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

B E T W E E N:

STANLEY FRANK OSTROWSKI,	)	Appearances:
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(plaintiff) applicant,	)	Jeffrey King,
	)	David Robins
- and –	)	for the applicant
	)	
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THE ATTORNEY GENERAL OF CANADA, PETER	)	Erica Haughey
MICHAEL KREMER, JUDITH MARJORY WEBSTER,	)	for the respondents,
PAMELA CLARKE, ROBERT HENRY DEGROOT,	)	Attorney General of Canada,
MITCHELL DAVID McCORMICK, JACOBUS	)	Peter Michael Kremer and
HASBEEK, also known as JACK HASBEEK and	)	Pamela Clarke
JAKE HASBEEK, THE CITY OF WINNIPEG,	)	
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OF POLICE and DANNY SMYTH in his capacity as	)	for the respondents,
CHIEF OF POLICE,	)	City of Winnipeg,
	)	Robert Henry De Groot,
(defendants) respondents.	)	Mitchell David McCormick,
	)	Jacobus Hasbeek,
	)	Herbert B. Stephen in his
	)	capacity as Chief of Police, and
	)	Danny Smyth in his capacity as
	)	Chief of Police
	)	
	)	Alyssa Mariani
	)	(on a watching brief)
	)	for the defendant,
	)	Judith Marjory Webster
	)	

) Jeff Baigrie
) (on a watching brief
) for the defendants,
) Weinstein & Myers LLP
)
) JUDGMENT DELIVERED:
) November 30, 2022

Motion to Re-open Summary Judgment Motion

GREENBERG J.

[1] This is a motion by the plaintiff, Stanley Ostrowski, to re-open a motion for summary judgment (the "original motion") brought by the defendants. In the original motion, the defendants sought to dismiss part of the plaintiff's claim on the basis that it was filed outside the applicable limitation period. I found in the defendants' favour and granted summary judgment. The plaintiff now wishes an opportunity to advance a legal argument that he did not advance at the time the original motion was argued. For the reasons that follow, I am dismissing his motion to re-open.

BACKGROUND

[2] On November 27, 2018, the Manitoba Court of Appeal quashed a murder conviction against the plaintiff after the Crown agreed that the failure to disclose two pieces of evidence to the defence at trial led to a miscarriage of justice (***R. v. Ostrowski***, 2018 MBCA 125 (CanLII)). On June 15, 2020, the plaintiff filed this wrongful conviction claim against Weinstein, who acted for a key Crown witness at his trial; Weinstein's firm, Myers LLP; a number of federal Crown attorneys who were involved in prosecuting Weinstein's client on unrelated charges; and the police officers who were involved in the murder investigation. The claim is based on the torts of negligence and conspiracy and

on breach of the plaintiff's rights under the ***Canadian Charter of Rights and Freedoms***.

[3] The defendant police officers and Crown attorneys brought the original motion, arguing that the claim against them is statute-barred because it was not brought within the two year limitation period prescribed by s. 21(1) of ***The Public Officers Act***, C.C.S.M., c. P230 ("***POA***"). Although the defendants Weinstein and Myers LLP also filed a summary judgment motion based on the limitation period, they did not pursue that motion. As the allegations against Weinstein and Myers LLP do not involve the execution of a public duty, their claim is subject to a different limitation period, one that is set out in s. 2(1)(e) of ***The Limitations of Actions Act***, C.C.S.M., c. L150 ("***LAA***").

[4] At the outset of the hearing of the original motion, I asked counsel to confirm what issues were contentious. I did this because it was not clear to me from the briefs that were filed whether there was an issue as to whether the ***POA*** or the ***LAA*** was the applicable limitation legislation. This was significant because the common law principle of discoverability does not apply under the ***POA***. Counsel for the plaintiff conceded that the ***POA*** was the applicable statute and that the contentious issue was when the two-year limitation period stipulated in s. 21 of the ***POA*** started to run.

