QB File No. CI 12-01-79879

THE QUEEN'S BENCH

Winnipeg Centre

BETWEEN:

MARTIN GREEN,

plaintiff,

- and -

HIEP TRAM, ARLENE SKULL, DEB WOLOSHYN, WALLY STEWART, JOHN ANCHAN, AND THE UNIVERSITY OF WINNIPEG.

defendants.

RESPONDING BRIEF OF MARTIN GREEN
Re: Motion for Stay of Discovery
FILED: OCT _____ 2013

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INTRODUCTION

1. In the present motion, filed on August 27th 2013, "the University Defendants" or "the Professors" (all those not including Tram and Skull, hereinafter referred to as the "Schoolteacher Defendants" or "the Schoolteachers") are seeking to stay or otherwise circumscribe the Plaintiff's right to oral discovery. The present motion is silent on the question of written discovery; therefore, in theory, the Plaintiff ought to be entitled to proceed with interrogatories. However, both groups of Defendants have in the meantime been resistant to the Plaintiff's efforts to obtain answers to interrogatories, prompting the Plaintiff to file a Motion with this Court on July 17th 2013 seeking to compel both answers to Interrogatories submitted the previous November, and

production of Affidavits of Documents which had not yet been filed by the University defendants.

2. Subsequent to the filing of the Plaintiff's motion of July 17th, the Defendant parties did indeed file Answers to Interrogatories; but those answers consisted almost entirely of refusals to answer. The University defendants also belatedly filed an Affidavit of Documents which consisted mostly of documents and correspondence already in the Plaintiff's possession, and which omitted mention of other documents of which the Plaintiff had either been specifically demanding disclosure, or whose existence was otherwise known to the Plaintiff. Accordingly, the Plaintiff feels that his Motion to Compel Discovery has not been satisfied due to the inadequate responses of the opposing parties.

3. At an appearance before Master Lee on September 27th 2013, the Master rejected the Plaintiff's request to argue both motions together and ordered instead that the University Defendants' Motion to Stay should be argued separately from and prior to the Plaintiff's Motion to Compel Discovery.

4. With all due respect, in view of the convoluted and entangled history of the discovery process thus far, and the presence of two contradictory motions on the table, one demanding the enforcement of his rights to discovery and another demanding a curtailment of those rights, the Plaintiff finds himself at a loss as to how he ought to argue one motion without simultaneously arguing the other. The parties having already filed affidavits on both motions, and the reasons being argued for or against the stay of discovery being equally applicable to both motions, the Plaintiff can see no prejudice to the University defendants in having to respond to his combined arguments at this time.

5. There is a complication in that the Schoolteacher defendants are not participating in the present Motion to Stay: therefore, whatever separate arguments they may wish to bring forward with respect to the Motion to Compel Discovery will not be heard at this time. Therefore, the Plaintiff is asking that the Court hear both motions at this time, the Plaintiff's and the Univeristy Defendants', but with respect to a ruling on the Plaintiff's right to compel discovery, the Court should only rule with respect to the University

Defendants. The Plaintiff would then argue his discovery rights with respect to the Schoolteacher Defendants at a separate hearing.

6. For the sake of completeness, it ought to be noted that there is a third motion on the table with respect to the Plaintiff's discovery rights; namely, his Motion for Exclusion of Parties filed in November of 2012. All briefs and affidavits on that motion have been filed. The Plaintiff argued before Master Lee that this motion should also be argued together with the other two, but Master Lee instructed that it should be stayed pending resolution of the Schoolteacher Defendants' Motion for Summary Judgment, which is scheduled to be argued on December 18th 2013.

THE PLAINTIFF'S NARRATIVE

7. It is the Plaintiff's contention that in the two years since this conflict first arose between himself and the University, the University (as well as the Schoolteachers) have gone to extraordinary lengths, both within and without the Queen's Bench proceedings, to thwart his legitimate rights to disclosure; that the Plaintiff has thereby suffered and continues to suffer irreparable harm on that account, and that the Courts should not now further reward the University's improper conduct by granting them an additional stay at this time.

8. The Plaintiff was removed from his Practicum at Gordon Bell High School on November 21st, 2011. On the same day, he wrote the University of Winnipeg requesting disclosure of reasons for his removal. The University refused to provide reasons, informing the Plaintiff instead that he would be contacted in due course by the Registrar.

Exhibit "6" of the Affidavit of Martin Green
sworn January 23, 2013 ("*Green Affidavit Jan 2013"*)

9. The Plaintiff was contacted by the Registrar on December 6th, 2011. The next day he wrote back, requesting written disclosure of the allegations against him. Two weeks later the Plaintiff received a response from the Registrar which included what the Registrar characterised as a "summary" of the allegations. In its entirety it reads as follows:

Dear Marty:

I am writing in response to your request for written disclosure of the allegations that prompted my investigation under the Student Non-Academic Conduct and Discipline Policy. I will summarize the comments made.

Several faculty members and students have submitted written complaints about your behaviour in classes during the term. The specific allegations are that you have been perceived by them as rude, disrespectful, dominating class time, confrontational, aggressive, prone to personal attacks on students and on professors, that you reduced one student to tears, that you frequently used class time to express your dissatisfaction with the way the class was being taught. In particular, concern was raised about your actions toward an American Sign Language Interpreter on Nov. 3, and your aggressive tone and conduct in a Physics class on Nov. 9. Several other complaints made allegations that such behaviour from you was typical in classes during the term. The reports come from the period October 27 through November 10, at which point the Deans attempted to meet informally with you to discuss these matters. Subsequently, as you know, your practicum placement school requested that you be removed from the practicum. Staff there made similar allegations to those from students and faculty on campus, as well as the allegation that you refused to follow directions and accept constructive criticism from cooperating teachers.

As per the policy, I am requesting a meeting with you to "review the matter and determine whether the facts as disclosed by the complainant are in dispute." Please contact me at (204) 786-9337 or c.russell@uwinnipeg.ca in order to arrange a day and time.

Yours sincerely,

Colin Russell
University Registrar

The Plaintiff wrote back the following day, expressing dis-satisfaction with the extent of the disclosure. In subsequent correspondence, the Registrar refused to provide additional disclosure.

10. Having been unable to obtain adequate disclosure from the University, the Plaintiff on January 6th 2012 filed applications under the Freedom of Information Act ("FIPPA") against both the University of Winnipeg and the Winnipeg School Division. After 60 days, both respondents having provided evasive and unsatisfactory responses, the Plaintiff filed complaints with the Manitoba Ombudsman. Subsequently, both the School Division and the University were told by the Omudsman that they had improperly withheld information and were ordered provide additional documentation to the Plaintiff.

Exhibits "A" and "B" of the Affidavit of Martin Green
sworn September 2013 ("*Green Affidavit Sep 2013"*)

11. On the 10th of January 2012 the Registrar informed the Plaintiff that he was being suspended from class attendance for behavior that was reported to be "disruptive and threatening". The Plaintiff demanded particulars of the accusations, and the Registrar refused to provide them.

Green Affidavit Jan 2013 **Exhibit "8"**

12. The following day, the Plaintiff was served with a Barring Notice informing him that he would be charged with Trespassing if he returned to the campus. The Plaintiff wrote the University on January 12, demanding the disclosure of all accusations against him so he could challenge the Barring Notice. The University refused to state the reason for the Barring notice or provide any other disclosure.

