Date: 20240722
Docket: CI 22-01-37202
(Winnipeg Centre)
Indexed as: Acheson v. The Government of Manitoba
Cited as: 2024 MBKB 114

COURT OF KINGS'S BENCH OF MANITOBA

Proceeding under ***The Class Proceedings Act***, C.C.S.M. c. C130.

B E T W E E N:

WILLIAM ACHESON,	)	Naomi J. Kovak
	)	Chya R. Mogerman
plaintiff,	)	for the plaintiff
	)	
- and -	)	Jim Koch
	)	Kelsey Harrison
THE GOVERNMENT OF MANITOBA,	)	for The Government of Manitoba
	)	
defendant.	)	Janelle Wagner
	)	for City of Winnipeg
	)	
	)	
	)	Judgment Delivered:
	)	July 22, 2024

CHARTIER J.

INTRODUCTION

[1] This is a proposed class action proceeding that has yet to be certified. Two separate motions were heard together, the defendant, The Government of Manitoba ("Manitoba"), brought a motion seeking to strike out the statement of claim (the "claim"), without leave to amend, on the grounds it is an abuse of the process of the court and that it discloses no reasonable cause of action. The plaintiff, William Acheson, also

brought a motion seeking to join the City of Winnipeg ("Winnipeg") as a defendant in this action, which is being resisted by Winnipeg on substantially the same basis as submitted by Manitoba on their motion to strike, but with additional grounds that the plaintiff is statute barred from doing so.

[2] A statement of claim was filed in this matter on August 31, 2022. An amended statement of claim was filed on May 17, 2023. A fresh second amended statement of claim was attached to the plaintiff's motion to join Winnipeg in this action, which was filed on July 31, 2023. The pleading that I considered for the purposes of both motions was the proposed second amended statement of claim. I also considered the affidavits of Sharron Wang, affirmed July 27, 2023, September 18, 2023, and September 21, 2023.

[3] This action involves a proposed class proceeding relating to tickets issued pursuant to ***The Highway Traffic Act***, C.C.S.M. c. H60 (the "***HTA***"), using image capturing enforcement, commonly referred to as photo radar enforcement. The proposed class period is November 20, 2017 to November 12, 2021. More specifically, the action is for the recovery of alleged overcharges on speeding fines issued under ***The Provincial Offences Act***, C.C.S.M. c. P160 (the "***POA***"), and the ***Preset Fines and Offence Descriptions Regulation***, M.R. 96/2017 (the "***Regulation***"), through the use of the Image Capturing Enforcement System or photo radar.

[4] The central issue raised by the plaintiff is the correctness of the amount of the fines that were issued under the legislation. The plaintiff and the putative class say that the fines issued under the legislation were calculated in such a manner that it resulted in an overpayment in the fine amount.

[5] Manitoba and Winnipeg say the issue is one that could, and should, have been raised through the processes available under the ***POA***, and attempts to re-litigate criminal proceedings through the civil courts have regularly been struck as an abuse of the process of the court, and a similar conclusion should be reached in this case. Further, and in the alternative, the individual causes of action, being unjust enrichment, negligent misrepresentation, fraudulent misrepresentation and rectification, raised in the claim are doomed to fail due to the absence of one or more constituent elements of the separate causes of action. Winnipeg also relies on s. 21(1) of ***The Public Officers Act***, C.C.S.M. c. P230, a limitation provision, and s. 88 of ***The Police Services Act***, C.C.S.M. c. P94.5, an immunity provision, and says the claim is statute barred.

BACKGROUND FACTS AND LEGISLATIVE SCHEME

[6] The plaintiff is a resident of Winnipeg, Manitoba. He received and paid photo radar speeding fines in the class period, including:

a) A ticket issued on July 27, 2021 that stated the "speed" was 43 km/hr, the "posted speed" was 30 km/hr, and that the "fine payable" was $221;

b) A ticket issued on August 20, 2021 that stated that the "speed" was 47 km/hr, the "posted speed" was 30 km/hr, and the fine payable was $272;

c) A ticket issued on October 7, 2021 that stated that the "speed was 43 km/hr, the "posted speed" was 30 km/hr, and the "fine payable" was $221; and

d) A ticket issued on October 7, 2021 that stated that the "speed" was 47 km/hr, the "posted speed" was 30 km/h, and the "fine payable" was $272.

