Federal Court  Cour fédérale

**Date: 20250211**

**Docket: T-1742-16**

**Citation: 2025 FC 266**

**Ottawa, Ontario, February 11, 2025**

**PRESENT: The Honourable Mr. Justice Duchesne**
**Case Management Judge**

**BETWEEN:**

**JEAN-MARC MURAT**

**Plaintiff**

**and**

**HIS MAJESTY THE KING IN RIGHT OF CANADA**

**Defendant**

## ORDER AND REASONS

[1] The Plaintiff, Mr. Murat, has brought a motion for leave to amend his Statement of Claim to include allegations of disguised extradition, among others, eight years after commencing the underlying proceeding. The motion arises after the completion of discovery and appears related to the Plaintiff's engagement of litigation counsel to assist his solicitor of record with the prosecution of his claims. The Defendant contests the Plaintiff's motion.

[2] For the reasons that follow, the Plaintiff's motion is granted in part and dismissed in part.

## I. Procedural Background

[3] The Plaintiff, Jean-Marc Murat, commenced this action on October 18, 2016. The Defendant served and filed his Statement of Defence on December 2, 2016.

[4] The Defendant delivered his affidavit of documents on January 17, 2017, while the Plaintiff delivered his affidavit of documents on June 21, 2017.

[5] The Defendant subsequently delivered supplementary affidavits of documents on April 11, 2018, July 6, 2018, and October 18, 2018.

[6] The Plaintiff was examined for discovery by the Defendant on November 22, 2018.

[7] The Plaintiff examined the Defendants' representative for discovery on November 30, 2018.

[8] The parties provided their responses to undertakings arising from the two discoveries on January 20 and 22, 2019.

[9] The Plaintiff delivered a supplementary affidavit of documents on January 22, 2019, and the Defendant delivered a fresh affidavit of documents on January 15, 2020.

[10] There were no further meaningful steps taken in the litigation by the Plaintiff between January 2019 and the fall of 2023. During that approximately four-year period, there were two

requests by the Plaintiff for an examination for discovery of a second representative of the Defendant. The Defendant took steps to make a second representative available to be examined. The Plaintiff neither followed up nor took any additional steps to actually examine a second representative identified by the Defendant.

[11] The parties agreed to attend a mediation session pursuant to Rule 386 of the *Federal Courts Rules* (the *Rules*) on November 27, 2023. The Plaintiff transmitted his without prejudice mediation brief to the Defendant on November 22, 2023. The Defendant was of the view that the Plaintiff's mediation brief contained new allegations and facts not earlier pled, as well as new causes of action and new additional solicitor. These changes had not been communicated to the Defendant in advance and caught him by surprise.

[12] The Plaintiff provided his proposed Amended Statement of Claim ("ASC") to the Defendant for his consideration and potential consent to the amendments he proposed. The Defendant communicated his refusal to consent to the proposed amendments and this motion was scheduled.

[13] The proposed amendments, the substance of which first appeared in the materials exchanged for mediation in November 2023, are alleged to have arisen from the Plaintiff's review of documents which were previously unknown to him. The documents that are alleged to lay at the heart of these proposed amendments were disclosed and produced to the Plaintiff through the Defendant's affidavit of documents, supplementary affidavits of documents, and fresh affidavit of documents by January 2020.

[14] The Defendant's employees who had been directly involved in the events described in the proceeding and are identified in the documents that gave rise to the proposed amendments are no longer in the Defendant's employ.

## II. The Allegations in the original Statement of Claim

[15] The Plaintiff seeks damages arising from his arrest and 39 days of detention. His original claim pleads various causes of action, including negligence, negligent investigation, false imprisonment, breaches of sections 2, 7, 9, 10 and 12 of the *Canadian Charter of Rights and Freedoms* (the *Charter*), as well as damages for past and future loss of income, special damages, aggravated and punitive damages. There was no claim in tort or otherwise for misfeasance in public office, for the tort of abuse of process, or based on bad faith.

[16] The Plaintiff was arrested by Canada Border Service Agency (CBSA) officers and the Toronto Fugitive Squad pursuant to section 55.1 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA) on the basis that the Plaintiff was inadmissible in Canada pursuant to section 36(1)(c) of the IRPA due to criminality. The criminality at issue was a kidnapping that had occurred in Haiti in October of 2012. The Plaintiff was detained, had three detention review proceedings pursuant to the IRPA, and was eventually released.

[17] The Plaintiff alleges that he was working in Canada at the time of the purported October 2012 kidnapping in Haiti and that his subsequent arrest and detention in Canada, commencing in July 2014, was unlawful and unconstitutional. He alleges that at all material times, he had

advised all parties to his detention that he was physically present in Canada at the time of the kidnapping and was not involved with it.

[18] The Statement of Claim contains additional chronologically pleaded facts pertaining to the Plaintiff's travel outside of Canada in July 2014 and the series of events that followed his return to Canada including his arrest, a September 2014 admissibility report pursuant to section 44 of the IRPA and his detention at the Maplehurst Institution from September 23, 2014, to October 31, 2014.

## III. The Plaintiff's proposed Amended Statement of Claim

[19] The Plaintiff claims that his proposed ASC does not add any new causes of action to the proceeding and seeks only to include allegations based on the information disclosed and produced through the discovery process. The proposed amendments are as follows:

> **Arbitrary Reasons for Detention**
>
> 51.1 Through the discovery process in this proceeding, the Plaintiff became aware of communications between the Defendant and the Government of Haiti, as well as internal communications between Canadian government officials at the CBSA and the RCMP, which shed light on the true reasons for the Plaintiff's arrest and detention: to carry out the Government of Haiti's informal request for the Plaintiff's return by means of the detention and removal procedure under the IRPA, thereby circumventing the extradition process under the *Extradition Act.* Such communications, which were never previously disclosed to the Plaintiff, included:
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> a. On July 29th (when the Plaintiff was returning from Jamaica), Interpol Ottawa informed the CBSA that they had "already advised [Interpol] Port-au-Prince" that Canada could not arrest the Plaintiff based on the Interpol Notice and Haitian arrest warrant, but assured Interpol Port-au-Prince that the information would be sent to the CBSA to take "any action [they can] under the immigration law."
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> b. Internal emails on July 29th indicated that the CBSA collected information from the Plaintiff when he landed at

Pearson for the purpose of assisting with Haiti's extradition efforts.

c. On October 17th, an RCMP liaison officer contacted the CBSA "to determine the status of MURAT's immigration case in Canada" because "the Haitian authorities have expressed an interest in having him returned to Haiti where he is wanted for having kidnapped two Haitian-Canadian citizens for ransom." The officer noted that he was "recently informed" the Interpol Notice was "insufficient to return individuals to certain countries, including Haiti" and "[t]hey may now be required to submit a full extradition request package."

d. The RCMP liaison officer also admitted: "We are seeking information on the status of this case and would like to identify the options open to CIC with respect to continued detention and possible deportation. If the latter is a possibility, then we would save our Haitian partners the time and expenses of preparing a formal extradition request."

e. In response, the CBSA acknowledged the unlawful nature of the RCMP's request and explained that extradition under the Extradition Act and removal under the IRPA are "two independent, parallel processes" and warned: "any discussions concerning the use of the removals process to circumvent extradition may be viewed as disguised extradition."

f. The RCMP liaison officer replied, confirming that the immigration proceedings are a stand-in for extradition proceedings: "The Haitians have not yet officially requested MURAT's extradition whilst awaiting a decision from the immigration hearing. If he is deported, this will not be necessary as I stated in my initial email."

g. The CBSA later sent an internal email cautioning officials about the language they use, stating: "Please be mindful of your discussions with the liaison officer and RCMP Interpol. There should be absolutely no discussions that speak to the circumventing of extradition by using removal."

h. On October 30th, when the CBSA told Interpol Ottawa and the RCMP liaison officer that they decided to release the Plaintiff due to the weakness of the case against him and

the cost of translating documents, their responses confirmed that Canada had previously made assurances to Haiti that they could avoid the extradition process and rely on the Plaintiff being deported through a 'disguised extradition'. Interpol Ottawa responded: "I will have to advise Port au Prince in case they want to send a Provisional Arrest Warrant for the subject and go the Extradition way." Interpol Ottawa also asked the CBSA to explain why the Plaintiff was released in "a different way than their case is weak."

i. The RCMP liaison officer also asked whether the evidence of the Plaintiff's employment could be provided to Haiti, noting: "there are some political issues at play here and if we are able to show our Haitian counterparts this evidence, it would surely go a long way in maintaining relations."

j. Finally, in April 2015 when Interpol Ottawa decided to close its file on the Plaintiff, a note to file indicated: "CBSA advised that in similar cases they tend to face court challenges alleging 'disguised extradition' and it would be very difficult to distinguish this matter given the weak evidence provided to them."

