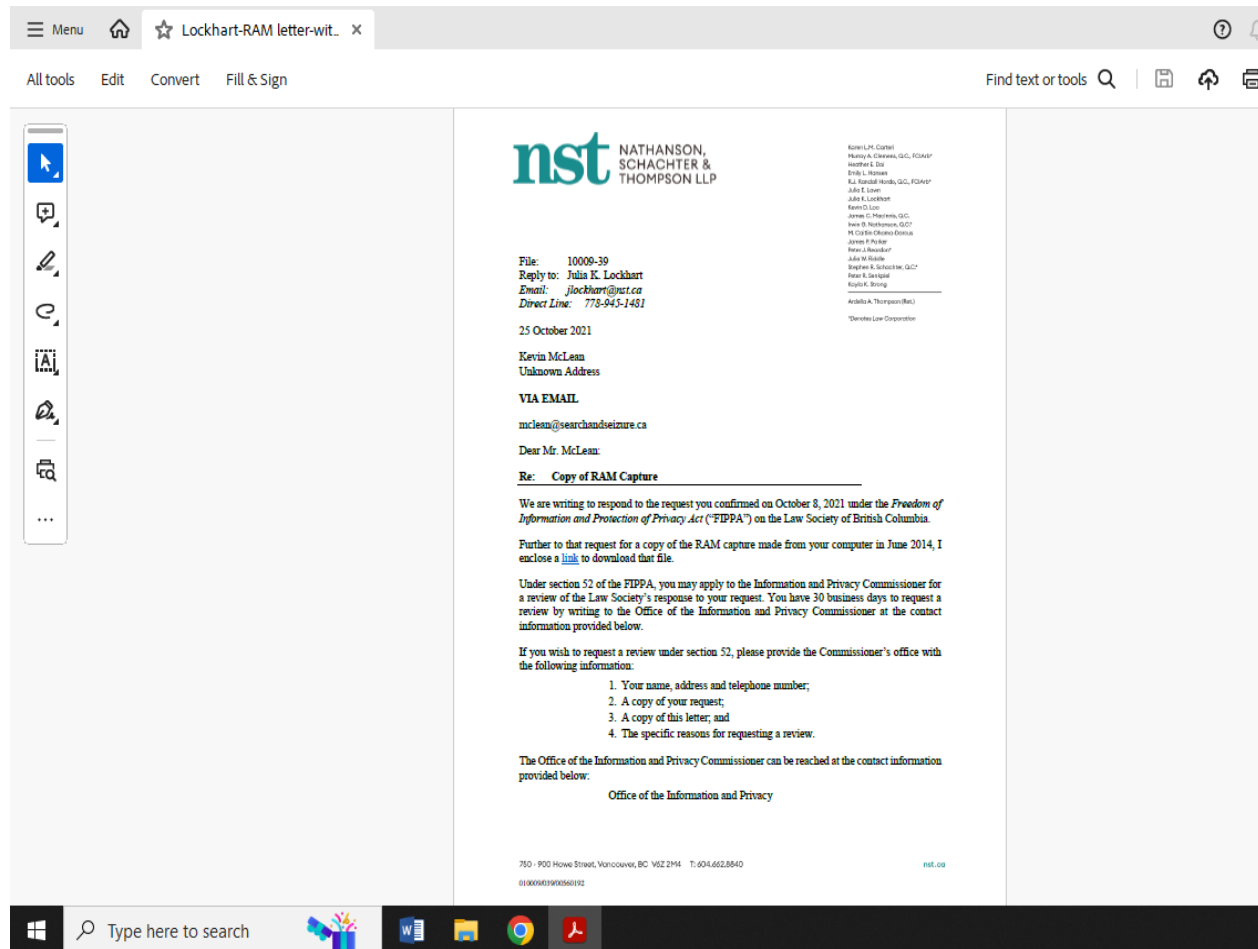
182. At full strength, without any level of arrogance *per se* but factually, Mr. McLean's running ability (which could have been kicked into "high gear" although would cause him serious aggravation of his impairments) would have rendered the police unable to catch him. He was in a pair of Saucony running shoes that he purchased while being subject to the Unlawful Lockouts. For a side note, Mr. McLean's preferred running shoes are the lightest running shoes, minimalist in nature, Nike Flywire Zoom Air Matumbos.
183. Mr. McLean avers, under oath but on belief, that his reputation preceded him in that one of his strengths in the LSBC case was that after he told the LSBC to "book an appointment" regarding the "wanting to see him", he left his keys on his office desk and went down the stairs some 18 floors. It was that lack of consent that came to haunt the LSBC. It rendered the June 3, 2024, seizure unconstitutional but with the damages case focused on June 4, 2014, which was, as Mr. McLean and the courts believed, solely about forensic copying of a hard drive.
184. Mr. McLean also avers, under oath but on belief, that the **TPS** knew it did not have reasonable grounds to believe to arrest Mr. McLean but most important **TPS** knew that it did not have sufficient evidence to charge Mr. McLean.
185. Mr. McLean avers, under oath but on belief, that **TPS** believed, by commentary from the other Respondents, that Mr. McLean has a good sense for when there is danger. Mr. McLean had confided in the **Landlord** many personal and confidential details.
186. Mr. McLean also admits that he has a tendency, when he is comfortable with people, to be "no filter" and "full disclosure". As will also be borne out at the appropriate time or in "due course", and perhaps not even in this **Tribunal**, by medical evidence and medical reports, Mr. McLean uses a coping mechanism for "past trauma" of trying to see the positive in situations and to use humour. Mr. McLean is admittedly a "people pleaser" and he has never liked to have his past traumas be others burdens. As such, he had informed the **Landlord**, in a different capacity (i.e. a casual and informal setting), that his scariest fear is "smallest spaces". Mr. McLean will delve into some other unjustified breaches of his liberty at a further time and evidence.

187. Mr. McLean readily admits that the **TPS** officers continued to reference a duty counsel lawyer when he was downstairs but that was AFTER they arrested and detained him. They should be commended for that aspect of their compliance, or at least attempts at compliance.

VOLUME #1(AA)(iv):Mr. McLean's objectivity

188. Mr. McLean remains objective in asserting the following. DC Kolankowski and Constable Romano were both articulate, charismatic, and well-spoken. Constable Romano was quick on his feet to come up with the “warrant comment” to save his partner.
189. In a more serious situation involving actual criminality, you can see why both of these officers would be well-suited in the “field of battle” or in a “more treacherous type situation”. In this regard, Mr. McLean commends them for that stable character trait because the minute any reasonable person hears that there is a warrant, they have to immediately back down because then you are disrespecting the order of a justice.
190. Parenthetically, and addressed by appendices, Mr. McLean was able to be successful against the LSBC and LSBC Defendants over many years on the basis that an “administrative order” was NOT a warrant. At times, he ran circles around the LSBC because the matter was in front of, low and behold, “justices”. For context, it should be well-known by now and in the public domain with so many different reported decisions, including Mr. McLean’s victories over the soon to be defunct LSBC including the privacy sphere, that he has the utmost respect for the judiciary, the police, and the legislatures of each province (and Parliament). His respect for the LSBC is absolutely zero. This was a regulatory body that simply had to go. It had to be wound down and then amalgamated. When a non-police body thinks that it can engage in that type of conduct and lie to the judiciary for ten plus years, it cannot continue:

“



191. Perhaps, Mr. McLean is a little more sensitive to privacy concerns as a result of the same considering the LSBC represented to the BCSC, BCCA and SCC (by leave application being dismissed), that all it did in June 2014 was:
- a. Forensically copy Mr. McLean's hard drive; and
 - b. Take paper copies from his printer.
192. Mr. McLean's submissions in 2015, in somewhat of a rhetorical fashion, to the BCSC (March 2015), asked the question, "Does the LSBC believe it is a body created under the Legal Profession Act [now repealed] or a body under the Police Act (RSBC)?" Obviously, at the time, Mr. McLean had no idea, nor

did the Court, that the LSBC had engaged in a concealed RAM dump of the “memory” of Mr. McLean’s CPU – which is entirely distinct from forensic copying of a member of the LSBC’s hard drive.

193. For consistency and precision purposes, the **Applicant** copies and pastes (see: Declaration #1 herein) the following from the LSBC’s motion in Spring 2017:

VOLUME #1(AA)(iv)(a): The filing by the LSBC in S-1410056 on April 2017

[23] On the morning of June 4, 2014, the plaintiff emailed Mr. Bussanich again and stated that his office was wide open for the Law Society to investigate. The plaintiff provided Mr. Bussanich with the password to his computer and stated that the investigators were at liberty to copy any documents they wanted

[24] On June 4, 2014, the investigators attended again at the plaintiff’s office. The investigators took two forensic copies of the HARD DRIVE on the plaintiff’s office computer. They also took copies of paper files provided by the plaintiff.

[25] Nobody from the LSBC reviewed the **HARD DRIVE** until the conclusion of a process set out in the Rule 4-43 order for the adjudication of the plaintiffs request that certain documents be excluded from review. As it turned out, the plaintiff initiated but did not pursue the exclusion request and an independent adjudicator eventually dismissed the request.

[26] The plaintiff did not provide to the investigators all the records they requested. He was cited for failing to comply with the Rule 4-43 order.

194. For ease of reference, Mr. McLean, for the purposes of why the “rouse” by the **Landlord** providing the **McLean Property** and **McLean Medication** to the **TPS 14th Division** and the **False Pretense Email**, were so effective, provides the below from the reported decisions to demonstrate the veracity and reliability of his statements to the **HRTO** and for benefit of the AGO, AGC, and OHRC:

McLean v. Law Society of British Columbia, 2015 BCSC 1431 (as per Madam Justice Gerow)

[93] Accordingly, I am of the view it is appropriate to grant the orders sought in paragraphs 7 and 8 of the May 13, 2015 application. I am making the following orders:

1. The plaintiff is not required to produce his personal phone to the Law Society pursuant to the Rule 4-43 order, and
2. Restraining the Law Society from entering or attempting to enter the plaintiff's residence pursuant to that order.

McLean v Law Society of British Columbia, 2017 BCSC 987 (as per Mr. Justice Grauer (as he then was))

4.1.2 Mr. McLean's application for summary judgment

[65] As I see it, and as the Court of Appeal intimated, it is important to distinguish between the different questions that arise from Mr. McLean's claim.

[66] The first question is whether the Law Society exceeded its statutory jurisdiction when it granted the investigation order; in other words, was the order ultra vires the Law Society? If so, it must be set aside.

[67] The second question is whether, assuming that it had jurisdiction to grant the order, the Law Society nevertheless acted improperly in the manner in which it granted the order, giving rise to procedural unfairness, so that the order must be set aside and, presumably, remitted to the Chair of the Discipline Committee. On this aspect, Mr. McLean relies upon: the failure of Mr. Riddell to give reasons for his decision to grant the order; the absence of information under oath to support the decision; the fact that the order was granted without notice to Mr. McLean; the absence of procedural safeguards (such as would, for instance, be available in an application for an Anton Pillar order, to which Mr. McLean likens the investigation order); and the conflict of interest that arises from what Mr. McLean terms a solicitor-client relationship that existed between Mr. Bussanich and Mr. Riddell.

[68] If either of those two questions were resolved in favour of Mr. McLean, then it would follow that the steps taken by the Law Society in carrying out the order were unlawful. The question of consent becomes immaterial.

[69] The third question is whether, assuming that the Law Society had jurisdiction to grant the order and did not act improperly in doing so, the Law Society nevertheless carried out the order in a manner that constitutes an unreasonable search and seizure. This turns primarily on the question of consent.

[70] The third question is one that could indeed be the subject of a civil action for damages, but I am satisfied that it is not one that can be decided on this application. This is because I would be obliged to weigh the evidence concerning whether and to what extent Mr. McLean consented to the investigation of his records and the copying of his computer contents.

195. As **HRTO** proceedings are one where the subjective element of the affected individual (Mr. McLean in this **HRTO** Proceeding) are taken into consideration, the **Landlord** knew of the same and he alleges used the same against him. Mr. McLean alleges, on suspicion, that the Landlord did so because of his “thin skull” in relation to his past trauma.
196. While Mr. McLean has not disclosed the above the “world-at-large”, it is appropriate to do so here because it demonstrates his vulnerability as a victim and the implied undertaking rule herein. Moreover, Mr. McLean is open to having the record sealed herein unless there are objections. Obviously, it is a far more appropriate time for the public interest considering the LSBC is in the process of dissolution and amalgamation. The BCA(BC) sections on amalgamation do not apply to the amalgamation between the LSBC and the SNP along with the provision of practice scope for paralegals. The latter will be well-known to Ontario lawyer licensees as per the substantial amendments (but not repeal) to the Law Society Act (Ontario) by the omnibus bill known as the “Access to Justice Act 2006” – which also amended various other statutes like the SPPA, Provincial Court Offences Act et al and repealed the former Interpretation Act (Ontario) by way of substitution of the Legislation Act 2006 (Ontario).
197. However, it also demonstrates that why Mr. McLean “stood down” and was so entirely respectful when he heard the word warrant while questioning the same. But for the justices in BC (including but not limited to: Madam Justice Gerow, Mr. Justice Bowden, Mr. Justice Grauer (as he then was), Mr. Justice MacIntosh, Mr. Justice Tysoe and the BCCA justices (Madam Justice Saunders, Mr. Justice Wilcock and Madam Justice Garron) [who granted the LSBC’s appeal albeit on narrow grounds but required LSBC’s admissions on certain aspects] who gave Mr. McLean a fair chance to present the facts and evidence known to him at the time, he likely would not be alive or standing here today. It is what makes this country so amazing and special, even where the optics were such that Mr. McLean was the “villain” and the LSBC was “holier than thou”, (which inevitably turned out to be opposite), he was given a fair chance at justice.
198. While the case would have been over in 2015 had the LSBC and its counsel (members of the LSBC at the time) were honest with the BCSC and then engaged in honest document listing, disclosure and production, it is neither here nor there now.

199. Mr. McLean also notes that the BC Privacy Commissioner and its delegated Adjudicator Siew deserve praise because they dismissed the LSBC’s application and side with Mr. McLean in 2018 on a seminal privacy decision where the LSBC tried to strip him of his privacy rights again (i.e. not make further requests).
200. Mr. McLean cannot belabour the point enough that even in 2017, before Mr. Justice Grauer, Mr. McLean analogized the distinction between an administrative search and seizure order (which this was Rule 4-43 order was) and a “search warrant” before a Justice of the Peace. If transcripts are necessary, Mr. McLean can provide the same. For current purposes, the spirited debate between Mr. McLean and counsel (now Mr. Justice Gomery of the BCSC) involved the LSBC countering that its administrative orders are not search warrants and they do not involve criminality of the member. As Mr. McLean later learned, it involved criminality of the LSBC. It is for that reason that Mr. McLean has realized since 2021 that he must always cover himself at all times and ensure that he leaves no “stone unturned”. His emails to his former spouse were in that nature.
201. For purposes herein, Mr. McLean can also advise the **HRT0**(and the AGO, AGC and OHRC) that Mr. McLean drew this to the attention of the AGBC in September 2021 (prior to obtaining what was referred to as the “**Concealed RAM Dump**”) and the AGBC confirmed that it did not agree with the LSBC’s conduct therein as there was no statutory power granted to it under the Legal Profession Act to engage in a “**Concealed RAM Dump**”). Again, Mr. McLean could not have been more impressed with the objectivity of the AGBC, albeit through its then designated counsel in “SK”, considering, at that time, the AGBC was an ‘ex officio’ benchner of the LSBC. Unsurprisingly, the AGBC, a few months later, pushed forward with the “single legal regulator legislation”. Said legislation came into force in May 2024.
202. With that backdrop, the **HRT0** can take judicial notice of why Mr. McLean was so fastidious, exacting and painstaking in ensuring that he had access to his property inside the **Rental Unit 410** and was so prompt in his response to the Constable Romano email (defined herein as the “**False Pretense Email**”).

VOLUME #1(BB): Returning to the “ <i>Mens Rea</i> of Fraud”

203. For sake of convenience and reference, *mens rea* refers to the guilty mind, the wrongful intention, of the accused. Its function is to prevent the conviction of the morally innocent – those who do not understand or intend the consequences of their acts.

VOLUME #1(BB)(i): Did Constable Romano and DCK not understand the consequences of their acts with the **False Pretense Email** and non-disclosure of why Mr. McLean was in attendance at **TPS 14th Division**?

204. This question answers itself. Both the “Constable” and “Detective Constable” are experienced police officers who must know the *Criminal Code* with sufficient particularity, knowledge and precision.
205. The **TPS** and the **TPS Respondents** are held to a higher standard particularly when the written text is in evidence.
206. As there cannot be ‘ego’ measurement in a **Retroceding** as to who is smarter, faster, stronger, et al, Mr. McLean is the first to admit that he was “outsmarted” by the ruse, subterfuge, and deception. Even those he spoke to thereafter said to him that he has no common sense and he should have sent an “agent”. Mr. McLean thought he could rely on the honesty of the **TPS** and Constable Romano. Apparently, he could not. Mr. McLean thought that “to protect and serve” meant something. In this instance, it did not.

VOLUME #1(B)(iii): *Mens Rea* is subjective (not objective)

207. For sake of convenience, “the test is not whether a reasonable person would have foreseen the consequences of the prohibited act, but whether the accused *subjectively appreciated* those consequences at least as a possibility. In applying the test, the court looks to the accused's intention and the facts as he believed them to be. An accused is not saved from conviction because he believed there was nothing wrong with what he is doing, or because he believed that what he was doing was honest, or because he hoped that the deprivation would not occur. The question is whether he subjectively appreciated that certain consequences would follow from his acts, not whether he believed the acts or their consequences

to be moral. His system of values is irrelevant. In certain cases, subjective awareness of the consequences can be inferred from the act itself, barring some explanation casting doubt on such inference

VOLUME #1(BB)(iv): <i>Did Constable Romano appreciate that Mr. McLean could have possibly relied on his email to attend in person (within 7 days) and be arrested, absent a warrant?</i>

208. The issue may be put another way, did the **TPS**, including Constable Romano and DCK, appreciate the consequences that the unauthorized collection and use of the **McLean Property** and **McLean Medication** coupled with the **False Pretense Email**, and then not rectifying the same after receipt of Mr. McLean's responsive email and his attendance therein (all defined and referenced as "Deceptive Acts", "Falsehoods" or "Other Fraudulent Means" (defined herein as "OFM")), would lead to prohibited consequences.
209. The prohibited consequence is depriving someone of what is or should be hers. The proper focus in determining the *mens rea* of fraud is to ask whether the accused intentionally committed the prohibited acts aware that deprivation, or risk of deprivation, could follow as a consequence. If this is shown, the offence is complete.
210. What should have been Mr. McLean's were the non-violation and non-infringement of his *Charter* rights. Alternatively, or further, Mr. McLean should not have been put to the pain and suffering in the manner in which it occurred considering the nature of the unproven offence. Mr. McLean says that not only should the charge not ever been approved and presented to him, it was not even worth of consideration. However, **TPS** was entitled to consider the same but if it had investigated the same, and reviewed the elements of the offence under section 264(b) of the *Criminal Code*, against the evidence of the only communications by Mr. McLean to Nicole from September 15, 2024 to October 2, 2024, the only conduct the **TPS** should have engaged in was warning the complainant (Nicole) or the complainant's agent that if such a similar complaint were advanced in the future, it may rise to "public mischief".
211. The rudimentary and lay person definition of public mischief: A person commits public mischief if they intentionally mislead a peace officer into investigating a crime by making a false statement, causing suspicion to fall on someone else, or reporting a crime that didn't happen.

212. The intentional element herein is quite obvious in that no individual, including Nicole, could not have made a criminal complaint regarding harassment considering that there was no indication that she as the sole complainant and alleged victim as she would have control of her email.
213. There is no dispute that Mr. McLean was deprived of what was his with respect to the **McLean Property** and **McLean Medication**. Mr. McLean should have never been required to have been arrested, detained, imprisoned, searched and seized in order to obtain that which was already his at first instance.
214. To the extent that knowledge cannot be proven, recklessness would suffice. Criminal responsibility is established when it is shown that the accused, with such knowledge, commits acts that *may* bring about the prohibited consequences, while being reckless as to whether or not they ensue.
215. The word “may” connote a possibility that the prohibited consequences. “**May**” means: might, can or could. “Prohibited” means: forbidden, illicit or illegal. “**Consequences**” means: results or effects.

VOLUME #1(BB)(v): The <i>HR Code</i> and Discrimination intertwine the <i>Criminal Code</i> (section 380)

216. The final element of Mr. McLean providing discrimination is whether his **Protected Characteristicss** in the Protected Areas were *a* factor in the following:
- adverse decision;
 - adverse treatment;
 - adverse impact; and
 - adverse effects.
217. The prohibited consequences, results and effects that Mr. McLean experienced as a result of the unauthorized possession of the **McLean Property** and **McLean Medication** coupled with the **False Pretense Email** and the deceptive and falsehood conduct, along with the conduct that met the “other fraudulent means”, on October 2, 2024, were that he was:
- Falsely or illegally arrested;

- b. Falsely or illegally detained;
- c. Falsely or illegally imprisoned;
- d. Falsely or illegally searched;
- e. Falsely or illegally “seized” or experienced an illegal seizure; and
- f. Unlawfully charged with a summary offence and subject to the coercive undertaking

which would not have occurred but for the **False Pretense Email** which could only have been sent by Constable Romano by having the unlawful leverage and means of **TPS**’ unlawful control of the aforementioned **McLean Property** and **McLean Medication**.

VOLUME #1(BB)(vi): Residual and Summary of the section 380 offence

218. “Pecuniary” is defined as: monetary, financial or economic. There is no dispute that Mr. McLean’s financial and economic interests have already been put to a loss and they continue at such loss as a result of the same. Further or in the alternative, they have been placed at risk (nota bene: legislative language is “imperiled”).
219. The **TPS** and **TPS** Respondents, with a focus on Constable Romano and DCK, knew the following which establishes the “*mens rea*”:
- a. subjective knowledge of the prohibited act of the unlawful arrest and all that followed pursuant to the unlawful possession of; and
 - b. subjective knowledge that the prohibited act could have as a consequence the deprivation of another (including knowledge that the victim's pecuniary interests are put at risk).
220. It is here where Mr. McLean relies heavily on the BCSC’s decision in *Joseph v. Meier* and AGC wherein Madam Justice Brown cites SCC authority (see: *R. v. Grant* in 2009) regarding the ability of an individual to decline to meet with the police or be questioned regarding a matter. As the Court said in *R. v. Grant*, 2009 SCC 32:

[21] More specifically, an individual confronted by state authority ordinarily has the option to choose simply to walk away: *R. v. Esposito* (1985), 1985 CanLII 118 (ON CA), 24 C.C.C. (3d) 88 (Ont. C.A.), at p. 94; *Dedman v. The Queen*, 1985 CanLII 41 (SCC), [1985] 2 S.C.R. 2, at p. 11, citing Martin J.A. in the Ontario Court of Appeal ((1981), 1981 CanLII 1631 (ON CA), 32 O.R. (2d) 641, at p. 653):

Although a police officer may approach a person on the street and ask him questions, if the person refuses to answer the police officer must allow him to proceed on his way, unless . . . [he] arrests him”

VOLUME #1(BB)(vii): Hypothetical: what were Constable Romano’s requirements regarding the email he sent to Mr. McLean? How should the email have read assuming what Constable Romano represented later was correct (or not)?

221. A rudimentary way to determine the above and below in relation to the unlawful arrest and unlawful conduct, which were predicated upon an unlawful seizure of **McLean Property** and **McLean Medication** (the ‘prohibited acts’ that followed (the ‘prohibited consequences’)) is to ruminate as to what the email should have read as and what would have occurred instead.
222. Mr. McLean respectfully submits that the Constable Romano email should have read as follows with the potential that the warrant never existed or existed:

“October 2, 2024

Dear Mr. McLean:

I write regarding a variety of issues which I will address below.

The **TPS 14th Division**, the location which is known to you by your attendance and discussion with Officer Salerno regarding being locked out of the rental unit where you reside, received some property and medication of yours delivered by your **Landlord**. The **TPS 14th Division** reluctantly accepted the same but it cannot be responsible for its safekeeping. Would you kindly attend or have an agent (authorized) attend on your behalf to pick-up the same at your earliest opportunity?

Alternatively, we appreciate that you and the **Landlord** are in dispute before the LTB and some of your other property is contained in Unit 410 but you have not regained access at this time. Is there a location where we can drive the same to you? We appreciate that your property and medication are important to you so kindly let us know which route you prefer.

I also wish to advise you that one Ms. Nicole Artopoulos had a complaint filed on her behalf by the **Landlord** that alleges that you have been harassing her via email. Our job at the **TPS** is to be unbiased and objective regarding criminal complaints. Would you be available for questioning regarding the matter? Alternatively, is there anything that you can provide us that would provide your account as to why you have not been harassing her? We are a little light on evidence at this stage so can you provide us any and all communications you have had with Ms. Nicole Artopoulos for us to determine whether this criminal complaint requires our further attention and investigation?

We understand that you and the **Landlord** are before the LTB. Can you provide us with an update regarding the same as to status and when you can expect completion of the same? Are these emails she is referring to in this criminal complaint ones that overlap with the LTB proceeding or are they independent?

Our job in assessing the validity of a criminal complaint is determine the following:

1. whether you had lawful authority to send the emails in question?
2. whether emails were of a repetitive nature towards Nicole.
3. whether you intended to harass her by sending those emails? Whether you knew you were harassing her by sending the emails?
4. whether Nicole had a reasonable fear for her safety regarding the emails?

It is always helpful to know, as we do not at this time, whether Nicole or anyone known to her or on her behalf, made known to you that she did not wish to receive these emails and asked you to discontinue. Can you advise the **TPS 14th Division** of the same?

We would ask at this time, in light of the criminal complaint, that you cease any and all communication with Nicole subject to being required to do so in any proceedings (past, current or future) where you are required to do so.

While you are not required to respond to us, in relation to the elements outside of the pickup of your property and medication, we think it would be in your best interests so you can provide your side of the events, and we can make a decision as to how to resolve this issue and/or proceed with criminal charges against you. You are entitled to attend with counsel if you wish to do so in person. If we do not hear from you, we will be entitled to take the position that we are entitled to rely on current and future evidence to obtain a warrant for your arrest. We may proceed to do so without further notice to you if we do not hear from you and/or you do not cooperate with our investigation.

Also, if we decide to proceed with the summary process, would you confirm that you are willing to accept email service of a criminal charging document along with a promise to appear on a certain date.

The matter is urgent. Please confirm receipt at your earliest opportunity.”

VOLUME #1(BB)(viii): The Mr. McLean response

223. Mr. McLean’s response would have been emblematic of all of the written emails prior and to do date. It would have followed.

VOLUME #1(BB)(ix): Constable Romano Email: belief nothing would happen or no one would be harmed

224. The accused's belief that the conduct was not wrong or that no one would be hurt, and his contention that he did not profit from the fraud, afford no defence to a charge of fraud. It is difficult to even entertain that Constable Romano (and then DCK) would not have known that their conduct was not wrong or that no one would be get hurt (or suffer a deprivation). However, such a belief does not afford a defence to a charge of fraud.

225. Of course, this is not a criminal proceeding but if Mr. McLean is able to prove that the elements for a fraud charge and conviction were met, then it provides an answer to all of the *Charter* questions, the **HRTO** general issues, and the issues regarding the Rule 21 motion.

VOLUME #1(BB)(x): *Was the unauthorized control of the **McLean Property** and **McLean Medication**, the **False Pretense Email** and deceptive conduct at the **TPS 14th Division** prior to unlawful arrest any of the following: (i) negligent misrepresentation; (ii) improvident business conduct; (iii) sharp conduct; (iv) innocent pranks; or (v) statements not intended to be acted upon.*

226. The requirement of intentional fraudulent action excludes mere negligent misrepresentation, improvident business conduct, sharp conduct, innocent pranks, or statements that are not intended to be acted

upon. Only deliberately fraudulent acts that, in the knowledge of the accused, actually put the property of others and themselves at risk may be appropriately criminalized.

227. Certainly, the **TPS 14th Division** is not engaged in innocent pranks or improvident business conduct *per se* (although some officers of other divisions have been charged with fraud for such conduct or theft in the course of their duties).

228. Therefore, it is only sub (i) and sub (v) that can be considered *per se*.

VOLUME #1(BB)(xi): Could the impugned conduct (False Pretense Email and conduct prior to unlawful arrest) be considered as “negligent misrepresentations”?

229. It is Constable Romano’s representation to Mr. McLean at the time of the arrest on the 2nd floor or main foyer of the **TPS 14th Division** where he unequivocally stated, “We have a warrant for your arrest”. Therefore, the **False Pretense Email** could not have contained negligent misrepresentations. The omissions were intentional and omitting that which was required constitutes an intentional or fraudulent misrepresentation. The same applied to the slippery, slick and glassy conduct of Constable Romano that lured Mr. McLean into a false sense of security regarding his life, liberty and security (see: “Oh I couldn’t find you. Sorry for the delay” type comments).

230. The self-evident inference of the timing of the Landlord drop off of the McLean Property and McLean Medication on October 2, 2024, after a binding order of VC Delorenzi of the LTB, was that the Landlord (not Nicole) was engaged in revenge. Mr. McLean says that she should be charged with public mischief but has little faith in the **TPS 14th Division** to do so. However, at the very least, a finding by the HRTO that the Landlord did will put the conduct of the TPS in the proper light and whether its conduct was an ***inexplicable*** departure from regular practice.

231. To the extent that the TPS represents that it was not, then it is a “zero sum game” in that then there are systemic issues which go to the public interest remedies to be granted, after consideration, by the HRTO under the *HR Code*.

232. In that same breath, then this HRTO Proceeding, considering the facts herein, should be of an enormous and immediate concern to the Attorney General of Ontario and the Attorney General of Canada. It should also be of concern to the chief Crown counsel in Ontario and particularly previous crown counsel who

have prosecuted any offences involving the conduct of the TPS *14th Division* that involves similar type conduct.

VOLUME #1(BB)(xi)(a): OCCURENCENUMBER: <u>29.2082035</u>

233. The occurrence number on the bag that the TPS put his property in was:

“ 29.2082035”

234. The **HRT0** can take judicial notice that the courthouses close at 4:30 p.m. so if the **TPS** had a warrant, it would have had to obtain the same between its represented time regarding receipt of the **McLean Property** and **McLean Medication** which was three p.m. (then stored in a temporary locker) and by 4:30 p.m. It is beyond implausible that the **TPS** did so or could do so. Moreover, to the extent it did, one can only imagine the deficiency of the ITO and non-disclosure of material facts so required to obtain an arrest warrant.

235. If the **TPS 14th Division** was proceeding with a warrant before a justice of the peace⁴⁰, it would have had to receive the complaint on behalf of Nicole, which presumably would have taken some time, and then review the evidence. After review of the evidence, the **TPS 14th Division** would have been required to draft the ITO and then swear the same under oath. The **TPS 14th Division** would have been required to have an individual constable or officer swear under oath that it had seen the evidence of the allegedly harassing emails and even, perhaps, appended them to the sworn ITO. Alternatively, the officer or constable could have sworn that he or she had seen the same, and believed that they were “without lawful authority”, believed that Mr. McLean intended to harass Nicole or was reckless regarding the same, they were of a repetitive nature and that Nicole had a reasonable fear for her safety. Mr. McLean says that none of that occurred or could have occurred during that time period and that none of those facts could have been sworn or they would have amounted to perjury.

236. Assuming those alleged facts were sworn, then the **TPS** would still have to draft the Form 7 under the *Criminal Code* which would take some further time to do so. After completely all of those acts, which are

of a solemn nature and require meticulous precision, the **TPS** would have to deliver the same to a Justice Of Peace for review and consideration. It is not a matter that a JOP merely “rubber stamps” but he or she (or “they”) must review with precision as an arrest warrant is of the most serious nature. The JOP would have had to turn his or her mind to why an arrest warrant was required for a summary offence as there were no discretionary exemptions or mandatory conditions met regarding the alleged offence of section 264(b) of the *Criminal Code*. An arrest warrant (first instance warrant) is only used when the police can provide evidence, under oath, as to why they need assistance from courts (JOP or justices) in bringing charges to the attention of an individual. The **TPS** would not have been able to do so. If they did so, this will be a matter for document production and discovery on the expedited timelines.

VOLUME #1(BB)(xii): Could the impugned conduct (**False Pretense Email** and conduct prior to unlawful arrest) be considered statements not to be relied upon?

237. It is trite that the **False Pretense Email** contained statements that Mr. McLean was to rely upon or his property would be sent to the property bureau (whatever that is).
238. For sake of convenience, the language of the email was as follows [emphasis is that of Mr. McLean]:

“Please be advised that we have received some of your property which will be held here at 14 Division for you to retrieve. We have received your passport, birth certificate, name change certificate, medication and a watch. Your property will be held here for the next 7 days and if not picked up by then, it will be sent to our property bureau.

When you attend 14 Division, let the front desk officers know you have property in temporary lockers under your name and they will retrieve it for you.

VOLUME #1(BB)(xiii): Did Constable Romano intend Mr. McLean to rely upon the statements in the **False Pretense Email**? If so, which ones?

VOLUME #1(B)(xiii)(a): Statement #1 to be relied upon by Mr. McLean: **TPS** received Mr. McLean’s property

239. Mr. McLean respectfully submits that Constable Romano intended for Mr. Mclean to rely upon that the **TPS** received the **McLean Property** and **McLean Medication**, and that the **TPS** did not seize the same. The particulars of how it was received, why it was received, and why **TPS** did not decline to receive the same will be a matter for document production in the **HRT0** Proceeding.

VOLUME #1(BB)(xiii): Statement #2 to be relied upon by Mr. McLean: “for you to retrieve”

240. Mr. McLean respectfully submits that “for you to receive” only means that Mr. McLean was to attend to retrieve the same with no risk of any potential arrest, detention, imprisonment, search or seizure.

VOLUME #1(BB)(xiv): Statement #3 to be relied upon by Mr. McLean: 7 day holding period

241. Based upon the above, if Mr. McLean did not attend by October 9, 2024, then the **TPS** would send the **McLean Property** and **McLean Medication** to the **TPS** property bureau.

242. From what Mr. McLean could find, the **TPS** Property Unit was located at:

“**Address:** c/o Property Management, Unit 330 Progress Ave, Scarborough, ON M1P 2Z4”

243. This was some 40 km from **TPS 14th Division**.

VOLUME #1(BB)(xv): Statement #4 to be relied upon by Mr. McLean: “front desk officers|

244. Another component of the “ruse” was that there were to be “front desk officers” to assist him in an administrative capacity. Mr. McLean alleges that the **TPS** and Constable Romano knew that Mr. McLean was familiar with that process by his attendance on September 21, 2024, and his interactions with Constable SOLERMO. In that regard, the situation and circumstances are tantamount to the individual attending, not being under any risk of having his or her liberty, security or life threatened but attending in

an administrative capacity. When Mr. McLean attended, only Constable Romano was present. When Mr. McLean was arrested and, without consent, detained in the basement area of the *14th Division*, Constable Romano confirmed with an officer (who had a well-groomed beard and was a man of exceedingly large stature) that nobody was “manning the front desk”. Constable Romano then requested that the large man and another officer act “in lieu of” of Constable Romano.

245. For document production on an expedited timeline, it will be of great interest to know whether the TPS *14th Division* stored his letter regarding the LTB issues, which was based on the LTB guidance, or whether it destroyed the same.
246. It will also be important to determine the same by way of public decision so that other members of the public can take heed of the same and whether taking that step of notifying the police after a temporary lockout is perhaps risky. For objectivity purposes, the LTB guidance does use the word “may” in relation to the step of notifying police after an illegal lockout. The second step is to contact the RHEU which Mr. McLean did. The third step involves the rights he has advanced and been successful in with respect to the shortening of the proceedings.
247. The HRTO can also be now informed, because of the unfortunate delay through no fault of Mr. McLean (i.e. the theft of his backpack and contents therein), that the Landlord has retained, what appears to be, two counsel with the last name “Kanavas”: one female and one male.
248. This came on the heels Mr. McLean delivering (via mail, registered mail and Express Post) his declarations, early submissions, authorities and an additional interim motion to the **Tribunal**.
249. The Landlord attempted to respond and did file in the Portal but then breached the law again by seeking an order of alternate service approximately 20 days before the “hearing proper” when LTB Rule 3.4 requires at least 40 days before the hearing proper. Mr. McLean had not consented to email service or service through the Portal as evidenced by his delivery of hard copy documents to the Landlord. He then put the Landlord on notice that if she failed to bring a motion to seek leave in this regard, the LTB Proceeding would be conducted in a manner where she could not serve Mr. McLean via alternate service and would have to personally serve him or serve him by way of delivery to the Rental Unit 410 address. She is obviously in a conundrum created by her lies and deceit in that if she serves Mr. McLean at Rental Unit 410, which would be legal service, she is then admitting that her Unlawful Lockouts were done with

intentional wrongdoing. She then falls within the offence sections of the RTA and there is an active RHEU file against her.

250. Mr. McLean alleges that there were no other front desk officers “on desk duty” at the time of the Constable Romano email or thereafter.
251. There was no reference to any involvement of DCK, Sergeant Cassidy, Detective Abdool, a fingerprint specialist, or any other officers to be in attendance.

VOLUME #1(BB)(xvi): Statement #5: “you have property” in “temporary lockers”

252. By Constable Romano referencing Mr. McLean having property in temporary lockers, the obvious implication and corollary was that it was Mr. McLean’s property and it was for his pickup which was merely being held on a temporary basis.

VOLUME #1(BB)(xvii): Statement #6 to be relied upon by Mr. McLean: “they will retrieve it for you”

253. When considering the last statement that induced Mr. McLean to attend promptly and that Constable Romano intended for Mr. McLean to rely upon, which was entirely different in character that what was to occur, “they will retrieve it for you” could only have meant that Mr. McLean would obtain the same after they retrieved it from temporary lockers.

VOLUME #1(BB)(xviii): Why was the ruse and subterfuge so well planned?

254. The SCC authority in *Grant*, citing Esposito and Dedman, answers that issue. It is the usage of the word “street” by the SCC that alters the legal landscape between being in the “street” vs. “inside a police station”. Moreover, the reasonable expectation of privacy completely diminishes once inside a “prison”. Therefore, by having Mr. McLean attend under intentional misrepresentations and false pretenses, he was inside the police station (*14th Division*) which lowered his REOP albeit without him knowing the authentic reasons why he was there. Moreover, it was Constable Romano’s questions when Mr. McLean left

temporarily (once for a bathroom break and the other to stretch his back and torso as a result of his physical disabilities) that perhaps should have sparked Mr. McLean’s curiosity. However, it did not. Moreover, that is not the legal test for fraud under section 380 of the *Criminal Code* in that the test is whether Constable Romano intended for him to rely upon those oral statements.

255. It was also the statements by Constable Romano that “they had a warrant” and “do not resist because it will be tougher for him” that completely negated Mr. McLean’s ability to walk away – while being inside the main foyer of the *14th Division*.
256. Mr. McLean was duped and the **TPS 14th Division**, including Constable Romano and DCK, intended for him to be duped.
257. Of course, if they had a warrant, Mr. McLean satisfied the requirements under section 29 of the *Criminal Code* to request a copy of the same. None was ever provided. Therefore, Mr. McLean will tender the remainder of the written analysis for the NOCQ, Rule 21 Motion et al on the basis that it was a warrantless arrest, and no detention, search, seizure, and imprisonment powers could have been incident to the same.

VOLUME #2: The Issues To be Decided pursuant to HRT0 Specific Rule 21

258. The issues to be decided in this NOM #1:
- a. **Issue #1:** do the issues, which are reasonably (i.e. not admitted by documents) in dispute, in this **HRT0 Proceeding** require an urgent resolution (see: *Rule 21.1* of the *Specific Rules*)?
 - b. **Issue #2:** has the **Applicant** provided a detailed description of the requested changes to the **Tribunal**’s normal process, including timelines?
 - c. **Issue #3:** has the **Applicant** provided one or more declarations signed by him, and does he have direct first-hand knowledge of the facts? Further, has Mr. McLean detailed all of the facts within his knowledge upon which he relies in support of his request to expedite?
 - d. **Issue #4:** do Mr. McLean’s submissions explain:

- i. why there are urgent circumstances that may affect the fair and just resolution of the merits of the Application *if* the **Applicant** proceeds in accordance with the **Tribunal**'s regular process;
- ii. the harm that would result if the Request is denied; and
- iii. why the Application should be given priority for **Tribunal** resources over other matters?

VOLUME #3: The issues to be decided in this HRT0 Proceeding absent the constitutional question?

259. The issues to be decided in this **HRT0 Proceeding** are as follows by issues of fact and issues of law.
260. The issues of fact follow in broad issues with specific issues which will be contained in the Appendices by way of chart:

VOLUME #3(A): Issues of Fact

- a. Background issues:
 - i. On Saturday, September 21st, 2024, did Officer Solermo of the **TPS (14th Division)** inform Mr. McLean that the **TPS 14th Division** could assist with him in retrieving his property?
 - ii. Had **Goldview** or the **Landlord** communicated with the *14th Division* of **TPS** before Mr. McLean arrived on Saturday, September 21, 2024?
 - iii. Was there any arrest warrant for Mr. McLean at that time?

- | |
|---|
| <ul style="list-style-type: none">b. ISSUE OF FACT #1: DID THE APPLICANT (MCLEAN) CONSENT TO THE TPS BEING THE CUSTODIAN, TEMPORARY OR PERMANENT, OF HIS PERSONAL INFORMATION (“PII”), PHI, SPI, CI and MEDICATION (THE “MCLEAN PROPERTY”) |
|---|

- i. Did the **Applicant** provide any consent, on a factual level, to the **Landlord** to deliver and/or the **TPS** to receive the **Applicant's** confidential property and medication on or around October 2, 2024?

c. ISSUE OF FACT #2: TPS POSSESSES THE MCLEAN PROPERTY ABSENT EVEN SEEKING HIS CONSENT

- i. When did the **TPS**, in fact, pick-up or receive the **Applicant's** property (the "**McLean Property**") and medication ("**McLean Medication**")?
- ii. Did **TPS** inform the **Landlord** (or whomever had the **McLean Property** and **McLean Medication**) that they could not receive that property without his consent? Did the **TPS** inform the **Landlord** that a third party could not waive his privacy and *Charter* rights?
- iii. Upon possessing the same, absent the **Applicant's** consent, were the **TPS** aware that the **Applicant** had, at least, one protected ground in mental disorder or mental impairment?

d. ISSUE OF FACT #3: PURPORTED WARNING INVOLVING PURPORTED HARASSMENT

- i. Did DC Kolankowski, in fact, warn the **Applicant** regarding an allegation of harassment made by or on behalf of the **Applicant's** former spouse in Ms. Nicole Artopoulos ("Nicole")?
- ii. Prior to October 2, 2024, did Nicole, or any other person, claim or purport to warn Mr. McLean that his sending of some seven emails from September 15, 2024, to October 2, 2024, regarding inter alia, providing Nicole's remaining non-essential items for pick-up and updates regarding the same in addition to providing her and Victory Wine updates regarding the unlawful lockout, FOB deactivation and threats and extortion by **Goldview** and the **Landlord** towards him?

e. ISSUE OF FACT #4: PURPORTED WARRANT OF OCTOBER 2, 2024

- i. Did the **TPS**, in fact, apply to a judge or justice of the peace to obtain an arrest warrant for Mr. McLean?

- ii. If so, when did the **TPS**, presumably DC Kolankowski, do so?
- iii. Was evidence under oath provided by the **TPS** in support of an arrest warrant for Mr. McLean?
- iv. What was the result of the arrest warrant application by the **TPS**?

f. **ISSUE OF FACT #5:** Emails on Wednesday, October 2, 2024: Constable Romano and Mr. McLean

- i. Did Constable Romano, at the time of sending the email to Mr. McLean, have a complaint made about Mr. McLean regarding an allegation of harassment towards Nicole?
 - 1. If so, what documents and evidence, under oath, in the form of an information were sworn by the alleged complainant?
 - a. Further, if Constable Romano had such knowledge from the alleged complainant, what investigation did he do at the time before sending the email to Mr. McLean?
- ii. Did Constable Romano, at the time of sending the email to Mr. McLean, have an arrest warrant for Mr. McLean?
- iii. Did Constable Romano, at the time of sending the email to Mr. McLean, know that the **TPS** would arrest Mr. McLean when he came to the *14th Division of TPS*?
- iv. Did Constable Romano, after receiving the email from Mr. McLean that he would attend the *14th Division of TPS* on that evening, know that when he arrived that the goal and the “agreed plan within the **TPS**” was to feign like the **TPS** was going to provide him with his property and medication, and then have two officers arrest him?
- v. At any time did Constable Romano inform Mr. McLean that he was going to be arrested prior to dangling the property and medication before him?

g. **ISSUE OF FACT #6:** Oral communications between Constable Romano and Mr. McLean on October 2, 2024 at night prior to the false arrest, false detention, unlawful seizure, unlawful search, unlawful imprisonment, et al

- i. When Mr. McLean arrived at the *14th Division (TPS)*, did Constable Romano inform him that he was under arrest or that there was a warrant for his arrest?

1. If not, did Constable Romano advise him that he may need counsel to pick up his property and medication?
2. Why would Constable Romano be so concerned (i.e. I could not find you but he did not have the **McLean Property** and medication) about Mr. McLean explaining to him that he needed to use the restroom and get some fresh air?
3. When Mr. McLean returned and informed Constable Romano that he would be stretching in the parking lot of the **TPS 14th Division**, did Constable Romano inform him that he may be under arrest and may wish to contact counsel?

h. Issue #7: Other facts denoted herein and to be included in the final written brief

261. What other facts are of relevant to the all of the issues herein which may be discovered at a later date.

Issue of Law

Issues of Law – General – HRTO

262. The issues of law follow in broad issues with specific issues which will be contained in the Appendices by way of chart:

ISSUE OF LAW #1: Mr. McLean and protected characteristics?

- a. What are the protected characteristics that Mr. McLean had and has under the Human Rights *Code* (“*HR Code*”)?

ISSUE OF LAW #2: Protected Areas: Landlord , Goldview , and TPS

- b. What are the protected areas in which the **Landlord** and **Goldview** must discharge, on an ongoing basis, with respect to duties as a **Landlord** and Condo Management Provider in Ontario?

- c. What are the protected areas in which the **TPS**, must discharge with respect to duties as a **Landlord** and Condo Management Provider in Ontario?

ISSUE OF LAW #3: Protected Characteristics (Physical Disability, Mental Disorder, and Mental Impairment) of Mr. McLean – a factor – in the adverse decisions made by **Landlord, Goldview** and **TPS**

- d. Were, some or all, of Mr. McLean’s protected characteristics a factor in the following:
- i. Adverse treatment:
 - 1. Was the adverse treatment he received from the **Landlord** from the time of the **Unlawful Lockouts** to the time of the misconduct of the **TPS** on October 2, 2024 and that which remains ongoing?
 - 2. Was the adverse treatment he received from **Goldview** from the time of the Threat & **Extortion** on September 23, 2024, to the time of the misconduct of the **TPS** on October 2, 2024 and that which remains ongoing?
 - 3. Was the adverse treatment he received from September 21, 2024, (see: Officer Salerno) to the time of the misconduct of the **TPS** on October 2, 2024 and that which mistreatment which remains ongoing?
 - ii. Was there an adverse impact upon him in relation to the above particularized impugned treatment he received from the Respondents, some or all?

ISSUE OF LAW #4: Reversal of burden

- iii. Has Mr. McLean established a *prima facie* case of discrimination against the Respondents in that, on a balance of probabilities, it is more reasonable than not that discrimination took place in some or all of the impugned incidents above?
 - 1. If so, what is required by the Respondents to defend against the discrimination that Mr. McLean experienced in the form of adverse treatment and adverse impact?

- a. Are the Respondents, some or all (subject to a joint enterprise being found amongst them and/or the **Landlord** and **Goldview** being found to be government agents of the **TPS** in their capacities in which they acted), able to justify each and every impugned act of misconduct within the framework available under the *Code* (e.g. bona fide requirement defence)?

ISSUE OF LAW #5: What is factor? What is “a” factor?

- e. What is the definition of factor when measured against the article of ‘a’ (versus “the”)?⁴¹

SPECIFIC ISSUES OF LAW

263. The following are the specific issues of law to be answered by the **Tribunal** on an interim basis and/or final bases:

Specific **ISSUE OF LAW #1:** Importance of the Circumstantial Evidence and Preservation of the Same

- a. What is the importance, value and magnitude of the factual evidence and in preserving the same to the determination by the **Tribunal** of whether discrimination has occurred and whether the Respondent have a defence under the *HR Code*?

Specific **ISSUE OF LAW #2:** *Code* Ground – only factor or one of many factors

- b. Is Mr. McLean required to prove that his *HR Code* grounds were the only factor in the adverse treatment or impact upon him or one of possibly several in the decisions, treatment and/or impact he received during the **Material Time** from some or all of the Respondents?

- i. What is the legal effect of Mr. McLean providing independently or herein that the Respondents acted unlawfully (and potentially in bad faith or with malice) with respect to the **Tribunal** determining if his **Protected Characteristicss** were a factor in the adverse decisions, adverse treatment and/or adverse consequences?

Specific ISSUE OF LAW #3 : Mental Health Profiling – comments – highly material evidence

- c. What is mental health profiling?
- d. How can Mr. McLean prove that the Respondents engaged in mental health profiling?
 - i. More specifically, in light of the text messages from the **Landlord** to Nicole which, inter alia, implicated **Goldview** in false allegations that Mr. McLean was slashing tires of a vehicle that he used, and that the **Landlord** would go to the police (in October 2023) if Mr. McLean exercised his legal rights, what obligations was there upon the **TPS** to fully investigate the issues before its conduct on September 21, 2024, and October 2, 2024?
 - ii. Did **TPS** take any actions for alleged reasons of safety, security, or public protection that relied on stereotypes about a person's mental health RATHER than on reasonable grounds to single out a person for greater scrutiny or differential treatment?
 1. As a matter of law, has Mr. McLean proven that the **TPS** relied on false grounds (such as "**NFA**", **Fictitious Warrant**, Fictitious Warning, and others) to engage in the adverse treatment including but not limited to:
 - a. False arrest;
 - b. False search;
 - c. False seizure;
 - d. False detention;
 - e. False imprisonment;
 - f. False charging of an offence; and
 - g. Others.

Specific ISSUE OF LAW #4 : Disadvantage assumed – adverse treatment – prohibited ground

- e. In Ontario, is disadvantage assumed where there is adverse treatment in relation to a prohibited ground? If so, is it necessary for an applicant and the **Tribunal** to go through the specific process of proving what the disadvantage is?

Specific **ISSUE OF LAW #5: Protected Characteristics**, Protected Areas and Prohibited Grounds

- f. What is the distinction between a **Protected Characteristics** and a **Prohibited Ground**?
- g. Is there a distinction between a Prohibited Ground and Protected Area?

Specific **ISSUE OF LAW #6: Forms of Discrimination: (i) extra burdens**

- h. Did the Respondents impose *extra burdens* upon Mr. McLean in some or all of the impugned particularized misconduct? If so, was there a legitimate reason to put Mr. McLean to the extra burdens including but not limited to:
- i. the **Landlord** and **Goldview** not providing any notice to him of the potential of the **Unlawful Lockouts**?
 - ii. Officer Solermo putting him to extra burdens with respect to having his rights enforced as a matter of law under the *RTA* and the *HR Code*?
 - iii. **Goldview**, as a de facto agent of the **Landlord**, misrepresenting the facts and law to Mr. McLean regarding the reasons for the **Unlawful Lockouts** and engaging in the Threat and **Extortion (Extortionary Act)**?
 - iv. The **Landlord** not leaving his property and medication at the front desk for pickup and/or making a time available for his attendance regarding the same and then delivering or causing to be delivered his property and medication to the **TPS 14th Division**?
 - v. The **TPS** requiring him, on a false grounds and false pretenses, to attend the *14th Division (TPS)* within seven days or his property and medication would be delivered elsewhere?
 - vi. Other particulars to be provided after document access and pre-hearing proper discovery.

Specific **ISSUE OF LAW #7: Agency**

- i. During the **Material Time**, was **Goldview**, including Ms. Ferguson (Condo Manager) and Mr. Goldrich (PCM), an agent of the **Landlord**? Is there uncontroverted evidence to support the **Landlord** and **Goldview** having discriminatory, prejudicial and stereotypical view of Mr. McLean from a psychosocial disability standpoint? ⁴²

Specific **ISSUE OF LAW #8**: Inexplicable departure – Usual Practices

- j. Was there an ***inexplicable*** departure from usual practices on behalf of:
- i. **Goldview**;
 - ii. **TPS**?

Specific **ISSUE OF LAW #9**: Differential criteria applied to Mr. McLean compared to other tenant(s), residents in Minto Complex, and by **TPS**?

- k. Were criteria applied to Mr. McLean that was not applied to others?

Specific **ISSUE OF LAW #10**: Any distinction between racial profiling and mental health profiling?

- l. Have our courts and tribunals, in light of the paramountcy of the *HR Code* to all other provincial legislative enactments, taken judicial notice (see: section 16 of the *SPPA*), that the unfair and misguided “mental health profiling” by those organizations operating in protected social areas, has led to the misguided stereotype that those with mental health issues are a risk to public security and safety EVEN when there is little objective evidence to support this perception?
- i. Which protected area has been found to have an adverse impact on those with mental health? ⁴³

Specific **ISSUE OF LAW #11**: Individual Objective Assessment

- m. Did the **Landlord**, **Goldview** and **TPS** assess Mr. McLean individually using objective criteria and not blanket assumptions or speculation based on a person’s diagnosis or perceived mental health issues?

Specific Issue #12: Evidence of wrongdoing in the criminal sphere

- n. Did **Goldview**'s threats and extortion of Mr. McLean reach any level of a commensurate or proportionate response to anything Mr. McLean had done considering he was locked out without any legal bases?
 - i. If not, could this be considered to be mental health profiling?
- o. Did the **TPS** rely on any evidence, which was objective that could meet reasonable and probable grounds under oath, at the time of arrest, that would satisfy the requirements for a warrantless arrest?
 - i. Did the "on the record" arresting officer in DC Kolankowski have any subjective belief in the reasonableness of the arrest considering that he was mistaken and/or misrepresented that he had already warned Mr. McLean about not contacting an unspecified individual at unspecified times?

Specific Legal Issue #13: Risk of profiling and presumed stereotypes

- p. What is the negative consequence of *assuming risk* based on stereotypes?
 - i. [unnecessary escalation of responses to people with mental health issues]

Specific Legal Issue #14: Circumstantial Evidence – Proving Mental Health Profiling

- q. As there is often no direct evidence or mental health profiling by organizations or persons subject to the *HR Code*, how has the case law evolved for an applicant to prove that mental health profiling was a factor in the alleged adverse treatment?
 - i. Were these impugned persons aware of any physical or mental health disabilities?
 - 1. [yes: all]
 - ii. Were statements made by the impugned persons to show the existence of stereotyping and prejudice?

- iii. Was there any explanation, or contradictory or changing explanation for why this **Applicant** was subjected to greater scrutiny or different treatment, or an explanation that does not accord with common sense?
- iv. Were there any deviations from normal practice that were hard to explain?
- v. Was an unprofessional manner used?
- vi. Was the victim (disabled person) subject to discourteous treatment?
- vii. Did the disabled person fit a certain profile?
- viii. Was there unfounded suspicion in the face of a possibly innocent explanation?
- ix. Misinterpreting innocent or ambiguous conduct as incriminatory?
- x. Overreaction to perceived challenging behaviour?
- xi. Events would have unfolded differently if the victim (disabled person) were not known or perceived to have mental health issues?