[5] In his brief and in oral argument on the original motion, plaintiff's counsel relied almost exclusively on the decision in ***Hill v. Hamilton-Wentworth Regional Police Services Board***, 2007 SCC 41, [2007] 3 SCR 129. That case held that, in wrongful conviction claims, the two-year limitation period runs from the date the conviction is quashed, which in this case was less than two years before the claim was filed. In my

reasons, I found that ***Hill*** does not apply to the limitation period under s. 21 of the ***POA***, as that section does not include an element of discoverability. While the statutory discoverability rule in s. 14 of the ***LAA*** would have allowed the plaintiff to commence a wrongful conviction claim after the conviction was quashed, his claim was not filed within the one year time frame allowed by that provision (see ***Ostrowski v. Weinstein et al***, 2022 MBQB 3).

[6] The result of the original motion was that I dismissed the entire claim against the defendant Crown attorneys and Attorney General of Canada. However, as the defendant police officers only sought to dismiss the claim against them in conspiracy, the claims in negligence and for breach of ***Charter*** rights remain extant.

[7] The plaintiff now seeks to re-open the summary judgment motion to argue that s. 21 of the ***POA*** does not apply to the claim against the police and Crown attorneys in this case because the actions on which the claim is based were outside the scope of their duties or because they acted with malice or bad faith. This is an argument that was not advanced at the time of the original hearing nor is it based on any new evidence. Nor did plaintiff's counsel offer any explanation for why it was not advanced at the original hearing, other than to suggest that I led him to believe that he was limited in the nature of the arguments he was entitled to advance.

THE LAW

[8] There is no dispute that, as I have not yet signed the order granting summary judgment, I have jurisdiction to reconsider my decision (***Ridout v. Ridout***, 2003 MBCA 61, at para. 6). The issue is whether it is appropriate to exercise that jurisdiction in this case.

[9] As I said, the plaintiff on this motion to re-open is not seeking to introduce new evidence. Rather he is seeking to advance a new legal argument. So decisions of our Court of Appal as to when it is appropriate to re-open an appeal are apt. Those decisions make it clear that a re-hearing will be granted only in exceptional circumstances where the interests of justice manifestly require it. In ***Willman v. Ducks Unlimited (Canada)***, 2005 MBCA 13 (CanLII), Freedman J.A. provided some examples of such circumstances (at para. 10):

> 1) [where] there is a patent error on a material point on the face of the reasons;
>
> 2) [where] the appeal was decided on a point of law that counsel had no opportunity to address, and which point could not have reasonably been foreseen and dealt with at the hearing; or
>
> 3) [where] the court has clearly overlooked or misapprehended the evidence or the law in a significant respect and there is a consequential serious risk of miscarriage of justice.

[10] ***Willman*** was followed in ***Samborski Garden Supplies Ltd. v. MacDonald (Rural Municipality)***, 2015 MBCA 53 (CanLII), where the court noted (at para. 23) that the standard for establishing that refusing a re-hearing would lead to a miscarriage of justice is significant. The Court dismissed Samborski's request for a re-hearing, stating:

> [24] We have not been persuaded that the appellate proceedings have unfolded in such a way that a procedural error has occurred, let alone that there is consequential risk of a miscarriage of justice unless a rehearing of the appeal is granted. A party should fully develop and put forward its best and strongest case at the hearing of the appeal, not after the appeal is decided. The dismissal of the appeal was not the time for the applicant to begin to look for further evidence to support its case. The parties received notice of the court's concern about the conditional use order having been discontinued under the Act in light of the record before the application judge and each counsel addressed that concern as they saw fit. A motion for a rehearing is not an opportunity, with the benefit of hindsight, to revisit the conduct of an appeal by experienced counsel (see *Compton Argo Inc*. at para. 3). To allow a rehearing in such

> circumstances would too quickly sacrifice the important principle of finality in litigation which is central to the proper administration of justice.
>
> [emphasis added]

[11] The plaintiff relies on ***Chase Industries Ltd. v. Vermette et al.***, 2004 MBQB 152 (CanLII), where Scurfield J. granted the defendant's motion to re-open a summary judgment motion that he had granted in favour of the plaintiff. In doing so, he said:

> [11] From this rule, and from the common law generally, I conclude that while the protection of the process is important, the bias of the court will always favour achieving substantial justice on the merits of a given case. This normally translates into an examination of the prejudice that would flow to either a plaintiff or a defendant from a decision to reopen. The overriding goal remains securing a just determination of issues on the merits. However, the court cannot ignore the potential damage to a party specifically and to the integrity of the judicial process generally that flows from opening a case that has already been decided...
>
> [emphasis added]

[12] ***Chase*** dealt with a situation where the defendants sought to re-open to allow them to introduce new evidence. While Scurfield J. found that the court must be concerned about achieving "substantial justice", he also found that the defendants had a good explanation for why they had not introduced the evidence at the original motion.