[7] The plaintiff relied upon the stated "fine payable" written on each ticket as accurately representing the amount he owed pursuant to the statutory scheme, including the ***Regulation***. Based on those representations, he paid each of the tickets online on the Government of Manitoba's website for online fine payments.

[8] During the class period, Manitoba issued and maintained a document referred to as the Brown Book, which is a partial reprint of the ***Regulation***, and contains offences for which offence notices (either tickets or informations) are issued.

[9] Manitoba collects fines that are paid, and those monies are shared with Winnipeg.

Issuance of Tickets by Photo Radar Enforcement

[10] In the present case, the plaintiff received four photo radar tickets for the offence of speeding under s. 95(1) of ***HTA***.

[11] As a means of enforcement, photo radar tickets are permitted under s. 257.1 of the ***HTA*** and are subject to the limitations outlined in that section of the ***Act***. Sections 257.1(1) and 257.1(2) read as follows:

> **Use of image capturing enforcement systems**
>
> 257.1(1) Municipalities, and peace officers acting on behalf of municipalities or the government, may use image capturing enforcement systems only if they are authorized to do so by the regulations and only
>
> (a) for enforcing subsections 88(7) and (9) (red light offences), subsection 95(1) (speeding offences), clauses 134(2)(b) and (c) (railway crossing offences) and subclauses 134(6)(a)(i) and (b)(i) (railway crossing offences); and

> (b) in accordance with any conditions, limitations or restrictions in the regulations about the use of such systems.
>
> **Limitations re speed limit enforcement**
>
> 257.1(2) Without limiting the generality of subsection (1), when municipalities and peace officers acting on behalf of municipalities or the government use image capturing enforcement systems for speed limit enforcement, they may only use them to detect speed limit violations that occur
>
> (a) in construction zones, playground zones and school zones; and
>
> (b) at intersections that are controlled by traffic control lights.

[12] Penalties for speeding offences under s. 95(1) of the ***HTA*** are set out under s. 238(2) of the ***HTA***:

> **Penalty for speeding offences**
>
> 238(2) A person who is guilty of an offence under subsection 95(1) is liable to a fine of not more than $7.70 for each km/h that the vehicle was driven over the speed limit at the place where the offence was committed.

[13] While the ***HTA*** creates the offences that may be prosecuted, the ***POA*** governs how those offences are to be prosecuted. This includes the prosecution of photo radar enforcement offences under the ***HTA***.

[14] At all material times, the provision of the ***Regulation*** that established the preset fines for speeding (s. 95(1)), and speeding in a designated construction zone (s. 95(1)(c)) which read as follows:

> 95(1) Preset Fine: $7.70 for each kilometre per hour in excess of 10km/h over the maximum permitted speed
> Court Costs: add 45% of preset fine.
> Surcharges: add 25% of preset fine, rounded up to nearest dollar, plus $50.
> Total fine: rounded down to the nearest dollar.
>
> 95(1)(c) Preset fine: $15.40 for each kilometre per hour in excess of 10 km/h over the maximum permitted speed
> Court Costs: add 45% of preset fine.

> Surcharges: add 25% of preset fine, rounded up to nearest dollar, plus $50.
> Total fine: rounded down to the nearest dollar.
>
> [emphasis added]

[15] As of November 12, 2021, the ***Regulation*** establishing the preset fines for speeding (s. 95(1)) and speeding in a designated construction zone (s. 95(1)(c)) was amended by replacing the underlined parts in the above paragraph, "…in excess of 10 km/h over the maximum permitted speed", with the words "over the speed limit".

[16] The plaintiff alleges that throughout the class period, Manitoba and Winnipeg were not calculating the fines in a manner consistent with the governing ***Regulation*** outlined in para. 14, with the charges accruing on each kilometre per hour "in excess of 10km/h" over the speed limit, but were instead calculating the fines with the charges accruing on each kilometre per hour over the speed limit.

[17] Both Manitoba and Winnipeg benefit from surplus fine revenue collected from photo radar enforcement.