Specific Legal Issue #15: Thin Skull Rule

- r. Are the police able to use the victim's (of mental issue or mental disorder profiling) sometimes disproportionate, odd, or even overly compliant response as a means for further discriminatory conduct against them?
 - i. What is the only exception?

Specific Legal Issue #16: Perceived vs. Actual Behaviour – how the <i>Criminal Code</i> , s. 495 and the HRTO decision work in harmony

- s. As the **HRTO** has found that it is not discriminatory for police to respond to actual behaviour of people with mental health disorder that causes risk, how does that dovetail with s. 495 of the *Criminal Code* and the exception to arresting people who are committing indictable offences before the peace officer or there is a risk that they will?
 - i. [Perfect harmony. If a police officer sees an individual, who is the subject of an allegation of criminal harassment via text, email or phone, using a computer in a hidden away spot in a restaurant and has some smirk on his face, typing feverishly, while texting at the same

time, the police are well within the law to not only question but potentially search and seize that which is plain sight. If they cannot search, they may be able to seize on the basis of watching an individual commit a crime, which would be indictable *per se*]

Specific Legal Issue #17: Did scrutiny occur by the impugned *HR Code* bound organizations?

t. What is scrutiny⁴⁴?

- i. If organizations scrutinize people with known or perceived psychosocial disabilities based on stereotypes and assumption, *rather* than ACTUAL CONDUCT, will that more often than not result in a violation of the *HR Code*?

Specific Legal Issue #18: What are the requirements for there to be a poisoned environment in the context of accommodation? Is there a difference when someone is a guest, occupant, or tenant? Difference between harassment and poisoned environment?

- u. In the context of accommodation, can a poisoned environment be based on the nature of comments or conduct and the impact of those on an individual rather than just the number of times the behaviour occurs? Does that occur in the context of tenancy? Is that differential treatment, even the undertone of the same, give rise to a denial of equality under the *HR Code*?

Specific Legal Issue #19: Poisoned environment – no need for directness

- v. In the context of accommodation, does the housing or management organization have a duty to address discrimination and false allegations being made? Does the discriminatory conduct need to be directed at a specific group?

Specific Legal Issue #20: Residual

w. This sub-heading will include issues from the Respondents, AGO, AGC,

VOLUME #5 : Constitutional Questions

Constitutional Question #1

264. The constitutional questions are as follows:

- a. Is the **TPS** subject to the *Charter*? Are the officers named herein subject to the *Charter*?
 - i. Was the **Landlord** acting in a capacity as an agent for the police when she engaged in some of the particularized conduct herein and to be known after document discovery?
- b. Was the Landlord authorized to waive the Applicant's section 8 Charter rights by delivering the McLean Medication and McLean Property to TPS absent his consent?
- c. Did the **False Pretense Email** vitiate the **Applicant's** consent to attending the **TPS 14th Division**?
- d. Was consent required for the **Applicant** to attend the **TPS 14th Division** and be arrested by the **TPS** on a sole vague count of contravention of section 264(b) of the *Criminal Code*?

Section 29 of the Criminal Code

- e. Did the TPS (Constable Romano and DCK) breach section 29 of the Criminal Code by not having a warrant on them when arresting MR. McLean?
- f. Did the TPS (Constable Romano and DCK) breach section 29 of the Criminal Code by not producing the purported warrant when Mr. McLean requested the same?
 - i. If the answer to either of those questions in the affirmative, did the TPS breach Mr. McLean's section 8 rights?

- ii. Are those breaches of Mr. McLean’s section 8 Charter rights savable under section 1 of the Charter pursuant to the Oakes test?
- g. Did the **TPS** and **TPS** respondents violate Mr. McLean’s *Charter* rights under section 7, 8, 9, 10, 11, 12 and 15 by the particularized conduct with particular emphasis on the following:
 - i. The unauthorized seizure of the McLean Property and McLean medication prior to Mr. McLean’s attendance at the *14th Division* of TPS;
 - ii. The FPE from Constable Romano to Mr. McLean and Mr. McLean’s response to the same without any correction by Constable Romano prior to his attendance at the *14th Division* of TPS;
 - iii. The Fictitious CH Warning by DCK;
 - iv. The Fictitious Warrant Representation by Constable Romano;
 - v. The disjunctive breaches of section 29 by TPS *14th Division*;
 - vi. The unlawful arrest of Mr. McLean;
 - vii. The unlawful detention of Mr. McLean;
 - viii. The unlawful mug shots and fingerprinting of Mr. McLean;
 - ix. The unlawful imprisonment of Mr. McLean without medical attention for a foot injury he sustained;
 - x. The unlawful addressing inputting in the undertaking by Sergeant Cassidy;
 - xi. The misrepresentation by the TPS *14th Division* that Mr. McLean would have the opportunity to speak with the “detectives” in a private room that night but was not afforded that opportunity; and
 - xii. Other particulars herein.
- h. If so, what remedies must be fashioned by the **HRTO**?

VOLUME #6: Legal Bases and Authorities for Discrimination – <i>Prima facie</i> – Respondents required to rebut – burden of proof

VOLUME #6(A): Overview

VOLUME #6(A)(I): Legislation

265. The *HR Code* was passed in 1990 by the Legislature. While the **HRTO** cannot answer a *Charter* question as a standalone question, it can answer questions involving the *Charter* when they are required to be answered in relation to the issues in an **HRTO** application. The *Charter* and the preamble of the *HR Code* intertwined (see: Preamble of the *Code* and *Charter*). Mr. McLean relies on section 2 of the *SPPA*. Mr. Mclean relies on section 64 of the *Legislation Act*.

VOLUME #6(A)((I)(a): Part 1: Freedom of Discrimination

266. Mr. McLean has and had the right to equal treatment, in the procedural and substantive sense, with respect to services from **Goldview** and **TPS** including the **TPS** respondents, without discrimination because of his disabilities which include his physical disabilities and impairments, mental disabilities and disorder(s) (see: *HR Code*, s. 1, and s. 2).

VOLUME #6(A)((I)(b): What is an agent of a **Landlord?**

267. Agency relationships arise from a principal instructing and an agent following those instructions. An agency relationship can be formed without formality and may be fleeting or temporary. An individual or person can be an agent for multiple principals at the same time even where their interests' conflict.

VOLUME #6(A)((I)(c): Section 9 of the *HR Code*

268. It is prohibited for a person to infringe or do, directly or indirectly, anything that infringers a right under Part 1 (see: *HR Code*, s.9).

VOLUME #6(B): Part II: Interpretation and Application

269. Disability has a wide-ranging set of meanings that are often independent and not intersectional (see: section 10(1) of the *HR Code*). Disability includes “mental impairment” and “mental disorder”.
270. “**Equal**” means: “equal” means subject to all requirements, qualifications and considerations that are not a prohibited ground of discrimination;
271. The Legislature passed ss. 10(3) to take into account “past and presumed disabilities”: The right to equal treatment without discrimination because of disability includes the right to equal treatment without discrimination because a person has or has had a disability or is believed to have or to have had a disability. 2001, c. 32, s. 27 (4). (see: ss. 10(3) of the *HR Code*).
272. Subsection 17(1) is titled “disability” which states, **17 (1)** A right of a person under this Act is not “infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of disability. R.S.O. 1990, c. H.19, s. 17 (1); 2001, c. 32, s. 27 (5).

VOLUME #6(B)(i): Accommodation

Would the Organization suffer undue hardship if they were required to accommodate the disabled individual?

273. Subsection 17(2) of the *HR Code* is titled “Accommodation” which states, “(2) No tribunal or court shall find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any. R.S.O. 1990, c. H.19, s. 17 (2); 1994, c. 27, s. 65 (2); 2002, c. 18, Sched. C, s. 3 (1); 2006, c. 30, s. 2 (1).

VOLUME #6(C): Section 34 and 36 of the Code

Application, Applicant and Respondents

274. An applicant who merely believes that his, her, or “they” had their rights infringed under Part 1 has permission (‘may’) to apply to the **Tribunal** for orders under section 45.2 of the *HR Code* within one year after the incident to which the ‘application’ relates or if there were a series of incidents, within one year after the last incident in the series (see: section 34 of the *HR Code*).
275. Respondents are any individuals or persons whom an order is sought in the application (see: *infra*).

VOLUME #6(C)(I) Section 37 of the <i>Code</i>

276. Subsection 37(1) states, “**37** (1) The Commission may intervene in an application under section 34 on such terms as the **Tribunal** may determine having regard to the role and mandate of the Commission under this Act. 2006, c. 30, s. 5. (2) The Commission may intervene as a party to an application under section 34 if the person or organization who made the application consents to the intervention as a party. 2006, c. 30, s. 5

VOLUME #6(C)(II): Section 39 of the <i>Code</i> , “Powers of Tribunal ”

277. Section 39 was passed by our Legislature in 2006 and it states, “**39** The **Tribunal** has the jurisdiction to exercise the powers conferred on it by or under this Act and to determine all questions of fact or law that arise in any application before it. 2006, c. 30, s. 5.

VOLUME #6(C)(III): Determination of <i>Charter</i> questions

278. The **Tribunal** can determine *Charter* questions so long as they are not stand-alone questions. Mr. McLean has advanced, in the spirit of comprehensiveness and urgency, the motion for expedited proceedings and notice of constitutional question in one memorandum or written brief. Moreover, the 15-day notice requirement is required pursuant to **HRTO Specific Rules**.

VOLUME #6(C)(IV): Section 42, the “ <i>SPPA</i> ”

279. The *Code* is paramount to all other legislation (statutes) in Ontario including the *SPPA* where the *SPPA* or a provision thereunder conflicts with a provision of the *Code*, regulations or the **Tribunal** rules.
280. This is a fascinating section because it makes even the “**HRTO Specific Rules**” paramount to that of the *SPPA* in the event of conflict. It was an intentional decision of the Legislature to grant more power to the rule making committee of an administrative tribunal than to that of the Legislature being democratically elected. It evinces an intention of the Legislature of extraordinary deference to the expertise of the **Tribunal**.
281. Concerning the paramountcy of the *HR Code*, it is paramount to the likes of any municipal statutes relating to police forces.
282. Moreover, the *HR Code* is paramount to all other legislation including the *RTA*, Condominium Act and CMSA.

VOLUME #6(C)(V): Section 45.2 of the <i>HR Code</i> (applications under section 34)

283. Subsection 45.2(1) was passed in 2006 and it states:

Orders of Tribunal: applications under s. 34

45.2 (1) On an application under section 34, the **Tribunal** may make one or more of the following orders if the **Tribunal** determines that a party to the application *has infringed* a right⁴⁵ under Part I of another party to the application:

1. An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.
2. An order directing the party who infringed the right to make restitution to the party whose right was infringed, other than through monetary compensation, for loss arising out of the infringement, including restitution for injury to dignity, feelings and self-respect.
3. An order directing any party to the application to do anything that, in the opinion of the **Tribunal**, the party ought to do to promote compliance with this Act. 2006, c. 30, s. 5.

Orders under par. 3 of subs. (1)

- (2) For greater certainty, an order under paragraph 3 of subsection (1),
(a) may direct a person to do anything with respect to future practices; and
(b) may be made even if no order under that paragraph was requested. 2006, c. 30, s. 5.

VOLUME #6(C)(VI): Patent Unreasonableness Standard Prevails

284. Despite the change in the judicial review landscape by the SCC in Vavilov, the Legislature has evinced its intention to maintain the most deferential standard of review to **Tribunal** decisions, “**45.8** Subject to section 45.7 of this Act, section 21.1 of the *Statutory Powers Procedure Act* and the **Tribunal** rules, a decision of the **Tribunal** is final and not subject to appeal and shall not be altered or set aside in an application for judicial review or in any other proceeding unless the decision is patently unreasonable. 2006, c. 30, s. 5; 2009, c. 33, Sched. 2, s. 35 (3).”

VOLUME #6(D): General

285. Section 46 provides the general definitions:

“**Tribunal** rules” means the rules governing practice and procedure that are made by the **Tribunal** under section 43. (“*règles du Tribunal*”) R.S.O. 1990, c. H.19, s. 46; 1994, c. 27, s. 65 (24); 2002, c. 18, Sched. C, s. 7; 2006, c. 21, Sched. F, s. 136 (2); 2006, c. 30, s. 7; 2019, c. 1, Sched. 4, s. 25

VOLUME #6(E): Civil Remedy in Court

286. Persons, who believe that they have had a right infringed under Part 1 of the *HR Code*, cannot proceed to the ONSC if they are only alleging that they had their rights breached under the *HR Code*. Subsection 46.1, “Civil Remedy” states:

Civil remedy

46.1 (1) If, in a civil proceeding in a court, the court finds that a party to the proceeding has infringed a right under Part I of another party to the proceeding, the court may make either of the following orders, or both:

1. An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.
2. An order directing the party who infringed the right to make restitution to the party whose right was infringed, other than through monetary compensation, for loss arising out of the infringement, including restitution for injury to dignity, feelings and self-respect. 2006, c. 30, s. 8.

Same

(2) Subsection (1) does not permit a person to commence an action based solely on an infringement of a right under Part I. 2006, c. 30, s. 8.

287. Breach of section 9 of the *HR Code* is an offence but it requires consent of the AGO to be prosecuted (see: subsection 46.2(1) and (2).

VOLUME #6(F): Acts of Officers, etc. and Opinion re authority or acquiescence

288. A corporation can request that the **Tribunal** in its decision make known whether or not the act or thing done or omitted to be done by an officer, official, employee or agent was done or omitted to be done with or without authority of acquiescence of the corporation and the opinion does not affect the application of subsection 1 of 46.3.

VOLUME #6(G): Act Binds Crown (see: section 47)

289. Subsection 47(1) states, “**47** (1) This Act binds the Crown and every agency of the Crown.”

VOLUME #6(H): *HR Code* has primacy or paramountcy over other Acts

290. Ss. 47(2) states, “(2) Where a provision in an Act or regulation purports to require or authorize conduct that is a contravention of Part I, this Act applies and prevails unless the Act or regulation specifically provides that it is to apply despite this Act. R.S.O. 1990, c. H.19, s. 47 (2).”

VOLUME #7: Warrantless Arrests: presumptively unreasonable

VOLUME #7(A): A Return to Section 495 of the *Criminal Code*

291. Under section 495 of the *Criminal Code*:

Arrest without warrant by peace officer

- **495 (1)** A peace officer may arrest without warrant
 - **(a)** a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;
 - **(b)** a person whom he finds committing a criminal offence; or
 - **(c)** a person in respect of whom he has reasonable grounds to believe that a warrant of arrest or committal, in any form set out in Part XXVIII in relation thereto, is in force within the territorial jurisdiction in which the person is found.

VOLUME #7(A)(I): Brief Conclusions

292. The definition of “*intimate partner*” with respect to a person, includes their current or former spouse, common-law partner and dating partner.⁴⁶

VOLUME #7(A)(I)(i): Section 495(2): Prohibition against arrest without a warrant

293. Section 495(2) of the *Criminal Code* states:

Limitation

(2) A peace officer shall not arrest a person without warrant for

- (a) an indictable offence mentioned in section 553,
- (b) an offence for which the person *may* be prosecuted by indictment or for which he is punishable on summary conviction, or
- (c) an offence punishable on summary conviction,

in any case where

- (d) he believes on reasonable grounds that the public interest, having regard to all the circumstances including the need to
 - (i) establish the identity of the person,
 - (ii) secure or preserve evidence of or relating to the offence, or
 - (iii) prevent the continuation or repetition of the offence or the commission of another offence,may be satisfied without so arresting the person, and
- (e) he has no reasonable grounds to believe that, if he does not so arrest the person, the person will fail to attend court in order to be dealt with according to law.

Consequences of arrest without warrant

(3) Notwithstanding subsection (2), a peace officer acting under subsection (1) is deemed to be acting lawfully and in the execution of his duty for the purposes of

(a) any proceedings under this or any other Act of Parliament; and

(b) any other proceedings, unless in any such proceedings it is alleged and established by the person making the allegation that the peace officer did not comply with the requirements of subsection (2).

VOLUME #7(A)(I)(ii): Section 553 of the *Criminal Code*

Nunavut Court of Justice: not relevant – not within territorial jurisdiction

294. Section 553 of the *Criminal Code* relates to: This section lists the offences for which a provincial court judge or Nunavut Court of Justice judge has absolute jurisdiction to try an accused without the accused's consent.

VOLUME #7(A)(I)(ii): Section 495(2)(b) of the *Criminal Code*

295. Mr. McLean's reading of ss. 495(2)(b) is that the police require a warrant to arrest an individual where it is a *hybrid offence* like those particularized and legislated in relation to the discretionary exemptions. Again, the precise reading of the statutory sections, passed by Parliament, are the focus of whether the **TPS** could even argue that there was an indictable offence component to the allegation, which Mr. McLean respectfully submits was of the utmost frivolous nature without any basis in law (or fact), and that is the discretion for the Crown is only activated or initiated if an accused may have committed criminal harassment WHILE [extreme emphasis], FOR [the benefit of], WHERE [the offence involved a weapon], and WHERE [the accused was not ordinarily resident in Canada]:

- a. **OUT ON BAIL: WHILE at large** under s. 515 [bail release], 679 or 680 [release pending appeal or review of appeal] (s. 515(6)(a)(i));
- b. **BENEFIT CRIMINAL ORGANIZATION:** "FOR the benefit of, at the direction of, or in association" with a **criminal organization** (s. 515(6)(a)(ii));
- c. **WEAPONS INVOLVED:** WHERE the **offence involved a weapon**, being a firearm, cross-bow, prohibited weapon restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, while the accused was subject to a prohibition order preventing possession of these items (s. 515(6)(a)(viii)); or
- d. **NON-RESIDENTS:** WHERE the accused is **not "ordinarily a resident in Canada"** (s. 515(6)(b)).

VOLUME #7(A)(I)(iii): The word "may" is fatal to the conduct of the **TPS** and its "arrest" of Mr. McLean without a warrant

296. While for sake of completeness, as these are public interest issues involving the *Charter* and the *HR Code*, it would not even matter if Mr. McLean was potentially subject to some of the discretionary elements for the Crown to exercise said discretion to proceed by indictment. Emphatically, Mr. McLean was not.

297. Therefore, Parliament was clear by the passing of subsection 495(2) in that, in addition to the **TPS** being required to have reasonable grounds to believe that Mr. McLean had committed an indictable offence (as he was not in the commission of a criminal offence at the time (or ever), and there was no warrant for his arrest), there were further prohibitions against the **TPS** arresting Mr. McLean on the night in question. Put another way, the **TPS** could have provided him with a “Promise to Appear”.
298. By the onset of this **HRTO Proceeding**, and likely future proceedings at this rate, the arrest of Mr. McLean is not deemed lawful by the “any other proceedings” clause in subsection 495(3)(b).
299. As a summary offence, it is a provincial court matter as opposed to even being an Ontario Superior Court matter.
300. Without acceding or admitting there is any validity to this charge, what was the necessity for two officers to restrain Mr. McLean, handcuff him, arrest him, detain him, seize any property on him, search the same, and then imprison him so he could sit in a jail cell without socks in a washroom without toilet paper? To suggest it was inhumane, cruel and unusual would be an understatement.
301. The **TPS** had available to it, leaving aside the **False Pretense Email**, section 497 of the *Criminal Code*:

Issue of appearance notice by peace officer

497 If, by virtue of subsection 495(2), a peace officer does not arrest a person, they may issue an appearance notice to the person if the offence is

- **(a)** an indictable offence mentioned in section 553;
- **(b)** an offence for which the person may be prosecuted by indictment or for which they are punishable on summary conviction; or
- **(c)** an offence punishable on summary conviction

VOLUME #7(A)(I)(iv): Questioning the Motives of the TPS

302. This is where the motives of the **TPS** must be questioned. The **TPS** has Mr. McLean's property in various bags including his medication. The **TPS** is fully aware that he did not consent to that delivery or pickup of the same, and the **TPS** had the unusual leverage of being able to require Mr. McLean to sign for his property and medication.
303. Therein, while it may have been seen to somewhat slippery or tricky, the "Promise to Appear" could have been included therein and provided to Mr. McLean with video evidence that he received the same.

VOLUME #7(A)(I)(v): IF TPS argument was that it needed to arrest Mr. McLean so he was under conditions, then that is putting the cart before horse.

304. Section 498 of the *Criminal Code* reads:

Release from custody — arrest without warrant

- **498 (1)** Subject to subsection (1.1), if a person has been arrested without warrant for an offence, other than one listed in section 469, and has not been taken before a justice or released from custody under any other provision of this Part, a peace officer shall, as soon as practicable, release the person, if
 - **(a)** the peace officer intends to compel the person's appearance by way of summons;
 - **(b)** the peace officer issues an appearance notice to the person; or
 - **(c)** the person gives an undertaking to the peace officer.
- **Person delivered or detained**

(1.01) Subsection (1) also applies in respect of a person who has been arrested without warrant and delivered to a peace officer under subsection 494(3) or placed in the custody of a peace officer under subsection 163.5(3) of the *Customs Act* and who is detained in custody for an offence other than one listed in section 469 and who has not been taken before a justice or released from custody under any other provision of this Part.
- **Exception**

(1.1) The peace officer shall not release the person if the peace officer believes, on reasonable grounds,

- **(a)** that it is necessary in the public interest that the person be detained in custody or that the matter of their release from custody be dealt with under another provision of this Part, having regard to all the circumstances including the need to
 - **(i)** establish the identity of the person,
 - **(ii)** secure or preserve evidence of or relating to the offence,
 - **(iii)** prevent the continuation or repetition of the offence or the commission of another offence, or
 - **(iv)** ensure the safety and security of any victim of or witness to the offence; or
- **(b)** that, if the person is released from custody, the person will fail to attend court in order to be dealt with according to law.

When subsections (1) and (1.01) do not apply

(2) Subsections (1) and (1.01) do not apply in respect of a person who has been arrested without warrant by a peace officer for an offence described in subsection 503(3).

Consequences of non-release

(3) A peace officer who has arrested a person without a warrant, or who has been given the custody of a person arrested without a warrant, for an offence described in subsection (1), and who does not release the person from custody as soon as practicable in the manner described in that subsection shall be deemed to be acting lawfully and in the execution of the officer's duty for the purposes of

- **(a)** any proceedings under this or any other Act of Parliament; or
- **(b)** any other proceedings, unless in any such proceedings it is alleged and established by the person making the allegation that the peace officer did not comply with the requirements of subsection (1).

305. It is terribly important to emphasize that by TPS releasing Mr. McLean on his own undertaking and WITH NO geographical restrictions or leaving the country for that matter, that it could have had any reasonable grounds to believe that there were any issues regarding Mr. McLean being a risk from a safety standpoint. This dovetails with clearly no concern of the TPS that Mr. McLean was part of a criminal organization or engaged in any contraventions of the *CDSA*.

306. Further, as Sergeant Cassidy represented to him that he was required to remain at the same residence where he was residing, he put down NFA. Mr. McLean was obviously in a daze and in shock but did his best to listen along and then sign.
307. The **Tribunal** can take judicial notice that those having been falsely arrested, detained, and imprisoned have one thing on their mind: seeing the outside.
308. Section 499 of the *Criminal Code* reads:

Release from custody — arrest with warrant

499 If a person who has been arrested with a warrant by a peace officer is taken into custody for an offence other than one listed in section 469 and the warrant has been endorsed by a justice under subsection 507(6), a peace officer may release the person, if

- **(a)** the peace officer issues an appearance notice to the person; or
- **(b)** the person gives an undertaking to the peace officer

VOLUME #7(A)(I)(vi):: Mr. McLean asked for a copy of the warrant and none was produced – UNEQUIVOCALLY – A WARRANTLESS ARREST – WITH WARRANTLESS SEARCHES, SEIZURES ET AL

Section 29 of the *Criminal Code*

309. Section 29 of the *Criminal Code* reads:

“Duty of person arresting

- **29 (1)** It is the duty of every one who executes a process or warrant to have it with him, where it is feasible to do so, and to produce it when requested to do so.
- **Notice**

(2) It is the duty of every one who arrests a person, whether with or without a warrant, to give notice to that person, where it is feasible to do so, of

 - **(a)** the process or warrant under which he makes the arrest; or
 - **(b)** the reason for the arrest.”

310. It is here where sequence of language and representations by Constable Romano destroys all credibility of the **TPS** and himself regarding the “warrant representation”. Constable Romano made the “warrant representation” only after
311. As Mr. McLean has been objective and thought of the various angle and trying to give the benefit of the doubt to these officers, this is one where none can be given based on the location of arrest. One can understand if the officers were in a hurry and rushing out the door to arrest an individual and somehow forgot the proverbial “piece of paper” aka the “warrant” and did not have it on them. In this day and age, one would think with the way in which the police officers have computer in their vehicles and various high technological devices on them at all times that they would have it electronically. However, Mr. McLean is speculating.
312. In any event, it would have been more than feasible in the span of three hours for Constable Romano or any other officer including one of the detectives to have produced the same. Mr. McLean asked and none was produced.
313. Therefore, the only conclusion that can be drawn was and is that the **TPS** did NOT have a warrant for Mr. McLean’s arrest. This is nearly fatal to any chance that the **TPS** could arrest Mr. McLean without a warrant.
314. The only way in which the **TPS** could have arrested Mr. McLean without a warrant was if there was no discretion for the Crown to proceed by summary process which were and to belabour the point because it is dispositive of the NOCQ:
- a. The offence of section 264(b) of the *Criminal Code* involved an allegation of VIOLENCE against an intimate partner AND the accused (Mr. McLean) had been CONVICTED of an offence against an intimate partner;
 - b. Committing an offence of section 264(b) was AFTER being released under section 142(2) to (5);
and

- c. Where the offence of criminal harassment (section 264(b)) was one that was committed (or conspired to commit) where the accused was engaged in any of the contraventions under section 5 to 7 which are: (i) possession for the purposes of trafficking; (ii) importing and exporting of a controlled substance; and/or (iii) production of a controlled substance.

315. The most deficient information did not include any allegation of violence by Mr. McLean. How could it? Mr. McLean's only communications were emails in relation to his extension of courtesy to Nicole in having her remaining non-essential items be available for pick-up on September 15, 2024. Moreover, the subsequent emails were provided as updates to an urgent situation of the Unlawful Lockouts. In order for there to be an allegation of violence, there has been some level of interpersonal relations between the two and there were none.
316. Mr. McLean had not been arrested or charged for anything so he could not be out on bail, an undertaking, a promise to appear or otherwise.
317. Finally, while Mr. McLean has medication, which is a controlled substance, he is prescribed the same at the same dosage for the last seven years. He is certainly not possessing for the purposes of trafficking – nor would it amount to enough weight to do so. He was certainly not exporting or importing the same and, bluntly, he does not let anyone come near it as it has been so important for his mental health, maturity and growth. He has obtained the prescription from various pharmacies in Ontario since 2018 and only after a qualified physician, including psychiatrist has prescribed the same. Certainly, Mr. McLean has no idea how to produce said medication. Simply put, there were no allegations at all in this regard.
318. Ergo, there was only one way in which the **TPS** could have arrested Mr. McLean **WITHOUT** a warrant and that was under section 495 of the *Criminal Code*, with section 495(2) providing prohibitions regarding the same, and section 495 of the *Criminal Code* states:

Arrest without warrant by peace officer

- **495 (1)** A peace officer may arrest without warrant

- **(a)** a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;
- **(b)** a person whom he finds committing a criminal offence; or
- **(c)** a person in respect of whom he has reasonable grounds to believe that a warrant of arrest or committal, in any form set out in Part XXVIII in relation thereto, is in force within the territorial jurisdiction in which the person is found.

319. As *per* section 29 of the *Criminal Code*, the passage of time oddly now assists Mr. McLean in unequivocally determining that Constable Romano and the **TPS** did not have any warrant on them and they were in their own police detachment or division for three hours. Therefore, the **TPS** could not have relied upon section 495(1)(c) of the *Criminal Code*. Therefore, that “may” was “eliminated”.
320. The **TPS** did not find Mr. McLean committing any criminal offence so that eliminates ss. 495(1)(b) in perpetuity.
321. This leaves ss. 495(1)(a) for the “straight indictable” in that the peace officers of the **TPS** need to be able, without a warrant, to, AT THAT TIME, have the unequivocal conclusion of law that Mr. McLean HAD committed an indictable offence. There was no evidence of such a conclusion of law at all.
322. Therefore, this leaves the remaining part of ss. 495(1)(a) and the **TPS** had no evidence, on reasonable grounds to believe, that Mr. McLean had committed OR was about to commit an indictable offence.
323. Without that component being eliminated, this left a “peace officer may arrest without a warrant, a person, who, on reasonable grounds, he (or she) believes HAS committed an indictable offence”. When measuring the unproven charge of ss. 264(b) (absent any sufficient particulars in that “information” which was at approximately 11 p.m.), this demonstrated that the **TPS** had none at all in relation to an indictable offence – let alone sufficient particulars or evidence in relation to meet the legal requirements for a charge on the summary process.
324. As was seen in *Joseph v. Meier*, the “defence” (also known as “Constable Meier and the Attorney General of Canada” as it was a civil matter) attempted to argue, in “argument” – not at that time, that Ms. *Joseph*

could have, implicitly, been arrested for the offence of “obstruction”. Madam Justice Brown of the BCSC quite rightly disposed of that incompetent and wasteful argument in three sentences at paragraph 33:

“ [32] While I am not satisfied that Cst. Meier specifically advised Ms. *Joseph* that she was detained and the reason it, even if he had done so she need not have provided her name or permitted Cst. Meier to search her bag as part of the investigative detention. As the Court said in *R. v. Grant*, 2009 SCC 32:

[21] More specifically, an individual confronted by state authority ordinarily has the option to choose simply to walk away: *R. v. Esposito* (1985), 1985 CanLII 118 (ON CA), 24 C.C.C. (3d) 88 (Ont. C.A.), at p. 94; *Dedman v. The Queen*, 1985 CanLII 41 (SCC), [1985] 2 S.C.R. 2, at p. 11, citing Martin J.A. in the Ontario Court of Appeal ((1981), 1981 CanLII 1631 (ON CA), 32 O.R. (2d) 641, at p. 653):

Although a police officer may approach a person on the street and ask him questions, if the person refuses to answer the police officer must allow him to proceed on his way, unless . . . [he] arrests him .

. . .

[33] At points in its argument the defence [sic] refers to the offence of obstruction. Cst. Meier did not suggest in evidence or argument that he arrested Ms. *Joseph* for obstruction. He arrested her for theft. There is no suggestion in his evidence or argument that he had reasonable grounds to arrest her for obstruction.”

325. The sole unproven offence herein was an allegation that Mr. McLean contravened ss. 264(b) on dates unknown, in unparticularized methods et al, and without any evidence of any allegation, without even considering “reasonable grounds to believe”, that Mr. McLean was engaged in some form of drug trafficking, drug producing and/or importation of drugs and/or any allegation of violence against an intimate partner AND had been convicted of such an offence against an “intimate partner”. It is trite that none were applicable on the evidence and in fact. Lastly, since Mr. McLean had not been arrested for any crime, with an obvious focus on this territorial jurisdiction which the **TPS** operates and was out on some form of bail, or release (also known as “being at large”) AND had missed an appearance, then this foreclosed any potential of the **TPS** having any “reasonable grounds to believe” that Mr. McLean had committed an indictable offence. Therefore, the **TPS** committed an unlawful search and breached his section 9 rights. The **TPS** then proceeded to breach his section 10 rights, section 8 and 7 rights. The **TPS** then subjected him to cruel and unusual punishment and breached his section 12 rights. This was all against the backdrop of the **TPS** unlawfully seizing (with the searches it may have conducted as it is unclear based on the “temporary locker comment”) and the **False Pretense Email**.

326. To dovetail the above to the *HR Code* and discrimination, the **TPS** knew Mr. McLean had disabilities as it possessed his medication, as admitted in email by Constable Romano. The **TPS** provide services which fall under section 1 of the *HR Code*. The only remaining question is whether Mr. McLean's protected characteristics were "a" factor in his adverse treatment. This is not a difficult hurdle to meet but even one of the statements from the case law is apropos: specifically, whether this was *inexplicable* departure from usual practices to establish a claim of discrimination.
327. There are two possibilities: (i) this was an *inexplicable* departure from usual practices and discrimination is easily established; OR (ii) this conduct is a usual practice of the **TPS** involving people with protected characteristics and there is a problem of systemic discrimination within the **TPS**.
328. The first is the more likely.
329. This leaves but one defence for the **TPS** and that is under section 17 of the *HR Code* which is the duty to accommodate. The only way that the **TPS** escapes liability is that if it could show that providing Mr. McLean with the **McLean Property** and **McLean Medication** via meeting him somewhere would have been not unduly onerous. Moreover, to the extent that the **TPS** had reasonable grounds to believe that it could arrest Mr. McLean, it would have been compelled to point to the indictable offence he had committed in conjunction with the alleged offence under section 264(b). Of course, there were none. To the extent that the **TPS** had read and understood the law of section 264(b) and sought evidence from Mr. McLean, and had any evidence from the complainant or an individual on behalf of the complainant, it would have been required to investigate first and determine whether there were reasonable grounds to believe that Mr. McLean had committed the offence of harassment. Had Constable Romano emailed Mr. McLean and asked for a copy of all of his communications with the complainant, he would have simply provided the affidavit in the record of the proceeding with the LTB. They were all with lawful authority and for the purposes of the LTB Proceeding or surrounding the same. He did not have any intent to harass Nicole and was certainly not reckless regarding the same. There is not an objective person in our society that would think that Nicole had to fear for her safety. While the document production will be most

important to tying up any loose ends and providing further context, there is no defence on the *Charter* breaches and the liability under the *HR Code*.

330. Again, document production and discovery, on the timelines above, will provide the full picture absent an need to speculate as to the nature of the complaint, when it was made, how it was made, what were the particulars, and what evidence under oath was provided.

VOLUME #7(B): A primer on unlawful arrests and the consequences of the same along with consequential relief

VOLUME #7(B)(I): *Joseph v. Meier*, RCMP and AGC

331. In a recent decision of the BC Supreme Court, as per Justice BD Brown, the BCSC found that an officer did not have reasonable grounds to arrest a woman who was apparently in the act of shoplifting or complicit in the same.
332. The case concerned a plaintiff who sought damages against an RCMP officer and the Attorney General of Canada in relation to events that took place at Marks Works Warehouse in Smithers, BC. She alleged she was injured when the officer improperly detained and arrested her believing she stole a scarf from the store. She claimed damages for false arrest, false imprisonment, assault and battery and violation of her *Charter* rights.

VOLUME #7(B)(I)(a): *Officer, RCMP and AGC rely, in misguided fashion, rely on section 25 of the Crim Code*

333. At trial, the officer and the Attorney General maintained the plaintiff was properly detained and that the arrest was lawful and reasonable. They argued s. 25 of the *Criminal Code* protected them from liability. To come within the protection of s. 25, they were required to establish that the officer: (i) was authorized by law to arrest the plaintiff, (ii) that he had reasonable grounds for the arrest, and (iii) that no more force

was used than necessary during the detention and arrest. It is trite that being detained and arrested are different species of law.

334. It was common ground that the officer did not have a warrant. Analytical precision is required in relation to what the indictable offence was herein involving Ms. *Joseph*. Presuming the scarf was under a \$100, and taking the officer's position at its highest (even though Ms. *Joseph* did not put the scarf in her bag), one would presume that it was a summary type charge (the US equivalent of misdemeanor).

VOLUME #7(B)(I)(b): Ms. *Joseph*'s evidence (with some comparative analysis to Mr. McLean)

335. The plaintiff's evidence was that, at 61 years of age, she required a walker for mobility. She had a fused ankle and various medical issues, including chronic pain. On the day of the arrest, she saw someone she recognized in the store. The two women shopped in the same area of the store while speaking to each other for a while. The store manager thought they were together and, when the manager saw the younger woman put a pink scarf in her bag, she confronted both women. The younger woman pulled the scarf out of the bag and threw it to the ground before fleeing the store. The plaintiff told the manager she had a scarf around her neck that she was buying [nota bene: it seems more likely that the language should have been, in fairness to the police in Smithers, BC, that "she intended to buy" or represented that she intended to buy]. A staff member called the police and the officer was dispatched to the store. He was told there were two suspects, a younger woman who had run from the store and an older woman who was still in the store. He attended the store *without* pursuing the woman who had fled.

336. When he arrived, the plaintiff was in line to pay at the cash register. The manager met the officer and provided him with information about the allegations. The officer waited until the plaintiff had made her purchases. As she left the store, he asked to speak to her but she refused to stop or provide information to him.

VOLUME #7(B)(I)(b)(i)(a): Return to *McLean v. TPS et al*

337. In relation to this **HRTO Proceeding**, the importance of being in a public setting as opposed to private property, particularly the **TPS 14th Division**, is a hallmark and a theme that the **Applicant** will advance in this **HRTO Proceeding**.
338. She told the officer she had done nothing wrong and did not need to speak to him. The officer radioed his partner who attended the store to provide backup. In the meantime, the officer attempted to place the plaintiff in handcuffs. She resisted, holding her hands clasped to her front, and turning away from him as he tried to take her arms back for cuffing. He took her to the ground and she continued to resist while she was on the ground. Eventually he stopped the struggle without handcuffing her and helped her to her feet. At approximately the same time, his partner arrived on scene.
339. The officer searched the plaintiff's belongings and found no stolen merchandise. She was released without charges and immediately alleged she had sustained injuries in the struggle.

VOLUME #7(B)(I)(b)(i)(b): Return to <i>McLean v. TPS et al</i>

340. In this **HRTO Proceeding**, it remains perplexing that even if the officers, proverbially speaking, “jumped the gun” with the arrest, the detention, the taking Mr. McLean down the stairs from main office foyer, the search, the seizure, the removal of socks, belts, jewelry, etc., why they did not wish to listen to Mr. McLean so he could explain that the officers were mistaken as to: (i) a warrant to arrest involving himself; (ii) having warned him about unspecified and unparticularized harassment involving an unspecified individual; (iii)
341. It is important to note that there was no allegation by the **TPS** that that Mr. McLean had been warned directly by the alleged complainant (Nicole). Mr. McLean's only communications with Nicole were, with lawful authority, involving the return of her remaining property on Sunday, September 15, 2024, and thereafter for confirmation purposes that she had obtained the same on her behalf and that of the company which she is CEO in Victory Wine & Spirits Inc. (“**Victory Wine**”).

342. The four-part test requires that the officers are able to reasonably conclude, if they even had the documents at the time, that Mr. McLean was not acting with lawful authority in sending emails to Nicole and then to Nicole and copied to the **Landlord**. As a former tenant, who had vacated on June 23, 2024, yet had some remaining non-essential items therein, Mr. McLean was not only acting with lawful authority, he was doing so as a courtesy to Nicole. In relation to doing as a courtesy, this occurred after the Landlord attempted to enter with the concierge on Saturday, September 14, 2024, and was told to leave and did. Mr. McLean could only surmise that since Nicole had vacated (from the date of June 23, 2024) that perhaps Nicole was sending an agent to pick up some of her non-essential items and to be in the carriage of the concierge. As such, he did so as a courtesy and did not ask for any compensation for doing the same. Therefore, the allegations of criminal harassment do not even meet the first part of the legal test for criminal harassment under the *Criminal Code*. While Mr. McLean did not have his computer with him, as he did not intend to be at the *14th Division (TPS)* for any length of time (i.e. the obtaining of his property and signing off for the same) (see: emails in the **HRT0** Application), he could have showed them if they allowed him to log on to his email there. They were all saved to a folder for the LTB matter involving *McLean v. Aphy Artopoulos*. Of note, Mr. McLean, due to such lawlessness of the Landlord in and outside of the LTB Proceeding is making a request of the LTB to determine whether she may have commenced other proceedings and not provided notice to Mr. McLean.
343. The timing of this alleged criminal complaint by whomever made it could not have been more suspicious in that Mr. McLean after the LTB reversed course on its own initiative to grant his motion for shortening of time, on October 1, 2024, the **Applicant** updated the **Landlord** and Nicole that he would need access to his property within Unit 410. Not only was this within lawful authority, the **Landlord** and anyone present in there were notified of the same and how could they know if Mr. McLean did not notify them.
344. Mr. McLean relied, in a fit of irony, on Officer Solermo's representation that the scope of the police assistance was to help him retrieve belongings.

VOLUME #7(B)(I)(b)(i): Return of <i>Joseph v. Meier</i>

345. The officer's evidence was that he initially told the plaintiff she was being detained on suspicion of theft. When she refused to speak to him, he told her she was under arrest for theft. When he moved to handcuff her, she turned and tried to walk back into the store. He testified he had arrested the plaintiff pursuant to section 495 of the *Criminal Code*, which permits an officer to arrest a person without a warrant if, on reasonable grounds, the officer believes the person **has committed** an **INDICTABLE OFFENCE**.

VOLUME #7(B)(I)(b)(i)(c): Return to <i>McLean v. TPS et al</i>

346. It is worth noting, by way of pause, that Mr. McLean was not in the process of committing an indictable offence when Constable Romano emailed him, when he responded via email or when he was at the *14th Division (TPS)*.
347. It appears to be common ground that there was no warrant for his arrest even though Constable Romano represented that there was. Moreover, it appears now to be common ground, at least the absence of denial, that DC Kolankowski was incorrect that he contacted Mr. McLean to warn him about an allegation of not merely civil harassment but criminal harassment. If there was no warrant, then the **TPS**, including Constable Romano and DC Kolankowski, had to come under the exceptions under section 495 of the *Criminal Code*. To the extent that Constable Romano had a warrant to arrest Mr. McLean, they would have been negligent in their duties to allow him to enter the *14th Division* and leave for innocent reasons each time. They would have been allowing Mr. McLean to leave their eyesight and control, and not be arrested. It is notable that Constable Romano's "warrant representation" came after DC Kolankowski was apparently check mated with Mr. McLean's quick on the feet with (one of the benefits of ADHD is the ability to multitask and think quick about a variety of topics which as a dysphemism referred to as "lack of singular focus") by referencing "entrapment" and "no warning whatsoever".
348. Pursuant to ss. 495(1)(c) the alleged warrant for arrest had to be within the City of Toronto. To the extent that the TPS never had a warrant at the time, then its sole defence rests on a fraudulent misrepresentation.
349. Subsection 495(1)(b) is irrelevant because Mr. McLean was coming at the request, and *quasi*-threat of destruction or removal of his property and medication, of Constable Romano. No criminal offence was

being committed by him generally or specifically. Parenthetically, there is an argument, subject to any qualified privilege or statutory immunity of the **TPS (14th Division)** (which Mr. McLean submits there was and is none), that in light of the conduct, that there is perhaps a violation of section 361 of the *Criminal Code*, “**False Pretense**”. However, Mr. McLean would not be so sanctimonious to not have these officers tried without due process and having their *Charter* rights breached. Two wrongs don’t make a right. Moreover, this would require Constable Romano’s evidence as to what was in his mind at the time of the email. Moreover, it appears to be an obvious and natural inference that Constable Romano was a little bit “jumpy” or “inquisitive” as to where Mr. McLean had gone, even though he was being full disclosure with Constable Romano, was that TPS 14th Division did not have a warrant for Mr. McLean’s arrest. If they did, they simply had to inform him of the same. If they were truly trying to be malicious with Mr. McLean, which he says they were and have been, then the usage of a warrant and drawing it to his attention, along with serving him with a copy, would have been the perfect way to do so. If Mr. McLean departed after that, then they would have Mr. McLean on two criminal offences. However, that is a mere hypothetical.

350. Returning to the “RGB” that Mr. McLean had committed an indictable offence (or the absence of the same) in relation to ss. 264, the only way that Constable Romano
351. As noted in the pleading (**HRTO** Application), the prosecutorial discretion (of which there is no allegation against the Crown at this time as none could be made on reasonable grounds but notice will be provided to the Crown in any event as a direct consequence of the Crown being bound by the *HR Code*, section 47), to proceed by indictment has four potential disjunctive grounds (using the definition and colloquial sense)
- a. “While at large”;
 - b. “Part of criminal organization”;
 - c. “Weapons involvement”; and/or
 - d. Not ordinarily resident of Canada.
352. Mr. McLean’s evidence is unequivocal, direct and absolute in his Declaration #1:
- a. He has never owned a weapon in his life;
 - b. He was not at large;
 - c. He has been an ordinary resident of Canada for 37 years of 41 years of existence

- i. The sole exception was when he was on a student visa at The Ohio State University from 2001 to 2005 where he was hand-picked by arguably the top institution in North America for education and sports on a tennis scholarship that paid his room, board and part of his educational;
- ii. He graduated in 2005 and his student visa elapsed in 2006;
- d. He was not at the time, and never has been, part of a criminal organization.

(see: Declaration #1 of Mr. McLean, on November 5, 2024).

VOLUME #7(C): Warrant representation

353. The warrant representation (or warrant misrepresentation) by Constable Romano appears to have some relevance at first blush but it does not on closer inspection. The “while at large” disjunctive ground for the Crown to proceed by indictment is where an individual has already gone through the arraignment process and has been granted bail or has been granted bail pending appeal or review. These sections, working in concert, evinced an intention by Parliament to provide the Crown with discretion to proceed by indictment with repeat offenders. Nothing could be further from the situation of Mr. McLean.
354. Mr. McLean is not part of any criminal organization so that subsection has no relevance. To the contrary, anything he did, which was not criminal in the least, was on his own accord in relation to unlawful conduct, under the *RTA*, by the **Landlord** and providing notice to Nicole and the **Landlord** as a means of protecting himself and courtesy notices.
355. The only communications at issue, by Mr. McLean (unless an individual was impersonating him), were included in his 19th declaration in the LTB Proceeding. The reason for so many declarations in #7 to #19 were from the time of the **Unlawful Lockouts**. Thankfully, Mr. McLean’s continued swearing of evidence allowed the **Tribunal** to realize the “circumstances” of his nonconsensual ordeal predicated on illegality. Mr. McLean addresses why the results in the LTB Proceeding in the future are somewhat of a “red herring” when it comes to *Charter* analysis in the context of this HRTO Proceeding which has some level of being measured against the conduct of the TPS against the Criminal Code. In cursory fashion, it is all about the temporal nature of the conduct by the TPS in that what happens in the future is a matter of administrative

decision makers and the investigative arm under the RTA. It does not affect what was reasonable on October 2, 2024.

356. The **TPS** (*14th Division*) had his passport and identification by unauthorized collection. Nonetheless, it was and is a valid passport so there was no issue involving him not being ordinarily resident in Canada.

VOLUME #7(D): The Non-Discretionary Indictable Aspects of an Allegation of Criminal Harassment

357. While Mr. McLean is innocent until or if proven guilty, Mr. McLean does not have a criminal record so there was no issue of violence at all let alone against an intimate partner of which he had convicted (see: (s. 515(6)(b.1) of the *Criminal Code*).
358. The distinction between a suspect, as surreal as it is for Mr. McLean to even write such language in relation to emails of a professional tone relating to issues surrounding a **Landlord** attempting to enter a private dwelling in violation of the *RTA* and then, in egregious violation of the *RTA* by **Unlawful Lockouts** of him on September 20, 2024, with knowledge of the same rising to the level of offences therein, being “at large” (discretionary for the Crown to proceed by indictment) versus the offence being one that is a violation of bail itself (i.e. breach of an undertaking or bail condition with those specifics) is self-evident. The former is where a suspect or convicted individual, arrested on reasonable grounds to believe that he or she has committed (*actus reus* and *mens rea*) of criminal harassment, was convicted of another offence or where there were reasonable grounds to charge the individual with another offence but it was not a breach of the release conditions that he or she commit the offence of criminal harassment. The latter is where the release or bail conditions had the specific stipulation to not commit such an offence and the offender was arrested and charged where the peace officer had reasonable grounds to believe that the individual had done so.
359. The non-discretionary element involving the *CDSA*, sections 5 and 7 relate to an individual who, on reasonable grounds to believe may have committed the offence of criminal harassment while being

engaged in offences involving drug trafficking which carry life imprisonment. No evidence of any relevance applied herein.

VOLUME #7(E): If a warrantless arrest, then there must be the potential of an indictable offence

360. Since there was no potential that anything alleged, as farfetched as it might be and even taking it at its highest, involved any of the discretionary or necessary elements of an allegation of criminal harassment being tied or connected with an indictable offence, the warrantless arrest of Mr. McLean on October 2, 2024, at approximately 8:15 p.m. was unlawful. All that flowed from it was unlawful.
361. Whether it was discriminatory is addressed infra. For sake of discourse, it is almost unimaginable that a *prima facie* of discrimination would not be established where an individual has one or more protected characteristics in a protected area like “services” involving the **TPS**, with the largest budget in the billions annually, and that their protected characteristics were NOT a factor in the adverse treatment.
362. The corollaries are most self-evident.
363. Adverse means “unfavourable, bad, difficult, unpleasant, or undesirable”. There is not a single rational and reasonable person that would consider spending their Wednesday evening arrested, detained, imprisoned, handcuffed, fingerprinted and without socks in a cold jail cell, with the fear of spending their night at said prison along with the potential of being brought before a judge for bail as “desirable”. Therefore, adverse is established with ease. The “treatment” or “decision” was the “decision to arrest without a warrant” and that flows to adverse impact or adverse effect.
364. When combining the idiosyncratic facts herein that this **TPS 14th Division** not only possessed Mr. McLean’s medication, without his consent, but Constable Romano explicitly referenced the same in email, the knowledge of the **TPS 14th Division** was unequivocal that it knew that Mr. McLean was prescribed a controlled substance (not merely a medication that was not), the obvious inference is that his mental disorder was a factor in his adverse treatment. There is also no dispute it had an adverse impact upon him.

365. The **Tribunal** can also take judicial notice that there are other medications, which are not controlled substances, that are used to treat ADHD like Vyvanse and Concerta. While Mr. McLean has tried those, they were not as effective for him as Adderall. The reason that has been jointly arrived at by many physicians is that Mr. McLean has an odd subset of ADHD, when combined with a unique blood type (O negative), in that he has excessively high noradrenaline or norepinephrine. The natural pathway or synthesis of the making of dopamine is from phenylalanine to tyrosine to L-dopa to Dopamine. However, with over supplementation of vitamin C and copper, dopamine is converted into noradrenaline and then with SAME and niacin, the noradrenaline is converted into adrenaline. Therefore, people with the ADHD with high levels of noradrenaline are in a state of jumpiness or jitteriness and are seen as “adrenaline junkies”, “lovers of constant movement”, “can’t sit still types” or “restless-leg syndrome”. There is a distinction between ADD and ADHD. It is why medication like Adderall is so successful for those with ADHD (high norepinephrine) because it causes the body to produce more dopamine. When combined with the likes of alkaline diet, particularly with those O negative blood, a process of “ion trapping” is engaged which keeps the Adderall in the body (as it is weak base) and leads to more dopamine-linked activities. It is somewhat counter-intuitive that a methamphetamine would do so, but on a scientific level it is not.

VOLUME #7(F): Egregious falsehoods and unlawfulness: motive for the **False Pretense Email** (which contained Deceit, Falsehoods and OFM)

366. Returning to the unlawful and warrantless arrests, the “false pretense email” is of the utmost importance when considering the unlawfulness of the arrest.

367. Had the police officers, claiming to have a fictitious warrant, approached Mr. McLean in the streets, with witnesses, not only would he have been able to walk away, the potential witnesses would have affected their conduct.

VOLUME #7(G): Returning to *Joseph v. Meier*

368. In *Joseph v. Meier*, the BCSC found:

[32] While I am not satisfied that Cst. Meier specifically advised Ms. *Joseph* that she was detained and the reason it, even if he had done so she need not have provided her name or permitted Cst. Meier to search her bag as part of the investigative detention. As the Court said in *R. v. Grant*, 2009 SCC 32:

[21] More specifically, an individual confronted by state authority ordinarily has the option to choose simply to walk away: *R. v. Esposito* (1985), 1985 CanLII 118 (ON CA), 24 C.C.C. (3d) 88 (Ont. C.A.), at p. 94; *Dedman v. The Queen*, 1985 CanLII 41 (SCC), [1985] 2 S.C.R. 2, at p. 11, citing Martin J.A. in the Ontario Court of Appeal ((1981), 1981 CanLII 1631 (ON CA), 32 O.R. (2d) 641, at p. 653):

Although a police officer may approach a person on the street and ask him questions, if the person refuses to answer the police officer must allow him to proceed on his way, unless . . . [he] arrests him .

...

[33] At points in its argument the defence refers to the offence of obstruction. Cst. Meier did not suggest in evidence or argument that he arrested Ms. *Joseph* for obstruction. He arrested her for theft. There is no suggestion in his evidence or argument that he had reasonable grounds to arrest her for obstruction.

VOLUME #7(H): Returning to McLean v. TPS

VOLUME #7(H)(i): The absence of any investigation or questions of Mr. McLean in relation to the purported criminal complaint

369. It is unassailable that the only questions that Constable Romano posed to Mr. McLean were in the nature:
- a. “Who are you?” [in relation to when he attended on October 2, 2024, in the evening]
 - b. Other follow up questions in relation to the same.
 - i. He then followed up, with, presumed at the time, courtesy, as to obtaining the McLean property and McLean Medication from the represented “temporary lockers”
 - c. “Where did you go?” [in relation to Mr. McLean proceeding up the street to College Street to utilize the facilities at a local restaurant]
 - i. Other follow up questions in that regard when Mr. McLean proceeded to the parking lot of the TPS 14th Division to perform some of his multi-daily stretches and exercises;

370. It is forcefully, in the linguistic sense, emphasized that there were no questions posed by Constable Romano (and then DCK) before Constable Romano uttered the words, “You are under arrest” for “criminal harassment”.
371. This occurred within seconds as he walked Westbound through the 14th a division foyer or lobby and was INTRODUCED to DCK, and after Mr. McLean went to sign a receipt for the McLean Property which was in a clear white plastic bag with a red seal on the top of the same.
372. The underlying reason for the emphasis of the same is that Mr. McLean was NEVER even asked regarding whether he would consent to an investigative questioning period regarding an alleged complaint by Nicole or on her behalf.
373. The usage of ‘purported criminal complaint’ is not to trivialize the criminal complaint made but that Mr. McLean’s position, in the context of the HRTO Proceeding, is that if the criminal complaint was not made by Nicole, then it is likely void ab initio. He has cited secondary sources in this regard from police websites in the TPS and others in Ontario outside the GTA.
374. The TPS could not have investigated the matter *per se* considering that the four-hour period from the time of the represented drop off of the McLean Property on October 2, 2024, to the time of the FPE [False Pretense Email] was so limited. To the extent that the TPS and TPS Respondents claim or submit, with or without evidence, that they did investigate the same, it is hard to give that any level of credibility on its face or that it was sufficient time to do the same. There are also issues herein as to the hours of work or employment for Constable Romano and DCK. While Mr. McLean does not know the same *per se*, their shifts would have to be either starting at that time or somewhere in the middle of those assigned work hours.
375. To the extent that DCK was mistaken in whom he spoke to or emailed (perhaps by way of Mr. McLean being impersonated by another), then he had a duty to inquire with Mr. McLean as to whether he, in fact, spoke to him. A mistaken arrest can happen based on fraud and impersonation (and now even AI in our current context (see: *infra* regarding “contextual analysis” involving *Charter* rights, particularly step 2 in the Collins test) but that is why is why the statements as follows have been around since the onset of the English language:
- a. “To err is human”; and
 - b. “There is never a wrong time to do the right thing.”