Green Affidavit Jan 2013 **Exhibit "8"**

13. On March 15th 2012 the Plaintiff was informed by the University that his final appeal would be heard on March 23rd. On the same day he wrote back, saying he would require disclosure of all information that the Appeals Committee had been given. The next day he received copies of various official documentation, and in addition a copy of the "Third Party Report" dated November 27 2011.

Green Affidavit Jan 2013 **Exhibit "9b"**

14. Within said report, it was disclosed that the author, Associate Dean of Sciences Danny Blair, in addition to drawing adverse inference from the Plaintiff's alleged refusal

to attend informal meetings, had relied on information from five letters of complaint in determining that the Plaintiff was guilty of non-academic conduct. Blair identified the sources of those five letters as including three Professors of Education, one student in the Faculty of Education, and the Principal of Gordon Bell, and reported that there was "an abundance of evidence" within those letters to justify the complaints of Non-Academic Misconduct. The Plaintiff therefore demanded access to those letters, arguing that it was a clear denial of due process to present such accusations to the Appeals Committee without allowing the Plaintiff the opportunity to answer them by referring to the evidence. The requested disclosure was accordingly provided him on the afternoon of Tuesday March 20th, less than three days prior to his appeal hearing.

Green Affidavit Jan 2013 **Exhibit "9c"**

15. Absent from the aforesaid disclosure was the letter from Principal Skull of Gordon Bell. The following day, the Plaintiff wrote back the University asking why the letter from Skull had not been disclosed to him. In fact, the Plaintiff did not receive disclosure of this letter until it was made available to him under FIPPA by order of the Manitoba Ombudsman, two months after his expulsion from the Program had already been ratified by the President of the Univeristy. Therefore, the Plaintiff was never given an opportunity to dispute the allegations which led to his removal from the Practicum.

Green Affidavit Jan 2013 **Exhibit "9d"**

16. Following the Plaintiff's conviction for non-academic misconduct, he wrote the Chariman of the Board of Regents seeking the opportunity to appeal. The Chairman did not respond. Having exhausted his internal remedies, the Plaintiff therefore filed the present claim with the Court of Queen's Bench on September 20th 2012.

Green Affidavit Jan 2013 **Exhibit "10"**

17. On November 20th 2012, the pleadings having closed and having filed his Affidavit of Documents, the Plaintiff began correspondence with opposing counsel with respect to proceeding with discovery. Receiving no response, he therefore served Mr. Meronek on November 30th with a Notice of Examination for Academic VP John Corlett

on behalf of the University, to be conducted on January 15th 2013. Mr. Meronek did not acknowledge.

Paragraph 3 of the Affidavit of Martin Green
sworn July, 2013 ("*Green Affidavit July 2013"*)

18. On the 13th of December 2012 the Plaintiff served Interrogatories on opposing counsel. Mr. Mackwood, on behalf of the Schoolteachers, acknowledged receipt and indicated he would undertake to provide answers as soon as possible in the New Year. Mr. Meronek did not acknowledge the Interrogatories.

Green Affidavit July 2013 **at paras. 4 and 7**

19. While these correspondences were taking place, Mr. Meronek did not respond to the Plaintiff's requests that he file Affidavits of Documents as required by Quees Bench Rules, so that the Plaintiff could prepare for examination of Mr. Meronek's client.

Green Affidavit July 2013 **at paras. 5 and 7**

20. On January 4th, 2013, Mr. Meronek wrote the Plaintiff indicating that because he intended to file a Motion for Summary Judgment, he would be neither responding to Interrogatories nor presenting Mr. Corlett for discovery. He further claimed that he was not required to produce Mr. Corlett because Mr. Corlett had by then resigned from the University of Winnipeg, and had not been provided conduct money.

Green Affidavit July 2013 **at para. 8**

21. Mr. Meronek did indeed serve his motion for Summary Judgment on January 7th, 2013. At an appearance two days later, Master Lee ruled that since any discovery would be rendered moot by a possible decision in Mr. Meronek's favor, that the Plaintiff's discovery rights should be put on hold; and in particular, the examination of Mr. Corlett should be cancelled.

22. At this time, the Schoolteachers declined to participate in Mr. Meronek's motion; In any event, the Plaintiff's claims for defamation against them would have remained active even if Mr. Meronek's motion with respect to the Conspiracy claim had been

successful. Accordingly the Plaintiff continued to assert, and Mr. Mackwood did not dispute, his discovery rights with respect to the Schoolteachers.

Green Affidavit July 2013 **at para. 11**

23. Over the next several months, the Plaintiff continued to press Mr. Mackwood for his Affidavit of Documents and Responses to Interrogatories. From time to time Mr. Mackwood responded, indicating that progress was being made, but declining to comment on specific inquiries by the Plaintiff with respect to specific documents. In April Mr. Mackwood served the Plaintiff with Affidavits of Documents on behalf of his clients that had evidently been filed with the Court two months earlier, and which made no mention of specific documents which the Plaintiff had asked about in an email dated March 6th 2013.

Green Affidavit July 2013 **at paras. 12-27**

24. On June 14th 2013, Mr. Mackwood wrote the Plaintiff indicating that because he had received instructions from his clients to move for Summary Judgment, he no longer intended to provide answers to Interrogatories.

Green Affidavit July 2013 **at para. 23**

25. On June 21st 2013 Master Berthaudin published his decision dismissing Mr. Meronek's motion for Summary Judgment. By this time, Mr. Mackwood had not yet filed his own motion; accordingly, the Plaintiff wrote opposing counsel urging them to fulfill their obligations under the QB rules and provide responses to interrogatories. Opposing counsel did not respond.

Green Affidavit July 2013 **at paras. 24-26**

26. Accordingly, on July 17th 2013, the Plaintiff filed a Motion to Compel Answers to Interrogatories. In the meantime Mr. Meronek had filed an appeal of the Summary Judgment decision. At an appearance before Master Berthaudin on the 29th of July, opposing counsel argued that they should not be required to answer Interrogatories

pending resolution of their respective motions. The Master did not agree, and instructed them to file Affidavits prior to our next appearance, scheduled for August 29th.

Green Affidavit Sept 2013 **at para. 15**

27. In the meantime, the Plaintiff had attempted to engage Counsel for the Univeristy in negotiations to reschedule Examination for Discovery on John Corlett. Counsel was unresponsive to the Plaintiff's inquiries. Therefore the Plaintiff attempted to contact Mr. Corlett directly. It developed that Mr. Corlett had by that time left the University of Winnipeg and taken up a new position at Grant McEwen University in Edmonton.

Green Affidavit Sept 2013 **at para. 19**

28. Mr. Meronek strenuously objected to the Plaintiff's choice of Mr. Corlett as the University's designate; accordingly, the Plaintiff asked Mr. Meronek to make arrangements to present Dean of Education Ken McCluskey instead. Mr. Meronek did not respond to the Plaintiff's inquiries. Accordingly, on August 14th 2013 the Plaintiff served upon Mr. Meronek a Notice of Examination for Ken McCluskey, to be held on Wednesday the 28th of August. Mr. Meronek did not acknowledge receipt.