[13] More recently, in ***Christie Building Holding Company v. Shelter Canadian Properties Limited***, 2021 MBQB 101 (CanLII), Joyal C.J.Q.B. refused to re-open a motion regarding the record in an arbitration appeal, saying:

> [50] The jurisprudence is clear that the court's discretion to reopen a hearing once a decision has been rendered must be exercised sparingly and with the greatest of care. There is indeed a strong interest in finality to litigation. That objective should only be departed from in exceptional circumstances. A court should be extremely cautious and reluctant to reopen a hearing without a rigorous consideration of the legal criteria for doing so and without the necessary supportive evidence.

[14] Joyal C.J.Q.B. cited, with approval, the comments of the Alberta Court of Appeal in ***Alberta (Child, Youth and Family Enhancement, Director) v. B.M.***, 2009 ABCA 258 (CanLII), where that court said:

> [11] ... [T]he Courts should be very sparing in their reopening of a pronounced decision, and should not do so simply for the asking. This is not an occasion for the losing party to advance new argument which he or she simply did not think of before. Or worse still, one which he or she held back...

ANALYSIS

[15] The plaintiff relies on the second and third examples set out in ***Willman*** as warranting a re-opening of the motion in this case. Plaintiff's counsel says that he did not have an opportunity to raise the new argument at the hearing of the original motion because I restricted the arguments that could be advanced at that hearing. He says that, at the pre-trial conference before the hearing of the motion, I directed counsel to limit their arguments to the question of when the two-year limitation period began to run.

[16] I find this submission to be disingenuous. The discussion and the directions at the pre-trial conference were meant to comply with the screening process mandated by the King's Bench Rules (Rule 20.01(2)) and the practice direction of the court (*Comprehensive Amendments to Court of Queen's Bench Rules (Civil) Effective January 1, 2018*). The purpose of the pre-trial is to determine whether the issues raised in the proposed summary judgment motion can be resolved by summary judgment or whether the issues require a full trial, for example, where the factual issues are so contentious that *viva voce* evidence is required. The pre-trial screening process also determines whether the summary judgment process is proportionate in the circumstances of the case. For

example, a two or three day trial may be less costly and more expeditious than a motion that will require the preparation of multiple affidavits and cross-examination on them.

[17] In this case, counsel at the pre-trial conference raised four possible issues they sought to resolve by summary judgment. I allowed two of those issues to proceed to a summary judgment hearing. I allowed the limitation issue to proceed by summary judgment because the facts were not contentious; the issue was essentially a legal one (Rule 20.03(4)). This was recorded in the pre-trial conference memorandum as follows:

> 12. All of the defendants argue that the claim is statute-barred. They wish the limitation issue determined by summary judgment. That issue is appropriate for summary judgment. While this motion will be brought by all defendants, Mr. Vincent will take the lead on the motion. Counsel for the other defendants need not file material or appear at the motion if they have nothing to add.
>
> 13. The limitation issue (when the clock starts running) is a legal issue. The chronology of events and dates is not in dispute and will be put before the court by either an affidavit or agreed facts.
>
> [emphasis added]

[18] Plaintiff's counsel says he interpreted the bracketed words in the memorandum as restricting his right to argue anything other than when the clock began to run. I do not accept this explanation for the following reasons. First, at the time of the pre-trial conference, notices of motion had not yet been filed and the scope of the arguments was not discussed at the conference. I did not know, at the time of the pre-trial, what legislation would be relied upon. As the memorandum indicates, Mr. Vincent was to take the lead on the motion and his clients (Weinstein and Myers LLP), not being public officers, could not rely on the ***POA***. As it turned out, Weinstein and Myers LLP did not

pursue summary judgment on the limitation period, while the other defendants did. As a result, the focus of the argument shifted to the ***POA***.

