Date: 20241219
Docket: CI 24-01-44522
(Winnipeg Centre)
Indexed as: Alexander v. Cheadle et. al.
Cited as: 2024 MBKB 190

# COURT OF KING'S BENCH OF MANITOBA

**B E T W E E N:**

| | | |
|---|---|---|
| KEITH ALEXANDER, | ) | R. Ian Histed |
| | ) | for the plaintiff |
| plaintiff, | ) | |
| - and - | ) | |
| | ) | |
| | ) | |
| ADAM CHEADLE, ANDREW ZURAWSKY and MAURICE SABOURIN | ) | Jonathan M. Woolley |
| | ) | for the defendant Sabourin |
| | ) | |
| defendant(s), | ) | |
| | ) | |
| | ) | Judgment Delivered: |
| | ) | December 19, 2024 |

## MARTIN J.

## INTRODUCTION

[1] Keith Alexander is a Winnipeg Police Service police officer who is suing two other police officers, Adam Cheadle and Andrew Zurawsky, for malicious prosecution. Mr. Alexander alleges they made false statements that caused him to be charged with a criminal offence, which was later stayed, or dropped, by prosecutors.

[2] As to Mr. Sabourin, the Statement of Claim asserts that when he was President of the Winnipeg Police Association (the Association), he arranged for a lawyer to represent Mr. Alexander respecting the criminal charge. The claim alleges that Mr. Sabourin (i) breached his fiduciary duty to Mr. Alexander, and (ii) induced the lawyer to breach his contractual and fiduciary duties of loyalty and confidentiality to Mr. Alexander. There is no claim for malicious prosecution against Mr. Sabourin.

[3] Mr. Cheadle and Mr. Zurawsky filed a joint Statement of Defence setting out certain facts denying the malicious prosecution claim.

[4] Mr. Sabourin has not filed a Statement of Defence. Rather, further to King's Bench Rule 21.01(3)(a), he seeks an order staying the proceedings against him on the basis the Court has no jurisdiction over the subject matter of the action against him. He says the essential character of the dispute is an allegation of unfair labour practice, supposedly committed by him in his role as Association President, against its member Mr. Alexander, for which the Manitoba Labour Board has exclusive jurisdiction (***The Labour Relations Act***, C.C.S.M. c. L10, s. 143(1)) (the ***Act***).

[5] For the reasons that follow, I would grant the motion and stay the civil claim proceedings.

## LEGAL PRINCIPLES

[6] The parties agree as to the applicable legal principles to determine this motion.

[7] First, on a Rule 21.01(3)(a) motion, the facts pleaded in the Statement of Claim are presumed to be true and provable (***Hozaima v. Perry et al.***, 2010 MBCA 21,

at para. 25). The facts as pled provide the contextual basis for the jurisdiction analysis.

[8] Second, the "essential character of the dispute" test as established by the Supreme Court of Canada decision in ***Weber v. Ontario Hydro***, 1995 CanLII 108 (SCC), is the proper analysis to be applied in this situation. The test looked at whether exclusive jurisdiction over a matter vests in a forum other than a court.

[9] In Manitoba, jurisprudence from the Manitoba Court of Appeal fleshes out the analysis: see ***Phillips v. Harrison***, 2000 MBCA 150; ***Warraich v. University of Manitoba***, 2003 MBCA 58; ***Giesbrecht v. McNeilly et al.***, 2008 MBCA 22 and ***Hozaima***.