376. The overriding evidence that diminishes or eradicates any possibility that DCK contacted Mr. McLean is that Constable Romano emailed him and did not note anything in relation to the same. A reasonable person, viewing this through the lens of the TPS (standing in their shoes), would think that a TPS officer emailing Mr. McLean would have mentioned it even in passing or implicitly. It is inconceivable that happened after Mr. McLean's email to Constable Romano as Mr. McLean walked from King Street in Toronto to 350 Dovercourt avenue (which is slightly north of Dundas Street). Moreover, it could not have happened between the time of the email from Constable Romano's email to Mr. McLean's email (some 15 minutes or so or less).
377. Moreover, it did not happen, by Mr. McLean's evidence which is uncontroverted and he is the only individual who could declare unequivocally whether it did or did not, between three p.m. and the time of the Constable Romano email.
378. Further, why would Mr. McLean be introduced to DCK if DCK had already warned him? That question answers itself.
379. Moreover, at no time did the TPS say, "Mr. McLean, DCK erred in his statement but you were warned by the complainant on [these dates]." The reason for the same was that Mr. McLean never was.
380. Again, it must be belaboured by Mr. McLean, which may seem to odd to a lay person or even a reasonable one, that Mr. McLean is not suggesting or implying that the TPS and TPS Respondents are "bad people" and have not conducted their careers in exemplary fashion. Moreover, he is not suggesting that they are poor human beings outside of work. He is not one of those individuals on a tirade about "defunding the police" or "curtailing police powers". In his evidence, he remains of the view that the US criminal justice system is the one that Canada needs to move closer to and that Canadian criminal justice system is far too lenient.
381. Mr. McLean is the first to admit that he has likely made more mistakes in life, professions et al that all of the TPS Respondents combined. The distinction is that he did not apply and become an officer. He never sought to become part of a public body.
382. Mr. McLean puts the TPS and TPS Respondents to strict proof regarding all of his facts and to dispute, under oath, his evidence.
383. With the situation, now somewhat fortuitous in the HRTO Proceeding, of Mr. McLean having his computer, wallet, passport et al stolen on Friday, October 25, 2024, in a local hospital, Mr. McLean's declaration #1 is current to the time that he has scoured not only his current email being utilized herein

but others and there is NOT one email from DCK. Fortunately, DCK is the arresting officer, and he has his email by way of his badge number.

384. Even to the extent that DCK claims he sent a warning to Mr. McLean, it could only have been on October 2, 2024. In that vein, Mr. McLean would have had to have violated or went against the alleged warning after that time for it to demonstrate that he was engaging in communications with knowledge. While a hypothetical, it is one that had to be addressed.
385. As a result of the same, Mr. McLean’s analysis rests on that the Fictitious Warrant Representation was a “change of position” by the TPS and it has stood by that change of position. Therefore, the analysis herein focuses on section 495 of the Criminal Code and section 29 of the Criminal Code. As it remains unclear whether a warrant existed at the time of the arrest, which seems nearly impossible, Mr. McLean addresses it in the primary that it did not exist and in the alternative in the event it did exist. While either would lead to a *Charter* breach, particularly section 8 of the *Charter*, pursuant to a breach of section 29 of the Criminal Code and the binding appellate decision of Bohn, the consequences and relief sought will be different herein and perhaps outside of the same.
386. Mr. McLean was then charged with one singular offence which was an alleged contravention of section 264(b) of the *Criminal Code*. The information was most deficient and it is impossible to even know how to even defend the same. There has been no attempt by the **TPS** to update the information.
387. The **HRTO** can now infer that the only reason that Constable Romano wished Mr. McLean to attend the *14th Division* without providing any alternative-like delivery of the **McLean Property** and medication was to lure him, on false pretenses, into the *14th Division* for a “hidden and secret purpose”.

VOLUME #7(I): Reasonable and Probable Grounds

388. To reincorporate from the **HRTO** Pleading: “The reasonable grounds must be both objective and subjective reasonable. Reasonable grounds is the point where **credibly-based probability** replaces suspicion. The concept of “reasonable grounds” is defined as the point where a credibly-based probability replaces mere suspicion. In a 2013 decision, *R v Phung*, the Alberta Court of Appeal clarified that an arrest is objectively reasonable when a reasonable person, considering the circumstances and taking into account

the officer's training and experience⁴⁷, would find reasonable and probable grounds for arrest if they were in the officer's shoes.

389. From what the **Applicant** has found online, DC Michael Kolankowski has a salary of \$130,000 per year.
390. The analysis is at the time of arrest from a *Charter* standpoint and an **HRTO**-vantage point; specifically, whether this was ***inexplicable*** departure from usual practices to establish a claim of discrimination.
391. It is important to note that the validity of an arrest is determined based on the circumstances that were apparent to the police officer **at the time** of the arrest, not what came to be known later. The formation of reasonable grounds does not require a *prima facie* case, meaning the officer does not have to prove the guilt of the accused beyond a reasonable doubt.⁴⁸ However, the officers need to have reasonable and probable grounds on Wednesday, October 2, 2024 at approximately eight p.m.

VOLUME #7(J): Detention is distinct from arrest

392. In Canada, the police have the authority to detain and arrest individuals under the *Criminal Code of Canada* and common law.
393. While a warrant issued by a Justice of the Peace or Judge is typically required for an arrest, there are certain situations where the police can make an arrest without a warrant. These circumstances are outlined in section 495(1) of the *Criminal Code*. They are the exceptions to the requisite standard of an individual or a peace officer swearing evidence under oath, under the penalty of the perjury, so the JOP or Justice can assess the validity, reliability, and credibility of the evidence so the police are authorized to arrest an individual for an alleged offence.
394. According to the *Criminal Code*, a peace officer may arrest without a warrant in the following situations:

- (a) When a person has committed an **indictable offence** or the officer believes, on reasonable grounds, that the person has committed or is about to commit an indictable offence [answer: no];
- (b) When a person is found committing a criminal offence [answer: No. The **Applicant** came in peace with a smile and polite attitude, and he left re-clamping his belt, adjusting his socks with a mere t-shirt and sleeveless vest on]; or
- (c) When a person is believed to have a warrant of arrest or committal in force within the territorial jurisdiction where the person is found [answer: While Constable Romano mentioned a warrant for the **Applicant**'s arrest, the **Applicant** would welcome reviewing that evidence under oath by whomever sought the same].

395. However, section 29 of the CC is a full answer to the above. Even if the TPS and TPS Respondents could argue that they did not have a physical copy on them or there was some emailing issue of the same from the courthouse or JOP to them on October 2, 2024, they could have emailed Mr. McLean a copy later on. Mr. McLean will in this regard hold some cards close to his vest to test the credibility of the TPS.
396. For an arrest to be lawful, the officer must have both objective and subjective grounds. This means that the reasonable grounds for arrest must be both objectively reasonable and based on the subjective belief of the officer.

VOLUME #7(K): The distinction between “Reasonable Suspicion” and Reasonable and Probable Grounds (‘reasonable grounds to believe’): applies in the arrest context and search and seizure

<i>R. v. Kang-Brown</i> , 2008 SCC 18 (CanLII), [2008] 1 SCR 456

397. The SCC in Kang-Brown:

“[164] In my view, “reasonable grounds to suspect” is substantively equivalent to “reasonable suspicion”. It is clear that the standard adopted by Iacobucci J. in *Mann* is lower than that of “reasonable grounds to believe”, and that it was inspired by the “articulable cause” standard, which has been equated to that of reasonable suspicion: see *R. v. Jacques*, 1996 CanLII 174 (SCC), [1996] 3 S.C.R. 312, at para. 52, *per* Major J. In my view, the “reasonable suspicion” standard is readily applicable in practice, is meaningful to the police and trial judges, and is likely to be used in cases **other than those involving detention**.⁴⁹ Thus, in the case at bar, the trial judge, after discussing *Mann* at length, framed her analysis of the grounds required to detain the accused in terms of reasonable suspicion: see para. 55.

[165] The reasonable suspicion standard is lower than the standard of reasonable grounds to believe required for a **lawful arrest**: see *Mann*, at para. 27. To meet the reasonable

suspicion standard, the police must rely on “a constellation of objectively discernible facts”: *R. v. Simpson* (1993), 1993 CanLII 3379 (ON CA), 12 O.R. (3d) 182 (C.A.), at p. 202, *per* Doherty J.A. While no single factor can on its own ground reasonable suspicion, a number of factors taken together may cause the police to entertain a reasonable suspicion. However, a mere “hunch based on intuition gained by experience” is **not** enough to meet the reasonable suspicion standard: *Mann*, at para. 30.

[166] The reasonable suspicion standard is a pragmatic and balanced response to the realities of modern law enforcement. To combat impaired driving, for example, Parliament enacted s. 254(2) of the *Criminal Code*, R.S.C. 1985, c. C-46, which authorizes peace officers to require drivers to provide roadside breath samples for testing by means of an approved screening device on the basis of a reasonable suspicion of alcohol consumption. According to Fish J. in *R. v. Woods*, [2005] 2 S.C.R. 205, 2005 SCC 42, at para. 30, “[t]hese screening tests . . . necessarily interfere with rights and freedoms guaranteed by the *Charter*, but only in a manner that is reasonably necessary to protect the public’s interest in keeping impaired drivers off the road.”

[167] The reasonable suspicion standard has also been held to apply in the customs context, in *R. v. Monney*, 1999 CanLII 678 (SCC), [1999] 1 S.C.R. 652, and *Jacques*, and where, as in *Clayton*, the police are confronting the pressing problem of gun crime. Reasonable suspicion means “reasonable grounds to suspect” as distinguished from “reasonable grounds to believe” (Kang-Brown, at paras. 21 and 25, *per* Binnie J., and at para. 164, *per* Deschamps J.). To the extent one speaks of a “reasonable belief” in the context of reasonable suspicion, it is a reasonable belief that an individual *might* be connected to a particular offence, as opposed to a reasonable belief that an individual is connected to the offence. [nota bene: if there is no offence, there is nothing to be connected to].

VOLUME #7(L): Application of the Law to the Facts

398. When Mr. McLean referred to “entrapment”, this is where the lies and falsehoods increased exponentially by Constable Romano and DC Kolankowski in succession in relation to the groundless and baseless charge of criminal harassment [words to the effect]:

- a. Mr. McLean: oh that is entrapment. You entrapped me
- b. Constable Romano: it is not entrapment;
- c. Mr. McLean: harassment? Whom? When? Where was the warning of any conduct that rose to the level of harassment?
- d. DC Kolankowski: I warned you. I warned about it.
- e. Mr. McLean: I never met you before in my life. I did not even know your name.

- f. DC Kolankowski: [blank look]
- g. Constable Romano: well there is a warrant for your arrest as well.
- h. Mr. McLean: oh warrant? I would like to see that warrant.

399. To be objective, Mr. McLean’s use of the word “entrapment” was incorrect in the legal sense. He was perhaps correct when considering the colloquial usage of the word. However, “entrapment” in the criminal sense is entrapping an individual to commit a crime that they would not have otherwise committed but for the entrapment.

VOLUME #7(M): The significance of proceeding by indictment at Crown discretion or by necessity

400. There is nothing in the emails to one Ms. Nicole Artopoulos that has any resemblance to harassment in the civil sense let alone the criminal sense. They are in evidence before the LTB.

401. At the time of drafting this Motion Submissions, there is yet another piece of evidence that gives credence to the lawful authority in which Mr. McLean was engaged in and that is the “Rental Housing Enforcement Unit” has

402. The relevant sections of the *Criminal Code* that the AGC and Smithers RCMP attempted to rely upon were:

Reasonable Grounds to Arrest/ s. 25 of the *Criminal Code*

[20] The defendants argue that s. 25 of the *Code* protects Cst. Meier (and indirectly the federal crown) from liability. S. 25 provides:

25 (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law

...

(b) as a peace officer or public officer

...

is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

[21] To come within s. 25, the defendants must establish that Cst. Meier was authorized to arrest Ms. *Joseph*; that he acted on reasonable grounds; that he used no more force than necessary: *Crampton v. Walton*, 2005 ABCA 81. The provision also provides a defence to civil liability: *Crampton* at para. 5.

[22] Constable Meier asserts that he arrested Ms. *Joseph* pursuant to s. 495 of the *Criminal Code*. That section permits a peace officer to arrest without warrant a person who, on reasonable grounds, he believes has committed an indictable offence. He says that he arrested Ms. *Joseph* for theft (s. 322).

[23] There is no issue between the parties that before an officer may arrest without a warrant he must have reasonable grounds to do so. The officer must subjectively believe that there are reasonable grounds to arrest and those grounds must be objectively reasonable: *R. v. Jowett Work*, 2019 BCCA 236; *R. v. Storrey*, [1990] 1 S.C.R. 241, 1990 CanLII 125.

[24] As discussed in *Crampton*, the assessment of whether there were “reasonable grounds” is the same under s. 25(1) as under other provisions of the *Code*:

19 The second element of the s. 25(1) defence requires the court, having determined that the type of action falls within the scope of the police officer's law enforcement duties, to examine the basis for the action and manner in which the action was carried out. The police officer must act on "reasonable grounds". Until a 1985 *Criminal Code* amendment, s. 25(1) required a police officer to act on "reasonable and probable grounds": R.S.C. 1985, c. C-46. Cases that refer to reasonable and probable grounds must be read in this light.

20 The phrase "reasonable grounds" also appears in s. 32(1) of the *Criminal Code*, which justifies the use of force to suppress a riot. In evaluating the conduct of a police officer, the court is to place itself in the shoes of the officer and assess whether reasonable grounds existed for the actions taken: *Berntt v. Vancouver (City)*, 1999 BCCA 345 (B.C. C.A.) at paras. 35-37. See also *R. v. Storrey*, 1990 CanLII 125 (SCC), [1990] 1 S.C.R. 241 (S.C.C.).

21 The modified objective test used in relation to s. 32(1) is equally applicable in determining reasonable grounds under s. 25(1). See, for example, *Chartier, supra*, at para. 59. In order to satisfy the second element of s. 25(1), namely that the police officer acted on reasonable grounds, the court must determine whether there was an objectively reasonable basis, given the circumstances faced by the police officer, for the actions undertaken by the officer.

Although the above passage refers to reasonable grounds under s. 32, the comments are equally applicable to the assessment of reasonable grounds under s. 495 of the *Code*.

VOLUME #7(N): Two different theories by different “constables” or “officers”: both were incorrect

403. There is one sufficient reason that the arrest could never be considered objectively reasonable is that it required two officers to arrest Mr. McLean and their reasons were entirely discrepant. DC Kolankowski grounded his reasons (pardon the pun) in the Fictitious Warning. Constable Romano grounded his reasons, as somewhat of a “save” to his partner, in the Fictitious Warrant.
404. However, the **Tribunal** can take judicial notice that it is DC Kolankowski that was the arresting officer on the “books” and the contact that Mr. McLean remains required to contact for his change of address. Mr. McLean remains the sole remaining tenant at Unit 410 as a matter of law. Because he was and is unlawfully locked out by the **Rental Unit 410** and the Minto Complex does not displace his legal status. The LTB and the ONSC have been unequivocally clear in their analysis in this regard. In *Ottawa-Carleton Association*, citing the pre-eminent scholarly authority in residential tenancy law in Ontario in Mr. Jack Flemming, the ONSC found that any individual who was a tenant at the time of the illegal lockouts or illegal eviction must be restored to their previous position. This sounds common sensical but some landlords, long in the purse, think they can suffer the costs of compensation and damages but both remedies have been ordered consistently since 2020.
405. However, like any decision in another court or tribunal fora, it is not determinative of the issues involving the *Charter* and the *HR Code*. As will be discussed infra, even the decision of an Attorney General of a province to proceed with a criminal charge is instructive and persuasive of whether malicious prosecution is at issue but it is not determinative. Even after an individual may be convicted of an offence, there are appeal and fresh evidence which sheds a new light on the nature of the complaint and what set the “wheels in motion” for a criminal charge.

VOLUME #7(O): The requirement of the peace officer to present an arrest warrant

406. The importance of an arrest warrant along with its consequences for non-compliance cannot be understated. When a warrant (which can only be issued by a justice (including a justice of the peace)) is obtained and then presented to a suspect, the suspect undoubtedly knows that such a warrant is an order of a justice – not merely the executive branch of government seeking to purportedly enforce laws – but that said justice has reviewed the “information” (evidence sworn under oath by the complainant or the peace officer which carries penalty of perjury charges for false information presented in an intentional or reckless fashion) and acted independently, as all justices are, in determining whether there is sufficient evidence (reasonable grounds to believe) that the alleged suspect has committed said offence. The process is one of some deliberation on behalf of the executive branch and that of the judiciary. It is not a matter that is deliberated over flippantly.
407. This is distinct from administrative warrants issued pursuant to legislative or regulatory powers which are always presumptively unreasonable because they warrantless. Put another way, warrants can only be issued by justices or justices of the peace. However, if an administrative decision maker issues a warrant for search and seizure (not an arrest warrant *per se*), they are often relying upon being authorized by statute, the statute is reasonable in its scope of search and seizure, and the search or seizure is carried out in a reasonable manner.

VOLUME #7(O): <i>Hunter et al. v. Southam Inc.</i>, [1984] 2 SCR 145 [“Hunter”]

408. The Hunter criteria can be summarized as follows:
- a. 1. there is a system for prior authorization by an entirely neutral and impartial arbiter;
 - b. 2. the arbiter must be satisfied that the person seeking the authorization has reasonable grounds, established under oath, to believe an offence has been committed;
 - c. 3. the arbiter must be satisfied that the person seeking the authorization has reasonable grounds to believe that something which will afford evidence of a particular offence under investigation will be recovered; and,
 - d. 4. the only documents authorized to be seized are those strictly relevant to the offence under investigation.

VOLUME #7(O): If no valid arrest, then no search and seizure powers, and imprisonment powers are invalid

409. If there is no valid arrest, or it was predicated on false grounds, then all the search and seizure powers purportedly incident to arrest are void *ab initio*.

VOLUME #7(O): Constable Romano's misrepresentation about a warrant

410. DC Kolankowski's misrepresentation that he had warned Mr. McLean is a severe and egregious misrepresentation but it could be chalked up as a mistake. It is a misrepresentation about he did or did not do.
411. However, when a constable, like Constable Romano, misrepresents that the **TPS** has a warrant for arrest, when it does not, that is blasphemous, sacrilegious and profane to the very separation of powers of government between the legislative branch, the executive branch and the judiciary. It is tantamount to the **TPS**, as an executive branch, usurping the power of the judiciary by falsely claiming to have a warrant.
412. Moreover, the conduct of the **TPS 14th Division** demonstrates a flagrant disrespect for our provincial Legislature in contravening the *HR Code* and the standards set by Parliament in the *Criminal Code*.

VOLUME #7(O): First Instance Warrant

413. The first instance warrant has been described by lawyers opining on the same on their public law firm websites as follows:

Arrest Warrants in Ontario

An arrest warrant is a piece of paper usually issued by a justice or a provincial court and signed by a judge, legally permitting a police officer to arrest a person. However, there are two types of arrest warrants in Ontario: (i) a first-instance warrant; and (ii) a bench warrant.

With either type, you can be arrested at any time but there are some important differences with how they are issued and the legal consequences.

First-Instance Warrant

This is issued when police have charged but **cannot locate** a person. However, an arrest warrant is often issued by a judge in cases where law enforcement officers require assistance in arresting somebody.

VOLUME #7(O): Application of the Law to the Facts (at the material time)

414. This is where the “warrant representation” lacks any semblance of credibility, reliability and believability because if the **TPS** could not locate Mr. McLean, they would have sworn evidence prior to the Romano Email or **False Pretense Email**. It would then have rendered the ITO to be deliberately misleading. Moreover, Mr. McLean attended on September 21, 2024, and had a dialogue, albeit admittedly somewhat foggy for him considering the day before he was subject to the **Unlawful Lockouts**, with Officer Solermo. Officer Solermo was aware of his name, he provided his identification and copies of his identification contained in the delivered package. If there was a warrant for Mr. McLean at the time, he would not have left the *14th Division* that day. Moreover, to the extent that a warrant was issued between that time and October 2, 2024, then the *14th Division* **TPS** would have had evidence that unequivocally demonstrated that it could not locate Mr. McLean during that period.
415. The **Tribunal** can take judicial notice that you are not a particularly difficult person to locate when you are constant dialogue with the LTB, filing with the LTB on a regular basis, in communication with the RHEU, you are 6’2”, approximately 200 pounds, and operating within a radius of some three to four kilometers. Moreover, Mr. McLean was particularizing under oath dates of his medical appointments, where he was, when he was attending, how he was printing out documents, and so on.
416. Moreover, Constable Romano’s email to Mr. McLean demonstrated that the **TPS** emailed him with ease and it was the first email that he had received from the **TPS**.
417. If the **TPS** cannot locate Mr. McLean, it obviously raises some thought-provoking conversation about the **TPS**’s ability to locate any potential suspect – particularly if there is urgency involving a known criminal.

This could not be the case and Mr. McLean does not doubt the **TPS**' ability to locate people with extreme ease with all of their acumen and intelligence.

418. The more plausible, probable and acceptable explanation was that there was no warrant to arrest Mr. McLean.
419. There are some likely theories as to why Sergeant Cassidy input "NFA" on the undertaking document, despite holding his license where he still receives all of his mail, which are as follows:
- a. To provide some level of justification, validation, or rationalization for why Mr. McLean was arrested at the **TPS 14th Division**;
 - b. A misguided theory that it could somehow seek a warrant *post-facto*; and
 - c. Others.
420. What is required for an arrest warrant under the *Criminal Code* involving an individual like Mr. McLean with no outstanding charges, no criminal record, located within the City of Toronto, and one that was responsive to emails, and had already presented himself to the *14th Division* seeking its services and assistance?
421. The question answers itself to some degree. However, there was no issue in locating Mr. McLean. He had already attended the **TPS 14th Division**. He had been active in his LTB Proceeding. He responded promptly to Constable Romano.

VOLUME #7(P): Section 493 of the <i>Criminal Code</i>

422. Section 493 of the *Criminal Code*:

PART XVI Compelling Appearance of Accused Before a Justice and Interim Release
Interpretation

493 In this Part,

accused includes

- (a) a person to whom a peace officer has issued an appearance notice under section 497, and
- (b) a person arrested for a criminal offence; (*prévenu*)

appearance notice [Repealed, 2019, c. 25, s. 209]

judge means

- (a) in the Province of Ontario, a judge of the superior court of criminal jurisdiction of the Province,
- (b) in the Province of Quebec, a judge of the superior court of criminal jurisdiction of the province or three judges of the Court of Quebec,
- (c) [Repealed, 1992, c. 51, s. 37]
- (d) in the Provinces of Nova Scotia, New Brunswick, Manitoba, British Columbia, Prince Edward Island, Saskatchewan, Alberta and Newfoundland and Labrador, a judge of the superior court of criminal jurisdiction of the Province,
- (e) in Yukon and the Northwest Territories, a judge of the Supreme Court, and
- (f) in Nunavut, a judge of the Nunavut Court of Justice; (*juge*)

warrant, when used in relation to a warrant for the arrest of a person, means a warrant in Form 7 and, when used in relation to a warrant for the committal of a person, means a warrant in Form 8. (*mandat*)

VOLUME #7(P)(I): Section 493 and Form 7

423. In borrowing the synopsis and summary from the law firm website of Paul Lewandoski Professional Corporation, the Applicant provides the below to distinguish between section 493 and 495. But for the interjections of analysis by Mr. McLean, all other information under this heading is that Paul Lewandowski Professional Corporation.
424. This section defines the term warrant in relation to arrest and committal warrants in specific forms.
425. In this Part, "warrant", when used in relation to a warrant for the arrest of a person, means a warrant in Form 7 and, when used in relation to a warrant for the committal of a person, means a warrant in Form 8.
426. Section 493 of the *Criminal Code* of Canada provides definitions for the term "warrant" in relation to warrants for the arrest or committal of a person. The section requires that these warrants be in specific

forms (Form 7 for arrest warrants and Form 8 for committal warrants). These forms provide standardized and uniform language for warrants, ensuring that they are legally valid and easily recognizable by police, lawyers, and judges. The purpose of these warrants is to give law enforcement the authority to **immediately** arrest or detain a **person** suspected of committing a crime.

VOLUME #7(P)(I)(a): Application of the Law to the Facts

427. The lack of immediacy from the Constable Romano Email or **False Pretense Email**, which could have been authorized by an individual other than himself, which reference seven days to pick up his property and medication or it would be sent to some bureau (which is odd in of itself), is a reason why there could not have been a warrant at the time.

VOLUME #7(P)(II) Arrest warrants vs. Committal Warrants

428. Arrest warrants are typically issued when a person is suspected of committing an offence, while committal warrants are issued when a person has been charged with an offence and needs to be held in custody until their trial date. These warrants are an important tool for maintaining public safety, as they allow police officers to quickly and efficiently take dangerous criminals off the streets. By providing clear definitions for the form of these warrants, section 493 ensures that law enforcement and the justice system can operate effectively with minimal confusion or errors. This helps to protect the rights of both the accused and the public, as these warrants must meet specific legal requirements before they can be issued. Overall, section 493 plays an important role in ensuring the smooth functioning of the criminal justice system in Canada.

VOLUME #7(P)(II)(a): Application of the Law to the Facts

429. Again, Mr. McLean has no criminal record at 41 years of age. The notion he would be mentioned in the same breath as a dangerous criminal would be absurd. There was no evidence to suggest the same.

VOLUME #7(Q): The Form 7 Warrant

430. The importance of having clear definitions and forms for warrants cannot be overstated. Warrants play a crucial role in the administration of justice, allowing law enforcement officials to take individuals into custody and present them before the appropriate legal authorities. Without clear guidelines as to what constitutes a valid warrant, there would be significant potential for abuse of power and miscarriage of justice.

VOLUME #7(Q)(I): Issued by a Justice or JOP

431. Form 7, the arrest warrant, is arguably the more well-known of the two forms. This document is issued by a judge or justice of the peace and provides law enforcement officials with the legal authority to take an individual into custody.

VOLUME #7(Q)(II): Requirements: specific information, about the person to be arrested

432. It must include specific information about the person to be arrested, including their name and physical description, as well as the reason for the arrest. The use of Form 7 ensures that arrests are made based on a clear legal basis and with a specific individual in mind.⁵⁰

VOLUME #7(Q)(III) There must be some form of investigation prior to seeking a warrant

433. Section 493 of the *Criminal Code* of Canada is of pivotal importance in the criminal justice system as it outlines the definition of a warrant and its forms. A warrant is an authorization issued by a judge to law enforcement officials to do or not do something related to a criminal investigation.
434. When dealing with this section of the *Criminal Code* of Canada, there are several strategic considerations that need to be taken into account to ensure the efficient processing of warrants, the protection of

individuals' rights, and the successful prosecution of criminal offenses. One strategic consideration when dealing with Section 493 is ensuring that warrants are issued in accordance with legal procedures.

<i>VOLUME #7(Q)(IV): Law enforcement officers requirement</i>	Probable cause

435. Law enforcement officers must have probable cause to believe that a person has committed a crime and should be arrested in order to request a warrant.

<i>VOLUME #7(Q)(V): Adequate evidence</i>

436. The judge must then be presented with adequate evidence to issue the warrant.

<i>VOLUME #7(Q)(VI): Failures by law enforcement</i>

437. Failure to follow these procedures can lead to legal challenges and the dismissal of evidence obtained through the warrant.

<i>VOLUME #7(Q)(VII): Clarity and accuracy of the warrant's language</i>

438. Another strategic consideration is the importance of accuracy and clarity in the warrant's language.

<i>VOLUME #7(Q)(VIII): Appropriate Form</i>

439. Warrants must use the appropriate form, and all details regarding the person being arrested, such as their name, address, and identification information, must be precise.

<i>VOLUME #7(Q)(IX) Risk of errors and omissions</i>

440. Any errors or omissions in the **warrant** can lead to legal challenges, the exclusion of **evidence**, and the release of the arrested person.

VOLUME #7(Q)(X): After obtaining a valid warrant – during the arrest and detention process

441. A third strategic consideration when dealing with this section of the ***Criminal Code of Canada*** is the importance of respecting individuals' rights during the arrest and detention process. Officers must provide clear and concise **information** regarding the reason for the arrest and the right to legal **counsel**. Any violation of these rights can lead to legal challenges, the exclusion of **evidence** or the release of the arrested person.

VOLUME #7(Q)(XI): Applicant's Query – subject to further research

442. The **Applicant** queries, on these facts, if an applicant, like Mr. McLean, detrimentally relies on a misrepresentation for attendance, based upon the unauthorized collection of his property and medication (all absent his consent by disclosure by the **Landlord** and receipt by the **TPS**), and the **TPS** had no legal grounds to arrest Mr. McLean in public (if possible) and/or in a private dwelling, room, house, and/or area, where REOP is higher than the *14th Division* **TPS**, is the charge itself nullified if created *per se* after the arrest? The **Applicant** does not know the answer to that issue and will not speculate until he has reasonable grounds to tender such a legal conclusion.

VOLUME #7(Q)(XII): Failure to comply with the requirements: dismissal of a case against an accused

443. There are several strategies that can be employed to ensure the successful use of Section **493** of the ***Criminal Code***. First, law enforcement officers should ensure that they gather adequate **evidence** to support the issuance of a **warrant**, as the absence of sufficient **evidence** can result in the dismissal of a case.
444. Second, officers must ensure that they use the correct form of **warrant** to avoid legal complications.

VOLUME #7(Q)(XIII): If no investigation, then the Form 7 and section 493 process cannot be used in good faith or lawfully

445. In conclusion, Section **493** of the **Criminal Code of Canada** outlines the definition and forms of warrants, an essential tool in criminal investigations. When dealing with this section, several strategic considerations need to be considered, including the importance of following legal procedures, accuracy and clarity of the warrant's language, and respecting individuals' rights.

VOLUME #7(R): Arrest warrants: to quash or not quash (certiorari)

446. Like any judicial authorization, it is subject to review and quashing. In order for the arrest warrant to have been valid, In criminal law, they are referred to as “Garfoli applications”. The principles are as follows. McLean relies on the following case and the principles are stated generally because of the fact that is inevitable there was no warrant:

- a. *R v Campbell*, 2010 ONCA 588 (CanLII), 261 CCC (3d) 1, per Juriansz JA, at para 45 aff'd at 2011 SCC 32 (CanLII), per Charron J;
- b. *R v Shier*, [1998] OJ No 5 at para 48;
- c. *Quebec (Attorney General) v Laroche*, 2002 SCC 72 (CanLII), [2002] 3 SCR 708, per LeBel J; and
- d. *R v Collins*, 1989 CanLII 264 (ON CA), 48 CCC (3d) 343, per Goodman JA, at p. 356.

447. A "Garofoli Application" refers to the procedure for determining the validity of a judicial authorization. This test applies equally to any motion to quash a court authorization.

VOLUME #7(R): Burden

448. A warrant, like any court order, is presumed valid. Consequently, the burden is upon the accused to prove the ITO was insufficient.

<i>VOLUME #7(R)(I): Standing</i>

449. Before a party can make such an application to exclude evidence collected by way of a search warrant, they must have standing, which requires that there be an established Reasonable Expectation of Privacy.

<i>VOLUME #7(R)(II): Reliance on Record</i>

450. A trial judge is entitled to determine whether an authorization "could have been granted based on the record that was before the authorizing justice, as amplified on review."

<i>VOLUME #7(R)(III): Test on Review</i>

451. The base test for review of a search warrant is "whether there was reliable evidence that might reasonably be believed on the basis of which the authorization could have issued, not whether in the opinion of the reviewing judge, the application should have been granted at all by the authorizing judge."
452. The review is not a "de novo" hearing into its validity.
453. The standard of review for an authorization is a "limited" one. If the authorizing justice "could have" issued the warrant, then the judge should not interfere. Stated differently, the reviewing judge must be satisfied that there is "no justifiable basis" upon which the justice could have granted the warrant.
454. When assessing the validity of the ITO the analysis must not elevate quibbles into substance.
455. A warrant is to be evaluated based on what the investigators did do, not what the investigators could have done. A failure to take investigative steps is only relevant as it relates to whether the ITO discloses sufficient grounds to authorize the warrant.
456. Where there is an application to quash a warrant and return seized items, it is proper that the police refrain from re-applying for a new search warrant. It is preferred that they wait until such time as the warrant is quashed and then re-apply.

VOLUME #7(R)(IV): Drawing Inferences

457. This test contemplates whether the information found in the ITO by itself and "drawing reasonable inferences" could have been sufficient.

VOLUME #7(R)(V): Invalidating a Warrant with RPG

458. A reviewing court may invalidate a warrant despite there being reasonable and probable grounds where it is for the purpose of protecting "the process and the preventative function it serves." [15] This is however a high threshold

VOLUME #7(R)(VI): Assessing Reliability

459. There is no need for the affiant to expressly refer to the testimonial reliability of the informant. The reviewing judge can assess that from the factual circumstances revealed in the affidavit. The court is to take a "global view" of the information contained in the affidavit.

VOLUME #7(R)(VII): Assessing ITO

460. The analysis of a warrant and ITO should be on "the whole of the document, not a limited focus upon an isolated passage or paragraph". It should be a "common sense review not line-by-line word-by-word dissection"
461. The applicant, in drafting the ITO, must "make full, frank and fair disclosure of all material facts in the ITO supporting the request. The facts must be set out "truthfully, fully and plainly." There must be "candour" and "accuracy."
462. However, there is no need to include every single piece of information. It is only "material facts" that must be included.

VOLUME #7(R)(VIII): Unsealing the Filings

463. It has been suggested that as soon as the investigation is complete the Crown should anticipate the need of defence to access the warrant filings and immediately apply to unseal them and disclose despite they are not technically in the possession of the Crown

VOLUME #7(R)(IX): Presumptions and Burdens

464. A warrant is presumed valid. The applicant bears the burden to establish that there was insufficient basis for issuing the warrant. This presumption applies not only to the warrant but the ITO as well.

VOLUME #7(R)(X): Degree of Deference

465. A review should be deferential to the authorizing justice. The reviewing judge is not examining police conduct with great attention to minor details or dissection. Rather the judge must look at whether there is sufficient evidence for the warrant. The warrant must be read in its entirety. The test on review is not whether the reviewing judge would have granted the warrant but whether there was "reliable evidence that might reasonably be believed" on which the warrant could have been issued.
466. The reviewing judge should not "substitute his or her own view for that of the authorizing judge."
467. A search of a private premises "is a derogation from common law rights of ownership. The necessary formalities in the execution of the warrant must, therefore, be strictly observed.
468. The review should not be an examination of police conduct "with a fine-tooth comb, fastening on their minor errors or acts or omissions, and embellishing those flaws to the point where it is the police conduct that is on trial rather than the sufficiency of the evidence."

VOLUME #7(R)(XI): Quality of Drafting

469. It is only important that the "core substance of the ITO could support the justice of the peace's exercise of discretion or issue the warrant."
470. The warrant must be read in its entirety to understand its meaning.
471. The ITO is examined on the whole, and not piecemeal.
472. It should be "reliable, balanced and material facts supporting the asserted grounds of belief". It should be "clear, concise, legally and factually sufficient"
473. A lack of chronological order or an otherwise confusing order is not necessarily fatal so long as it has a reasonable approach.

VOLUME #7(R)(XII): Affiant Standard of Care

474. Carelessness in drafting is not generally sufficient to invalidate the warrant. It must be intentionally false statements or omissions. But it is not automatic. The court must consider their impact upon the basis of the decision to authorize.

VOLUME #7(R)(XIII): Knowledge Requirement of The Affiant for Errors or Omissions

475. Errors or omissions that are found must be shown to have been known, or should have been known, by the affiant.

VOLUME #7(R)(XIII)(a): Material Omissions and Non-Disclosure

476. A failure to draft an ITO that is full, fair and frank may be a breach of s. 8 of the *Charter*.
477. "Materiality" must be evaluated on the "totality of the circumstances."
478. It is improper for the warrant to contain incomplete, misleading or misrepresented information on the investigation. This can occur where the affiant is deliberately kept out of the investigation and only given favourable information to support the warrant.
479. Material non-disclosure of fact made strategically by the police (such as for an improper motive including the intention to mislead the authorizing justice) may invalidate the warrant regardless of whether there existed reasonable and probable grounds to authorize the warrant.
480. Non-disclosure of "neutral" facts is acceptable and not necessary.
481. The ITO does not have to include non-observed details.

482. Where there is an innocent material omission (i.e. an omission without any improper motive), the reviewing judge must ask "whether the omission leaves the issuing judge with an incorrect impression or an insufficient basis on which to issue the warrant.
483. False or Misleading Information
484. Errors in the information, "whether advertent or even fraudulent, are only factors to be considered in deciding to set aside the authorization and do not by themselves lead to automatic vitiation of the ... authorization."
485. The warrant will typically be invalid if the misstatement or omission was deliberate or a finding of bad faith. The quashing is necessary to avoid corruption of the process. However, where the justice "could have" granted the warrant regardless of the deception, it may still be valid.
486. However, at times a poorly drafted and misleading warrant will, on its own, invalidate the warrant.

<i>VOLUME #7(R)(XIV): Deliberate Misleading</i>

487. Deliberately misleading information should be excised from the ITO. Where it taints the ITO as a whole it may invalidate the warrant.
488. A "deliberately misleading" ITO will invalidate the warrant.

<i>VOLUME #7(R)(XV): Error on Source</i>

489. A warrant will be invalidated by the claimed basis to be "reliable, confidential sources" when in fact it was based on a wiretap.

<i>VOLUME #7(R):(XVI): Discretion to Strike Otherwise Valid Warrant</i>

490. Even where a warrant passes Araujo standard, it has been suggested that the reviewing court maintains "residual discretion" to declare it invalid on the basis that it is necessary to "protect the integrity of the process." Appropriate circumstances to invalidate a warrant using residual discretion would include cases where the affiant has deliberately given false material statements or omitted material facts.

VOLUME #7(S): Further inferences and contextual references (see: Declaration #1)

491. It is now the obvious inference as to why Detective Abdool, who Mr. McLean does not make any allegation against *per se* as he was handed the file, agreed to release Mr. McLean promptly once they spoke through the glass of the prison cell.
492. It is also now telling as to why Mr. McLean never had the promised or represented sit-down meeting with the detectives which he welcomed. Detective Kolankowski, without slighting him, informed Mr. McLean that the *14th Division (TPS)* gets the “best sandwiches”. Mr. McLean retorted, perhaps a little immaturely and ungraciously, that he is from Vancouver and he eats Asian food.
493. The natural inference herein is that if the **TPS** received the **McLean Property** and **McLean Medication** around three p.m. and the Constable Romano email was in the early evening of that day, there would not have been time to consider the allegation of harassment, draft the relevant particulars and evidence for a warrant, and then be before a justice before the close of business day. Moreover, it is likely that the **Landlord** panicked when she realized that Mr. McLean had obtained that extraordinary order involving a request to shorten time. It is important to note what the test is, as ignorance of the law is no defence, in obtaining a request to shorten time. The test is from the LTB document itself:

“In deciding whether to grant your request, the LTB Member may consider the following factors in Rule 16.4 of the LTB’s Rules of Procedure:

- a. Any **prejudice (harm)** you or another the party may experience if the request is granted or not granted
- b. Whether there is any way the prejudice may **be remedied** (addressed)
- c. Whether this request is made in **good faith**
- d. If the request is for an extension of time, the length of the delay in filing the document and the reason for it
- e. Any other factors the LTB Member considers relevant in the circumstances.”

VOLUME #7(S)(I): Application of the Law to the Facts

494. Implicit in the granting of an order is that a Vice Chair of the LTB has found:
- a. The applicant has moved in good faith;
 - b. The harm that the applicant (in this case a tenant) would experience is greater than the respondent (in this case the **Landlord**);
 - c. The prejudice (in this case the Unlawful Lockouts and the Threat and **Extortion** by **Goldview**) could not be remedied unless there was a shortening of time; and
 - d. Any other factors.

VOLUME #7(S)(I)(a): A seminal contextual point

495. In the LTB Proceeding, it is imperative to note that Mr. McLean had filed his T2 application in early August 2024 and his request to shorten the time was ONLY AFTER the Unlawful Lockouts. Therefore, he operated in good faith in the face of illegality by the **Landlord**. It seems what set off the **Landlord**, as she was losing control and realizing the inevitable would occur, was that Mr. McLean, relying on Detective Salermo's representation to him that he could have the police attend with him to obtain some of his property on an interim basis, was that very representation that he would do so. He also notified counsel to the Condo Corporation (and responding on behalf of **Goldview** and Ms. Ferguson). Said law firm, Lash Condo Law, requested Mr. McLean provide their number in the event he did so. He agreed as he was doing everything above board with full disclosure.
496. Therefore, if the **Landlord** filed this criminal complaint, on behalf of her daughter, it was tantamount to public mischief or a false police complaint. It is important to note that the **Landlord** file a motion, without serving Mr. McLean, with a request to shorten time and it failed. Clearly, the **Landlord** was upset. Being upset and cranky is not a reason to file a meritless police complaint. It is clear that she obtained the **McLean Property** and **McLean Medication** without his consent and delivered exactly what Mr. McLean said he needed. However, at no time did Mr. McLean provide consent for the **TPS** to receive the same but merely confirmed, in writing, like the emails with Nicole, that he would do so to ensure there was a record that could be relied upon. Mr. McLean also notes that he was operating, out of an abundance of caution, considering the Threat and **Extortion** by Ms. Ferguson on September 23, 2024 as she represented to him,

“If you are SEEN on the property, we will call the police.” Out of respect for the police, Mr. McLean ensured that he had place in the written record those emails so that Ms. Ferguson’s potential call to the police for him being “seen” on the property would have no merit at all.

497. Since that time, which is not relevant to determining whether the **TPS** had reasonable grounds to believe that Mr. McLean had committed an indictable offence and had authority to arrest Mr. McLean without a warrant, the Rental Housing Enforcement Unit informed Mr. McLean, on Friday, October 11, 2024, that he had opened up a file regarding the conduct of the **Landlord** (and presumably her agents). The RHEU only does so when it is of the view that an offence under the RTA has been committed. In broad strokes, this means that a tenant or **Landlord** (in this case a “**Landlord**”) has KNOWINGLY committed an offence under the RTA. It is not merely that a **Landlord** has done so in an ignorant way but knows the law and breaches it in any event. While imprisonment is not a potential for the **Landlord** in that regard, the fines are such that they are carry penal liability that some would view as near criminal.
498. So, instead of taking responsibility for her actions, she took the law into her own hands again.
499. While that does not absolve the police for their breaches of the *Criminal Code*, none of this would have happened but for the lawless **Landlord**.
500. The decision to arrest, absent a warrant, was not only unlawful but it was arbitrary.

VOLUME #7(S)(II): First Discretionary Ground for Crown to elect to proceed by indictment

VOLUME #7(S)(II)(a): Section 515 of the <i>Criminal Code</i>

501. Section 515 of the *Criminal Code* reads as follows:

“Release order without conditions

- **515 (1)** Subject to this section, when an accused who is charged with an offence other than an offence listed in section 469 is taken before a justice, the justice shall, unless a plea of

guilty by the accused is accepted, make a release order in respect of that offence, without conditions, unless the prosecutor, having been given a reasonable opportunity to do so, shows cause, in respect of that offence, why the detention of the accused in custody is justified or why an order under any other provision of this section should be made

502. Section 679(1) reads as follows:

Release pending determination of appeal

- **679 (1)** A judge of the court of appeal may, in accordance with this section, release an appellant from custody pending the determination of his appeal if,
 - **(a)** in the case of an appeal to the court of appeal against conviction, the appellant has given notice of appeal or, where leave is required, notice of his application for leave to appeal pursuant to section 678;
 - **(b)** in the case of an appeal to the court of appeal against sentence only, the appellant has been granted leave to appeal; or
 - **(c)** in the case of an appeal or an application for leave to appeal to the Supreme Court of Canada, the appellant has filed and served his notice of appeal or, where leave is required, his application for leave to appeal.

503. Section 680(1) of the Crim Code reads as follows:

“Review by court of appeal

- **680 (1)** A decision made by a judge under section 522, a decision made under subsections 524(3) to (5) with respect to an accused referred to in paragraph 524(1)(a) or a decision made by a judge of the court of appeal under section 320.25 or 679 may, on the direction of the chief justice or acting chief justice of the court of appeal, be reviewed by that court and that court may, if it does not confirm the decision,
 - **(a)** vary the decision; or
 - **(b)** substitute another decision that, in its opinion, should have been made.

VOLUME #7(S)(III): Application of the Law to the Facts

504. It is self-evident that none of these sections are applicable.

VOLUME #7(S)(IV): 2nd Ground: Discretion – Crown Election – Crown Proceed by Indictment

505. Section 515(6)(a) of the *Criminal Code* reads:

“Order of detention

(6) Unless the accused, having been given a reasonable opportunity to do so, shows cause why the accused’s detention in custody is not justified, the justice shall order, despite any provision of this section, that the accused be detained in custody until the accused is dealt with according to law, if the accused is charged

(a) with an indictable offence, other than an offence listed in section 469

- (ii) that is an offence under section 467.11, 467.111, 467.12 or 467.13, or a **serious offence** alleged to have been committed for the benefit of, at the direction of, or in association with, a criminal organization,..”

VOLUME #7(S)(V): Application of the Law to the Facts

506. There was no evidence, let alone an allegation, that Mr. McLean committed the alleged and unproven offence, for the benefit of a criminal organization. Therefore, there was and is no ability for the Crown to even consider proceeding by indictment on this ground alone.

VOLUME #7(S)(VI): Discretionary Ground #3:

507. Section 516(6)(a)(viii) reads as follows:

“Order of detention

(6) Unless the accused, having been given a reasonable opportunity to do so, shows cause why the accused’s detention in custody is not justified, the justice shall order, despite any provision of this section, that the accused be detained in custody until the accused is dealt with according to law, if the accused is charged

(a) with an indictable offence, other than an offence listed in section 469

(viii) that is alleged to involve, or whose subject-matter is alleged to be, a firearm, a cross-bow, a prohibited weapon, a restricted weapon, a prohibited device, any ammunition or prohibited ammunition or an explosive substance, and that is alleged to have been committed while the accused was under a prohibition order within the meaning of subsection 84(1), including a release order made under this section, that prohibited the accused from possessing any of those things;

508. The test under subparagraph (viii) [8] is a conjunctive one where not only does the accused have to commit the offence of criminal harassment while using a weapon but also while the accused was under a weapons prohibition under section 84(1) of the *Criminal Code*.

VOLUME #7(S)(VI)(a) VOLUME #7(S): Application of the Law to the Facts

509. There was no evidence to support that this subsection was involved in any manner. Ergo, on this disjunctive ground alone, the Crown could not exercise any discretion to proceed by indictment.

VOLUME #7(S)(VII): 4th Ground of Discretion: Ordinarily non-resident

510. The language in this subparagraph while the same as the previous above under subsection 515(6) of the *Criminal Code* is as follows:

“(b) with an indictable offence, other than an offence listed in section 469 and is not ordinarily resident in Canada,”

VOLUME #7(S)(VII)(a): Application of the Law to the Facts

511. This subparagraph has no relevant as Mr. McLean is a Canadian citizen and has been ordinarily resident in Ontario since 2018.

VOLUME #7(S)(VIII): Conclusion on Discretionary Exemptions

512. None of the discretionary exemptions would have been applicable at the time of the arrest.

VOLUME #7(S)(IX): Mandatory Conditions: requiring the Crown to proceed by indictment

513. The mandatory conditions can be disposed of without the same exhaustive analysis as above. For sake of convenience, the portion from the appendices of the **HRTO** Application is recopied:

- i. to any of the necessary *Criminal Code* requirements that an allegation and charge of section 264(b) of the *Criminal Code*
 1. where the offence was an allegation of violence against an **"intimate partner"** and the accused had been previously convicted of an offence of violence against an **"intimate partner"** (s. 515(6)(b.1));
 2. where the **offence alleged is a breach** under s. 145(2) to (5) [i.e. escaped from lawful custody] while (s. 515(6)(c)); or
 3. where the offence committed (or conspired to commit) was an **offence under s. 5 to 7 of the CDSA** that is punishable by life imprisonment (s. 515(6)(d));

514. The sections read as follows with respect to ss. 516(6)(b.1) and subsection 516(6)(d) which covers the first and third mandatory conditions where Parliament has taken away any discretion from the Crown to NOT proceed by indictment (i.e. must proceed by indictment):

“Order of detention

(6) Unless the accused, having been given a reasonable opportunity to do so, shows cause why the accused’s detention in custody is not justified, the justice shall order, despite any provision of this section, that the accused be detained in custody until the accused is dealt with according to law, if the accused is charged

- **(b.1)** with an offence in the commission of which violence was allegedly used, threatened or attempted against their intimate partner, and the accused has been previously convicted or discharged under section 730 of an offence in the commission of which violence was used, threatened or attempted against any intimate partner of theirs;

- (c) with an offence under any of subsections 145(2) to (5) that is alleged to have been committed while they were at large after being released in respect of another offence under the provisions of this Part or section 679, 680 or 816;
- (d) with having committed an offence punishable by imprisonment for life under any of sections 5 to 7 of the *Controlled Drugs and Substances Act* or the offence of conspiring to commit such an offence.”

515. Out of a pure abundance of caution and for completeness, sections 145(2) and 145(5) of the *Criminal Code* are reproduced and sections 5 to 7 of the *CDSA* (only subsection (1) of each) are reproduced:

Criminal Code

Section 142 of the Criminal Code

Escape and being at large without excuse

- **Failure to attend court or surrender**

(2) Every person is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years or is guilty of an offence punishable on summary conviction who,

- (a) is at large on a release order and who fails, without lawful excuse, to attend court in accordance with the release order;
- (b) having appeared before a court, justice or judge, fails, without lawful excuse, to subsequently attend court as required by the court, justice or judge;
- (c) fails to surrender themselves in accordance with an order of the court, justice or judge, as the case may be; or
- (d) fails, without lawful excuse, to comply with an order made under section 515.01.

- **Failure to comply with appearance notice or summons**

(3) Every person who is named in an appearance notice that has been confirmed by a justice under section 508 or who is served with a summons and who fails, without lawful excuse, to appear at the time and place stated in the notice or the summons, as the case may be, for the purposes of the *Identification of Criminals Act*, or to attend court in accordance with the notice or the summons, as the case may be, is guilty of

- (a) an indictable offence and liable to imprisonment for a term of not more than two years; or
- (b) an offence punishable on summary conviction.

- **Failure to comply with undertaking**

(4) Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than two years or an offence punishable on summary conviction who,

- (a) is at large on an undertaking and who fails, without lawful excuse, to comply with a condition of that undertaking; or

- **(b)** is at large on an undertaking that has been confirmed by a justice under section 508 and who fails, without lawful excuse, to appear at the time and place stated in the undertaking for the purposes of the *Identification of Criminals Act* or to attend court in accordance with the undertaking.
- **Failure to comply with order**
 - (5) Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than two years, or is guilty of an offence punishable on summary conviction, who
 - **(a)** is at large on a release order and who fails, without lawful excuse, to comply with a condition of that release order other than the condition to attend court; or
 - **(b)** is bound to comply with an order under subsection 515(12), 516(2) or 522(2.1) and who fails, without lawful excuse, to comply with that order.

VOLUME #7(S)(X): CDSA

Trafficking in substance

- **5 (1)** No person shall traffic in a substance included in Schedule I, II, III, IV or V or in any substance represented or held out by that person to be such a substance.

Importing and exporting

- **6 (1)** Except as authorized under the regulations, no person shall import into Canada or export from Canada a substance included in Schedule I, II, III, IV, V or VI.

Production of substance

- **7 (1)** Except as authorized under the regulations, no person shall produce a substance included in Schedule I, II, III, IV or V.

VOLUME #7(S)(X)(a): Application of the law (mandatory sections) to the facts

516. None of the *Criminal Code* sections above had any relevance. At the time Mr. McLean did not even have an intimate partner and no threats of violence were used at all by him and the remainder is obviously then irrelevant.

517. Mr. McLean was not at large in any manner whatsoever so subsection 516(6)(c) had no relevance.

518. Mr. McLean was not obviously not involved with this offence (or at all) in the trafficking producing or selling controlled substances. To the contrary, while somewhat delayed, the police administered him with his prescribed medication of Adderall XR on October 2, 2024.
519. None of the *Criminal Code* sections 142(2) to (5) are relevant as Mr. McLean had not been charged with any other offence and did not have any criminal convictions.
520. None of the *CDSA* sections have any relevance either.

VOLUME #7(S)(X)(b): Conclusion on the Discretionary Exemptions for the Crown to elect to proceed by indictment and the Mandatory Conditions for the Crown being required to proceed by indictment

521. As there were no mandatory conditions for the Crown to proceed by indictment, the unproven offence under section 264(b) of the *Criminal Code* was one that was presumptively a summary offence with mandatory minimum jail time and other factors.
522. The Parliamentary policy behind the above is entirely sound with respect to the mandatory conditions where Parliament did not want Crowns in this country to make the decision as to whether they could proceed by summary or indictment when you have the following:
- An individual using criminal harassment in a violent manner and had been convicted of violence (not against anyone) but a previous intimate partner is one where a reverse onus is imposed for bail purposes. In that regard, the individual must be arrested in order to be brought before a judge.
 - An individual who has already been arrested and charged, it at large and has already breached a condition of release is one that must be arrested because he or she must explain to a judge on the record why he or she should be release; and
 - An individual who is involved in the trafficking of drugs, the importation or exportation of drugs, and/or the manufacturing of drugs (all controlled substances without any right to possess the same), while using criminal harassment against others, must be arrested and brought before a judge for determination of whether he or she can be released.

VOLUME #7(S)(X)(c): SEMINAL POINT:

523. The seminal point herein is that the **TPS** (or any police in this country) CANNOT arrest without warrant IF the offence is one that could (may) be prosecuted by:
- Summary process; or
 - Indictable process.
524. Without a warrant, the **TPS** had to rely upon section 493 of the *Criminal Code*. Of course, it goes without any level of thought, that if the police see an individual committing a criminal offence, most of the time in public, that the police cannot be constrained by the warrant requirement.
525. Moreover, if the police have reasonable grounds to believe that an individual has committed an indictable offence (not a hybrid), they can ('may') proceed with a warrantless arrest.
526. Of course, pursuant to section 29 of the *Criminal Code*, if an officer has a warrant, he or she must provide a copy of the same upon request. The other alternative is that the office provides the reasons for the arrest.

VOLUME #7(S): Section 495(3) of the *Criminal Code*

527. Section 495(3) of the *Criminal Code* states:

Consequences of arrest without warrant

(3) Notwithstanding subsection (2), a peace officer acting under subsection (1) is deemed to be acting lawfully and in the execution of his duty for the purposes of

- (a) any proceedings under this or any other Act of Parliament; and
- (b) any other proceedings, unless in any such proceedings it is alleged and established by the person making the allegation that the peace officer did not comply with the requirements of subsection (2)"

VOLUME #7(S): Section 495(3) explanation

528. However, it is important to note that this protection only applies if the peace officer was acting lawfully and within the scope of their duties. If the officer acted unlawfully or outside their authority, they are not protected by this provision.

529. While it does not provide blanket immunity for unlawful or malicious acts, it serves as a vital legal protection for peace officers who act in good faith and in compliance with the law.

VOLUME #7(S): What are other proceedings?

