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(Winnipeg Centre)
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COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

PATRICK CULLIGAN,	)	
	)	R. Ian Histed
plaintiff (appellant),	)	for the plaintiff/appellant
- and -	)	Bradley McClelland
	)	for the defendants/respondents
JEFFREY NORMAN, JASON CHYMYSHYN AND THE CITY OF WINNIPEG	)	
defendants (respondents).	)	Judgment Delivered: December 6, 2023

TOEWS J.

INTRODUCTION

[1] The plaintiff/appellant (appellant) appeals the decision of an Associate Judge striking the appellant's statement of claim and a reply in a civil proceeding as an abuse of process on two grounds:

i. The appellant's pleadings and specifically the reply offends King's Bench Rule 25.06(7) in that rather than amending the statement of claim, the appellant filed a reply which improperly raises new claims; and

ii. the claim is an improper collateral attack on the decision of the Provincial Court convicting the appellant of several criminal offences.

[2] The reasons of the Associate Judge are set out in an endorsement dated February 24, 2023 (the "Endorsement"). In those reasons, the Associate Judge found that in striking the statement of claim and reply with prejudice that the statement of claim is based entirely on a set of facts that were the subject of a criminal proceeding before the Provincial Court of Manitoba and that all of the facts alleged in the statement of claim, which form the foundation of the causes of action alleged, are facts that were addressed in some manner by the Provincial Court Judge in the related criminal proceedings against the appellant.

[3] In respect of the hearing of this appeal, the Court of King's Bench Rule 62.01(13) provides:

> **62.01(13)** The hearing of the appeal shall be a fresh hearing and
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> (b) if the appeal is from an order, decision or certificate of an associate judge, the parties may not adduce further evidence, except with leave of the judge hearing the appeal.

[4] Neither party has sought to adduce further evidence and accordingly this appeal proceeded based on the record before the Associate Judge. However, since this is a fresh hearing, no legal or factual deference is owed to the findings of the Associate Judge. I would note, however, that while I have independently reviewed the material relied upon by the parties before me, I have also accepted as accurate and specifically adopted portions of the reasons of the Associate Judge in the Endorsement in my own reasons.

[5] Furthermore, since this is a new hearing, I decided to ask the respondents who initially made the motion to strike the pleadings to present their arguments first with the appellant responding to those submissions. Neither party raised an objection to proceeding in that fashion.

THE FACTS

[6] The incident which gave rise to the statement of claim was an arrest of the appellant by the two individual respondents, both City of Winnipeg police officers, on January 12, 2015. Following his arrest, the appellant was prosecuted in the Provincial Court and convicted of several criminal offences by a Provincial Judge. These included convictions for resisting a peace officer in the execution of his duty, possession of cocaine and breach of an undertaking.

[7] As summarized by the Associate Judge in her reasons, the statement of claim is based entirely on a set of facts that were the subject of the criminal proceedings before the Provincial Court. I agree with the Associate Judge when she states in her reasons, at p. 2, para. 6 of Endorsement:

> [6] … All of the facts alleged in the statement of claim, which form the foundation of the causes of action alleged, are facts that were addressed in some manner by the Provincial Court Judge in the related criminal proceedings against the [appellant].

[8] The Associate Judge further notes at para. 7 of the Endorsement that the appellant testified at the criminal proceedings and the evidence he gave, and that his witnesses addressed in those criminal proceedings, include the same factual allegations he now relies on in these civil proceedings. At para. 8 of the Endorsement, the Associate Judge notes that the Provincial Judge:

> [8] … made specific findings that facts alleged by the [appellant] at his criminal trial were "incredible', inconsistent with his own witnesses' statements, and that the [appellant] … was prone to making things up and/or jumping to conclusions without proper facts. These same factual allegations are now being raised by the [appellant] in these civil proceedings as the foundation for his claim.

[9] In my opinion, the Associate Judge has properly summarized the Provincial Judge's reasons in this regard, and I accept her summation of the Provincial Judge's reasons as being fair and accurate.

[10] The criminal convictions entered in the Provincial Court were appealed by the appellant to the Court of King's Bench, and ultimately with leave, to the Court of Appeal. In each case, the court upheld the findings of the Provincial Judge in full. Leave to appeal to the Supreme Court of Canada was denied.