51.2 None of the above communications were disclosed to the Plaintiff at any time during his detention, contrary to the Defendant's disclosure obligations under the IRPA and the Charter. The communications demonstrate the Defendant's intent to use arrest, detention and removal powers under the IRPA to carry out a 'disguised extradition', improperly and unlawfully circumventing extradition procedures under the Extradition Act and abusing their statutory authority under the IRPA.

[20] The Plaintiffs seeks to add the following to the itemized list of negligent acts pleaded at paragraph 65 of the Statement of Claim in support of his claim in negligence and in negligent investigation:

65. […]

(f) provided false, inflammatory and defamatory information about the Plaintiff to third parties; and,

(g) improperly used the immigration process for a disguised extradition, i.e. to circumvent the extradition process by carrying out Haiti's informal extradition request through immigration proceedings that would lead to a deportation order.

[21] The Plaintiff seeks to add one sentence as underlined below to paragraph 68 of his pleading as part of his claim of false and wrongful imprisonment:

> 68. The CBSA officers falsely and wrongfully imprisoned the Plaintiff and maintained his incarceration despite lacking reasonable and probable grounds to conclude that he was the fugitive wanted by Haitian authorities. The CBSA falsely imprisoned the Plaintiff by refusing to consider whether there were any reasonable and probable grounds for the Haitian authorities to issue an arrest warrant. By imprisoning the Plaintiff pursuant to Haiti's informal request, without any evidence of wrongdoing other than the bare fact of Haiti's request, the CBSA imprisoned the Plaintiff arbitrarily and without statutory authority. This false imprisonment either commenced at the moment he was first transferred to Maplehurst on September 24, 2012, or at other times when CBSA officers were confronted with the Plaintiff's statements that he was physically in Canada during the kidnapping and refused to verify or investigate these statements. The false imprisonment continued while the Plaintiff was transferred to Lindsay and ended on his release on October 31, 2014.

[22] The Plaintiff seeks leave to amend paragraphs 79 and 80 of his pleading as underlined immediately below in connection with his allegations of the breach of his *Charter* rights:

> 79. The Plaintiff claims that he was denied of his liberty and security of the person and arbitrarily detained and imprisoned during his incarceration at Maplehurst. CBSA officers detained and imprisoned the Plaintiff on material that they failed to verify, and failed to disclose to him and/or his counsel. The IRB and CBSA were aware that the Plaintiff alleged he was physically present in Canada during the crimes and refused to investigate. The IRB and CBSA refused to release him until faced with irrefutable evidence of the Plaintiff's innocence. This was not in accordance with the principles of fundamental justice. The Defendant's wrongful non-disclosure of evidence and its denial of procedural fairness in the detention review process, as detailed above, constituted further breaches of the principles of fundamental justice, including the right to make full answer and defence.
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> 80. The Plaintiff claims that he was arbitrarily detained and imprisoned as he was imprisoned on the basis of suspect information that did not connect the Plaintiff to the crime. As later revealed in communications that were withheld from the Plaintiff, the detention was carried out pursuant to an informal request from Haiti, without any evidence of wrongdoing by the Plaintiff. The detention therefore lacked an 'immigration purpose' under the *IRPA* because the admissibility proceeding was, in fact, a disguised extradition and part of a deliberate scheme to remove the Plaintiff pursuant to Haiti's request while circumventing the more onerous procedures under the *Extradition Act*.

## IV. The Test Applicable on a Motion for Leave to Amend

[23] Although not cited by either party on this motion, the applicable rule and the legal principles engaged on this motion were thoroughly canvassed by Justice McHaffie in *GE Renewable Energy Canada Inc v Canmec Industrial Inc*., 2024 FC 187 (CanLII) (*"GEREC I"*), and again in a summarized manner in *GE Renewable Energy Canada Inc v Canmec Industrial Inc*, 2024 FC 887 (CanLII) (*"GEREC II"*), aff'd, 2024 FCA 139 (CanLII). Justice McHaffie summarized the applicable legal principles in GEREC II (for ease of simplicity) as follows:

> I. Legal principles
>
> [9] The principles on a motion to amend are not in dispute. I summarized them in my decision in GEREC I. In the interests of efficiency, I will simply repeat that discussion here.
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> [10] The general rule is that an amendment pursuant to Rule 75(1) of the *Federal Courts Rules*, SOR/98-106 should be allowed at any stage of an action for the purpose of determining the "real questions in controversy," provided that allowing the amendments (i) would not result in an injustice to other parties not capable of being compensated by an award of costs; and (ii) would serve the interests of justice: *Enercorp Sand Solutions Inc v Specialized Desanders Inc*, 2018 FCA 215 at para 19, quoting *Canderel Ltd v Canada*, 1993 CanLII 2990 (FCA) at p 10; *McCain Foods Ltd v JR Simplot Company*, 2021 FCA 4 at para 20; *Janssen Inc v Abbvie Corporation*, 2014 FCA 242 at para 9. The onus lies on the amending party to show the amendments should be allowed: *Merck & Co, Inc v Apotex Inc*, 2003 FCA 488 at paras 29, 35–36.
>
> [11] In assessing whether an amendment would serve the interests of justice, the Court may consider factors such as (i) the timeliness of the motion to amend; (ii) whether the proposed amendments would delay trial; (iii) whether the amending party's prior position has led another party to follow a course of action in the litigation that it would be difficult to alter; and (iv) whether the amendments will facilitate the Court's consideration of the substance of the dispute on its merits: *Enercorp* at paras 20–21, quoting *Continental Bank Leasing Corp v Canada*, 1993 CanLII 17065 (TCC) at p 2310; *Federal Courts Rules*, Rule 3. These factors are considered together without any single factor being determinative.

[12] An amendment must also yield a sustainable pleading, and an amendment that is liable to be struck out under Rule 221 should not be permitted: *Enercorp* at para 22; *McCain* at paras 20–22; *Teva Canada Limited v Gilead Sciences Inc*, 2016 FCA 176 at paras 28–32. Thus, where it is plain and obvious that proposed amendments do not disclose a reasonable cause of action, or the amendments represent a "radical departure" from the party's prior positions, they should not be permitted: Rule 221(1)(a),(e); *Enercorp* at paras 22–28; *McCain* at paras 20–23; *Hospira Healthcare Corporation v The Kenny Trust for Rheumatology Research*, 2020 FCA 191 at para 5, citing *Merck* at para 47; *Atlantic Container Lines AB v Cerescorp Company*, 2017 FC 465 at para 8; *Proslide Technology, Inc v Whitewater West Industries, Ltd*, 2023 FC 1591 at paras 15–16; but see *J2 Global Communications Inc v Protus IP Solutions Inc*, 2009 FCA 41 at paras 8–10. This has been described as a "threshold issue," to be addressed before turning to other questions of justice and injustice: *Teva* at para 31.

