KING'S BENCH FOR SASKATCHEWAN

Citation: **2024 SKKB 2**

Date: **2024 01 05**
Docket: KBG-SA-00393-2023
Judicial Centre: Saskatoon

BETWEEN:

JOHN OLIVARES

Plaintiff

- and -

~~SASKATOON POLICE SERVICES~~, AVERY CHAD SPOTT (and/or) Avery Chad Spott (badge #465), ERIC JELINSKI (and/or) Eric Jelinski (badge #893), JESSE JACKSON (and/or) Jesse Jackson (badge #790), KEVIN SANDERSON (and/or) Kevin Sanderson (badge #884), JOHN DOE (name and badge number unknown at this time), JOHN DOE (name and badge number unknown at this time), JANE DOE (name and badge number unknown at this time)

Defendants

Counsel:

no one appearing — for the plaintiff
Christine K. Libner — for the defendants

FIAT — ROTHERY J.
January 5, 2024

Introduction

[1] The four defendant police officers, Avery Spott, Eric Jelinski, Jesse

Jackson and Kevin Sanderson, apply to strike the plaintiff's claim against them on the basis that the claim is statute-barred and therefore frivolous, vexatious and an abuse of the court's process. The plaintiff was duly served with the application but did not appear.

[2] Because the defendants apply for an order pursuant to Rule 7-9 of *The King's Bench Rules*, they are not required to attend mediation prior to this application in accordance with s. 7-1 of *The King's Bench Act*, SS 2023, c 28 (formerly s. 42(1.2) of *The Queen's Bench Act, 1998*, SS 1998, c Q-1.01, rep). See *Crescent Point Resources Partnership v Husky Oil Operations Limited*, 2020 SKQB 128 at paras 15-16, 61 CPC (8th) 393.

[3] Rule 7-9 states:

> **7-9**(1) If the circumstances warrant and one or more conditions pursuant to subrule (2) apply, the Court may order one or more of the following:
>
> (a) that all or any part of a pleading or other document be struck out;
>
> (b) that a pleading or other document be amended or set aside;
>
> (c) that a judgment or an order be entered;
>
> (d) that the proceeding be stayed or dismissed.
>
> (2) The conditions for an order pursuant to subrule (1) are that the pleading or other document:
>
> (a) discloses no reasonable claim or defence, as the case may be;
>
> (b) is scandalous, frivolous or vexatious;
>
> (c) is immaterial, redundant or unnecessarily lengthy;
>
> (d) may prejudice or delay the fair trial or hearing of the proceeding; or
>
> (e) is otherwise an abuse of process of the Court.
>
> (3) No evidence is admissible on an application pursuant to clause (2)(a).

[4] The defendants rely upon Rule 7-9(2)(b) and (e) to seek an order striking the entire claim of the plaintiff. They submit that the circumstances warrant that all of the claim be struck out as provided by Rule 7-9(1)(a).

[5] The plaintiff commenced his action on April 11, 2023, with the issuance of the statement of claim against the defendants. The defendants filed their statement of defence on May 5, 2023. The plaintiff filed a "Reply to Statement of Defence and Supporting Evidence of Claim" (including a USB stick) [Reply] on May 11, 2023.

[6] The plaintiff alleges in his claim that the defendants arrested him on October 28, 2017, forcibly confined him and committed an aggravated assault on him, and unlawfully detained him for forty days at the Saskatoon Correctional Centre. The plaintiff seeks damages of $6 million.

[7] Avery Spott filed an affidavit in support of the defendants' application, and counsel filed the convictions dated December 6, 2017, from the Provincial Court of Saskatchewan, that the plaintiff "on or about the 28th day of October, 2017 at or near Saskatoon, Saskatchewan did have in his possession a weapon, to wit: a hammer, for a purpose dangerous to the public peace, contrary to section 88 of the Criminal Code". The plaintiff was sentenced to a period of incarceration at the Provincial Correctional Centre for a term of 30 days, "time served".

[8] The plaintiff's Reply, which included the certified copy of the Provincial Court proceedings, confirms that the plaintiff was provided full disclosure of his arrest on October 28, 2017, prior to entering his guilty plea to the charge under s. 88 of the *Criminal Code*, RSC 1985, c C-46, on December 6, 2017.

[9] The affidavit of Avery Spott confirms that the plaintiff had originally been charged with assault under s. 270 of the *Criminal Code*, wilful obstruction of a peace officer in the lawful exercise of duty contrary to s. 129(a), failure to comply with

conditions contrary to s. 145(3), along with the charge under s. 88 of the *Criminal Code*.

[10] With the Provincial Court's order that the plaintiff's 30-day sentence had been served by December 6, 2017, the court process regarding the events of October 28, 2017, had drawn to a conclusion.

[11] The defendants rely on s. 5 of *The Limitations Act*, SS 2004, c L-16.1, for their submission that the plaintiff did not commence his action against them within two years of the date of claim. The commencement of the claim on April 11, 2023, is well beyond the two-year limit, which, on the outside, is two years after December 6, 2017.

[12] Section 5 of *The Limitations Act* states:

> **5** Unless otherwise provided in this Act, no proceedings shall be commenced with respect to a claim after two years from the day on which the claim is discovered.

[13] Section 6 of *The Limitations Act* must be considered by the Court to determine when the plaintiff discovered his claim against the defendants. Section 6 states:

> **6**(1) Unless otherwise provided in this Act and subject to subsection (2), a claim is discovered on the day on which the claimant first knew or in the circumstances ought to have known:
>
> (a) that the injury, loss or damage had occurred;
>
> (b) that the injury, loss or damage appeared to have been caused by or contributed to by an act or omission that is the subject of the claim;
>
> (c) that the act or omission that is the subject of the claim appeared to be that of the person against whom the claim is made; and
>
> (d) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it.
>
> (2) A claimant is presumed to have known of the matters mentioned in clauses (1)(a) to (d) on the day on which the act or omission on which the claim is based took place, unless the contrary is proved.

