Date: 20240415
Docket: CI 18-01-15816
(Winnipeg Centre)
Indexed as: Polischuk v. The City of Winnipeg
Cited as: 2024 MBKB 60

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

DANIEL POLISCHUK,	)	Janet I. Jardine
	)	for the plaintiff
plaintiff,	)	
- and -	)	
	)	
	)	
THE CITY OF WINNIPEG	)	William R. Gardner
	)	Kaisha Thompson
defendant(s),	)	for the defendant
	)	
	)	
	)	Judgment Delivered:
	)	April 15, 2024

MARTIN J.

INTRODUCTION

[1] Daniel Polischuk is a hardworking, fundamentally honest and decent man who worked for many years as an independent subcontractor for the City of Winnipeg (the City) before he was banned in 2017 from performing any City work, based on an untrue allegation. While heads of liability in the Statement of Claim are awkwardly worded, it is understood Mr. Polischuk sues for loss of income based on

(i) misfeasance in public office, (ii) causing loss by unlawful means, and more generally, (iii) breach of a common-law duty of procedural fairness or natural justice.

[2] Although justice would seem to demand a positive result for Mr. Polischuk, the legal requirements to be proved for these claims are not accommodating. For the following reasons, his claim is dismissed.

[3] However, this decision is not a vindication of the City's actions or conduct. Mr. Polischuk was not dealt with fairly and his bans were neither well-grounded nor just. In response to my enquiry, counsel for the City very fairly acknowledged that if I found the second ban was not reasonable, the City would lift that ban. That said, if I had the authority to quash both bans I would do so. Considering the facts I have found, the City should act honourably and voluntarily lift both bans, particularly as most of the City employees involved have moved on. It is the only right way to make amends. Doing so would enable an opportunity for Mr. Polischuk to take-on City work. I trust the City's counsel will ensure appropriate City personnel are made aware of my assessment of this situation.

[4] For organizational convenience, liability will be dealt with under Part 1, while, to the extent necessary, damages will be addressed under Part 2.

PART 1: LIABILITY

FACTS

[5] Despite a bevy of witnesses and testimony, I will be relatively concise. I find the following facts.

Background

[6] Mr. Polischuk is now 59 years old. He has been operating heavy machinery for about 50 years, starting as a youngster on the family farm. It is the only livelihood he has really known.

[7] Together with his wife, as a partnership they operate Polischuk Trucking. Mr. Polischuk operates the equipment, backhoes, and tandem trucks, while Mrs. Polischuk takes care of administration, although if pressed, she also operates some machines.

[8] Since about 1999, Polischuk Trucking has subcontracted solely to Schultz Transfer Limited (Schultz Transfer), a corporation owned and operated by Mr. Polischuk's father-in-law, Arthur Schultz, with assistance from Mrs. Polischuk. From time to time, Mr. Polischuk's two sons also worked for Polischuk Trucking and Schultz Transfer.

[9] During that time, and through the trial, Schultz Transfer's sole source of work was as an independent contractor to the City, chiefly for two separate departments: the Water Department, supply of clean water (Water), and the Wastewater Department, flow of sewer effluent (Wastewater). Each year prior to 2017 and since, Schultz Transfer would bid and be awarded annual contracts by the City. Because of their bids, it was amongst the first contractors called for jobs. This meant Schultz Transfer, and hence Mr. Polischuk, received a steady and consistent stream of City work daily.

[10] As a result, since approximately 1999 until he was fully banned from City work in November 2017, Mr. Polischuk's primary, if not sole, source of income was as a subcontractor machine operator for the City, primarily in Water and Wastewater.

[11] For reasons that are not controversial nor necessary to explain, working as a subcontractor in Water could be far more financially rewarding than working in Wastewater, or any other public works department in the City, if an operator was prepared to take the available work. Mr. Polischuk was such an operator. If he was called to work, he worked; at any time, on any day, Christmas and birthdays included. Remarkably, he would work up to or over 4,000 hours a year.

[12] I find that until 2017, Mr. Polischuk was considered a highly regarded, reliable and skilled backhoe and machine operator for the City.

The City

[13] The contracts between the City and Schultz Transfer were standard form contracts used by the City for independent contractor work. The contract was comprised of the Bid Opportunity contract and a General Conditions document. Key provisions included:

Bid Opportunity contract:

- E7.1(d) - the Contract Administrator may suspend an Operator from callout list, at his sole discretion, for the Operator's attitude, ability or actions
- E7.2 - after suspension, the Contractor "will be requested to explain the circumstances that caused the suspension"

- E7.3 - there would be no financial compensation for suspension or removal from the callout list

General Conditions document:

- C 5.6 - the Contract Administrator may order a Contractor to remove any person performing work, who the Contract Administrator determines is guilty of misconduct
- C 5.11 - if the Contractor disputes the decision of the Contract Administrator in respect of, for example C 5.6 above, the Contractor shall act in accordance with the decision and may concurrently appeal the decision as provided for in C 20.1 & 20.2
- C 6.24 - the Contractor shall not employ any Subcontractor that the Contract Administrator objects to, acting reasonably
- C 20.1 & 20.2 - a Contractor may appeal the decision of the Contract Administrator to the Chief Administrative Officer (CAO) of the City, and if he disagrees with the CAO's decision, he may proceed to arbitration

[14] In 2017, the City's Contract Administrator for the Schultz Transfer contracts was Abe Wiebe, of the Public Works Department. Several others, including Tim Evinger and Mike Gottfried, supervisors of Water repair crews, were involved with Mr. Wiebe in the matters underpinning this litigation. Below them were foreman and other workers. Wastewater personnel were also responsive to Mr. Wiebe, as were some other departmental personnel.