[13] Pleadings that are inadequately particularized to allow the opposing party to plead in response are also subject to being struck under Rule 221 for failure to comply with the requirement in Rule 174 that they contain "a concise statement of the material facts on which the party relies": *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 at paras 16–20; *Fox Restaurant Concepts LLC v 43 North Restaurant Group Inc*, 2022 FC 1149 at paras 4, 20–32. Amendments may similarly be refused on this ground, whether considered as a threshold issue or as a matter of the interests of justice: *McCain* at paras 22–23; *Enercorp* at paras 34–37. However, where appropriate, a lack of particulars in a proposed amendment may be addressed by granting leave to reapply or by imposing an obligation of particulars as a condition of the amendment: *Enercorp* at paras 26–30, 34–38; *Atlantic* at para 15.

[14] I add one further note to the foregoing summary. Where a party seeks to amend a pleading after discovery and seeks to rely on discovery evidence to justify its proposed amendment, it is open to the Court to review and assess that evidence in determining whether, taking a realistic view in the context of the law and the litigation process, the proposed amendment discloses a reasonable cause of action or is "doomed to fail": *Teva* at paras 27–32, 38–42. In this regard, the Federal Court of Appeal has noted that an allegation made without any evidentiary foundation is an abuse of process, and that an unsupported allegation cannot be sustained simply in the hope that sufficient facts will be obtained on discovery that will support the allegation: *AstraZeneca Canada Inc v Novopharm* Limited, 2010 FCA 112 at paras 4–5.

> [15] In other words, while the general rule is that the factual allegations in a proposed amendment are to be assumed to be true, it is relevant to both the threshold issue and, at the very least, the interests of justice whether a proposed amendment is supported or contradicted by the available discovery evidence. At the same time, a motion to amend is not the occasion to weigh competing evidence where the amending party has established credible evidentiary support for its amendments: *Atlantic* at para 16. As GEREC underscores, a motion to amend is not a motion for summary judgment or summary trial.

[24] The "reasonable prospect of success" test described in *McCain Foods Limited v J.R. Simplot Company*, 2021 FCA 4 at para 20 (*McCain*) as a threshold issue for allowing an amendment is very closely related to, if not effectively the same as, the "plain and obvious that there is no reasonable cause of action" test applied on motions to strike pursuant to Rule 221 of the *Rules*. The facts pleaded in the amendment are assumed to be true for the purposes of analysis unless they are manifestly incapable of being proven. The amending language to be added to the pleading ought to be read generously and the Court should accommodate any deficiencies in drafting (*R. v Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 at para 17 to 25; *Atlantic Lottery Corp. Inc. v Babstock*, 2020 SCC 19 (CanLII), [2020] 2 SCR 420 at paras 87 to 90). The use of the word "reasonable" in the applicable test does not require the Court to assess the likelihood of success (*Wenham v Canada (Attorney General)*, 2018 FCA 199 (CanLII) at paras 29 to 33).

[25] In deciding whether an amendment has a reasonable prospect of success, its chances of success must be examined in the context of the law and the litigation process, and a realistic view must be taken. It is often helpful for the Court to ask itself whether the amendment, if it were

already part of the proposed pleadings, would be a plea capable of being struck out. If yes, the amendment should not be allowed (*McCain* at paras 21 and 22).

## V. The Evidence on this Motion

[26] The Plaintiff has filed a copy of the pleadings as well as the proposed ASC along with an affidavit sworn by one the Plaintiff's lawyer's legal assistants in support of his motion.

[27] The affidavit outlines an uncontentious chronology of this proceeding to this date. The chronology is not disputed by the Defendant.

[28] The affidavit also introduces a number of documents that were disclosed and produced by the Defendant through his affidavit of documents and supplementary affidavits of documents between 2017 and 2020. The Defendant does not contest the documentary exhibits introduced by the Plaintiff.

[29] Paragraphs 18 and 19 of the tendered affidavit are curious in that the deponent deposes that "the following documents are examples of documents produced by the defendant which the plaintiff did not previously have access to or knowledge of". The basis upon which the deponent can make this affirmation is not reflected in the affidavit itself. The blanket catch-all statement of personal knowledge of the matters deposed to and the deponent's belief in the truth of the information deposed as received from others included at paragraph 1 of the affidavit are not sufficient to explain how the deponent is any position to depose as to the Plaintiff's past access to documents and knowledge of their existence.

[30] The Court cannot accept the deponent's evidence in this regard. The Plaintiff's knowledge is known to the Plaintiff and cannot be held to be known by the deponent unless there is some evidence that the Plaintiff informed the deponent of his knowledge or lack of knowledge. There is no such evidence here. This determination is nevertheless inconsequential on this motion.

[31] The Defendant filed an affidavit in his responding record. That affidavit also sets out a chronology of events leading up to this motion. The Defendant's chronology is consistent with the Plaintiff's chronology of events. The Defendant's evidence is that the documents produced by the Plaintiff on this motion, which are argued as being the triggering event for this motion were disclosed and produced to Plaintiff on January 17, 2017, with the exception of three documents (AGC_0522, AGC_0307 and AGC_0050) that were disclosed on January 15, 2020.

[32] The key evidentiary points to be understood from the affidavits filed are that:

a) this proceeding was commenced on October 17, 2016;

b) documentary discovery was completed by January 15, 2020;

c) the litigation remained largely dormant between January 15, 2020, and July 2023, save for the 15 or so extensions of time sought by the Plaintiff;

d) at the request of the parties, a mediation session had been scheduled for November 27, 2023;

e) the Plaintiff retained litigation co-counsel at some time between July 13, 2023, and November 27, 2023; and,

e) this motion arose as a result of the content of the Plaintiff's mediation brief that took the Defendant by surprise.

[33] The Court record reflects that the Plaintiff's co-counsel filed a Notice of Appointment of Solicitors on November 22, 2023, and served it upon the Defendant along with the Plaintiff's Mediation Brief on November 22, 2023, five days before the mediation that had been scheduled in this matter.

## VI. ARGUMENTS

### A) The Plaintiff's Argument

[34] The Plaintiff relies on some of the jurisprudence referred to in GEREC II and generally reiterates the applicable governing principles on this motion. Where the Plaintiff departs from the principles helpfully assembled and considered in GEREC II is with respect to whether a proposed amendment discloses a reasonable chance of success. The Plaintiff's position is that the Court may, rather than must, consider whether proposed amendments disclose a reasonable chance of success. If the proposed amendment would not survive a motion to strike, then the amendment should not be allowed (*Astrazeneca Canada Inc v. Apotex Inc*, 2016 FC 865 at para 21 ("Astrazeneca").

[35] The Plaintiff argues that in the absence of non-compensable prejudice, the fact that proposed amendments may effect a "radical departure" in a proceeding is not a discrete ground for refusing leave to make the proposed amendments, provided that they reflect a pleading with a reasonable chance of success.

[36] The Plaintiff argues that his proposed amendments do not add any new causes of action or legal grounds in support of the relief sought. The prayer for relief is unchanged. Rather, he argues, the amendments add material facts and particulars in support of the already pleaded

causes of action. In this way, the amendments are similar to those considered by the Federal Court in *Astrazeneca*, as "what is sought is an amendment to an existing plea expanding the scope of the evidence available to prove the plea" rather than the addition of a new legal ground or cause of action.

[37] The material facts and particulars to be added through the amendment, he argues, relate to the allegations of false and wrongful imprisonment, the breach of his section 7 *Charter* rights, and the breach of his section 9 *Charter* rights.

[38] He argues that the material facts and particulars arising from the Defendant's productions support the existing causes of action that have been pleaded and the broader question of the lawfulness or arbitrariness of the Plaintiff's detention. In the Plaintiff's view, these facts suggest that the Defendant was pursuing an ulterior and improper purpose inconsistent with the IRPA, that is, to use the admissibility procedure under the IRPA to carry out a disguised extradition, circumventing the more onerous procedures under the *Extradition Act*.

[39] He argues that the allegation of disguised extradition sought to be added is not a substantively new claim but a subset of the existing pleading that the detention was arbitrary and unlawful. The original Statement of Claim had pleaded that the detention was unlawful because of, among others, the absence of any evidence to support the inadmissibility charge.