530. “Other proceedings” are not defined but the SCC has provided the law in this regard. The Supreme Court has indicated that “any other proceedings” means that section 13 is not restricted only to the use of evidence at criminal proceedings (*Dubois, supra* at page 377)

531. The **HRTO Proceeding** would be another proceeding.

VOLUME #7(S): *Bona fides vs. mala fides*

532. “Bad faith” is defined as: The opposite of “good faith,” generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one’s rights or duties, but by some interested or sinister motive.⁵¹

VOLUME #7(S): Harmony with the *HR Code*

533. As the **HRTO Proceeding** is another proceeding where it is alleged that the peace officers did not act within their duties or scope of the same, the following sections dovetail with section 495(3):

“Acts of officers, etc.

46.3 (1) For the purposes of this Act, except subsection 2 (2), subsection 5 (2), section 7 and subsection 46.2 (1), any act or thing done or omitted to be done in the course of his

or her employment by an officer, official, employee or agent of a corporation, trade union, trade or occupational association, unincorporated association or employers' organization shall be deemed to be an act or thing done or omitted to be done by the corporation, trade union, trade or occupational association, unincorporated association or employers' organization. 2006, c. 30, s. 8.

Opinion re authority or acquiescence

(2) At the request of a corporation, trade union, trade or occupational association, unincorporated association or employers' organization, the **Tribunal** in its decision shall make known whether or not, in its opinion, an act or thing done or omitted to be done by an officer, official, employee or agent was done or omitted to be done with or without the authority or acquiescence of the corporation, trade union, trade or occupational association, unincorporated association or employers' organization, and the opinion does not affect the application of subsection (1). 2006, c. 30, s. 8.”

VOLUME #7(S): Unreviewable Discretionary Powers

534. The SCC decision in *Goodwin* affirmed the decision in *Hunter* that an unreviewable discretionary legislative power would be contrary to s. 8.
535. There is no challenge to the law authorizing arrest warrants. However, there is a challenge to the unlawful conduct of the **TPS** in misleading Mr. McLean into believing that they had an arrest warrant.
536. As stated by the SCC in *Goodwin*, “The scope and availability of review is part of the analysis under s. 8. A driver’s ability to challenge the accuracy of the ASD result is critical to the reasonableness of the ARP regime. Here, the process for review of the ARP suspensions only permits the Superintendent of Motor Vehicles to consider whether the applicant was a “driver” and whether the ASD registered a “fail”, “warn”, or the driver refused to provide a sample. The absence of meaningful review of the accuracy of the result of the seizure, in light of the unreliability of the test, raises concerns about the reasonableness of the ARP scheme. Absent such review, a driver could find herself facing serious administrative sanctions without the precondition for the sanctions being met, and without any mechanism for redress. The serious consequences of a driver registering a “fail”, combined with an inability to challenge the basis on which these consequences are imposed, render the ARP scheme unreasonable.”

VOLUME #7(S): Latin principle

537. The impartiality requirement has often been expressed in Latin by the principle *nemo debet esse iudex in propria causa*: no one ought to be a judge in his or her own cause.

VOLUME #8: The <i>Charter</i>

VOLUME #8(A): Section 32 of the <i>Charter</i>

538. Section 32 governs which persons are subjects to the *Charter*: Section 32.(1) This *Charter* applies:
- a. to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
 - b. to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.
 - c. Purpose
539. Section 32(1) defines the scope of the *Charter*'s application. The text of section 32(1) provides "a strong message that the *Charter* ... is essentially an instrument for checking the powers of government over the individual": *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 at page 261, quoted in *Dickson v. Vuntut Gwitchin First Nation*, 2024 SCC 10 at paragraph 45.
540. Section 32(1) is drafted in a broad manner "to prevent Parliament, the legislatures, and the federal, provincial, and territorial governments from avoiding their *Charter* obligations by conferring certain of their legislative responsibilities or powers on other entities that are not ordinarily subject to the *Charter*": *Dickson, supra* at paragraph 44. This provision "must be interpreted in a manner that is flexible, purposive, and generous, rather than technical, narrow, or legalistic": *Dickson, supra* at paragraph 45.
541. The *Charter* is not intended to govern relations between private actors. "The exclusion of private activity from the *Charter* was not a result of happenstance. It was a deliberate choice that must be respected. We do not really know why this approach was taken, but several reasons suggest themselves. Historically,

bills of rights, of which that of the United States is the great constitutional exemplar, have been directed at government. Government is the body that can enact and enforce rules and authoritatively impinge on individual freedom”: *McKinney*, *supra* at page 262.

542. Section 32(1) establishes that “the *Charter* applies broadly to the legislative, executive, and administrative branches of government. The *Charter* applies to Parliament, the provincial legislatures, and the federal, provincial, and territorial governments in respect of all matters within the legislative authority of Parliament and the provinces, which includes entities not specifically listed under s. 32(1)”: *Dickson*, *supra* at paragraph 69.
543. The *Charter* binds the actions of governments and not private actors: *R.W.D.S.U. v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at paragraphs 65-66; *R. v. Buhay*, [2003] 1 S.C.R. 631, at paragraph 31; *Highwood Congregation of Jehovah’s Witnesses (Judicial Committee) v. Wall*, [2018] 1 S.C.R. 750 at paragraph 39. Perhaps the fullest discussion of the issue of *Charter* application is found in *McKinney*, *supra*, and in its companion cases, *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451, *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483 and *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570.
544. In *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, the Supreme Court set out the basic approach to determining whether the *Charter* applies. The *Charter* can apply in two ways. The first depends on the nature of the actor. If an entity is a part of “government”, either by its very nature or due to extensive government control, then the *Charter* generally applies to all of its actions. The second way the *Charter* applies depends on the nature of the action. Even if an entity is not part of “government”, the *Charter* nonetheless might apply to certain actions of that entity. Persons or entities that are not “government” but that implement a specific government policy or program, must generally comply with the *Charter* in performing the relevant governmental activity but not in respect of their non-governmental or private activities. See also *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, [2009] 2 S.C.R. 295 (“*GVTA*”) at paragraphs 15-16; *Dickson*, *supra* at paragraphs 42, 61, 70.

VOLUME #8(B): Government – The “nature of the actor”

545. If an entity is a part of “government” then the *Charter* generally applies to all its activities, including those that might in other circumstances be thought of as private, commercial, contractual or non-public in nature.⁵²

VOLUME #8(C): The federal and provincial governments

546. The *Charter* applies to the executive and legislative branches of the federal and provincial governments (*Dolphin Delivery, supra*, at paragraph 33; *Dickson, supra* at paragraphs 41, 69). See also *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, which discusses the application of the *Charter* to decisions of the federal Cabinet.
547. “Parliament” and the “provincial legislatures” are expressly named in section 32(1) and therefore the *Charter* applies to the legislation they enact (*Dolphin Delivery, supra* at paragraph 34). However, that the privileges of Parliament and the legislatures that are necessary for their proper functioning as legislative assemblies are immune from *Charter* scrutiny since they themselves are constitutionally entrenched (*New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319; *Canada (House of Commons) v. Vaid*, [2005] S.C.R. 667 at paragraph 30).
548. The *Charter* also applies to regulations, by-laws, orders, directives, rules, etc. that are adopted pursuant to legislation (*Dolphin Delivery, supra* at paragraph 39; *Eldridge, supra* at paragraph 21).

VOLUME #8(D): Municipalities

549. The *Charter* applies to municipalities and their actions (*Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844).

550. “The possibility that the Canadian *Charter* might apply to entities other than Parliament, the provincial legislatures and the federal or provincial governments is, of course, explicitly contemplated by the language of section 32(1) inasmuch as entities that are controlled by government or that perform truly governmental functions are themselves “matters within the authority” of the particular legislative body that created them” (*Godbout, supra* at paragraph 48).
551. Municipal councils are institutionally distinct from the provincial governments but exercise delegated law-making authority. They exhibit many of the indicia of a government actor: (1) they are democratically elected by members of the public and are accountable to their electorate; (2) they possess a general taxing authority; (3) they are empowered to make, administer and enforce laws within a defined territorial jurisdiction; and (4) they derive their existence and law-making powers from the provincial legislature (*Godbout, supra*, at paragraph 51).

VOLUME #8(E): Government officials

552. The actions of government officials *qua* government officials are subject to the *Charter*. Ministers and government officials acting pursuant to legislative authority are subject to the *Charter* (*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at 1078; *McKinney, supra* at pages 264-5).
553. Individuals who normally act as agents of government will not attract the application of the *Charter* when acting outside the scope of their duties. For example, the Supreme Court considered a case where a Crown Attorney instituted his own personal defamation action. The Court held that the Crown Attorney acted as an agent of government in his official capacity, but was not bound by the *Charter* in instituting the legal proceedings. Even though the suit may have been funded by the government, the proceedings were instituted in his own capacity and it was not demonstrated that the government had requested or required him to institute these proceedings or that it had controlled the conduct of the litigation (*Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at paragraphs 74-75).

VOLUME #8(F): Crown corporations

554. Crown corporations or agencies are likely to be considered government actors if established by government to implement government policy (*Douglas College, supra*). However, the fact that an entity is a creature of statute and provides a “public service” is not sufficient to make it a government actor (*McKinney, supra*; *Stoffman, supra*).
555. This is consistent the *HR Code*, section 47(1).

VOLUME #8(G): Police services

556. Police services are government institutions that exercise statutory authority. In this **HRTO Proceeding**, the **Applicant** alleges that **TPS** and the **TPS Respondents** did not exercise any statutory authority or their conduct was not consistent with any statutory authority. As a result of the same, the **Applicant** avers that **TPS** violated his *Charter* rights including but not limited to the following:
- a. Section 7;
 - b. Section 8;
 - c. Section 9;
 - d. Section 10;
 - e. Section 12; and
 - f. Section 15.
557. As a result of an agreement with the Province of New Brunswick, the Royal Canadian Mounted Police participates in the government functions of New Brunswick and, therefore, has the constitutional obligations of New Brunswick in respect of language rights (*Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada*, [2008] 1 S.C.R. 383).

VOLUME #8(H): Non-governmental entities – The “nature of the action”

558. The *Charter* does not apply to non-governmental entities created by government for the purpose of legally enabling them to do things of their own choosing (such as private corporations, hospitals and universities) (*McKinney, supra; Stoffman, supra*).
559. Governments cannot circumvent the *Charter*, however, simply by granting powers to non-governmental entities or by pursuing governmental initiatives through means other than the traditional mechanisms of government action: *Eldridge, supra* at paragraph 42; *Godbout, supra* at paragraph 56; *GVTA, supra* at paragraph 22; *Dickson, supra* at paragraphs 44, 70.
560. An entity is not considered part of the apparatus of government (it is a non-governmental entity), when it is subject only to “ultimate or extraordinary control” by the government. See *Stoffman, supra* at pages 513-14 for indicators of “ultimate or extraordinary control”:
- a. ministerial or governmental control over the use by the entity of funding received from the government, *e.g.*, specific funds must be used for the provision of health-care services;
 - b. the requirement that an internal regulation be approved by the Minister in order for it to take effect;
 - c. the obligation on the part of the entity to submit reports or other information to the government;
 - d. the power of the government to make regulations to meet contingencies not expressly provided by statute that would govern an entity’s operation.
561. Although the *Charter* generally does not apply to actions of non-governmental entities, specific actions of a non-governmental actor can attract *Charter* scrutiny where there is a high degree of control exercised by the government in the accomplishment of the act or because the government retains responsibility for the act in question. These acts would include:
- a. a measure taken under the constraint of a statute because it can be considered an act of the legislative branch of government (*Stoffman, supra*);
 - b. a measure adopted at the instigation of a minister or the government (*Stoffman, supra*);
 - c. a measure taken in order to implement a specific government program or policy (*McKinney, supra; Stoffman, supra; Eldridge, supra; Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307). See also *Sagen et al. v. Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games (“VANOC”)*, 2009 BCCA 522, leave to appeal to SCC denied: [2009] S.C.C.A. No. 459.
562. The fact that legislation imposes a requirement of ministerial approval before a regulation or by-law of a non-governmental entity can come into effect is not sufficient to turn the matter covered by the approved regulation into a governmental action. Ministerial approval does not necessarily mean that the regulation is delegated legislation or that the content of the regulation represents ministerial policy (*Stoffman, supra*).

VOLUME #8(I) Courts, court orders, litigation and the common law

563. Courts are not “government” under section 32(1). The exercise of the judicial function does not itself constitute government action for the purposes of section 32(1). Something more than the mere existence of a judicial order will be required in order to trigger the application of the *Charter* (*Dolphin Delivery*, *supra* at paragraph 36).
564. The *Charter* will apply to a court order that is based on the common law in circumstances where a court makes an order on its own motion for reasons of a public nature. Thus, an injunction against union picketing in front of the courthouse made by the Chief Justice of the Supreme Court of British Columbia on his own motion, based on the Court’s authority in matters relating to criminal contempt, was subject to *Charter* scrutiny (*B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214). Similarly, a court-ordered publication ban was subject to scrutiny for compliance with the section 2(b) guarantee of free expression (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835).
565. Does the *Charter* apply to litigation between private actors? *Dolphin Delivery* was the first Supreme Court of Canada decision to discuss the application of the *Charter* in the context of purely private litigation. See also *Tremblay v. Daigle*, [1989] 2 S.C.R. 530. *Dolphin Delivery* does not “preclude the possibility of a successful reliance on the *Charter* by a party to a dispute between private individuals, provided it could be shown that the party against whom the *Charter* was invoked relied upon some form of governmental action” (*Stoffman*, *supra* at page 507). However, [p]rivate parties owe each other no constitutional duties and cannot found their cause of action upon a *Charter* right. The party challenging the common law cannot allege that the common law violates a *Charter* right because, quite simply, *Charter* rights do not exist in the absence of state action. The most that the private litigant can do is argue that the common law is inconsistent with *Charter* values. It is very important to draw this distinction between *Charter* rights and *Charter* values; care must be taken not to expand the application of the *Charter* beyond that established by section 32(1), either by creating new causes of action, or by subjecting all court orders to *Charter* scrutiny. Therefore, in the context of civil litigation involving only private parties, the *Charter* will “apply”

to the common law only to the extent that the common law is found to be inconsistent with *Charter* values. (*Hill, supra* at paragraph 95). See also *Grant v. Torstar Corp.*, [2009] 3 S.C.R. 640 at paragraphs 44-46, in which the Supreme Court also makes reference to *R. v. Salituro*, [1991] 3 S.C.R. 654 at 670.

566. The *Charter* applies to the common law where there is a challenge to governmental action that was authorized or justified on the basis of a common law rule (*Dolphin Delivery, supra* at pages 598-99; *Hill, supra*; *Tremblay v. Daigle, supra*; *R. v. Golden*, [2001] 3 S.C.R. 679 at paragraphs 86 and 104). In the absence of governmental action, *Charter* values can still inform the development of the common law. “Where the principles underlying a common law rule are out of step with the values enshrined in the *Charter*, the courts should scrutinize the rule closely. If it is possible to change the common law rule so as to make it consistent with *Charter* values, without upsetting the proper balance between judicial and legislative action ... then the rule ought to be changed” (*Salituro, supra* at page 675; see also *R. v. Swain*, [1991] 1 S.C.R. 933 at 978-79; *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156).

VOLUME #8(J): Private actors

567. Private actors such as informers or private security guards who cooperate with state officials are not state agents subject to the *Charter* unless they would have acted differently “but for” state intervention (*R. v. Broyles*, [1991] 3 S.C.R. 595 at 608; *R. v. M. (M.R.)*, *supra* at paragraph 29; *Buhay, supra* at paragraphs 29-30).

VOLUME #8(K)Administrative decision-making

568. Not every board or tribunal is a government actor. However, where an individual, board or tribunal exercises administrative decision-making authority under a statute, the exercise of discretion must proportionately balance *Charter* protections – defined as “both the *Charter*’s guarantees and the foundational values they reflect” with the relevant statutory objectives in coming to a “reasonable”

decision. A reasonable decision is one in which the relevant *Charter* protections “are limited no more than is necessary given the applicable statutory objectives” (*Loyola High School v. Quebec (Attorney General)*, [2015] 1 S.C.R. 613 at paragraph 4; *Law Society of British Columbia v. Trinity Western University*, [2018] 2 S.C.R. 293 at paragraphs 57-58; *Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395 at paragraph 24.)

VOLUME #8(L): Public law damages

569. In accordance with section 32 of the *Charter*, an action for damages for a breach of *Charter* rights is a public law action directed against the state for which the state is primarily liable. The nature of the remedy is to require the state (or society at large) to compensate an individual for breaches of the individual’s constitutional rights. “An action for public law damages — including constitutional damages — lies against the state and not against individual actors” (*Vancouver (City) v. Ward*, [2010] 2 S.C.R. 28 at paragraph 22).

VOLUME #8(M): APPROPRIATE REVIEW MECHANISM: The Constitution Act, 1982: PART VII, Section 52 versus PART I, s. 24(1)

No challenge by Mr. McLean to the various sections of the *Criminal Code*

Mr. McLean is only challenging the actions of the **TPS** and **TPS** respondents as to whether they breached his *Charter* rights

570. S. 52 provides an explicit basis for judicial review of legislation in Canada, for, whenever a court finds that a law is consistent with the Constitution of Canada, the court must hold that law invalid i.e. of no force and effect. (see: Hogg, 3.4, page 54). When an order of invalidity is made against a legislative section that ends the matters in that a particular litigant cannot then also obtain s. 24 damages. Moreover, in a civil proceeding, the entity relying on the law will lose the legal bases for their case (see: Hogg). The purpose of s. 8 is preventing unjustified searches and seizures before the happen.
571. Since the *Charter* is part of the Constitution of Canada, any law that is inconsistent with the *Charter* is “of no force and effect”. Since it falls to this Court of Appeal to determine whether or not a law is

inconsistent with the *Charter*, s. 52(1) provides an explicit basis for judicial review of legislation in Canada (see: Peter W. Hogg, *Constitutional Law of Canada*, (Toronto: Thomson Carswell, 2005) ["Hogg"] at page 866).

572. The challenge herein is to the conduct of the **TPS** and the individual **TPS** respondents and those agents of theirs including but not limited to **Goldview** and the **Landlord** to the extent they were conscripted as municipal government agents.
573. Where s. 52 of the Constitution Act, 1982 is not engaged, a remedy under s. 24(1) of the *Charter* may nonetheless be available. This will be the case where the statute or provision in question is not in and of itself unconstitutional, but some action taken under it infringes a person's *Charter* rights. Section 24(1) would there provide for an individual remedy for the person whose rights have been so infringed.
574. This course of action has been described as "reading down as an interpretive technique", but it is not reading down in any real sense and ought not to be confused with the practice of reading down as referred to above. It is, rather, founded upon a presumption of constitutionality. It comes into play when the text of the provision in question supports a constitutional interpretation and the violative action taken under it thereby falls outside the jurisdiction conferred by the provision. I held that this was the case in *Slaight Communications Inc. v. Davidson*, 1989 CanLII 92 (SCC), [1989] 1 S.C.R. 1038, when I determined that a provision which provided a labour adjudicator with discretion to make a range of orders could not have been intended to provide him with the discretion to make unconstitutional orders. The legislation itself was not unconstitutional and s. 52 was not engaged, but the aggrieved party was clearly entitled to an individual remedy under s. 24(1).

VOLUME #8(N):the <i>Charter</i> (generally)

VOLUME #8(N)(i): Returning to <i>Joseph v. Meier</i>

575. In *Joseph*, the BCSC outlined the arguments of Ms. *Joseph* and the defendants:

“Breach of *Charter* Rights/Appropriate relief

[73] Ms. *Joseph* argues that her ss. 7, 8, 9 and 10(a) *Charter* rights were breached. Those sections provide as follows:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

8. Everyone has the right to be secure against unreasonable search or seizure.

9. Everyone has the right not to be arbitrarily detained or imprisoned

10. Everyone has the right on arrest or detention
(a) to be informed promptly of the reasons therefor;

[74] Ms. *Joseph* acknowledges that: “tort law and the *Charter* are distinct legal avenues” and that “a concurrent action in tort, or other private law claim, bars s. 24(1) damages if the result would be double compensation” (*Vancouver (City) v. Ward*, 2010 SCC 27, at para. 36).

[75] She argues that traditional tort law does not provide a remedy for Cst. Meier’s search of her pockets, belongings and cell phone. She argues that these searches are breaches of her reasonable expectation of privacy, of her right to be secure against unreasonable search and seizure and security of the person.

[76] She argues as well that she had a right to be promptly informed of the reason for detention which Cst. Meier did not provide. She says that the tort of false arrest is capable of remedying his act of touching her but is not able to address his violation of her s. 10(a) rights.

[77] The defendants acknowledge that a *Charter* breach and damages is not within s. 21 of the *Police Act*.

[78] The defendants recognize that Ms. *Joseph* has not specifically pled a breach of s. 8 of the *Charter*, however, they do not appear to take issue with this. They address the substance of the claims.

[79] They argue that Ms. *Joseph* has not established that her *Charter* rights have been breached. Secondly, they say that she has not established that *Charter* damages are just and appropriate. Third, they say she had alternate remedies available for her tort claims. Notably, she could have brought an action against the provincial government pursuant to the *Police Act*. They say that double compensation is not the intent of s. 24 of the *Charter*.

[80] They argue that a declaration of a *Charter* breach would provide an adequate remedy if a *Charter* breach is found. They say that she has suffered no significant damages as a result of the breach and that any harm she suffered was contributed more than equally by her.

[81] They argue that *Charter* damages would have a chilling effect on officers making on the ground decisions. They argue “we do not want to encourage people who are reasonably suspected of a crime to push back in hopes that the officer will back down and do nothing knowing their conduct will be put under the microscope in court at a later date.” They argue that the remedy must be appropriate and just. Damages may be awarded to compensate the plaintiff, vindicate the right or deter future violations of the right. They say that the damages should be nominal. The search of Ms. *Joseph*’s purse and phone was brief and Cst. Meier returned both items to her within minutes. She was detained for a very brief period of time and was released at the scene. She left the store at approximately 2:47 pm and was released approximately 30 minutes later.

VOLUME #8(N)(ii): Application to McLean v. TPS et al

576. The distinction with an enormous difference in McLean v. **TPS** et al was the adverse decisions of Constable Romano, DC Kolankowski, and **TPS** were not “on the ground decisions”. They were calculated, well-planned, and pre-mediated with the proverbial bow on the top, the “luring” by way of a “rouse”.
577. As a result of so many different violations of law, including the *Charter*, the *HR Code*, the *Criminal Code* (by **TPS** et al), the common law and equity, Mr. McLean is saddled with further loss and damage as a result of having to prepare the same. However, no stone can be unturned as not only he deserves justice and substantive change *in persona* but the public does as well.
578. Justice delayed is justice denied. This is apropos to the test pursuant to HRTO Specific Rule 21.

VOLUME #8(O): The application of the *Charter*

VOLUME #8(O)(I): The Purposive Analysis

579. Purposive analysis, the cornerstone of *Charter* interpretation, requires that *Charter* rights be given a generous and liberal interpretation aimed at fulfilling the purpose of the right in question and of the *Charter* as a whole. The central precept of the purposive approach is that the meaning of the right must be understood in light of the interests it was meant to protect. This requires consideration of the relevant linguistic, philosophic and historical contexts. Regard must be had for the language used, other *Charter* rights with which the right is associated, and the need for *Charter* rights to be capable of development over time (*Hunter et al. v. Southam Inc.*, [1984] 2 SCR 145; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Irwin Toy Ltd. v. A.G. Quebec*, [1989] 1 S.C.R. 927; *R. v. Zundel*, [1992] 2 S.C.R. 731; *R. v. K.R.J.*, [2016] 1 SCR 906, at paragraphs 37-38). *Charter* rights should be read broadly, putting the burden of justifying limitations on the state (*Beena B. v. Children’s Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R.

825; *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876). It is important not to “overshoot” the purpose of the right in question (*Big M Drug Mart, supra*; *R. v. Suberu*, [2009] 2 S.C.R. 460, at paragraph 24; *R. v. Grant*, [2009] 2 SCR 353, at paragraphs 16-17). Internal exceptions to *Charter* rights should be subject to the same interpretive principles; courts should not “undershoot” the purpose of a *Charter* exception by giving it an unduly narrow interpretation (*R. v. Stillman*, 2019 SCC 40, at paragraph 22). Within the purposive approach, the analysis must begin by considering the text of the provision. Giving primacy to the text as the first factor to consider within the purposive approach prevents an interpretation that overshoots or undershoots the purpose of the right (*Quebec (Attorney General) v. 9147-0732 Québec Inc.*, 2020 SCC 32 at paragraphs 8-10).

580. The principle that a provision bearing more than one plausible meaning must be read in a manner that favours the accused is a principle of penal statutory interpretation, but not one of *Charter* interpretation. *Charter* rights and freedoms do not automatically receive the most generous interpretation that their language can bear. While *Charter* interpretation is to be liberal, this is subordinate to the purposive approach, meaning that *Charter* rights must be interpreted liberally within the limits that their purposes allow (*R. v. Poulin*, 2019 SCC 47 at paragraphs 53-55).

VOLUME #8(O)(II): The Contextual Analysis

581. The contextual analysis is detailed with analytical, methodical, and reasoned precision while applying the facts and uncontroverted facts in the context of the **HRTO Proceeding**.
582. Contextual analysis, another interpretive doctrine regularly invoked in conjunction with the purposive approach, requires that the *Charter* question be situated within the actual social, political and legal context in which it arises (e.g.: regulatory vs. criminal matters; citizens vs. non-citizens) (*Edmonton Journal v. A.G. Alberta et al.*, [1989] 2 S.C.R. 1326; *Thomson Newspapers Ltd. v. Canada*, [1990] 1 S.C.R. 425; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154; *Chiarelli v. Canada (M.E.I.)*, [1992] 1 S.C.R. 711; *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154; *May v. Ferndale Institution*, [2005] 3 S.C.R. 809). Contextual analysis will often involve a consideration of the principles and policies underlying the law or area of law in question (e.g., extradition: *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779;

immigration: *Chiarelli, supra*; customs: *R. v. Simmons*, [1988] 2 S.C.R. 495, *R. v. Jacques*, [1996] 3 S.C.R. 312; highway safety: *R. v. Orbanski*; *R. v. Elias*, [2005] 2 S.C.R. 3). When legal rights are at stake, the contextual approach suggests that the *Charter* will be interpreted more flexibly where the relevant state action does not threaten the individual with the risk of imprisonment (*Wholesale Travel, supra*; *R. v. Pontes*, [1995] 3 S.C.R. 44; *Michaud v. Quebec (Attorney General)*, [1996] 3 S.C.R. 3; *R. v. Richard*, [1996] 3 S.C.R. 525; *R. v. Jarvis*, [2002] 3 S.C.R. 757, at paragraphs 60-65).

583. The contextual approach is also relevant to the determination of the appropriate balance to be struck between individual rights and societal interests (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *Wholesale Travel, supra*; *Chiarelli, supra*; *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350, at paragraphs 22-27) whether this balancing occurs within the substantive right itself (*Chiarelli, supra*; *Thomson Newspapers, supra*; *R. v. Jordan*, [2016] 1 S.C.R. 631, at paragraphs 19-28; *R. v. Saeed*, [2016] 1 S.C.R. 518, at paragraphs 4-5; *Carter v. Canada (Attorney General)*, [2015] 1 S.C.R. 331, at paragraphs 2, 79-80; *Kazemi Estate v. Islamic Republic of Iran*, [2014] 3 S.C.R. 176) or under section 1 (*Edmonton Journal, supra*; *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232; *Ross, supra*; *Harvey, supra*; *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381). The contextual approach may also be applied in determining the appropriate remedy to be granted (*Schachter v. Canada*, [1992] 2 S.C.R. 679; *R. v. Grant*, [2009] 2 S.C.R. 353; *Ernst v. Alberta Energy Regulator*, [2017] 1 S.C.R. 3) Contextual factors, or “the matrix of legislative and social facts”, may prompt the Supreme Court to depart from its own precedents (*Carter v. Canada (Attorney General)*, [2015] 1 S.C.R. 331; *United States v. Burns*, [2001] 1 S.C.R. 283; *R. v. Bedford*, [2013] 3 S.C.R. 1101.) In some cases, social science evidence or social or legislative facts will be determinative (*R. v. Bedford*, [2013] 3 S.C.R. 1101).

584. Consequently, *Charter* analysis is highly fact driven. “*Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of *Charter* issues”: *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, at page 361.

VOLUME #8(O)(III): The Contextual Analysis

585. The *Charter* values:

However, *Charter* values will inform statutory interpretation only where genuine ambiguity arises between two or more plausible readings of the text, each of which is equally in accordance with the intentions of the statute (*Canadian Oxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743 at paragraph 14; *Medovarski v. Canada (Minister of Citizenship and Immigration)*; *Esteban v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 539 at paragraph 48, *R v. Clarke*, [2014] 1 S.C.R. 612 at paragraph 12). “[W]here two readings of a provision are equally plausible, the interpretation which accords with *Charter* values should be adopted: see *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at page 1078; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at page 660; *R. v. Lucas*, [1998] 1 S.C.R. 439, at paragraph 66; and *R. v. Sharpe*, [2001] 1 S.C.R. 45 at paragraph 33” (*Application under s. 83.28 of the Criminal Code (Re)*, [2004] 2 R.C.S. 248, at paragraph 35.)

586. Waiver has been disapproved in human rights legislation. Waiver has been disapproved of in respect of human rights legislation. Contracting parties (labour relations contracts) are not competent to contract themselves out of anti-discrimination provisions of human rights legislation; contracts having such effect are void, as contrary to public policy (*Ontario Human Rights Commission v. Etobicoke*, [1982] 1 S.C.R. 202; *Newfoundland Association of Public Employees v. Newfoundland (Green Bay Health Care Centre)*, [1996] 2 S.C.R. 3; *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157).

587. For waiver of any *Charter* right to be effective, it must be voluntary and fully informed (a clear understanding of the true consequences and effects of the waiver of rights): see *Borden, supra*, at paragraph 34; *Richard, supra*, at paragraph 22. One rights holder cannot waive another rights holder’s rights: *R. v. Reeves*, [2018] 3 S.C.R. 531, at paragraphs 4, 48-52.

VOLUME #9: Charter rights in relation to arrest and detention

VOLUME #9(A): Section 9 of the Charter

588. Section 9 of the *Charter* is analyzed below. The commencement point is the language in the most historically important document in Canadian legal history in the *Charter*: “Everyone has the right not to be arbitrarily detained or imprisoned.
589. In the 1911 case of *Meering v. Graham White Aviation* stated that an individual can be falsely imprisoned while one is asleep and that is as much an attack on your dignity as if you were aware of it at the time. Dignity is a central theme in the *HR Code*.
590. There is no set time for which the imprisonment must last as it could be momentary depending on the circumstances. The word “false” is misleading as the plaintiff is required only to prove a direct imprisonment. The Respondent carries the burden of showing the legislation does not detain or imprison members contrary to the *Charter*. The mistake of fact is not a defence as if the defendant locked or closed the door to a room with individuals inside the defendant does not intend the specific consequences

VOLUME #9(B)” If the interference was unlawful – breach of section 9

591. The purpose of section 9: The guarantee in section 9 against arbitrary detention or imprisonment “is a manifestation of the general principle, enunciated in section 7, that a person’s liberty is not to be curtailed except in accordance with the principles of fundamental justice... Section 9 serves to protect individual liberty against **unlawful state interference**” (*R. v. Grant*, [2009] 2 S.C.R. 353 at paragraph 54).
592. Section 9 may be raised to challenge the reasons for detention, the procedures which result in detention being ordered and the character and nature of the detention.

VOLUME #9(C): Section 9: argued often in conjunction with section 7, 8, 10 and 12

593. While section 9 can be raised on its own, it is often raised in conjunction with other *Charter* rights such as those in section 7 (right to liberty / principles of fundamental justice), section 8 (search and seizure),

section 10 (rights on arrest or detention) and section 12 (cruel and unusual treatment or punishment). Since the rights in sections 8-14 of the *Charter* are illustrative of the rights protected by section 7, the procedural safeguards surrounding detention have been considered under section 7 as an aspect of the principles of fundamental justice (*R. v. Swain*, [1991] 1 S.C.R. 933 at 1008-1013).

VOLUME #9(D): Approach

594. Like other *Charter* rights, section 9 must be applied using a contextual approach (*R. v. Jacques*, [1996] 3 S.C.R. 312 at paragraph 20)

VOLUME #9(E): Burden

595. The individual has the burden of proving they were arbitrarily detained or imprisoned. The analytical framework for determining whether a provision limits section 9 involves two steps:
- a. 1) *was the individual detained or imprisoned?* and
 - b. 2) *was that detention or imprisonment arbitrary?*

(see: See *R. v. Hufsky*, [1988] 1 S.C.R. 621 at paragraphs 12-13).

VOLUME #9(F): Initial Analysis of the Law to the Facts

596. Mr. McLean was detained and imprisoned from the time he went to sign for the **McLean Property** and **McLean Medication**.
597. Mr. McLean was only arrested based on false pretenses and misrepresentations, which he detrimentally relied upon for his attendance, of the sole reasons for him to attend the **TPS 14th Division**.
598. Arbitrary means that the police conducted themselves with no criteria.

599. In reiterating the above, if there was no warning by DC Kolankowski and no warrant as represented by the Constable Romano, along with a paucity or no evidence, then there was no criteria to arrest. It follows that the detention and imprisonment were all violations of the **Applicant**'s *Charter* rights.

VOLUME #9(G): Was the individual “detained” or “imprisoned”?

600. The term “detained” in section 9 has the same meaning as in section 10 of the *Charter*. The Supreme Court has stated that there is “no reason in principle why the general approach to the meaning of detention reflected in those cases [*R. v. Therens*, [1985] 1 S.C.R. 613 and *R. v. Thomsen*, [1988] 1 S.C.R. 640] should not be applied to the meaning of ‘detained’ in section 9” (*Hufsky*, *supra* at paragraph 12).

601. Detention requires some form of physical or psychological restraint by the state. It has been defined as “a suspension of the individual’s liberty interest by a significant physical or psychological restraint” (*Grant*, *supra* at paragraph 44). See also the discussion of detention in Section 10 – General.

602. A **psychological** detention occurs where an individual is legally required to comply with a direction or demand or where, in the absence of such a direction, state conduct would lead a reasonable person to conclude that the individual had no choice but to comply (*Grant*, *supra* at paragraphs 30-31, 44). In cases where there is no physical restraint or legal obligation to comply, determining whether a person has been detained may be more challenging. To determine whether the reasonable person in the individual’s circumstances would conclude they had been deprived by the state of the liberty of choice, the court may consider factors including the following:

- a. the circumstances giving rise to the encounter as they would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focused investigation;
- b. the nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter; and

- c. the particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication (*Grant, supra* at paragraph 44; *R. v. Le*, [2019] 2 S.C.R. 692 at paragraph 31; *R. v. Lafrance*, 2022 SCC 32 at paragraph 22).

603. The above analysis involves an objective determination, made in light of the circumstances of the encounter as a whole. No single consideration, including a police statement to an individual that they are “not detained” and may leave, is determinative of whether a detention has occurred (*Lafrance, supra* at paragraph 39).

VOLUME #9(H): Reasonable person: considerations

604. The “reasonable person” analysis may incorporate considerations of race where relevant (*Le, Super* at paragraph 73, citing *Grant, supra* at paragraph 44). The question is how a reasonable person of a similar racial background would perceive the interaction with the police (*Le, supra* at paragraph 75). In this regard, it is necessary to consider the larger social context of the disproportionate policing of racialized and low-income communities (*Le, supra*, at paragraphs 97 and 106). This need arises regardless of whether the police action amounted to racial profiling (*Le, supra* at paragraphs 74-79).

605. Not every interaction between a police officer and a member of the public is a detention within the meaning of section 9:

- a. [T]he police cannot be said to “detain”, within the meaning of sections 9 and 10 of the *Charter*, every suspect they stop for purposes of identification, or even interview. The person who is stopped will in all cases be “detained” in the sense of “delayed”, or “kept waiting”. But the constitutional rights recognized by sections 9 and 10 of the *Charter* are not engaged by delays that involve no significant physical or psychological restraint (*R. v. Mann*, [2004] 3 S.C.R. 59 at paragraph 19, cited in *R. v. Suberu*, [2009] 2 S.C.R. 460 at paragraph 23).

606. Therefore, an investigative detention does not necessarily arise the moment police engage an individual for investigative purposes or ask preliminary questions (*Suberu, supra* at paragraphs 23-24, 28). When

applying the objective test set out in *Grant* to determine whether the individual has been psychologically detained, the perspective of the reasonable person must be informed by the fact that a bystander is under no legal obligation to comply with a police request for information or assistance. The onus is on the applicant to demonstrate deprivation of liberty in the circumstances (*Suberu, supra* at paragraphs 22, 28).

VOLUME #9(I): Once trespass occurs – detention occurs at that point in time

607. The nature of any police intrusion into a home or backyard is reasonably experienced as more forceful, coercive and threatening than when similar state action occurs in public (*Le, supra* at paragraph 51). While not determinative, when the police enter a private residence as trespassers, it strongly supports a finding of detention at that point in time (*Le, supra* at paragraph 44).

VOLUME #9(J): Detention can occur in seconds

608. While the overall duration of an encounter may contribute to the conclusion that a detention has occurred, a detention, even a psychological one, can occur within a matter of seconds, based on a single forceful act or word (*Grant, supra* at paragraph 42; *Le, supra* at paragraphs 65-68).
609. A driver is not detained for the purposes of the *Charter* when required by statute to remain at the scene of an accident (*R. v. Rowson*, 2015 ABCA 354 at paragraph 52, affirmed [2016] 2 S.C.R. 158).
610. Section 9 of the *Charter* may have some application to detentions within correctional institutions. Changes in one's conditions of imprisonment may be sufficiently severe as to be considered a second "detention," the legality of which is reviewable by *habeas corpus*. See *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643.

VOLUME #9(K): Was the detention or imprisonment arbitrary?

611. Arbitrariness can arise either from the law itself or from the conduct of officials.

612. To belabour the point, there is no challenge, by way of the NOCQ, to the statutes at issue passed by Parliament.

VOLUME #9(L): Detention or imprisonment: section 9 of the <i>Charter</i>

613. An **unlawful detention** (*i.e.*, detention or imprisonment that is not authorized by statute or common law) is always arbitrary and unjustifiably limits section 9 of the *Charter* (*Grant, supra* at paragraphs 54-55, 57; *R. v. Tim*, 2022 SCC 12 at paragraph 22). A **lawful detention** is not arbitrary within the meaning of section 9 (*Mann, supra* at paragraph 20), “unless the law authorizing the detention is itself arbitrary” (*Grant, supra* at paragraph 54; *Tim, supra* at paragraph 22). Both statute law and common law are subject to *Charter* scrutiny (*R. v. Clayton*, [2007] 2 S.C.R. 725 at paragraph 21). Finally, where authorized by a *Charter*-compliant law, the manner in which the detention is carried out must be reasonable to avoid violating section 9.

VOLUME #9(M): <i>Collins</i> Test under section 8: applied to section 9

614. The test mirrors the three-part section 8 *Charter* framework for assessing the reasonableness of searches set out in *R. v. Collins*, [1987] 1 S.C.R. 265 (*Grant, supra* at paragraphs 54-56; *Le, supra* at paragraph 124).

VOLUME #9(N): Was the incarceration statutorily authorized?

A specific class of offenders

615. In general, detention is not arbitrary where there are ““standards that are rationally related to the purpose of the power of detention”” (*Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350 at paragraph 89). The Supreme Court has also stated that the imprisonment of an individual cannot be said to be “arbitrary” where “it is readily apparent that not only is the incarceration **statutorily authorized**, but that the legislation narrowly defines a class of offenders with respect to whom it may properly be

invoked, and prescribes quite specifically the conditions [under which incarceration may take place]” (*R. v. Lyons*, [1987] 2 S.C.R. 309 at paragraph 62).

616. When referencing the *Joseph* case, Ms. *Joseph* was arrested and detained outside of the Mark’s Work Warehouse but whether she was imprisoned, which is possible out in the public, was debatable.

VOLUME #9(O): Automatic detention: consideration – danger to society

617. Conversely, a law authorizing automatic and indeterminate detention without any standards is arbitrary. A law compelling the automatic detention of individuals on the basis of the danger they present to society will be arbitrary if there are no criteria or standards in place to determine if they are in fact dangerous (*Swain, supra* at 1012).

VOLUME #9(P): Arbitrary defined and interpreted

No criteria – express or implied – govern its exercise

618. A law authorizing the random stopping of motor vehicles was found to be arbitrary because it gave police officers an “absolute discretion” in the selection of which drivers to stop: “A discretion is arbitrary if there are no criteria, express or implied, which govern its exercise” (*Hufsky, supra* at paragraph 13. See also *R. v. Ladouceur*, [1990] 1 S.C.R. 1257 which cites *Hufsky* at 1276-1277).

VOLUME #9(R): Detention: improper motives

619. Detention undertaken for improper motives may be held to be arbitrary. Anything in the circumstances of the detention or arrest which would make it suspect on any other ground, such as an arrest made because a police officer was biased towards a person of a different race or nationality, or where there was a personal enmity, hostility or antagonism between a police officer directed towards the person arrested, if established, might have the effect of rendering invalid an otherwise lawful arrest (*R. v. Storrey*, [1990] 1 S.C.R. 241 at 251-252).

620. “Individual liberty interests are fundamental to the Canadian constitutional order. Consequently, any intrusion upon them must not be taken lightly and, as a result, police officers do not have *carte blanche* to detain. The power to detain cannot be exercised on the basis of a hunch, nor can it become a *de facto* arrest” (*Mann, supra* at paragraph 35).

VOLUME #9(S): Length of detention

621. The length of the detention following arrest but prior to charge or appearance before a justice, if unreasonable on the facts, will render a detention arbitrary (*Storrey, supra*; see also *Charkaoui, supra* at paragraph 91).
622. The existence or exercise of prosecutorial discretion (in the context of applications for a dangerous offender designation) does not render arbitrary the application of a law authorizing incarceration (*Lyons, supra* at paragraphs 63-66).
623. *Criminal Code* provisions governing bail also cannot be said to be arbitrary where they set out a process with fixed standards that is subject to exacting procedural guarantees and review by a superior court (*R. v. Pearson*, [1992] 3 S.C.R. 665 at 700; *R. v. Morales*, [1992] 3 S.C.R. 711 at 741).
624. The Supreme Court in *Le* declined to resolve the question of whether trespass by the police will disqualify the lawfulness of the detention, finding that there was no reasonable suspicion that would support investigative detention and no statutory basis for the detention (*Le, supra* at paragraphs 128-133).
625. An otherwise lawful detention conducted by First Nations Constables off-reserve is not arbitrary, where the Constables are conferred by legislation with the powers of police officers in satisfaction of the definition of “peace officers” in section 2(c) of the *Criminal Code* (*R. v. Decorte*, [2005] 1 S.C.R. 133).
626. In relation to the common law, the Supreme Court has stated that “[t]he common law regarding police powers of detention, developed building on *R. v. Waterfield*, [1963] 3 All E.R. 659 (C.A.), and *Dedman*

v. The Queen, [1985] 2 S.C.R. 2, is consistent with *Charter* values because it requires the state to justify the interference with liberty based on criteria which focus on whether the interference with liberty is necessary given the extent of the risk and the liberty at stake, and no more intrusive to liberty than reasonably necessary to address the risk” (*Clayton, supra* at paragraph 21).

VOLUME #9(T): Detention in specific contexts

VOLUME #9(T): (i) Arrest – “Reasonable and probable grounds”

627. It is trite that if the **TPS** did not have a warrant to arrest Mr. McLean, then the arrest was presumptively unreasonable. Further, if Mr. McLean had not committed any of the specified offences under the discretionary elements for the Crown to proceed or elect to proceed by indictment on the section 264(b) of the *Criminal Code* unproven charge, including not being at large and out on bail, and/or the nondiscretionary elements for the Crown to be required to proceed by indictment, then it mattered not what type of reasonable and probable grounds the **TPS** had.
628. Put another way, the **TPS** could have had, which Mr. McLean submits that it cannot discharge that burden on the evidence at the time of the arrest, reasonable and probable grounds that Mr. McLean committed the offence under section 264(b)

VOLUME #9(T)(ii): Ignorance of the law is no defence for the TPS

629. The difficulty, and bluntly rather insurmountable set of legal hurdles, barriers and obstacles, that the **TPS** had to overcome, for the **TPS** is that ignorance of the law is no defence (see: section 19 of the *Criminal Code*). When returning to the elements of section 264(b) of the *Criminal Code*, there are four rather technical and heavy obstacles for the **TPS** to have had reasonable and probable grounds as to Mr. McLean committing all of the elements of the offence including the *actus reus* and *mens rea*:
- a. the person charged was acting lawfully, such as making communications for a **legally authorized purpose**;
 - b. the person charged was acting without wrongful intentions or without recklessness

- c. the fear alleged by the complainant was unreasonable; or
- d. the allegations are a falsification or **manipulative**.

VOLUME #9(T)(iii): Lawful Authority

630. In relation to “lawful authority”, what could be more lawful than notifying Nicole (and Victory Wine) of a delivery of her property for her attendance without him present for pickup. Subsequent emails thereafter were confirmatory in nature.
631. There were then four emails to Nicole, some copied to the **Landlord**, that confirmed the events after the **Unlawful Lockouts** where the **Landlord** is likely to be liable for a fine of \$35,000 to the LTB in an administrative fine and likely anywhere from \$5,000 to \$15,000 in compensation to Mr. McLean for said **Unlawful Lockouts** in his capacity as the sole remaining tenant.
632. The tenor of the emails is a professional tone with various notifications and updates all relating to an ongoing LTB Proceeding. Not only was there lawful authority but they were tendered in certain respects as a courtesy but also for protection of Mr. McLean’s rights so he could not be held liable for any loss or damage in the event there was an allegation in that regard.
633. The very emails were placed into evidence with the LTB along with confirmatory certificates of service.
634. Had Nicole and Victory Wine taken any issue with the emails, they simply had to respond and confirm that they were received and they did not require any further updates. It is well-known principle of anyone legally trained, practiced law and/or a practicing lawyer (or most professional disciplines) to “cover your a-x-x” (“CYA”).
635. Perhaps, there was an element of a false police complaint made on behalf of Nicole. Perhaps, that person who engaged in the same was the **Landlord** (her mother). It is unclear at this juncture. The **Applicant** need not engage in suspicion – however reasonable.

VOLUME #9(T)(iv): Failure to investigate by TPS 14th Division

636. However, that is why there is a thing that law enforcement does called an “investigation”. While it would have been improper to lure Mr. Mclean to the **TPS 14th Division** on false pretenses for questioning regarding the same, it still would have been far less egregious than the conduct that the **TPS 14th Division** engaged in on that Wednesday, October 2, 2024, evening.

637. The **Tribunal** can take judicial notice that a brief detention and investigative questioning is far different than that of an arrest, detention, and imprisonment.

VOLUME #9(T)(v): Section 264(b) does not even get out of the gate

638. The criminal charge under section 264(b) does not even get out of the gate. Therefore, there were no legal grounds to even consider a charge let alone an arrest, detention, imprisonment, search and seizure, and the likely ongoing seizure and searches of the **McLean Property** (by copies or otherwise).

VOLUME #9(T)(vi): : Constable Romano received a copy of an order of Vice Chair of LTB: shortening time

639. In fairness to the officers of the **TPS**, at that time, they were unaware that not only had Mr. McLean obtain an extraordinary order of “shortening the time for the entire proceeding” but the **Tribunal** then later set the date for the entirety of all of the issues involving the **Landlord**’s breaches of the RTA, and then on Friday, October 11, 2024 the RHEU confirmed, in writing, with Mr. McLean that he had overcome that hurdle as well and it now has an ongoing active investigation complaint file into the **Landlord**.

640. While Mr. McLean’s initial positions turned out to be somewhat prophetic, while the **TPS** attempted to downplay the significance of it (when Mr. McLean emailed Constable Romano regarding the same and then had a cordial conversation about it when he arrived on October 2, 2024), Mr. McLean cannot cherry pick or be sanctimonious. At the time means “at the time” and neither parties can attempt to have later evidence factor into the **Material Time**.

VOLUME #9(T)(vii): : Knowing that the other person was harassed

641. Mr. McLean’s initial response to the sneak attack, after the **False Pretense Email** and the luring of him into the **TPS 14th Division**, is ironically some of the best evidence in relation to this ground as it was in the nature of a “spontaneous utterance”. Mr. McLean, in response, to the “sly guy move” of “here is your property, sign here, and here come the handcuffs move” was, in part, “Harassment of who? When? What? I was never warned by anyone.” At that stage, Mr. McLean is unaware whom they are even referring to as another person.
642. Objectively, the officers of the **TPS** later confirm it related to Nicole with some unspecified dates, modes of communication et al, under section 264(b) of the *Criminal Code*.
643. While legal analysis and litigation should never be reduced to simple “common sense”, as then there would be no requirements for legal representation of others, under this second element of the test, the question must be asked: if Mr. McLean knew that he was engaged in harassment of another person, would attend the police department on their own in the evening?
644. The question answers itself.
645. Under this element, it comes back to Mr. McLean, as he was being tag-teamed arrested by Constable Romano and DC Kolankowski, the immediate question (after the above) that Mr. McLean asked in that no one ever warned him. DC Kolankowski responded, “I warned you.” As Mr. McLean was made aware that there were video cameras in the “dungeon” of the *14th Division* of the **TPS**, if there are video cameras in the foyer or reception area of the **TPS**, Mr. McLean not only welcomes it but demands it. The reason being is that Mr. McLean is well aware that people have referred to him over the years as highly demonstrative and expression-filled. He is not the most “stoic” of people.
646. While he did not have a mirror around to check his facial expression, he vividly remembers how stunned he was when DC Kolankowski made that representation. He only surmises that if caught on video camera, then it will show the look of absolute shock on his face considering he had not had any phone call with

any police officer at that point or ever in his six plus years in Toronto, Ontario. Secondly, his evidence is most consistent with then Constable Romano saying, “Well there is a warrant for your arrest.” This appears to be Constable Romano thinking quickly on his feet, albeit unlawfully, to save his “partner” from his misrepresentation.

647. Not only will the **Tribunal** but the Attorneys General will note that on October 2, 2024, Mr. McLean had been displaced from his **Rental Unit 410** for approximately 14 days at that time. Moreover, the order of a Vice Chair of the LTB was issued on October 1, 2024. At that point, Mr. McLean knew the end was in sight. Put another way, it was not for him to be braggadocios or that he was going to be successful in a LTB matter but rather there is no law that supported the **Landlord** and **Goldview** engaging in a surreptitious lockout of him from **Rental Unit 410** when they knew he was away from Unit 410 and all of his property remained.
648. Even if Mr. McLean passed during the time of the **Unlawful Lockouts** and the hearing of the issues surrounding the **Unlawful Lockouts**, and there was no executor or executrix, and/or delegated representative, the estate of Mr. McLean would win because the LTB must decide in accordance with the law.

VOLUME #9(T)(viii): Reasonable fear for their safety

649. As noted in the pleading, reasonable fear about loss of economic status or money is not a ground to file a criminal harassment complaint and/or for anyone to be charged. That is exactly what the LTB proceeding is about: money and property. The “reasonable person standard” is an objective one. Ignorance of the law is not a defence for anyone let alone the **TPS**.

VOLUME #9(U): Arrests with warrant and arrests without warrants (“Warrantless Arrests”)

650. The *Criminal Code* contains provisions governing arrests with and without a warrant. These provisions require, in order to safeguard the liberty of individuals, that the police have met the required threshold before making an arrest (*Storrey, supra* at 249).

651. The standard of “reasonable and probable grounds” has both a subjective and an objective aspect: “It is not sufficient for the police officer to personally believe that he or she has reasonable and probable grounds to make an arrest. Rather, it must be objectively established that those reasonable and probable grounds did in fact exist. That is to say a reasonable person, standing in the shoes of the police officer, would have believed that reasonable and probable grounds existed to make the arrest” (*Storrey, supra* at 250).
652. The standard of reasonable and probable grounds for arrest relates to the facts underpinning the arrest and not the existence of an offence in law (*Tim, supra* at paragraph 36). An arrest based on a mistake of law, i.e. where an officer knows the facts and erroneously concludes that they amount to an offence, when, as a matter of law, they do not, is unlawful and therefore arbitrary (*Tim, supra* at paragraph 36). This will be the case whether the mistake of law involves a non-existent offence or when the offence itself exists but could not be engaged by the facts relied on by the officer (*Tim, supra* at paragraph 41).
653. A lawful arrest based on reasonable and probable grounds will never be arbitrary (*R. v. Latimer*, [1997] 1 S.C.R. 217 at paragraphs 22, 26).

VOLUME #9(U)(i): Application of the Law to the Facts

654. The corollary is that an arrest, absent a warrant, NOT based on reasonable and probable grounds

VOLUME #9(V): Section 9: judge police on what they did – not what they could have done

655. Courts of appeal have held under section 9 that police are to be judged on what they did, not what they could have done: an unlawful arrest cannot be defended on the basis that the individual could have been detained under the common law power of investigative detention (*R. v. Moore*, 2012 BCCA 400; *R. v. Whitaker*, 2008 BCCA 174 at paragraph 65, leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 296; *R. v. Charley* (1993), 62 O.A.C. 399).
656. As such, Mr. McLean again notes the “red herring” of the LTB Proceeding. While the decisions have been in his favour, that does not allow him to “cherry pick”.

VOLUME #9(W): Seminal point: if the arrest was unlawful – then all searches, seizures, imprisonment

657. Note that an arrest which is unlawful makes a search incident to that arrest unlawful and contrary to section 8 of the *Charter* (for a discussion of relevant principles, see Section 8 – Search and seizure).

VOLUME #10: RIGHTS UPON ARREST OR DETENTION (OR BOTH)

VOLUME #10(A): Section 10 of the *Charter*

658. Section 10 of the *Charter* states:

10. Everyone has the right on arrest or detention

- a. to be informed promptly of the reasons therefor;
- b. to retain and instruct counsel without delay and to be informed of that right; and
- c. to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

659. Section 10 provides for certain rights that are triggered as soon as an individual is "detained" or "arrested" within the meaning of the section. Section 10 “ensures that people have a chance to challenge the lawfulness of an arrest or detention”, by requiring that individuals be informed promptly of the reasons for their arrest or detention, and then have a meaningful opportunity to retain and instruct counsel without delay (*R. v. Bielli*, 2021 ONCA 222 at paragraph 85). Although arrest and detention “are obviously not the only [situations] in which a person may reasonably require the assistance of counsel ... they are situations in which the restraint of liberty might otherwise effectively prevent access to counsel or induce a person to assume that he or she is unable to retain and instruct counsel” (*R. v. Therens*, [1985] 1 S.C.R. 613 at paragraph 52).

660. Out of *Meier* comes the principle, which is a longstanding legal precedent, is that the police cannot “Monday morning quarterback” and ruminate and then represent about what they could have potentially charged for at the time including obstruction. Moreover, if an arrest was unlawful, based upon a Fictitious Warrant, then there could not be obstruction.
661. Oddly, a sixty-year-old female in a rural town in BC, with a fused ankle and mobility issues was more defiant than Mr. McLean.
662. The obvious reasons are denoted herein but Constable Meier, unlike Constable Romano and DCK, did not claim to have a warrant.
663. Moreover, the misrepresentations by the TPS and TPS Respondents (Romano particularly) was such that he did not merely misrepresent some facts to Mr. McLean but he misrepresented that he and TPS *14th Division* were: judge, jury and executioner in the colloquial sense as it relates to applying for, obtaining and executing search warrants. Constable Romano unilaterally morphed his powers from that of only the executive branch to both the executive and the judiciary.
664. To review such a warrant would amount to an unreviewable discretionary power of the TPS *14th Division* because it would mean that Mr. McLean was applying to invalidate a warrant based upon a non-independent decision maker in the TPS *14th Division* deciding upon its own internal ITO.
665. There is NO procedure in the Criminal Code to apply to invalidate such a warrant – a warrant of imagination of the TPS *14th Division*.
666. This is not to be cheeky but perhaps the likes of the attitudes of Constable McArthur and Sergeant Morris of the *14th Division* are emblematic of a systematic problem at that division: inability to be in touch with reality? Perhaps, much of what is going on is in their heads. Victims of domestic violence do not want to receive half nude photos from a personal cell of an office. But maybe said division thinks they do. Sergeant McInnis did not want “anaconda genitalia pictures” from Sergeant Morris and him showing up for a sleep over he thought should happen. Perhaps DCK was of the view that a conversation in his head was telepathic with Mr. McLean. It was not. Perhaps Constable Romano had an afternoon nap and thought he had submitted an ITO to a justice. It is unlikely the Justice of the Ontario Superior Court or JOP received the same.