Green Affidavit Sept 2013 **at para. 20**

29. On the Friday preceeding the Wednesday, Mr. Meronek wrote the Plaintiff that he would not be producing Mr. McCluskey because he intended to file a Motion for Stay, which the Plaintiff would be receiving either later that day or the next Monday.

Green Affidavit Sept 2013 **at para. 15**

30. On Tuesday, still having received no Notice of Motion, the Plaintiff wrote Mr. Meronek indicating that he expected to see Mr Meronek at the examination the following day. Later that afternoon, the Plaintiff received Mr. Meronek's Motion. The following morning the Plaintiff attended to the Examination with a Court Reporter, but Mr. McCluskey did not appear. A Certificate of Non-Attendance was issued by the Court Reporter.

Green Affidavit Sept 2013 **at para. 15 and Exhibit "D"**

31. In the meantime, both sets of Defendants had filed their Answers to Interrogatories which consisted almost entirely of refusals to answer. The University Defendants also served their Affidavit of Documents.

***Answers on Interrogatories,* Affidavit of Colin Russel filed August 28 2013**

Affidavit of Arlene Skull – Answers on Interrogatories
Served but not Filed Aug 26 2013 (See Supplementary Affidavit of Martin Green)

Affidavit of Hiep Tram – Answers on Interrogatories
Served but not Filed Sept 9 2013 (See Supplementary Affidavit of Martin Green)

The Plaintiff's Case: FACTUAL ARGUMENTS

32. As a result of the foregoing, the Plaintiff has suffered irreparable damage in his quest to defend himself against the unfair actions of the Defendants:

a) At the time of his removal from the Practicum, staff in the Education Department refused to disclose reasons for his removal or indeed respond to any further inquires on his part, and instructed him to wait instead to be contacted by the Registrar. The Registrar did not contact him for another two weeks, and did not provide him with reasons until four weeks later, when the Practicum was already over.
b) Even when the Registrar did provide the Plaintiff with what he characterised as a "summary" of the complaints against him, the information regarding the removal from the Practicum was so vague and incomplete that it would have been impossible for the Plaintiff to have effectively argued it in any event.
c) On January 10th the Registrar suspended the Plaintiff from class attendance and then refused to disclose the text of the complaint which led to his suspension.
d) The following day the University barred the Plaintiff from campus property and subsequently refused to disclose the allegations which led to the ban, as well as denying him the right to appeal.
e) On the 20th of January 2013 the University formally expelled the Defendant from the Education Program. The Plaintiff had never been given an opportunity to read the charges against him or confront his accusers.

f) Unable to obtain disclosure through internal channels, the Plaintiff applied for FIPPA disclosure against both groups of defendants. The University and the Schoolteachers both “stonewalled” for two months before issuing formal refusals to disclose. Disclosure was ultimately forthcoming only after appeals by the Plaintiff to the Manitoba Ombudsman, whose rulings which ordered the release of documents did not come until months after the Plaintiff’s final appeal was decided against him, when it was already too late.

g) Less than three days before his final appeal hearing on March 23rd 2012, the Plaintiff was finally able to pressure the University into revealing four of the five Letters of Complaint which had been written four months earlier. This only occurred because the Plaintiff was able to show that the Appeal Committtee had already been made privy to documentation that referred to the contents of those four letters. It was therefore obvious even to the University that the continued witholding of those letters from the Plaintiff, when their contents had already been made known (albeit indirectly) to the Appeals Committtee, would be such an egregious violations of due process that it would be unable to sustain a legal challenge.

h) In any event, the University did not allow the Plaintiff to cross-examine the authors of the Letters of Complaint at his Appeal Hearing, nor did they allow him to call witnesses of his own. ***Green Affidavit Jan 2013*** **Exhibit “9d”**

i) Having exhausted his internal remedies, the Plaintiff then initiated the present action in September of 2012. Once the pleadings were closed, he immediately moved to assert his discovery rights which were available to him under the Queens Bench Rules.

j) Both sets of defendants ignored the Plaintiff’s requests that they file their Affidavits of Documents in accordance with the timelines set out in the rules; accordingly, the Plaintiff moved forward unilaterally to Discovery via both Interrogatories and Oral Examinations. Both sets of Defendants continued to ignore the mandatory timelines set out in the QB rules in terms of responses to Interrogatories, and were unresponsive to the Plaintiff’s inquires thereto.

k) The University defendants furthermore ignored the Plaintiff's legitimate and properly served Notice of Examination on John Corlett until one week prior, when they filed their own Motion for Summary Judgment. Although Master Lee ruled that the University's motion ought to take precedence over the Plaintiff's discovery rights, the Plaintiff will argue below that this was an incorrect decision which caused him irreparable harm in that he was forced to defend himself on the Motion for Summary without the benefit of the discovery to which he was legitimately entitled.

l) The Defendant's refusal to present Corlett for discovery in January further caused irreparable damage because they knew that he was leaving the University to move to Alberta, which caused serious difficulties to the Plaintiff not only in terms of his costs of discovery but also in terms of his right to name Corlett as the University's designate, which became at best arguable once he was no longer in the employ of the University. The Plaintiff was thereby deprived of the opportunity to obtain evidence from a witness who was a key player in the proceedings against him.

m) Ironically, the Plaintiff was finally provided with significant disclosure in the form of **Exhibit "B" of Colin Russell's Affidavit of January 2013,** which provided a veritable cornucopia of information, including the fact that the three letters of complaint from Education Faculty members were not independent but were in fact specifically requested by the Associate Dean of Education. The Plaintiff therefore learned that he had suffered irreparable harm because the University had witheld from him the means to dispel the impression, prevailing at his earlier appeal hearing, that the complaints against him were multiple and independent.

n) The aforesaid Attachment also disclosed much additional documentation that had been under the control of the University and which for no apparent reason had not been disclosed a the time of the Plaintiff's FIPPA application even under the orders of the Manitoba Ombudsman. In fact, a cynical observer could argue that the University was somehow able to prevail upon the Ombudsman to order the release only of documents which the University already knew to be in the hands of the Plaintiff. Unlike the QB Rules, the Manitoba Ombudsman does not

require a party to submit an itemized list of documents for which it is claiming privilege.

o) While the Plaintiff accepted the curtailment of his discovery rights vis-à-vis the University pending the resolution of their Motion for Summary, his right to discovery with respect to the Schoolteachers remained undisputed. Knowing that with the end of the school term in June, students who were important witnesses would be leaving the school and no longer readily available, the Plaintiff continued to press the Schoolteachers for responses on interrogatories. Once again, the Schoolteachers stonewalled for five months before announcing, halfway through June, that they would not after all be responding to interrogatories pending their own Motion for Summary.

p) In the face of continuing pressure from the Plaintiff, and influenced by Master Berthaudin's instructions on the 29th of July 2013, both groups of defendants finally abandoned their formal claim to to exemption from discovery, and filed Answers to Interrogatories in August. Upon review, however, these filings turned out to be a mockery of disclosure, with the defendants refusing to provide responsive answers to every single question put by the Plaintiff.

q) In particular, the defendant Skull, in justifying her refusal to identify potential witnesses, made the outrageous and factually unsupported claim that prodiving such information to the Plaintiff would put said witnesses at risk to their personal safety. This despite the fact that the Plaintiff had approached counsel for the Schoolteachers as early as January 2013 inquiring as to what arrangmements they might require with respect to the confidentiality of potential witnesses who were minors, and to which inquiry opposing counsel did not reply.