[10] In ***Warriach***, Scott C.J.M. wrote:

> [11] The principles conveniently summarized in *Desrivieres* in my opinion are equally applicable to the broader context of any dispute where the source of an effective dispute mechanism is statutory in nature. See *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360, 2000 SCC 14, where Bastarache J., for the court, concluded his consideration of Weber by stating (at para. 39):
>
> > To summarize, the underlying rationale of the decision in *Weber, supra*, is to ensure that jurisdictional issues are decided in a manner that is consistent with the statutory schemes governing the parties. The analysis applies whether the choice of forums is between the courts and a statutorily created adjudicative body, or between two statutorily created bodies. The key question in each case is whether the essential character of a dispute, in its factual context, arises either expressly or inferentially from a statutory scheme. In determining this question, a liberal interpretation of the legislation is required to ensure that a scheme is not offended by the conferral of jurisdiction on a forum not intended by the legislature.
>
> See as well *Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057*, 1990 CanLII 110 (SCC), [1990] 1 S.C.R. 1298, which provides further support for my conclusion that the Legislature's preference for a statutory dispute resolution method should be followed in circumstances where a collective agreement is not involved.
>
> [underlining added]

Of note, ***Warriach*** was not a labour case but rather an administrative law matter where legislation regulating universities provided an apt statutory scheme for the dispute.

[11] Moving ahead, in ***Giesbrecht*** the Court reaffirmed the ***Weber*** test at paras. 30 and 31, but as expressed by the Supreme Court of Canada in 2006:

> [30] In order to determine whether the present dispute arises out of the collective agreement, such that, as the judge concluded, the court lacks jurisdiction to hear and resolve the dispute, a two-step process must be undertaken. This was explained by LeBel J., for the majority, in the Supreme Court's decision in *Bisaillon v. Concordia University*, 2006 SCC 19, [2006] 1 S.C.R. 666, in the following terms (at paras. 31-32):
>
> The first stage of this approach [referring to *Weber*] consists in identifying the essential character of the dispute. On this point, the Court has stressed that what must be done is not limited to determining the legal nature of the dispute. On the contrary, the analysis must also take into account all the facts surrounding the dispute between the parties: *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners* ... at paras. 25 and 29.
>
> At the second stage, it must be determined whether the factual context so identified falls within the ambit of the collective agreement. In other words, it must be determined whether the collective agreement implicitly or explicitly applies to the facts in dispute. In *Regina Police*, this Court explained this second stage of the analysis as follows:
>
> > Simply, the decision-maker must determine whether, having examined the factual context of the dispute, its essential character concerns a subject matter that is covered by the collective agreement. Upon determining the essential character of the dispute, the decision-maker must examine the provisions of the collective agreement to determine whether it contemplates such factual situations. It is clear that the collective agreement need not provide for the subject matter of the dispute explicitly. If the essential character of the dispute arises either explicitly, or implicitly, from the interpretation, application, administration or violation of the collective agreement, the dispute is within the sole jurisdiction of an arbitrator to decide. ... [para. 25]
>
> [31] Once that analysis is complete, and if it is determined that the dispute arises out of the agreement, then a further factor to consider is whether the collective agreement's mechanisms provide the claimant with an effective remedy (see paras. 55-7 below).
>
> [underlining added]

[12] Thus, in shorthand, the test requires three questions to be analyzed:

(i) What is the essential character of the dispute?

(ii) What is the ambit of the collective agreement or statutory scheme?

(iii) Does the collective agreement, or statutory scheme, provide an effective remedy?

(see also ***Phillips*** at para. 46)

[13] Third, to be clear, the ***Weber*** test applies in circumstances engaging a statutory scheme, such as the ***Act***, rather than a specific collective agreement scheme (***Warriach; Tomchuk v. University of Winnipeg Faculty Association***, 2008 MBQB 168; and ***Baron v. Canadian National Railway Company et al***, 2024 MBKB 177).

## APPLICATION OF PRINCIPLES

### *What is the Essential Character of the Dispute?*

[14] It is the facts and the factual context that are important, not how a particular claim is framed as set out in the complaint or claim (***Giesbrecht***, at para. 32).