[11] In the reply to the statement of defence, the appellant raises a further new allegation, asserting that there was the improper withholding of information by the prosecution in the criminal proceeding that should allow the appellant to now proceed, either by way of an amendment to the statement of claim or through the reply, with his civil claim. The appellant states that the alleged new information was brought to light in an article that appeared in the Winnipeg Free Press subsequent to his criminal conviction.

[12] As summarized by the Associate Judge in her reasons at para. 17 of the Endorsement:

> [17] The [appellant] relies on a newspaper article that reported on alleged wrongdoings of one of the listed defendants, that arose in the context of a different civil claim filed by an unrelated party. … Further, the [appellant] argues I should infer, simply because a claim was filed in the past against one of the defendants, that there must be highly relevant documentation available. He says this despite the claim being discontinued without even a defence filed.

[13] Although the appellant acknowledged in his own brief filed before the Associate Judge that he has the right to pursue an alternate remedy should he be able to properly make out the suppression of evidence as he alleges, he chose not to do so because "… the route to obtain it would be circuitous, onerous and lacking in certainty." The appellant maintains that "this civil proceeding is (the) more efficient and cost effective way of arriving at the truth … ." (See para. 14 at p. 4 of the Endorsement)

THE POSITION OF THE DEFENDANTS (RESPONDENTS)

[14] On this appeal from the decision of the Associate Judge, the respondents have requested that the decision of the Associate Judge be upheld for the following reasons:

i. the statement of claim and reply constitute an abuse of process in that they attempt to relitigate the appellant's criminal convictions; and

ii. the reply is procedurally barred as it raises a new cause of action.

[15] The respondents also take the position that the Associate Judge was correct in refusing to hear the appellant's motion seeking to compel answers to questions on interrogatories.

[16] In their brief, the respondents rely extensively on the decision of ***Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79***, 2003 SCC 63, [2003] 3 S.C.R. 77 (QL), in advancing their position that the statement of claim and the reply constitute an abuse of process. In ***C.U.P.E., Local 79***, the court confirmed the doctrine of abuse of process as it relates to a motion to strike a pleading. In addition, the court held that the appropriate mechanism to challenge a criminal conviction is the existing

appeal structure and cautioned against the use of relitigation and collateral attacks on a criminal conviction.

[17] Similarly, the respondents note that the Manitoba Court of Appeal in ***Michaud v. Brodsky***, 2008 MBCA 67, 228 Man.R. (2d) 136, and ***Hyra v. Manitoba***, 2014 MBQB 21, 302 Man.R. (2d) 175 (upheld by the Manitoba Court of Appeal at 2015 MBCA 55) confirmed that a civil action which results in the relitigation of a criminal conviction, must be struck as an abuse of process, save for truly exceptional circumstances.

[18] In respect of the exceptional circumstances exception, the respondents state that there are no exceptional circumstances here and that the appellant has failed to establish any reason why the relitigation of his criminal convictions ought to be permitted.

[19] In respect of the objection to the reply raising a new cause of action, the respondents rely on King's Bench Rule 25.06(7) which provides:

> 25.06(7) An allegation that is inconsistent with an allegation made in a party's previous pleading or that raises a new ground of claim shall not be made in a subsequent pleading but by way of amendment to the previous pleading.

[20] The respondents state that the reply is the first instance where a ***Charter of Rights*** (the "***Charter***") remedy pursuant to s. 24(1) of the ***Charter*** for non-disclosure is raised and is therefore barred by Rule 25.06(7). The respondents also argue that this claim for damages pursuant to s. 24(1) of the ***Charter*** necessitates the relitigation of the appellant's criminal convictions.

[21] The respondents state that the only remedy that the appellant has in respect of his allegation that he has been prevented from making a full answer and defence and

that his criminal trial was unfair is an application to the federal Minister of Justice under s. 696.1 of the ***Criminal Code***.