***Affidavit of the Arlene Skull* sworn Sept 9 2013 at para 15**
***Affidavit of Green* sworn July 2013 at para 12**

r) Within short order both parties re-asserted their respective claims to exemption from discovery: the Schoolteachers by filing their Motion for Summary, and the Professors by filing the present Motion for Stay.

33. It is the Plaintiff's position that the Defendants should not now be rewarded for nearly two years of stonewalling by being granted an order for an additional curtailment of the Plaintiff's discovery rights, when they have not faced any adverse consequences

up til now for their improper refusals to provide discovery when the Plaintiff was undisputedly entitled to it; especially so, because the Plaintiff will be done irreparable harm by being forced to defend himself against two simultaneous Motions for Summary Judgement without the benefit of the discovery which was his right.

The Plaintiff's Case: LEGAL ARGUMENTS

34. In their Motion Brief, the Defendants identify the "three-prong test" for a Stay of Proceedings:

> 13. The three prong test for granting a stay is:
> a. Does the stay applicant have an arguable case on appeal?
>
> b. Would the stay applicant suffer irreparable harm if a stay were not granted? and
>
> c. Does the balance of convenience justify a stay?
> *Ludlow v. Ludlow* [2011] M.J. No. 87 (MB CA) at para 12, 22 & 23 [TAB 2]
>
> ***Motion Brief* of the Defendants at para 13**

The First Prong

35. The first prong of the test deals with the "arguable case". The jurisprudence on this issue shows that in general, the Defendants are not called upon to meet a very high threshold on the first prong. Nevertheless we will examine the arguments which the Defendant is relying on here. They are:

> (i) The court lacks jurisdiction over non-academic conduct and discipline in relation to academic matters of the University;
>
> (ii) The Plaintiff should have exercised his right to seek judicial review;
>
> (iii) The Plaintiff has failed to plead all the essential ingredients for the tort of conspiracy to injure; and
>
> (iv) The Plaintiff has not suffered any damages as a result of the alleged conspiracy.

Appeal Brief of the University Defendants, filed September 3, 2013, at para 42

36. The Defendant further claims that the Master failed to take into account the appropriate section of the University of Winnipeg Act, of which they hilight subsection (d) in their present Brief:

> The board may:
>
> (c) establish programs, services and facilities to further the university's purposes and objects, either by the university alone or in co-operation with others;
>
> **(d) exercise internal disciplinary jurisdiction over the non-academic conduct of students, including the power to expel or suspend for cause;**

***The University of Winnipeg Act*, s. 12(2), Defendant's Brief [TAB 4]**

37. Bearing in mind that the threshold is not generally set too high on the first prong, the following points ought to still be noted:

a) One ought to be disturbed by the curious juxtaposition of the phrases "non-academic conduct" and "discipline in relation to academic matters" (see para. 35 above). Are these academic matters or disciplinary matters? The defendants do their best to blur the lines which have been carefully drawn through years of jurisprudence. In any case, the question of the court's putative jurisdiction or lack thereof in questions of non-academic matters was thoroughly considered by Master Berthaudin, who relied on ***Hozaima v. Perry et al,*** 2010 MBCA 21 in finding that the Defendants had identified no effective dispute mechanism available to the Plaintiff in matters relating to his removal from the teaching practicum; and that therefore there was no common law bar to the Plaintiff in seeking redress through the Courts.

***Decision of Master Berthaudin* at paras. 33-38**

Indeed, there is a general principle that the Courts will not involve themselves in "academic matters". But how does that bear on the Plaintiff''s expulsion from the faculty, which was clearly done on the grounds of *non*-Academic misconduct? The Defendants answer to this question, as seen in their ***Motions Brief on their Appeal from a Master to a Judge***, is to so broaden the definition of "academic mattters" as to make any distinction between "academic" and "non-academic" entirely meaningless:

> "Clearly, any conduct which reflects detrimentally on the University, its staff and students, as a result of a student's behavior in the pursuit of hid/her education, is an academically related matter."

Motions Brief of the Defendants **filed Sept 3 2013 at para 52**

b) On the question of whether the Plaintiff should have exercised his right to seek judicial review, it ought to be noted that this same question was thoroughly argued in ***Hozaima v. Perry et al,*** 2008 MBQB 199 and submitted as **TAB 8** of the Plaintiff's Motion Brief before Master Berthaudin. In ***Hozaima*****,**, Chief Justice Monnin found that the Court's jurisdiction to exercise its s.38 powers (to stay proceedings where judicial review has not been sought) should not be exercised when the remedy sought by the plaintiff is beyond what is available through the University's internal mechanisms.

Responding Brief of Martin Green **filed Mar 4 2013 on Motion for Summary TAB 8 at para 54**

That the available remedies through the University would be inadequate to "make the plaintiff whole" can hardly be doubted for any number of reasons, not the least of which is the declaration by Colin Russell in his Affidavit of August 26th on this motion, where he appears to indicate that even if the Plaintiff is successful showing before this Court that the Defendants conspired unfairly to remove him from the Practicum, the University still has no intention of allowing him to resume his studies in the Faculty Education. (More on this point below.)

Affidavit of Colin Russell **sworn on Aug 26 2013 at para 15**

c) On the question of whether the Plaintiff has properly pleaded the essential elements of the Tort of Conspiracy, it cannot be said that Master Berthaudin failed to consider this argument. Indeed, at para. 48 of his decision, he states:

> "…while there are criticisms of the content of the statement of claim as it relates to allegations against the University defendants, in my view it can be reasonably read as containing a sufficient pleading of conspiracy to injure."

And in any case, in situations where the pleadings may have certain weaknesses, especially when the Plaintiff is self-represented, it is generally the first presumption of the Courts that the Plaintiff should be allowed the opportunity to amend the pleadings, rather than having them struck out entirely.

***Decision of Master Berthaudin* at paras. 33-38**

d) On the question of whether the Plaintiff has suffered any damages as a result of the alleged conspiracy, this point was indeed included in the original Motions Brief of the Defendants at para 32 as a bald assertion with no elaboration, and it appears at first blush to be completely ludicrous. How has the Plaintiff not been devastated by the actions of the Defendants? The answer can be found in the Affidavit of Colin Russell, already alluded to in para 38(b) above, where Russell states:

> "The determination of the issue of the Plaintiff's practicum will have no impact on his suspension from the University and as such a delay in the Examination of the University of Winnipeg defendant will have no adverse impact on the Plaintiff".

Evidently the University wishes to argue that the Plaintiff has suffered no damages through his removal from the practicum, because the same damages would have ensued in any event through his Suspension for Non-Academic Misconduct. Has Russell forgotten that the Plaintiff's suspension was only for one

year, and that according to its terms, the Plaintiff should now be eligible to return to his studies? Was it not the Plaintiff's removal from his host school that identified him as a pariah, unsuitable for placement in any school, and thereby ineligible to graduate? ***Russell Affidavit* Jan 8 2013 at para 14**

Further, if the Courts find that the University acted unfairly in removing the Plaintiff from his Practicum placement, what does that say about the fairness of the procedures which subsequently removed him from the Education program; procedures driven by most of the same individuals who oversaw his Practicum removal? To maintain, as Russell says they would, that notwithstanding a possible decision by this Court that the Practicum removal was unfair, that nevertheless there was nothing wrong with the Non-Academic Misconduct proceedings, surely demonstrates an appalling degree of arrogance on the part of the University and a disturbing unwillingness to accept any decision from this Court which casts their disciplinary proceedings in an unfavorable light.