[40] Finally, the Plaintiff argues that the Defendant will not suffer any prejudice that is not compensable by an award of costs if leave is granted for him to proceed with the proposed

amendments. He also argues that his motion is timely, that granting the amendments will not delay this proceeding, that no unfairness results to the Defendant by allowing them, and that the proposed amendments will facilitate the Court's consideration of the true substance of the dispute between the parties. In short, granting leave for the Plaintiff to amend his pleading in the manner proposed would be consistent with and in the interests of justice.

### B) The Defendant's Arguments

[41] The Defendant argues that the Plaintiff's proposed amendments are in reality new claims of disguised extradition, breaches of procedural fairness and defamation that should have been known by the Plaintiff long ago, at least at the time that the Defendant served its affidavits of documents and supplementary affidavit of documents. The Defendant argues that the proposed amendments are:

a) barred by the applicable limitation period;

b) have no reasonable prospect of success;

c) are presumed to cause and would cause actual prejudice to the Defendant; and,

d) would not be in the interests of justice.

#### i) Disguised Extradition

[42] The Defendant argues that the Plaintiff's arrest and detention for the purpose of an admissibility hearing did not amount to a "disguised extradition" in fact or law. The proceeding was instituted to pursue a valid immigration objective, he argues, and jurisprudential principles applicable to an argument of "disguised extradition" reflect that there must be clear evidence that the Minister did not genuinely consider the public interest to remove the person that is the

subject of the immigration proceedings. The Defendant argues that the e-mail communications relied upon by the Plaintiff do not preclude, reduce or eliminate the valid immigration purpose the Defendant had to pursue the Plaintiff in the form of an admissibility hearing.

[43] The Defendant argues that in order to establish that the immigration proceedings are improper, the Plaintiff will be required to demonstrate that the Minister did not genuinely consider it in the public interest to pursue an admissibility proceeding, i.e., that he failed to pursue the lawful objectives of the IRPA. This is a heavy onus, and it must be presumed that the Minister acted reasonably until the contrary is shown (*Halm v Canada (Minister of Employment and Immigration)*, [1996] 1 FC 547; *Dunsmuir v New Brunswick*, [2008] 1 S.C.R. 190 at para. 146).

[44] The scheme and content of the IRPA, and more particularly sections 36, 44 and 57 thereof, prescribe the process by which persons may be inadmissible to Canada on the grounds of serious criminality or criminality or, for engaging in certain criminal acts either within or outside of Canada. The Defendant argues that the weight of the disclosed documentary evidence reflects that the Plaintiff was arrested and detained by lawful authority and that the actions of Canadian officials were consistent with the regular process and were informed by their good faith that there were reasonable grounds to believe that the Plaintiff may be inadmissible to Canada.

[45] The Defendant argues that the evidence clearly demonstrates legitimate immigration concerns regarding the Plaintiff. He also argues that there is no evidence to support the proposition that immigration proceedings were instituted for an improper purpose in this case.

[46] The Defendant argues that the Plaintiff's argument of alleged disguised extradition was open to the Plaintiff to advance at an earlier time. The Plaintiff was aware from the beginning that his arrest and detention was based on a warrant issued by Haiti and there is no reason he could not have advanced the arguments he now attempts to include in his proposed ASC, not only at the time of filing his Statement of Claim but also before the Immigration Division of the Immigration and Refugee Board.

**ii) False, inflammatory and defamatory information about the Plaintiff to third parties**

[47] The Defendant argues that the proposed amendments as to false, inflammatory or defamatory information transmission does not particularize a viable claim, remains deficient and is not curable by further amendment.

[48] He argues that the Plaintiff's original pleading alleges humiliation and a tarnished reputation. There was no allegation made that the Defendant transmitted harmful information to third parties as is pleaded in the proposed ASC. The Defendant argues that the Plaintiff is now seeking leave to plead the tort of defamation, a new cause of action, without meeting any of the requirement for such a claim to be pleaded and without pleading the essential elements of an arguable claim.

[49] The Defendant argues that the tort of defamation requires the Plaintiff to allege that the Defendant made a statement: (a) which is defamatory by its plain meaning or by innuendo; (b) that refers to the plaintiff; and (c) was communicated to a third party (*Grant v Torstar Corp*., 2009 SCC 61, at para. 28), along with particulars of the alleged defamation, as well as when,

where, how, by whom and to whom it was made. The Defendant argues that none of these are present in the proposed amended Statement of Claim with the effect that the proposed amendment has no reasonable chance of success. In addition, the Plaintiff has not served a notice of libel pursuant to section 5(1) of the *Libel and Slander Act* which is an absolute bar to the defamation claim pursuant to section 6 of the same *Act*.

**iii) Procedural fairness through non-disclosure in the detention review process that further breached the principles of fundamental justice, including the right to make full answer and defence.**

[50] The Defendant argues that the Plaintiff's allegation of non-disclosure relates exclusively to his allegation of disguised extradition. As his proposed amendments on disguised extradition must fail, so should his proposed amendment on breach of procedural fairness.

[51] The Plaintiff was issued a report pursuant to section 44 of the IRPA in which it was alleged that there are serious grounds to believe that he is a person who is inadmissible on serious criminality pursuant to paragraph 36(1)(c) of the IRPA. The report informed the Plaintiff that he was wanted on an outstanding warrant issued by Port-au-Prince Haiti on or about November 14, 2012, for charges of kidnapping and forcible confinement.

[52] The Defendant argues that the Plaintiff was provided the Notice of Arrest at the first detention review, pursuant to section 55 of the IRPA. The Notice provided in detail the charges that he was facing in Haiti, made note of his criminal record in the United States and his failure to comply with CBSA directions in the past. The Plaintiff was provided with the Haitian arrest

warrant as soon as it became available. The warrant noted the information on the charges, the elements of the offence and information identifying the Plaintiff as a suspect.

[53] The Defendant's position is that the Plaintiff knew the case to meet as it relates to his admissibility to Canada.

#### iv) The Interests of Justice

[54] The Defendant argues that the interests of justice do not suggest that the proposed amendments should be permitted. He also argues that the Plaintiff proposes to expand the scope of the action and shift the focus of the litigation by alleging disguised extradition, breach of procedural fairness and defamation. Such amendments could, if allowed, delay the trial of this matter. The Defendant's more particularized arguments on the interests of justice will be considered later in these reasons.

## VII. Analysis

### A) Do the proposed amendments have a reasonable chance of success?

[55] Determining whether the proposed amendments have a reasonable chance of success requires an assessment of: i) whether there is a new cause of action pleaded through an amendment and, if so, does it have a reasonable chance of success, or ii) if there is no new cause of action pleaded, whether the proposed amendment if permitted gives rise to a pleading that has a reasonable chance of success. In this assessment, the Court is focussed on the proposed amendments and their effect and not on the underlying pleading as it is drafted without the proposed amendments.

**i) Disguised Extradition**

[56] The proposed amendments are focussed on the new allegations that the Defendant engaged in the disguised extradition of the Plaintiff through the use of proceedings pursuant to the IRPA. These amendments are sought to be asserted in an action for damages arising from the Plaintiff's arrest and 39-day detention in Canada prior to his release. The Plaintiff argues that his allegations of disguised extradition are not a new cause of action while the Defendant argues that they set out a new cause of action being asserted beyond the expiry of the limitation period applicable to it.

[57] A summary of the source of the law of disguised extradition was set out *Kindler v. MacDonald*, 1985 CanLII 5563 (FC), [1985] 1 FC 676, at page 683 to 686, as follows:

> The law prevailing in cases in which it is alleged that deportation proceedings are being used as a mean of achieving a disguised extradition was admirably set out by Lord Denning M.R., in *Regina v. Governor of Brixton Prison, Ex parte Soblen*, [1963] 2 Q.B. 243 (C.A.). Lord Denning began by noting that "the law of extradition is one thing; the law of deportation is another" (page 299). He then stated (at page 300):
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> > It is unlawful, therefore, for the Crown to surrender a fugitive criminal to a foreign country unless it is warranted by an extradition treaty with that country.
>
> However, Lord Denning also noted at pages 300-301 that the law of deportation formed "another side to the picture" and, that, by international law:
>
> > ... any country is entitled to expel an alien if his presence is for any reason obnoxious to it ....
>
> This power to deport would not be taken away by the fact that the deportee was a fugitive from justice in his own country or even by the fact that his own country wanted him back and made a request for him (*ibid.*, pages 302-303).