[19] Second, at the hearing of this motion, defendants' counsel indicated that they did not interpret the memorandum as restricting the scope of argument.

[20] Third, if there was any ambiguity as to what arguments the plaintiff could make, counsel could have objected to the pre-trial memorandum as the parties are directed to do by the final words of the memorandum:

> Copies of this pre-trial conference memorandum were forwarded to counsel. If there are any errors, omissions or corrections, counsel must advise the court and other parties within 14 days of the receipt of this memorandum.
>
> [emphasis added]

[21] Finally, it is clear from the following exchange with counsel at the outset of the hearing of this motion that there had been no discussion at the pre-trial about what arguments could be advanced or even what limitation legislation was in issue:

> THE COURT: Sorry, I was going to ask, actually -- I don't want to interrupt you there, but I -- I had a -- a couple of questions I want to ask to make sure that there's no argument about matters that may not be contentious, so maybe I should start out by seeing if there's anything that's agreed to.
>
> Is it -- is the -- is there a -- a -- a dispute as to whether *The Public Officers Act* is the right piece of legislation here? That is to say is there a dispute that the limitation – about whether the limitation period is two years? Is the only issue when the limitation started to run, or is there also a dispute as to which statute and which limitation is applicable?
>
> MR. BARNES TRICKETT: My understanding from the material is that there's no dispute that *The Public Officers Act* is the applicable piece of legislation.
>
> THE COURT: Okay. So, Mr. Robins, can you confirm that that's not contentious?

> MR. ROBINS: We don't take issue with the applicability of *The Public Officers Act*, but we of course will dispute the question of whether the two-year limitation period had expired prior to the --
>
> THE COURT: Yes.
>
> MR. ROBINS: -- commencement of the action.

[22] I do not accept that plaintiff's counsel believed he was prevented from raising, at the original hearing, the argument he seeks to advance now. He provided no other explanation as to why the new argument was not advanced at that time. However, he says that, even if counsel were at fault for not raising the argument earlier, not allowing the motion to be re-opened so that the argument can be advanced now would risk a miscarriage of justice.

[23] As I said, the Court of Appeal in ***Samborski*** held that the standard for showing the risk of a miscarriage of justice is significant. The court cited Hamilton J.A.'s comment in ***Rémillard v. Rémillard***, 2015 MBCA 42 (CanLII), at para. 22, that a "miscarriage of justice connotes a result that is perverse and fundamentally wrong." In my view, an applicant cannot show that a result is perverse simply by showing that the court did not consider an argument. It seems to me that, to succeed on the motion to re-open, the plaintiff must show there is some merit to the new argument. In my view, he has not done so here. I say that for the following reasons.

[24] The new argument which the plaintiff wishes to advance is that s. 21 of the ***POA*** cannot be relied upon by the defendants to dismiss a claim if the actions on which the claim is based were outside the scope of the defendants' duty or if they acted maliciously or in bad faith. The plaintiff relies on ***Chaput v. Romain et al***, [1955] SCR 834, where the Court held that the defendant police officers could not rely on the limitation period in

the Quebec ***Magistrate's Privilege Act***, R.S.Q. 1941, c. 18, s. 5, because they were not exercising a public duty when they broke up an orderly religious meeting of Jehovah's Witnesses. The Court found that, not only was there no authority for the acts complained of, the acts were specifically prohibited by law. By comparison, in ***Koshurba v. Rural Municipality of North Kildonan and Popiel*** (1965), 52 D.L.R. (2d) 84 (Man.C.A.) (CanLII), the court held that an officer who was involved in a motor vehicle accident while on duty could rely on s. 21 of the ***POA***.