[15] In 2017, Water was divided into A-side and B-side crews, or shifts, comprised of different City employees who were, from an employee-culture stance, distinct groups. Perhaps not coincidentally, complaints about Mr. Polischuk came only from the B-side shift.

[16] The saga of Mr. Polischuk's removal from City work started on the last day of March and into April 2017.

March - April 2017

[17] Other than what is described below, in the approximate 18 years that Mr. Polischuk worked for the City before March 31, 2017, there is no record or reliable evidence of any complaint or deficiencies with his work, abilities, actions or conduct, except for perhaps the occasional, minor, undocumented concern for not properly wearing safety equipment when outside his machinery. That said, there was one minor disagreement from 2014, which I need not assess for its merit; it was dated, it was never brought to his or Schultz Transfer's attention and, critically, it played no part in this situation.

[18] On March 31, 2017, Mr. Evinger instructed a foreman to directly address Mr. Polischuk for being out of his backhoe while not wearing proper safety equipment. Mr. Evinger then wrote a formal incident report. He noted that Mr. Polischuk made a rude comment to the foreman, which Mr. Polischuk denies, although he contended he was wearing proper safety equipment. Although these types of reports are to be forwarded to the contractor, in this case Schultz Transfer, that was not done. Further, although Mr. Evinger testified there were other prior safety equipment issues with

Mr. Polischuk, no incident reports were ever written. Without an incident report, a contractor is blind to any concerns about his operators.

[19] On the same date, at the same location on Britannica Street, an issue arose about Mr. Polischuk's willingness to help another crew, as well as the crew to which he was assigned. This became a concern for Mr. Evinger, albeit mostly short-lived, as by the end of the workday he realized the true situation. On the evidence, this incident was a petty misunderstanding between personnel at the site; Mr. Polischuk did not misconduct himself in any way. Nonetheless, I find Mr. Evinger harbored blame with Mr. Polischuk for some of the incident.

[20] Around the same time, other disturbing issues seemed to be percolating for Polischuk Trucking and Schultz Transfer. On April 2, Mr. Schultz emailed a City representative raising these concerns. Leaving aside the details, which are not important to this decision, he expressed that a lead hand on the Water B-side shift was resentful toward Schultz Transfer operators (the Polischuks) to the point he was "willing to lie to his superiors to get my operators in trouble". Otherwise, the Polischuks and Schultz Transfer felt they were being unfairly dealt with by various people on the Water B-side crew. The City did not address these concerns, but Mr. Evinger was informed. Mr. Evinger was not happy that a City employee was feeding information to Schultz Transfer.

[21] Also, coincidentally, Mr. Evinger learned that a female City employee on the B-side crew was upset by offensive comments attributed to Mr. Polischuk by another B-side employee. Mr. Polischuk denied making the comments.

[22] Against this backdrop, a few weeks later, Mr. Wiebe met with Mr. Evinger, Mr. Gottfried, and other City personnel about Mr. Polischuk's supposed misbehavior. Mr. Wiebe made the decision, essentially on Mr. Evinger's account and on his request, to ban Mr. Polischuk from any further work with Water. Mr. Gottfried concurred with the request. Mr. Wiebe considered Mr. Evinger's account as recurring complaints of belligerence, disrespect, and refusal to follow orders. Mr. Wiebe's enquiry of these events was essentially just to hear what Mr. Evinger told him; he did not drill-down into the accusations at all. He justified his decision as desirable to stop the reported misbehavior and to support Mr. Evinger, who clearly did not want Mr. Polischuk working at Water.

[23] A short while later, Mr. Wiebe and a subordinate, Frank Stranieri, met with Schultz Transfer to tell them the decision. To be clear, the decision was final, without any opportunity for Schultz Transfer to influence it in any way, and no City employee had spoken to Mr. Polischuk for his side of the story. Further, aside from the one March 31 formal incident report, no other complaint or concern was noted in an incident report. As such, Schultz Transfer had no advance warning of any concerns, nor any real opportunity to address supposed concerns.

[24] To be clear, Schultz Transfer was not prevented from working with Water, just Mr. Polischuk as a subcontractor. And Mr. Polischuk could still work for other departments, including Wastewater, but as noted earlier, that was not as lucrative as working with Water. I accept that Mr. Wiebe did not know and gave no consideration whether the ban from Water would impact Mr. Polischuk's income.

[25] As to the contract, Mr. Wiebe, other City personnel, and Schultz Transfer all believed that there was no avenue of appeal of Mr. Wiebe's decision because the decision involved a subcontractor ban or suspension, not a contractor suspension. As an aside, in my view they are wrong; Schultz Transfer could have appealed this decision as the contractor affected by the decision (General Conditions, C 20.1 & 20.2).

[26] Thereafter, Mr. Polischuk never again worked for Water, but did continue working for Wastewater and other City public works departments.