The decision as to which of these principles, deportation or extradition, was applicable was seen by Lord Denning (at page 302) as depending

> ... on the purpose with which the act is done. If it was done for an authorised purpose, it was lawful. If it was done professedly for an authorised purpose, but in fact for a different purpose with an ulterior object, it was unlawful.

He continued (at page 302):

> If, therefore, the purpose of the Home Secretary in this case was to surrender the applicant as a fugitive criminal to the United States of America because they had asked for him, then it would be unlawful. But if the Home Secretary's purpose was to deport him to his own country because the Home Secretary considered his presence here to be not conducive to the public good, then the Home Secretary's action is lawful. It is open to these courts to inquire whether the purpose of the Home Secretary was a lawful or an unlawful purpose. Was there a misuse of the power or not? The courts can always go behind the face of the deportation order in order to see whether the powers entrusted by Parliament have been exercised lawfully or no. That follows from *Reg. v. Board of Control, Ex parte Rutty* ([1956] 2 Q.B. 109).

[…]

The issue of deportation as "disguised extradition" came before the Supreme Court of Canada in *Moore v. Minister of Manpower and Immigration*, [1968] S.C.R. 839; 69 D.L.R. (2d) 273. In that case Moore, who had previously been deported from Canada because he had a serious criminal record in the United States, entered Canada from Panama by air. He carried a Canadian passport indicating that he had been born in Canada and was a Canadian citizen whereas he was born in the United States and was a citizen of that country. Two days after his entry he was waiting to board an aircraft to return to Panama when he was arrested. An inquiry was ordered under the Immi-gration Act and Moore was ordered deported. Although the order did not specify the country to which he was to be deported, the Court agreed to assume that his destination was to be the United States. Moore argued that he was the subject of an exercise of the power to deport for the purpose of extradition and that this constituted an abuse which should be restrained by the Court.

> Moore was unsuccessful. In his reasons, Cartwright C.J., stated that he agreed with the view expressed by Stephenson J. in *Soblen*, supra, that the onus of proving that a deportation order, valid on its face, is in fact a sham, or not made *bona fide*, is on the party who alleges it, "however difficult it may be for him to discharge that onus" (at page 843 S.C.R.; page 275 D.L.R.). He then continued (at page 844 SCR, pages 275-276 DLR):
>
> > To decide that the deportation order, valid on its face, was in fact a sham, or not made bona fide, rested with the party making such an allegation "however difficult it may be to discharge that onus".

[58] The typical case of disguised extradition was described by Justice Campbell in *Bembenek v. Canada (Minister of Employment and* Immigration), 1991 CanLII 11763 (ON SC), (1991) 69 C.C.C. (3d) 34, at page 49 (*Bembenek*) as follows:

> The real mischief of disguised extradition is the case where extradition fails because the evidence of foreign crime is too weak for extradition, and deportation is sought to achieve indirectly what could not be achieved directly through extradition: see, generally, G.V. LaForest, Q.C.,, *Extradition to and From Canada*, 2nd ed. (1977) pp. 37-9. Disguised extradition is typically established when the evidence is not strong enough for extradition and the authorities of both countries collude together through deportation to achieve indirectly what they could not achieve through extradition. That is not this case. […]
>
> Although the applicant has not established the typical case of disguised extradition, it is asserted that the evidence shows that the immigration officials did bring immigration proceedings as a disguised form of extradition.
>
> This is an allegation of bad faith. The applicant bears a heavy duty onus to show bad faith. The applicant must go so far as to show that the immigration proceedings are a sham (citing *Moore v. Minister of Manpower and Immigration*, [1968] S.C.R. 839).
>
> […]
>
> Before addressing the allegations of bad faith and collateral purpose, it is important to examine the Minister's duties and responsibilities under the deportation provisions of the *Immigration Act.*

[59] In *Shepherd v. Canada (Minister of Employment and Immigration)* (Ont. C.A.), 1989 CanLII 4359 (ON CA) (*Shepherd*), the Ontario Court of Appeal considered an allegation of disguised extradition in an appeal from an order dismissing an application for a writ of *habeas corpus ad subjiciendum* with *certiorari* in aid to review a deportation order. The Ontario Court of Appeal explained the notion of disguised extradition applicable in the case before it as follows:

> The theme underlying many of the arguments raised on behalf of Shepherd was that this was really what the cases have referred to as a "disguised extradition." That is, that for reasons unknown to Shepherd, Canadian authorities decided to take the initiative and to bring deportation proceedings against Shepherd, not for the purpose of ridding the country of him, but for the purpose of turning him over to American or Tennessee authorities. By taking the initiative, it is argued, Canada avoids having to consider art. 6 of the extradition treaty. Looking at it from Shepherd's perspective, he is deprived of the possible benefit of art. 6.
>
> It was argued on behalf of Shepherd that this use of deportation procedures to remove an individual from Canada to a country where he potentially faces a death penalty contravenes s. 7 of the *Charter*, having regard to the availability of extradition and the possible protection from capital punishment available to an individual removed by extradition.

[60] The Ontario Court of Appeal considered the Federal Court Trial Division and the Federal Court of Appeal decision reversing the Trial Division decision in *Re Kindler and Minister of Justice*, 1987 CanLII 9004 (FC); *MacDonald v. Kindler*, 1987 CanLII 8968 (FCA) and summarized the governing principles of an allegation of disguised extradition as follows:

> The whole question as to what constitutes a disguised extradition was examined in the reasons of Rouleau J. in *Kindler* at the trial level, cited as *Kindler v. Minister of Employment and Immigration*, 1985 CanLII 5563 (FC), [1985] 1 F.C. 676, 47 C.R. (3d) 225, and in the reasons of the Federal Court of Appeal in that case, referred to earlier.

> At the trial level, Rouleau J. quashed the Deputy Minister's order to hold an inquiry under s. 27(3) of the Act, the same section under which Shepherd's inquiry was held. Rouleau J. found the inquiry process to be contrary to s.7 of the *Charter*. The Federal Court of Appeal set aside that order, holding that the inquiry process did not violate s.7 of the *Charter.*
>
> From the reasons of the two courts, the following principles emerge:
>
> 1. If the purpose of the exercise is to deport the person because his presence is not conducive to the public good, that is a legitimate exercise of the power of deportation.
>
> 2. If the purpose is to surrender the person as a fugitive criminal to a state because it asked for him, that is not a legitimate exercise of the power of deportation.
>
> 3. It is open to the courts to inquire whether the purpose of the government was lawful or otherwise.
>
> 4. The onus is on the party alleging an unlawful exercise of power. It is a heavy onus.
>
> 5. To succeed, it would be necessary to hold that the Minister did not genuinely consider it in the public interest to expel the person in question.
>
> 6. The adoption of the Charter as not lessened the onus.

[61] *Shepherd* was cited and considered by the Ontario Superior Court of Justice's decision in *United States of America v. Kissel*, 2006 CanLII 47314 (*Kissel*), a decision relied upon by the Plaintiff. The proceedings in *Kissel* arose from an application to stay extradition proceedings under sections 7 and 24(1) of the *Charter*. Paragraphs 136 to 162 of the decision set out a fulsome discussion of disguised extradition. In the end, the Court in *Kissel* denied the application to stay the extradition on the basis of disguised extradition and other grounds of alleged abuse of process. Disguised extradition was not considered in the context of a claim for damages arising from alleged unlawful detention through immigration processes.