[25] The particular facts on which the claim against the police officers in this case is based relate to the non-disclosure to the defence at the plaintiff's murder trial of something referred to as the "Jacobson report". That "report" was the notes taken by Officer Jacobson of a call he received from Mathew Lovelace (a Crown witness in the plaintiff's murder trial) in which Lovelace reported that the plaintiff "has a contract out on my friend". Jacobson left a note summarizing the Lovelace call for the defendant Officer De Groot, who had previous involvement with Lovelace. While that note, and a summary of De Groot's subsequent interview of Lovelace, were disclosed to the defence, Jacobson's original, more detailed, notes of the phone call (the Jacobson report) were not. In my view, the disclosure of officers' notes falls within the scope of duties of a police officer even if the officer was negligent in the execution of that duty. In fact, s. 21 specifically covers "alleged neglect or default in the execution of" a duty (see ***Al's Steakhouse and Tavern Inc. v. Deloitte & Touche***, [1997] O.J. No. 3046 (C.A.) (QL)).

[26] The allegations in the statement of claim against the federal Crown attorneys are based on the non-disclosure of a plea arrangement relating to drug charges that Lovelace was facing at the time of the plaintiff's murder prosecution. The Crown and Lovelace's lawyer, the defendant Weinstein, entered into an agreement that, if Lovelace testified against the plaintiff in the murder trial, they would enter a stay of proceedings on the drug charge. The Crown and Weinstein also agreed that Weinstein would not tell his client about the deal until after the murder trial to ensure that his evidence was not tainted. While this plea arrangement may have been unusual, it falls within the scope of authority of Crown attorneys to negotiate plea arrangements.

[27] The facts of this case are clearly distinguishable from the facts of ***Chaput***, where, in breaking up an orderly religious meeting, police were acting "wholly wide of any statutory or public duty" (at p. 856). In this case, there is no merit to the argument that the defendants cannot rely on s. 21 of the ***POA*** because they were acting outside the scope of their public duty.

[28] As for the argument that the defendants cannot rely on s. 21 because they acted with malice or bad faith, in oral argument, plaintiff's counsel conceded that the plaintiff was not alleging that the Crown attorneys were "acting in a deliberate and malicious use of their office." He acknowledged the distinction between this case and ***Al's Steakhouse***, a case on which he relied, where the court found that the negligence claim against the Crown was statute-barred, but the claim for malicious prosecution could proceed. Plaintiff's counsel argued that, while the Crown attorneys in this case did not act

maliciously, they acted in an "unconventional way". He did not explain why that would exclude the application of s. 21.

[29] The plaintiff says that, in quashing the plaintiff's murder conviction, the Court of Appeal found that there had been "Crown misbehaviour". That is not correct. As the Crown conceded that the failure to disclose evidence resulted in a miscarriage of justice and that the conviction should be quashed, the court made no findings regarding the conduct of the Crown or police. The comment about Crown misbehaviour, which the plaintiff's counsel has taken out of context, related to a motion to introduce fresh evidence on the appeal. The Court dismissed that motion, finding that the evidence of misbehaviour was irrelevant to the issue before the court. In writing the decision for the court, Beard J.A. said:

> [81] There was a second motion for fresh evidence related to further information regarding one of the witnesses who had testified before this panel. That fresh evidence was sealed pursuant to the Manitoba, Court of Appeal Rules, Man Reg 555/88 R, r 21(4), and there was also a publication ban in place at the beginning of the hearing to prevent the publication of any of the details of that evidence. With the consent of the parties, this Court has reviewed that evidence.
>
> [82] I am of the view that this evidence goes to the issue of whether there was Crown misbehaviour, which was relevant to whether there had been a miscarriage of justice. This has been conceded by the Crown and is no longer at issue. The fresh evidence is not, in my view, of assistance in determining the only issue on appeal, being whether there should be an order for a new trial with a judicial stay of proceedings or an acquittal. Therefore, I am of the view that the evidence is not relevant to the issues to be determined and the motion should be dismissed. I would order that the publication ban regarding this evidence should remain in effect.