667. A person is arrested where there is either “(i) the actual seizure or touching of a person’s body with a view to his detention, or (ii) the pronouncing of ‘words of arrest’ to a person who submits to the arresting officer” (*R. v. Latimer*, [1997] 1 SCR 217 at paragraph 24; *R. v. Asante-Mensah*, [2003] 2 SCR 3 at paragraphs 42-46).
668. The phrase “words of arrest” should not be interpreted formalistically: the arresting officer does not actually need to say the word “arrest”. The question is what the person ought to have reasonably understood, based on all the words said and the full context (*Latimer, supra* at paragraphs 24-25, citing *R. v. Evans*, [1991] 1 S.C.R. 869, at page 888).

VOLUME #10(C): Detention – Generally

669. “Detention” in section 10 has the same meaning as in section 9 of the *Charter* (*R. v. Hufsky*, [1988] 1 S.C.R. 621 at paragraph 12).
670. Detention requires some form of significant physical or psychological restraint, compulsion or coercion (*R. v. Grant*, [2009] 2 S.C.R. 353 at paragraph 44). Section 10 is directed at a multiplicity of restraints of liberty of varying duration (*Therens, supra* at paragraph 50).
671. A psychological detention occurs where the subject is legally required to comply with a direction or where, in the absence of such a direction, state conduct would lead a reasonable person to conclude that they had no choice but to comply (*Therens, supra* at paragraph 57; *Grant, supra* at paragraphs 30, 44; *R. v. Le*, 2019 SCC 34 at paragraphs 25-26; *R. v. Lafrance*, 2022 SCC 32 at paragraph 21).
672. Changes in one’s conditions of imprisonment may be sufficiently severe so as to be considered a second “detention,” the legality of which is reviewable by *habeas corpus* (see *Cardinal et al. v. Director of Kent Institution*, [1985] 2 S.C.R. 643 at paragraph 13; see also *May v. Ferndale Institution*, [2005] 3 S.C.R. 809; *Mission Institution v. Khela*, [2014] 1 S.C.R. 502).
673. It is always important to remind the reader that Constable Romano represented words to the effect when arresting or attempting to with Mr. McLean, “Don’t resist.”
674. Even DCK apologized to Mr. McLean if he injured him – albeit in the “prison” area or separated area of the *14th Division*.
675. DCK did not and Mr. McLean is not making that allegation.

676. Mr. McLean did suffer some injuries in the prison cell but NOT at the hands of the TPS and TPS Respondents. He had an issue with his left foot as a result of the Unlawful Lockouts and the lack of socks and cold floor caused some irritation. When he attempted to take off some of the skin therein, it further broke leading to a vast amount of bleeding. This is one of the unfortunate consequences of prison and its protocol of “no socks” and a “lack of any toilet paper” or “tissue” inside the cell.

VOLUME #10(D): Detention – Criminal context Moran – no longer good law unless questioning

Closest cases are: Lafrance and Tessier where individuals come to a police station without being arrested but then are detained or arrested Distinction herein: McLean came based upon the FPE and Fraud

677. The applicable test for determining whether a detention has occurred in the criminal context is always the objective assessment set out in *Grant, supra* at paragraph 44, as explained above. The Supreme Court has directed that courts are to no longer apply the factors identified by the Ontario Court of Appeal in *R. v. Moran*, 1987 CanLII 124. Those factors had often been applied, by trial courts and appellate courts, where a person had been questioned at a police station. See *Lafrance, supra* at paragraphs 24-28.
678. A detention may occur simply by the police officer touching an individual and ordering them to move (*R. v. Feeney*, [1997] 2 S.C.R. 13 at paragraph 56). As noted above, not every interaction between police and individuals will amount to a detention, even where police are engaged in a criminal investigation. The Supreme Court has held that “no detention is effected, and therefore section 10(b) rights are not breached, where an individual voluntarily assists the police by, for example, freely agreeing to provide a statement” (*Lafrance, supra* at paragraph 21). That said, the assessment of voluntariness must be informed by a practical understanding of the power imbalance between police and individuals, especially in the context of criminal investigations. The mere fact that police told the individual that they were “not detained”, under no obligation to co-operate and free to leave, is not determinative in objectively assessing whether the person was subject to psychological detention (*Lafrance, supra* at paragraphs 37-40).
679. Similarly, where the police drive someone to the police station who is not under arrest, this will not necessarily amount to a detention: “the question is whether a reasonable person in the passenger’s shoes would believe that he or she could cease cooperating by asking the police to stop the vehicle and leave;

the answer will depend on all the circumstances of the case, including what has already transpired” (*Lafrance, supra* at paragraph 49).

680. The venue of the police questioning can also play a contextual role. A police intrusion into a private space, such as a home or backyard, “is reasonably experienced as more forceful, coercive and threatening than when similar state action occurs in public” (*Le, supra* at paragraph 51). Where questioning occurs in a secure environment controlled by the state, such as a locked interview room in a police station, this is a factor militating in favour of a psychological detention (*Lafrance, supra* at paragraphs 50-51). That said, it is not a determinative factor. In another recent case of questioning in a police station during a criminal investigation, the Supreme Court held that there had been no psychological detention due to a range of contextual factors, including that the person had brought themselves to the station on police request (not demand), and was permitted to leave as they wished (*R. v. Tessier*, 2022 SCC 35 at paragraphs 105-111).

Agent of police

681. A student summoned by the principal who feels compelled to be there is not detained for the purposes of section 10(b), although this might be the case where the principal is acting as an agent of the police (*R. v. M.(M.R.)*, [1998] 3 S.C.R. 393 at paragraphs 65-68).
682. When police investigations are expanded and directed at other offences during a questioning session, the police have a duty to inform the person of rights under section 10 again. As such, an individual is, in effect, “re-detained” (*R. v. Borden*, [1994] 3 S.C.R. 145 at paragraphs 43-45; *R. v. Black*, [1989] 2 S.C.R. 138 at 152-153).
683. The demand for a roadside breath test under section 234.1(1) (now section 254(2) of the *Criminal Code*) falls within the criteria for detention. The difference in duration of the restraint of liberty resulting from a section 234.1(1) demand (screening) and that resulting from a section 235(1) (now section 254(3) of the *Criminal Code*) demand (breathalyzer) is not such as to prevent the former from constituting a detention within the meaning of section 10 (*Thomsen, supra* at paragraph 13; *Schmautz, supra* at paragraphs 16-17).

VOLUME #11: Right to be free from Unreasonable Search OR Seizure

VOLUME #11(A): Section 8 of the *Charter*

684. Section 8 of the *Charter* reads: . Everyone has the right to be secure against unreasonable search or seizure.

VOLUME #11(B): Unreasonable search or seizure simpliciter

685. It is trite that an unreasonable search simpliciter or an unreasonable seizure simpliciter can constitute a breach of Section 8.

VOLUME #11(C): *Privacy: core of Section 8; if lacuna – section 7 of the Charter provides residual protection*

686. While privacy is a central or core concern under section 8 of the *Charter*, section 7 also provides residual protection for privacy interests (*R. v. Mills*, [1999] 3 S.C.R. 668, and especially at paragraphs 77-89, 94, 99 and 108, where the court embedded privacy analysis based on section 8 considerations within analysis of a section 7 principle of fundamental justice).

VOLUME #11(D) Purpose of Section 8 of the *Charter*

PREVENT unjustified intrusions before they happen

687. Section 8 protects people, not places, against unjustified intrusions on their privacy interests (*Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at page 159; *R. v. Gomboc*, [2010] 3 S.C.R. 211 at paragraphs 17, 75). As demonstrated by *Hunter v. Southam, supra*, the protection of people includes corporations as legal persons. The purpose of section 8 is to prevent unjustified searches before they happen, not simply to determine after the fact whether they ought to have occurred in the first place (*Hunter v. Southam, supra* at page 160).

VOLUME #11(E) Overlap between *HR Code* and Section 8 of the *Charter*

688. The values underlying the privacy interest protected by section 8 are dignity, integrity and autonomy (*R. v. Plant*, [1993] 3 S.C.R. 281 at page 292). The protection section 8 provides for privacy — personal, territorial and informational — is essential not only to human dignity, but also to the functioning of our democratic society. As such, section 8 protects a sphere of individual autonomy within which people have the right “to be let alone” and on which the state cannot intrude without permission (*R. v. Ahmad*, 2020 SCC 11 at paragraph 38). At the same time, section 8 permits reasonable searches and seizures in recognition that the state’s legitimate interest in advancing its goals or enforcing its laws will sometimes require a degree of intrusion into the private sphere (*Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, [2015] 3 S.C.R. 250 at paragraph 55).

VOLUME #11(F): Overlap of section 8 with other <i>Charter</i> rights

689. The Supreme Court has suggested that the interests protected by section 8 may extend beyond those of privacy (*R. v. A.M.*, [2008] 1 S.C.R. 569 at paragraph 33, per Binnie J, citing *Hunter v. Southam, supra* at page 159) but has not yet articulated the nature of any additional potential section 8 protections. That said, at a minimum, section 8 protections may overlap with protections generally recognized under other *Charter* rights. For example, in *R. v. S.A.B.*, [2003] 2 S.C.R. 678, the Supreme Court decided that self-incrimination principles in relation to warrant powers to collect DNA evidence at sections 487.04 to 487.09 of the *Criminal Code* should be analyzed under section 8 of the *Charter* and that analysis need not turn to section 7 (see paragraphs 1, 33-35; see also *Wakeling v. United States of America*, [2014] 3 S.C.R. 549 at paragraphs 48-50).

VOLUME #11(G): Analysis

690. As the validity of the *Criminal Code* or the *HR Code* is not challenged by either of the parties, there are two steps the analysis when analyzing the conduct of the **TPS** and its actual and apparent agents:
- a. *Has there been a “search” or a “seizure”?*
 - b. *If so, was the search or seizure reasonable?*

VOLUME #11(G): Step 1

691. Not every form of examination conducted by the government, and not every taking by the government, will constitute a ‘search’ or ‘seizure’ for constitutional purposes. An inspection is a search, and a taking is a seizure, where a person has a reasonable privacy interest in the object or subject matter of the state action and the information to which it gives access (*R. v. Tessling*, [2004] 3 S.C.R. 432 at paragraph 18; *R. v. Evans*, [1996] 1 S.C.R. 8 at paragraph 11).
692. What is a seizure? It is well settled that a demand by a person for production of records is a seizure.
693. Photocopying of a record is a search (see: *R. v. Law*, 2002 SCC 10). It remains unclear whether the **TPS**, in fact, photocopied any of Mr. McLean’s documents.
694. Whether the public authority "takes" the documents or compels the person to hand them over or demands entry into the private property, the impact on the person's right to privacy is the same (see: sections 17(1) and (4) of the *Combines Investigation Act*, therefore, constitute a seizure within the meaning of s. 8 and *Thomson Newspapers Ltd. v. Canada*, 1990 CanLII 135 (SCC))

VOLUME #11(H): Section 495 authorizes warrantless searches or seizures (searches and seizures incident to warrantless arrests) – presumptively unreasonable

695. Legislation that authorize warrantless searches and/or seizures is presumptively unreasonable. In the absence of prior judicial authorization, a search or seizure is presumptively unreasonable. The burden shifts to the governmental body to justify the reasonableness of the search in that it must “rebut the presumption”
696. The test is a three-part conjunctive test as noted in Branch citing *Collins*:
- a. a. whether these searches and/or seizures are authorized by law;
 - b. b. that the law authorizing the search or seizure is reasonable; and
 - c. c. that the manner in which the searches and/or seizures was carried out was reasonable.

697. In order to be reasonable, searches and seizures must be authorized by law. The reason for this requirement is clear: under both the *Charter* and the common law, agents of the state can only enter onto or confiscate someone's property when the law specifically permits them to do so. Otherwise, they are constrained by the same rules regarding trespass and theft as everyone else. There are three ways in which a search can fail to meet this requirement.
698. First, the state authority conducting the search must be able to point to a specific statute or common law rule that authorizes the search or seizure. If they cannot do so, the search cannot be said to be authorized by law.
699. Second, the search must be carried out in accordance with the procedural and substantive requirements the law provides. For example, s. 487 of the *Criminal Code*, R.S.C., 1985, c. C-46, authorizes searches, but only with a warrant issued by a justice on the basis of sworn information setting out reasonable and probable grounds. A failure to meet one of these requirements will result in a search and/or seizure which has not been authorized by law.
700. Third, and in the same vein, the scope of the search is limited to the area and to those items for which the law has granted the authority to search. To the extent that a search exceeds these limits, it is not authorized by law.
701. This dovetails with the test for public interest litigation in that there are undecided issues of public importance which certainly transcend the litigant.
702. The Honourable Chief Justice Finch (of the BCCA) then summarized the principles as follows at para 44 in *Arkisntall* (although this involve an administrative search warrant under provincial legislation):

“In *Hunter*, the Supreme Court of Canada stated that a warrantless search is *prima facie* unreasonable. To rebut this presumption of unreasonableness, it is necessary to meet the three requirements established in *R. v. Collins*, 1987 CanLII 84 (SCC), [1987] 1 S.C.R. 265: that the search was authorized by law; that the law authorizing the search was reasonable; and that the

manner in which the search was carried out was reasonable. The main area of dispute on this appeal is under the second *Collins* criterion.”

VOLUME #11(I): Separate Warrant for Technological Devices

703. Although that landmark finding was in a criminal case of *R. v. Vu*, Cromwell J. writing for a unanimous court regarding separate warrant

If, for example, an authorizing justice were faced with confidential intellectual property or potentially privileged information, he or she might find it necessary and practical to impose limits on the manner in which a computer could be searched. In some cases, authorizing justices may find it practical to impose conditions when police first request authorization to search. In others, they might prefer a two-stage approach where they would first issue a warrant authorizing the seizure of a computer and then have police return for an additional authorization to search the seized device. This second authorization might include directions concerning the manner of search

VOLUME #11(K): Step 2

704. A search or seizure will be reasonable where it is (1) authorized by law; (2) the law itself is reasonable; and (3) the manner in which the search is carried out is reasonable (*R. v. Collins*, [1987] 1 S.C.R. 265 at paragraph 23; *Hunter v. Southam, supra*; *R. v. Nolet*, [2010] 1 S.C.R. 851 at paragraph 21; *R. v. Shepherd*, [2009] 2 S.C.R. 527 at paragraph 15).

VOLUME #11(K)(I): Both steps of the inquiry

705. Both steps of the inquiry call for a highly contextual analysis, with the result that different contexts yield different expectations of privacy which in turn give rise to different requirements at the second stage of the analysis. In general terms, determining the constitutional reasonableness of a search and seizure is “a function of both the importance of the state objective and the degree of impact on the individual’s privacy

interest” (*R. v. Rodgers*, [2006] 1 S.C.R. 554; *S.A.B.*, *supra* at paragraph 38; *Hunter v. Southam*, *supra* at pages 159-60)

VOLUME #11(L)Has there been a search or seizure
(i) Types of state conduct to which section 8 may apply

706. The courts have defined “**search**” for section 8 purposes as any state activity that interferes with a reasonable expectation of privacy. This can include looking for things that are tangible or intangible, such as spoken words and electronic data (*R. v. Morelli*, [2010] 1 S.C.R. 253), or scents (*Evans*, *supra* at paragraphs 12-21; *R. v. Kokesch*, [1990] 3 S.C.R. 3).

VOLUME #11(M): Interception of personal, private or confidential information

707. The interception and recording of a private communication should be considered a search in all circumstances, save where all parties to a conversation expressly consent to the recording (*R. v. Duarte*, [1990] 1 S.C.R. 30 at pages 42-46).

VOLUME #11(M)(i): Application of the Law to the Facts

708. Herein, the **TPS** had no right to inspect any of the **McLean Property** and/or **McLean Medication** as no third party could waive his rights (see: Cole). Moreover, the **TPS** attempted to use the unlawful arrest as a means to sanitizing its breaches as a “catch all” power or powers incident to the arrest. To the extent that the arrest was unlawful, all other *Charter* rights are made out in unassailable fashion.
709. The **TPS** did not ask for permission but are now in the position of begging for forgiveness in any court fora.
710. A “**seizure**” for section 8 purposes is the “taking of a thing from a person by a public authority without that person’s consent” (*R. v. Dyment*, [1988] 2 S.C.R. 417 at page 431; *R. v. Colarusso*, [1994] 1 S.C.R.

20 at page 58; *R. v. Law*, [2002] 1 S.C.R. 227 at paragraph 15). This includes situations in which a person is required to produce a thing (including information) pursuant to a state compulsion (*R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627 at page 642; *Mills* (1999); *supra* at paragraph 77; *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3 at page 34; see also *R. v. White*, [1999] 2 S.C.R. 417; *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425). The power to make copies of documents is analogous to a requirement for production of documents and constitutes a seizure within section 8 (*Comité paritaire*; *supra* at page 439).

VOLUME #11(N): Police engage in seizure even when they did not directly take from the individual

711. In order to constitute a “seizure”, a “taking” by the state need not be directly from the person whose rights are affected. For example, where a medical professional obtains a bodily sample for medical purposes, disclosure of the sample to police will amount to a “seizure” (*Dyment, supra*; *R. v. Dersch*, [1993] 3 S.C.R. 768; *Colarusso* at page 56). This is so whether the sample is provided pursuant to a police demand, request, or whether it is provided voluntarily. The fact that a person who has acquired lawful possession of information for their own purposes voluntarily discloses the information to the state does not vest in the state a delegated or derivative power to appropriate that information for the purposes of a criminal investigation (*R. v. Cole*, [2012] 3 S.C.R. 34 at paragraph 67).
712. The section 8 protection against seizure does not apply to government action merely because those actions interfere with property rights. Rather, “there must be a superadded impact upon privacy rights occurring in the context of administrative or criminal investigation” (*Quebec (Attorney General) v. Laroche*, [2002] 3 S.C.R. 708 at paragraph 53).

VOLUME #11(O): What are the police really after

713. Thus, a restraint order against property will constitute a seizure where it is issued for the ultimate purpose of investigation (*Laroche, supra* at paragraph 54). Similarly, where what the police are “really after” is

ultimately to access the data on a personal computer, the taking of the computer constitutes a seizure because it deprives individuals of control over highly private information and ensures the preservation of that information for potential future state inspection (*R. v. Reeves*, 2018 SCC 56 at paragraphs 29-31).

714. Where the state has seized records, the Supreme Court has indicated that **disclosure** of those records to individuals outside of those to whom, or for purposes other than for which, they were originally divulged may interfere with a reasonable expectation of privacy (*Mills* (1999), *supra* at paragraph 108; *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390 at paragraphs 28-30, 39-43; see also *Wakeling*, *supra* at paragraphs 91-96 *per* McLachlin C.J. and paragraphs 122-125 *per* Karakatsanis J., dissenting; but see *Wakeling*, *supra* at paragraphs 32-40 where Moldaver J. appears to endorse a plain meaning interpretation of s. 8 that would not generally capture the disclosure of information by the state)

VOLUME #11(Q): (ii) “Totality of the circumstances” test

715. Whether or not state action has interfered with a reasonable expectation of privacy (so as to constitute a search or seizure) is to be determined on the basis of the totality of the circumstances. The “totality of the circumstances” test is one of substance, not form (*R. v. Edwards*, [1996] 1 S.C.R. 128 at paragraph 45). Four lines of inquiry guide the application of the test (*Cole*, *supra* at paragraph 40; *Tessling*, *supra* at paragraph 32):
- a. an examination of the subject matter of the search;
 - b. a determination as to whether the claimant had a direct interest in the subject matter;
 - c. an inquiry into whether the claimant had a subjective expectation of privacy in the subject matter; and
 - d. an assessment as to whether this subjective expectation of privacy was objectively reasonable (*Tessling*, *supra* at paragraphs 31-32; *Gomboc*, *supra* at paragraphs 18, 78; *Cole*, *supra* at paragraph 40; *R. v. Patrick*, [2009] 1 S.C.R. 579 at paragraph 27).
716. The totality of the circumstances test determines both the existence and extent of the reasonable expectation of privacy. If there is no reasonable expectation of privacy, the protections of section 8 are not engaged and the analysis ends there. If there is a reasonable expectation of privacy of any degree,

section 8 will be engaged to prevent state interference except under the authority of a warrant or other reasonable law (*Cole, supra* at paragraph 9).

VOLUME #11(R): The subject matter of the search

717. It is essential at the outset to identify the subject matter of the search. In many cases this will be a straightforward matter. In others, however, it will not. In such cases, the characterization of the subject matter can make a major contribution to the analysis (see *e.g., Patrick, supra* at paragraphs 29-30, explaining that the garbage bag at issue in that case was more aptly characterized as a “bag of ‘information’ whose contents, viewed in their entirety, paint a fairly accurate and complete picture of the householder’s activities and lifestyle”; see also *Tessling, supra* at paragraphs 34, 58; *Cole, supra* at paragraph 41).
718. When identifying the subject matter of an alleged search, the court must not do so “narrowly in terms of the physical acts involved or the physical space invaded, but rather by reference to the nature of the privacy interests potentially compromised by the state action.” This involves consideration of what the state activity may “tend to reveal” (*R. v. Spencer*, [2014] 2 S.C.R. 212 at paragraphs 26, 31).
719. The nature of the privacy interest does not depend on whether, in the particular case, privacy shelters legal or illegal activity. The analysis turns on the privacy of the area or the thing being searched and the impact of the search on its target, not the legal or illegal nature of the items sought (*Patrick, supra* at paragraph 32; *Spencer, supra* at paragraph 36).
720. The Supreme Court has identified three broad privacy interests protected by section
- a. **personal** privacy,
 - b. **territorial** privacy and
 - c. **informational** privacy.
721. The distinction between these categories provides a useful analytical tool but is not determinative of the analysis as, in a given case, the privacy interest may overlap the categories (*Tessling, supra* at paragraph 24; see also *Gomboc, supra* at paragraph 19).

VOLUME #11(S)(I): Personal privacy

722. Privacy of the person perhaps has the strongest claim to constitutional shelter because it protects, in particular, the right of individuals not to have their bodies touched or explored to disclose objects or matters they wish to conceal (*Tessling, supra* at paragraph 21) and is often at issue in criminal investigations when the state wishes to pursue invasive procedures such as drug testing and cavity searches.
723. The Supreme Court has repeatedly emphasized the close relationship between bodily privacy and human dignity (see *e.g.*, *Tessling, supra* at paragraph 21; *R. v. Golden*, [2001] 3 S.C.R. 679 at paragraphs 87 and 98-99; *Dyment, supra* at pages 431-32; *R. v. Pohoretsky*, [1987] 1 S.C.R. 945 at page 949; *R. v. Stillman*, [1997] 1 S.C.R. 607 at paragraph 42).

VOLUME #11(S)(II) Territorial/spatial privacy

724. Territorial privacy has its origins in the notion that “the house of everyone is to him as his castle and fortress” (*Semayne’s Case*, [1558-1774] All E.R. Rep. 62 (1604), at page 63). This has developed into a more nuanced hierarchy protecting privacy: in the home, being the place where our most intimate and private activities are most likely to take place.⁵³
725. Such a hierarchy of places does not contradict the underlying principle that section 8 protects “people, not places”, but uses the notion of place as an analytical tool to evaluate the reasonableness of a person’s expectation of privacy (*Tessling, supra* at paragraph 22).

VOLUME #11(S)(III): Informational privacy

726. In fostering the underlying values of dignity, integrity and autonomy, it is fitting that section 8 of the *Charter* should seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual (*Plant, supra* at page 293). Informational privacy has been defined as “the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others” (*Tessling, supra* at paragraph 23; see also *Patrick, supra*; *Gomboc, supra*; *Cole, supra*; *A.M., supra*).
727. Informational privacy includes at least three conceptually distinct, though overlapping, understandings of what privacy is: privacy as secrecy; privacy as control and privacy as anonymity. Privacy as secrecy encompasses the expectation that information disclosed in confidence will be held in trust and confidence by those to whom it is disclosed. Privacy also encompasses a wider notion of control over, access to, and use of information. This aspect of privacy “derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit” (*Spencer, supra* at paragraph 40). Privacy as anonymity permits individuals to act in public places but to preserve freedom from identification and surveillance. This conception of privacy is particularly important in the context of Internet usage (*Spencer, supra* at paragraphs 41-43). Because the Internet has exponentially increased both the quality and quantity of information that is stored about Internet users, and because users cannot fully control or even be fully aware of who may observe a pattern of online activity, it is by remaining anonymous that the user can in large measure be assured that the activity remains private (*Spencer, supra* at paragraph 46).

VOLUME #11(T): Individual Identity at stake: highest REOP

728. Privacy concerns in relation to information are at their strongest where aspects of an individual’s identity are at stake, such as in the context of information “about one’s lifestyle, intimate relations or political or religious opinions” (*Mills* (1999), *supra* at paragraph 81; *Thomson Newspapers, supra* at page 517; *Branch, supra* at paragraph 62).

VOLUME #11(T) Whether the claimant had a direct interest in the subject matter

VOLUME #11(T)(I) Locus standi: Mr. McLean must have an interest in the subject matter at issue

729. In order to have standing to bring a claim under section 8, the state conduct at issue must implicate the claimant's personal privacy rights (as opposed to those of a third party) (*Edwards, supra* at paragraphs 43, 45-47; *R. v. Marakah*, 2017 SCC 59 at paragraph 12). In the section 8 context, the Supreme Court sometimes equates the issue of standing with the existence of a reasonable expectation of privacy (see *e.g.*, *Marakah, supra* at paragraphs 54-55). In other cases, the Court appears to understand the issue of standing in the narrower sense described above, as a means of limiting arguments based on the constitutional rights of third parties (see *e.g.*, *Edwards, supra* at paragraph 34; *R. v. Ferguson*, 2008 SCC 6 at paragraph 61).

VOLUME #11(T)(II): Exception to the rule: any fact Crown has alleged or will allege: result in prosecution

730. As an exception to the general rule that a *Charter* applicant bears the burden of proving the *Charter* infringement, the court may assume, for the purpose of considering the applicant's s. 8 challenge, any fact that the Crown has alleged or will alleged in the prosecution (*R. v. Jones*, 2017 SCC 60 at paragraphs 32-33).
731. Where a person is a third party in a location where a search or seizure takes place (*e.g.*, a passenger in a stopped vehicle or a guest in a house), this factor may limit their privacy interest in the location and in its contents (*R. v. Belnavis*, [1997] 3 S.C.R. 341 at paragraphs 22, 24; *Edwards, supra* at paragraphs 45-47, 49). However, the intrusion on the privacy rights of a third party may be relevant to the question of whether the search was carried out in a reasonable manner, which arises at the second stage of the section 8 analysis (*Edwards, supra* at paragraphs 35-38; see "(b) *If so, was the interference reasonable?*" below).

VOLUME #11(U) Whether the claimant had a subjective expectation of privacy

VOLUME #11: Mr. McLean’s subjective EOP: reasonableness not the issue

VOLUME #11: Not high hurdle

732. When determining whether a claimant had a subjective expectation of privacy, “reasonableness” is not the issue (*Patrick, supra* at paragraph 37). The question is whether the claimant had, or is presumed to have had, an expectation of privacy in the subject matter of the search (*Patrick, supra* at paragraph 37; *Jones, supra* at paragraphs 19-22). This is not a high hurdle. For example, in the case of information about activities taking place in a dwelling house, an expectation of privacy can be presumed in the claimant’s favour (*Patrick, supra* at paragraph 37; *Gomboc, supra* at paragraph 25). Similarly, a subjective expectation of privacy can be inferred in text messages sent to a known recipient (*Jones, supra* at paragraph 15).

VOLUME #11(V): Subjective important but absence should not undermine the section 8 right

733. The subjective expectation of privacy is important but its absence should not be used too quickly to undermine the protection afforded by section 8 to the values of a free and democratic society. A person who fears their telephone is bugged may no longer have a subjective expectation of privacy but does not necessarily forfeit the protection of section 8. Privacy is a normative rather than descriptive standard (*Tessling, supra* at paragraph 42; *R. v. Jarvis*, 2019 SCC 10 at paragraph 68).

VOLUME #11(W) Whether the subjective expectation of privacy was objectively reasonable

VOLUME #11: The subjective expectation of privacy – whether objectively reasonable – purposes of the intrusion

734. The analysis of whether a subjective expectation of privacy is objectively reasonable is highly contextual and “can vary with the nature of the matter sought to be protected, the circumstances in which and the place where state intrusion occurs, and the purposes of the intrusion”: (*Patrick, supra* at paragraph 38; *Colarusso, supra* at page 53; see also *R. v. Buhay*, [2003] 1 S.C.R. 631 at paragraphs 22, 23 and 24).
735. There is no definitive list of factors that must be considered in assessing the objective reasonableness of an expectation of privacy. The relevant case law, however, provides useful guidance in the form of a non-exhaustive list of factors that are potentially relevant (*Cole, supra* at paragraph 45).

VOLUME #11(X): Place where the alleged “search” occurred

VOLUME #11: Intersection of the LTB Proceeding and **HRTO Proceeding:** **TPS** could not rely upon the illegality of the **Landlord** to bypass consent of the **Landlord**

736. Analysis of this factor can include consideration of: (i) presence at the time of the search or seizure; (ii) possession or control of the property or place searched; (iii) ownership of the property or place; (iv) historical use of the property or item; and (v) the ability to regulate access, including the right to admit or exclude others from the place (*Edwards, supra* at paragraph 45; *Belnavis, supra* at paragraph 20; *M.(M.R.), supra* at paragraph 31; *Buhay, supra* at paragraph 18).

VOLUME #11: Application of the Law to the Facts

737. It remains a matter for document discovery and production as to how the **TPS** obtained the **McLean Property** and **McLean Medication** in that there are only two realistic possibilities:
- a. The **TPS** attended the **Rental Unit 410** to obtain the same; or

- b. The **TPS** received the same in unauthorized fashion by the **Landlord** or a **Landlord** agent delivering the same to it at the *14th Division*.

738. The **TPS** represented to Mr. McLean that it obtained the **McLean Property** and **McLean Medication** on or around 2:30 in the afternoon.
739. Private dwellings, in contrast to other premises, carry heightened privacy expectations (*Kokesch, supra* at pages 16-18; *Feeney, supra* at pages 43-45; see also *R. v. Landry*, [1986] 1 S.C.R. 145). The perimeter around these dwellings carries similar constitutional protection (*Plant, supra* at page 291; *Wiley, supra* at page 273; *Grant* (1993), *supra*; *Gomboc, supra* at paragraph 79).

VOLUME #11(Y): Police could not attend to obtain Mr. McLean’s property or have a non-government agent provide that which they could not obtain without a seizure warrant and then a search warrant (if electronic in nature)

740. Although police have an implied license to approach the door of a residence and knock for the limited purpose of communicating with the occupant, conduct going beyond the terms of the implied license (*e.g.*, attempting to “sniff” for marihuana or pushing the door open), intrudes on the reasonable privacy interest in the dwelling (*Evans, supra* at paragraph 15; *R. v. MacDonald*, [2014] 1 S.C.R. 37 at paragraphs 26-27).

VOLUME #11(Z): Private Dwellings: especially – **McLean Property** located therein – high REOP

741. This heightened expectation of privacy in private dwellings will be lessened in the context of administrative inspections where the dwelling also serves as the workplace in a regulated industry (*Comité paritaire, supra* at page 424).

VOLUME #11(AA): **Rental Unit 410:** Master Key for **Goldview** – still high REOP

742. A person retains a limited, but still significant, expectation of privacy in a hotel room, public locker, or other place even though there exists a “master key” (*R. v. Wong*, [1990] 3 S.C.R. 36; *Buhay, supra*).
743. Travelers using public transportation maintain a reasonable expectation of privacy in their luggage (*R. v. Kang-Brown*, [2008] 1 S.C.R. 456; *R. v. Chehil*, [2013] 3 S.C.R. 220).

VOLUME #11(BB): Whether the subject matter was in public view

744. There can be no reasonable expectation of privacy in something that is knowingly exposed to the public, or to a section of the public, or abandoned in a public place (*Tessling, supra* at paragraph 40; see also *R. v. Boersma*, [1994] 2 S.C.R. 488; *Stillman, supra* at paragraphs 62, 226; *Evans, supra* at paragraph 50; *Baron v. Canada*, [1993] 1 S.C.R. 416, at page 453; *Dyment, supra* at page 435; *R. v. Monney*, [1999] 1 S.C.R. 652 at paragraph 45; *Patrick, supra* at paragraphs 27, 40, and 53; and *Gomboc, supra* at paragraph 119). However, the mere fact that a person enters a public space does not mean that the person expects to be personally identified and subjected to extensive surveillance (*Spencer, supra* at paragraph 44).

VOLUME #11(CC): Privacy is NOT binary

745. The fact that information may already be available to some segment of the public does not preclude further harm to the privacy interest by further dissemination. Privacy is not a binary concept; information is not simply either private or public (*R. v. J.J.*, 2022 SCC 28 at paragraph 60; *Sherman Estate v. Donovan*, 2021 SCC 25 at paragraph 81).

VOLUME #11(DD): Control over / ability to regulate access to the subject matter of the search

746. One may continue to have a reasonable expectation of privacy with respect to property or a thing even when it is no longer in one’s possession (*Mills* (1999), *supra* at paragraph 108; *Colarusso, supra* at paragraph 74; *Marakah, supra* at paragraph 37). Privacy interests in modern society include the

reasonable expectation that private information will remain confidential to the persons to whom and restricted to the purposes for which it was divulged (*Dyment, supra* at page 429; *Mills* (1999), *supra* at paragraph 108).

VOLUME #11(EE): Control

747. Control over and ability to regulate access to the subject matter of the search are relevant factors in determining the objective reasonableness of a subjective expectation of privacy. However, control is not an absolute indicator of a reasonable expectation of privacy, nor is lack of control fatal to a privacy interest (*Marakah, supra* at paragraph 38).

VOLUME #11(FF): Tattletales (distinguished from public mischief)

748. It is reasonable to ask citizens to bear the “tattletale” risk that someone will tell the police what they said. To accept this risk, however, is not to accept the risk of a different order that someone will consent to the police making an electronic recording of their words (*Duarte, supra* at page 48; *Reeves, supra* at paragraph 42). Similarly, to accept the risk that a participant in an electronic conversation could disclose its contents to police is not to accept the risk that the state will intrude upon the electronic conversation absent such disclosure (*Marakah, supra* at paragraph 40).

VOLUME #11(GG): REOP remains high: where loss of control over subject matter was involuntary

749. A reasonable expectation of privacy may persist in circumstances where the loss of control over the subject matter of the search is involuntary, such as where a person is in police custody, where the subject matter of the search is stolen by a third party, or where the person is restrained from accessing the subject matter of the search by court order (*Reeves, supra* at paragraph 38).

VOLUME #11(HH): Whether the subject matter had been abandoned [not applicable]

750. A person normally does not retain a reasonable expectation of privacy with respect to property or things, including informational content that have been voluntarily abandoned. The determination of whether a thing has been abandoned — *i.e.*, whether a person has relinquished a privacy interest in it — will have to be determined on the particular facts of the case. In the case of garbage, for instance, abandonment will be a function of both location (where the garbage was left) and the intention of the person abandoning the garbage (*Patrick, supra* at paragraphs 54-5, 62).

VOLUME #11(HH)(i): Application of the law to the Facts

751. The LTB Proceeding is replete with Mr. McLean's affidavit evidence confirming that there was no abandonment. The **TPS** had no right to obtain his property and medication without his consent.
752. The **Landlord** has never been an agent of Mr. McLean's and never will be.

VOLUME #11(II): Even when constructively seized – without consent – stolen – not abandoned

753. An item that is stolen is not, by virtue of that fact alone, abandoned. Although the owner would reasonably expect a certain degree of intrusion into the stolen item (*e.g.*, examination for evidence relevant to its theft or for reasons of safety), they do not lose all privacy interest in the object and retain a reasonable expectation that the police will not conduct a search for evidence to be used in a separate and unrelated investigation against the owner (*Law, supra* at paragraph 28).

VOLUME #11(JJ): Invasiveness of the technique or technology

754. In the context of personal privacy, the level of invasiveness is a function of the circumstances, including the duration of the search technique, whether there is penetration into the body, whether the technique causes pain or discomfort, and whether the search involves the removal of substances from the body

(*Stillman, supra* at paragraphs 45-46; *R. v. Beare*; *R. v. Higgins*, [1988] 2 S.C.R. 387; *R. v. Saeed*, [2016] 1 S.C.R. 518 at paragraph 49).

755. A pat-down or frisk search, which may involve examination of a person's pockets but which does not involve the application of physical force or the removal of clothing, is relatively non-intrusive (*Cloutier v. Langlois*, [1990] 1 S.C.R. 158). A strip search, however sensitively conducted, is highly intrusive. The most intrusive type of search is a body cavity search (*Golden, supra*; *Saeed, supra*
756. The forcible taking of bodily samples and dental impressions is highly invasive of personal privacy (*Pohoretsky, supra* at page 949; *Dyment, supra* at page 436; *Colarusso, supra* at page 53; *Stillman, supra* at paragraph 42; *R. v. Grant*, [2009] 2 S.C.R. 353 (*Grant (2009)*) at paragraph 109). In general, police must have either consent or a warrant to seize such samples or impressions (*Stillman, supra*).

VOLUME #11(KK): Fingerprinting is relatively non-intrusive BUT if not lawful – high REOP remains

757. Fingerprinting incident to lawful arrest is relatively non-intrusive (*Beare, supra* at page 413; *Grant (2009), supra* at paragraph 109). In the absence of lawful arrest, however, individuals retain a high expectation of privacy in their fingerprints (*Feeney, supra* at paragraph 60).
758. The intrusion into our privacy that occurs when a person hears our words or observes us in passing is fundamentally different than the intrusion that occurs when the same person simultaneously makes a permanent recording of us and our activities. A visual recording may be able to capture a level of detail that the human eye cannot, and can do so in a permanent form that can be accessed, edited, manipulated and studied by the person who created the recording and that can be shared with others. It does not follow, however, that visual recordings in public places will always interfere with reasonable privacy expectations (*Jarvis (2019), supra*).

759. Surreptitious interception and recording of private communications constitutes a serious intrusion into the privacy rights of those affected (*Duarte, supra*; *Wong, supra* at pages 47-49; *R. v. Tse*, [2012] 1 S.C.R. 531 at paragraph 17) and is generally only permissible subject to prior judicial authorization (*Duarte, supra* at pages 42-43; *R. v. Fliss*, [2002] 1 S.C.R. 535 at paragraphs 47-49; *R. v. Pires*; *R. v. Lising*, [2005] 3 S.C.R. 343 at paragraph 8).
760. Video surveillance without prior judicial authorization in a home, hotel room, or other place where there is a reasonable expectation of privacy will also constitute an unreasonable search or seizure (*Wong, supra* at pages 50-51).
761. Text messaging bears the hallmarks of traditional voice communication — it is intended to be conversational, transmission is generally instantaneous, and there is an expectation of privacy in the communication. Prospective, continuous police access to text messages from an investigative target’s service provider is subject to the high standards for authorization of interception of communications under Part VI of the *Criminal Code* (*R. v. TELUS Communications Co.*, [2013] 2 S.C.R. 3 at paragraphs 1, 5, 32). By contrast, police access to *historical* text messages (those that have been sent and received or are no longer capable of reception) is not an “interception” and may be authorized pursuant to a production order as opposed to a wiretap (*Jones, supra* at paragraphs 74, 80).

VOLUME #11(LL): Nature of the information

762. Documents of a personal and confidential nature or that reveal a personal core of biographical information carry a reasonable expectation of privacy sufficient to attract constitutional protection (*Mills* (1999), *supra* at paragraph 81; *Plant, supra* at pages 292-294). This includes information which tends to reveal intimate details of the lifestyle and personal choices of the individual (*Plant, supra* at page 293; *Tessling, supra* at paragraph 62).

VOLUME #11(MM): Commercial documents lower: passport, bank cards, credit cards, birth certificates, name change et al and medication prescription information – higher REOP

763. **Commercial documents** generally carry a lower or diminished expectation of privacy (*Branch, supra* at page 35; *Plant, supra* at pages 293-294; *143471 Canada Inc. v. Quebec (Attorney General)*; *Tabah v. Quebec (Attorney General)*, [1994] 2 S.C.R. 339 at pages 377-378), especially those documents required to be produced or maintained pursuant to a regulatory scheme (*Comité paritaire, supra* at pages 444-445). A reasonable expectation may nevertheless be found in commercial documents and section 8 is therefore capable of applying in this context (see *e.g., Hunter v. Southam, supra*; *McKinlay Transport, supra*; *Thomson Newspapers, supra*; and *Baron, supra*).

VOLUME #11(NN): Finger Prints

764. An individual's genetic makeup provides the foundation for who an individual is as a human being. As such “[i]n a very real sense, an individual's genetic makeup is their "biographical core” (*Reference re Genetic Non-Discrimination Act*, 2020 SCC 17 at paragraph 87).

VOLUME #11(OO): Context in which the search occurs

765. The context of the search, and the activity that brings a person into contact with the state, can have an impact on the person’s reasonable expectation of privacy.
766. Privacy expectations are generally lower in relation to administrative searches or seizures in regulatory schemes where the purpose of the intrusion is to ensure compliance with the statute rather than the prosecution of criminal acts (see *e.g., Comité paritaire, supra*; *143471 Canada Inc., supra*; *McKinlay Transport, supra*; *Branch, supra*). This is because in a modern industrial society, it is generally accepted that many activities in which individuals can engage must nevertheless to a greater or lesser extent be

regulated by the state to ensure that the individual's pursuit of their self-interest is compatible with the community's interest in the realization of collective goals and aspirations. In many cases, this regulation must necessarily involve the inspection of private premises or documents by agents of the state, as compliance can only be tested by inspection of the business premises and/or business records. It follows that there can only be a relatively low expectation of privacy in respect of premises or documents that are used or produced in the course of activities which, though lawful, are subject to state regulation as a matter of course *Thomson Newspapers, supra; Fitzpatrick, supra; White, supra; Branch, supra*).

767. This principle is not absolute, however. The reasonable expectation of privacy in relation to communications subject to solicitor-client privilege is invariably high, regardless of whether the context is criminal or regulatory (*Federation of Law Societies, supra* at paragraph 38; *Chambre des notaires, supra*).
768. The degree of personal privacy expected at borders, where travelers expect to be searched, is lower than in other enforcement situations (*R. v. Simmons*, [1988] 2 S.C.R. 495 at page 528; *Monney, supra* at paragraph 34; *R. v. Jacques*, [1996] 3 S.C.R. 312 at paragraph 18).
769. The expectation of privacy is reduced in the school setting in relation to the responsibility of teachers and other school authorities to provide a safe environment and maintain order and discipline in the school (*M.(M.R.), supra*).

VOLUME #11(PP): Part of the scheme by the **TPS 14th Division**: lure Mr. McLean to the **14th Division TPS** (reception area) – arrest him – then into the prison component of the **14th Division**

770. Prisons carry a decreased expectation of privacy (*Weatherall, supra; R. v. Conway*, [1989] 1 S.C.R. 1659; *Tessling, supra* at paragraph 22).

VOLUME #11: Application of the Law to the Facts

771. The heading is self-evident and speaks for itself.

VOLUME #11(QQ): Relationship between the purpose for which the information was initially disclosed or collected and the purpose for which it is to be subsequently used or disclosed

772. Privacy is not an all or nothing right. It encompasses the reasonable expectation that private information will remain confidential to the persons to whom and restricted to the purposes for which it was divulged (*Mills* (1999), *supra* at paragraph 108; *Dyment*, *supra* at page 429; *Colarusso*, *supra* at page 71). Accordingly, a person may have a residual and continuing privacy interest protecting against the subsequent use or disclosure — and potentially retention — of information that has been divulged for a specific or limited purpose (*Law*, *supra* at paragraph 23; *Dyment*, *supra* at pages 432-435; *Mills* (1999), *supra* at paragraph 94; *R. v. Dore* (2002), 166 C.C.C. (3d) 225 (Ont. C.A.); *Wakeling*, *supra* at paragraph 39).

VOLUME #11(RR): One state agent in Constable Romano with the “**False Pretense Email**” and then

773. Constitutional requirements cannot be avoided by employing one state agent for a purpose for which the prerequisites for search may not be as demanding and then allowing another agent attached to the law enforcement apparatus of the state to claim the fruits of that search "without regard to the rightly stringent prerequisites of searches for those [law enforcement] purposes" (*Colarusso*, *supra* at paragraph 42; *R. v. Jarvis*, [2002] 3 S.C.R. 757; *R. v. Ling*, [2002] 3 S.C.R. 814; *Law*, *supra* at paragraph 23).

VOLUME #11(SS): State agents are NOT lay people

774. When a state agent, in the course of carrying out their authorized regulatory duties, comes across clear evidence of a crime or wrongdoing relating to the very same matters they were required to investigate for compliance purposes, the state agent may pass that information on to the appropriate authorities for offence investigation without the need for further lawful authority (*Laroche*, *supra* at paragraph 84; *R. v. D'Amour*, (2002), 4 C.R. (6th) 275 (Ont. CA) at paragraph 63; *Jarvis* (2002), *supra*). These cases were distinguished in *Cole* on the basis that they all arose in heavily regulated environments. In contrast,

teachers have a reasonable and continuous expectation of privacy in the personal information on their work-issued laptop. Although the school board is legally entitled to inform the police of the discovery of contraband on the laptop, the police required a warrant to search the computer (*Cole, supra* at paragraphs 70-73).

775. A provincial law authorizing the use, for the purpose of an administrative roadside sanction scheme, of breath samples taken pursuant to *Criminal Code* powers to screen drivers for alcohol constitutes a distinct search for *Charter* purposes (*Goodwin, supra* at paragraphs 53-54).

VOLUME #11(TT): Consent

776. It is possible for what would otherwise be an infringement of section 8 to be constitutional if the person concerned waives their constitutional right to privacy. For such waiver/consent to be valid, it must be fully informed and voluntarily given by the rights holder. To be fully informed, a person must be provided with sufficient information to make the preference meaningful (*R. v. Borden*, [1994] 3 S.C.R. 145). For the consent to be voluntary, the person must have had a real choice in providing the purported consent (see *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844 at paragraph 72; *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 at paragraph 98).
777. Consent cannot be given by a third party (*Cole, supra* at paragraphs 75-79). In the context of shared computers, in which multiple people may have privacy interests, waiver by one rights holder does not constitute waiver for all rights holders (*Reeves, supra* at paragraph 52). While it is reasonable to ask citizens to bear the risk that a co-user of their shared computer may access their data or discuss the data with police, it is not reasonable to ask them to bear the risk that a co-user could consent to the “taking” of the computer by police (*Reeves, supra* at paragraph 43). In *Reeves, supra*, the majority distinguished the “taking” of a home computer by police, with the consent of a co-owner, from the situation in which a citizen voluntarily brings an item to police. The question of whether the latter situation would engage section 8 was expressly left for another day (*Reeves, supra* at paragraph 46; see also paragraph 129 *per* Côté J, dissenting). Note, however, the majority’s passing observation that the co-owner signed

the consent form authorizing the police to take the computer because she did not think she had a choice (paragraph 46).

778. Consent for a search and seizure for one purpose does not necessarily allow for the intrusion on the same privacy interests for other purposes (*Mills* (1999), *supra* at page 108; *Dyment*, *supra* at page 429). Consent to take bodily samples will generally only be consent to use the sample for the specific purpose for which consent is given (*Borden*, *supra* at page 162). However, where no specific limits are placed by the police or the consenting party on the use to which a bodily sample is to be made, there *may* be no subsisting expectation of privacy protecting against the use of the sample in a later investigation that was not and could not reasonably have been anticipated by the police at the time the sample was taken (*R. v. Arp*, [1998] 3 S.C.R. 339 at paragraphs 89-91). Consent to collect a bodily sample for medical purposes does not allow the police to use the sample for investigative purposes (*Dyment*, *supra* at page 431).

VOLUME #11(UU): Was the search or seizure reasonable?

VOLUME #11: (i) Search under a warrant

779. Because the purpose of section 8 is to *prevent* unjustified searches before they happen, the default standard is a system of prior authorization. More specifically, the default standard has three elements: (1) prior authorization; (2) granted by a neutral and impartial arbiter capable of acting judicially; (3) based on reasonable and probable grounds to believe that an offence has been committed and there is evidence to be found at the place to be searched.

VOLUME #11(VV): Power of dictation not allowed: must be separation between the executive and judiciary

780. The warrant granting power in a statute must involve a true grant of discretion to the decision-maker (*Baron*, *supra* at page 435; see also *Kourtessis v. M.N.R.*, [1993] 2 S.C.R. 53) and must be specific in its focus.

VOLUME #11(WW): Search warrant (including an arrest warrant under Form 7) must be drafted by the executive branch of the government

781. Judicial neutrality precludes the justice of the peace from becoming personally involved in the drafting of search warrant information. However, this does not preclude judges from providing advice or direction to an officer applying for a warrant (*R. v. Clark*, 2015 BCCA 448 at paragraph 49, *aff'd* 2017 SCC 3).

VOLUME #11(XX): Ex parte applications: principles apply – the object of a seizure warrant and search warrant a

782. The application for a search warrant must contain a full and frank disclosure of all material facts and not just those favourable to the state. The application, while being clear and concise, must avoid incomplete recitations of known facts, taking care not to invite an inference that would not be drawn or a conclusion that would not be reached if the omitted facts were disclosed (*Morelli, supra* at paragraphs 4, 44-60; *R. v. Araujo*, [2000] 2 S.C.R. 992 at paragraphs 46-47; *R. v. Garofoli*, [1990] 2 S.C.R. 1421).
783. Where tainted evidence is used in order to obtain a warrant, the search may nevertheless be sustained and the warrant may be constitutionally sufficient provided that, after excising the objectionable information, there remains sufficient independently obtained information to validly authorize the search (*Grant* (1993), *supra* at pages 253-254; *Plant, supra* at page 296; see also *Wiley, supra*). Despite the presence of reasonable and probable grounds (after excision) a warrant based on a deliberate or fraudulent attempt to mislead the issuing judge may be set aside where doing so is necessary to protect the process of prior authorization and the preventive function it serves (*Araujo, supra* at paragraphs 54-59)
784. Where a search warrant or production order is sought in respect of a journalist or the media, the issuing judge should apply a four-part analysis. First, the judge should consider whether to require notice to the media, which may be appropriate in cases where judge does not have sufficient information to carry out the balancing exercise at the third stage of the analysis. Second, the judge must be satisfied that all statutory preconditions have been met. Third, the judge must balance the state interest in investigating and prosecuting crimes against the media's right to privacy in gathering and disseminating the news. This

balancing exercise should be based on all the circumstances, which may include: (1) the likelihood and extent of any potential chilling effects; (2) the scope of the materials sought and whether the order sought is narrowly tailored; (3) the likely probative value of the materials; (4) whether there are alternative sources from which the information may reasonably be obtained and, if so, whether the police have made all reasonable efforts to obtain the information from those sources; (5) the effect of prior partial publication, which must be assessed on a case-by-case basis; and (6) the vital role that the media plays in the functioning of a democratic society and the fact that the media will generally be an innocent third party. At the final stage of the analysis, the authorizing judge should consider imposing conditions on the order to ensure that the media will not be unduly impeded in the publishing and dissemination of the news. This may include, for example, providing for a sufficient period of time for compliance with a production order to allow the media to challenge it. The authorizing judge may also see fit to order that the materials be sealed for a period pending review (*Vice Media*, *supra* at paragraph 82; *National Post*, *supra* at paragraphs 78-84; *Lessard*, *supra*). From the media perspective, assistance orders accompanying a warrant and requiring the surrender of documents are preferable to a physical search of the media premises (*National Post*, *supra* at paragraph 90).

785. A warrant to search a place does not by itself carry with it sufficient authority, under section 8 *Charter* principles, to further search a computer found within that place. Rather, a prerequisite for a valid computer search is explicit judicial authorization involving due consideration of the distinctive privacy concerns raised by such a search. Where police come across a computer in the course of a warranted search but do not have specific authorization to search computers, they may seize the computer (assuming it may reasonably be thought to contain the sorts of things covered by the warrant) and do what is necessary to ensure the integrity of the data (*Vu*, *supra* at paragraphs 48-49).

VOLUME #11(ZZ): Warrantless searches

COLLINS TEST: how TPS and the Crown overcome the unreasonableness (presumptively) – conjunctive elements

786. A warrantless search or seizure is presumptively unreasonable (*Hunter v. Southam, supra*; *Nolet, supra* at paragraph 21; *Goodwin, supra* at paragraph 99). The party [TPS and TPS respondents] seeking to justify a warrantless search bears the onus of rebutting the presumption by establishing that the search was:
- a. authorized by law [statute];
 - b. the law itself is reasonable; and
 - c. the manner in which the search or seizure takes place is reasonable.⁵⁴

VOLUME #11(ZZ)(I): COLLINS TEST: Part 1: Authorized by law

787. Sources of lawful authority for section 8 purposes accepted by courts have so far included statutes, regulation and the common law. This is not to necessarily rule out other sources that meet the general criteria for being “law” (see, generally, John Mark Keyes, *Executive Legislation* (2nd Edition, 2010), Chapter. 1). There has not yet been judicial consideration of whether or to what extent recent developments on the “prescribed by law” requirement under section 1, which recognize the possibility that other instruments like policies or guidelines may be tantamount to “law” where certain requirements are met, are applicable in the section 8 context: see section 1 for further discussion of those developments.
788. Significant privacy intrusions generally cannot be implied from the authorizing law; authority must normally be specific and express (see *R. v. Shoker*, [2006] 2 S.C.R. 399 regarding legislation and *Caslake, supra* regarding the common law). In some circumstances, courts may find implied authority for intrusions on diminished privacy interests (*Cole, supra*; *M. (M.R.), supra*).

VOLUME #11(ZZ)(I)(a): Common law power of search incident to arrest

789. A valid search incident to arrest must meet three conditions: (1) the person searched is lawfully arrested; (2) the search is “truly incidental” to the arrest, i.e., for a valid law enforcement purpose related to the reasons for the arrest; and (3) the search is conducted reasonably (*R. v. Tim*, 2022 SCC 12 at paragraph 49).