[27] No further incidents occurred until two events in November 2017.

November 2017

[28] The first event took place on November 10. Mr. Polischuk was working with a Wastewater crew. He was released from the job around noon. He went to refuel his tandem truck at a location close to an outdoor yard, shared by both Water and Wastewater, to store supplies and material such as sand, gravel and mud. I accept Mr. Polischuk went to the yard, on his own initiative and for convenience, to get some clean mud which would be needed as backfill to complete the Wastewater job the next day. No employee was at the Wastewater area, so Mr. Polischuk drove into the Water side and asked the yard backhoe operator for some clean mud. He refused because no one had told him that he could load Mr. Polischuk with clean mud. Mr. Polischuk left. Curiously, immediately, the operator reported all this to Mr. Evinger.

[29] Upon hearing this, Mr. Evinger confirmed that the Wastewater crew had not directed Mr. Polischuk to get clean mud. Shortly, Mr. Evinger sent an email to Mr. Stranieri, with a copy to six senior City personnel including Mr. Wiebe, asserting:

> …
>
> At the time Danny [Mr. Polischuk] the driver from S[c]hultz, was asking for the fill for the Sewer Dept. he was lying. In fact if he was signed out at the time, he was also trespassing on City property, and attempting theft.
>
> These actions are inexcusable, and cannot be tolerated. If a City of Winnipeg employee is caught stealing the punishment is dismissal. I would expect that the contractors should be held liable for their actions as well.
>
> Since S[c]hultz Trucking [i.e. Mr. Polischuk] is no longer in our employ it would seem to me that he should not be employed by the City of Winnipeg at all.

Thus, Mr. Evinger reported that Mr. Polischuk had lied, trespassed, and attempted theft. He demanded Mr. Polischuk be banned from any City work.

[30] I pause to explain the significance of clean mud. Clean mud is material excavated from Water or Wastewater repair sites. It is used to backfill holes created by the excavation. If not left at the site, it is either directly disposed of at the Brady Landfill or taken to the yard. From the yard it is stored for backfill or transferred to the Brady Landfill, at some expense to the City. Historically, it was freely available to be taken and used by City employees, citizens, or others, but that policy was no longer in effect in 2017. Thus, while the clean mud in the yard belonged to the City, it had no value. In fact, once it amassed, it is costly waste.

[31] As this played out, the second event happened. Early on November 12, Mr. Polischuk was in a City building jointly used by Water and Wastewater. He was talking to some employees. Mr. Evinger took exception to this. He told Mr. Polischuk he was not allowed there. An inconsequential exchange followed leading to

Mr. Evinger threatening to call police if Mr. Polischuk did not leave, which he then did. Forthwith, Mr. Evinger sent two emails to the same group as on November 10, setting out what happened.

[32] For various innocuous reasons, with Mr. Wiebe's concurrence, Mr. Stranieri took the lead on Mr. Evinger's two complaints. Hearing about these matters from her husband, Mrs. Polischuk, on behalf of Schultz Trucking, reached out to Mr. Stranieri to set up a meeting to discuss these issues. They spoke by phone on November 14. She denied Mr. Polischuk was trying to steal mud and wanted a meeting to "clear this up".

[33] On November 22, Mr. Stranieri sent a letter to Schultz Transfer suspending Mr. Polischuk for an incident on "November 11" [sic], "until the Contract Administrator [Mr. Wiebe] and the contractor S[c]HULTZ Transfer Ltd. meet to discuss the reason for the suspension". On November 24, Mrs. Polischuk met with Mr. Stranieri, but Mr. Wiebe did not join them because Schultz Trucking's principal, Arthur Schultz, was not there. Mr. Evinger earlier declined to attend; as far as he was concerned, there was nothing to clear up.

[34] At the meeting, Mr. Stranieri told Mrs. Polischuk that the decision had already been made to permanently ban Mr. Polischuk, regardless that a meeting had not taken place. Mr. Wiebe confirmed this in his testimony, saying the decision was made before November 24, in other words, without any real input or opportunity for a fulsome explanation by either Schultz Transfer or Mr. Polischuk.

[35] Thereafter, Mr. Stranieri collected some additional information from City personnel. Mr. Wiebe was told about the meeting with Mrs. Polischuk and of Schultz Transfer's position that Mr. Polischuk was not trying to steal mud. Of note, Wastewater personnel were not bothered about this issue, but as co-workers they were satisfied to follow along with Mr. Evinger's wishes.

[36] Mr. Wiebe testified that he made the decision to permanently ban Mr. Polischuk because of the November 10 "attempted theft", and earlier incidents. On November 30, Mr. Wiebe sent a letter to Schultz Transfer explicitly referencing only the November 10 incident as a basis for his decision to permanently ban Mr. Polischuk from any City work. He wrote that he did so "[a]fter reviewing all statements provided by the parties", although no one asked Mr. Polischuk for a statement or asked him what happened.

[37] In examination for discovery, Mr. Wiebe conceded the obvious and agreed that in banning Mr. Polischuk, he was "limiting him from getting income through working equipment - - being an operator of equipment for the City of Winnipeg, and only from being an operator".