[15] Mr. Alexander says the dispute is essentially personal in nature, such that Mr. Sabourin is properly sued in his personal capacity, rather than his capacity and role as former Association President in this situation. In his brief, he states: "In its essential character, this dispute is about the defendant attempting to subvert the criminal defence of the plaintiff to a failed prosecution maliciously initiated by other union members who are co-defendants." During the hearing, his counsel confirmed what is evident from the pleading: as against Mr. Sabourin only, the alleged cause of

actions are (i) breach of fiduciary duty, and (ii) inducing a breach of contract between the lawyer hired to represent Mr. Alexander on the criminal charge and Mr. Alexander.

[16] Mr. Sabourin says all the facts and allegations pled arise as a result of his actions and role as President of the Association in representing of Mr. Alexander, as a member of the Association. If there is cause for complaint, it is an unfair labour practice issue for the Labour Board, likely for breach of the duty of fair representation.

[17] The factual context comprises of those facts pled in the claim:

- Mr. Sabourin "was at all relevant times to this action" the President of the Association. Mr. Alexander and the other two defendants were police officers and members of the Association.
- The Association "is the sole bargaining agent for all contractual matters with the City of Winnipeg and provides counsel and support to its members on a wide-range of issues, including when members are facing criminal charges".
- Mr. Cheadle and Mr. Zurawsky reported to the Association and the WPS Professional Standards Unit alleged threats (against another police officer) made by Mr. Alexander.
- Mr. Alexander retained a lawyer to represent him. Mr. Sabourin "facilitated and approved" the hiring. The lawyer's fees were paid for by the Association. In October 2019, Mr. Alexander was charged with two criminal counts of uttering threats. In time, Mr. Alexander's lawyer arranged a

potential plea deal, which Mr. Alexander rejected because he was not guilty.

- In April 2021, Mr. Sabourin told Mr. Alexander if he did not accept his lawyer's advice respecting the proposed plea bargain, his lawyer's representation could be withdrawn by the Association. Mr. Alexander sought and retained other counsel.
- In February 2022, Mr. Alexander's criminal charges were stayed, or discontinued by the Crown.
- In May 2022, Mr. Sabourin first advised Mr. Alexander as follows:

> "I will address your concern that [your lawyer], in your view, inappropriately shared information about the case and I can only assume you are referring to him discussing the case with the [Association]. I can tell you this is common practice as the [Association] is the client who retained [the lawyer] on your behalf."

[18] For completeness in understanding the pleading, on these facts as pled, Mr. Alexander concludes in the Claim that Mr. Sabourin is liable to him because:

- "In his position as president of the [Association], and by virtue of his control, influence and direction over the funding of Alexander's legal defence to the criminal charges, Sabourin owed a fiduciary duty to Alexander to act only in Alexander's interest." Mr. Sabourin "breached his fiduciary duty" by interfering and attempting "to bring about a plea agreement" to his and Mssrs. Cheadle's and Zurawsky's advantage, and "by interfering in the defence of the criminal charges and by violating Alexander's right to confidentiality and loyalty from [the lawyer]".

- "… [I]n the premises, Sabourin is liable to the plaintiff for breach of fiduciary duty, and inducing [the lawyer] to breach his contractual and fiduciary duties of loyalty and confidentiality to Alexander."

[19] Two additional points. First, the claim also alleges the criminal charges were initiated by Mr. Cheadle and Mr. Zurawsky in consultation with Mr. Sabourin, to remove Mr. Alexander as their supervisor and force his retirement. No facts were pled to support this assertion. This statement amounts to a bald assertion or conclusory opinion. Properly construed, the assertion is not a statement of fact. Moreover, for context, Mr. Alexander does not claim against Mr. Sabourin for malicious prosecution. Second, the parties agreed that I could consult the respective Collective Agreement and the Association Constitution, which was filed.

[20] All in, as pled, the essential character of the dispute *vis-a-vis* Mr. Sabourin is of arbitrary, discriminatory or bad faith treatment of a union member, by an agent of the union, for a purpose inconsistent with the requirements of the union in representing that member. The facts assert that Mr. Sabourin's conduct was in his role as Association President representing Mr. Alexander as a member of the Association, respecting criminal charges against him for which the Association was obligated to represent him. Further, the pleadings incorporate as fact Mr. Sabourin's comment that it is common practice for lawyers to communicate and share information about a member's matter given the Association's position as "client", retaining and paying for the lawyer.