790. A person under lawful arrest has a reduced expectation of privacy, which is a factor in determining the appropriate standard on which a search incident to arrest is authorized (*R. v. Stairs*, 2022 SCC 11 at paragraph 76).
791. Generally, to search incident to a lawful arrest there must be “some reasonable basis” related to the purpose for the arrest such as safety of the arrestee or officer, preservation of evidence from destruction, and the discovery of evidence that can be used in the prosecution of the arrestee (*Stairs, supra* at paragraphs 37-38; *Cloutier, supra* at page 186; *Caslake, supra* at paragraphs 17 and 20; *Golden, supra* at paragraphs 92-95; *Stillman, supra* at paragraphs 34-50; *Nolet, supra* at paragraph 49). Search incident to arrest may not be conducted in an abusive manner (*Cloutier, supra* at page 186; *Stillman, supra* at paragraph 34).
792. The common law authorizes the search of an arrested person’s property in their possession at the time of arrest provided the purpose of the search is related to the reasons for the arrest. See e.g., *Nolet, supra* at paragraph 53, where the search of a secret compartment in the cab of a truck’s trailer two hours after the driver’s arrest for possession of contraband was a valid search incident to arrest for possession of proceeds of crime, while the later “inventory search” of the cab was invalid as it was not done for a purpose related to the arrest, but pursuant to RCMP administrative procedures.
793. The general standard for search incident to arrest may need to be modified in some circumstances to take into account the particular privacy interests and law enforcement objectives at stake (*Stairs, supra* at paragraph 32).
794. For example, the common law authorizes strip searches incident to arrest on a higher standard, where the police have reasonable and probable grounds to conduct the search for the purpose of discovering weapons or seizing evidence related to the purpose of the arrest. The search must be conducted in a manner that interferes with the privacy and dignity of the person being searched as little as possible (*Golden, supra* at paragraphs 101-104; *Ward, supra* at paragraph 65; *Tim, supra* at paragraph 66).

795. A penile swab of a person arrested for sexual assault can be conducted as incidental to the arrest where there are reasonable grounds to believe that it will reveal evidence of the offence (*Saeed, supra* at paragraph 83).
796. The taking of an arrested person's bodily samples and teeth impressions is not authorized by the common law power of search incident to arrest (*Stillman, supra* at paragraph 49). Generally, there is no danger that this evidence will disappear.
797. The search of a cell phone has the potential to be a much more significant invasion of privacy than the typical search incident to arrest (*R. v. Fearon*, [2014] 3 S.C.R. 621 at paragraph 58). As a result, police officers will not be justified in searching a cell phone or similar device incidental to every arrest. Rather, such a search will comply with section 8 where: (1) the arrest is lawful; (2) the search is truly incidental to the arrest in that the police have a reason based on a valid law enforcement purpose to conduct the search, and that reason is objectively reasonable; (3) the nature and the extent of the search are tailored to the purpose of the search; and (4) the police take detailed notes of what they examine on the device and how it is searched. In respect of factor (2), the valid law enforcement purposes in this context are: (a) protecting the police, the accused, or the public; (b) preserving evidence; or (c) discovering evidence, including locating additional suspects, in situations in which the investigation will be stymied or significantly hampered absent the ability to promptly search the cell phone incident to arrest (*Fearon, supra* at paragraph 83).
798. When a person is arrested in their home, the general search incident to arrest standard ("some reasonable basis") will apply to a search of the area of the home in the physical control of the accused at the time of arrest. In addition, areas of the home outside of the physical control of the accused at the time of arrest that are sufficiently proximate to the place of arrest may be searched for safety purposes if there is reason to suspect that the search will further the objective of police and public safety, including the safety of the accused (*Stairs, supra* at paragraph 82). The nature and extent of this search must be tailored to the safety purpose of the search and the heightened privacy interests in a home.

799. Since individuals have different expectations of privacy in different contexts and with regard to different subject matters, it follows that the standard of review of what is “reasonable” in a given context must be flexible, if it is to be meaningful (*McKinlay Transport, supra*). A reasonable law is one that strikes a reasonable balance between the particular state interest that is pursued by the law and privacy (*Shoker, supra*; *S.A.B., supra* at paragraphs 42-43; *McKinlay Transport, supra* at page 643; *Comité paritaire, supra* at pages 422 and 424; *Rodgers, supra* at paragraphs 35-44; see also *Jarvis (2002), supra*; *Branch, supra*; *Mann, supra*; *Clayton, supra*; and *Wakeling, supra*, at paragraphs 66 and 81). Warrantless search powers have been upheld as reasonable in a number of contexts including: administrative and regulatory searches (see *e.g.*, *McKinlay Transport, supra*; *Comité paritaire, supra*; *Thomson Newspapers, supra*); border searches (*Simmons, supra*; *Monney, supra*; *Jacques, supra*); and roadside searches (*Hufsky, supra*). See also the discussion of common law search powers, above.
800. There is no “hard and fast” test for reasonableness under section 8 (*Thomson Newspapers, supra* at page 495; *Goodwin, supra* at paragraph 57). Considerations that may be helpful in the reasonableness analysis include: the nature and purpose of the legislative scheme, the mechanism employed having regard for the degree of its potential intrusiveness and its reliability, and the availability of judicial supervision (*Del Zotto, supra*; *Goodwin, supra* at paragraph 57).

VOLUME #11(ZZ)(B): Nature and purpose of the legislative scheme

801. A compelling public purpose will weigh more heavily in the reasonableness analysis (*Goodwin, supra* at paragraph 59; see *e.g.*, *McKinlay Transport, supra*; *Comité paritaire, supra*).
802. The characterization of a search or seizure as criminal on one hand or administrative or regulatory on the other is relevant in assessing its reasonableness (*Goodwin, supra* at paragraph 60). The proper characterization of the search or seizure involves a contextual analysis. In addition to the nature of the regime generally, regard may be had for other relevant aspects of the search or seizure such as whether it is administered by a police officer and the severity and immediacy of the consequences flowing from the search or seizure (*Goodwin, supra* at paragraph 63). In the administrative or regulatory context, the

procedural safeguards fashioned in *Hunter v. Southam, supra* may not apply. Searches and seizures in such contexts will generally — but not always — be subject to a lower standard in assessing what intrusions are reasonable in the circumstances (*Thomson Newspapers Ltd., supra*; but see *Federation of Law Societies* and *Chambre des notaires, supra*, explaining the heightened standard applicable to searches implicating solicitor-client privileged material, regardless of context).

VOLUME #11(ZZ)(B): Mechanism employed [nota bene: false pretenses and luring]

803. The intrusiveness of a search or seizure on privacy interests is an important consideration. Generally speaking, a law authorizing a search or seizure should reflect the least intrusive means by which the state interest can be achieved (see *e.g., McKinlay Transport, supra; Comité paritaire, supra; Goodwin, supra* at paragraph 65; *Saeed, supra; Chambre des notaires, supra*). A legislative provision that interferes with solicitor-client privilege more than is “absolutely necessary” to achieve the ends of the enabling legislation will be unreasonable for section 8 purposes (*Lavallee, supra* at paragraph 36; *Chambre des notaires, supra* at paragraphs 28, 82).
804. Another relevant consideration is the threshold on which the search or seizure may be conducted, and whether the power to search or seize is narrowly targeted (*Chehil, supra* at paragraph 28). See discussion of thresholds, below.
805. The reliability of a search or seizure mechanism is directly relevant to its reasonableness (*Goodwin, supra* at paragraph 67). A method of searching that captures an inordinate number of innocent individuals cannot be reasonable (*Goodwin, supra; Chehil, supra* at paragraph 51).

VOLUME #11(ZZ)(C): Availability of judicial oversight

If the arrest by the TPS was unreasonable and unconstitutional, and there was no warrant for an arrest, for a seizure and then a search (see: distinction in cases like <i>R. v. Vu</i> where two warrants are required: one to seize the computer, and next to search the contents) – then the rest of the conduct is all unconstitutional – all fruit from the poisonous tree

806. An unreviewable, discretionary power of search and seizure would be contrary to section 8 (*Hunter v. Southam, supra* at page 166; *Tse, supra* at paragraph 82; *Goodwin, supra* at paragraph 70). The right to privacy encompasses both protection against unreasonable search and seizure and the ability to identify and challenge such invasions. In some circumstances involving searches that are not subject to prior authorization, additional safeguards will be required to ensure the requisite level of transparency and accountability, and to help ensure that such powers are not being abused (*Tse, supra* at paragraphs 83-84; *Fearon, supra* at paragraph 82). Such safeguards may include after-the-fact notice to the target of the search (see *e.g., Tse, supra; Chehil, supra* at paragraph 58) as well as record-keeping requirements (*Fearon, supra* at paragraph 82).
807. In addition to judicial review of the lawfulness of the search, section 8 may also require a mechanism for review of the reliability of the findings, particularly where the consequences of a search or seizure follow automatically and immediately (*Goodwin, supra* at paragraph 71). A law imposing serious administrative sanctions on the basis of an unreliable breath screening test requires a mechanism for meaningful review of the accuracy of the test result in order to satisfy the section 8 reasonableness requirement (*Goodwin, supra* at paragraph 75).

VOLUME #11(ZZ)(D): Thresholds upon which a search may be authorized

808. “**Reasonable grounds to believe**” is the common standard in the *Criminal Code*, and most federal enactments, authorizing a search warrant in Canada.
809. Without a judicial authorization to arrest, search, or seizure, the conduct of the **TPS** was presumptively unreasonable. They have an incredibly steep and onerous burden to specifically point to the statutory sections that they would rely upon, AT THE TIME, that authorized their conduct.

VOLUME #11: RGB (RPG) identical to the US standard to probable cause

810. “Reasonable grounds to believe” and “probable cause” as found in the Fourth Amendment to the American Constitution are identical standards (*Hunter v. Southam, supra* at pages 167-168) and equate with

"reasonable and probable grounds" (*R. v. Debot*, [1989] 2 S.C.R. 1140 at page 1166). "Reasonable grounds" is the equivalent of "reasonable and probable grounds" (*Baron, supra* at pages 446-447; *Morelli, supra* at paragraphs 127-8, per Deschamps J., in dissent but not on this point).

811. Reasonable grounds can be based upon detailed "tips" furnished by a reliable informer (*Debot, supra* at pages 1168-1169; *Plant, supra* at pages 296-297; see also *Grant* (1993), *supra*; *Wiley, supra*). Reasonable grounds can also be based on information provided in a 911 call, particularly where firearms posing a risk to public safety are the focus of the investigation (*Clayton, supra* at paragraphs 33-5).

VOLUME #11(ZZ)(E): RPG: pure question of law TPS bear the onus with the Crown to bear the onus

812. The existence of reasonable and probable grounds is a question of law (*Shepherd, supra* at paragraph 20), which the Crown bears the onus of proving.

VOLUME #11(ZZ)(F): Reasonable Suspicion vs. RGS (RGB)

813. The standard referred to as "**reasonable suspicion**" or "**reasonable grounds to suspect**" is to be contrasted with the higher standard of "reasonable grounds to believe".

VOLUME #11(ZZ)(G): If Reasonable Suspicion is insufficient for a search, then it is too low to arrest and detain an individual

814. "Reasonable suspicion" as opposed to "reasonable grounds to believe" is generally an **insufficient** basis upon which to conduct a search in a criminal investigation context (*Mann, supra* at paragraphs 34, 40). However, "reasonable grounds to suspect" has been held to be a constitutionally sufficient standard in some contexts:

- a. in the *Criminal Code*'s roadside screening regime (*Hufsky, supra*; *Clayton, supra*)

- b. for border searches in the customs context (*Simmons, supra; Jacques, supra; Monney, supra* at paragraph 34);
- c. some searches using sniffer dogs (*Kang-Brown, supra; A.M., supra; Chehil, supra; MacKenzie, supra*).

VOLUME #11(ZZ)(G)(i): Application of the Law to the Facts

815. None of the above noted areas of roadside screening, border searches and sniffer dogs are relevant or apropos herein. The commonality of the above limited areas for reasonable suspicion is the REOP is much lower.

VOLUME #11(ZZ)(H): If minimally intrusive searches, low REOP, presence of safeguards – reasonable suspicion may be reasonable

816. Factors the Court has considered in assessing the constitutional sufficiency of the reasonable suspicion standard for certain types of searches include the minimally intrusive nature of the particular type of search, a relatively low expectation of privacy, a narrowly targeted objective, the effectiveness of the investigative technique, the presence of safeguards against abuses of the power, and the fact that inappropriate conduct by the police can be addressed under the “reasonableness of the search” component of the section 8 framework if necessary (*Kang-Brown, supra* at paragraphs 24-25, per Binnie J., paragraphs 159-169, per Deschamps J., and paragraphs 243-244, per Bastarache J.; *A.M., supra* at paragraphs 77-89, per Binnie J.).

VOLUME #11(ZZ)(I): Relevance standard does NOT apply in the criminal context

817. In some cases arising in the administrative or regulatory context, the Court has accepted as reasonable laws authorizing searches or seizures on a broader threshold of **relevance** (see *e.g., McKinlay Transport, supra* at paragraph 35: requirement to produce, for audit purposes, information that may be relevant to the filing of an income tax return; *Comité paritaire, supra*: power to access a premises of employment and to

inspect records relevant to determining an employer's compliance with regulations governing working conditions). The relevance standard is commonly used for regulatory or administrative inspection powers in federal enactments.

VOLUME #11(ZZ)(I)(a)1: Application of the Law to the Facts

818. The only jurisdiction in which this Notice of Constitutional Question is being addressed is in the criminal sphere.

VOLUME #11(ZZ)(H): Was the search carried out in a reasonable manner?

VOLUME #11: Even if the search was pursuant to reasonable lawful authority – section 8 limits can be found

819. Searches or seizures conducted pursuant to reasonable lawful authority can nevertheless be found to limit section 8 if the search or seizure is carried out in an unreasonable manner (*R. v. Genest*, [1989] 1 S.C.R. 59; *R. v. Cornell*, [2010] 2 S.C.R. 142). The manner will be unreasonable if the search is more intrusive than is reasonably necessary to achieve its objectives (*Vu*, *supra* at paragraph 61).
820. The reasonableness of a search executed pursuant to a warrant will be judged based on whether “the search overall, in light of the facts reasonably known to the police, was reasonable” (*Cornell*, *supra* at paragraph 31).
821. Except in exigent circumstances, police officers must make an announcement before forcing entry into a dwelling house (*Cornell*, *supra* at paragraph 18). The onus is on them, where they depart from the “knock and announce” principle, to explain why they thought it necessary to do so, as judged by what was, or should reasonably have been, known to them at the time. The Crown, in other words, cannot rely on *ex post facto* justifications (*Cornell*, *supra* at paragraph 20).

822. It is not generally a constitutional requirement that a warrant spell out in advance the manner in which a computer is to be searched. Rather, the manner search is generally reviewed after the fact. In circumstances where the manner of search goes beyond the purposes for which the warrant was issued (*e.g.*, to search for evidence of an unrelated crime) the search may be unreasonable for *Charter* purposes (*Vu, supra* at paragraphs 53-55).

VOLUME #11(ZZ)(I): Additional considerations

Interaction between section 8 of the *Charter* and section 8 of the *Privacy Act*, *MFOIPPA* and *PIPEDA*

823. The privacy protection offered by the *Charter* and the *Privacy Act* can overlap but differences in purpose and scope between the two regimes exist and ought not to be overlooked. Compliance with one regime does not remove the need for compliance with the other.

VOLUME #11(ZZ)(J): Interaction with section 1 of the *Charter*

824. In a number of cases, the Supreme Court has suggested that limits on section 8 rights are unlikely to be justified under section 1 of the *Charter* given the overlap between the reasonableness standard under section 8 and the minimal impairment analysis under the section 1 test (*Lavallee, supra* at paragraph 46, per Arbour J.; *Grant, (1993), supra* at page 241; *Thomson Newspapers, supra*, per Wilson J.; *Lessard, supra*, per La Forest J.; *Baron, supra*, per Sopinka J.; *Chambre des notaires, supra* at paragraphs 89-91).

VOLUME #12: Equality under the *Charter*

Volume #12(A):Section 15 of the *Charter*

825. Section 15 of the *Charter* is now analyzed:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
(2) Section (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

VOLUME #12(B): Purpose of section 15: all are secure – human being: (i) concern; (ii) respect; and (iii) consideration

826. As articulated by the Supreme Court in its first section 15 case and subsequently reaffirmed, “[t]he promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration” (*R. v. Kapp*, [2008] 2 S.C.R. 483 at paragraph 15 citing *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at 171, *per* McIntyre J.). See also more recently *Quebec (A.G.) v. A*, [2013] 1 S.C.R. 61, at paragraph 417, where McLachlin C.J., concurring with the majority on section 15, noted that discrimination perpetuates or promotes “the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration.”

VOLUME #12(C): Analysis: Application

827. Section 15 applies to government action in the form of legislation, regulations, directions, policies, programs, activities and the actions of government agents carried out under lawful authority. It has been found to apply to:

- Collective agreements with government (*Douglas/Kwantlen Faculty Association v. Douglas College*, [1990] 3 S.C.R. 570);
- The common law (*R. v. Swain*, [1991] 1 S.C.R. 933);
- Decisions of government-delegated decision-makers (the failure to provide sign language interpretation to deaf patients to ensure effective communication with their physician as an aspect

of the public funding of medical services) (*Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624);

- d. Programs developed in partnership with third parties (Casino Rama project with Ontario First Nations) (*Lovelace v. Ontario*, [2000] 1 S.C.R. 950) Administrative action (*e.g.*, the implementation of an otherwise non-discriminatory statute in a discriminatory way by government officials) (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120).

VOLUME #12(C)(i): Application of the Law to the Facts

828. The obvious question in relation to “government agents” is whether they were acting under lawful authority. This appears to be a “double-edge sword” or conundrum or enigma because an agent of government, perhaps the **Landlord** and/or **Goldview** in certain instances or capacities, may believe they are acting under lawful authority of the government (**TPS**) but they were not.

VOLUME #12(D): The slippery slope of government “acting”

829. Section 15 does not impose positive obligations on governments to counteract inequalities in Canadian society (*Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657; *R. v. Sharma*, 2022 SCC 39). However, if government does act, it must not discriminate (*Eldridge, supra*; *Vriend v. Alberta*, [1998] 1 S.C.R. 493). Section 15(2) is aimed at enabling government action intended to combat discrimination proactively through affirmative measures (*Kapp, supra*, at paragraphs 25, 33 and 37; see also *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, [2011] 2 S.C.R. 670, at paragraphs 40-1, hereafter *Cunningham*).

VOLUME #12E: Corporations and estates (of individuals) are excluded

830. The guarantee in section 15 applies to “[e]very individual”, which the Supreme Court has interpreted to exclude estates of individuals (*Canada (Attorney General) v. Hislop*, [2007] 1 S.C.R. 429, at paragraphs

72-73 — but note paragraphs 74-77 dealing with timing of the individual’s death relative to bringing the claim). Although no majority of the Court has ruled on corporations’ standing under section 15, the reasoning in *Hislop*, as well as lower court decisions, suggest that they do not have section 15 rights (*Hislop, supra* at paragraph 73).

831. Since its first section 15 case through to its more recent pronouncements, the Supreme Court has consistently characterized the guarantee of equality as substantive. That is, the Court has underscored that “the concept of equality does not necessarily mean identical treatment and that the formal ‘like treatment’ model of discrimination may in fact produce inequality” (*Kapp, supra*, at paragraph 15 citing *Andrews, supra*, at 165; see also *Withler v. Canada*, [2011] 1 S.C.R. 396 at paragraph 39; *Kahkewistahaw First Nation v. Taypotat*, [2015] 2 S.C.R. 548, at paragraph 17; *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, [2018] 1 S.C.R. 464, at paragraph 25; *Fraser v. Canada (Attorney General)*, 2020 SCC 28 at paragraphs 41-42; and *Ontario (Attorney General) v G.*, 2020 SCC 38 at paragraphs 43 and 47). This is to be contrasted with the Court’s decontextualized and formal approach to equality under the *Canadian Bill of Rights* (see for instance *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183 where the Supreme Court cited with approval the statement that “[i]f section 46 treats unemployed pregnant women differently from other unemployed persons, be they male or female, it is...because they are pregnant and not because they are women” — this statement was later expressly disavowed in *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219).

VOLUME #12(F): Three (3) step framework:

832. In *Law v. Canada* [1999] 1 S.C.R. 497 (“Law”), the Court synthesized its approach into a three-step framework, which it rearticulated in *Kapp, supra*, *Withler, supra*, *Quebec v. A, supra*, *Taypotat, supra*, *Fraser, supra*, and *Sharma, supra*, as comprising two steps. The test can be stated as:
- a. Does the law, on its face or in its impact, create a distinction based on an enumerated or analogous ground?
 - b. Is the distinction discriminatory?

- c. After the claimant has satisfied the first step of the section 15(1) analysis, it is open to the defendant (government) to establish that the impugned distinction qualifies under section 15(2) as an affirmative action-type measure, designed to ameliorate the conditions of a historically disadvantaged group. If the requirements of section 15(2) (elaborated below) are met by the government, this ends the analysis as there is no discrimination within the meaning of section 15(1):
 - i. The focus of section 15(1) is on *preventing* governments from making distinctions based on enumerated or analogous grounds that have the effect of perpetuating disadvantage or prejudice or imposing disadvantage on the basis of stereotyping
 - ii. The focus of section 15(2) is on *enabling* governments to pro-actively combat discrimination.

833. In addition to being **purposive** and **substantive**, the section 15 analysis is fact-driven, highly **contextual** and **comparative**.

834. The role of comparison in the section 15 analysis has evolved. Prior to *Kapp, supra*, a number of Supreme Court decisions paid considerable attention to the specifics of framing the appropriate comparator group. However, in *Kapp*, the Court noted concerns over a formalistic and “artificial” approach to comparisons (at paragraph 22), and in *Withler, supra*, the Court rejected the “mirror comparator” group approach used in some earlier decisions (*Auton, supra*, at paragraphs 48-55; see also *Hodge v. Canada*, [2004] 3 S.C.R. 357). The “mirror comparator” approach required claimants to identify comparators who are “...like the claimants in all ways save for the characteristics relating to the alleged ground of discrimination” (*Auton, supra* at paragraph 55). The Supreme Court in *Withler* explicitly eliminated the “mirror comparator” requirement. At the same time, it confirmed that section 15 is inherently comparative in that claimants have to establish distinctive treatment (which presupposes comparison with others) based on a prohibited ground (paragraph 62; see also *Sharma, supra*, at paragraphs 31 and 41).

VOLUME #12(G): Burden of Proof Under Section 15 of the <i>Charter</i>

835. The burden of proving a limit of section 15 lies with the claimant (*Law, supra* at paragraphs 76-83). The amount and nature of the evidence required can vary greatly depending on the nature of the claim. Proof of legislative intent to discriminate is not required; the claimant must establish that either the purpose or the effect of the law or action is discriminatory (*Law, supra* at paragraph 80). In relevant cases, it will be

for the government to demonstrate that a measure falls within the scope of section 15(2) and is therefore not discriminatory (*Kapp, supra* at paragraphs 39-41).

VOLUME #12(H) Claimant: no burden to produce evidence – every element of claim

836. While the courts generally require evidentiary support for a claim of discrimination, as a practical matter, the claimant does not have to adduce evidence to prove every element of the analysis (*Law, supra* at paragraph 82). Nor does the claimant have to adduce data or other sophisticated social science evidence not generally available in order to establish a limit of section 15 (1); where appropriate, the courts may rely on judicial notice or logic (*Law, supra* at paragraph 77).

VOLUME #12(I): Claimant burden: evidence: (i) historical; (ii) social; (iii) political; and (iv) legal

837. However, the claimant does have the burden of ensuring that the court is aware of the relevant historical, social, political and legal context of the claim (*Law, supra* at paragraph 83). An equality rights claim may fail if the court finds that the evidentiary record is inadequate, particularly where the claim is premised on the court's acceptance of societal patterns not substantiated by statistical or social science evidence (*Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429).
838. In challenges based on "adverse effect" discrimination, where it is alleged that a seemingly neutral law or action has a disproportionate adverse impact on a group characterized by a prohibited ground, claimants may show that the law or action affected individuals in a qualitatively different way, or that members of a group were affected at a higher rate as compared to other groups. The existence and nature of the impact is assessed in light of the full context of the claimant group's situation and the outcome of the law or action, using any relevant evidence, including statistics if useful and available. Both evidence of statistical disparity and of broader group disadvantage may demonstrate disproportionate impact, but neither is mandatory and their significance will vary depending on the case. Claimants need not prove that the ground was the cause of the harmful impact, nor that the law or action was solely responsible for the harmful impact, nor that all members of the group were impacted in the same way (*Fraser, supra* at

paragraphs 51-75). At the same time, while no specific form of evidence is required, claimants must present sufficient evidence to establish that the law or action, in its impact, creates or contributes to a disproportionate impact on the claimant group, relative to others. Evidence of the broad historic and systemic disadvantage of the claimant group is not, on its own, sufficient to satisfy the causation burden under step (i) (*Sharma, supra* at paragraphs 42-48, and 71).

VOLUME #12(J): Two-part framework for analysis under section 15(1)

839. The section 15 (1) framework for analysis involves two steps:
- a. (i) Does the law create a distinction based on an enumerated or analogous ground?
 - b. (ii) Is the distinction discriminatory?
840. A distinction may be made expressly by a law or government action (*e.g.*, a benefit provided only to persons over 65 years of age) or may arise due to the adverse effect of a law or government action on an individual claimant because of their particular personal characteristic(s) (*e.g.*, a rule that requires all employees to work on Saturdays but not on Sundays, which affects individuals differently depending on their religious affiliation). Another way of determining if there has been an adverse distinction is to ask whether the government has failed to take into account the already disadvantaged position of a group within Canadian society resulting in substantively different treatment based on personal characteristics (*e.g.*, failure to provide government documents in alternative formats accessible to persons with visual impairments). The issue of whether the government intended to cause the disadvantageous distinction is not relevant to the inquiry. This part of the analysis focuses on the comparative effect of government action on the claimants and other groups.
841. The first inquiry (whether the law creates a distinction based on a ground) can be seen as imposing a threshold requirement in that a claim will fail if the claimant cannot demonstrate that a government law or action withholds a benefit that is provided to others or imposes a burden that is not imposed on others, based on an enumerated or analogous ground (*Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698; *Auton, supra*).

842. With respect to establishing that the distinction is based on a prohibited ground, the list of grounds “enumerated” in section 15 (1) (race, national or ethnic origin, colour, religion, sex, age or **mental or physical disability**) is not closed and courts may identify additional prohibited grounds analogous to those listed.

VOLUME #12(K): Analogous grounds: immutable or constructively immutable

843. Analogous grounds are similar to the enumerated grounds in that they identify a basis for stereotypical decision-making or a group that has historically suffered discrimination. Analogous grounds describe personal characteristics that are either immutable (characteristics that people cannot change) or constructively immutable (characteristics that are changeable only at unacceptable cost to personal identity). Once a ground has been found to be analogous, it will always be a ground in the future (*Corbiere*, *supra*, at paragraphs 13-15 and 58-62).
844. The Supreme Court has held that the following are not analogous grounds:
- a. **Place or province of residence** (*Siemens v. Manitoba (Attorney General)*, [2003] 1 S.C.R. 6; *R. v. Turpin*, [1989] 1 S.C.R. 1296);
 - b. **Professional status, occupational status** or employment by a particular organization has not been recognized as an analogous ground (*Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989; *Baier v. Alberta*, [2007] 2 S.C.R. 673; *Health Services and Support-Facilities Subsector Collective Bargaining Association v. British Columbia*, [2007] 2 S.C.R. 391 at paragraph 165). However, both the majority and Deschamps J.’s concurring reasons in *Ontario v. Fraser*, [2011] 2 SCR 3 [*Fraser* 2011] seem to open the door slightly wider for claimants to assert that distinctions based on occupational status unjustifiably limit section 15;
 - c. **“substance orientation”** such as marihuana use as a personal characteristic (*R. v. Malmo-Levine*; *R. v. Caine*, [2003] 3 S.C.R. 571).
845. While there is still no Supreme Court guidance on point, lower courts have generally found that **poverty** in and of itself is not an analogous ground (see generally: *Alcorn v. Canada (Commissioner of Corrections)* (1999), 163 F.T.R. 1, *aff’d*. 2002 FCA 154, as one’s economic condition is not akin to the “immutable characteristics” enumerated in section 15(1)). See, however, *Falkiner v. Ontario (Director, Income Maintenance Branch, Ministry of Community and Social Services)* (2002), 212 D.L.R. (4th) 633 (Ont. C.A.), which found that “receipt of social assistance”, intersecting with grounds of sex and marital

status, was an analogous ground. In addition, lower courts have found that **prisoner status** is not an analogous ground (see: *Alcorn, supra*; *Sauvé v. Canada*, [2000] 2 F.C. 117, affirmed on this point by SCC minority [2002] 3 SCR 519).

846. The Supreme Court has recognized that some grounds of discrimination are “embedded” in others and that discrimination can be based on multiple or intersecting enumerated and analogous grounds (*Law, supra*; *Gosselin, supra*). For example, while the Supreme Court has not yet recognized family or parental status as an analogous ground, it has indicated that a robust analysis of gender and parenting “can be carried out under the enumerated ground of sex, by acknowledging that the uneven division of childcare responsibilities is one of the “persistent systemic disadvantages [that] have operated to limit the opportunities available” to women in Canadian society” (*Fraser, supra* at paragraph 116, citing *Taypotat, supra* at paragraph 17; *Withler, supra* at paragraph 43; *Quebec v. A, supra* at paragraphs 327-32; *Alliance, supra* at paragraph 28; *Centrale, supra* at paragraph 35). There can also be discrimination as between members of a group (e.g., among persons with different types of disabilities — see: *Nova Scotia (Workers' Compensation Board) v. Martin*; *Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 S.C.R. 504 (hereafter “*Martin; Laseur*”) at paragraphs 76-81).
847. Pregnancy, which is distinct from but fundamentally interrelated with gender, is an example of a personal characteristic that does not apply to all members of the group in question (women) at any given time, which has been held to be the basis for discrimination under human rights legislation. (See generally: *Brooks, supra*). Embedded analogous grounds may be necessary to permit meaningful consideration of intra-group discrimination (*Corbiere, supra* at paragraph 15).
848. Note that when the government enacts legislation aimed at remedying previous inequality or disadvantage, it may still unjustifiably limit section 15 if it does not fully remediate that inequality, or if it introduces another inequality. The fact that legislation is remedial does not immunize it from *Charter* review (*Hislop, supra* at paragraph 39).
- 849.
850. Also note that where the government has created an affirmative action or targeted ameliorative program aimed at improving the situation of a particular **historically disadvantaged** group (e.g., programs

targeted at First Nations, Inuit or Métis groups or a subset thereof), the government may argue that the program in question falls within the scope of section 15(2). The 15(2) defense is raised at this stage of the analysis without needing to go to step “2” of the section 15(1) analysis. (See the detailed discussion of section 15(2) below).

851. This second stage is generally aimed at determining whether the distinction in question amounts to discrimination in the substantive sense. The focus of this analysis has evolved over the years. While in *Law, supra*, the Supreme Court approached this question by assessing the law’s impact on the claimant’s “essential human dignity”, it acknowledged in *Kapp, supra*, that “several difficulties have arisen from the attempt...to employ human dignity as a legal test” (paragraph 21). Accordingly, this stage of the analysis was refocused on the guiding concepts from *Andrews, supra* of “the perpetuation of disadvantage and stereotyping as the primary indicators of discrimination” (*Kapp, supra* at paragraph 23; *Withler, supra* at paragraph 30; *Quebec v. A., supra* at paragraphs 324 and 418). In *Taypotat, supra*, the Supreme Court suggested a further shift in emphasis at this stage of the inquiry to focus on whether a distinction has “the effect of perpetuating arbitrary disadvantage on the claimant” (*Taypotat, supra* at paragraph 16; *Quebec v. A., supra* at paragraph 331). In *Fraser, supra*, the Supreme Court suggested a shift in emphasis to focus on whether the distinction “imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage” (*Fraser, supra* at paragraphs 27, 81). Historical discrimination need not be demonstrated for a court to find that a law infringes s. 15(1) (*Ontario v. G., supra* at paragraph 39).
852. The Supreme Court has repeatedly underscored the importance of addressing the broader context in the substantive equality analysis (*Turpin, supra* at 1331; *Ermineskin Indian Band and Nation v. Canada*, [2009] 1 S.C.R. 222 at paragraph 193; *Withler, supra* at paragraph 43). While some of the formal requirements of previous s. 15 tests have been streamlined in *Fraser*, the Supreme Court has reiterated that the equality analysis remains sensitive to context (*Fraser, supra* at paragraphs 86-113; see also *Ontario v. G., supra*, at paragraph 43 and *R. v. C.P., supra*, at paragraph 57).
853. In *Law*, the Supreme Court had elaborated four contextual factors to help guide the analysis at this stage: (a) pre-existing disadvantage, if any, of the claimant group; (b) degree of correspondence between the

differential treatment and the claimant group's reality; (c) whether the law or program has an ameliorative purpose or effect, including the multiplicity of interests that such a law or program attempts to balance as described in *Withler, supra* at paragraph 38 (largely, but not wholly subsumed, since *Kapp, supra*, within the section 15(2) analysis); and (d) the nature of the interest affected. In recent decisions, the Supreme Court stated that it is not necessary or desirable to apply a step-by-step consideration of these factors and described them "as a way of focusing on the central concern of section 15 - combating discrimination (*Kapp, supra* at paragraph 24; *Quebec v. A., supra* at paragraph 331; *Alliance, supra* at paragraph 28).

854. In *Fraser, supra*, the Supreme Court stated that in determining whether the law has the effect of reinforcing, perpetuating, or exacerbating disadvantage, there is no "rigid template" of factors to be applied (*Fraser, supra* at paragraph 76). The goal is to examine the impact of the harm caused to the affected group, in light of any systemic or historic disadvantages that this group has faced. The harm may include economic exclusion or disadvantage, social exclusion, psychological harms, physical harms, and political exclusion (*Fraser, supra* at paragraph 76). Whether these harms establish discrimination depends centrally on whether they relate to systemic or historical disadvantages faced by the claimant group (*Fraser, supra* at paragraphs 76-77). At the root of s. 15 is the awareness that certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed (*Fraser, supra*, at paragraph 78, citing *Quebec v. A, supra* at paragraph 332; *Taypotat, supra* at paragraph 20). Notably, "the presence of social prejudices or stereotyping are not necessary factors in the s. 15(1) inquiry. They may assist in showing that a law has negative effects on a particular group, but they "are neither separate elements of the *Andrews* test, nor categories into which a claim of discrimination must fit" (*Fraser, supra*, at paragraph 78, citing *Quebec v. A, supra*, at paragraph 329). Similarly, there is no longer any obligation for the claimant to demonstrate that the distinction is arbitrary in order to prove a *prima facie* breach of s. 15(1) (*Fraser, supra* at paragraph 80), though it is a factor that may be usefully considered (*Sharma, supra* at paragraph 53).
855. Once a group has been found to suffer pre-existing disadvantage, this will be "settled law" which can be relied on in subsequent cases no matter what the nature of the impugned law is (*Lavoie, supra* at paragraph 45).

856. The majority in *Fraser* found that an RCMP job-sharing program which did not allow members to buy back full-time pension benefits had a differential impact on women and perpetuated their disadvantage in light of a number of contextual factors: the economic and gendered constraints affecting the “choice” to work part-time; the persistence of gender divisions in domestic labour and childcare; the disadvantages women face in balancing professional and domestic work; the historical gender biases within pension plans based on male-pattern employment; and the negative financial consequences of all these factors for women upon retirement (*Fraser, supra* at paragraphs 86-113). The appropriateness of considering the legislative objective under section 15 has been the subject of recent controversy. In *Fraser, supra*, the majority stated that the second step should focus on whether the law or government action has a discriminatory impact on disadvantaged groups, not on the issue of whether the distinction is justified in the sense that it is relevant to a legitimate state objective, an inquiry properly left to section 1 of the *Charter* (*Fraser, supra* at paragraph 79; see also *Ontario v. G.*, *supra* at paragraph 69). However, more recently, in *Sharma, supra*, the majority identified “legislative context” as an appropriate part of the section 15 analysis, with relevant considerations including “the objects of the scheme” and “particular policy goals sought to be achieved” (at paragraph 59).

VOLUME #12(L) (iii): Framework of analysis for section 15(2)

857. The basic purpose of section 15(2) is to shield ameliorative programs from the charge of “reverse discrimination”. That is, section 15(2) enables governments to combat discrimination through programs aimed at helping disadvantaged groups without fear of challenge under section 15(1) by groups that do not share that disadvantage (*Kapp, supra* at paragraph 16). In addition, section 15(2) enables governments to assist one disadvantaged group, or subset thereof, without being paralyzed by the necessity to assist all, including others who may suffer similar or equal disadvantage (*Cunningham, supra* at paragraph 41).

858. The Supreme Court has stated that “[s]ections 15(1) and 15(2) work together to promote the vision of substantive equality that underlies s. 15 as a whole” (*Kapp, supra* at paragraph 16). Affirmative action programs accommodating disadvantage are an expression of equality, not an exception (*Kapp, supra* at

paragraph 37, citing P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp. 2007), volume 2, at page. 55-53; see also *Andrews, supra* at 169.

859. In *Kapp*, the Court elaborated an independent role for section 15(2), whereas before it had been viewed as an “interpretive aid” to section 15(1) (*Law, supra*; *Lovelace, supra*). This was likely done with a view to simplifying the analysis for these types of measures and reinforcing the message that, far from constituting a form of “reverse discrimination” against more advantaged individuals, they are consistent with the section 15 equality guarantee. Under the new approach, once the claimant has established a distinction on a prohibited ground (“step (i)” above), it is open to the government to establish that the impugned law, program or activity is ameliorative within the meaning of section 15(2) and accordingly, constitutional, obviating the “step (ii)” analysis of whether or not the distinction amounts to discrimination in the substantive sense. To satisfy the requirements of section 15(2), the government must establish that:
- a. The program has a genuinely ameliorative or remedial purpose; and
 - b. The program targets a disadvantaged group identified by the enumerated or analogous grounds (*Kapp, supra* at paragraph 41).
860. If the government fails to meet these requirements, it can still argue that the impugned measure does not have a substantively discriminatory impact within the meaning of section 15(1) (*Kapp, supra* at paragraph 40).

VOLUME #12(M): Ameliorative or remedial purpose

861. Under (i), the government must establish that its goal in creating the program or benefit in question was to “improve the conditions of a group that is disadvantaged” (*Kapp, supra* at paragraph 48). While adopting an “intent-based analysis”, courts need not adhere slavishly to the government’s own statement of intent and should also consider whether it was “rational for the state to conclude that the means chosen to reach its ameliorative goal would contribute to that purpose”. To be “rational”, “there must be a correlation between the program and the disadvantage suffered by the target group” (*Cunningham, supra* at paragraph 44; *Kapp, supra* at paragraph 49). This standard permits “significant deference”. At the same time, it allows judicial review of colourable initiatives, where the

impugned program only nominally seeks to serve the disadvantaged and should not be immunized from the full section 15(1) analysis (*Kapp, supra* at paragraph 49).

862. The impugned program’s ameliorative purpose need not be its exclusive objective. However, where an ameliorative program is part of, or relates to a larger legislative scheme, section 15(2) protects only those distinctions “that serve and are necessary to the ameliorative purpose” (*Kapp, supra*, at paragraph 52). Laws or programs aimed at restricting or punishing the behaviour of a targeted group would not qualify under section 15(2) (*Kapp, supra* at paragraph 54).
863. Section 15(2) is not a stand-alone defence to any and all claims brought under s. 15(1). Section 15(2) cannot bar s. 15(1) claims by the very group the legislation seeks to protect. The purpose of s. 15(2) dictates that, for the government to invoke a s. 15(2) defence, there must first be a claim by a person or group excluded from the program alleging that the exclusion is discriminatory (*Fraser, supra*, at paragraph 69; *Centrale des syndicats, supra* at paragraph 39; *Alliance, supra* at paragraph 32).

VOLUME #12(N): Disadvantaged group identified by the enumerated or analogous ground

864. The types of programs protected under section 15(2) are those “targeting the conditions of a specific and identifiable disadvantaged group, as contrasted with broad societal legislation, such as social assistance programs” (*Kapp, supra* at paragraph 55). “‘Disadvantage’ under section 15 connotes vulnerability, prejudice, and negative social characterization”. The interpretation of “disadvantage” is as explored in key section 15 cases such as *Andrews, supra*, *Miron v. Trudel, supra*, and *Law, supra*. For a program to qualify, not all members of the group targeted need to be disadvantaged, as long as the group as a whole has experienced discrimination (*Kapp, supra* at paragraph 55).

VOLUME #12(O): Underinclusive ameliorative programs

865. Until the Supreme Court’s decision in *Cunningham, supra*, it was unclear how section 15(2) would operate where the claimant group shares a history of disadvantage equal and perhaps similar to that of the targeted beneficiary group. *Cunningham* was an ‘intra-Aboriginal’ discrimination claim brought by status

Indians impugning provincial legislation which authorized Métis settlements to exclude status Indians from their membership. The Court drew on its approach in *Lovelace, supra*, in which a program benefitting only *Indian Act* bands was found to not discriminate against the claimants, non-*Indian Act* bands and Métis. Likewise in *Cunningham*, the exclusion of the claimant status Indians, a group similarly disadvantaged to the Métis, was allowed under section 15(2). The Court confirmed that its deferential approach under section 15(2) in *Kapp* prevails even where the claimants share a similar history of disadvantage and marginalization with the targeted beneficiary group (at paragraph 53).

866. *Cunningham* involved “a special type of ameliorative program” insofar as the impugned legislation came out of self-government negotiations with the Métis and was designed to “enhance and preserve [their] identity, culture and self-governance” (paragraph 54). It was not a typical ameliorative program that confers benefits on a group. As such, the exclusion of status Indians was seen as necessary to the objective of the program. In this unique factual context, the Court stated that the exclusion of the claimant group must “serve or advance the ameliorative goal” (paragraph 46).
867. Taken at face value, the “serve or advance” standard appears unusually stringent in light of the generally deferential approach taken by the Court in *Cunningham*. Outside of cases such as *Cunningham* that deal with the preservation of cultural identity, it is difficult to see how the exclusion of another disadvantaged group would serve or advance an ameliorative purpose. Accordingly, it is reasonable to expect that outside the unique context of programs designed to preserve specific cultural identities, ameliorative programs will be upheld as long as the exclusion of the claimant group is not an irrational means of pursuing the stated ameliorative goal.

VOLUME #12(P):: The relationship between section 15 and section 1

868. The relationship between section 15 and section 1 has been difficult to determine over the years on a wholly satisfactory basis. This is because certain aspects of the s. 15 analysis adopted by the Supreme Court at various points (the correspondence factor established in *Law, supra*; the arbitrary perpetuation of disadvantage in *Quebec v. A and Taypotat, supra*; and the ameliorative purpose or effect, including the multiplicity of interests being balanced, in *Withler, supra*) have dovetailed with aspects of the s. 1 analysis,

which assesses the rationality of the impugned distinction relative to the government's asserted legislative or policy goal).

869. In *Quebec v. A.*, *supra*, the majority of the Supreme Court emphasized the importance of maintaining the analytic distinction between section 15 and section 1. Specifically, the Court's approach in *Walsh*, *supra*, was disavowed insofar as it addressed the broad policy goals of respecting individual autonomy and freedom of choice in the context of the section 15 analysis, rather than in the section 1 justification, where the government bears the onus of proof (see paragraphs 340, 343, 384, and 422).
870. In *Fraser*, *supra*, the Supreme Court reiterated the importance of keeping the analyses under these two provisions distinct. The Supreme Court stressed that any government arguments about the necessity or reasonableness of the impugned law or action are to be advanced under s. 1. This justification requires a pressing and substantial objective for the discrimination and proof of proportionality between that objective and the means used to achieve it (*Fraser*, *supra* at paragraphs 79-80; see also *R. v. C.P.*, *supra*, at paragraph 57). However, in *Sharma*, *supra*, the majority called this analytic distinction into question, stating that "the objects of the scheme" and "particular policy goals sought to be achieved" by a particular law or government action are relevant considerations under section 15 (at paragraph 59).
871. On a number of occasions, the Supreme Court has found that an otherwise discriminatory law or program was justified under section 1 of the *Charter* (see *McKinney*, *supra*; *Weatherall v. Canada (Attorney General)* [1993] 2 S.C.R. 872; *Egan*, *supra*; *Lavoie*, *supra*; *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381; and *Quebec v. A.*, *supra*).

VOLUME #13: CRUEL AND UNUSUAL PUNISHMENT OR TREATMENT

872. The **Applicant** pauses here to note that he will research the issue of cruel and unusual punishment but he would say that there is an interesting intersection between the **Landlord's** unlawful and without notice entries when he was in the washroom of the **Rental Unit 410** and the **TPS** (*14th Division* – incarceration division). On July 13, 2024, the **Landlord** was attempting to enter the bathroom while Mr. McLean was using the bathroom.

873. On October 2, 2024, when Mr. McLean was imprisoned against his will, there was no toilet paper in that jail cell.
874. It is unclear why there would not be considering that is a human right to some degree.
875. The conduct of both is so incredibly antiquated and uncouth that both may need a lesson in etiquette and manners let alone human rights.
876. Section 12 of the *Charter* and the relevant case law is below:
12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.
877. The purpose of section 12 is “to prevent the state from inflicting physical or mental pain and suffering through degrading and dehumanizing treatment or punishment. It is meant to protect human dignity and respect the inherent worth of individuals” (*Quebec (Attorney General) v. 9147-0732 Québec Inc.*, 2020 SCC 32 at paragraph 51, quoted in *R. v. Bissonnette*, *supra* at paragraph 59; *R. v. Hills*, 2023 SCC 2 at paragraph 32).
878. For section 12 to be engaged, the impugned measure must be a “treatment or punishment” by a Canadian state actor. Section 12 is violated if the treatment or punishment is “cruel and unusual” (*Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 at 608-609; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4 at paragraph 47; *R. v. Boudreault*, [2018] 3 S.C.R. 599 at paragraph 45; *Bissonnette*, *supra* at paragraph 56).
879. The section 12 right protects individuals. The Supreme Court has confirmed that section 12 does not protect corporations as “the text ‘cruel and unusual’ denotes protection that ‘only human beings can enjoy’” (*Quebec (Attorney General)*, *supra* at paragraph 1, quoting *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 1004).
880. The definition of “punishment” for the purpose of section 12 is the same as the definition that applies in the context of ss. 11(h) and (i) of the *Charter* (*Boudreault*, *supra* at paragraph 38). A measure will therefore be a punishment if it “(1) . . . is a consequence of conviction that forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence, and either (2) . . . is imposed

in furtherance of the purpose and principles of sentencing, or (3) . . . has a significant impact on an offender’s liberty or security interests”. (*R. v. K.R.J.*, [2016] 1 S.C.R. 906, at paragraph 41, quoted in *Boudreault*, *supra* at paragraph 39; *Bissonnette*, *supra* at paragraph 57; *Hills*, *supra* at paragraph 31).

881. While the Supreme Court has not articulated a general definition of “treatment”, it is clear that this term extends the application of section 12 beyond measures that amount to punishment (*R. v. Rodgers*, [2006] 1 S.C.R. 554 at paragraph 63). The Supreme Court has noted the broad dictionary definition of treatment as “a process or manner of behaving towards or dealing with a person or thing...” (*Chiarelli v. Canada (Minister of Employment & Immigration)*, [1992] 1 S.C.R. 711 at paragraph 29). The Supreme Court has left open the possibility that treatment may include measures imposed by the state outside of the penal or *quasi*-penal context. However, the mere legal prohibition of certain conduct does not constitute treatment under section 12. According to the Supreme Court, “there must be some more active state process in operation, involving an exercise of state control over the individual, in order for the state action in question, whether it be positive action, inaction or prohibition, to constitute ‘treatment’ under section 12 (*Rodriguez v. British Columbia (Attorney General)*, *supra*, at 610)

- a. The following measures have been considered treatments for the purpose of section 12:
- b. Detention for non-punitive reasons is a treatment — including the detention of permanent residents and foreign nationals for immigration-related reasons, as authorized under the *Immigration and Refugee Protection Act* (*Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350 at paragraphs 95-98); and
- c. the taking of a DNA sample, at least where ordered as a consequence of conviction, is a treatment (*Rodgers*, *supra* at paragraph 63).

882. If a measure engages section 12, the next question is whether it is “cruel and unusual”.

883. The analysis does not give a distinct meaning to the words “cruel” and “unusual”. Instead, the phrase “cruel and unusual” is a “statement of a compendious norm”, one that is meant to be flexible, context-specific, and linked to reasonable or objective community standards. It can be expected that the protection of section 12 will evolve over time (*Smith*, *supra*; *Bissonnette*, *supra* at paragraph 65; *Hills*, *supra* at paragraph 100).

Volume #13(A): The Two Prongs

884. Section 12 affords two prongs of protection.

Volume #13(A)(I): The First Prong

885. The first considers the severity or quantity of a particular punishment in light of the circumstances (*Hills, supra* at paragraph 35). It prohibits treatments or punishments “whose effect is grossly disproportionate to what would have been appropriate” in an individual’s particular circumstances, even if that same measure could be appropriate in someone else’s situation (*Bissonnette, supra* at paragraphs 6, 61-63, citing *R. v. Smith*, [1987] 1 S.C.R. 1045 at 1072). Gross disproportionality is a high threshold. A measure must be more than “merely excessive” or disproportionate: it must “outrage our society’s sense of decency” such that Canadians would find it “abhorrent or intolerable” (*Smith, supra* at 1072; *R. v. Morrisey*, [2000] 2 S.C.R. 90, at paragraph 26; *R. v. Lloyd*, [2016] 1 S.C.R. 130, at paragraph 24; *Boudreault, supra* at paragraph 45; *Bissonnette, supra* at paragraphs 61, 70; *Hills, supra* at paragraphs 109-110).

Volume #13(A)(II): The Second Prong

886. The second prong focused on the method or inherent nature of the punishment (*Hills, supra* at paragraph 36). It prohibits a “narrow class” of treatments or punishments that are “inherently” cruel and unusual because they are “degrading or dehumanizing” and “intrinsically incompatible with human dignity” (*Bissonnette, supra* at paragraphs 6, 60, 64, 68). Such measures will “always be grossly disproportionate”, and therefore any law allowing them to be imposed would be contrary to section 12, even if the law set out tailored exemptions or judicial discretion (*Bissonnette, supra* at paragraphs 68, 111).

887. In situations where both prongs of the section 12 protection are potentially at issue, the treatment or punishment is to be assessed initially under the second prong. The reason is that if the measure “that might be imposed is cruel and unusual by nature, and hence intrinsically incompatible with human dignity, it will be unnecessary ... to consider whether it is grossly disproportionate in a given case” (*Bissonnette, supra* at paragraph 69). For that reason, the discussion below will begin with the second prong of protection.

Volume #13(B): Second prong: Inherently cruel and unusual

888. The Supreme Court has identified several treatments or punishments as being inherently cruel and unusual, and thus always contrary to section 12.
- a. A sentence of life imprisonment with no eligibility for parole for 50 years or more, as was formerly allowed by section 745.51 of the *Criminal Code*. Such a punishment is “degrading in nature and thus incompatible with human dignity” because “it negates, in advance and irreversibly, the penological objective of rehabilitation” (*Bissonnette, supra* at paragraphs 3, 7-9, 71, 73, 111);
 - b. Torture, because its aim is “the denial of a person’s humanity” (*Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, at paragraph 51; *Bissonnette, supra* at paragraph 66; *Kazemi Estate v. Islamic Republic of Iran*, [2014] 3 S.C.R. 176, at paragraph 52;). For the generally agreed-upon definition of “torture”, see section 269.1 of the *Criminal Code* and Article 1 of the *Convention against Torture*; and
 - c. “The infliction of corporal punishment, such as the lash, irrespective of the number of lashes imposed, or ... the lobotomization of certain dangerous offenders or the castration of sexual offenders” (*Smith, supra* at 1073; *Bissonnette, supra* at paragraphs 66, 111).

Volume #13(C): If not inherent cruel and unusual then assessed under the first prong

889. The Supreme Court has held that the following treatments or punishments are **not** inherently cruel and unusual, and instead are to be assessed under the first prong:
- a. Mandatory minimum sentencing provisions (*Smith, supra*; *Nur, supra* at paragraphs 44-46; *Hills, supra* at paragraphs 37-38);
 - b. Criminal sentences involving a fixed term of imprisonment or a fine (*Bissonnette, supra* at paragraphs 62-63); and
 - c. Detention, because “[d]etention itself is never pleasant, but it is only cruel and unusual in the legal sense if it violates accepted norms of treatment” (*Charkaoui, supra* at paragraph 96).

Volume #13(D): First Prong: Cruel and Unusual in some circumstances

890. There are several kinds of treatment or punishment that, while not inherently cruel and unusual, may be *grossly disproportionate* in particular circumstances and thus contrary to the first prong of protection

afforded by section 12. As can be seen above, what is cruel and unusual in terms of treatment is often more severe than what Mr. McLean experienced but it is often in the context of those convicted.

891. When an individual has a presumption of innocence, there are a variety of protections afforded.
892. However, when considering the nature of this criminal complaint and it is suspicious timing, the FPE, the Fictitious CH Warning, the ruse carried on by the TPS *14th Division*, the threat that he would be staying in jail overnight and going to the courthouse, and the NFA, with new driver's license in hand of Mr. McLean, the TPS have to be liable for some the cruel and unusual punishment.
893. As discussed infra, the unknown complaint has to be held to account for setting the proceeding in motion or giving it any form of life but under section 12, is only the TPS that can be found to be liable herein.
894. As the word treatment is so prevalent in the *HR Code*, if Mr. McLean is able to prove that the treatment was cruel or unusual under the first prong of the test for section 12, then he will have obviously proven adverse treatment.
895. However, he will have also proven that the conduct of the TPS was such a radical and inexplicable departure from its usual practices, that discrimination will have been proven as well.

VOLUME #14: Remedies under the <i>Charter</i>

VOLUME #14(A): Section 24(1) of the <i>Charter</i>

896. Section 24.(1) states, "Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."
897. The *Charter* contains three provisions that govern the granting of remedies where there is a finding of unconstitutionality. Section 24(1) provides remedies against unconstitutional government *action*; section 24(2) provides for the exclusion of evidence obtained in violation of the *Charter*; and section 52(1) of the *Constitution Act, 1982* provides that a *law* that is inconsistent with the Constitution is, to the extent of the inconsistency, of no force or effect.

VOLUME #14(B): Purpose

898. This section permits a person whose rights have been infringed to apply to a “court of competent jurisdiction” for “such remedy as the court considers appropriate and just in the circumstances”. Within certain jurisdictional limits, the court’s exercise of its remedial power is discretionary.

VOLUME #14(C): Analysis

VOLUME #14(C)(I): What is the relationship between section 24(1), section 24(2) and section 52(1) of the Constitution Act, 1982?

