

## **COURT OF KINGS'S BENCH OF MANITOBA**

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

TYLER LINTICK,	)	<u>Dave G. Hill</u>
	)	<u>Kelsey M. Brooks</u>
plaintiff,	)	for the plaintiff
	)	
- and -	)	<u>Nicole K. Beasse</u>
	)	for the defendant
THE CITY OF WINNIPEG,	)	
	)	
defendant.	)	Judgment Delivered:
	)	December 7, 2023

### **CHARTIER J.**

[1] The defendant, The City of Winnipeg, moves for summary judgment seeking dismissal of the action filed by the plaintiff, Tyler Lintick, on the basis that the claim set out in the action is statute barred pursuant to provisions of ***The Limitations of Actions Act***, R.S.M. 1987, c. L150, (the "***LAA***"), and ***The Public Officers Act***, C.C.S.M. c. P230, (the "***POA***"). The defendant also says this action is an abuse of process because the dispute between the plaintiff and the defendant originated in the context of the plaintiff's employment, which is governed by a collective agreement between the defendant and the Winnipeg Police Association.

[2] The defendant's originally filed motion relied only on the **LAA** and not the **POA**, though the latter Act was referenced in its brief filed in support of the motion. I allowed the parties to file supplementary written briefs after the hearing of the motion to canvass the arguments relating to s. 21(1) of the **POA** more fully.

[3] I have considered the filed pleadings as well as the affidavit of Tyler Lintick, sworn October 16, 2022, the affidavit of Kimberly Dawn Carswell, affirmed August 23, 2022, and the affidavit of Ken Azaransky, sworn January 3, 2023.

### **FACTS**

[4] The plaintiff is an employee of the defendant, and more specifically, is employed as a police officer with the Winnipeg Police Service. The statement of claim initiated by the plaintiff is for damages pursuant to s. 24(1) of the **Canadian Charter of Rights and Freedoms**, (the "**Charter**"), in relation to an incident which occurred on February 24, 2017, where the plaintiff was detained, arrested and taken into custody and had his residence searched. He was released after meeting with the representative from Behavioural Health where he was questioned and found to be medically fit to be released. He was then placed on administrative leave for three months, and then cleared to return to work. The plaintiff says the detention, arrest and search of his residence were unlawful and in breach of the **Charter**, which resulted in a loss of reputation amongst his colleagues, and, further, that those actions and that conduct was highhanded, oppressive and done with an intent to cause distress and injury to the plaintiff.

[5] The defendant says it had grounds to act as it did due to concerns it had relating to the plaintiff's mental health, and that it acted in good faith. The defendant also says

that the essential character of the dispute between the plaintiff and the defendant arises from the Collective Agreement between the City of Winnipeg and the Winnipeg Police Association, and is within the exclusive jurisdiction of the labour arbitrator.

[6] Subsequent to these events that occurred in 2017, there were discussions between the Winnipeg Police Association and the Winnipeg Police Service. These discussions occurred in the fall of 2019 and apparently led to a resolution. The plaintiff initiated the claim shortly after the discussions between the Winnipeg Police Service and the Winnipeg Police Association had ended.

[7] The plaintiff's statement of claim was filed October 20, 2021, alleging damages pursuant to s. 24(1) of the **Charter** as a result of **Charter** violations and punitive damages in relation to the defendant's conduct.

### **SUBMISSIONS**

[8] The defendant says that a number of sections under the **LAA** apply, s. 2(1)(e), s. 2(1)(g) and s. 2(1)(d), all of which have a two-year limitation period, resulting in this action being statute barred. It also says that s. 21(1) of the **POA** applies. Finally, it says that the action is an abuse of process because it is within the jurisdiction of a labour arbitrator under the Collective Agreement between the Winnipeg Police Association and the defendant.

[9] The plaintiff says that s. 21(1) of the **POA** is ambiguous and any ambiguity should be resolved in his favour. The plaintiff says the defendant's conduct was outside the scope of its authority and outside the scope of the warrants and, therefore, was not done "...in pursuance or execution or intended execution of a statute or of a rule or regulation

made thereunder, or of a public duty or authority...” nor was the defendant’s conduct “...in respect of an alleged neglect or default in the execution of the statute, rule, regulation, duty, or authority...” (the **POA** at para. 21(1)). Therefore, the conduct falls outside the parameters of s. 21(1) or, in the alternative, is ambiguously outside of its parameters.

[10] The plaintiff also relies on the decisions of **Zadworny v. Manitoba (Attorney General) et al.**, 2007 MBCA 142, **Prete v. Ontario (Attorney-General)**, 1993 CanLII 3386 (ON CA), **T.L.B. et al. v. R.E.C.**, 2000 MBCA 83, as well as **Ordon Estate v. Grail**, 1998 CanLII 771 (SCC), for the proposition that when the limitation periods under the **LAA** and another statute are not the same, a government cannot rely on the provisions of that statute to immunize itself from the application of the **Charter** by enforcing a shorter limitation period than what would otherwise be available to the plaintiff.