[14] The case of *Stephens v MLT Aikins LLP*, 2021 SKQB 323 at paras 103-108, 75 CPC (8th) 117, outlines the ratio of the Supreme Court of Canada in *Grant Thornton LLP v New Brunswick*, 2021 SCC 31, pertaining to the proper analysis of legislation regarding discoverability as outlined in s. 6 of *The Limitations Act*. Elson J. stated the following:

> [103] Parenthetically, it is important to note that, at para. 35 of *Grant Thornton*, the Court also observed that the language of the New Brunswick statute was modelled after similar provisions in the Ontario, Saskatchewan and Alberta statutes, "all of which have been found to codify the common law rule of discoverability". In referencing the legislation in Saskatchewan, the Court expressly referenced the decision of this Court in *Jardine* [2017 SKQB 217] at para 36.
>
> [104] Perhaps more importantly, the Court also addressed the degree of knowledge required for the "discovery" of a claim within the meaning of the statute. In doing so, it expressly rejected the approaches followed by both the application judge and the Court of Appeal. In their place, Moldaver J., writing for a unanimous panel of the Court, articulated an approach that would find a claim to have been discovered "when a plaintiff has knowledge, actual or constructive, of the material facts upon which a plausible inference of liability on the defendant's part can be drawn." (para. 42).
>
> [105] Moldaver J. went on, at paras. 43-46, to explain each of the three considerations that apply to this approach, namely: (1) the "material facts" about which a claimant must have actual or constructive knowledge; (2) the "state of knowledge" required; and (3) the test for determining a "plausible inference of liability".
>
> [106] With respect to the required "material facts", Moldaver J. wrote that they simply consisted of the sets of facts that define discoverability. In the New Brunswick statute, the description of these facts is set out in s. 5(2), which is roughly analogous to s. 6 of the *Act*. Moldaver J. was careful to emphasize that the description is cumulative such that actual or constructive knowledge of one set of facts would not suffice to trigger the limitation period.
>
> [107] As for the state of knowledge required to show a claim or cause of action is discovered, Moldaver J. wrote that a court can properly consider both direct and circumstantial evidence to assess the existence of actual or constructive knowledge. As to the concept of constructive knowledge, he stated that it will be found where the material facts ought to have been discovered by "exercising reasonable diligence". Moldaver J. also addressed the circumstances which could reasonably trigger such an exercise. In this regard, he

> endorsed the comments of the Ontario Court of Appeal in *Crombie Property Holdings Ltd. v McColl-Frontenac Inc.*, 2017 ONCA 16 at para 42, 406 DLR (4th) 252, which suggested that the presence of a suspicion may put a plaintiff on inquiry and "trigger a due diligence obligation".
>
> [108] The final consideration in assessing whether a claim is discovered, within the meaning of the discoverability rule, focuses on whether the actual or constructive knowledge of the material facts forms a sufficient basis on which a "plausible inference of liability" could be drawn. Moldaver J. expressed preference for the term "plausible inference" as it ensured more consistency than the term "*prima facie* grounds", which lacked a universal definition. He defined a plausible inference as one which gives rise to a "permissible fact inference" (para. 45). Moldaver J. went on to clarify the nature of the test for determining a plausible inference of liability. In this regard, he wrote the following at para. 46:
>
> > 46 The plausible inference of liability requirement ensures that the degree of knowledge needed to discover a claim is more than mere suspicion or speculation. This accords with the principles underlying the discoverability rule, which recognize that it is unfair to deprive a plaintiff from bringing a claim before it can reasonably be expected to know the claim exists. At the same time, requiring a plausible inference of liability ensures the standard does not rise so high as to require certainty of liability (*Kowal v. Shyiak*, 2012 ONCA 512, 296 O.A.C. 352) or "perfect knowledge" (*De Shazo* [2005 ABCA 241], at para. 31; see also the concept of "perfect certainty" in *Hill v. South Alberta Land Registration District* (1993), 8 Alta. L.R. (3d) 379, at para. 8). Indeed, it is well established that a plaintiff does not need to know the exact extent or type of harm it has suffered, or the precise cause of its injury, in order for a limitation period to run (*HOOPP Realty Inc. v. Emery Jamieson LLP*, 2018 ABQB 276, 27 C.P.C. (8th) 83, at para. 213, citing *Peixeiro* [[1997] 3 SCR 549], at para. 18).

[15] On the plaintiff's own pleadings, it is clear that he knew or ought to have known all the damage he asserts against the defendants and knew who the defendants were who he alleges caused him injury, by the day he pled guilty to the charge pursuant to s. 88 of the *Criminal Code* on December 6, 2017. That is, the plaintiff's claim was discovered on December 6, 2017. Therefore, the plaintiff's claim is statute-barred.

[16] All the conditions that allow a plaintiff's claim to be struck in its entirety have been made out in this application. As stated by the Court of Appeal in *Walker v Mitchell*, 2020 SKCA 127 at paras 24-27, [2021] 4 WWR 555, the characterization of pursuing a claim that is statute-barred constitutes an abuse of process as contemplated

by Rule 7-9(2)(e), and one that ought to be struck out.

[17] The application by the defendants is successful. The plaintiff's claim is hereby struck in its entirety.

[18] The defendants seek costs of this application. However, there is a fee waiver certificate filed April 11, 2023. Costs are governed by *The Fee Waiver Act*, SS 2015, c F-13.1001. I decline to make any order as to costs.

"A.R. Rothery" J.
A.R. ROTHERY