In any event, the Defendants surely know that at this time, the Plaintiff is suing in a separate proceedings for damages relating to his suspension for Non-Academic Misconduct (MCQB CI 13-01-83238). Do they intend to turn the tables and argue in that case that the Plaintiff likewise suffered no damages because even if the courts found that he was improperly convicted of Misconduct, that he suffered no damages because he could not in any event have graduated on account of having been removed from his Practicum?

Furthermore, it is simply not true that the Plaintiff suffered *no* damages as a result of his practicum removal. A letter from Deb Woloshyn to the Plaintiff dated Dec 19, 2011, states that the Plaintiff's sponsorship to the WestCAST student conference was revoked based on the Plaintiff being removed from the practicum at the request of the host school. It was not until one month later that the Plaintiff was found guilty of Non-Academic Misconduct.

Green Affidavit Jan 2013 **Exhibit "10"**

e) Finally, the Defendants argue that Master Berthaudin did not properly take into

account the statutory bars to Plaintiff's claim, quoting s. 12.2(d) of the University of Winnipeg Act. It is hardly surprising that Master Berthaudin failed to take this section into account, since the Defendant's did not argue it, relying instead on Section 34(2) which they have evidently abandoned in their present appeal.

***Motions Brief of the Defendants* filed Feb 19 2013 at paras 55-62**

Section 12.2(d) was indeed cited by the Defendants at para. 68 of the aforesaid Brief, but it was cited in support of the Defendants argument for a common-law bar; an argument that Master Berthaudin properly rejected by relying on ***Hozaima***.as discussed above.

38. Finally, above and beyond the individual reasons cited by the Defence in seeking to overturn Master Berthaudin's ruling, it should not be forgotten that in general, actions of this type, involving defamation and conspiracy, are not as a rule considered "good candidates" for resolution by summary processes, involving as they do questions of the credibility of different witnesses, the existence or non-existence of mala fides, the competing narratives of the various parties, all of which are best left to the trial judge. This point is thoroughly discussed in ***Combined Air Mechanical Services v Fleisch* (2011) ONCA 764 ("Fleisch") [TAB 1],** where the court concludes a lengthy analysis with the observation:

> "Generally speaking, in those cases, the motion judge (*note: referring here to a Motion for Summary*) simply cannot achieve the full appreciation of the evidence and issues that is required to make dispositive findings. Accordingly, the full appreciation test is not met and the "interest of justice" requires a trial".

***Fleisch* at pars 46-52 [TAB 1]**

39. In conclusion, with regard to the first prong of the "three-prong test", the points being raised by the Defendants in their appeal were all thoroughly dealt with by Master Berthaudin, whose opinions ought to be given at least some deference; therefore it is an

exaggeration to say, as the Defendants do in their Notice of Motion, that they "strongly satisfy" the first prong of the test.

***Notice of Motion of the Defendants* at para. 5**

The Second Prong

40. In the same Paragraph 5 of their Notice of Motion, where the Defendants claim that they "strongly satsify" two of the three prongs, those prongs are identified as the first and third: in other words, the Defendants admit that they only weakly satisfy the second prong. Let us then consider their arguments, which are containede in paras. 22 through 27 of their Motions Brief.

41. The first point raised by the Defendants is the statement by Colin Russell that the University has already spent considerable time and expense in responding to various claims by the Plaintiff. It is hard to see how this unsubstantiated claim addresses the question of irreparable harm; furthermore, the Defendants have so far been unresponsive to attempts on the part of the Plaintiff to have Russell cross-examined on his Affidavit to determine just how much time and money the University has indeed spent. In the absence of such evidence, the Court should pay no heed to this argument.

***Affidavit of Colin Russell* sworn Aug 27 2013 at para 16**

42. In fact, the authorities are fairly clear that costs incurred in the ordinary course of litigation are not normally considered sufficient to meet the irreparable harm test. In ***Bell Canada v Communication, Energy and Paperworkers Union of Canada* (1997) CanLII 4851 FC ("Bell") [TAB 2],** Richard, J. wrote:

> "While unnecessary time and costs will have been expended if the proceeding goes ahead and it is ultimately decided that the Board is without jurisdiction, this is more a matter of inconvenience than irreparable harm."

***Bell* at p. 4 [TAB 2]**

43. The Defendants then appear to attempt to make an argument based on ***Ludlow*** that it is not the expenses *per se* which are objectionable, but the "unfairness"

associated with having to incur those expenses. Such an argument can surely be little more than an exercise in sophistry. But in any event, the Defendants have failed to serve the Plaintiff with a copy of the ***Ludlow*** case, their email service having been missing all the Tabs; their promised pickup service being unavailable when called for; and their subsequent substitutional service via regular mail as being far too slow to reach the Plaintiff in time to review. As such, we are in no position to argue against it, within the strict time constraints laid down by Master Lee for the filing of arguments in this matter; and accordingly, the Plaintiffs urge the Court to disregard entirely the portion of the Defendants' argument which relies on ***Ludlow.***

Supplementary Affidavit of Martin Green, **filed October 2013**

44. For all that, the Defendants cannot resist returning to the argument (in para 26 of their Brief) that taking part in the Discovery Process at this time would "work a hardship on the University, which has limited funds." If by so arguing, they are attempting to imply that the Plaintiff in this case has *unlimited* funds available to him, (or even "relatively unlimited" compared to the meager resources of the University) they should introduce evidence to that effect. They have not done so; and even if they did, any argument based on the relative economic strengths of the two parties must surely have limited legal admissibility.

45. It is interesting that the "irreparable harm" prong of the test appears, from the jurisprudence, to only be arguable on behalf of the applicant and not the respondent. To the extent that the respondent stands to suffer irreparable harm through the granting of a stay, it appears he must argue it on the basis of "balance of convenience". We therefore now turn to the third prong of the test, which the Defendants claim to "strongly satisfy", and which they argue in all of four paragraphs from 29 through 32.

The Third Prong: Inconvenience to the Defendant

46. In paragraph 29 the Defendants argue that the Plaintiff would suffer no inconvenience because his discovery rights are being put on hold in any event due to the Motion for Summary Judgment by the Schoolteachers. If this is true, it begs the question: why then did the Professors feel it necessary to bring this motion in the first

place? The answer is fairly obvious: it was to belatedly justify their refusal to produce Dean of Education Ken McCluskey for examination on the 28th of August.

47. In fact, while it may or may not be the case that Discovery will be halted while a Summary Judgment motion proceeds, this is an entirely different matter from filing a Motion for Summary (or indeed a Motion to Stay) for the purpose of interfering with an Examination for Discovery that has already been properly scheduled according to the Queens Bench Rules. In ***Trans-Canada Medical Management v Dr. Michael Varenbut et al*** **(2003) Ontario Superior Court of Justice ("Trans-Canada") [TAB 3]**, Rouleau, J overruled a Master who cancelled an already-scheduled Examination for Discovery on the basis of a subsequently-filed Motion for Summary Judgment:

> "The real issue before the Master and before me is whether the announcement that a summary judgment is being brought by the defendants suspends the discovery rights of the plaintiff. In my view the rules do not provide for such a result."