[30] The plaintiff has provided no explanation, other than one which I have rejected, for why the new argument that he seeks to advance was not raised at the original hearing. Nor has he demonstrated that there is some merit to the new argument. There is an

additional factor here that leads me to conclude that not allowing the summary judgment motion to be re-opened would not lead to a miscarriage of justice. I emphasize that the summary judgment motion resulted in the dismissal of only part of the claim. The claim against the police officers based on negligence and breach of ***Charter*** rights, for failure to disclose the Jacobson report, remains extant. The claim against the Crown attorneys, which was dismissed, is based on the failure to disclose the Lovelace deal. The plaintiff has not shown that dismissing that part of the claim without allowing further argument is "a result that is perverse or fundamentally wrong" (***Rémillard***, *supra*). I arrive at this conclusion not just by considering the merits of the argument with respect to the application of s. 21 of the ***POA***, but by looking at the merits of the claim itself as, arguably, it would be a perverse result to not allow a claim with merit to proceed. Assessing the merits of the claim would normally be difficult in the context of a motion and argument that focused on the limitation issues. However, as I will explain, the comments of the Court of Appeal in quashing the plaintiff's conviction and the facts pleaded in the statement of claim make the conclusion here evident.

[31] The Court of Appeal found that non-disclosure of the Lovelace deal could only have affected the outcome of the murder trial if Lovelace knew about the deal. Beard J.A. explained (***R. v. Ostrowski***, *supra*):

> [56] The question of whether Mr. Lovelace received any consideration for his testimony was relevant to his credibility in two ways. First, if it could be shown that he knew about the Lovelace deal, his denials in that regard would be untruthful, which would affect his overall credibility. Further, the fact that he was receiving consideration for his testimony, if known to him, would factor into the credibility of that testimony--it raises the question of whether he was lying about the accused's involvement in the murder in exchange for a deal on his drug charges.

. . . . .

> [77] It is clear, as the Crown has acknowledged, that the failure to disclose the fact of the Lovelace deal and the Jacobson report to the defence impaired the accused's ability to make full answer and defence. That evidence could have been used by the defence to challenge the overall credibility of Mr. Lovelace and Csts. McCormick and DeGroot and also to challenge the credibility of important details of their testimony regarding Mr. Lovelace's statements to Sgt. Jacobson.
>
> [78] That said, the new evidence is neither exculpatory as regards the charge against the accused, nor does it clearly render Mr. Lovelace's testimony unreliable. A jury would still have to consider Mr. Lovelace's testimony in the context of all of the other evidence, to determine whether his information about the accused was reliable and credible. There is a significant amount of other evidence that supports the details provided by Mr. Lovelace, such that it would remain open to a jury to find his testimony about the accused credible and reliable even in light of the evidence regarding the Lovelace deal and the Jacobson report.
>
> [79] For these reasons, I am of the view that, based on all of the information now available, there is evidence upon which a properly instructed jury could reasonably find the accused guilty.
>
> [emphasis added]

[32] Beard J.A. found that the Lovelace deal may have affected the outcome of the murder prosecution if Lovelace knew about the deal. She left open the possibility that Lovelace did know about the deal:

> [58] The questions of whether Mr. Lovelace knew of the Lovelace deal and how that deal affected the credibility of his testimony would be for a jury to determine. It is not at all clear, however, that a jury would find that Mr. Lovelace knew, before the murder trial, about the deal that Mr. Weinstein was negotiating with the federal Crowns. In my view, it is reasonably possible that a jury would find that Mr. Lovelace had no knowledge of that deal before he testified.

[33] However, the plaintiff's claim against the Crown attorneys is based on the fact that Lovelace did not know about the deal. The statement of claim states:

> 56. Lovelace did not know about the deal because Weinstein (Lovelace's lawyer) negotiated the Lovelace deal without Lovelace's instructions and

> because Weinstein intentionally did not inform Lovelace until about November 16, 1988 (when the trafficking charge was dismissed) [after the murder trial] that he had made the deal on his behalf. . . .

[34] As the facts on which the claim against the Crown attorneys is based are that Lovelace did not know about the deal his lawyer had made for him, the non-disclosure of the deal could not have affected his credibility and, therefore, could not have affected the outcome of the trial. As a result, in my view, not allowing the plaintiff to re-open the original motion to advance an argument that that part of the claim should proceed would not risk a miscarriage of justice. Nor does it prejudice the plaintiff in pursuing the claim against the police officers, which is based on a different set of facts.

[35] As a result, I am dismissing the plaintiff's motion to re-open.

_____J.