Procedure under the POA

[18] The ***POA*** replaced the former ***Summary Convictions Act***, C.C.S.M. c. S230, in December 2013. The new ***Act*** was intended to address all topics related to provincial prosecutions, rather than rely upon the provisions of the ***Criminal Code***. It addresses matters including proceeding by tickets or informations, procedures for hearings, and appeals.

[19] Section 8 of the ***POA*** specifies the content that must be included in a ticket where an enforcement officer believes an offence has been committed and there is a preset fine associated with the offence at issue. Similar and additional content requirements are set under s. 9(2) for the purposes of a photo radar enforcement ticket.

[20] The form of the ticket is prescribed by Form 4 of the Forms Regulation, M.R. 122/2017. Among other things, the form requires the law enforcement officer who issues the ticket to identify the specific statutory provision that is said to have been breached. As well, the form sets out the three options which may be elected by the person issued the ticket in order to respond to the ticket:

a) To pay the fine indicated. By paying the offence, the person named in the ticket admits to the offence.

b) To admit the offence but seek a reduction in the fine or time to pay. The person named in the ticket may admit to the offence, but also may apply to a justice to explain why the fine should be reduced or why they need more time to pay.

c) Dispute the charge and request a hearing. The person named in the ticket may choose not to admit the offence and dispute the charge. By doing so, the person named in the ticket is entitled to a hearing date to dispute the charge.

[21] The above three options are reflected in ss. 15 to 18 of the ***POA***. In addition, s. 19 applies where a person is in default, either by not responding to the ticket, or where the person fails to appear at the hearing.

[22] While the claim states that the plaintiff paid four tickets based upon the amounts reflected on the ticket, it is not clear under which processes those were paid. To the extent the pleading implies he paid the tickets at face value, it is likely that he elected to pay the fine indicated on the ticket. Alternatively, he may have paid the amount after a

default conviction in which case he would have been deemed to admit the offence under s. 19(1)(a) of the ***POA***. In either case, the plaintiff's actions would constitute an admission of the offence as alleged, either pursuant to s. 16 or s. 19(1)(a) of the ***POA***.

[23] In the circumstances set out above relative to the plaintiff, s. 79 of the ***POA*** afforded him a limited right to seek leave to appeal to this Court on a question of law or mixed law and fact. There is a right to seek leave on a conviction but only a right to seek leave in relation to a sentence imposed if the proceeding was commenced by an information, but no right to do so if the proceeding was commenced by a ticket, which is the case here. At the material time, s. 79 read as follows:

> **Right to appeal — defendant**
>
> 79(1) A defendant may appeal the following to the Court of Queen's Bench:
>
> (a) a conviction;
>
> (b) a sentence imposed on the defendant, but only if the proceeding was commenced by an information;
>
> (c) any other order made by a justice against the defendant under this Act.
>
> **Right to appeal — Attorney General or prosecutor**
>
> 79(2) The Attorney General or a prosecutor may appeal the following to the Court of Queen's Bench:
>
> (a) a dismissal of a charge against a defendant;
>
> (b) a sentence imposed on a defendant, but only if the proceeding was commenced by an information;
>
> (c) any other order made by a justice under this Act.
>
> **Limited appeal re tickets**
>
> 79(3) An appeal under subsection (1) or (2) for proceedings commenced by a ticket may be taken only with leave of a judge of the Court of Queen's Bench on a question of law or mixed fact and law.

SUBMISSIONS OF THE PARTIES

[24] Manitoba submits that the plaintiff's claim is an abuse of process of the court pursuant to Rule 25.11(1) of the Court of King's Bench Rules, M.R. 553/88, and relying on a number of cases, including the decision of ***British Columbia (Workers' Compensation Board) v. Figliola***, 2011 SCC 52, and ***Glenko Enterprises Ltd. v. Keller***, 2000 MBCA 7, says that the issue in this claim should have been properly adjudicated pursuant to the provisions of the ***POA*** in relation to the speeding offences. Manitoba says it is an abuse of process because it constitutes a collateral attack on a decision in a criminal proceeding and using a civil action to re-litigate that issue is an improper use of this Court's process. Manitoba also relies on the decision of ***Weaver v. City of Winnipeg et al***, 2011 MBQB 309, in this regard. Manitoba also says that the action should also be struck pursuant to Rule 25.11(1) on the basis it does not disclose a reasonable cause of action in relation to unjust enrichment, negligent misrepresentation, fraudulent misrepresentation, and rectification.