[38] On December 1, Mr. Stranieri sent an email to Mr. Evinger and numerous other City personnel saying:

> All information collected from the Wastewater Excavation department regarding the incident that took place November 10, 2017 involving Danny Polischuk of SCHULTZ TRANSFER LTD. attempting to take material from a City of Winnipeg yard without permission from the foreman, has been reviewed and the decision has been made to permanently suspend …

[39] So ended Mr. Polischuk's many years as a reliable and skilled subcontractor for the City.

General Findings

[40] If not already clear, I do not find that Mr. Polischuk was given any opportunity to answer or rectify the April 2017 allegations, notably the supposed vulgar comments about a female employee, which is the only allegation of any potential substance. I am satisfied that had it been handled directly with Mr. Polischuk, and perhaps the employee and a bias-free manager, consistent with the respectful work-place policy, an understanding would have been reached that would not have resulted in a ban. Of note, the employee did not make a formal complaint and she did not expect that Mr. Polischuk would be prevented from working with her further. As well, she did not know her concern was a reason for Mr. Polischuk's ban from Water. With respect to Mr. Evinger's other complaints, there was no basis in fact. Mr. Wiebe was wrong to say Mr. Polischuk was belligerent or refused to follow orders.

[41] I also do not find that the "attempted theft" event in November, trying to get a load of mud without prior authorization, was in fact an attempted theft. I accept Mr. Polischuk's evidence unequivocally; he was not trying to steal anything but rather was proactively requesting mud that would be needed to backfill the excavated hole on the project he had been working on. The fact he was not asked to get mud by a Wastewater employee is a red herring. It was reasonable for him to expect that ultimately, he would be asked to get mud. Moreover, clean mud had no value, and he had no other use for it. Mr. Polischuk did not lie to the backhoe operator and was not trespassing. Mr. Evinger jumped to nasty and wrong assumptions.

[42] I also find that once Mr. Evinger initiated his allegations of lying, trespass, and attempted theft, and advocated a ban from all City work, there was no looking back; the permanent ban was essentially a foregone conclusion. In testimony, Mr. Wiebe was clear that although Mr. Evinger could not make the decision to ban Mr. Polischuk, he wanted to support Mr. Evinger and other personnel. Supporting staff was the key reason to ban Mr. Polischuk.

[43] Finally, as to the November 12 event in the Water and Wastewater building, viewed dispassionately, it was entirely minor and inconsequential. It is not surprising the situation was tense for both men; Mr. Evinger had strict views of the workplace and disdained Mr. Polischuk, while Mr. Polischuk felt embarrassment by the events which unfolded since April and Mr. Evinger's confrontation in front of other staff. Mr. Polischuk being in the building was in no way a challenge to anyone's authority or otherwise a snub. It was entirely innocent.

ANALYSIS

[44] As noted at the outset, the claim seeks relief based on three heads of tort liability: (i) misfeasance in public office; (ii) causing loss by unlawful means; and (iii) more generally, breach of a "common-law duty of procedural fairness and Rules of Natural Justice" in an administrative decision.

Misfeasance Of Public Office

[45] I start by noting that the Statement of Claim does not articulate a head of liability as misfeasance in public office. Despite the lack of precision in the claim,

the parties understood throughout that misfeasance in public office is what was meant.

[46] The leading precedent remains the Supreme Court of Canada's decision in ***Odhavji Estate v. Woodhouse***, 2003 SCC 69 (CanLII), at para. 30, where the Court noted "the underlying purpose of the tort is to protect each citizen's reasonable expectation that a public officer will not intentionally injure a member of the public through deliberate and unlawful conduct in the exercise of public functions".

[47] In ***Odhavji***, at para. 22, the Court explained the tort can arise in one of two ways: "Category A involves conduct that is specifically intended to injure a person or class of persons" and "Category B involves a public officer who acts with knowledge both that she or he has no power to do the act complained of and the act is likely to injure the plaintiff." The Court explained the common elements of both categories further:

> [23] In my view, there are two such elements. First, *the public officer* must have engaged in deliberate and unlawful conduct in his or her *capacity as a public officer*. Second, the public officer must have been aware both that his or her conduct was unlawful and that it was likely to harm the plaintiff. What distinguishes one form of misfeasance in a public office from the other is the manner in which the plaintiff proves each ingredient of the tort. In Category B, the plaintiff must prove the two ingredients of the tort independently of one another. In Category A, the fact that the public officer has acted for the express purpose of harming the plaintiff is sufficient to satisfy each ingredient of the tort, owing to the fact that a public officer does not have the authority to exercise his or her powers for an improper purpose, such as deliberately harming a member of the public. In each instance, the tort involves deliberate disregard of official duty coupled with knowledge that the misconduct is likely to injure the plaintiff.
>
> (italics and underlining added)

Moving ahead almost 20 years, in ***Ontario (Attorney General) v. Clark***, 2021 SCC 18 (CanLII), at para. 22, the Supreme Court reiterated the essence of the underlined passage as a requirement for a successful misfeasance claim.