[11] The plaintiff says that an action for the recovery of money has a limitation period of six years pursuant to s. 2(1)(i) of the **LAA**. The defendant further says that the essential character of the dispute is not within the ambit of the Collective Agreement.

### **SUMMARY JUDGMENT**

[12] Summary judgment is available where there is no genuine issue requiring a trial. The issues before me on this summary judgment motion involve questions of law, the interpretation of s. 21(1) of the **POA** and other limitation periods, and whether this Court has jurisdiction to hear this matter. Summary judgment is an appropriate means to determine these legal issues which are potentially dispositive of this proceeding.

## **ISSUES**

[13] The following are the issues to be determined:

- i) Is the statement of claim statute barred pursuant to the **LAA** or the **POA**?
- ii) Is the statement of claim an abuse of process for want of jurisdiction?

## **ANALYSIS**

- i) **Is the statement of claim statute barred pursuant to the LAA or the POA?**

[14] Having considered the submissions of the parties, including the supplementary briefs filed in this matter, I find that s. 21(1) of the **POA** applies to the statement of claim brought by the plaintiff and, as a result, this claim is statute barred as it was not brought within two years of when the act giving rise to the cause of action occurred.

[15] I note that subsequent to both the hearing of this matter and the filing of further written submissions of the parties, the Manitoba Legislature repealed s. 21(1) of the **POA** by virtue of ***The Limitations Amendment and Public Officers Amendment Act***, S.M. 2023, c. 22. That statute contains certain transitional provisions which I find are inapplicable here. Section 31.2 of that Act states that:

### **Expiry of former limitation period**

31.2 No proceeding may be commenced under this Act respecting a claim discovered before September 30, 2021, if its former limitation period expired before the claim's transition date.

Therefore, although s. 21(1) of the **POA** is now repealed, it was in effect at the material time for the purposes of this case.

[16] Section 21(1) of the **POA** had received critical commentary by both this Court in ***Ostrowski v. Weinstein et al***, 2022 MBQB 3, as well as the Manitoba Court of Appeal

in the decision of ***Nerbas v Manitoba***, 2019 MBCA 85. I assume that it is at least, in part, as a result of the critical commentary emanating from the courts, which stated that there was an urgent need for reform, that this provision has now been repealed.

[17] At the material time, s. 21(1) of the ***POA*** read as follows:

**Limitation of actions against public officials**

21(1) No action, prosecution, or other proceedings lies or shall be instituted against a person for an act done in pursuance or execution or intended execution of a statute or of a rule or regulation made thereunder, or of a public duty or authority, or in respect of an alleged neglect or default in the execution of the statute, rule, regulation, duty, or authority, unless it is commenced within two years next after the act, neglect, or default complained of, or in case of continuance of injury or damage, within two years next after the ceasing thereof.

[18] The acts giving rise to this action occurred on February 24, 2017, and therefore the action should have been filed by February 23, 2019. The action was not filed until October 20, 2021. The defendant is a municipality which is a person within the meaning of s. 21(1) of the ***POA*** (see: ***Bellemare v. La Caisse Populaire de Saint-Boniface Ltee. et al***, 2001 MBQB 25, at paras. 13-20). I also find that the limitation period applies to claims for damages under s. 24(1) of the ***Charter***. (See ***Ostrowski*** at para. 11).

[19] The analysis in ***Ostrowski*** is relevant. In that case, the Court found that the limitation period under s. 21(1) of the ***POA*** is triggered by a fixed event, the occurrence of the act complained of, and there is no discoverability component in that section.

[20] The impugned actions of the defendant through members of the Winnipeg Police Service were clearly in relation to an act done pursuant to that section. I do not find that there is any ambiguity in s. 21(1) of the ***POA*** in the sense stated by the plaintiff at para. 9 of these reasons. In this regard, I have also considered the French version of the ***POA***.

[21] The plaintiff argues, relying on the cases of **Zadworny**, **Prete**, **T.L.B.**, and **Ordon Estate**, for the proposition that where limitation periods under the **LAA** and another statute are not the same, the government cannot rely on the provisions of that statute to immunize itself from the application of the **Charter** by enforcing a shorter limitation period than what would otherwise be available to a plaintiff under the **LAA**. I firstly note that the **T.L.B.** and **Ordon Estate** cases both involve conflicting limitation periods in the same statute. The **LAA** and the **POA** are, of course, different statutes. I will add that neither of those two cases are **Charter** cases. I find that the **POA** specifically applies to public officials and that it was passed for a specific purpose and with a particular legislative intent. As the Court stated in **Ostrowski**, "...[w]hile most modern limitation of actions legislation attempts to balance the interests of plaintiffs and defendants, the intention of the legislature in enacting provisions like s. 21 was to make the interests of the defendants and protection of the public purse paramount..." (at para. 34).