[25] Winnipeg opposes the plaintiff's motion to be joined as a party to these proceedings on the basis the proposed amendment to join them does not raise a valid cause of action and is an abuse of process. It adopts Manitoba's position relating to abuse of process. Winnipeg also takes a similar position to Manitoba saying that the proposed claim does not demonstrate a reasonable cause of action. Winnipeg also says the proposed claim against the City is statute barred pursuant to s. 21(1) of the ***Public Officers Act*** and s. 88 of the ***Police Services Act***.

[26] The plaintiff says that it is not plain and obvious that the claim constitutes an abuse of process as there is no challenge to the underlying conviction, and he is only challenging the correct statutory amount of the fine payable. He says that the legislative scheme under the ***POA*** does not provide a proper forum to bring forward his position that Manitoba and Winnipeg have over collected amounts payable under the legislation. He also says that it is not plain and obvious that the statement of claim does not raise a reasonable cause of action in relation to unjust enrichment, negligent misrepresentation, fraudulent misrepresentation and rectification, and that it is not plain and obvious that the claim against Winnipeg is statute barred.

ISSUES

[27] The issues on the two motions are:

a) Should the claim against Manitoba be struck without leave to amend on the grounds it is an abuse of the process of the court or discloses no reasonable cause of action? and

b) Should Winnipeg be joined as a party to these proceedings, or should the motion to join Winnipeg be dismissed because the action is an abuse of process of the court, discloses no cause of action, or is statute barred?

ANALYSIS

a) Should the claim against Manitoba be struck without leave to amend on the grounds it is an abuse of the process of the court or discloses no reasonable cause of action?

(i) The claim is not an abuse of process of the court.

[28] For the reasons that follow, I am not persuaded the plaintiff's claim should be struck as an abuse of the court's process.

[29] The leading case on abuse of process is the Supreme Court of Canada ("SCC") decision in ***Figliola***. Abella J., writing for the majority, described abuse of process as follows:

> [31] And finally, we come to the doctrine of abuse of process, which too has as its goal the protection of the fairness and integrity of the administration of justice by preventing needless multiplicity of proceedings, as was explained by Arbour J. in *Toronto (City)*. …
>
> …
>
> [33] Even where *res judicata* is not strictly available, Arbour J. concluded, the doctrine of abuse of process can be triggered where allowing the litigation to proceed would violate principles such as "judicial economy, consistency, finality and the integrity of the administration of justice" (para. 37). She stressed the goals of avoiding inconsistency and wasting judicial and private resources…
>
> [34] At their heart, the foregoing doctrines exist to prevent unfairness by preventing "abuse of the decision-making process" (*Danyluk*, at para. 20; see also *Garland*, at para. 72, and *Toronto (City)*, at para. 37). Their common underlying principles can be summarized as follows:
>
> - It is in the interests of the public and the parties that the finality of a decision can be relied on (*Danyluk*, at para. 18; *Boucher*, at para. 35).
> - Respect for the finality of a judicial or administrative decision increases fairness and the integrity of the courts, administrative tribunals and the administration of justice; on the other hand, relitigation of issues that have been previously decided in an appropriate forum may undermine confidence in this fairness and integrity by creating inconsistent results and unnecessarily duplicative proceedings (*Toronto (City)*, at paras. 38 and 51).
> - The method of challenging the validity or correctness of a judicial or administrative decision should be through the appeal or judicial review

mechanisms that are intended by the legislature (*Boucher*, at para. 35; *Danyluk*, at para. 74).

- Parties should not circumvent the appropriate review mechanism by using other forums to challenge a judicial or administrative decision (*TeleZone*, at para. 61; *Boucher*, at para. 35; *Garland*, at para. 72).
- Avoiding unnecessary relitigation avoids an unnecessary expenditure of resources (*Toronto (City)*, at paras. 37 and 51).