[48] An unlawful act is not confined to an explicit breach of a statutory duty. It includes acts in the absence of, or in the excess of, or for an improper purpose of a governing statute. It can be an act of commission or omission. However, critically, the act must be deliberate. The Court expressed in ***Odhavji*** this notion in several ways:

> [25] … the ambit of the tort is limited … by the requirement that the unlawful conduct must have been deliberate and the defendant must have been aware that the unlawful conduct was likely to harm the plaintiff.
>
> [26] … misfeasance in a public office is not directed at a public officer who inadvertently or negligently fails adequately to discharge the obligations of his or her office …

and

> [28] … The requirement that the defendant must have been aware that his or her conduct was unlawful reflects the well-established principle that misfeasance in a public office requires an element of "bad faith" or "dishonesty". … In order for the conduct to fall within the scope of the tort, the officer must deliberately engage in conduct that he or she knows to be inconsistent with the obligations of the office.

[49] How do these principles apply in this situation?

[50] Mr. Polischuk's counsel asserts that Mr. Wiebe (i) was a public officer, who (ii) in exercising a public function, did not properly (hence, unlawfully) exercise his discretion under the contracts when he banned Mr. Polischuk both in April and November 2017, and (iii) he deliberately did so knowing it was likely to harm Mr. Polischuk. More generally, they criticize Mr. Wiebe's review of Mr. Evinger's concerns as lacking objectivity and rigor. All in, they say the decisions were not

reasonable; Mr. Polischuk was not given a fair shake, as the results were tainted by extraneous considerations and fundamentally flawed processes.

[51] On the other hand, the City maintains that given the information available to Mr. Wiebe on both occasions, his decisions were reasonable and informed by circumstances justifying banning Mr. Polischuk. In no way were his actions knowingly unlawful or done to harm Mr. Polischuk. Moreover, as the bans were grounded in a broad discretion provided for in private contract, Mr. Wiebe was not exercising public functions and the tort of misfeasance does not apply.

[52] Unfortunately for Mr. Polischuk, I find that his misfeasance claim fails on three distinct and essential elements of this tort. Specifically, Mr. Wiebe:

> (i) was not acting in a public officer capacity when he exercised his role as contract administrator for this contract;
>
> (ii) did not know, nor did he have subjective disregard, that the manner he exercised his contract administrator obligation was unlawful; and
>
> (iii) did not know, nor did he have subjective disregard, that the alleged unlawful conduct was likely to harm Mr. Polischuk.

Public Officer

[53] In broad terms, Mr. Wiebe *may have* been a public officer for the City. I need not definitively make that determination but will proceed on that basis while distinguishing his role here as not being within the scope of his public officer duties.

[54] For these events, in his role as Contract Administrator for the Schultz Transfer contract, I find he was not acting in a "capacity as a public officer" or "in the exercise

of public functions". At best, he was a public officer acting in a private law capacity as administrator of a commercial contract between the City and Schultz Transfer. That contract was subordinate or incidental to any broader duty to citizens or the public that Mr. Wiebe may have had in his public works role. There are many examples of a public officer not acting in such a capacity in various fact situations. Many of these involve limitation periods in public office statutes, but the principles are analogous.

[55] For example, ***Des Champs v. Conseil des écoles séparées catholiques de langue française de Prescott-Russell***, [1999] 3 SCR 281, dealt with a school board's reorganization and related termination of an employee. The Court held the Board could not rely on a public office limitation period to end the suit. The headnote succinctly explains:

> In this case, the Board's reorganization was a public initiative. Delivery of an educational program is a responsibility owed by the Board to all members of the public alike. The appellant's alleged injury, however, was created by the Board's implementation of the reorganization and raises only labour relations issues against the Board as the appellant's employer. The Board's action, upon which the appellant's claim is based, was distinct, separate, subordinate and incidental to the Board's execution of its public duty and powers. …
>
> (underlining added)

In other words, the activity at issue for the public authority was more of an internal or operational nature, having a predominantly private character than a public duty.

[56] More recently, I note ***Taylor v. British Columbia***, 2020 BCSC 1936 (CanLII), a case involving an allegation of misfeasance by a public official:

> [61] For the reasons given in [*D*]*es Champs* and *Keene* I conclude that the decision to terminate the plaintiff was a private, employment matter and that misfeasance does not apply. While Ms. Henderson was employed as a public official at the time when she terminated the plaintiff's employment, not every

> act of a public official relates to the exercise of public authority. Ms. Henderson was not exercising public authority under any legislation, nor is it alleged that she was acting contrary to any legislative authority. She was acting in the capacity of an employer *vis-à-vis* an employee and not as a public official *vis-à-vis* a member of the public. I do not agree with the plaintiff that because she is a member of the general public that means misfeasance by a public official is engaged. The Government of British Columbia, like any employer, is entitled to dismiss an employee (and the employee is entitled to challenge that dismissal) but that does not mean that the act of dismissal is misfeasance by a public official for the purposes of this tort.

This is analogous to Mr. Polischuk's termination of his subcontractor role with the City.

[57] While this public officer point is dispositive of the misfeasance claim, I will consider the other two related issues.

Knowledge of an Unlawful Act

[58] As I have noted, for both the April and November bans, an independent or objective examination of the incidents, as would be expected by someone in Mr. Wiebe's role, was lacking. On the trial evidence, neither the April nor November bans were objectively, reasonably justifiable based on anything Mr. Polischuk did or did not do. However, despite the deficiencies in considering issues related to either of the events, I fail to see how Mr. Wiebe dishonestly, or in bad faith, exercised whatever contractual obligation he had, or other statutory duties he may have had.