Trans-Canada **at para 14 [TAB 3]**

48. In Paragraph 30, the Defendants again raises the "time and energy expended for naught" argument. It is odd that the same Defendants do not object to spending time and energy on the present motion for the purpose of frustrating the Plaintiff's discovery rights. They have indicated their unwillingness to provide the evidence which would show that it costs them more or less in time or energy to argue the present motion rather than to simply let the Plaintiff proceed with discovery; nor do they seem to consider the time and energy spent by the Plaintiff in arguing the present motion to be an inconvenience which acts to counterbalance to their own costs in time and energy.

49. In Paragraph 31, the Defendants claim that because the Plaintiff is seeking monetary damages rather than reinstatement, the balance of convenience therefore favors the granting of a stay. This argument is simply incomprehensible.

50. The fourth and final pillar in the Defendants "balance of convenience" argument is a reference from ***Walia*** which states that Summary Judgment takes should take

precedence over Discovery. There may be circumstances where this is so; however, in ***Trans-Canada*****,** a clear distinction is drawn between the question of priorites and the question of whether a Discovery action already in progress may be interrupted in mid-stream:

> "More significantly, however, it appears that the Master mis-apprehended the nature of the relief sought. The Master dealt with the motion as if it were a motion to determine which step, discovery or motion for judgment, is to take precedence. In fact the motion was simply one by the plaintiff to require the discovery process to proceed in the normal course as provided for in the rules."

Accordingly, to the extent to which the present motion is merely attempting to retroactively validate the Defendants' failure to comply with their pre-existing discovery obligations, up to and including their non-apprearance at the Examination of August 28th, it should be dismissed.

***Trans-Canada* at para 11 [TAB 3]**

51. Furthermore, it is by no means settled law that a Motion for Summary should take precedence over Discovery. Rouleau makes this quite clear in ***Trans-Canada*** at paragraph 16; the point is developed even further in ***Fleisch*****:**

> "However, we add an important caveat to the "best foot forward" principle in cases where a motion for summary judgment is brought early in the litigation process. It will not be in the interest of justice to exercise rule 20.04(2.1) powers in cases where the nature and complexity of the issues demand that the normal process of production of documents and oral discovery be completed before a party is required to respond to a summary judgment motion. In such a case, forcing a responding party to build a record through affidavits and cross-examinations will only anticipate and replicate

what should happen in a more orderly and efficient way through the usual discovery process."

The present proceedings, where the Plaintiff is being forced to defend himself for a second and even a third time against Motions for Summary Judgment without the benefit of discovery, is precisely the type of abuse which the latter Court (of which the same Rouleau is also coincidentally a member) so eloquently warns against in the quoted passage.

***Trans-Canada* at para 16 [TAB 3]**
***Fleisch* at para 57 [TAB 1]**

52. There is one final issue to be dealt with. At paras. 12 and 13 of their Notice of Motion, the Defendants argue that the Plaintiff should not be permitted to examine Dean of Education Ken McCluskey on behalf of the University, but instead should be required to examine Registrar Colin Russell. The Queen's Bench Rules clearly state that it is the examining party who shall declare the intended examinee, and not vice versa. While it is true that the responding party has some rights of appeal in this regard, it is difficult to comprehend how the Registrar, a salaried employee who was not involved in any of these proceedings until after the Plaintiff's removal from the practicum, is a more suitable examinee than the Dean of Education, the person to whom the named defendants report within the organizational structure of the University, and who was present and a participant in meetings, discussions and correspondence with regard to the Plaintiff's removal from the practicum.

53. In any event, since the Defendants do not even attempt to argue this demand in their Brief, one can hardly avoid the conclusion that even they must have realized how unreasonable it is, and have therefore simply abandoned it.

The Third Prong: Inconvenience to the Plaintiff

54. In the foregoing, we have replied to the Defendants' arguments on the Balance of Convenience test. In addition, the Plaintiff is entitled to argue independent factors supporting a "balance of convenience" in his favor; in other words, having removed

sand from the left hand balance pan, we shall now proceed to add sand to the right hand pan.

55. In the early paragraphs of this Brief, and as itemized in Paragraph 32, we have chronicled how the Defendants, at every turn, have exerted extraordinary efforts to thwart the Plaintiff's legitimate rights to disclosure of evidence, both prior to and following the initiation of the present proceedings. The resulting "inconvenience" to the Plaintiff can hardly be exaggerated.

56. Assuming for the moment that the Plaintiff's claims are true, and that the Defendants conspired to injure him for improper reasons, how is he to prove his case? Much of the evidence is in the nature of "his word against theirs"; with the Defendants being largely in control of access to independent witnesses, his best hope is to catch them in unsustainable contradictions based on their own false testimony.

57. But in order to succeed in this stratagem, it is of critical importance that the Plaintiff play his cards close to his chest; because if the Defendants find out what evidence is available to the Plaintiff, they will be tempted to take any opportunity to tailor their stories to work around whatever the Plaintiff is able to prove.

58. This is not mere hypothetical speculation. In his Motions Brief filed in November 2012, where he argues for exclusion of co-defendants from examinations for discovery, the Plaintiff needed to present evidence that the Defendants would tailor their evidence if given the opportunity. He cited the written record which showed that Tram had reported to Skull that he had "tapped" a student on the shoulder, whereupon Skull subsequently reported to the University that the Plaintiff had "grabbed" a student by the shoulder. The Plaintiff continued:

> "Even in making the present argument, the plaintiff is forced to relinquish the element of surprise, to which he would otherwise be entitled, be revealing at least two avenues of questioning that he intends to pursue on discovery. It is to be expected that having been so forewarned, the

defendants will take the opportunity to harmonize their testimony, at least on these particular questions, in advance of their examinations."

***Brief of Martin Green*, filed November 2012 at paras. 5 and 6**

59. Sure enough, in laying the groundwork for their present Motion for Summary, the Schoolteachers subsequently produced "previously undisclosed" documentation which purports to show that Tram did indeed confirm the "grabbing" narrative.

***Supplementary Affidavit of Documents of the Defendant Arlene Skull* at Doc. 10 Served but not Filed Aug 26 2013 (See Supplementary Affidavit of Martin Green)**

60. If the Plaintiff had not disclosed this line of argument to the Defendants prior to going to trial, they would certainly have had a very hard time explaining away the contradiction on the witness stand. The Plaintiff knew the risk, but also knew that he needed to "ante up" something of value in order to argue his Motion for Exclusion, and as a consequence he has now lost the advantage which he would otherwise have had. It should be apparent that as long as the Plaintiff is denied the opportunity to "pin down" the Defendants once and for all as to their narrative, he takes the greatest risk in trying to defend himself, because he then gives the Defendants the opportunity to tailor their evidence.

61. One might ask: is not the risk of tailoring symmetric? Why are the Defendants not prejudiced by allowing the Plaintiff to withhold *his* evidence until they disclose *theirs*? This question goes to the heart of what is known as "the right to remain silent". It is well established that this right applies to the accused party but not his accusers, notwithstanding the apparent assymetry. The reasons for this are elucidated below.