[30] The Manitoba Court of Appeal in ***Glenko***, identified a number of principles concerning whether a claim should be dismissed on the ground that the action is an abuse of the process of the court:

> 94 There are a number of principles which emerge from the decided cases:
>
> (1) An action should not be stayed or dismissed as an abuse of process except in a clear case, where it is plain and obvious that the action cannot succeed. See *Sussman v. Ottawa Sun*, [1997] O.J. No. 181 (Q.L.) (Gen. Div.), and *Brown et al. v. Coldstream Copper Mines Limited et al.*, [1954] O.W.N. 830 (H.C.).
>
> ...
>
> (3) It would indeed be a manifest error not to stay or dismiss the action if the case is one where *res judicata* or issue estoppel would be successfully raised at trial. The doctrine of abuse of process is intended to prevent the re-litigation of an issue which was determined in an earlier proceeding and which would be determinative of the later case. See *Reddy v. Oshawa Flying Club* (1992), 11 C.P.C. (3d) 154 (Ont. Gen. Div.). Further, even where the precise issue was not determined in the prior litigation, an action may be stayed as an abuse of process where the issue properly should have been adjudicated in the earlier litigation. …

[31] I agree with the submissions of the plaintiff that the cases submitted by Manitoba and Winnipeg are distinguishable because here there is no collateral attack on the underlying conviction which is not contested. Neither is the claim about seeking a lower fine amount based on the particular circumstances relating to the plaintiff's individual case. Instead, the plaintiff's claim is that the amount of the collected fine is contrary to the applicable ***Regulation*** and constitutes an overcollection of the amount owing by the defendants.

[32] The situation here is similar to the issue in ***Garland v. Consumers' Gas Co.***, 2004 SCC 25. In that case, the SCC stated that:

> 71 …the doctrine of collateral attack does not apply in this case because here the specific object of the appellant's action is not to invalidate or render inoperative the Board's orders, but rather to recover money that was illegally collected by the respondent as a result of Board orders. Consequently, the collateral attack doctrine does not apply.

As in ***Garland***, here there is no collateral attack on the underlying conviction under the ***POA***, but rather, the plaintiff's action seeks to recover money which the plaintiff says was unlawfully collected by Manitoba and Winnipeg as a result of a failure to apply the applicable ***Regulation***.

[33] Manitoba and Winnipeg say that the plaintiff could, and should, have brought the subject matter of his claim before the Provincial Court pursuant to the procedure set out in the ***POA***. I accept that this issue could have been brought by the plaintiff at that time, however, in my view, he should not be estopped from raising it as an issue in this civil action. I say this because it is not clear that the appeal provision at s. 79 of the ***POA***, would allow the plaintiff to bring the matter before the Court of King's Bench because an appeal only lies in respect of a conviction and not a sentence, at least not a sentence that was imposed when the proceeding was initiated by way of a ticket as it was here. A sentence cannot be appealed by either the Crown or a defendant under s. 79 of the ***POA***. The plaintiff is not appealing his conviction, but only the amount of the fine which he says is improper based on the applicable legislation.

[34] The decision of ***Arenson v. Toronto (City)***, 2008 CanLII 36762 (ON SC); ***Arenson v. Toronto (City)***, 2009 ONCA 169, (leave to appeal to the SCC dismissed, ***City of Toronto v. Anna Marie Arenson***, 2009 CanLII 33130 (SCC)), also has

similarities to this case. In upholding the decision of the Ontario Superior Court, the Ontario Court of Appeal stated, at para. 2, it was "…satisfied that the entirety of [Ms. Arenson's] claim is not governed by the *Provincial Offences Act*. [She] cannot recover her damages under the *Act*." Similarly here, the plaintiff would have been unable to pursue an appeal of his sentence from the Provincial Court as there is no appeal mechanism to the Court of King's Bench to challenge the alleged overcollection of the fine amount. I do not find that the issue in this case could be challenged under s. 79(1)(c) as submitted by Manitoba as the proper amount of the fine relates to sentence and so is governed by s. 79(1)(b) of the ***POA***. Therefore, the processes under the ***POA*** do not constitute an appropriate review mechanism. There is no violation of the integrity of the administration of justice in allowing this matter to be considered by this Court and I find that, conversely, there would be an injustice to the plaintiff if this Court is not allowed to consider the matter. It is at least arguable, based on the ***Regulation*** in question, that a fine amount may have been over collected.