[22] The **Zadworny** and **Prete** cases are **Charter** cases but predate the Supreme Court of Canada decisions of **Manitoba Metis Federation Inc. v. Canada (Attorney General)**, 2013 SCC 14, and **Ravndahl v. Saskatchewan**, 2009 SCC 7, referred to and relied on by this Court in **Ostrowski**, and which are the governing authorities. **Prete** is also distinguishable as it involved a short limitation period of six months, while the **POA** is a two-year limitation period, which is not dissimilar to many of the limitation periods found in the **LAA**. Finally, I do not agree that this action can be construed as an action for the recovery of money.

[23] In ***Ravndahl***, the Supreme Court of Canada stated that "...[p]ersonal claims for constitutional relief are claims brought as an individual *qua* individual for a personal remedy...." The Court distinguished those claims from "...claims which may enure to affected persons generally under an action for a declaration that a law is unconstitutional." (at para. 16). The Court went on to say that the argument that the provincial limitation of action legislation at issue did not apply to personal claims was abandoned in that case, which was consistent with a previous decision of the Court "...which held that limitation periods apply to claims for personal remedies that flow from the striking down of an unconstitutional statute." (at para. 17).

[24] Those principles were reiterated by the Supreme Court of Canada in ***Manitoba Metis Federation*** where the majority concluded:

[134] ...although claims for personal remedies flowing from the striking down of an unconstitutional statute are barred by the running of a limitation period, courts retain the power to rule on the constitutionality of the underlying statute...

[25] In ***Manitoba Metis Federation***, the Manitoba Métis Federation sought declaratory relief, not personal remedies. It made no claim for damages or land. The Supreme Court of Canada concluded that the ***LAA*** did not apply, and the claim was not statute barred. Here, the plaintiff is not seeking to strike down any legislation, including s. 21(1) of the ***POA***. The plaintiff seeks a personal remedy, namely damages, under s. 24(1) of the ***Charter***, which is subject to statutory limitation periods.

[26] In the circumstances, I do not need to consider the defendant's alternative submissions under the ***LAA***, and I simply note that the ***LAA*** was also the subject of amendments.



**ii) Is the statement of claim an abuse of process for want of jurisdiction?**

[27] Given my findings relating to the limitation period in the **POA**, it is not necessary for me to consider whether this claim is as abuse of process as being a dispute arising out of the Collective Agreement. However, I will say that I am not satisfied on the record before me that this action falls under the jurisdiction of the Collective Agreement and that it is employment related.

[28] The leading authority is the Supreme Court of Canada decision of **Weber v. Ontario Hydro**, 1995 CanLII 108 (SCC), [1995] 2 SCR 929. If a dispute arises under a collective agreement, the jurisdiction to resolve it lies exclusively within the domain of the labour arbitrator. To make that determination, the court must attempt to define the “essential character” of the dispute. The Court stated that “[t]he question in each case is whether the dispute, in its essential character, arises from the interpretation, application, administration or violation of the collective agreement.” (at para. 52). The Court at para. 54 also indicated that the “...approach does not preclude all actions in the courts between the employer and employee. Only disputes which expressly or inferentially arise out of the collective agreement are foreclosed to the courts...”

[29] I note that the record before me is deficient in several respects. A copy of the grievance was not provided so as to be able to determine what the grievance encompassed. But more importantly, the statement of claim is framed as a wrongful arrest and detention under the **Charter**, which is not, on its face, workplace related. Although it may have initially related to the workplace, the essential character of the dispute is not, in my view, employment related. Once the defendant, through the actions

of the police officers, proceeded to a detention and an arrest, it took the matter outside of the Collective Agreement. I agree with the plaintiff that this matter is more akin to the matter of ***Rukavina v. Ottawa (Police Services Board)***, 2020 ONCA 533, where in that case the plaintiff was alleging that he was wrongly charged with criminal offences and that the allegations did not pertain to discipline. The plaintiff's claim is similar, although here he was never charged with any offence and quickly released. The essence of the claim is that the plaintiff is challenging the defendant's conduct where he says he was wrongfully arrested and detained and subject to an unwarranted search and seizure.

### **CONCLUSION**

[30] For the reasons stated, I am allowing the defendant's motion for summary judgment and I am dismissing the action, as the action is statute barred by virtue of s. 21(1) of the ***POA***. I do so on a without costs basis. The basis on which I dismissed this action is s. 21(1) of the ***POA***. This statute was not originally cited in the initial statement of defence filed by the defendant on December 3, 2021. It was amended to rely on this section on August 31, 2022, after the filing of the notice of motion for summary judgment. The provision was also not originally cited as a ground for the motion for summary judgment. I allowed the parties to file further written submissions on s. 21(1) of the ***POA*** after the hearing of this matter on that issue, as it had not been properly canvassed at the hearing. In the circumstances, I am exercising my discretion to not award costs as had that statute been initially pled, the plaintiff would have been

put on early notice, however, the section was only relied upon relatively late in this litigation.

\_\_\_\_\_ J.