[22] In respect of the Associate Judge's refusal to order interrogatories to be answered, the respondents submit an Associate Judge had ruled on May 10, 2022, that the respondents' motion to strike should be heard separately and in advance of the appellant's motion to compel answers. That decision was not appealed by the appellant, but rather the appellant attempted to have the motion to compel answers heard at the same time that the respondents' motion to strike was heard on February 9, 2023. Accordingly, the respondents submit that the Associate Judge was correct in dismissing the motion to compel answers.

THE POSITION OF THE APPELLANT

[23] In his brief, the appellant sets out his version of the incident leading up to his arrest and his subsequent prosecution. It would be an understatement to say that there is a marked difference between his version of the incident and that advanced by the respondents or found by the Provincial Judge in the criminal proceedings. However, it is not necessary for me to set out the appellant's version of what occurred in any substantive way. It is sufficient for the purposes of these reasons that the issues raised in the statement of claim were before the Provincial Court and were addressed in some manner in the appellant's criminal proceedings. The substantive issues in the criminal proceedings before the Provincial Judge can be summarized as follows:

i. Whether there was a wrongful detention;

ii. Whether there was excessive force used by the respondents in arresting the appellant;

iii. Whether the personal property of the appellant was stolen; and

iv. Whether the respondents planted cocaine on the appellant.

[24] The issues identified by the appellant in these proceedings are framed in his brief in the following manner:

i. Whether the claim is an abuse of process in that the appellant seeks to relitigate a criminal conviction;

ii. Whether the reply should be struck as advancing a cause of action; and

iii. Whether the respondents should answer the questions on interrogatories.

[25] Within the context of these issues the appellant submits:

i. The respondents were not a party to the prosecution of the appellant and therefore the findings of fact made in the criminal proceeding do not bind the appellant or the respondents in this civil proceeding;

ii. The collateral attack doctrine does not apply because the appellant is not seeking a reversal of his convictions, but seeks damages for false imprisonment primarily;

iii. There are circumstances where it is not an abuse of process to revisit the factual findings that support a criminal conviction;

iv. The focus of the inquiry into whether a civil proceeding constitutes an abuse of process as being a collateral attack is on the integrity of the adjudicative process;

v. Where the relitigation enhances rather than impeaches the integrity of the justice system, fairness dictates that the original result in the criminal proceedings should not be binding in the new context of the civil proceedings;

vi. In this case the convictions were obtained by the respondents' violation of the appellant's right to full answer and defence;

vii. A previous lawsuit by an unrelated third party against one of the respondent police officers in which it was claimed the officer threatened to plant drugs on the plaintiff in that action would "shake the whole foundation" of the Crown's criminal case against the appellant (p. 13 at para. 33 of the appellant's motion brief);

viii. The fact that this unrelated claim was "settled years later by a notice of discontinuance" without a defence being filed (p. 16 at para. 39 of the appellant's motion brief) has kept the court in the dark due to the respondents' refusal to answer interrogatories about that unrelated claim in which one of the respondents was a named defendant;

ix. The reputation of the administration of justice would suffer greater harm by binding the appellant to the result of what he claims to have been a constitutionally unfair trial in the criminal proceeding;

x. In respect of whether the reply constitutes a new cause of action, the appellant submits, *inter alia*, that requiring the appellant to shift the allegations in the reply to the statement of claim would accomplish "exactly nothing other than

a waste of time and procedure." (p. 19 at para. 47 of the appellant's motion brief); and

xi. The pleadings in the reply are "… not so much a cause of action as a factor that negates the defence that is presently being urged upon the court …" (p. 20 at para. 47 of the appellant's motion brief)

DECISION

[26] After considering the submissions of counsel and reviewing the material before me, I conclude, in dismissing the appellant's appeal, that the statement of claim and reply constitute an abuse of process in that they attempt to relitigate the appellant's criminal convictions.

[27] As stated by Arbour J. in ***C.U.P.E., Local 79***, at para. 37:

> **37** … the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would … bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, *per* Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:
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> > The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).
> > One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. [Emphasis added.]
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> As Goudge J.A.'s comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice.