[35] Manitoba and Winnipeg also rely on the decision of this Court in ***Weaver*** as a basis that the claim is an abuse of process. That decision has some similarities to this case in that it involved a proposed class action against Manitoba and Winnipeg for the recovery of speeding fines issued through photo radar enforcement for speeding in construction zones. In my view, however, that case was about unjust enrichment and not about abuse of process. In any event, that case is also distinguishable in that in ***Weaver*** the plaintiff was challenging the underlying conviction, whereas here, the plaintiff is not challenging the underlying conviction, but rather admits the conviction but

says he has been overcharged on his fine based on the applicable ***Regulation***. The plaintiff is challenging what he submits is an excess collection of the amount of the fine to which Manitoba and Winnipeg are not entitled as a result of the conviction, pursuant to the ***Regulation***.

[36] This constitutes a fundamental difference between ***Weaver*** and the circumstances here. In that case, the Court rejected the basis for the asserted claim of unjust enrichment, which was an alleged absence of a juristic reason for the unjust enrichment. The basis for the motion judge's decision that the action be struck was that it was plain and obvious that the plaintiff's action for unjust enrichment could not succeed as there was not an absence of a juristic reason. There was not an absence of a juristic reason there because the motion judge found there was a proper conviction based on s. 95(1) of the ***HTA*** as the judge found that the definition of "construction zone" was of no consequence to the s. 95(1) speeding offence which was the relevant provision. The Court found there was a juristic reason for the fine, and therefore, no unjust enrichment. Here, by contrast, the issue of whether there is a juristic reason for the amount of the applicable fine is not clear.

(ii) <u>It is not plain and obvious that the claim does not disclose a cause of action.</u>

[37] In ***R. v. Imperial Tobacco Canada Ltd.***, 2011 SCC 42, the SCC set out the well-known test regarding striking a pleading for not disclosing a reasonable cause of action:

> [17] …A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 15; *Hunt v. Carey Canada Inc.*, 1990 CanLII 90 (SCC), [1990] 2 S.C.R.

> 959, at p. 980. Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial: see, generally, *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83; *Odhavji Estate*; *Hunt*; *Attorney General of Canada v. Inuit Tapirisat of Canada*, 1980 CanLII 21 (SCC), [1980] 2 S.C.R. 735.

[38] The claim alleges four separate causes of action, unjust enrichment, negligent misrepresentation, fraudulent misrepresentation, and rectification. For the reasons that follow, I do not find that it is plain and obvious that the claim does not disclose a cause of action in relation to unjust enrichment and negligent misrepresentation. However, I do not find that the allegations in relation to fraudulent misrepresentation and rectification disclose a cause of action.

Unjust Enrichment

[39] In order to make out the cause of action for unjust enrichment, the plaintiff is required to demonstrate the following elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment (see ***Alberta v. Elder Advocates of Alberta Society***, 2011 SCC 24, at para. 82; ***Garland***).

[40] Under the first prong of the unjust enrichment test, the plaintiff has pleaded that the transactions at issue are payments of money by the plaintiff, who received a ticket, to Manitoba and Winnipeg, and that both Manitoba and Winnipeg benefit from the surplus fine revenue collected from photo radar enforcement, based on the ***Regulation***.

[41] The plaintiff has also pleaded under the second prong, that he suffered a corresponding deprivation by making the overpayment to Manitoba and Winnipeg.

[42] Finally, the plaintiff has pleaded that there is an absence of juristic reason for the enrichment. Under this third prong of the test, the plaintiff must show that no juristic reason from an established category exists to deny recovery. The established categories include a contract, a disposition of law, a donative intent, and other valid common law, equitable or statutory explanations.

[43] If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case. The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. The plaintiff has pleaded the necessary material facts to demonstrate an absence of juristic reason for the enrichment. Specifically, the plaintiff has pled material facts that support the view that, in the context of the legislative regime, Manitoba and Winnipeg's collection of the excess fines may have been unlawful.

[44] Manitoba and Winnipeg relied on the ***Weaver*** decision to argue that there is a juristic reason for the enrichment. However, as noted in relation to the abuse of process argument, ***Weaver*** has a different factual matrix. The finding of a juristic reason in ***Weaver*** turned on the judge's rejection of the plaintiff's argument that the offence which he pled guilty is an offence that does not exist at law.