[21] At its heart, the dispute *vis-a-vis* Mr. Sabourin is an unfair labour practice of him as a union (Association) agent toward a member it is duty bound to properly represent. The character of the dispute is not the same as against Mr. Cheadle and Mr. Zurawsky, which is a dispute about them providing false evidence to stimulate a criminal charge.

***What is the Ambit of the Statutory Scheme?***

[22] Generally, the ***Act*** is designed to be an all-encompassing scheme to address aspects of labour relations between employers and employees, and of a unions or association's duty toward its members. As reiterated by Beard J. (as she then was) in ***Tomchuk***:

> [25] The jurisdiction of the Board under s. 20 of the Act was considered by the Manitoba Court of Appeal in Paulet v. Brandon University Faculty Assn., 1991 CanLII 8367 (MB CA), [1991] M.J. No. 462. In that case, O'Sullivan J.A., for the court, found that the creation of an unfair labour practice in s. 20 of the Act was part of a statutory scheme whereby unfair labour practices are assigned by statute to the exclusive jurisdiction of the Labour Board. The decisions in Gendron and Paulet were recently affirmed by the Manitoba Court of Appeal in its unanimous decision in Rowel v. Hotel and Restaurant Employees and Bartenders Union, Local 206, [2005] M.J. No. 222. Scott C.J.M. stated as follows:
>
> > [13] We see no reason to revisit the decision of this court in Paulet. This is because we are in entire agreement with it. Paulet remains consistent not only with Gendron, but with the full weight of subsequent authority in the Supreme Court of Canada to the same effect, namely, that within their sphere Labour Relations Boards, such as the one constituted under the Manitoba Act, should retain exclusive jurisdiction over labour relations disputes subject only to judicial review.
>
> [underlining added]

[23] As to union and members, s. 4(1)(c) of the ***Act*** specifies it applies to "unions and employers' organizations composed of, or representing or claiming to represent, those employees or employers."

[24] Further, s. 143(1) of the ***Act*** is a privative clause conferring exclusive jurisdiction to exercise the powers conferred upon any panel of the Labour Board under the ***Act*** and to determine all questions of fact and law which arise in any matter before it. In other words, as affirmed by the Manitoba Court of Appeal, by statute, the Labour Board not only has jurisdiction, but it has exclusive jurisdiction to hear unfair labour practice allegations, including those within a union and its members.

[25] Specific to this situation, Mr. Alexander submits that none of the articulated types of unfair labour practice in the ***Act*** apply.

[26] I disagree. While several sections may apply, I particularly note s. 20 of the ***Act*** specifies:

> Duty of fair representation
>
> 20 Every bargaining agent which is a party to a collective agreement, and every person acting on behalf of the bargaining agent, which or who, in representing the rights of any employee under the collective agreement,
>
> (a) in the case of the dismissal of the employee,
>
> (i) acts in a manner which is arbitrary, discriminatory or in bad faith, or
>
> (ii) fails to take reasonable care to represent the interests of the employee; or
>
> (b) in any other case, acts in a manner which is arbitrary, discriminatory or in bad faith;
>
> commits an unfair labour practice.

[27] In this case, one of the rights under the applicable Collective Agreement is that, in certain circumstances, the employer will pay legal fees of an Association member charged criminally. It is recognized the Association will, as here, assist the member in arranging counsel and will be reimbursed from the employer according to a process

set out in the Collective Agreement. The Association Constitution dovetails with these provisions through its legal assistance provisions. Neither the Collective Agreement nor the Association were specifically pled, but the facts pled are clear that the Association, and hence Mr. Sabourin, became involved pursuant to them.