[28] In ***C.UP.E., Local 79***, Arbour J. sets out the considerations underlying the doctrine of abuse of process and specifically, affirms the applicability of this doctrine to a criminal proceeding. In this context she also broadly identifies the circumstances where relitigation will enhance, rather than impeach, the integrity of the judicial system. She holds at paras. 51, 52 and 54:

> **51** Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.
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> **52** In contrast, proper review by way of appeal increases confidence in the ultimate result and affirms both the authority of the process as well as the finality of the result. It is therefore apparent that from the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original result should not be binding in the new context. This was stated unequivocally by this Court in *Danyluk*, *supra*, at para. 80.
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> **54** These considerations are particularly apposite when the attempt is to relitigate a criminal conviction. Casting doubt over the validity of a criminal conviction is a very serious matter. … The administration of justice must equip itself with all legitimate means to prevent wrongful convictions and to address any real possibility of such an occurrence after the fact. Collateral attacks and relitigation, however, are not in my view appropriate methods of redress since they inordinately tax the adjudicative process while doing nothing to ensure a more trustworthy result.

[29] In view of Arbour J.'s specific recognition that these considerations are "particularly apposite" when the attempt is to relitigate a criminal conviction, the appellant's arguments in respect of collateral attacks on criminal convictions and relitigation are clearly without merit when he argues that the respondents were not a party to the prosecution of the appellant and therefore the findings of fact made in the criminal proceeding do not bind the appellant or the respondents in this civil proceeding.

[30] On the same basis, the appellant's position that the collateral attack doctrine does not apply because the appellant is not seeking a reversal of his convictions, but seeks damages for false imprisonment primarily, is not well founded.

[31] While it is true that there may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, there is no evidence here that this case raises any of the instances identified by Arbour J. in her reasons. Beyond the urged inferences of the appellant, there is no evidence here that the criminal proceeding was tainted by fraud or dishonesty or that fresh, new evidence, previously unavailable, conclusively impeaches the original results.

[32] The appellant's remedy lies not by way of what is clearly an inappropriate collateral attack. I agree with the comments of the Associate Judge when she states at para. 15 of the Endorsement:

> In my view, and particularly where there is a proper way to address an injustice in a criminal proceeding, that proper procedure should be followed. It is a clear abuse of process to try and attack those criminal convictions through the civil process as an alternative, simply because it is more convenient. That would be opposite to the interests of justice. If the [appellant] wishes to re-litigate his criminal case, he must follow the proper process in doing so.

[33] In my opinion, there is no evidence here that the integrity of the adjudicative process is at stake or that fairness dictates that the original result in the criminal proceedings should not be binding in the new context of the civil proceedings.

[34] As noted by the respondents, the remedy available to the appellant in respect of his allegation that he has been prevented from making a full answer and defence and that his criminal trial was unfair is, if any, an application to the federal Minister of Justice under s. 696.1 of the ***Criminal Code***.

[35] The assertion by the appellant that a previous lawsuit by an unrelated third party in which it was claimed one of the respondents threatened to plant drugs on the plaintiff in that action would "shake the whole foundation" of the Crown's criminal case against the appellant, is itself without foundation. I agree with the observation of the Associate Judge that in this case there are no circumstances that would give the court a reason to depart from its approach to abuse of process cases (see: para 18 of the Endorsement) or as stated by Arbour J. at para. 52 of ***C.UP.E., Local 79***, no circumstances that "dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole."

[36] In view of my findings that the appellant's statement of claim and reply constitute an abuse of process as being an inappropriate collateral attack on a criminal proceeding and should therefore be struck, it is not necessary for me to decide whether the reply should be struck on the basis that it violates Court of King's Bench Rule 25.06(7) or whether the Associate Judge properly dismissed the appellant's motion for an order seeking answers to interrogatories. However, had it been necessary to make those

determinations I would have come to the same conclusions that the Associate Judge arrived at.

CONCLUSION

[37] For the reasons set out above, I find that the allegations in the statement of claim and the reply are an abuse of process and that the reply, along with the statement of claim, are struck without leave to re-file. The appeal of the appellant is dismissed. The respondents shall have their costs as ordered by the Associate Judge in respect of the proceeding before her as well as costs on a tariff basis in this court. If costs cannot be agreed upon, counsel may advise the court in writing as to their position on quantum and I will set the amount of costs.

_____ J.