[45] In this case, at this preliminary stage of the proceeding, the proper interpretation of the relevant provision of the ***Regulation*** is a live issue. Whether the ***Regulation***, properly interpreted, operates to provide a juristic reason for the enrichment is a matter for trial. The case was clear in ***Weaver***, it is not so here. If the plaintiff's interpretation of the law is correct, then letting Manitoba and Winnipeg retain the overpayments may

well constitute an unjust enrichment. Manitoba and Winnipeg did not submit that this underlying issue was "plain and obvious".

Negligent Misrepresentation

[46] The SCC has reaffirmed the five elements that must be present for a successful claim of negligent misrepresentation, as summarized in ***Queen v. Cognos Inc.,*** 1993 CanLII 146 (SCC), [1993] 1 SCR 87, at p. 110:

> …The decisions of this Court cited above suggest five general requirements: (1) there must be a duty of care based on a "special relationship" between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making said misrepresentation; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted...

[47] In ***Imperial Tobacco***, the SCC made the following comment in relation to a potential claim of negligent misrepresentation when the defendant is a government actor as we have here. It stated as follows:

> [43] A complicating factor is the role that legislation should play when determining if a government actor owed a *prima facie* duty of care. Two situations may be distinguished. The first is the situation where the alleged duty of care is said to arise explicitly or by implication from the statutory scheme. The second is the situation where the duty of care is alleged to arise from interactions between the claimant and the government, and is not negated by the statute.

[48] Having considered the pleading, and in particular paras. 3, 18, 21-22, and 35-37, I do not find it is plain and obvious that this pleading will not succeed, possibly on either one or both of the heads described in para. 43 of the ***Imperial Tobacco*** case.

Fraudulent Misrepresentation

[49] The SCC affirmed the four elements for fraudulent misrepresentation or civil fraud in ***Bruno Appliance and Furniture, Inc. v. Hryniak***, 2014 SCC 8:

> [21] …(1) a false representation made by the defendant; (2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness); (3) the false representation caused the plaintiff to act; and (4) the plaintiff's actions resulted in a loss.

[50] Upon review of the allegations in the claim, I do not find that the pleading sets out facts that support that Manitoba or Winnipeg made a false representation to the plaintiff. An essential element in a claim for fraudulent misrepresentation is an intention to deceive, by knowingly or recklessly making a false representation, on the part of the defendant. Here the allegations are only that the defendants were aware, or should have known, that the tickets were not issued in a manner consistent with the ***Regulation***. Moreover, there are other provisions in the ***HTA*** which support the imposition of the fine amount that was imposed. The claim, therefore, does not make out a claim for fraudulent misrepresentation and that part of the pleading should be struck.

Rectification

[51] The SCC summarized the remedy of rectification in ***Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.***, 2002 SCC 19:

> 31 Rectification is an equitable remedy whose purpose is to prevent a written document from being used as an engine of fraud or misconduct "equivalent to fraud". The traditional rule was to permit rectification only for mutual mistake, but rectification is now available for unilateral mistake…, provided certain demanding preconditions are met....Rectification is predicated on the existence of a prior oral contract whose terms are definite and ascertainable….

[52] That Court has also outlined the four conditions that must be satisfied before rectification of a document can be ordered at para. 31:

> 31 …Insofar as they are relevant to this appeal, these preconditions can be summarized as follows. Rectification is predicated on the existence of a prior oral contract whose terms are definite and ascertainable. The plaintiff must establish that the terms agreed to orally were not written down properly. The error may be fraudulent, or it may be innocent. What is essential is that at the time of execution of the written document the defendant knew or ought to have known of the error and the plaintiff did not. Moreover, the attempt of the defendant to rely on the erroneous written document must amount to "fraud or the equivalent of fraud". The court's task in a rectification case is corrective, not speculative. It is to restore the parties to their original bargain, not to rectify a belatedly recognized error of judgment by one party or the other: [citations omitted] In *Hart, supra*, at p. 630, Duff J. (as he then was) stressed that "[t]he power of rectification must be used with great caution". Apart from everything else, a relaxed approach to rectification as a substitute for due diligence at the time a document is signed would undermine the confidence of the commercial world in written contracts.