[62] The Plaintiff also refers the Court to the Ontario Superior Court of Justice decision in *United States of America v. Tollman*, 2006 CanLII 31731 (ON SC) (*Tollman*) and the discussion of disguised extradition and of the common law doctrine of abuse of process in connection with *Charter* claims. Similarly to the situation in *Kissel*, the Ontario Superior Court of Justice in *Tollman* was concerned with an application to stay an extradition proceeding on the basis of abuse of process. Neither disguised extradition nor the common law doctrine of abuse of process were considered in the context of a claim for damages arising from an alleged unlawful detention through immigration processes pursuant to the IRPA.

[63] The Defendant's authorities on the issue of disguised extradition engage with the same concepts relied upon by the Plaintiff and highlight that Canadian authorities can legitimately engage with foreign authorities, as the case may be, and that such engagement and cooperation would not necessarily provide the basis for an argument of disguised extradition (*United States of America v. Quintin*, 2000 CanLII 22657 (ON SC) at paras 47-48; *Kissel* at paras 142 to 144 and 151). The Court need not consider these authorities in any specific detail because these concepts and these authorities are of little assistance to either party in connection with this motion and the issues it raises.

[64] The lynchpin of a disguised extradition argument is that there has been an abuse of process because the Canadian authority did not have legitimate grounds in seeking to deport the person sought to be deported (*Kissel* at para 145). In this case, the Plaintiff alleges at paragraph 50 of his Statement of Claim that he was unconditionally released from custody in Canada on October 31, 2014. He does not allege that he was deported nor that he was about to be deported.

Rather, he alleges that he suffered losses as a result of his detention and seeks damages to recover his losses through claims in negligence, negligent investigation, false or wrongful imprisonment and allegations of *Charter* breaches.

[65] Disguised extradition is a powerful and meaningful argument in the appropriate context. It is not, however, a discrete cause of action for the recovery of damages in connection with the commission of torts or *Charter* breaches that have been claimed by the Plaintiff in this case.

[66] *Kissel* and *Bembenek* expose that the core of an allegation of disguised extradition is the demonstration of an abuse of process and bad faith on the part of the Canadian authority. They also suggest that another key element would be collusion between state authorities. These elements, if considered in the context of an action for the recovery of damages rather than in a proceeding to stay a deportation order, share the common elements of an intentional bad faith unlawful exercise of a statutory or other power by the allegedly responsible party.

[67] The recovery of damages on the basis of these elements guides one to intentional torts, as the law of negligence does not require the establishment of intention on the part of the tortfeasor for liability to be established.

[68] Abuse of process is a separately actionable intentional tort that may give rise to the recovery of damages. Justice Brown of the Superior Court of Justice describes the tort in *Magno et al v. Lariviere et al*, 2014 ONSC 705 at para 24 as follows:

> [24] Four elements must be present to establish the tort of abuse of process, as follows: (1) the plaintiff is or was the subject of a

> lawsuit initiated by the defendant; (2) the defendant's predominant purpose in initiating the lawsuit was to further some improper purpose collateral to or outside the ambit of the legal process; (3) the defendant performed a definite act or threat in furtherance of that improper purpose; and (4) the plaintiff was caused to suffer some special damages or loss unique to him or her. *Metropolitan Separate School Board v. Taylor* (1994), 21 C.C.L.T. (2d) 316 (Ont. Ct. (Gen. Div)) ["*Taylor*"].

[69] Abuse of office by the exercise of a statutory power may also form the basis of recovery in tort through a claim of misfeasance in public office (*Odhavji Estate v Woodhouse*, 2003 SCC 69 at para 22 to 32 (*Odhavji*). The constituent elements of this tort are that: 1) the Defendant must be a public official or an official that acts under statutory authority; 2) the public official must have engaged in wrongful conduct in this or her capacity as a public officer; and 3) that their wrongdoing was intentional.

[70] I note that the Applicant did not assert and does not propose to assert any claim in abuse process or for misfeasance in public office in his Statement of Claim or ASC.

[71] Claims in negligence and in negligent investigation turn on the existence of a duty of care being owed to the Plaintiff, the negligent breach thereof, that the Plaintiff sustained damages, and that the damages sustained by the Plaintiff were in fact and law caused by the Defendant (*Clements v Clements*, 2012 SCC 32 at paras 6 to 8; *1688782 Ontario Inc. v Maple Leaf Foods Inc*., 2020 SCC 3 at para 18 (*Maple Leaf Foods*); *Odhavji* at para 44; *Hill v Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 at para 96).

[72] The recovery of damages on the basis of false or wrongful imprisonment also does not require proof of the alleged tortfeasor's intention for the claim to be made out save for the demonstration that the imprisonment or detention was intentional (Lewis Klar and Cameron Jefferies, *Tort Law*, 7th ed (Toronto, Thomson Reuters, 2023) at 68 to 77). Beyond that key feature, the alleged tortfeasor's intention becomes irrelevant to determining whether false or wrongful imprisonment is established at trial.

[73] I now consider the proposed amendments in light of the causes of action asserted by the Plaintiff in his Statement of Claim.

**ii) Proposed Amended Paragraphs 51.1 and 51.2**

[74] Proposed amended paragraphs 51.1 and 51.2 fall beneath the proposed amended title of "Arbitrary Reasons for Detention". The Court observes that the Plaintiff had previously alleged that his detention was arbitrary at paragraphs 79 and 80 of his original Statement of Claim in connection with the *Charter* claims he has advanced.

[75] The proposed paragraph 51.1 includes subparagraphs (a) to (j) that generally allege the content of internal communications between the Defendant, the Government of Haiti, CBSA personnel and the RCMP as learned by the Plaintiff through the document discovery disclosure and production process between 2017 and 2020.

[76] Subparagraph 51.1(a) contains allegations that reproduce a portion of the Defendant's production AGC 0288 and as such is an allegation of material fact.

[77] Subparagraph 51.1(b) contains allegations of material facts with respect to the more general allegation of the Defendant's intention in connection with the Plaintiff's detention pleaded at paragraph 51.1 based on the Defendant's productions bearing numbers AGC 0288, AGC 0307, and AGC 0295.

[78] Subparagraphs 51.1(c), (d), (e), (f) and (g) also contain allegations of material facts with respect to the communications between an RCMP liaison officer and the CBSA based on the Defendant's productions bearing number AGC 609, in support of the more general allegation of the Defendant's intention in connection with the Plaintiff's detention pleaded at paragraph 51.1.

[79] Subparagraph 51.1(h) contains allegations of material facts with respect to the communications between the CBSA, Interpol Ottawa and the RCMP based on the Defendant's productions bearing number AGC 624 in support of the more general allegation of the Defendant's intention in connection with the Plaintiff's detention pleaded at paragraph 51.1

[80] Subparagraph 51.1(i) contains specific allegations of material facts that are pleaded in support of the more general allegation of the Defendant's intention in connection with the Plaintiff's detention pleaded at paragraph 51.1 based on the Defendant's productions bearing number AGC 0621.

[81] Subparagraph 51.1(j) contains specific allegations of material facts that are pleaded in support of the more general allegation of the Defendant's intention in connection with the

Plaintiff's detention pleaded at paragraph 51.1 based on the Defendant's productions bearing number AGC 0050.

[82] The proposed amendment, by adding paragraph 51.2 to the pleading, summarizes the allegations of material fact pleaded at paragraphs 51.1(a) to (j) and pleads the material fact that these communications had not been disclosed to the Plaintiff while he was detained contrary to the alleged disclosure obligations incumbent upon the Defendant pursuant to the IRPA and the *Charter*.

[83] The second sentence of the proposed paragraph 51.2 completes the first sentence in the paragraph and is quite directly a statement of argument based on the Plaintiff's assessment of the meaning, import and effect of the material facts pleaded at paragraphs 51.1(a) to (j), particularizing the Defendant's state of mind during the time of detention.