[28] Further, as noted by jurisprudence, the statutory scheme need not be explicit. Rather, to paraphrase the Supreme Court of Canada as quoted in ***Giesbrecht*** (at para. 11 herein), is whether the essential character of the dispute arises explicitly, implicitly or inferentially from the application and administration of the statutory scheme. To the same effect, ***Warriach*** quoted para. 39 from the ***Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners***, 2000 SCC 14, case:

> [39] To summarize, the underlying rationale of the decision in *Weber*, supra, is to ensure that jurisdictional issues are decided in a manner that is consistent with the statutory schemes governing the parties. The analysis applies whether the choice of forums is between the courts and a statutorily created adjudicative body, or between two statutorily created bodies. The key question in each case is whether the essential character of a dispute, in its factual context, arises either expressly or inferentially from a statutory scheme. In determining this question, a liberal interpretation of the legislation is required to ensure that a scheme is not offended by the conferral of jurisdiction on a forum not intended by the legislature.
>
> [underlining added]

[29] I find the dispute against Mr. Sabourin falls within the ambit of the ***Act***.

***Does the Statutory Scheme Provide an Effective Remedy?***

[30] Section 31(4) of The ***Act*** provides a comprehensive menu of remedies for unfair labour practices, as determined by the Legislature in devising the ***Act*** and scheme of labour relations in Manitoba. The remedies may not duplicate those of a civil action, but that makes them no less effective, especially in the context of a

complaint respecting whether a union failed to properly represent a member, for whatever reason.

***Case Specific Precedent***

[31] Mr. Alexander relies on numerous precedent cases as examples of situations where courts have found a claim that stood independent of the ambit of a specific collective agreement or statutory scheme. The heart of those cases is different than here. None of the precedents provided involve allegations against a plaintiff's union, or union representative, for matters arising out of its representation of a member or are akin to breach of fiduciary duty arising from that representation. All the precedents comprise (i) suits against an employer or other third-party or individuals alleging improper acts, some similar to those against Mr. Cheadle or Zarawsky, and (ii) issues of whether a particular collective agreement or some other specific statutory scheme has jurisdiction over the dispute. ***Rukavina v. Ottawa (Police Services Board)***, 2020 ONCA 533, is the best precedent to consider.

[32] In ***Rukavina***, the plaintiff police officer was charged criminally by the Special Investigation Unit (SIU) for a controlled explosion he was supervising in a workplace training exercise. The Crown ultimately stayed the charges. Sergeant Rukavina alleged in his civil claim that subordinates provided false evidence to SIU, and suppressed other information, thereby committing malicious prosecution. In addition, he pled the police Chief and Ottawa Police Service acted in a way that continued to mislead the SIU. In law, the claim was framed as malicious prosecution and misfeasance in public office.

[33] The Ontario Court of Appeal found that once the SIU investigation was underway, the event was no longer a workplace dispute. The alleged conduct after the involvement of SIU did not fall within the applicable collective agreement or other statutory scheme - - it was neither labour relations nor disciplinary in character. The alleged improper influence of a criminal investigation took place outside of the workplace, even though the "genesis of the dispute" was workplace centered. The pleadings were not of unfair workplace treatment. While I accept the dicta in ***Rukavina***, for reasons I have stated, Mr. Sabourin's situation is materially different.

[34] Clearly, it is important to carefully characterize the dispute based on the facts and factual context alleged. Critical also is to not lump defendants together in the analysis, but to look at the facts alleged against each. Here, the motion is for Mr. Sabourin alone, not the other defendants. On facts pled respecting him, the character of the dispute is a union representation dispute. Aside from the factual context, I find that the fiduciary duty claim, which arises only from the Association's duty to represent, supports my analysis of the character of the dispute. As to the inducement claim, it is linked and part of the matrix arising from Mr. Sabourin's conduct as Mr. Alexander's union representative.

## CONCLUSION

[35] Mr. Sabourin's motion for a stay of proceedings of the claim against him for want of jurisdiction is granted. Costs may be spoken to if not agreed.

_____ J.