[59] At its core, he did what he thought was best for the City departments and personnel involved. He can be criticized for the weight he placed on this point, but he had the right to consider how the allegations impacted City employees. I accept that Mr. Wiebe truly thought he was acting properly and for good reason; dutifully prioritizing his concern for the City and its personnel ahead of concern for

Mr. Polischuk. His actions, or omissions, were flawed but not dishonest; he had no ill-will or bad faith towards Mr. Polischuk, a man he did not know.

[60] Under the contract, Mr. Wiebe had an obligation to base any assessment of contractors, or their operators, acting reasonably. Assuming Mr. Wiebe's decisions were not reasonable, it does not necessarily follow that they were actions or decisions needed to underpin a misfeasance claim. Unreasonableness does not necessarily equate to unlawfulness (or even negligence). To the extent he fell short of expected contractual obligations to Schultz Transfer, and by extension to Mr. Polischuk, this may have amounted to a breach of the contract, or more likely provided good grounds for the appeal of his decision to the CAO, or arbitration, as specified in the contract.

[61] Finally, I do not find any breach or abuse or excess of statutory or legislated power incidental to Mr. Wiebe's employment position or duties with the City.

Knowledge of Harm

[62] I accept that in April 2017 Mr. Wiebe did not know enough about Mr. Polischuk's extreme work habits to understand, by any standard, as a subcontractor to Schultz Transfer, Mr. Polischuk would be financially harmed by being restricted to working for other public works departments but not Water. With the complete ban from City work in November, arguably Mr. Wiebe may have been subjectively reckless in not considering that Mr. Polischuk would likely be harmed in some way. However, in both instances, Mr. Wiebe could not have known whether Mr. Polischuk, being an independent contractor, could have done other non-City work,

for Schultz Transfer, for himself (Polischuk Trucking), or another contractor, to replace the lost City work. As demonstrated from evidence respecting the damage claim, eventually Mr. Polischuk was able to replace what amounted to one-full-time-person equivalent work as an employee of another company (although he traditionally worked much more than that).

[63] Clearly and with hindsight, Mr. Wiebe's decisions had an adverse effect, financially and psychologically on Mr. Polischuk. I say with hindsight because I do not find that Mr. Wiebe intended to harm Mr. Polischuk in any way or reasonably foresaw, particularly that a ban from Water alone, would financially or otherwise have that effect. As facts came out at trial, it became clear Mr. Polischuk was harmed. Finally, to address other sundry submissions, I do not find that Mr. Wiebe otherwise attempted to restrict Mr. Polischuk's work at the City in order to affect his income or otherwise target Mr. Polischuk.

[64] The misfeasance claim fails.

Causing Loss by Unlawful Means

[65] The claim asserts that the City wrongfully interfered with Mr. Polischuk's contractual relations with Schultz Transfer by the first and second bans. In ***A.I. Enterprises Ltd. v. Bram Enterprises Ltd.***, [2014] SCC 12 (CanLII), the Court used the descriptor "causing loss by unlawful means" or simply the "unlawful means" tort. See also ***Ultracuts v. Magicuts***, 2023 MBCA 71, at para. 37.

[66] ***A.I. Enterprises*** remains the key precedent explaining the tort of causing loss by unlawful means. The headnote of the Supreme Court's decision provides a concise yet complete summary:

> The tort of unlawful interference with economic relations has also been referred to as "interference with a trade or business by unlawful means", "intentional interference with economic relations", "causing loss by unlawful means" or simply as the "unlawful means" tort. The unlawful means tort is an intentional tort which creates a type of "parasitic" liability in a three-party situation: it allows a plaintiff to sue a defendant for economic loss resulting from the defendant's unlawful act against a third party. Liability to the plaintiff is based on (or parasitic upon) the defendant's unlawful act against the third party. The two core components of the unlawful means tort are that the defendant must use unlawful means and that the defendant must intend to harm the plaintiff through the use of the unlawful means.
>
> In order for conduct to constitute "unlawful means" for this tort, the conduct must give rise to a civil cause of action by the third party or would do so if the third party had suffered loss as a result of that conduct. The unlawful means tort should be kept within narrow bounds. Its scope should be understood in the context of the broad outlines of tort law's approach to regulating economic and competitive activity. …
>
> …
>
> Mere foreseeability of economic harm does not meet the requirement for intention in the unlawful means tort. The defendant must have the intention to cause economic harm to the plaintiff as an end in itself or the intention to cause economic harm to the plaintiff because it is a necessary means of achieving an end that serves some ulterior motive. It is the intentional targeting of the plaintiff by the defendant that justifies stretching the defendant's liability so as to afford the plaintiff a cause of action. It is not sufficient that the harm to the plaintiff be an incidental consequence of the defendant's conduct, even where the defendant realizes that it is extremely likely that harm to the plaintiff may result. Such incidental economic harm is an accepted part of market competition.

[67] Recently the jurisprudence for this tort was revisited by the Manitoba Court of Appeal in ***Ultracuts***. The essential elements of the tort were set out at para. 47:

> (i) the defendant committed an unlawful act against a third party;
>
> (ii) the unlawful act caused economic harm to the plaintiff; and

(iii) the defendant intended to cause economic harm to the plaintiff when committing the unlawful act.