[53] A ticket issued under the ***POA*** is not a contract or agreement between the plaintiff and the defendants. Paragraph 47 of the claim asserts otherwise, but I agree with Manitoba's submissions that this mischaracterizes what a ticket is, which is a notice of an offence under provincial statute. The ticket is referenced in the pleading, and I am, therefore, able to consider that document on a motion to strike. The actual tickets which were issued to the plaintiff were not placed in evidence, but a sample ticket was placed into evidence. It outlines the offence for which the person receives the ticket, and the procedure to pay the fine for the offence or to contest either the fine or the offence. It contains no language that can be construed as an agreement between two parties.

[54] The plaintiff cannot plead an agreement as between himself and the defendants, where the document at issue is a statutory offence notice. These are not circumstances

in which rectification is available, and the plaintiff is not entitled to the relief he seeks in this regard.

b) Should Winnipeg be joined as a party to these proceedings, or should the motion to join Winnipeg be dismissed because the action is an abuse of process of the court, discloses no cause of action, or is statute barred?

[55] I have already addressed the issue of whether the claim has merit under the previous analysis under abuse of process and no reasonable course of action in relation to Manitoba's claim. I find there is merit to the part of the claim relating to unjust enrichment and negligent misrepresentation.

(i) Should Winnipeg be joined as a party to these proceedings?

[56] I am granting the plaintiff's motion to join Winnipeg as a party to these proceedings pursuant to Rule 26.01. The plaintiff will have leave to amend his pleading to join Winnipeg as a party. I find the criteria set out in the decision of ***Winnipeg (City) v. Caspian Projects Inc. et al.***, 2020 MBQB 129, at para. 102, have been met. There is no prejudice to Winnipeg as the proceedings are in the early stages. There is no delay on the part of the plaintiff moving for the amendment.

[57] I will add that both Manitoba and Winnipeg have benefited from the collection of fines and that from the standpoint of eventual remedies, Winnipeg should be a party. I find that pursuant to Rule 5, Winnipeg is a necessary party as it will enable the Court to adjudicate effectively and completely on the issues in the proceeding. Winnipeg has a "…direct interest [that] arises from a legal or proprietary interest in the subject matter of the case or when a person will be bound by the result…." (***Gendis Inc. v. Canada (Attorney General)***, 2002 MBQB 160, at para. 11.)

(ii) Is it plain and obvious that the claim against Winnipeg is statute barred?

[58] I am not persuaded that it is plain and obvious that the claim against Winnipeg is statute barred under either of the two provisions. Regarding the provision of the ***Public Officers Act***, I agree that it is not plain and obvious that s. 21(1) of this ***Act*** applies given that the claim against Winnipeg has arisen in the existing action with Manitoba. A case management conference was held on May 9, 2023, where the plaintiff advised he would be seeking to join Winnipeg as a defendant in these proceedings. A separate claim could have been initiated against Winnipeg, but this would not have been proportional. The plaintiff moved to bring Winnipeg in these proceedings with dispatch prior to the two-year limitation period under the ***Public Officers Act***. It is not clear in these circumstances that it is plain and obvious that this limitation defence would succeed.

[59] I also find that it is not plain and obvious that s. 88 of the ***Police Services Act*** would bar the plaintiff's claim against Winnipeg. Consideration has to be given to s. 40(1) of the ***Police Services Act*** which says that "[a] municipality that operates a police service is jointly and severally liable for a tort committed by a police officer in the performance of his or her duties". There is also commentary in the Manitoba Court of Appeal decision of ***Beaulieu et al v. Winnipeg (City of) et al***, 2021 MBCA 93, which makes it unclear whether that provision would apply to this claim (at paras. 20-24, and 66).

CONCLUSION

[60] Manitoba's motion to strike is dismissed except in relation to the allegations of fraudulent misrepresentation and rectification contained in the pleading. The paragraphs

of the pleading in relation to those two specific causes of action are struck. The plaintiff's motion to join Winnipeg as a party is allowed (with the deletion of the pleadings relating to fraudulent misrepresentation and rectification).

[61] No costs are awarded on these motions pursuant to the parties' agreement.

_____ J.