899. Where a *Charter* violation is the result of legislation, and not a discretionary action, the proper remedial authority is section 52(1) of the *Constitution Act, 1982* (*R. v. Ferguson*, [2008] 1 S.C.R. 96 at paragraphs 58-61). Where section 52(1) is not engaged because the relevant statute or legislative provision is not in itself unconstitutional, section 24(1) of the *Charter* may be available to provide an individual remedy for a person whose rights have been infringed by government action (*Schachter v. Canada*, [1992] 2 S.C.R. 679 at pages 719-720; *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575 [hereinafter “*Dunedin*”] at paragraph 14; *Canada (Attorney General) v. PHS Community Services Society*, [2011] 3 S.C.R. 134 at paragraph 144).
900. The distinct functions of sections 52(1) and 24(1) also underpin the principle that remedies under section 52(1) should generally not be combined with individual section 24(1) remedies (*Schachter*, *supra*, at page 720; *Guimond v. Quebec*, [1996] 3 S.C.R. 347 at paragraph 19; *Mackin v. New Brunswick*, [2002] 1 S.C.R. 405 at paragraph 81; *Vancouver (City) v. Ward*, [2010] 2 S.C.R. 28). Despite statements to the contrary in some cases (see *e.g.*, *Schachter*, *supra*; *R. v. Demers*, [2004] 2 S.C.R. 489 at paragraphs 61-63), there is no “hard-and-fast rule” against combining section 24(1) and section 52(1) remedies (see *Ontario (Attorney General) v. G.*, 2020 SCC 38 at paragraphs 141-142). There is, however, a general principle that section 24(1) should not be used to grant damages, or relief that would be tantamount to

damages, in respect of the enactment of an unconstitutional law (see *e.g.*, *Mackin, supra*, at paragraphs 79-81; *Canada (Attorney General) v. Hislop*, [2007] 1 S.C.R. 429 at paragraph 102; *Ward, supra*, at paragraph 39). This rule is not absolute, however, as section 24(1) damages may be available if the state conduct under a law found to be invalid was “clearly wrong, in bad faith or an abuse of power” (*Mackin, supra*, at paragraph 78, and *Ward, supra*, at paragraph 39). This limited government immunity from damages awards does not apply when decisions made in accordance with government policies infringe the *Charter* (*Conseil scolaire francophone de la Colombie-Britannique*, 2020 SCC 13 at paragraphs 164-179).

901. When a court has suspended the effect of a declaration of invalidity under s. 52(1), an individual remedy under section 24(1) will often be appropriate and just to recognize the time and resources the claimant invested to pursue matters in the public interest (*G., supra*, at paragraphs 145-152). In these circumstances, a court should grant an immediately effective individual remedy to the claimant unless there is a compelling reason, such as where granting an exemption would undermine the reason for the suspension of the declaration of invalidity, or where it is inappropriate due to practical considerations like judicial economy (*G, supra*, at paragraphs 150-151). See also the discussion in section 52(1) under the heading “Exemption from a temporarily valid law”.
902. Individual relief under section 24(1) may also be appropriate in circumstances where a law has been declared unconstitutional, but where the declaration of invalidity operates prospectively only. In particular, an accused who is charged under a temporarily operative offence (*i.e.*, prior to the declaration of invalidity taking effect) may be entitled to personal relief under section 24(1) if conviction under the offence would be a breach of the accused’s own *Charter* rights and if granting individual relief would not undermine the purpose of the suspension (*R. v. Albashir*, 2021 SCC 48 at paragraph 67).
903. The words of section 24 indicate that section 24(2) was intended to be the primary basis for the exclusion of evidence because of a *Charter* violation. It should not be circumvented by resort to section 24(1) (*R. v. Collins*, [1987] 1 S.C.R. 265 at page 276; *R. v. Therens*, [1985] 1 S.C.R. 613 at pages 620-621). However evidence may be excluded pursuant to section 24(1) in rare cases “where a less intrusive remedy cannot be fashioned to safeguard the fairness of the trial process and the integrity of the justice system” (*R. v. Bjelland*, [2009] 2 S.C.R. 651 at paragraph 19; *Canada (Citizenship and Immigration) v. Harkat*, [2014]

2 S.C.R. 33 at paragraph 95). Where another remedy can ensure trial fairness and the integrity of the justice system, exclusion of evidence is not “appropriate and just” (*Bjelland, supra*, at paragraph 24). Also, where evidence was not obtained through a breach of the *Charter* but use of it at trial may infringe the *Charter*, the remedy of exclusion is available by resort to section 24(1) (*R. v. White*, [1999] 2 S.C.R. 417 at paragraph 89).

VOLUME #14(D): Standing — Who may apply for a remedy under section 24(1)?

904. Anyone whose rights or freedoms have been directly infringed or denied may apply for a remedy. Despite the plain wording of the section ("Anyone whose rights *have* been violated...") indicating the contrary, section 24(1) applies not only in the case of actual interference with *Charter* guarantees, but also where an apprehension of a future interference can be established on a balance of probabilities (*New Brunswick (Minister of Health & Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46 at paragraph 51; *United States of America v. Kwok*, [2001] 1 S.C.R. 532 at paragraph 66).
905. A section 24(1) remedy is not generally available to a claimant who only asserts that the *Charter* rights of a third party have been infringed (*R. v. Edwards*, [1996] 1 S.C.R. 128 at paragraphs 54-55, citing *Rahey v. R.*, [1987] 1 S.C.R. 588 at page 619 (Wilson, J. concurring); *R. v. Ferguson, supra*, at paragraph 61). However, a party who otherwise has standing to apply for judicial review, may apparently invoke the *Charter* to challenge the reasonableness of a decision whether or not their own *Charter* rights or freedoms are at stake and whether or not they are even capable of enjoying the right or freedom pleaded (*Loyola High School v. Quebec (Attorney General)*, [2015] 1 S.C.R. 613 at paragraphs 33-35).
906. To obtain a *Charter* remedy, the applicant must: (1) establish an adequate factual foundation; (2) bring their claim at the correct stage of litigation; and (3) persuade the court that, on a balance of probabilities, their *Charter* rights have been violated (*Collins, supra*, at page 277).

VOLUME #14(E): What constitutes a court of competent jurisdiction to grant remedies under section 24(1)?

907. The application for a section 24(1) remedy must be made to “a court of competent jurisdiction.”
908. Section 24(1) does not extend the basic jurisdiction of the courts and tribunals; its applicability depends on a jurisdictional basis external to the *Charter* itself (*Singh v. Canada (Minister of Employment & Immigration)*, [1985] 1 S.C.R. 177 at page 222).

VOLUME #14(F) HRTO (as paradoxical as it may sound) is a “court of competent jurisdiction”

909. A statutory tribunal is a “court of competent jurisdiction” to apply the *Charter* and provide section 24 remedies in respect of *Charter* issues arising in matters properly before it, if it has been granted the explicit or implicit power to decide questions of law and if the legislature has not clearly withheld authority to adjudicate the *Charter* (*R. v. Conway*, [2010] 1 S.C.R. 765 at paragraph 22; *Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395 at paragraph 30).
910. A “competent” court or tribunal will have the further jurisdiction to grant a particular remedy sought under section 24(1) only if to do so accords with its mandate, function and structure (*Dunedin, supra*, at paragraphs 41-46; *R. v. Conway, supra*, at paragraph 82). Even where an administrative tribunal lacks jurisdiction to grant the **precise** remedy sought, if it nonetheless has sufficient authority to appropriately **remedy** the alleged breach, it **is** a court of competent jurisdiction and a claimant will be **required** to proceed before it (*Okwuobi, supra*, at paragraphs 45-48).

VOLUME #14(G):: Minister not a court of competent jurisdiction

911. A Minister deciding whether to surrender a fugitive in the extradition process is not a court of competent jurisdiction. The Minister must respect the *Charter* rights of the fugitive in the decision-making process, but cannot decide whether a breach of the *Charter* has occurred; this is a judicial function (*United States of America v. Kwok, supra*, at paragraph 80).
912. The *Charter* does not create routes of appeal where no statutory route exists (*R. v. Meltzer*, [1989] 1 S.C.R. 1764 at pages 1773-1774).

VOLUME #14(H): What remedies are available under section 24(1)?

VOLUME #14(I): Widest discretion: most unfettered of all

913. It is “difficult to imagine language which could give the court a wider and less fettered discretion” in crafting remedies than section 24(1) (*Mills, supra*, at page 181). Nonetheless, the discretion is not unfettered: “[w]hat is appropriate and just will depend on the facts and circumstances of the particular case” (*Ward, supra*, at paragraph 19). Courts are to approach *Charter* remedies purposively and give vitality to the maxim, “where there is a right, there must be a remedy” (*Doucet-Boudreau, supra*, at paragraph 25). This purposive approach consists of two specific requirements:
- a. 1) the remedy must be “responsive” and promote “the purpose of the right being protected”;
 - b. 2) the remedy must be effective (*Doucet-Boudreau, supra*, at paragraph 25; *PHS Community Services Society, supra*, at paragraph 142).

VOLUME #14(I)(i): Application of the Law to the Facts

914. Herein, each violation of each *Charter* right must be given proper and respectful attention and analysis.

VOLUME #14(J): Remedy: what is just and appropriate?

915. A remedy that is “appropriate and just” fulfils the following requirements:
- a. The remedy is meaningful, in that it is “relevant to the experience of the claimant and must address the circumstances in which the right was infringed or denied” (*Doucet-Boudreau, supra*, at paragraph 55);
 - b. The remedy must respect basic constitutional principles, such as the principle of separation of powers, although it is permissible for a *Charter* remedy to “touch on functions that are principally assigned to the executive” (at paragraph 56).

- c. The remedy does not exceed the judiciary's power and competence by involving it in "the kinds of decisions and functions for which its design and expertise are manifestly unsuited" (at paragraph 57).
- d. The remedy must be fair to the party against which it is imposed in that it "should not impose substantial hardships that are unrelated to securing the right" (at paragraph 58).

VOLUME #14(K): A flexible and malleable approach

916. Because courts should expect evolution in the understanding of what is required to appropriately remedy *Charter* violations, the approach to *Charter* remedies must "remain flexible and responsive to the needs of a given case," and they should remain open to employing remedies with "novel and creative features when compared to traditional and historical remedial practice" (at paragraph 59).
917. "[C]osts and practicalities" may be relevant in a court's selection of an appropriate and just remedy (*Association des parents de l'école Rose-des-vents v. British Columbia (Education)*, [2015] 2 S.C.R. 139 at paragraph 49).

VOLUME #14(L): Very deferential standard: particularly with the HRTO with the HR Code having primacy and paramountcy over all other provincial law, Crown being bound,

918. The standards of deference applicable in reviewing the decisions of trial judges generally apply equally to their decisions in relation to the remedial provisions of section 24 (*Doucet-Boudreau, supra*, at paragraph 86; *R. v. Carosella*, [1997] 1 S.C.R. 80 at paragraphs 48-51). Appellate intervention is warranted only if the trial judge misdirected themselves in law, committed a reviewable error of fact, or rendered a decision that is "so clearly wrong as to amount to an injustice" (*R. v. Babos*, [2014] 1 S.C.R. 309 at paragraph 48).

VOLUME #14(M): Civil/administrative remedies

919. **Damages** are available in appropriate cases where they would serve a "functional" purpose in remedying a *Charter* violation. This requires a claimant to demonstrate that damages would further one or more of

the general objects of the *Charter*, including those of section 24(1), namely: compensation (remedying any personal loss the claimant has suffered); vindication (importance of upholding *Charter* rights); and/or deterrence (of further breaches by state actors) (*Ward, supra*, at paragraphs 25-31). In response to a *Charter* damages claim, the government may establish that other considerations render a pecuniary award inappropriate or unjust in the circumstances, *e.g.*, double compensation or duplicative remedies; or concerns that an award of damages would interfere with “good governance” and the rule of law (*Ward, supra*, at paragraphs 32-45). The quantum will be determined based on evidence of pecuniary or non-pecuniary loss, as well as in light of the other functional purposes of section 24(1), *i.e.*, vindication and deterrence (*Ward, supra*, at paragraphs 46-57).

920. Where a claimant seeks *Charter* damages in a civil suit alleging that a Crown prosecutor breached the *Charter* in respect of disclosure obligations, damages are available if harm was suffered by the accused and the Crown intentionally withheld information when it knew, or would reasonably be expected to have known, that the information was material and that the failure to disclose would likely affect the accused’s ability to make full answer and defence (*Henry v. British Columbia (Attorney General)*, [2015] 2 S.C.R. 214 at paragraph 82).
921. **Declaratory relief** is available under section 24(1), in particular where the factual record is inadequate to justify a more directive remedy that would interfere with the prerogative powers of the executive (*e.g.*, *Canada (Prime Minister) v. Khadr*, [2010] 1 S.C.R. 44 at paragraphs 46-47). Declaratory relief can be effective and therefore sufficient because there is a tradition in Canada of state actors taking *Charter* declarations seriously (*Association des parents de l’école Rose-des-vents, supra*, at paragraph 62). On the other hand, declaratory relief was held to be inadequate in *PHS Community Services Society, supra*, at paragraph 148, presumably because of the urgency of the situation and perhaps the record of the Minister’s approach to the matter.
922. A **stay of proceedings** could potentially be available as a measure of last resort (see explanation below under “criminal remedies” for more detail as to when) in the civil or administrative context (*e.g.*, security certificates) where there is a failure to disclose evidence in circumstances giving rise to a section 7 violation (*Charkaoui v. Canada (Citizenship and Immigration)*, [2008] 2 S.C.R. 326, at paragraphs 74-77; *Harkat, supra*, at paragraph 106).

923. **Mandamus** is available in exceptional circumstances, where a specific action by the executive is the only response capable of remedying the unconstitutionality (*PHS Community Services Society, supra*, at paragraph 150).
924. **Injunctive relief** is available, as the “power of courts to issue injunctions against the executive is central to section 24(1) of the *Charter*” (*Doucet-Boudreau, supra*, at paragraph 70). Interlocutory injunctive relief is also a possible section 24(1) remedy (*RJR-MacDonald Inc. v. Canada*, [1994] 1 S.C.R. 311 at pages 333-334). The 3-part *American Cyanamid* test should be applied in applications for **interlocutory injunctions** and **interim stays** in *Charter* cases: serious question to be tried; irreparable harm; balance of inconvenience (*Metropolitan Stores Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110 at page 127, citing *American Cyanamid v. Ethicon Ltd.*, [1975] A.C. 396; *Harper v. Canada (Attorney General)*, [2000] 2 S.C.R. 764 at paragraph 4).
925. The remedial power under section 24(1) authorizes courts to order “**structural injunctions**” that require ongoing judicial supervision (*Doucet-Boudreau, supra*, at paragraphs 72-74). The granting of such a remedy requires good evidence as to the current state of affairs (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120 at paragraphs 157-158).

VOLUME #15: Remedies (detailing the issues in the proceeding (see: <i>HoJo Inn</i>))

926. While the legal framework is somewhat different under the federal human rights statute vs. the *Code*, the principles are applicable:

“[89] If the **Tribunal** finds that a complaint is substantiated, it can make an award against the party found to have engaged in a discriminatory practice. The purpose of the remedial provisions under the *CHRA* (s. 53) is to make a victim of discrimination whole and to put the complainant back in the position he or she would have been in had the discrimination not occurred (*Public Service Alliance of Canada v. Canada Post Corporation*, 2010 FCA 56 at para 299, *aff’d* 2011 **SCC** 57).

[90] There must be a causal link between the discrimination and the loss claimed (see (*Chopra v. Canada (Attorney General)*, 2007 FCA 268 [*Chopra*] at paras 32, 37). The onus is on the complainant to establish that it is more likely than not that this causal connection exists.

[91] The specific statutory framework for each remedy is integrated into the analysis of that claim.

VOLUME #15: Legal Bases

VOLUME #15(A): SPPA

927. The **Tribunal** is required to govern this **HRT0 Proceeding** in not just an expeditious manner but in the **most** expeditious, just and cost-effective manner in determining the merits of the issues in this **HRT0 Proceeding** (see: section 2 of the *SPPA*).

VOLUME #15(B): the Code

928. The *Code* does not provide any legislative grounds, bases or authority for an expedited proceeding.

VOLUME #15(C): HRT0 Specific Rules

929. The **HRT0 Specific Rules** provide authority for an **Applicant** bringing a motion for expedited proceeding. Specifically, Rule 21 authorizes the same which states:

“21.1 An **Applicant** may request that the **Tribunal** deal with an Application on an expedited basis in circumstances which require an urgent resolution of the *issues in dispute*. A Request to Expedite an Application must be made in Form 14⁵⁵ and filed with the Application in accordance with Rule 6.1 or 24.1

21.2 A Request to Expedite an Application made under *Rule 21.1* must include:

- a detailed description of the requested changes to the **Tribunal**’s normal process, including timelines [see: Orders sought supra];
- one or more declarations signed by persons with direct first-hand knowledge detailing *all the facts* upon which the **Applicant** relies in support of the request to expedite; and
- submissions that explain:
 - why there are urgent circumstances that *may* affect the fair and just resolution of the merits of the Application if the Application proceeds in accordance with the **Tribunal**’s regular process;
 - the harm that would result if the Request is denied; and,
 - why the Application should be given priority for **Tribunal** resources over other matters.

21.3 Where the **Tribunal** denies a Request to Expedite, it need not give reasons

21.4 A response to a Request to Expedite an Application must be in Form 15, Response to Request to Expedite an Application, delivered to all other parties and any affected persons identified in the Application and filed with the **Tribunal** not later than **seven days** after the request was sent or as the **Tribunal** directs.”

VOLUME #15(D): Jurisprudence

VOLUME #15(D)(I): Section 21 Orders are interim orders

930. It is trite that the **Tribunal** views a decision involving a Rule 21 motion as an interim order (see: *Weerawardane* or *HoJo Inn*; paragraph 1).

VOLUME #15(D)(II): Continuing violation of the *Code*

931. The importance of continuing violations of the *Code* cannot be understated for purposes of a motion for expedited proceeding (see: *HoJo Inn*, paragraph 3).

VOLUME #15(D)(II)(a): Application of this legal ground to the facts and evidence

932. Mr. McLean continues to suffer loss and damage, wherein he seeks compensation pursuant to the *Code*, as a result of the violations of the *Code* in the form of the following:

- a. Discriminatory treatment from the time of the **Landlord**’s surreptitious text messages;
- b. **Goldview**
- c. **TPS**:

933. An analogy can be drawn here by way of the “ripple effect” or “domino effect”.

VOLUME #15(D)(III): Sworn evidence matters

934. Further, the importance of irreparable harm being sworn is important for the **Applicant** (moving party) to be successful in a motion for expedited proceedings (see: *HoJo Inn*, paragraph 3).

VOLUME #15(D)(III)(a): Application of this legal ground to the facts and evidence

935. Not only has Mr. McLean sworn an affidavit or a declaration, the facts are not in dispute. This is not a situation where the TPS lost a copy of the alleged warrant and then provided it to Mr. McLean via email. Rather, this is a case of misrepresentation upon misrepresentation. When considering the purposes of the Charter sections at issue which is preventative of having those rights breached in so many of the sections and that of the HR Code not seeking to put “band-aids on cuts” but causing change to occur such that those “cuts” do not occur, it is not hyperbole to state that this may be the most important HRTO application in the last five to ten years.
936. As a society, we can never be good enough at addressing racism and racial profiling, and sexism and sexist attitudes, but mental health and mental health profiling is an area that requires such a nuanced approach and deft touch. It is hard to see. You may see an individual who appears to have it altogether but you do not know what they are struggling with and what situation causes them to break.
937. Mr. McLean is a “human enough” (avoiding the sexist language of “man enough”) to admit, he broke in that jail cell. He struggles in small places. He has some past trauma, which will be fleshed out in “Reply” to the pleadings or in the “reply” to the responsive submissions, that was a contributing factor or part of why he broke.
938. The Tribunal can take judicial notice that many who have struggled with mental health or mental disorders, including addiction and substance abuse, have this uncanny ability to take an immense amount of pain. It is often because the pain they have put themselves through is nothing compared to what others can do to them. However, it does not provide a carte blanche license to breach their human rights and Charter rights. They can often bounce back with scars in all and may feel the anxiety and trauma more than the “normal person” but it is a part of their makeup. It is often said, which is shocking to the layperson, that the best

actors in the world feel anxiety before acting in a movie or live on stage more than anyone else. The Tribunal can take judicial notice that even the likes of Simone Biles, the greatest female gymnast ever, has publicly and courageously put her mental health struggles for the world to see – and learn from. The same is applicable to that of Naomi Osaka, former world number one tennis player, who has courageously taken time away from the sport of tennis to address those issues and then return when she was ready to compete. Those examples are in the acting world and in sports.

939. Life, liberty and security of the person and our Charter rights are not a game to be played with. Emails from TPS email account are never to be taken as a “prank”. In all fairness, had the TPS made the joke that Mr. McLean had to drive to Windsor or Sudbury to pick up his property and medication but then two minutes later confirmed it was at TPS 14th Division, Mr. McLean would have laughed and commended the good sense of humour. Some may have not. However, that would have been against the backdrop of being able to enter the 14th Division (TPS), speak with a front desk officer, sign for his property and leave.

VOLUME #15(D)(IV): Urgent

940. *Rule 21.1* requires urgent circumstances. “**Urgent**” is defined as: requiring immediate action or attention. Circumstances are defined and interpreted by the pleadings, evidence and record of proceeding. Herein, the HRT0 Application is precisely pleaded at each issue to be decided factually and legally. These Comprehensive Submissions address all of the issues to be decided in the constitutional questions. If Mr. McLean can be successful for himself, and on pure points of law, the remainder of the HRT0 Proceeding will be streamlined.
941. From a personal standpoint, Mr. McLean is concerned about retaliation for bringing this HRT0 Application but standing idle was not an option.
942. If the Crown intends to approve or proceed with such a charge, which on its face has no merit and as a matter of law, then it will demonstrate increased urgency.
943. Had the TPS 14th Division tendered an apology to Mr. McLean about its conduct and how it would change as a division and a police force, with actual benchmarks to be met with independent review, then perhaps urgency may not be such a compelling factor. However, none has been forthcoming.
944. Mr. McLean will be the first to alert the Tribunal if that occurs.

VOLUME #15(D)(V): Scope of Issues

945. The scope of the issues of dispute must be detailed (see: *HoJo Inn*, paragraph 4).
946. A respondent must file complete response within 35 days after a copy of the application was delivered [emphasis] to the **Respondents** (see: Rule 8), and a reply may be filed within 14 days of when the response was sent to the **Applicant** (see: Rule 9) (see: *HoJo Inn*, paragraph 5). The **Applicant** has requested a shortened timeline imposed upon himself with respect to the Reply.

VOLUME #15(D)(VI):

947. Rule 21 does not provide for any specific changes to the **Tribunal**'s process so the **Tribunal**'s decision-making authority is on a case-by-case basis (see: *HoJo Inn*, paragraph 6). The scope of changes may include:
- a. abridgement of a response
 - b. reply;
 - c. disclosure timelines; and
 - d. setting early hearing dates.
948. The **Tribunal** may abridge timelines for both the Form 15 response and the section 2 response to the application along with scheduling hearing dates BEFORE receiving the application and/or receiving the response to expedite (see: *HoJo Inn*, paragraph 6, citing *Bobbitt v. Metroland*, 2008 HRTO46).

VOLUME #15(D)(VII): Termination of employment

949. Termination of employment has serious implications for an employee in most circumstances (see: *HoJo Inn*, paragraph 7). There is no dispute that dismissal, particularly wrongful dismissal, has serious and significant consequences that occur and effects on the employee, his family and financial situation (see:

HoJo Inn, paragraph 7). The financial consequences for a dismissed employee may constitute a **justification**, particularly if there is reason to believe⁵⁶ that these [financial consequences] will lead to other *significant consequences* which may not be easily remedied (see: *HoJo Inn*, paragraph 9).

VOLUME #15(D)(VII)(a): Financial Consequences – Other Significant Consequences –Not Easily Remedied

950. **“Remedy”** is defined as: ‘set right’ (an undesirable situation).

951. Section 64 of the *Legislation Act* states:

“Rule of liberal interpretation

64 (1) An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects. 2006, c. 21, Sched. F, s. 64 (1).”

952. **“Easily”** is defined as: ‘without difficulty or effort’.

VOLUME #15(D)(VII)(b): Key factors in demonstrating financial consequences

VOLUME #15(F): Timing of the contraventions and the timing of the HRT0 Application along with request to expedite

953. The timing of the circumstances that gave rise to an **HRT0 Application** and the timing of an expedited request are a factor for the **Tribunal** to consider in granting a motion to request expedited proceedings (see: *Christianson*, , Tab 7, pages 204 to 207)

VOLUME #15(G): Timing of enforcement of rights is another factor

954. The rapidity or delay in which an **Applicant** seeks to enforce rights, whether directly related to the **Tribunal** processes or indirectly related by reference to any outside agreements, is a factor for the **Tribunal** in determining whether to grant a Rule 21 motion (see: *Visic*, paragraph 4).

VOLUME #15(K): Refusal to expedite will render remedy for alleged human rights breaches moot or unavailable

955. Pursuant to *Ebrahimi* (see: 2009 **HRTO**1062), circumstances where a refusal to expedite may render the remedy for the alleged human rights breaches moot or unavailable is a ground that will militate in favour of the **Tribunal** granting such an order.

VOLUME #15(L): Evidence trumps assertions

956. Particularized evidence, declared under oath or the same effect, will meet the test to establish that an **HRTO Application** is truly urgent and should be expedited (not must (see: “**HRTO Important Information about Expedited Proceedings**”). In this regard, Mr. McLean’s evidence is Declaration #1

VOLUME #15(M): Must explain how financial need or disability – urgent circumstance

957. An **Applicant** must explain how her financial and/or disability constitute an *urgent circumstance* that may affect the fair and just resolution of the merits of the Application if the hearing proceeds as scheduled (see: *Larabee*, per Adj. Carey, paragraph 12).

VOLUME #15(N): *Will the respondent suffer prejudice?*

958. An important consideration is whether the **Respondents** claim any prejudice by an order of expedited proceedings (see: *Wambach*, paragraph 7).

VOLUME #15(O): Meaningful Remedies

959. The meaningfulness of a remedy in the underlying **HRT0 Application** is an important factor (see: *Wambach*, paragraph 8).

VOLUME #15: Answer to the Above Noted Issues under VOLUME #15

Answer to Issues #1 to #6

960. The **Applicant** respectfully submits that the answers must be to the following issues are as follows.

Issue #1: *is the Tribunal authorized to vary or waive the application of any of its Specific Rules?*

961. The **Tribunal** is authorized to vary or waive the application of any of its *Specific Rules* pursuant to the Social Justice Common Rules (see: “Both parts are read together”).⁵⁷

Issue #2: is there any specific legislative prohibition against the **Tribunal** waiving the requirement that an **Applicant** file a request to expedite after he or she has filed his or her Application under the relevant sections of the *Code* and the **HRT0 Specific Rules**?

962. There is no specific statutory prohibition against waiving the **HRT0 Specific Rule** under *Rule 21.1*. To the contrary, section 2 of the *SPPA* any and all rules that are passed by a tribunal shall be liberally construed to secure the just, most expeditious and cost-effective determination of every proceeding on its merits.

Issue #3: do the issues, which are reasonably (i.e. not admitted by documents) in dispute, in this **HRT0 Proceeding** require an urgent resolution (see: *Rule 21.1* of the *Specific Rules*)?

963. They do for not only Mr. McLean but the public at large to determine whether this is a systemic issue or idiosyncratic.

964. The old adage could not be more apropos herein, “**Justice delayed is justice denied**”.

Issue #4: has the **Applicant** provided a detailed description of the requested changes to the **Tribunal**’s normal process including timelines?

965. The **Applicant** has provided a detailed description of the requested changes to the **Tribunal**’s normal processes including timelines including being respectful of the **HRT0**’s resources with respect to the date of the **Hearing Proper** (i.e. an alternate date if an adjudicator or Vice-Chair is not available therein). It is self-evident that the primary focus herein is to ensure that document production and disclosure is expedited with a hearing date anchored for the constitutional questions so they can be decided in the public interest. It is not to trivialize any other individual’s HRT0 applications but unless they involve Charter issues involving three distinct groups of parties in two separate protected areas wherein there is a high probability that substantive change will be undertaken by such orders, then these timelines are more than reasonable and generous to the respondents. To the extent that certain counsel for the Attorneys General have any conflicts, the orders can be amended, within reason, accordingly.

Issue #5: has the **Applicant** provided one or more declarations signed by him and does he have direct first-hand knowledge of the facts? Further, has Mr. McLean detailed all of the of the facts within his knowledge upon which he relies in support of his request to expedite?

966. The **Applicant**’s declaration #1 provides the material facts in support of these required factors.

Issue #6: do Mr. McLean’s submissions explain:

- i. *Why there are urgent circumstances that may affect the fair and just resolution of the merits of the Application if the **Applicant** proceeds in accordance with the **Tribunal**’s regular process;*
- ii. *The harm that would result if the Request is denied; and*
- iii. *why the Application should be given priority for **Tribunal** resources over other matters?*

967. The circumstances are urgent because Mr. McLean continues to suffer and other individuals may be subject to this misconduct. The **Tribunal**’s normal processes are not sufficient. Moreover, the input of the

Attorneys General is most important. The hearing of the constitutional question first will allow for findings and orders in relation to the same that will streamline the issues thereafter from a compensation standpoint.

968. The harm that would result is that Mr. McLean and the public will suffer from these events and even if one other individual suffers the same way, that is too many.

969. Constitutional questions should be given priority over non-constitutional questions

970. If anything, the **Tribunal** will expend less resources than if this **HRTO Application** went through the *normal processes*.

971. The **Applicant**'s declaration #1 provides the material facts in support of these required factors.

VOLUME #16: Where this could go from here? How does that affect the ongoing component of loss of dignity for Mr. McLean?

VOLUME #16: Malicious Prosecution

972. There is the *potential* for a malicious prosecution civil case or cause of action. Mr. McLean makes clear that this initial memorandum will be delivered to the Crown. There is no attempt for a “quid pro quo”. The Crown is bound by the *HR Code* and its submissions may be relevant. Mr. McLean welcomes them.

973. There is an implied undertaking herein so that quells any fears of cross-contamination of evidence from one case to another.

974. Mr. McLean submits that there were no reasonable and probable grounds to arrest so any further prosecution (if any) will be malicious in nature and substance. The legal tests are as follows relating to Crown and government liability.

975. In *H.A. v. S.M.* (Div Ct, 2021) the Divisional Court considered the tort of malicious prosecution and its defences:

[16]The elements of the tort of malicious prosecution were set out by the Supreme Court of Canada in *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339, at paras. 53-56. It requires the plaintiff to establish:

1. The prosecution was initiated by the defendant;
2. The prosecution was terminated in the plaintiff's favour;
3. The absence of reasonable and probable grounds to commence or continue the prosecution; and

4. Proof that the defendant's conduct was motivated by malice or an improper purpose.

[17] It is well-established that the existence, or continued existence, of reasonable and probable grounds is fatal to claims in negligent investigation and malicious prosecution. The onus is on the plaintiff to establish an absence of reasonable and probable grounds. Where the evidence of a particular witness is essential to the existence of reasonable and probable grounds, establishing a breach of the standard of care in a negligent investigation claim requires a plaintiff to demonstrate that the police defendants had "overwhelming" evidence discrediting that witness: see *J.H. v. Windsor (City) Police Services Board et al.*, 2017 ONSC 6507, 44 C.C.L.T. (4th) 257.

[18] The Supreme Court of Canada in *R. v. Storrey*, 1990 CanLII 125 (SCC), [1990] 1 S.C.R. 241, at pp. 250-51, defined the concept of reasonable and probable grounds in the context of an arrest as requiring an investigating officer to subjectively have reasonable and probable grounds on which to base the arrest. The arrest must also be justifiable from an objective point of view but need not demonstrate anything more. In other words, "a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds" to make the arrest: see *495793 Ontario Ltd. (Central Auto Parts) v. Barclay*, 2016 ONCA 656, 132 O.R. (3d) 241, at para. 49. Whether the evidence known to the police or a prosecutor amounts to reasonable and probable grounds is a question of law: see *R. v. Sheppard*, 2009 SCC 35 at paras. 42-3.

[19] The function of the police is to investigate incidents which might be criminal, make a conscientious and informed decision as to whether charges should be laid and present the full facts to the prosecutor. Although this requires, to some extent, the weighing of evidence in the course of the investigation, police are not required to evaluate the evidence to a legal standard or make legal judgments. That is the task of prosecutors, defence lawyers and judges: *Barclay*, at para. 51.

[20] Regardless of possible frailties in credibility or reliability, the uncorroborated⁵⁸ testimony of a single witness may be a sufficient basis upon which to convict, and therefore provides reasonable and probable grounds for an arrest and prosecution. In cases that turn on the credibility of an allegedly unbelievable complainant, where guilt may be proved depending on the trier of fact's assessment of credibility, our courts have consistently held that the complainant's credibility is best determined after the complainant has testified and, if he or she chooses, after an accused has also testified. It is up to the court trying the charges to evaluate witnesses, and police generally are not required to weigh and assess the evidence: *J.H.*, at para. 6.

[27] The continued existence of reasonable and probable grounds is fatal to claims in negligent investigation and malicious prosecution. When the police have

reasonable and probable grounds to arrest, the onus is on the plaintiffs to establish that reasonable and probable grounds have been vitiated. The plaintiffs have failed to discharge this onus. It is open to this court to grant summary judgment and dismiss the plaintiffs' claims when the motions judge incorrectly failed to do so.

976. In *R v Scott* (Sup Ct, 2002) [affirmed at Ont Court of Appeal, 2003] the court made clear that the stress involved in a criminal trial by the defendant was not actionable, barring malice (which it also addresses at length):

[31] Under our system of criminal law, a person accused of a crime must bear the consequences of arrest and incarceration until trial. No one wants to be forced to bear the costs of defence, loss of a job, lost opportunities, loss of reputation, loss of freedom and other indignities that come with imprisonment. Subject to the granting of judicial interim release, even an innocent person must bear these consequences and without recourse to compensation.

[32] Crown attorneys have duties that play an important part in this process. They are vested with a prosecutorial discretion to be exercised in the public interest separate from the obligations of the police and free of political or other partisan concerns. It is in the public interest that no one should be incarcerated or asked to stand the terror of trial in the absence of sufficient evidence. It is also in the public interest to continue a prosecution to trial where the admissible evidence indicates a reasonable chance of success. Crown attorneys must constantly assess the evidence presented by the police or other complainants, including its admissibility, credibility, reliability and probative value, to ensure that their discretion is being properly and fairly exercised. Our system provides judicial checks, such as preliminary hearings and motions to test compliance with the *Charter* and disclosure of the prosecution's case, the presumption of innocence, and the requirement of proof beyond a reasonable doubt, all in an attempt to ensure fairness to an accused. However, the Crown attorney must constantly assess the evidence to ensure continuation of the prosecution is warranted in the interests of justice, recognizing always that it is the court, not the Crown attorney, which decides guilt or innocence.

[33] In recognition of the duty of a Crown attorney to exercise his or her important discretion free of the chill of threats of civil prosecution, our courts have set a high barrier which must be overcome before a Crown attorney can be called to account in a court for failure to perform that duty. The plaintiff must establish on the balance of probabilities harm resulting from the tort of malicious prosecution by the Crown attorney, with particular attention to the evidence of the probability of malicious intent: *Nelles v. Ontario* (1989), 1989 CanLII 77 (SCC), 60 D.L.R. (4th) 609 (S.C.C.).

Malicious Prosecution

Reasonable and Probable Cause

[35] Reasonable and probable cause has a subjective element and an objective element. The subjective element consists of the prosecutor's actual honest belief in the guilt of the accused. The objective element requires that the prosecutor's belief must be reasonable, that is, founded on reasonable grounds of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious person in the position of the prosecutor to the conclusion that the person charged was probably guilty of the crime imputed.

See *Nelles* at pp. 639 and 642. The Crown must have sufficient evidence to believe that guilt could properly be proved beyond a reasonable doubt before reasonable and probable cause exists. A lower threshold for initiating prosecutions would be incompatible with the prosecutor's role as a public officer charged with ensuring justice is respected and pursued. See Proulx at para. 31. This is what constitutes an arguable case to put before a jury.

[36] The absence of reasonable cause is a **matter of law** which can be decided by a judge on a motion under Rule 21 or Rule 20 to strike the action and so provides a screening mechanism for unmeritorious claims: See Lamer J. in *Nelles* at p. 642-3.

[37] Even at trial, the issue of whether there are reasonable and probable grounds that the accused committed an offence is a question of law to be determined by a judge: *Pizzardi v. Ontario*, [2000] O.J. No. 1751 at para. 12, citing *McGillivray v. New Brunswick* (1994), 1994 CanLII 4465 (NB CA), 116 D.L.R. (4th) 104 (N.B.C.A.). In *McGillivray* at p. 108, the court said that, in the absence of mala fides, where a court orders the accused to stand trial there exist reasonable and probable grounds to believe that the accused committed the offence charged. The court cited the test at the level of the preliminary hearing as that set forth in *United States of America v. Sheppard*, 1976 CanLII 8 (SCC), [1977] 2 S.C.R. 1067, which I paraphrase:

Is there any evidence upon which a jury properly instructed could return a verdict of guilty? The justice must commit an accused for trial in any case in which there is admissible evidence which could, if it was believed, result in a conviction.

[38] In *Temilini v. O.P.P. (Commissioner)*, [1990] O.R. (2d) 664 (C.A.) a lawyer brought an action for malicious prosecution against the police after dismissal of fraud charges. On appeal from a motion under Rule 21.01 to dismiss the claim, the court said at p. 669:

The committal for trial may be helpful to the defence but it is not determinative. It is similar to the issuance of an Attorney General's fiat for prosecution.

The court relied on *Curry v. Dargie* (1984), 62 N.S.R. (2d) 416 (C.A.) citing Macdonald J.A. at 429:

To my mind the fiat of the Attorney General is not conclusive proof that the proceeding was instituted by the informant on reasonable and probable grounds. It does, however, go a long way toward negating the lack of probable cause, particularly if it cannot be shown that the facts were not unfairly placed before the Attorney General when he gave his consent to the prosecution. The fiat therefore becomes a formidable obstacle in the path of the appellant.

Temilini and *Curry v. Dargie* were cited with approval in *Thompson v. Ontario*, 1998 CanLII 7180 (ON CA), [1998] O.J. No. 3917 (C.A.) at para. 39.

[39] In *Temilini* and in *Thompson* the courts were addressing only reasonable and probable grounds. They were not addressing the effect of a judicial order binding the accused over for trial on the issue of malice.

[40] Notwithstanding the equating of an Attorney General's fiat, a *quasi*-judicial act, and the trial process preceding a judicial order of committal for trial, I am bound to follow *Temilini* rather than *McGillivray* on the impact of a judicial committal for trial on the issue of reasonable and probable cause in an action for malicious prosecution. A similar conclusion was reached, following a principled analysis of a comparable situation, by Binks J. in *Al's Steak House and Tavern Inc. v. Deloitte & Touche*, [1999] O.J. No. 427 (Gen. Div.).

Malice

[41] Malice is the equivalent of an improper purpose. It has a wider meaning than spite, ill will or a spirit of vengeance and includes any other improper purpose, such as to gain a private collateral advantage. Malice on the part of a Crown attorney is a deliberate and improper use of the office such that he or she has "perpetrated a fraud on the process of criminal justice and in doing so has perverted or abused his [or her] office and the process of criminal justice": Lamer J. in *Nelles* at p. 639-40.

[42] Lamer J. continued in *Nelles* at p. 642:

... in cases of malicious prosecution, we are dealing with allegations of misuse and abuse of the criminal process and of the office of the Crown Attorney. We are not dealing with merely second-guessing a Crown Attorney's judgment in the prosecution of a case but rather with the deliberate and malicious use of the office for ends that are improper and inconsistent with the prosecutorial function. and

... one element of the tort of malicious prosecution requires a demonstration of improper motive or purpose; errors in the exercise of discretion and judgment are not actionable.

These principles are repeated in the conclusion of the majority judgment in *Nelles* at p. 644.

[43] The majority judgment in *Proulx* at paragraph 35 stated:

... a suit for malicious prosecution must be based on more than recklessness or gross negligence. Rather, it requires evidence that reveals a willful and intentional effort on the Crown's part to abuse or distort its proper role within the criminal justice system.

[44] In *Oniel v. Toronto (Metropolitan) Police Force*, 2001 CanLII 24091 (ON CA), [2001] O.J. No. 90 (C.A.), an action against the police rather than a Crown attorney, Borins J.A. discussed the issue of malice and the source of its definition in *Nelles*, starting at paragraph 43. He concluded at paragraph 47:

There can be no doubt that in the appropriate case it is proper to infer malice from the absence of reasonable and probable cause to commence or to continue a prosecution.

He cited as authority cases dating back to the 19th century in the U.K. and into the 20th century in the courts of this province.

[45] Borins J.A. continued at paragraph 49:

Although the prosecutor may have reasonable and probable cause to commence a prosecution, if the prosecutor obtains information which suggests the person probably did not commit the offence, or recklessly disregards advice that such information could be obtained through routine investigative steps, the prosecutor lacks reasonable and probable cause to continue the prosecution, and malice may be inferred.

977. As noted in the cases and citations above, to prosecute an individual who is probably not guilty can justifiably raise an inference of malice. In *Ontario Society for the Prevention of Cruelty to Animals v. Sovereign General Insurance Company* (Ont. CA, 2015) the Court of Appeal stated the following as it related to the types of injury that suffice for malicious prosecution:

[62] Furthermore, the target must have suffered an injury. As noted in G.H.L. Fridman's *The Law of Torts in Canada*, 3rd ed. (Toronto: Thomson Reuters Canada Limited, 2010) at p. 823: "The plaintiff must incur or suffer damage in

consequence of the malicious prosecution. If he does not, no action will lie.” Or, as stated in Carolyn Sappideen and Prue Vines, Fleming’s The Law of Torts, 10th ed. (Sydney: Law Book Company, 2011) at p. 706:

We have seen that a claim for malicious prosecution must be founded on actual injury. This must consist either in injury to reputation, presumed wherever the plaintiff was accused of a crime involving scandalous reflection on the plaintiff’s fair name; or injury to the person, as **when the plaintiff was imprisoned or put in jeopardy of it**; or damage to the plaintiff’s pecuniary interests, such as being put to expense in defending himself against the charge.

[63] In essence, malicious prosecution involves intentional conduct and malice and no action will lie in the absence of actual injury.

978. In *Curley v. Taafe* (Ont CA, 2019) the Court of Appeal noted that the complainant may be treated as the prosecutor in certain circumstances:

[21] As indicated in *Nelles*, the first element that a plaintiff in an action for malicious prosecution must establish is initiation of the proceedings by the defendant. Simmons J.A. elaborated on the nature of the conduct required to amount to initiation of a prosecution by a private citizen in *Kefeli v. Centennial College of Applied Arts and Technology* (2000), 23 C.P.C. (5th) 35 (Ont. C.A., in Chambers), at para. 24:

A claim for malicious prosecution requires that the defendant must have initiated the prosecution or set it in motion, and that, ordinarily, the court will view the police officer who laid the charge as being the person who set the prosecution in motion. However, he also submits, correctly, that the complainant may be treated as the prosecutor in exceptional circumstances, including the following:

- the complainant desired and intended that the plaintiff be prosecuted;
- the facts were so peculiarly within the complainant’s knowledge that it was virtually impossible for the professional prosecutor to exercise any independent discretion or judgment; and
- the complainant procured the institution of proceedings by the professional prosecutor, either by furnishing information which he knew to be false, or by withholding information which he knew to be true, or both. [Citations omitted.] [Footnotes omitted.]

Further cases

Summerside

979. Griffin v. Summerside is an excellent example of how police matters involving civilians can get out of control in the context. It also stood for a new precedent in law or a reasonably new one. Malicious prosecution claims have succeeded when unfounded and malicious complaints have been made to professional associations, such as in the 2006 decision of PEI's Supreme Court, *Griffin v the City of Summerside*, 2006 PESCTD 15 and in which the above extract from Remedies in Tort was relied upon:

"By far, the majority of cases of malicious prosecution are found to originate in a criminal context. However, there is no authority which has been cited which restricts a malicious prosecution action to a criminal proceeding. The case at bar arises from a disciplinary hearing against Griffin. It is common ground among all the parties, with which I agree, that the tort of malicious prosecution is available to the plaintiff, Griffin, in this case. The onus is on him to prove the tort and each and every element of the tort."

980. Canada has yet to confirm that liability for malicious prosecution can be established in civil proceedings, though the courts here have allowed, in limited contexts, similar claims against individuals other than the Attorney General or Crown prosecutors. In 1990 the Ontario Divisional Court held in *Stoffman v Ontario Veterinary Association* that a professional regulator could be sued for malicious prosecution based on wrongfully instituted disciplinary proceedings. In a 2013 ruling, *Jo v Alberta*, the Alberta Court of Queen's Bench imported malicious prosecution claims into child welfare proceedings. Importantly, in *Drainville v Vilchez*, the Ontario Superior Court of Justice also allowed a claim against an individual who had wrongfully reported an incident to the police and even awarded damages of \$23,866.37.

981. The facts in *Drainville* leading to a frivolous and groundless criminal complaint against Mr. Drainville were:

"The claim arose out of a misunderstanding that developed when Mr. Drainville drove into a gas station to put air in a tire. A work area was marked off by cones where a fuel truck was refueling the pumps. When he drove into an area seemingly clear of cones and leading to the air pump, the fuel truck driver waved him to a stop and when he stopped, the driver put his legs in contact with the Drainville front bumper. The driver reported Drainville to the police, telling them in indignant anger that Drainville intentionally went out of his way to hit him. The police laid the two charges set out above. Mr. Drainville alleges in his statement of claim that the defendant Vilchez's statements were untrue, were intentionally made, and that as a result of the defendant's misrepresentations, the charges were laid, causing him to attend court for his trial where he was acquitted by the judge.

982. At paragraph 7 and 8, the ONSC noted the test that the proceeding, including a criminal proceeding and regulatory proceeding, must be commenced by the defendant or defendants;

[7] Normally the person or entity against whom a malicious prosecution suit is brought is the police or the Crown. However, there are rare cases like his one where the complainant has been the defendant, without creating even a ripple on the surface of the lake of analytic discipline. In fact, this tort arose out of private litigation, not actions against public officials. The target of the suit is the person who was “actively instrumental in setting the prosecution in motion”. In this case, it is the defendant who initiated and was actively instrumental in initiating proceedings against the plaintiff when he complained to the police about the alleged actions of the plaintiff. It meets the elements of the exception to the general rule found in *Kefeli v. Centennial College of Applied Arts & Technology*, [2002] O.J. No. 3023 (C.A.), cited in *Fitzpatrick v. Orwin*, 2012 ONSC 3492 (SCJ); *Wood v. Kennedy*, 1998 CanLII 14927 (SCJ).

[8] In *R.A.W v. L.C.K* (1998), 1998 CanLII 14927 (ON SC), 165 D.L.R. (4th) 542 (Ont. C.J.-Gen. Div.) Sharpe J. (as he then was) adopted the following analysis from the House of Lords, at pp.567-569 of *Martin*:

Where an individual falsely gives a police officer information indicating that some person is guilty of a criminal offence and states that he is willing to give evidence in court of the matters in question, it is properly to be inferred that he desires and intends that the person he names should be prosecuted. Where the circumstances are such that the facts relating to the alleged offence can be within the knowledge only of the complainant, then it becomes virtually impossible for the police officer to exercise any independent discretion or judgment, and if a prosecution is instituted by the police officer the proper view of the matter is that the prosecution has been procured by the complainant.”

983. There is a parallel to be drawn here because the complaint against Mr. McLean for criminal harassment does not even get out of the proverbial gate is that Mr. McLean was engaged in sending emails for a specific purpose which were to protect himself and for purposes of an LTB proceeding. The other oddity is that Mr. McLean is seeking compensation against the Landlord for harassment under the RTA for entering without authority. The Landlord has then proceeded to breach every major section of the RTA

and LTB Rules DURING the course of the LTB Proceeding without even the pretense of attempting to correct the same.

984. The timing could not have been any more coincidental or suspicious when the complaint appears to have arose on the day after the order of Vice Chair Delorenzi.
985. Now, if the police had merely contacted Mr. McLean to obtain his side of the story and then closed the frivolous complaint, then it is hard to say whether a proceeding would have been commenced. The answer is likely the negative. The charge is said to commence the proceeding. But what if he was not charged but falsely arrested? It is unclear whether the tort of malicious prosecution would lay per se. In any event, there could not have been a ripple on the surface of the lake of analytical precision or analytical discipline by the criminal complaint by presumably the Landlord.
986. It is unlikely that the Landlord even had authority to do so. Her daughter is not a minor but some three years younger than Mr. McLean (41).
987. Tossing around words like “harassment” in the colloquial sense are defamatory and prejudicial enough but to do in the context of a criminal complaint is flat out objectionable.
988. In *R.A.W v. L.C.K, supra*, the Court of Appeal found that the alleged incidents of sexual assaults or touching never took place; therefore, there were no reasonable and probable grounds as the incident never happened.
989. In this instance, criminal harassment never occurred. It is a four-part test that requires stringent analysis and somewhat complex in that regard in favour of a thorough investigation and understanding the context.
990. In this regard, Mr. McLean again relies on the TPS somewhat downplaying the order of Vice Chair Delorenzi without reference to the legal test of the LTB in a request to shorten proceedings. Unless it is a situation of an individual appearing outside the home of another individual seeking to enter, which can invoke other criminal charges, the lens from which the police view criminal harassment of communications must be analytically precise. As the first part of the test is a subjective one, a request to interview a potential suspect is not only recommended but nearly necessary.
991. It is also notable that in the case law regarding criminal harassment that one would think that a warning is a necessary precondition of another breaching section 264(b) of the Criminal Code. It is not a necessary condition but the case law shows that an individual is often charged by way of counts, with dates in the “information”, for those times AFTER he or she continued after a warning from the complainant. It is the

concept of it being unwelcome or unwanted in that a warning is so required. It is why DCK was quick, albeit falsely, to say the warned Mr. McLean (the “**Fictitious CH Warning**” as defined herein).

VOLUME #16(B): Abuse in Public Office

992. There is the potential for abuse in public office as an action or a cause of action. The legal tests are as follows in a wide variety of cases.
993. In *The Catalyst Capital Group Inc. v. Dundee Kilmer*, the Court found as follows with respect to the category A and category B of the tort:

“[13] As this court set out in *L. (A.) v. Ontario (Minister of Community and Social Services)* (2006), 2006 CanLII 39297 (ON CA), 218 O.A.C. 150 (C.A.), at para. 35, leave to appeal refused, [2007] S.C.C.A. No. 36: The tort of misfeasance in public office is founded on the principle that those that hold public office and exercise public functions are subject to the law and must not abuse their powers to the detriment of ordinary citizens.

[14] The elements of the misfeasance tort were set out by the Supreme Court of Canada in *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 63. The court explained that the tort of misfeasance in public office can arise in one of two ways. What it called Category A involves conduct that is specifically intended to injure a person or a class of persons. Category B involves a public officer who acts with knowledge both that she or he has no power to do the act complained of and that the act is likely to injure the plaintiff. The court explained, at para. 23, that there are elements common to both forms of the tort:

First, the public officer must have engaged in deliberate and unlawful conduct in his or her capacity as a public officer. Second, the public officer must have been aware both that his or her conduct was unlawful and that it was likely to harm the plaintiff. What distinguishes one form of misfeasance in public office from the other is the manner in which the plaintiff proves each ingredient of the tort.

[15] The court in *Odhavji* went on to explain that the requirement that the defendant must have been aware that his or her conduct was unlawful reflects the well-established principle that misfeasance in public office requires an element of “bad faith” or “dishonesty”. The fact that a public official makes a decision that harms a member of the public is not, in and of itself, a basis to infer bad faith. As the court stated at para. 28: In a democracy, public officers must retain the authority to make decisions that, where appropriate, are adverse to the interests of certain citizens. Knowledge of harm is thus an insufficient basis on which to conclude that

the defendant has acted in bad faith or dishonestly. A public officer may in good faith make a decision that she or he knows to be adverse to interests of certain members of the public. In order for the conduct to fall within the scope of the tort, the officer must **deliberately engage in conduct** that he or she knows to be inconsistent with the obligations of the office.

[16] In *Pikangikum First Nation v. Nault*, 2012 ONCA 705, 298 O.A.C. 14, at para. 77, leave to appeal refused, [2013] S.C.C.A. No. 10, this court explained that:

The tort of misfeasance of public office is difficult to establish. The plaintiff must prove more than mere negligence, mismanagement or poor judgment. To succeed, the plaintiff must demonstrate that the defendant knowingly acted illegally and in bad faith chose a course of action specifically to injure the plaintiff.”

994. In *Meekis v. Ontario* (Ont CA, 2021) the Court of Appeal extensively considered the elements of the tort of misfeasance of public office:

“[70] In *Ontario (Attorney General) v. Clark*, 2021 SCC 18, 456 D.L.R. (4th) 361, at para. 22, a majority of the Supreme Court summarized the tort of misfeasance in public office in the following terms:

A successful misfeasance claim requires the plaintiff to establish that the public official engaged in deliberate and unlawful conduct in his or her capacity as a public official, and that the official was aware that the conduct was unlawful and likely to harm the plaintiff. [Citations omitted.]

[71] This court described the purpose of the tort of misfeasance in public office in *Freeman-Maloy v. Marsden* (2006), 2006 CanLII 9693 (ON CA), 79 O.R. (3d) 401 (C.A.), at para. 10, leave to appeal refused, [2006] S.C.C.A. No. 201, as follows:

The tort of misfeasance in a public office is founded on the fundamental rule of law principle that those who hold public office and exercise public functions are subject to the law and must not abuse their powers to the detriment of the ordinary citizen. As Lord Steyn put it in *Three Rivers District Council v. Bank of England* (No. 3), [2000] 2 W.L.R. 1220 (U.K. H.L.), at 1230: “The rationale of the tort is that in a legal system based on the rule of law executive or administrative power ‘may be exercised only for the public good’ and not for ulterior and improper purposes”. The “underlying purpose” of the tort of misfeasance in a public office “is to protect each citizen's reasonable expectation that a public officer will not intentionally injure a member of the public through deliberate and unlawful conduct in the exercise of public functions”: *Odhavji* ... at para. 30.

[72] The past four decades have seen a revival in the application of the tort of misfeasance in public office, both in Canada and abroad. The wide-ranging situations in which plaintiffs have claimed misfeasance against various kinds of public officials illustrate that it is “a tort of great flexibility and breadth”: *Erika Chamberlain and Stephen G.A. Pitel*, *Fridman’s The Law of Torts in Canada* (Toronto: Thomson Reuters, 2020), at p. 1099.

The elements of misfeasance in public office

[73] Iacobucci J. set out the elements of the tort of misfeasance in public office in *Odhavji*, at para. 32. As summarized in Lewis N. Klar et al., *Remedies in Tort* (Toronto: Thomson Reuters, 2021), at §60, to succeed on a misfeasance claim, a plaintiff must show that:

- 1) the defendant was a public official exercising public functions at the relevant time;
- 2) the public official deliberately engaged in an unlawful act in their public capacity, which, as affirmed in *Clark*, at para. 23, is typically established by proving any of (a) an act in excess of the public official's powers, (b) an exercise of a power for an improper purpose, or (c) a breach of a statutory duty (the "unlawful act element");
- 3) the public official was aware both that their conduct was unlawful and that it was likely to harm the plaintiff, which, as noted in *Clark*, at para. 23, may be established through actual knowledge, subjective recklessness, or "conscious disregard" for the lawfulness of the conduct and the consequences to the plaintiff (the "knowledge element");
- 4) the public official's tortious conduct was the legal cause of the plaintiff's injuries; and
- 5) the injuries suffered are compensable in tort law.

[74] The first three of these elements are unique to the tort of misfeasance in public office, while the other two are common to torts generally: *Foschia v. Conseil des Écoles Catholique de Langue Française du Centre-Est*, 2009 ONCA 499, 266 O.A.C. 17, at para. 22.

[75] I do not take the respondents to be disputing that the coroners involved in the investigation into Brody's death were public officials exercising public functions at the relevant times. As such, I will focus my analysis below on the remaining four elements of the tort, and in particular the unlawful act and knowledge elements.