[68] Applying these essential elements to this case means Mr. Polischuk must prove, on a balance of probabilities, that the City committed an unlawful act against Schultz Transfer, which caused economic harm to Mr. Polischuk, which the City intended to cause when committing the unlawful act.

[69] Before proceeding with the analysis, I pause to note Mr. Polischuk's counsel submitted the cases of ***Johnson v. BFI Canada Inc. et al***., 2010 MBCA 101 (CanLII) and ***Payjack v. Springhill Farms et al.***, 2002 MBQB 98 (CanLII). Both are distinguishable, as ***Johnson*** dealt with a different tort, inducing breach of contract, and ***Payjack*** preceded by a dozen years the Supreme Court's restatement of the tort of causing loss by unlawful means in ***A.I. Enterprises***.

[70] On the facts I have found, the actions of the City, through Mr. Wiebe, likely amount to an unlawful act against Schultz Transfer for which it could advance a claim through to arbitration or, absent that remedial process, a suit for breach of contract. Mr. Wiebe breached the contractual provisions to act reasonably (C 6.24) in objecting to Mr. Polischuk's working for Schultz Transfer respecting City work. From this, I have found Mr. Polischuk was harmed economically. Thus, the first two prerequisites of this tort, as framed in ***Ultracuts***, have been made out.

[71] However, unfortunately for Mr. Polischuk, this claim fails on the third requirement. I am not satisfied Mr. Wiebe *intended* to cause economic harm to Mr. Polischuk. I reiterate the criterion from ***A.I. Enterprises,*** at paras. 95 – 97,

set out in the context of this case:

- the core intention required for this tort means Mr. Wiebe must either have had

  (a) an intention to cause economic harm to Mr. Polischuk as an end in itself, or

  (b) an intention to cause economic harm to Mr. Polischuk because it is a necessary means of achieving an end that serves some ulterior motive.

  In other words, the City must be shown to be "aiming at" or "targeting" Mr. Polischuk (para. 95);
- "it is not sufficient that the harm to [Mr. Polischuk] be an incidental consequence of the City's conduct, even where the City realizes it is extremely likely that harm to [Mr. Polischuk] may result" (para. 95); and
- "mere foreseeability of such harm does not meet the requirement for an intention" (para. 97).

[72] The Supreme Court was clear this tort must be narrowly construed, in part to avoid "the danger of *ad hoc* decisions tailored to achieve a vision of commercial morality – precisely the danger which the unlawful means requirement is meant to avoid" (para. 85).

[73] I do not accept Mr. Wiebe intended to cause Mr. Polischuk economic harm per se. Despite finding Mr. Wiebe was not justified in the bans, subjectively, he acted in what he considered to be the best interests of the City. He did not act with malice or even ill-will towards Mr. Polischuk. The income consequence was not in

Mr. Wiebe's mind on the first ban. While it is clear the second ban would affect Mr. Polischuk's ability to indirectly earn income from the City, this was not the objective but rather was incidental, or collateral, to him being banned for what Mr. Wiebe believed, wrongly as it turns out, was justifiable.

[74] As I understand the jurisprudence, the intent to do economic harm under this tort is a higher or stricter standard than for misfeasance; it is akin to specific intent while foreseeability is not sufficient. Here, for both tort claims, the underlying facts and inferences are the same. If the intent to harm is not made out under misfeasance, clearly it is not under causing loss by unlawful means.

Common Law Duty of Procedural Fairness and Rules of Natural Justice

[75] Properly, the claim does not seek judicial review.

[76] However, the claim asserts that by imposing each ban without providing Mr. Polischuk an opportunity to respond to the allegations underpinning the bans, the City breached its common-law duty of procedural fairness and rules of natural justice, which affected Mr. Polischuk's rights, privileges, and interests.

[77] The City counters that there is no such duty in the context of the governing contract and Mr. Wiebe's role in administering it. Further, Mr. Polischuk is not a party to the contract in any event.

[78] I have already addressed the notion of Mr. Wiebe's public officer role; this matter is bound in private contract law, which controls this heading of liability as well. The fact that one party to the contract, the City, is a government entity does

not mean that public law duties are owed in what is essentially a private law situation of contractual performance.

[79] I start by noting that the common law duty of fairness is not free standing. As noted in ***Dunsmuir v. New Brunswick***, 2008 SCC 9 (CanLII), at paras. 112-113, the starting point in an analysis should address the nature of the relationship with the public authority. Where it is fundamentally a breach of contract situation, as here, redress should be had to ordinary contractual remedies. Procedural fairness and the rules of natural justice are the hallmarks of administrative tribunals and judicial review.

[80] The following principles or commentary from the Supreme Court of Canada's 2018 decision of ***Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall***, [2018] 1 SCR 750, are important:

- "Private parties cannot seek judicial review to solve disputes that may arise between them; rather, their claims must be founded on a valid cause of action, for example, contract, tort or restitution." (para. 13)
- "Judicial review is only available where there is an exercise of state authority and where that exercise is of a sufficiently public character. Even public bodies make some decisions that are private in nature — such as renting premises and hiring staff — and such decisions are not subject to judicial review: … In making these contractual decisions, the public body is not exercising "a power central to the administrative mandate given to it by Parliament" but is rather exercising a private power …" (para. 14)

[81] Finally, the duty of good faith in contractual relations arising in ***Bhasin v. Hrynew***, 2014 SCC 71 (CanLII), has no application here.