[84] I find that the particulars pleaded in the proposed paragraphs 51.1 and 51.2 are in the nature of particulars required by Rule 181(1) of the *Rules* in a pleading in which a defendant's intention and state of mind is alleged and at issue. Taken together, these allegations appear intended to form part of the factual matrix that supports the Plaintiff's previously pleaded causes of action because, as the Plaintiff argues, he is not raising a new cause of action through his proposed amended pleadings. The question is whether they in fact add to the factual matrix or stand alone as allegations irrelevant to existing and pleaded causes of action contained in the Statement of Claim.

[85] The proposed amendments argue that the Defendant's "true reasons for the Plaintiff's arrest and detention was to carry out the Government of Haiti's informal request for the Plaintiff's return by means of the detention and removal procedure under the *IRPA* […]". As discussed above, a tortfeasor's intention is not an element to be established in connection with causes of action in negligence, negligent investigation and false or wrongful imprisonment. These intended particulars as to intention are therefore irrelevant to the causes of action pleaded by the Plaintiff.

[86] The proposed amendments at paragraphs 51.1 and 51.2 of the proposed ASC have no relevance to the causes of action pleaded based on the breach of the Plaintiff's section 12 *Charter* rights, or to his pleaded causes of action based on the breach of his section 2(a), 7, 9, 10 and 12 *Charter* rights as neither of these require the establishment of the Defendant or of the CBSA officers' intent. Those portions of the proposed amendments that allege the breach of any disclosure obligations reiterate and repeat the disclosure failures pleaded at paragraphs 44, 48, 66 and 79 of the existing Statement of Claim. They are needlessly repetitive.

[87] Finally, the Plaintiff's claims for aggravated damages and punitive damages are based "all the causes of above" and make no reference to the Defendant's intention, state of mind or bad faith.

[88] None of the causes of action or claims advanced by the Plaintiff require that he establish the intent or state of mind of the Defendant or of his officials. It follows that the proposed

amendments at paragraphs 51.1 and 51.2 detailing allegations of intention or state of mind have no relevance to the causes of action advanced or to the damages claimed.

[89] Based on the analysis above, I must reject the Plaintiff's submission that the proposed amendments at paragraphs 51.1 and 51.2 add material facts and particulars in support of the causes of action already pleaded. The proposed amendments are not the type of amendment contemplated by the Court in *Aztrazeneca* because they are not amendments to an existing plea to expand the scope of evidence to prove the plea. Rather, they are amendments to include elements that are irrelevant to the pleas and to the causes of action advanced.

[90] Considering that the Plaintiff repeats that these allegations and the allegations of disguised extradition are not being pleaded as a new or additional cause of action, the proposed amendments are free floating, untethered allegations unconnected and irrelevant to causes of action that have been asserted. They cannot be considered to have any chance of success or to yield a sustainable pleading as they are not relevant to any pleaded cause of action or to the potential damages to be awarded should the pleaded claims be made out. As irrelevant allegations, the proposed amendments are liable to be struck pursuant to Rule 221(c) or (f) of the *Rules* and should not be permitted (*GEREC II* at para 12).

**iii) Proposed Amended Paragraphs 65(f) and (g)**

[91] The proposed paragraph 65(f) and (g) are included in the Plaintiff's pleased causes of action in negligence and negligent investigation. Both causes of action are based on the existence of a duty of case owed to the Plaintiff by the Defendant, the breach of that duty of care by the

alleged tortfeasors and the demonstration that the breach caused the Plaintiff to suffer damages in fact and in law (*Maple Leaf Foods* and *Odhavji Estate, supra*).

[92] The amendments are proposed to be added to paragraph 65 of the Statement of Claim as additional *indicia* of the CBSA officers' negligence and negligent investigation. The key allegation made by the Plaintiff, at paragraph 65 of his original pleading, is that these instances of negligent conduct would have occurred after the initial investigation and directly establish the Defendant's failure to give due consideration to the Plaintiff's explanation that he could not be the fugitive at issue in the various communications received by the Defendant or his officials.

[93] Paragraph 65(f) is an allegation that the CBSA officers "provided false, inflammatory and defamatory information to third parties" in connection with their negligent investigation. As with the allegations contained in proposed paragraph 51.1 and 51.2, the Plaintiff argues that this allegation does not constitute a new cause of action but is being proposed to support the pleas of negligence and negligent investigation.

[94] The allegations of false statements and the provision of defamatory information need not necessarily be advanced by a separate and distinct plea in defamation or as a separate cause of action to be sustainable. In *Young v Bella*, 2006 SCC 3, at para 56, the Supreme Court of Canada held that "[t]he possibility of suing in defamation does not negate the availability of a cause of action in negligence where the necessary elements are made out. Freedom of expression and the policies underlying qualified privilege can be taken into account in determining the appropriate standard of care in negligence". This is particularly the case where damages claimed are sought

to cover more than just harm to the Plaintiff's reputation, as is the case here (*Spring v Guardian Assurance plc*, [1994] 3 All E.R. 129 (H.L.)

[95] As the Supreme Court of Canada notes, however, the necessary elements of a claim in defamation or in respect of the provision false information need to be made out. Of necessity, they would also have to be pleaded in accordance with Rules 174 and 181 of the *Rules*, lest they remain as bald statements or conclusions that are not allegations of fact that are not to be taken as true for the purposes of a claim sustainability analysis (*Empire Company Limited v Canada (Attorney General),* 2024 FC 810 at para 22 and the jurisprudence cited therein).

[96] With respect to defamation, as noted by the Defendant, the elements to be pleaded must include the alleged defamatory statement, and particulars as to when, where, how, by and to whom it was made. These requisite elements are not pleaded by the Plaintiff in his proposed ASC or otherwise. Given that the necessary elements and particulars required to support the allegation, even without being a stand alone cause of action, are not pleaded and that the proposed amendment is bald, the proposed amendment does not have a reasonable chance of success as an additional ground of negligence.

[97] The proposed amended paragraph 65(g) sets out the allegation that the CBSA officials involved "improperly used the immigration process for a disguised extradition, i.e, to circumvent the extradition process by carrying out Haiti's informal extradition request through immigration proceedings that would lead to a deportation order". The Plaintiff argues that this proposed

amendment supports the pleaded causes of action in negligence and negligent investigation and the existing pleading that the detention was arbitrary and unlawful.

[98] I disagree with the Plaintiff based on the analysis carried out above and for the reasons set out above in connection with the proposed amendments at paragraph 51.1 and 51.2. The proposed amendment at paragraph 65(g) is irrelevant to the causes of action advanced, is liable to be struck pursuant to Rule 221(c) or (f), and therefore has no reasonable chance of success.

**iv) Proposed Amended Paragraph 68**

[99] Paragraph 68 sets out the crux of the Plaintiff's claim in false and wrongful imprisonment. The proposed amendment seeks to add that, "[b]y imprisoning the Plaintiff pursuant to Haiti's informal request, without any evidence of wrongdoing other than the bare fact of Haiti's request, the CBSA imprisoned the Plaintiff arbitrarily and without statutory authority". The allegation pleads material facts in opposition to the recognized defence of statutory authority to a claim of false imprisonment.

[100] I agree with the Plaintiff that this proposed amendment pleads particulars in connection with a previously pleaded cause of action. There is no threshold issue to be determined with this proposed amendment.

**v) Proposed Amended Paragraphs 79 and 80**

[101] The proposed amendments to paragraphs 79 and 80 are presented as additional allegations in support of the Plaintiff's claim that his section 2(a), 7, 9, 10 and 12 *Charter* rights were breached by the Defendant.

[102] The proposed amendment at paragraph 79 is that "[t]he Defendant's wrongful non-disclosure of evidence and its denial of procedural fairness in the detention review process, as detailed above, constituted further breaches of the principles of fundamental justice, including the right to make full answer and defence." The proposed amendment reiterates a portion of that which was already pleaded at paragraph 79 and otherwise sets out argument to tie that reiterated pleading to a *Charter* breach.