A "narrow window of opportunity" to succeed at trial is sufficient

[76] While the material facts may lack detail in the early stages of a proceeding, at the pleadings stage it is generally enough for a plaintiff to establish "a narrow window of opportunity" to make out a misfeasance claim at trial: *Granite Power Corp. v. Ontario*, 2004 CanLII 44786 (ON CA), 72 O.R. (3d) 194, at para. 40.

[77] However, the tort requires more than a "bald pleading" that a public official acted for an improper purpose; there must be material facts about specific officials and their specific unlawful purpose in acting as they did: *Trillium Power Wind Corporation v. Ontario (National Resources)*, 2013 ONCA 683, 117 O.R. (3d) 721, at paras. 59-61.

Discriminatory conduct may satisfy the unlawful act element

[78] In *Castrillo v. Workplace Safety and Insurance Board*, 2017 ONCA 121, 136 O.R. (3d) 654, at para. 45, Lauwers J.A. found that a misfeasance claim based on an alleged improper purpose in the exercise of a discretionary public spending power was "adequate in strictly pleadings terms". He explained that this amounted to a specific application of "the more general

proposition that a statutory power must only be used for a proper purpose” [Emphasis added].

[79] It is well-settled that exercising discretion based on discriminatory considerations constitutes an improper purpose: *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, at para. 53. There can be no doubt that a failure to act, if based on discriminatory considerations, is equally improper. Indeed, in his oft-cited judgment in *Roncarelli v. Duplessis*, 1959 CanLII 50 (SCC), [1959] S.C.R. 121, Rand J. affirmed that using one’s public power to discriminate against a particular class of persons is “knowingly foreign” to the proper exercise of discretionary statutory decision-making.

[80] In *Madadi v. Nichols*, 2021 BCCA 10, 455 D.L.R. (4th) 471, the British Columbia Court of Appeal recently considered the adequacy of pleadings in support of a claim for misfeasance in public office where the plaintiff alleged that a disciplinary body penalized him for the improper purpose of discrimination. The court confirmed, at para. 72, that a misfeasance claim grounded in part on the pleading that a public body exercised its discretion based on “discriminatory reasoning”, coupled with “pleas of knowledge that the conduct was unlawful, subjective awareness of the consequential harm to the respondent, and improper purpose” was sufficient to establish a possible cause of action for misfeasance in public office.

Failures to act may be unlawful even where there is no positive duty to act

[81] Additionally, this court has confirmed that omissions by public officials may be the source of a claim for misfeasance in public office. In *Grand River*, Epstein J.A. explicitly rejected the argument that an omission to act cannot be unlawful without a deliberate breach of an express statutory duty. Rather, Epstein J.A. held as follows, at para. 81:

On my reading of the relevant paragraphs from *Odhavji*, there is no requirement for a breach of a statutory duty to make out a claim for misfeasance in public office. Conduct by a public officer may be unlawful even where there is no positive duty to act, provided that the conduct was done with the intent to harm. Similarly, a refusal to exercise a power with a specific intent to injure might satisfy the test for misfeasance in public office. Here, the respondents plead that “the Ministers’ continuous course of conduct (including their failure to act) ... was deliberate and unlawful in the exercise of their public functions: they knowingly acted for an improper purpose as described above and knowingly exceeded their authority”. Thus, I reject the Crown’s argument that the misfeasance claim should have been struck because the respondents did not plead a failure to act in the face of a clear statutory duty. [Emphasis added.]

995. In *Conway v. The Law Society of Upper Canada* (Ont CA, 2016) the Court of Appeal commented briefly on the elements of the tort of misfeasance in public office:

[20] The tort of misfeasance in public office has been variously described in the case law as the tort of abuse of public office or abuse of statutory power: *Odhavji Estate v. Woodhouse*, 2003 SCC 69 (CanLII), at paras. 25 and 30. Whatever the nomenclature, the essence of the tort is the deliberate and dishonest wrongful abuse of the powers given to a public officer, coupled with the knowledge that the misconduct is likely to injure the

plaintiff: Odjhavji Estate v. Woodhouse, at para. 23. Bad faith or dishonesty is an essential ingredient of the tort: Odhavji Estate v. Woodhouse, at para. 28 and Gratton-Masuy Environmental Technologies Inc. v. Ontario, 2010 ONCA 321, at para. 85.

996. In *Clark v. Ontario (Attorney General)* (Ont CA, 2019) the Court of Appeal considered a claim in misfeasance in public office:

E. Does an action lie against the Crown for misfeasance in public office?

[97] The Attorney General’s motion to strike the officers’ claim for misfeasance in public office was brought under r. 21.01(1)(b) of the Rules of Civil Procedure. The applicable principles were reviewed in the preceding section of this decision.

[98] The elements of the tort of misfeasance in public office were set out by the Supreme Court of Canada in *Odhavji Estate v. Woodhouse*, 2003 SCC 69 (CanLII), [2003] 3 S.C.R. 263, at paras. 22-23. The motion judge succinctly and accurately detailed the elements of this tort for the category of claim made in this case, at para. 141:

[T]he tort is made out by “a public officer who acts with knowledge both that she or he has no power to do the act complained of and that the act is likely to injure the plaintiff.” [Odhavji at para. 22] ... “[T]he tort involves deliberate disregard of official duty coupled with knowledge that the misconduct is likely to injure the plaintiff”: Odhavji (at para. 23). The tort of “misfeasance in a public office requires an element of bad faith or dishonesty”: Odhavji (at para. 28). For a public officer’s “conduct to fall within the scope of the tort, the officer must deliberately engage in conduct that he or she knows to be inconsistent within the obligations of the office”: Odhavji (at para. 28).

[99] The Attorney General makes two arguments: first, the tort of misfeasance in public office was inadequately pleaded and the motion judge erred in failing to so find; and second, the motion judge erred in failing to find that Crown attorneys are immune from civil liability for misfeasance in public office. We do not accept these arguments, for the reasons that follow.

Misfeasance in public office was adequately pleaded

[100] The motion judge set out the allegations made by the officers and stated, at para 149:

[T]he officers have pleaded that the Crown Attorneys acted unlawfully by acting in breach of their statutory duties under the Crown Attorneys Act and by breaching their oath of office. In my view, they have pleaded the essential elements of the tort of misfeasance in public office by asserting knowing, deliberate, and unlawful disregard of official duty coupled with knowledge that the misconduct is likely to injure the plaintiffs.

[101] The motion judge added, at para. 150:

The dispute between the parties largely relates to the proper construction of the statutory duties of Crown Attorneys and whether they were in fact breached in this case. At this stage, a motion to strike, I am not called upon to decide that the plaintiffs can prove their allegations; instead, I am required to assume they can.

[102] We agree with the motion judge's conclusion that the pleading of misfeasance in public office was adequate, as a careful review of the statement of claim reveals. The pleading of this tort focuses in particular on the Crown's conduct of the appeal. This court's reasons were especially hard on the officers, noting that their "conduct in this case might well be characterized as 'torture'". The court noted, at para 43, to repeat:

What occurred here was the administration of a calculated, prolonged and skillfully choreographed investigative technique developed by these officers to secure evidence. This technique involved the deliberate and repeated use of intimidation, threats and violence, coupled with what can only be described as a systematic breach of the constitutional rights of detained persons - including the denial of their rights to counsel. It would be naïve to suppose that this type of egregious conduct, on the part of these officers, would be confined to an isolated incident.

[103] The statement of claim asserts, in paras. 33 and 34:

During oral argument at the appeal, Justice Doherty, asked Ms. Alyea many questions about what had occurred. She never advised him, or the court, about the new material facts that the Crown had learned about the conduct of Ms. Cressman, and more importantly, the exculpatory findings with respect to the conduct of the police officers which she had come to know.

As such, the Crown, either negligently or deliberately, attempted to protect its own agents conduct, rather than respecting their duty of care and responsibility to the officers and the administration of justice. [Emphasis added.]

[104] The statement of claim states plainly, at para. 47, that Crown counsel "committed the tort of misfeasance in public office by engaging in deliberate and unlawful conduct in their capacity as Crown attorneys, clearly in contravention of their sworn statutory duty." It was "deliberate and unlawful conduct." Further:

The new material facts Ms. Alyea and her superiors became aware of which clearly exonerated the police officers and implicated Ms. Cressman's conduct, were suppressed by senior Crown Law Officers and were kept from the judges of the Court of Appeal. [Emphasis added.]

[105] Other critical elements of the tort were also pleaded, at para. 48:

Crown attorneys involved in this case deliberately engaged in conduct that they knew to be inconsistent with the obligations of the Crown attorney and they did so in bad faith, with the knowledge that this misconduct was likely to injure the officers. [Emphasis added.]

[106] The pleading of misfeasance in public office is adequate, properly particularized, and carefully tracks the elements of the Odhavji Estate test. The motion judge did not err

in so finding.

Crown attorneys are not immune from civil liability for misfeasance in public office

[107] The Attorney General argues that Crown attorneys are immune from liability for misfeasance in public office, and enlists the same two grounds it deployed in the successful argument that Crown attorneys are immune from liability for negligence in the performance of their duties: the prospect of liability for misfeasance could divert Crowns from their duties and could have a chilling effect on their conduct. These were the policy reasons Moldaver J. rejected in *Henry* when he extended liability for *Charter* damages for wrongful non-disclosure in a criminal prosecution.

[108] The motion judge rejected these arguments in relation to the claim for misfeasance in public office.

[109] We conclude that Crown attorneys are not immune from claims of liability for misfeasance in public office. The trigger for liability provides the functional equivalent of the “high liability threshold” Moldaver J. set in *Henry* for liability for *Charter* damages for wrongful disclosure.

[110] The nerve of the Supreme Court’s decisions in the trilogy and in *Henry* is the deliberate abuse of authority by Crown attorneys. See *Nelles*, at paras. 55-56, per Lamer J.; and *Proulx*, at para. 35, per Iacobucci and Binnie JJ. In *Miazga*, Charron J. said, at para. 51:

Thus, the public law doctrine of abuse of process and the tort of malicious prosecution may be seen as two sides of the same coin: both provide remedies when a Crown prosecutor's actions are so egregious that they take the prosecutor outside his or her proper role as minister of justice, such that the general rule of judicial non-intervention with Crown discretion is no longer justified. Both abuse of process and malicious prosecution have been narrowly crafted, employing stringent tests, to ensure that liability will attach in only the most exceptional circumstances, so that Crown discretion remains intact.

[111] In *Miazga*, several parties sought to amend the test from *Nelles* so that malice could be inferred because “independent evidence of malice presents too high a barrier,” but Charron J. rejected these arguments, at para. 52, because they “are ill-conceived and do not account for the careful balancing established in *Nelles* and *Proulx* between the right of individual citizens to be free from groundless criminal prosecutions and the public interest in the effective and uninhibited prosecution of criminal wrongdoing.” She concluded that “the ‘inherent difficulty’ in proving a case of malicious prosecution was an intentional choice by the Court, designed to preserve this balance.” See also paras. 79-84.

[114] We agree with the motion judge’s conclusion that the pleading of misfeasance in

public office was adequate and that Crown attorneys are not immune from claims of liability for misfeasance in public office.

Volume #15(B)(i): Application of the Law to the Facts

997. Simply put, the next week will be telling as various government officials are confronted with the evidence under oath of Mr. McLean and this brief in a variety of contexts. However, bad faith has been found to be less than malice.

VOLUME #16(C): Breach in public office or breach of trust ⁵⁹

998. The most known case relates to section 122 of the *Criminal Code* is McNish⁶⁰.
999. In *McNish*⁶¹, the ABCA found as follows:

“ The appellant, Bradford McNish, appeals his convictions for breach of trust under section 122 of the *Criminal Code*, RSC 1985, c C-46 and unauthorized use of a computer under section 342.1(1)(c): *R v Braile*, 2018 ABQB 361. The convictions stem from the surveillance and investigation of a woman named Akele Taylor by a private security firm, aimed to collect negative information about Ms. Taylor for use in a high conflict custody case. The surveillance and investigation of Ms. Taylor involved former and current members of the Calgary Police Service (CPS) including Mr. McNish and his co-accused, Anthony Braile and Brian Morton. All three were tried together. Mr. McNish was also charged with bribery, but that charge was dismissed.

For the reasons that follow, the appeal is dismissed.

Background

Following their separation in 2012, Ms. Taylor and her common-law partner, Ken Carter, engaged in a protracted and acrimonious custody dispute over their one-year old child. Mr. Carter hired a private security firm run by a retired CPS officer, Stephen Walton, to assist him gain information against Ms. Taylor in this custody dispute. Mr. Walton then engaged a number people, including Mr. McNish and his co-accused, to surveil and investigate Ms. Taylor.

[4] Mr. McNish was a long-time friend of Mr. Walton, and an active member of the CPS at the time of the offences. He joined the CPS in 1980, left the service in the mid-nineties and returned in 2008. At the time of the offences, he was on medical leave from CPS and was receiving Workers' Compensation Board (WCB) benefits.

[5] Mr. McNish conducted a number of days of surveillance of Ms. Taylor in August of 2012. He received two cheques from Mr. Walton: one for \$5,000 dated August 19, 2012 and the second for \$4,000 dated December 22, 2012. He testified that this was payment for eight days of surveillance and one day of security work for a corporation.

Mr. McNish testified that while engaged in surveillance he once attempted to replace the battery on a GPS device placed on Ms. Taylor's vehicle. He also approached Ms. Taylor's friend and former roommate, ML, at her residence and offered to pay her in exchange for information on Ms. Taylor.

[7] Mr. McNish also testified that he conducted searches on police databases. Some of these searches were related to the surveillance of Ms. Taylor, other searches were unrelated to Ms. Taylor. In August of 2012, he searched the Canadian Police Information Centre (CPIC) for names related to Ms. Taylor and ML. He made a further CPIC search in September of 2012. The RCMP is the holder of the CPIC database. At the request of Mr. Walton, he conducted Police Information Management System (PIMS) searches in 2014 and 2015. These searches were unrelated to Ms. Taylor. CPS is the holder of the PIMS database.

[8] At trial, Mr. McNish testified he passed no information from the CPIC searches on to Mr. Walton, and conducted them mainly out of concern for his own safety and for the safety of others. The PIMS searches were conducted at the request of Mr. Walton and some information was passed onto Mr. Walton.

2. Breach of trust

[27] The trial judge relied on *R v Boulanger*, 2006 SCC 32, the leading case on breach of trust by an official, in convicting Mr. McNish of breach of trust.

[28] Section 122 of the *Criminal Code*, RSC 1985, c C-46 provides:

122. Every official who, in connection with the duties of his office, commits fraud or a breach of trust is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, whether or not the fraud or breach of trust would be an offence if it were committed in relation to a private person.

[29] To establish the offence of breach of trust by a public official, the Crown must prove five elements beyond a reasonable doubt (*Boulanger* at para 58):

1. The accused is an official;
2. The accused was acting in connection with the duties of his or her office;

3. The accused breached the standard of responsibility and conduct demanded of him or her by the nature of the office;
4. The conduct of the accused represented a serious and marked departure from the standards expected of an individual in the accused's position of public trust; and
5. The accused acted with the intention to use his or her public office for a purpose other than the public good, for example, for a dishonest, partial, corrupt, or oppressive purpose.

[30] The first four elements relate to the *actus reus*; the fifth relates to the *mens rea*.

[31] At trial, Mr. McNish conceded the first two elements: that he was an official at the time of the offence, and that he was acting in connection with the duties of his office. On the second element of the offence the trial judge said, at para 93:

This element is also not contested by Mr. McNish. On the basis of the following facts, I find that Mr. McNish was acting in connection with his duties as a police officer:

1. He accessed CPIC on August 13, 2012, to search the license plate associated to ML's vehicle, the name Akele Hunt, and the name Alexander Zachata.
2. He accessed CPIC on August 15, 2012, to search the name Akele Hunt.
3. He accessed CPIC on September 18, [2012] to search the license plate number starting with the letters GET.
4. He accessed Police Information Management System (PIMS) on November 20, 2014 to search the name Haung Wong.
5. He accessed PIMS on January 21, 2015, to search the name Kevin Showalter.
6. He used the surveillance training and experience he had gained from his employment with the Calgary Police Service.

[32] On appeal, Mr. McNish takes issue with the trial judge's last finding: that Mr. McNish was acting in connection with the duties of his office when, while working for Mr. Walton, he used his surveillance training and experience gained as a police officer.

[33] We see no merit to this submission. First, the final submissions of Mr. McNish make clear this element was not in issue; rather the position of Mr. McNish was that the Crown had not established the fourth and fifth elements of the offence.

[34] Second, the evidence before the trial judge included the following:

1. Mr. McNish had experience in surveillance and tracking devices as a police officer.
2. Mr. McNish accessed CPIC in August 2012 for information to assist him personally in his surveillance of Ms. Taylor as well as to obtain the address of ML. He then visited ML at her apartment in an attempt to obtain further information about Ms. Taylor.
3. Mr. McNish used his knowledge of tracking devices obtained through his employment as a police officer to “covertly...find the GPS tracker” placed on Ms. Taylor’s vehicle by the security firm. The trial judge also accepted the evidence of DC that Mr. McNish tracked Ms. Taylor’s vehicle utilizing the tracking device and a computer program.
4. Mr. McNish was not permitted to engage in private security work outside of his employment with CPS.

[35] This evidence permitted the trial judge to make the factual findings he did.

[36] The conviction pursuant to s 122 turned on the last three elements of the offence. These last three elements, and in particular the fourth and fifth, are the primary issues on appeal.

[37] The third element asks whether the accused breached the standard of responsibility demanded of the particular accused given the nature of the accused’s office. This requires that the standard be proven. The standard can be proven through opinion evidence, policy statements or codes of conduct: see for example *R v Serré*, 2011 ONSC 5778 at para 18; *R v Brown*, 2014 BCSC 1911 at para 52. Acting contrary to a code of conduct with which an official has sworn to comply can constitute a breach of the standard of responsibility: *R v Ellis*, 2010 ONSC 2390 at paras 183-188, aff’d 2013 ONCA 739, leave to appeal to SCC refused, 35649 (7 February 2014).

[38] The fourth element – the standard of a “serious and marked departure” – is not one of perfection, and mistakes and errors in judgment are excluded: *Boulanger* at para 52. This ensures that administrative fault is not criminalized. The inquiry is contextual, considering the public purpose the officer serves and the officer’s responsibilities, in addition to the severity of the departure from those responsibilities: *Boulanger* at para 53. The test is described in *Boulanger* at para 54 as being analogous to the test for criminal negligence:

The test to be met in the inquiry is analogous to the test for criminal negligence. As in cases of breach of trust by a public officer, it became necessary in criminal negligence cases to distinguish conduct sufficient to attract criminal sanction from less serious forms of conduct meriting civil or administrative sanction. To make this distinction, the Ontario Court of Appeal held in *R. v. Rajic* (1993), 1993 CanLII 3423 (ON CA), 80 C.C.C. (3d) 533, that the conduct must represent a “marked” departure from prudent conduct. The Supreme Court of Canada confirmed this approach in cases involving dangerous driving of a motor vehicle, stating that the conduct must represent a “marked” departure from the standard of care of a reasonable person in all the circumstances of the case: *R. v. Hundal*, 1993 CanLII 120 (SCC), [1993] 1 S.C.R. 867. Similarly, the public official’s conduct must represent a “marked” departure from the standards expected of an individual in the accused’s position of public trust.

[39] The fifth element of the offence is the “subjective mental element”: *Boulanger* at para 54. The bar for this element is “elevated” – again to avoid criminalizing administrative fault: *Boulanger* at para 56. The *mens rea* may be inferred from the circumstances. For example, evidence of private benefit may suggest a *mens rea* sufficient for the offence, but personal benefit is not dispositive: *Boulanger* at para 57.

[40] The trial judge found the Crown had established the third element. He found because Mr. McNish breached well-established policies for use of CPIC and PIMS he breached the standard of responsibility expected of him. This finding was based on Mr. McNish’s own evidence about why he accessed the police databases: see paras 94 and para 97.

[41] At trial Mr. McNish submitted the Crown had not established the fourth element because his acts were errors in judgment as evidenced by him using his own regimental number to access the police databases, and not conduct that met a “serious and marked departure”. He also submitted the Crown had failed to establish the requisite *mens rea*, the fifth element.

[42] On the fourth and fifth elements, the trial judge found as follows at paras 107-108:

I find it a serious and marked departure for Mr. McNish to engage in this particular kind of provocative surveillance activities in contravention of the CPS policy respecting outside interests. I find it a serious and marked departure for a police officer to conduct CPIC and PIMS searches breaching CPS policy and the privacy of individuals for the sole purpose of facilitating paid surveillance on an individual for a private company that was determined to achieve its clients [sic] goals without caring about the rights of other individuals that get in the way.

Mr. McNish agreed that he conducted several days of surveillance, both static and mobile, on Ms. Taylor, along with a team of other individuals. He agreed that he approached [ML] to collect and pay for negative information about Ms. Taylor to advance Mr. Carter's custody case plan. He agreed that he knew that the Waltons were using GPS tracking on Ms. Taylor's car, and that he himself crawled under her car to look for the GPS tracker. I find that he told [DC] about placing the device on Ms. Taylor's car and tracking her on a laptop. I find Mr. McNish had the specific intent to do what he knew was a criminal offence. [emphasis added]

[43] On the fourth element, the appellant submits the trial judge erred in considering Mr. McNish's surveillance of Ms. Taylor because it was Mr. McNish's accessing the police databases that formed the basis of this offence, not his surveillance. We do not agree; it is clear Mr. McNish accessed CPIC to facilitate his unauthorized surveillance of Ms. Taylor.

[44] The fourth element of the *Boulanger* test, whether the conduct of an accused is a serious and marked departure from the conduct of an individual in the accused's position of public trust, must focus on the conduct or the duties of the accused as alleged. Here, that conduct included Mr. McNish accessing CPIC to assist him in conducting his paid surveillance of Ms. Taylor. Mr. McNish admitted he knew he was not permitted to access police data bases other than in the course of his police duties. He also admitted he accessed CPIC to assist him surveilling Ms. Taylor, work that he knew he was not permitted to do. Any information Mr. McNish obtained from his accessing police data bases and his surveillance of Ms. Taylor was not for the purpose of his police duties but for the benefit of Mr. Walton and his client, Mr. Carter.

[45] Police data bases include sensitive, personal information of individuals. Those individuals expect their information to be kept private; individuals do not expect police officers, outside the scope of the duties of their office, to utilize the information for personal gain and/or unauthorized surveillance of them.

[46] The trial judge found that Mr. McNish's conduct was a serious and marked departure from the conduct of an individual in the accused's position of public trust because (1) he accessed information in the police databases; (2) these accesses were breaches of CPS policy and the privacy of individuals; and (3) they were not done for a police purpose but "for the sole purpose of facilitating paid surveillance on an individual for a private company that was determined to achieve its clients' goals without caring about the rights of other individuals that get in the way." We discern no error in the trial judge's finding that the fourth element was met.

[47] The *mens rea* of the offence, the fifth element, required the trial judge to consider whether Mr. McNish used his office for a purpose other than the public good. The trial judge found the Crown established the requisite *mens rea*.

[48] Clearly, the trial judge did not accept Mr. McNish's evidence that all his actions to which he testified – the surveillance of Ms. Taylor while on sick leave, knowing this

type of work was not permitted, and accessing the police databases in breach of well-established policies - were errors in judgment and therefore, he did not have the specific intent required.

[49] The trial judge considered all of the activities Mr. McNish testified he participated in during the timeframe of the indictment in assessing whether the Crown had proven the *mens rea* beyond a reasonable doubt. His doing so was in answer to the testimony and submissions of Mr. McNish at trial that his conduct was not criminal. Further, the full extent of Mr. McNish's involvement – including his participation in the surveillance - provided the context from which the trial judge inferred Mr. McNish did have the requisite intent when he carried out the CPIC and PIMS searches.

[50] The evidence before the trial judge established that none of the activities were for a police purpose: in other words, not for the public good. All the CPIC and PIMS searches were to assist Mr. Walton's operations for Mr. Walton's private clients. The first breaches were to assist Mr. McNish in his surveillance of Ms. Taylor, which information was to assist Mr. Carter. Mr. McNish was paid for this surveillance. The last two data breaches allowed Mr. McNish to give information to Mr. Walton.

[51] These findings are supported by the evidence. We see no error. Mr. McNish has not shown that the verdict was unreasonable. There is also no merit to the argument that the reasons are insufficient. Thus, this ground of appeal is dismissed.

VOLUME #16(D): Public mischief

1000. Whoever filed this criminal complaint must be charged with the offence of public mischief for the betterment of the public as such a complaint is wasteful of police resources and taxpayer dollars. The HRTO Application and HRTO Proceeding is not.
1001. When an individual engages making a complaint of this frivolous nature, when there was obvious legal authority to have sent the emails (the only communications that Mr. McLean sent) and there was not even a solitary warning or notice to Mr. McLean that such emails were unwelcome, then how could Mr. McLean had known he was acting contrary to the Criminal Code or that the emails were unwelcome? The question answers itself.
- 1002.
1003. Mr. McLean quotes the following article in relation to section 140(1) of the *Criminal Code*:

“What is public mischief? Although it may sound like a term used to describe unruly children, it is in fact a serious offence under s. 140 (1) of the *Criminal Code* of Canada. It

is described as the deliberate intention to mislead a legal authority (i.e. the police) by doing any of the following acts listed below which require the police to enter into or continue an investigation:

- Making a false statement that accuses some other person of having committed an offence
- Doing anything intended to cause some other person to be suspected of having committed an offence that the other person has not committed, or to divert suspicion from himself
- Reporting an offence has been committed when it has not been committed
- Reporting or in any other way making it known or causing it to be made known that he or some other person has died when he or the other person has not died.

Here we will examine public mischief in the context of false domestic assault/abuse allegations.

These types of claims/behaviours are often associated with domestic altercations. Many times in the heat of the moment, people make 911 calls in an attempt to punish their significant other for whatever perceived injustice they feel has been done against them. Complainants can sometimes exacerbate and embellish the truth. All claims must be investigated, as very clearly the vast majority of domestic abuses claims are serious and factual. However, false domestic abuse claims waste valuable and costly resources and a conviction for public mischief carries a severe punishment to deter the frequent abuse of making a false domestic abuse report.

If the person is charged with public mischief, the Crown can elect summarily or by indictment. If the crown elects summarily, the person could be facing a jail term of up to 6 months in jail. If the Crown elects by indictment, the maximum jail term is 5 years in jail.

People need to be very aware of the significant consequences and repercussions associated with lying to a police officer in these or any other circumstances. The charges associated with these offences can be very serious and carry jail time. For example, a spouse may wish to retract statements made to the police in the heat of the moment of an argument after some time has passed. Can you do this and what are the repercussions?

This is a very tricky situation. Spouses and/or partners often tend to think differently after some time has passed about charges they may have wanted to proceed with at an earlier point in time. This can happen for many reasons, including that fact that the claim was falsified, they fear for their life, or they come to the realization that their spouse will be locked up and it will be devastating for the relationship or family.

If a complainant retracts (often referred to as “recants”) their statement, there is a possibility they could be charged with the offences of obstruction of justice and/or public mischief. Further, in my experience, the original domestic charges are

usually not withdrawn by the Crown especially in cases where there was a recorded statement taken under oath from the victim by the police. The Crown Attorney has a very clear directive from the Attorney General and a mandate to proceed with almost every case of domestic abuse in Canada.

Another big consequence that can be associated with these cases is the financial and social impact. A case may take up to a year or more before the trial is conducted after the charge was laid. During this time, the couple involved in the dispute cannot communicate or associate and they are basically always forced to live separately by court order. The couple must therefore assume all the many inconveniences, financial and other costs that are incurred as a result of both a “non-association” and “non-attendance” order.

Making any kind of report to the police is a serious matter. The police have an important job to serve and protect and their resources are not to be wasted or used improperly as there are dire and grave consequences to follow.

1004. The following is from the Criminal Law Notebook on public mischief.⁶² Offences relating to **public mischief** are found in Part IV of the *Criminal Code* concerning "Offences Against the Administration of Law and Justice". Offences relating to **public mischief** are found in Part IV of the *Criminal Code* concerning "Offences Against the Administration of Law and Justice".
1005. The similar theme and language arise around whether an offence of public mischief, like an allegation of criminal harassment, is purely summary, hybrid or straight indictable when considering the accused's history of any potential other offences or releases (or bail conditions):

“When charged under s. 140 [public mischief], the accused can be given an appearance notice without arrest under s. 497 or a summons. If arrested, he can be released by the arresting officer under s. 498 or 499 on an undertaking with or without conditions. He can also be released by a justice under s. 515.

Reverse Onus Bail

If police decide to bring the accused before a Justice pursuant to s. 503, there will be a presumption against bail (i.e. a reverse onus) if the offence, prosecuted by indictment, was committed:

- **while at large** under s. 515 [bail release], 679 or 680 [release pending appeal or review of appeal] (s. 515(6)(a)(i));

- "for the benefit of, at the direction of, or in association" with a **criminal organization** (s. 515(6)(a)(ii));
- where the **offence involved a weapon**, being a firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, while the accused was subject to a prohibition order preventing possession of these items (s. 515(6)(a)(viii)); or
- where the accused is **not "ordinarily a resident in Canada"** (s. 515(6)(b)).

And, regardless of Crown election, if the offence alleged was one:

- where the offence was an allegation of violence against an **"intimate partner"** and the accused had been previously convicted of an offence of violence against an **"intimate partner"** (s. 515(6)(b.1));
- where the **offence alleged is a breach** under s. 145(2) to (5) while (s. 515(6)(c));
- where the offence committed (or conspired to commit) was an **offence under s. 5 to 7 of the CDSA** that is punishable by life imprisonment (s. 515(6)(d));

1006. The point is now well-made that if the Landlord made the criminal complaint, and it amounted to public mischief, and she did not meet any of the "Three Mandatory Conditions" for a "straight indictable", then she could be charged but not arrested *per se*.

1007. The language in section 140 of the CC is:

"Public mischief

140 (1) Every one commits public mischief who, with intent to mislead, causes a peace officer to enter on or continue an investigation by

- (a) making a false statement that accuses some other person of having committed an offence;
 - (b) doing anything intended to cause some other person to be suspected of having committed an offence that the other person has not committed, or to divert suspicion from himself;
 - (c) reporting that an offence has been committed when it has not been committed;
- or
- (d) reporting or in any other way making it known or causing it to be made known that he or some other person has died when he or that other person has not died.

Punishment

(2) Every one who commits public mischief

- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or
- (b) is guilty of an offence punishable on summary conviction."

1008. The proof of offence is met with the following requirements:

Volume #16(D)(i): Public Mischief: an offence of revenge

1009. The following is noted from the Criminal Law Notebook. Public mischief consists of causing a peace officer to begin or continue an investigation. There are largely two "categories" of mischief under s. 140(1)(c). There is false accusations against an anonymous individual so as to evade liability and then there is false accusations against an identified individual for purposes of revenge or punishment.

1010. The report does not need to be made directly to police. Other agents of the state will likely suffice.

Purpose

The purpose of the offence of public mischief is to "protect innocent persons 'from the grievous and fearful consequences that can flow from false accusations.'"^[4]

Section 140(1)(b) intends to "protect the integrity and efficiency of police investigations into crime."^[5]

Subject Matter of Diversion

Under s. 140(1)(b) it is not necessary to prove that the diversion was away from the accused himself. Any false statement will do.

"Offence"

"Offence" can mean both *Criminal Code* offences as well as provincial offences of a penal nature.^[7]

"Reporting"

"Reporting" is not restricted to reporting to police and can include others such as Children's Aid.^[8]

Actual Investigation Not Needed

The accused can be convicted of attempted public mischief where the officer receiving the report does not undertake an investigation because the accused is not believed.^[9]

Voluntariness Voir Dire Not Necessary

There is no need for a voluntariness *voir dire* to determine if a statement was made to a police officer in order to make out the offence.^[10]

"Statement"

Section 118 defines "statement" as meaning "an assertion of fact, opinion, belief or knowledge, whether material or not and whether admissible or not".

VOLUME #17: Conclusion

VOLUME #17(A): Torts by analogy

1011. While this is not a tort matter before the HRTO Proceeding, the following is from the above noted to demonstrate that there is much in the way of interplay between various areas of law. In *Joseph*, the BCSC stated as follows:

[37] There is no real issue that (apart from the defences raised) Ms. *Joseph* was assaulted, confined and injured. The issue is the nature and extent of the injuries she received as a result of the incident.

[38] The elements of the torts are:

- i. False Arrest: A false arrest involves an arrest, without reasonable grounds for doing so (*Hanisch v. HMTQ in Right of Canada et al.*, 2003 BCSC 1000 at para. 88). As discussed above, Cst. Meier’s arrest of Ms. *Joseph* was not lawful due to the absence of reasonable grounds.
- ii. False Imprisonment: false imprisonment “is the intentional and total confinement of a person against his or her will without lawful justification” (*Hanisch* at para. 88). Cst. Meier completely restricted Ms. *Joseph*’s movement, as above, without lawful justification.
- iii. Assault and Battery: battery involves the intentional infliction of unlawful force on another person; assault is the act of “intentionally creating in another person an apprehension of imminent harmful or offensive contact” (*Norberg v. Wynrib*, 1992 CanLII 65 (SCC), [1992] 2 S.C.R. 226; Fleming, *The Law of Torts*, 5th ed. (1977), p. 24). Because the arrest was unlawful, Cst. Meier’s subsequent use of force similarly had no basis in law.

[39] I am satisfied that Ms. *Joseph* was falsely arrested, falsely imprisoned, assaulted and battered.”

Volume #17(B): The legal change of position – cannot be unwound

1012. The legal change of position by the TPS 14th Division from the DCK Fictitious CH Warning to Constable Romano's warrant representation makes the Charter analysis vis-à-vis Mr. McLean and the TPS rather rudimentary and facile to predict the outcome. The breaches of section 29 by the TPS are so severe that the section 8 of the Charter breaches follow. Those section 8 of the Charter breaches cannot be saved under section 1 of the Charter – at least have not been so as of today's date by our SCC. This would certainly not be the first case where they were. While exclusion of evidence is not a particularly huge issue for the public, Mr. McLean, after reviewing the prior episodes⁶³ involving 14th Division, does not want the 14th Division to have discretion over holding a pen for him.
1013. For clarity as it relates to the compensation aspect of this HRT0 Proceeding, Mr. McLean's point must be taken as: there is no fear of any of these "men" at the TPS 14th Division when it is equal. It is only when they are holding a badge, gun, and misleading him with intent. When they are not and claiming to act with purported authority, he does not fear them. While physically disabled, he can defend himself. But adding a resisting arrest charge on top of the False Arrest where there is not a singular legal authority in this country to support any semblance of analytical discipline in analyzing the legal test under ss. 264(b) was likely the design. Break Mr. McLean without his medication and hope he was labelled the "criminal". Now, some 35 days later, he is anything but and, bluntly, those who set the "wheels in motion" of this "revenge ploy" must be held to account. Goldview is not to blame either with Ms. Ferguson spewing off that if Mr. McLean was seen on the property, *after being illegally locked out without access to his medication and property (with most of it remaining therein Rental Unit 410)*, is part and parcel of the same "thug like" abusive and discriminatory conduct. The TPS and TPS Respondent did not merely put the *icing on the cake* of this unlawful scheme, they added enough unlawful icing to fill up a "cake shop". They all must "reap" what they "sowed", and then correct (where applicable).
1014. Mr. McLean respectfully submits that the orders for expedited proceedings must follow and the determination of the NOCQ will have the inevitable determinations in his favour and for the public to some degree but with early document production fostering the public interest issues herein. If the TPS wishes to stand by its reflexive question. "Have I lived up to my word?", the best way to find out is with documents produced and field with the HRT0. Upon the conclusion of those issues, the **HRT0** can then determine the issues as they relate to the *HR Code*.

1015. All of which is respectfully submitted and duly signed by Mr. McLean on November 7, 2024:

DULY SIGNED BY THE INDIVIDUAL BELOW

Per:

A handwritten signature in black ink, appearing to read "Ka McLean", written over a light gray rectangular background.

Kevin A. McLean, B.A., J.D., CIM

KM/dsw

Appendices

Appendix #1: Form 7

FORM 7(Sections 475, 493, 597, 800 and 803) Warrant for Arrest

Canada,
Province of ,
(*territorial division*).

To the peace officers in the (*territorial division*):

This warrant is issued for the arrest of (*name of person*), of , born on (*date of birth*), referred to in this warrant as the accused.

Because the accused has been charged with (*set out briefly the offence in respect of which the accused is charged*);

And because (*check those that are applicable*):

- ☐ (a) there are reasonable grounds to believe that it is necessary in the public interest to issue this warrant for the arrest of the accused [507(4), 512(1)];
- ☐ (b) the accused failed to attend court in accordance with the summons served on the accused [512(2)];
- ☐ (c) (an appearance notice *or* undertaking) was confirmed and the accused failed to attend court in accordance with it [512(2)];
- ☐ (d) it appears that a summons cannot be served because the accused is evading service [512(2)];
- ☐ (e) the accused was ordered to be present at the hearing of an application for a review of an order made by a justice and did not attend the hearing [520(5), 521(5)];
- ☐ (f) there are reasonable grounds to believe that the accused has contravened or is about to contravene the (summons *or* appearance notice *or* undertaking *or* release order) on which the accused was released [512.3];
- ☐ (g) there are reasonable grounds to believe that the accused has committed an indictable offence since their release from custody on (summons *or* appearance notice *or* undertaking *or* release order) [512.3];

- ☐ (h) the accused was required by (appearance notice *or* undertaking *or* summons) to attend at a time and place stated in it for the purposes of the *Identification of Criminals Act* and did not appear at that time and place [512.1, 512.2];
- ☐ (i) an indictment has been found against the accused and the accused has not appeared or remained in attendance before the court for their trial [597];
- ☐ (j) (*if none of the above applies, reproduce the provisions of the statute that authorize this warrant*).

Therefore, you are ordered, in Her Majesty's name, to immediately arrest the accused and to bring them before (*state court, judge or justice*), to be dealt with according to law.

- ☐ (*Check if applicable*) Because there are reasonable grounds to believe that the accused is or will be present in (*specify dwelling-house*), this warrant is also issued to authorize you to enter the dwelling-house for the purpose of arresting the accused, subject to the condition that you may not enter the dwelling-house unless you have, immediately before entering the dwelling-house, reasonable grounds to believe that the person to be arrested is present in the dwelling-house.

Signed on (*date*), at (*place*).

(*Signature of judge, provincial court judge, justice or clerk of the court*)

(*Name of the judge, provincial court judge or justice who has issued this warrant*)

- R.S., 1985, c. C-46, Form 7
- R.S., 1985, c. 27 (1st Supp.), s.203
- 1997, c. 39, s. 3
- 1999, c. 5, s. 46
- 2019, c. 25, s. 335

Endnotes

¹Where a party intends to question the constitutional validity or applicability of any law, regulation, by-law or rule or where a party claims a remedy under s. 24(1) of the Charter of Rights and Freedoms, in relation to an act or omission of the Government of Canada or the Government of Ontario, a Notice of Constitutional Question must be delivered to the Attorneys General of Canada and Ontario and all other parties and filed with the **Tribunal** as soon as the circumstances requiring the notice become known and, in any event, at least 15 days before the question is to be argued.

²Parties and their representatives may not use documents obtained under these Rules for any purpose other than in the proceeding before the **Tribunal** (see: HRTO Specific Rule,

³1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

⁴In order to be capable of justification under section 1, the limit on the right or freedom must be "prescribed by law". The limit may be: (i) either express or implied in a statute or a regulation (*R. v. Therens*, [1985] 1 SCR 613; *R. v. Thomsen*, [1988] 1 SCR 640; *R. v. Orbanski*; *R. v. Elias* [2005] 2 SCR 3); (ii) in a government policy, where: (1) the government entity was authorized to enact the policy; (2) the policy sets out binding rules of general application, i.e., of a legislative nature, (such as rules of a regulatory body or provisions of a collective agreement) as opposed to those which are administrative in nature (such as internal guidelines or interpretive aids for government officials); (3) the policy is sufficiently precise so as to enable people to regulate their conduct by it, and so as to provide guidance to those who apply the law; (4) the policy is sufficiently accessible to give notice to the public of the rules to which they are subject (*Greater Vancouver Transportation Authority v. Canadian Federation of Students - British Columbia Component*, [2009] 2 SCR 295, at paragraphs 50, 65); and (iii) a common law limit, assuming there is sufficient government action for the Charter to apply (*Therens*, *supra*; *RWDSU v. Dolphin Delivery*, [1986] 2 SCR 573; *R. v. Swain*, [1991] 1 SCR 933; *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 SCR 835); *R. v. N.S.*, [2012] 3 SCR 726).

⁵(see: <https://www.attorneygeneral.jus.gov.on.ca/english/glossary/?id=469#results>).

⁶See: *infra*

⁷“Adverse” means and refers to: unfavourable, unpleasant, and harmful.

⁸Although the Appellant alleges that the **Landlord** and Goldview had created a poisoned environment for him based upon his Mental Disorder and Physical Disabilities

⁹Due to the five page limit, the Applicant has provided a detailed appendices herein and his motion for an expedited proceedings, will be filed and served promptly thereafter, will provide further facts, evidence and declaration(s) under oath.

¹⁰(not the only or even potentially the substantial factors which are to be determined after pleadings, document discovery and other pre-hearing inquiry and evidence methods) in

¹¹The Applicant had never met DC Kolankowski until October 2, 2024 at around 815 p.m. at *14th Division* (TPS). The Applicant had never spoken with DC Kolankowski until

¹²For a recent case involving a “property management company”, please see: *Clarke v. Radar Property Management*, 2024 HRTO 1511. However, the **Tribunal** dismissed the claim as the applicant (Adrian Clarke) failed to file early. The importance of filing early cannot be understated with the one year statutory limitation period.

¹³such as the gym, King’s lounge, courtyard, and barbeque area.

¹⁴<https://www.tps.ca/mission-vision-values/>

¹⁵As it related to the TPS and its employees, contractors or agents, the Applicant was accessing a service, so represented by the Ontario LTB when a tenant had been unlawfully and without notice locked out of a rental unit, on September 20 and 21, 2024. When the Applicant received the Constable Romano email on Wednesday, October 2, 2024, it was a welcome one, to some degree, as the LTB had reversed its previous decision regarding a request for expedited proceedings or shortening of time, on its own initiative, after the Applicant had tendered further particularized affidavits. The Applicant was finalizing his submissions for the same but was able to relinquish the need to do so in light of **Vice-Chair Delorenzi** order. For context and risk involved, if the Applicant was not successful with the same, he could not seek the same order again, and he had no right of appeal. It would have been months to a year before his matter would be heard.

¹⁶For example, the purpose of section 8 of the Charter is to prevent unjustified searches or seizures (see: *R. v. Dyment* in relation to disjunctive nature of the same) before they happen.

¹⁷The Applicant will be bringing a motion after receipt of the file number from the HRTO for an expedited proceedings with specifics for truncated and abridged timelines. The Applicant has provided the further particulars involving the various officers, constables and sergeant at the **Appendices**.¹⁷

¹⁸An OCF-19 is a form that is issued by the CEO of the FSRA

¹⁹“condominium management provider” means a corporation, partnership, sole proprietor, association or other organization or entity that, on behalf of others and for compensation or reward or the expectation of such, provides condominium management services or holds himself, herself or itself out as such (see: Condominium Management Services Act, 2015, SO 2015, c 28, Sch 2, s 1, <https://canlii.ca/t/8zdc#sec1>)

²⁰“**principal condominium manager**” means the principal condominium manager designated under section 49 (see: Condominium Management Services Act, 2015, SO 2015, c 28, Sch 2, s 1, <<https://canlii.ca/t/8zdc#sec1>>, retrieved on 2024-10-09)

²¹“condominium manager” means an individual who has the prescribed qualifications to be licensed as a condominium manager under this Act and who provides condominium management services to,

(a) a client on behalf of a condominium management provider, or

(b) a client directly, if authorized by a regulation made for the purposes of subsection 51 (3)

²²Purchased new washer and dryer for Unit 410. Paid for thousands of dollars of repairs. Applicant purchased new patio sets, planters, shower heads, Dyson products, vacuums, etc.

²³It seems a little coincidental or prophetic with the benefit of hindsight but that would oversimplify issues that require analytical precision and not “black and white thinking” or using heuristics or analytics to come to some conclusions. The Applicant has confirmed under oath and will confirm herein again that he has not set foot on the property of the Minto Complex out of pure fear from the Goldview Threat and Goldview **Extortion**.

²⁴For objectivity purposes, this is not to say that these officers are “bad people” or of “poor character” but the facts herein are certainly ones that do not portray them at their peak. Moreover, the Applicant does not deny that he and the TPS’ employees were able to allow emotions to be locked-in and have more professional dialogue. However, the Applicant should have never been in that position at first instance. It is for that reason that empathy and sympathy are somewhat in order and why the Applicant has proceeded with this route with HRTO, where there is a quasi-implied undertaking along with the ability of certain individuals to seek anonymization orders if they wish.

²⁵ (which is a copy and paste of relevant parts from said declaration made on December 29, 2023):

²⁶Who shall remain confidential but I am willing to provide such contact information (if there is consent of that person) and/or I am required by law to do so albeit I would ask that it would be provided “in camera” for any adjudicator to review

²⁷I will note parenthetically in this regard that, at times, I did return the keys as the **Landlord** was, in my view, causing extreme stress for her Daughter, and I did not wish to have her Daughter (my Spouse) suffer so I would stay at a hotel for a small period to allow the **Landlord** to come down from her temper or whatever new issue was bothering her at the time.

²⁸which was partly due to leaving Vancouver to rekindle my relationship with my Spouse

²⁹I found somewhat alarming considering her knowledge of my disability and explaining my MRI results from October 2022 and August

³⁰Which I found strange considering the payments that I had made to her over the years

³¹October 27, 2023

³²I presume she was referring to me not having any reference letter from her or not having a “written lease” when I overheard, oversaw or otherwise

³³The **Landlord** is correct in this representation she made to third parties but that was during the time when I arrived from Vancouver as per the above and below

³⁴Sharpe, Pepall and van Rensburg JJ.A. for the ONCA in 2017: [38] The trial judge observed, at para. 368, that it was difficult to fix a reasonable amount for the damages Ms. Stack and her family had suffered. He found that the effect on Ms. Stack had been “severe”, that her life had been “irretrievably altered” and he was satisfied by the evidence of Dr. Silver “that it is unlikely that she will ever be the same as she was before these incidents”. The ONCA in Nissen, citing Young, found as follows, “[45] The trial judge was faced with what he properly recognized to be a difficult task. On the evidence, he found that Ms. Stack had suffered a severe psychological injury that had radically affected her outlook and enjoyment of life. Her friends and her family testified that she was a different person since the injury, and she presented unchallenged expert evidence that she had suffered from post-traumatic stress disorder that was difficult to treat and likely to be permanent. While I view the damages awarded by the trial judge to be very generous, I am not persuaded that his reasons reveal any error of law or principle that would justify appellate intervention.”

³⁵R. v. Bohn, 2000 BCCA 239 (CanLII), at para 5, <<https://canlii.ca/t/533x#par5>>, retrieved on 2024-10-29

³⁶McLean asked for a copy of the warrant with Constable Romano but was not given one at the time or thereafter in the *14th Division* or after via email (see: Declaration #1)

³⁷Herein, there is no dispute that McLean asked for one and was not provided with one. When he queried Constable Romano again, after querying DCK about the Fictitious Warning, Constable Romano said words to the effects, “Do you want to get out of here and get on with this?” Thereafter, Mr. McLean took the self-preservation mode and “yes sir, no sir” type approach due to his intense traumas with unjustified interventions by authorities (see: Declaration #1).

³⁸To the extent that Constable Romano contradicted him, he would be committing perjury (see: Declaration #1, declaration on belief citing the source)

³⁹A justice who retired from the BCCA in 2013 after a long and distinguished career as a chambers and trial justice in the BCSC and then as an appellate justice. Mr. McLean had the pleasure of appearing before her before her retirement in the chambers of the BCCA. The HRTO can take judicial notice, pursuant to section 16 of the SPPA, that not only is Bohn the leading authority in this area but the plethora of appellate justices in BC, particularly females (without delving into the issue of a current genders and no-binary individuals), that have issued precedents adopted by the SCC is astronomical relative to other provinces – perhaps excluding Ontario. Moreover, BC has produced arguably the greatest SCC jurist of them all in former Chief Justice of the SCC in Justice McLachlan. This is not to compare one province’s justices over another but for the purpose of the binding nature of Bohn.

⁴⁰A justice of the peace in Ontario is a judicial officer appointed pursuant to the *Justices of the Peace Act*, R.S.O. 1990, C. J.4. This Act affirms that a justice of the peace has judicial jurisdiction throughout Ontario and creates a framework under which justices of the peace are appointed and hold office, and also provides for the conditions under which they perform their duties. There are over 325 justices of the peace in Ontario that are assigned to and perform judicial responsibilities. Both provincial court judges and justices of the peace compose the Ontario Court of Justice, one of Ontario’s two trial courts.

The judicial functions, powers and duties of a justice of the peace are set out in legislation and case law. Two of the more important legislative Acts which confer jurisdiction upon a justice of the peace are the *Criminal Code* and the Ontario *Provincial Offences Act*, but there are many other federal and provincial statutes and regulations that empower justices of the peace with legal authority and/or jurisdiction. Primarily, the two main areas of jurisdiction are criminal law and regulatory law (provincial offences).

Respecting criminal law, justices of the peace preside over virtually all judicial interim release (bail) hearings in the province and the majority of criminal remand courts. They also preside over other criminal hearings. They receive informations (the document which commences a criminal proceeding), confirm or consider the issuance of process by either a summons or a warrant and are responsible for receiving and considering the denial or issuance of search warrants and other matters of criminal process.

Justices of the peace exercise jurisdiction over the majority of provincial regulatory offences and municipal by-law prosecutions. As in criminal proceedings, justices of the peace receive informations and warrant applications, consider the issuance of process and preside at hearings and trials.

On appointment, a justice of the peace must cease other employment and refrain from any political activity. The *Justices of the Peace Act* states that a justice of the peace shall not engage in any other remunerative work without the approval of the Justices of the Peace Review Council.

Justices of the peace in Ontario must retire upon attaining the age of 65 years but may continue in office until attaining the age of 75 years, subject to the annual approval of the Chief Justice of the Ontario Court of Justice.

<https://www.ontariocourts.ca/ocj/jpaac/role/>

⁴¹Issue, influence, aspect, cause, thing, element, circumstance, reasons, or part

⁴²[*nota bene*: throwing out binders and hole punch; Ms. Ferguson saying, apparently, that Mr. McLean was going crazy, slashing tires, and not well. **Landlord’s** comments; pattern of behaviour;

⁴³Mental health services and policing (which is a form of ‘services’ albeit not for Mr. McLean in this instance)

⁴⁴Inspection, examination, analysis or search

⁴⁵Equal treatment within one of the protected areas.

⁴⁶<https://laws-lois.justice.gc.ca/eng/acts/c-46/page-1.html>

⁴⁷[*nota bene*: herein, it required two officers with Constable Romano and DC Kolankowski. With due respect to both, they are lucky nobody got seriously physically injured as the Applicant was extending his hand for a handshake with DC Kolankowski and to sign for the pickup of his property, and then was completely blindsided.]

⁴⁸(see: <http://www.winnipegcriminaldefencelawyer.ca/reasonable-grounds#:~:text=In%20a%202013%20decision%2C%20R,were%20in%20the%20officer's%20shoes.>)

⁴⁹In *McLean v. TPS et al*, there was not only detention but imprisonment along with search and seizure

⁵⁰Form 8, the committal **warrant**, is used in cases where an individual has already been arrested and is being held in custody pending **trial** or sentencing. This **document** allows for the transfer of an individual from police custody to a correctional facility. It too must include specific **information** about the individual in question, as well as details about the charges they are facing. The use of Form 8 ensures that individuals are transferred in accordance with the rules and procedures established by law. Overall, Section **493** serves an important purpose in providing clear guidelines for the use of warrants in the criminal **justice** system. Its

emphasis on specific forms for arrest and committal warrants ensures that these documents are issued in a consistent and standardized way, helping to reduce confusion and potential for abuse. As such, this section of the *Criminal Code* provides an essential foundation for the administration of **justice** in Canada.

⁵¹*Hiigenberg v. Northup*, 134 Ind. 92, 33 N. E. 780; *Morton v. Immigration Ass’n*, 79 Ala. 617; *Coleman v. Billings*, 89 Ill. 191; *Lewis v. Holmes*, 109 La. 1030, 34 South. 66, 61 L. R. A. 274; *Harris v. Harris*, 70 Pa. 174; *Penn Mut. L. Ins. Co. v. Trust Co.*, 73 Fed. 653, 19 C. C. A. 310, 38 L. R. A. 33, 70; *Insurance Co. v. Edwards*, 74 Ga. 230.⁵¹

⁵²(*Eldridge*, *supra*, at paragraph 40. See also *Douglas College*, *supra*; *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211 and *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391 — on the application of the *Charter* to “government” as employer).

⁵³(*Evans*, *supra* at paragraph 42; *R. v. Silveira*, [1995] 2 S.C.R. 297 at paragraph 140; *R. v. Feeney*, [1997] 2 S.C.R. 13 at paragraph 43); in diluted measure, in the perimeter space around the home (*Kokesch*, *supra*; *R. v. Grant*, [1993] 3 S.C.R. 223 (*Grant* (1993) at pages 237, 241); *R. v. Wiley*, [1993] 3 S.C.R. 263 at page 273); in commercial space (*Thomson Newspapers*, *supra* at pages 517-19; *McKinlay Transport*, *supra* at page 641); in private cars (*R. v. Wise*, [1992] 1 S.C.R. 527 at page 533; *R. v. Mellenthin*, [1992] 3 S.C.R. 615); in a school (*R. v. M. (M.R.)*, [1998] 3 S.C.R. 393, at paragraph 32); and even, at the bottom of the spectrum, a prison (*Weatherall v. Canada (Attorney General)*, [1993] 2 S.C.R. 872, at page 877) (*Tessling*, *supra* at paragraph 22).

⁵⁴(see: (*Collins*, *supra* at page 278; *R. v. Caslake*, [1998] 1 S.C.R. 51, at paragraphs 10-11; *Tessling*, *supra* at paragraph 18; *R. v. Mann*, [2004] 3 S.C.R. 59 at paragraph 36; *Grant* (2009), *supra* at paragraph 56; *Shepherd*, *supra* at paragraph 15; *Nolet*, *supra* at paragraph 21; but see *Nolet*, *supra* at paragraph 46, upholding the warrantless search on the basis that the reasonableness of the law authorizing it had not been challenged).

⁵⁶(*nota bene* not reasonable and probable grounds to believe)

⁵⁷ <https://tribunalsontario.ca/documents/hrto/Practice%20Directions/HRTO%20Rules%20of%20Procedure.html>

⁵⁸Herein, it is not only uncorroborated but contested and highly disputed on the law. It is unclear what facts were presented to the TPS 14th Division

⁵⁹<https://www.cbc.ca/news/canada/calgary/calgary-police-corruption-trial-braile-morton-mcnish-verdict-1.4639095>

⁶⁰*Criminal law — Breach of trust by public officer — Conviction — Appeals*

⁶¹*R v McNish*, 2021 ABCA 28

⁶²[https://criminalnotebook.ca/index.php/Public_Mischief_\(Offence\)](https://criminalnotebook.ca/index.php/Public_Mischief_(Offence))

⁶³poisoned, sexist workplace environment: <https://www.cbc.ca/news/canada/toronto/female-sergeant-files-human-rights-complaint-against-toronto-police-1.4466392>