62. The "right to remain silent" is commonly regarded in popular culture as a means by which criminals evade responsibility for their unlawful acts. It is indeed unfortunate that the formulaic declaration known as "taking the Fifth" (so called after the American Fifth Amendment) is expressed in the words: "I refuse to testify on the grounds that it might tend to incriminate me". This wording gives the impression that only a guilty party

would refuse to testify; the very act of “taking the Fifth” has become, in the popular mind, an admission of guilt.

63. Indeed, the Plaintiff in these proceedings has no wish to withhold his testimony; he is literally chomping at the bit for an opportunity to tell his story. But not until the other side has laid its cards on the table first! It would be much more clear, for the Plaintiff’s sake, if the declaration of “taking the Fifth” were formed in these alternative words:

> “I refuse to testify at this time on the grounds that if they knew my testimony, my accusers would be in a position to concoct new evidence which I would then have difficulty in refuting.”

64. Indeed, the Defendants will be “prejudiced” if they are compelled to disclose the full extent of their evidence against the Plaintiff in advance: they will be prejudiced because the Plaintiff will then have the opportunity to expose their acccusations as being false and malicious. In this way the Defendants will indeed suffer “irreparable harm” if the Plaintiff is allowed to proceed with discovery. But this is hardly the type of irreparable harm from which the “three-pronged test” is intended to protect them.

65. On the contrary, it is not the Defendants but the Plaintiff who suffers irreparable harm, and continues to suffer it on a daily basis, as a result of being unable to effectively reply to the scandalous accusations against him, which have cost him untold hardship in terms of personal humiliation, alienation of family and friends, and the inability to move forward in life. Further, there is the irreparable harm of being forced to defend himself against two new Motions for Summary Judgment without the benefit of Discovery. Contrast this with the “irreparable harm” claimed by the University which consists merely of the “unfairness” of having to deal with the claims by the Plaintiff, thereby distracting them from their everyday business…a distraction which they brought upon themselves as a result of their own outrageous conduct in denying the Defendant his legitimate due process rights starting from the very day he was removed from his Practicum and continuing right up to the present.

66. The Plaintiff therefore claims that the balance of convenience argument favors a dismissal of the present Motion to Stay.

Further Evidence of the Defendant's Male Fides

67. If it is not by now abundantly clear that the Defendants, in resisting the Plaintiff's attempts to obtain discovery, are doing so improper purposes, the Court should further consider the circumstances associated with the Defendants' outrageous actions in causing the Plaintiff to be charged with Criminal Code offenses including Forcible Entry.

68. On January 11th 2013 the University issued a Barring Notice to the Plaintiff indicating that he would be charged with Trespassing if he appeared on campus property. The Plaintiff subsequently learned that the Notice had been issued in response to a complaint by George Bush, a former instructor of the Plaintiff. The Plaintiff asked the University to disclose the nature and details of the Bush complaint so he could respond to it, but they refused to do so. The Plaintiff therefore informed them that if they continued to refuse his attempt to appeal the Barring Notice, he would be forced to present himself on Campus to assert his rights. The University re-iterated its position that the Plaintiff would be arrested if he did so.

Green Affidavit of Sept 2013 **Exhibit "F"**

69. On January 28th, the Plaintiff made one final attempt to resolve the impasse by offering to abide by the terms of the Barring Notice if the University would simply disclose to him the details of the Bush Complaint. The University did not respond to this offer. Instead, as he subsequently learned, they hired an additional four security officers to be on the lookout for him. These officers remained on duty, day and evening shifts, for the next ten days until the Plaintiff was arrested and placed in detention by the Winnipeg Police on Feb. 7th 2013.

Green Affidavit of Sept 2013 **at para 24**

70. While the university is arguing, in the present motion, that to comply with the Plaintiff's discovery rights would unfairly burden them with excessive costs, it should be clear that in the aforesaid incident, the University was willing to spend thousands of

dollars simply to deny the Plaintiff the opportunity to know the charges against him. It is clear that when given the choice between saving money and denying disclosure, the University chose to deny disclosure. The Plaintiff urges the Court to draw the inference that the same improper motivation has led them to deny the Plaintiff his legitimate discovery rights in the present proceedings.

The Plaintiff's Cross-Motions

71. If the present Motion before the Court is dismissed, then the Defendants will be denied the Stay of Discovery which they are seeking. Presumably this means the Plaintiff will be allowed to proceed with discovery. But what would be the nature of this discovery? Indeed, there are already two other Motions before the Court, filed by the Plaintiff, in which he seeks to enforce his discovery rights. And as a result of the changing circumstances of the case, it has become necessary for the Plaintiff to now make a third motion, to be filed and served concurrently with the present Brief, in which the Plaintiff asks for further relief from this Court in order to ensure that the Defendants are not able to continue to subvert his legitimate discovery rights as they have until now.

72. The Plaintiff already has a Motion before the Court asking for exclusion of co-defendants from each others' Discovery, on the grounds that they should not be given the opportunity to tailor their evidence to support each others' narrative. In view of the complete and utter lack of responsiveness by the Defendants to the Plaintiff's written interrogatories, it is to be expected that upon Examination before a Court Reporter, the individual Defendants would likewise simply refuse to answer. In this way, they would learn the thrust of the Plaintiff's questioning, and thereby gain the opportunity to confer amonst themselves as to how to answer; and in so doing effectively frustrate the intent of the sought-after Order for Exclusion, assuming that said order were to be granted.

73. It is therefore clear that the Plaintiff cannot hope to obtain effective discovery from these Defendants unless such discovery is held before a Master rather than a Court Reporter; accordingly, this relief is being sought in the new Cross-Motion being filed by the Plaintiff concurrently with this Brief.

74. The Plaintiff also filed, in July 2013, a Motion to Compel Answers to Discoveries. Subsequently, the Defendant parties filed Affidavits of Responses which were so evasive as to be tantamount to a blanket refusal to answer. The Plaintiff therefore is seeking, in his new Motion, an Order from the court demanding “better answers”.

75. Since such an order would normally require the parties to argue the admissibility of each individual question; and since the presently scheduled hearing of Nov 6 2013 is not designed to accommodate such arguments; and since in any event, the University’s Motion to Stay is centered on oral discovery and not written discovery, the Plaintiff therefore asks this Court that it set up a date on which the admissibility of the Interrogatories may be argued before a Master on a question-by-question basis.

76. Defendant Skull has justified her refusal to disclose names and contact information of witnesses by citing her obligations under the Teacher’s Code of Ethics. It is furthermore problematic whether in any event she still has, as an individual defendant, access to the said information requested by the Plaintiff without exercising her authority as an officer of the Winnipeg School Division (“the WSD”). The Plaintiff thereby asks the Court to grant him leave to add the WSD as a defendant to this claim, on the grounds that the tortious actions of the defendants Skull and Tram were in any event carried out in the course of their functions as employees of said School Division, which is therefore vicariously liable for the consequences of said actions.

***Affidavit of the Arlene Skull* sworn Sept 9 2013 at paras 6 and 15**

77. The Plaintiff argues that the addition of the WSD as a defendant is necessary in order to allow him to exercise his legitimate discovery rights, which he cannot otherwise do with respect to the individual defendants, who do not have personal access to the necessary information; and that there is no prejudice to the WSD by being added as a defendant at this stage, since they are already paying for counsel to represent their employees, and furthermore the Plaintiff has already provided notice to opposing counsel, in an email dated May 7th 2013, that he anticipated the need to add the WSD as a defendant for the very reasons which have in fact developed as noted herein.