[82] The common law duty of fairness, as pled here, does not apply to this situation. The claim fails on this head of liability.

Conclusion Respecting Liability

[83] Unfortunately for Mr. Polischuk, none of the heads of liability as pled apply or have been made out on these facts.

PART 2: DAMAGES

[84] If I were to have found liability in Mr. Polischuk's favor, I would assess provisional damages as follows.

[85] The damages aspect was the most unclear portion of this three-week trial. Mr. Polischuk relied on an actuary, who revised his report three times before testimony. The City relied on a chartered professional accountant, with a background in fraud. Neither expert had access to full financial statements or tax filings from Polischuk Trucking or Mr. Polischuk's income tax returns. Much of the source data or records had gaps, were seemingly irreconcilable in parts and were not uniformly assessed. For the most part, estimates instead of actual figures were used to ascertain net income after expenses for Polischuk Trucking or Mr. Polischuk's billings for City work. Future losses bore little comparison to Schultz Transfer contract rates after 2017, or related expenses, to determine the real contribution Mr. Polischuk made, or could have made, and hence his loss. And, not unusually, the experts did not agree as to what assumptions were valid to underpin their calculations.

[86] Regardless, Mr. Polischuk's expert calculated loss of past income from November 2017 to December 31, 2023, between $381,000 to $420,000, after other mitigating income but before prejudgment interest. The major assumption causing this $40,000 gap was whether to assume annual earnings based on two- or five-years average earnings up to 2016. Future earnings-related loss was estimated between $540,000 and $603,000 to age 75, rising to between $631,000 and $705,000 respectively at age 80. Also claimed were amounts for investment management fees.

[87] In closing submissions, Mr. Polischuk's counsel acknowledged various problems with the evidence. They sought $381,000 for past loss, plus a management fee, and future loss to age 75 of $433,000, plus a management fee, or about $40,000 per year going forward from the end of trial (exclusive of adjustments for discount rate and other factors). Counsel also asked for aggravated and punitive damages, especially considering the falsehoods spread in the underlying stories related to the bans.

[88] I pause to comment that I was not provided with a future earnings loss from trial to age 65, the standard retirement age. As I understand it, the reason for this, and for using the 75 to 80 years-of-age range, was to accommodate the submission that given Mr. Polischuk's work ethic, he will work to at least 75 years of age, likely longer. Past calculations appear to be based on hours worked at about, or more than, 4,000 hours per year (based on about 4,600 hours worked/billed over 12 months in 2016–17). While I accept that this is Mr. Polischuk's current and honest intention, I have difficulty accepting that working such hours will become the reality, especially considering the physically taxing nature of the work he does. I understand

that his father-in-law still works somewhat, well into his 80s, but I do not find this as a valid measure for Mr. Polischuk; they are unique individuals. I acknowledge Mr. Polischuk is in good health. Finally, as I understand it, his actuary applied contingencies for disability using an age 65 metric and without considering Mr. Polischuk effectively working more than two full-time equivalent jobs.

[89] The City says damages should not go past the end of trial. As they calculate it, Mr. Polischuk fully mitigated his loss by sometime in 2022 and that should continue. They say past losses, as updated during trial, should be pegged at $281,000.

[90] Consistent with jurisprudence, if I cannot determine lost income with a sufficient degree of precision, I should do my best with the evidence presented or assess equivalent general damages instead.

[91] In part for the reasons stated and given the substance of the examinations and cross-examinations at trial, I have difficulty accepting the reliability of either experts' ultimate past-loss calculations. There is no doubt Mr. Polischuk suffered income loss from the first and the second bans, despite his efforts at mitigation, which are beyond reproach. I disagree that Mr. Polischuk fully mitigated his loss by or during 2022. Conversely, I am not satisfied with the actuary's estimates for components of his calculation, rather than examining and utilizing actual values that should have been available or established. As such, I set damages for loss of income to December 31, 2023 (roughly 6 years), at the midpoint between counsels' submissions ($381,000 and $281,000), being $331,000, but inclusive of pre-judgment interest.

[92] As to future losses, I would set it at $10,000 below Mr. Polischuk's counsel's submission of $40,000 per year, or $30,000 per year, which is roughly the same amount per year as counsel's submission of $433,000 to age 75. I would provide that only to age 65, or 5½ years, for a total of $165,000. Beyond that, the contingencies associated with Mr. Polischuk working roughly 4,000 plus hours per year, and his ability to mitigate to the extent he is capable of working, offset any further claim.

[93] Finally, given Mr. Evinger's careless and damning accusations of Mr. Polischuk, and the nature of Mr. Wiebe's flawed execution of his contractual duties, all leading to Mr. Stranieri's December 1 email saying that Mr. Polischuk was banned for attempting to take City material, I would award aggravated damages of $15,000. Punitive damages are not warranted.

[94] The total provisional award would thus be $511,000. Given this relatively moderate quantum, and current investment opportunities that may approach stock or bond market returns after fees, I decline to grant investment management fees.

CONCLUSION

[95] Mr. Polischuk's claim is dismissed. Provisional damages are as set out.

[96] Counsel should make an appointment to address costs.

_____ J.