[103] Despite the Defendants' capable argument to the contrary based on the likely outcome of the arguments on the merits of the case, I do not consider that this proposed amendment is liable to be struck on a motion to strike pursuant to Rule 221 of the *Rules*.

[104] The proposed amendment to paragraph 80 is a substantive reiteration of the amendments proposed at paragraphs 51.1 and 51.2, with minor but important changes. The first sentence of the proposed amendment is an allegation of material facts that are relevant to the detention. As such, it is a permissible amendment.

[105] The second sentence, however, is a bald and conclusory statement and argument that alleges a "deliberate scheme" designed to remove the Plaintiff pursuant to Haiti's request. This proposed amendment is a reformulation and repetition of the amendments proposed at paragraphs 51.1, 51.2, and 65(g). It is irrelevant to the causes of action advanced, is bald, and is liable to be struck pursuant to Rule 221(c) or (f). It presents no reasonable chance of success.

**B) Is it in the interests of justice to allow the proposed amendments**

[106] The proposed amendments set out in paragraphs 51.1, 51.2, 65(f), 65(g) and the second sentence of the proposed amendment to paragraph 80 have not crossed the threshold of having a reasonable chance of success. As directed by the Federal Court of Appeal in *Teva Canada Limited v. Gilead Sciences Inc*., 2016 FCA 176 at para 31, the Court need not consider or investigate other matters such as the prejudice to the Defendant in connection with those proposed amendments as they ought not to be allowed.

[107] Accordingly, I need only consider whether it is in the interests of justice to grant leave for the Plaintiff to amend his pleading by adding the proposed amendments to paragraphs 68, 79, and the first sentence of the proposed amendment to paragraph 80.

[108] In determining whether it is in the interests of justice to allow the proposed amendments, the Court may consider factors such as (i) the timeliness of the motion to amend; (ii) whether the proposed amendments would delay trial; (iii) whether the amending party's prior position has led another party to follow a course of action in the litigation that it would be difficult to alter; and (iv) whether the amendments will facilitate the Court's consideration of the substance of the dispute on its merits.

[109] I am persuaded by the Plaintiff that it is in the interests of justice to grant him leave to amend his pleading and to add his proposed amendments to paragraphs 68, 79, and the first sentence of the proposed amendment to paragraph 80.

[110] The Court record and the evidence filed reflects that the parties have completed the discovery phase of this proceeding but have not requested a pre-trial conference. No trial date has been fixed. Given that this litigation appears to have been dormant for a significant period of time between early 2019 and the fall of 2023 and that there are no forward-looking scheduled court events or key steps to be taken by either of the parties, I cannot find that this motion is untimely, or that the motion would delay a trial that has yet to be fixed.

[111] The Court has some sympathy for the Defendant and his argument that it is not in the interests of justice to allow the amendments proposed by the Plaintiff. While over six years have elapsed between the time when the Plaintiff received the documents that have led to this motion, relatively little time has elapsed in the litigation timeline itself. Whatever amended pleading and/or continued examination for discovery arising from any allowed amendment will not disrupt an established timetable or jeopardize an existing trial date. No evidence has been led to suggest that additional steps to complete any amendments to the Statement of Defence or additional discovery leading to a pre-trial conference cannot be accommodated.

[112] The Defendant's argument that the passage of time, the fading of memories and the potential unavailability of witnesses may impact its ability to defend against any allowed amendment and therefore cause it prejudice that is not compensable by costs is compelling as a legal argument. However, the Defendant has not led evidence to support this argument other than that the CBSA employees directly involved in the facts of this proceeding are no longer employed by the CBSA. The end of an employment relationship between the Defendant and a potential witness may make a potential witness more difficult to locate than would have been the

case during the employment relationship, but that alone does not constitute non-compensable prejudice on a motion to amend. His argument is therefore not persuasive.

[113] The Defendant also argues that the delay at issue creates a presumption of non-compensable prejudice arising from any allowed amendment. No authority is cited by the Defendant in support of this argument. The leading statement of the principle of a presumption of non-compensable prejudice arising from an amendment was set out by the Ontario Court of Appeal in *Frohlick v Pinkerton Canada Limited*, 2008 ONCA 3, at para 17, in connection with Rule 26.01 of Ontario's *Rules of Civil Procedure*, RRO 1990, O. Reg. 194. The principle outlined therein was that the expiry of a limitation period gives rise to a presumption of prejudice to the Defendant because of the loss of a limitation period defence if an amendment is permitted for the assertion of a since barred cause of action. This presumption of prejudice will be determinative unless the party seeking the amendment can show the existence of special circumstances that rebut the presumption. The presumption does not apply here because there is no new cause of action being advanced by the Plaintiff and there is no correlative loss of a limitation period defence.

[114] Finally, the Defendant argues that the Plaintiff's delay in bringing this motion is inordinate and without reasonable explanation. I disagree. The evidence in the record reflects that this motion was necessary because of the Plaintiff's new co-counsel taking a different approach, unanticipated by the Defendant, to the issues involved in this proceeding in a mediation brief. The Plaintiff has sought to explain his delay in bringing this motion and to explain why the delay was incurred. The explanation is adequate.

[115] In all of the circumstances, it would have been preferable for the Plaintiff to notify the Defendant that new co-counsel had been appointed and that a different approach was being taken in this proceeding going forward. Not suggesting that such was the case until the delivery of the Plaintiff's mediation brief, after several years of inactivity, was assured to shock the Defendant and complicate the proceeding needlessly. The changes in representation and approach could and should have been managed better and communicated more respectfully.

**CONCLUSION**

[116] There is no basis upon which to make an Order allowing the Plaintiff to provide additional particulars of his proposed and rejected amendments. They do not add to the causes of action advanced and are irrelevant to them. The Plaintiff's motion will therefore be granted in part and dismissed in part.

[117] The parties are encouraged to discuss and settle the costs of this motion by February 21, 2025. If the parties cannot settle the costs of this motion, then they can each serve and file costs representations in writing not exceeding 3 pages each, double-spaced, excluding schedules and authorities by February 24, 2025, failing which there will be no costs awarded on this motion.

**THIS COURT ORDERS** that:

1. The Plaintiff's motion is granted in part and dismissed in part.

2. The Plaintiff is granted leave to amend paragraphs 68 and 79 of his Statement of Claim in the manner set out in his proposed Amended Statement of Claim.

3. The Plaintiff is granted leave to amend paragraph 80 to include the sentence, "As later revealed in communications that were withheld from the Plaintiff, the detention was carried out pursuant to an informal request from Haiti, without any evidence of wrongdoing by the Plaintiff." as the second sentence of that paragraph.

4. The Plaintiff is otherwise refused leave to amend his Statement of Claim in the manner set out in his proposed Amended Statement of Claim.

5. The Plaintiff shall serve and file his Amended Statement of Claim within 15 days of the date of this Order.

6. Costs of this motion are to determined following receipt of the parties' written representations or agreement as to costs.

7. The parties are to confer and are to provide the Court, by February 19, 2025, with their availability to attend a virtual case management conference to fix a timetable for the continuation for this proceeding.

"Benoit M. Duchesne"
Judge
Case Management Judge

**FEDERAL COURT**
**SOLICITORS OF RECORD**

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| **DOCKET** | T-1742-16 |
| **STYLE OF CAUSE** | JEAN-MARC MURAT v HIS MAJESTY THE KING IN RIGHT OF CANADA |
| **PLACE OF HEARING** | HELD BY VIDEOCONFERENCE |
| **DATE OF HEARING** | APRIL 5, 2024 |
| **ORDER AND REASONS** | DUCHESNE J. |
| **DATED** | FEBRUARY 11, 2025 |
| **APPEARANCES** | |
| Louis Century<br>Melanie Anderson<br>David Kingwell | FOR THE PLAINTIFF |
| Hillary Adams<br>Laoura Chritodoulides | FOR THE DEFENDANT |
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| Attorney General of Canada<br>Toronto, Ontario | FOR THE DEFENDANT |