Green Affidavit July 2013

78. With respect to the Examination of Ken McCluskey scheduled for August 28th 2013, the Plaintiff is now moving to Strike the Defence of the University defendants for failure to attend said Examination. The Plaintiff understands that this drastic remedy, although technically permitted by the QB rules, is not normally implemented at this stage of the proceedings; and indeed the Plaintiff does not desire such implementation at this time, preferring to press forward the opportunity to argue the case on its merits; however, we urge the Court to apply whatever alternate sanctions it finds appropriate in this case, noting in particular the assessment of costs against the Defendants as was ordered in ***McIsaac v Helathy Body Services Inc*** **(2007) BCSC 612 ("McIsaac")**

McIsaac **at para 50 [TAB 4]**

79. With respect to the Affidavit of Documents presented by the University defendants, the University lists forty-five "Schedule A" documents and no "Schedule B" documents other than a general disclaimer for solicitor-client privilege. However, the University's cover letter of June 27th 2012, written on the orders of the Ombudsman who found that they had improperly withheld documents in response to the Plaintiff's FIPPA application, speaks of 150 numbered doucments, seventy-eight documents being released in full, twenty-six being released in part, and another forty-five being withheld.

Green Affidavit **of Sept 2013 at para 3 and Exhibit "A"**

80. In light of the discrepancy between the Defrendants' Affidavit of Documents, and the information disclosed by order of the Ombudsman, the Plaintiff is asking this Court to order the University to provide a better Affidavit of Documents, one which is consistent with the numbering system already implemented in their letter of June 27th, including a detailed itemization of the forty-five Schedule B documents identified under FIPPA. The Plaintiff notes that the University should not be accorded any sympathy for the additional time and expense of complying with such an order, since the work was already done more than a year ago.

Conclusions.

81. In conclusion, the Plaintiff submits that the Defendants have failed to meet the three-prong test; and furthermore, to the extent that they have met those conditions, it would be an affront to natural justice to award them a stay of discovery at this point in the proceedings when they have been improperly evading their legitimate responsibilities in this regard since even before the present action was launched.

82. The Plaintiff is seeking an order of Costs with respect to these various Motions which would send a message to these Defendants that their conduct has been improper, and effectively deter them from continuing to proceed in this manner. The Defendants' have already demonstrated a willingness to lavish extraordinary sums of University money for the sole purpose of denying disclosure to the Plaintiff, as described in paras 69 and 70 above; and because those monies are derived from institutional budgets, the University administrators do not feel any "sting" associated with Costs awarded "in the cause", which may not be payable for years. We note, for instance that the President of the University is scheduled to retire next year and it is his successor who will be left "holding the bag" for costs incurred in these proceedings. We therefore urge that nothing short of an order for Costs "payable forthwith" will carry any significant weight with these Defendants. If necessary, the Plaintiff asks the Court to convene a subsequent hearing where this matter may be argued.

83. In the event that this Motion is granted, the Plaintiff argues that all parties ought to bear their own costs, since the QB Rules contemplate that no stay is to be granted on an appeal from a Master to a Judge except by the Court's discretion, and therefore, short of simply abandoning his legitimate interests, the Plaintiff had no choice but to oppose this motion.

Epilogue

84. As a Canadian citizen of the Mosaic persuasion, the Plaintiff has frequent occasion, whether in Temple or in ordinary social situations, to encounter co-religionists who are members of the legal profession, wherupon the Plaintiff has often taken advantage of the opportunity to discuss his experiences as a self-represented litigant.

85. In one such conversation with a well-known Member of the Bar, a co-religionist of the Plaintiff whom we will hereinafter refer to as Mr. K, the Plaintiff expressed his indignation at learning of a recent case where it took twenty-two years from the time the action was launched until it was argued in Court. The Plaintiff recalls expressing his frustration using words similar to “the legal system is a farce”; whereupon Mr. K admonished him that it was not so; that the system was not “broken”, and it was more likely that lack of sufficient diligence on the part of counsel was to blame for such inordinate delays of justice. Mr. K further expressed the opinion (or perhaps it was a boast) that working within the rules, he could get any case to trial in 18 months (or 24 at the most), provided he saw fit to devote his fullest efforts to that end.

86. In the present case, the Defendants have frequently expressed resentment (as described in the foregoing) at the efforts they have had to exert in response to the Plaintiff’s actions. We, for our part, believe we are doing nothing more than using the Queen’s Bench Rules for their intended purpose; namely, the speedy and expeditious determination of justice. Perhaps it is commonly accepted within the Legal Profession that many of the “deadlines” mandated by the QB rules are not meant to be taken literally, but we do not feel bound to acquiesce to this state of affairs simply because it has become the norm. Indeed, given the age of the Plaintiff, if we were to allow this case to languish for twenty-two years before going to trial, the issues would most likely have become moot in the most definite sense of the word before then.

87. We therefore feel fully justified in agressively taking up the challenge which Rocky has laid down before us: namely, to get our case to trial inside of two years. At the time of this filing it will have been thirteen months, so we feel we are still “on track” to make target. We urge the Court to respect our desires in this regard, even if it may seem that in practise “speedy justice” has become more the exception than the rule.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

October _____ 2013

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DOCUMENTS TO BE RELIED UPON

Document Name	**Date Filed**	**Doc. No.**
Statement of Claim	Sep 20 2012	1
Affidavit of Colin Russel	Jan 08 2013	22
Affidavit of Martin Green	Jan 23 2013	27, 28
Motion Brief of the Univeristy Defendants	Feb 19 2013	30
Motion Brief of the Plaintiff	Mar 04 2013	32
Reason for Judgment of Master Berthaudin	Jun 21 2013	49
Affidavit of Arlene Skull	Aug 26 2013	59
Notice of Motion of the University Defendants	Aug 27 2013	60
Affidavit of Colin Russell	Aug 28 2013	61
Answers on Interrogatories: Colin Russell	Aug 28 2013	62
Motion Brief of the University Defendants	Sep 03 2013	64
Affidavit of Martin Green	Sep 09 2013	66
Affidavit of Arlene Skull	Sep 09 2013	67
Disposition Sheet of Sr Master Lee	Sep 30 2013	71
Motion Brief of the University Defendants	Oct 04 2013	73
Supplementary Affidavit of Arlene Skull	Aug 26 2013*	N/A
Answers on Interrogatories: Arlene Skull	Aug 26 2013*	N/A
Answers on Interrogatories: Hiep Tram	Sep 09 2013*	N/A

LIST OF AUTHORITIES

Combined Air Mechanical Services v Fleisch (2011) ONCA 764 (“Fleisch”) **[TAB 1]**

Bell Canada v Communication, Energy and Paperworkers Union of Canada (1997) CanLII 4851 FC (“Bell”) **[TAB 2]**

Trans-Canada Medical Management v Dr. Michael Varenbut et al (2003) Ontario Superior Court of Justice (“Trans-Canada”) **[TAB 3]**

McIsaac v Helathy Body Services Inc (2007) BCSC 612 (“McIsaac”) **[TAB 4]**