

**COURT OF KING'S BENCH OF MANITOBA**

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

|                                        |   |                                    |
|----------------------------------------|---|------------------------------------|
| RICHARD THAIN,                         | ) | <u>Deborah Yeboah</u>              |
|                                        | ) | for the plaintiff                  |
| - and -                                | ) |                                    |
|                                        | ) |                                    |
| PATTISON OUTDOOR ADVERTISING LP and    | ) | <u>No Appearance</u>               |
| CITY OF WINNIPEG o/a WINNIPEG TRANSIT, | ) | for the defendant Pattison         |
|                                        | ) | Outdoor Advertising LP             |
| defendants.                            | ) |                                    |
|                                        | ) | <u>Jurgen Feldschmid</u>           |
|                                        | ) | for the defendant City of Winnipeg |
|                                        | ) |                                    |
|                                        | ) | <u>Michael Bodner</u>              |
|                                        | ) | on a watching brief for the        |
|                                        | ) | Attorney General of Manitoba       |
|                                        | ) |                                    |
|                                        | ) | <u>Judgment Delivered:</u>         |
|                                        | ) | June 17, 2026                      |

**GRAMMOND J.**

**INTRODUCTION**

[1] In this action, the plaintiff seeks a declaration that the defendants breached his rights under the *Canadian Charter of Rights and Freedoms*, (the "**Charter**"), a remedy under s. 24(1) of the *Charter*, and damages arising from a series of other causes of action. The claim arises from the plaintiff's unsuccessful attempts to place advertisements on transit buses in Winnipeg in 2014 (the "Ads").

[2] The plaintiff and the defendant Pattison Outdoor Advertising LP ("Pattison") have entered into an agreement pursuant to which the plaintiff's claim against Pattison has been resolved, but that aspect of the claim has not yet been discontinued on the court record.

[3] On February 6, 2023, the plaintiff confirmed, through counsel, that he would pursue only **Charter** remedies as against the defendant the City of Winnipeg (the "City"). On February 28, 2023, I granted permission to the City to file a motion for summary judgment dismissing the plaintiff's claim as against it, and these reasons relate to the disposition of that motion.

[4] On April 3, 2025, I directed counsel to serve the Attorneys General with notice of the summary judgment motion pursuant to s. 7(2) of **The Constitutional Questions Act**, C.C.S.M. c. C180. The Attorney General of Manitoba (the "Attorney General") filed written submissions and case law for my review but did not take a position on the outcome of the motion. The Attorney General of Canada declined to participate.

## **BACKGROUND**

[5] In 2010, the City and Pattison entered into a contract relative to the sale and placement of advertising on transit buses in Winnipeg (the "Contract").

[6] In August 2014, the plaintiff entered into two contracts with Pattison for the placement of the Ads on Winnipeg transit buses, which pertained to the public funding of religious schools in the province of Ontario, and were to run from September 15 through October 12, 2014, to coincide with the opening of the Canadian Museum for

Human Rights in Winnipeg (the "Museum"). On September 15, 2014, Pattison advised the plaintiff that the Ads would not run because they were found to be in violation of the **Canadian Code of Advertising Standards** (the "**Code**"). Thereafter, the plaintiff entered into a contract with a different service provider pursuant to which the Ads were placed on bus shelters in Winnipeg.

[7] The plaintiff has alleged that Pattison acted as an agent or co-conspirator of the City with respect to advertising content on City transit buses, and that the refusal to run the Ads constituted a breach of his **Charter** rights, namely his rights to freedom of conscience and expression (ss. 2(a) and (b) respectively).

[8] The City argued that the **Charter** does not apply to Pattison's decision not to run the Ads because Pattison was not the City's agent. Rather, pursuant to the Contract, Pattison had complete control over advertising on buses, subject to the **Code**. The City also submitted that by entering into the Contract, it was not seeking to implement a statutory scheme, government program, or policy, and as such its actions relative to advertising do not attract **Charter** scrutiny.

### **EVIDENTIARY ISSUE**

[9] In support of its motion, the City relied upon an affidavit sworn by a legal assistant to which four exhibits are attached. The plaintiff objected to the City's reliance upon two of those exhibits, as follows:

- a) the transcript of the examination for discovery of a representative of Pattison, conducted by counsel for plaintiff (Ex "B"); and

- b) the transcript of the examination for discovery of a representative of the City, conducted by counsel for plaintiff (Ex "C").

[10] The plaintiff pointed to ***Court of King's Bench Rules*** (M.R. 553/88) 31.11 and 39.04, which govern the use of examination for discovery evidence at trials and on motions, respectively. Rule 31.11(1) provides that at a trial, a party may read into evidence as part of their own case the examination for discovery evidence of an adverse party or a person examined on behalf of or in addition to the adverse party, unless the trial judge orders otherwise. Rule 39.04 provides that on the hearing of a motion, an examination for discovery in the proceeding may be used in evidence and rule 31.11 applies with necessary modifications.

[11] The plaintiff also pointed to ***Telecommunication Employees Association of Manitoba Inc. et al. v. Manitoba Telecom Services Inc. et al.***, 2005 MBQB 259 ("T.E.A.M."), where the court stated:

[16] Rule 31.11(1) is clear. At the trial of an action, a party can only make use of the evidence that it obtained by examining for discovery a party or the representative of a party who is adverse in interest. . .

. . .

[18] . . . On its face, Rule 39.04 simply imports Rule 31.11 into the motion process. At trial, a party cannot rely on its own discovery evidence or that of a co-defendant that is not adverse in interest. . .

[19] . . . When read as a whole, the rules render the discovery evidence of a party, that is not adverse in interest, inadmissible. This is logical because the practice of filing friendly discoveries would allow a party to present its position without exposing the person discovered to cross-examination. . .

. . .

[21] Discovery evidence has traditionally been viewed by the courts as the property of the party that conducted the examination. . . [C]ounsel frequently conduct their examinations for discovery in a manner that is shaped by their belief that the evidence is their client's property. . .

[22] . . . [A]n affidavit would be more direct, focused and persuasive. An affidavit also gives the opposing party an opportunity to conduct a complete cross-examination. . .

[12] In response to the plaintiff's objections, the City submitted that its reliance upon the examination transcripts was somewhat unnecessary because the plaintiff agreed to certain key facts set out at paragraph 25 below, namely that Pattison, and not the City, made the decision to refuse to run the Ads.

[13] I will comment first upon the examination transcript of the City's representative, at exhibit "C" of the affidavit, upon which the City seeks to rely regarding, *inter alia*, an alleged concession by the plaintiff's counsel. The transcript reflects that an objection was raised relative to a question that was asked, and that after discussion the plaintiff's counsel withdrew the question. In my view, the withdrawal of a question on an examination does not necessarily constitute a concession on the merits of the point at issue, and I see no such concession having been made here.

[14] More importantly, however, it is clear that the City cannot rely upon the transcript because the "adverse party" requirement is not met, and as referenced in ***T.E.A.M.***, for policy reasons a party should not be permitted to rely upon a transcript where it should have filed an affidavit. In this case, there is no evidence before me that the City could not have obtained and filed an affidavit from its own representative in support of its summary judgment motion. Having said that, although the City cannot rely upon the transcript of the examination of its own representative, the plaintiff has relied upon the same transcript in his defence of the motion and is entitled to do so

because the plaintiff and the City are adverse parties and, as the examining party, that transcript is the plaintiff's property.

[15] The examination transcript of the Pattison representative found at exhibit "B" must be treated somewhat differently, because the City and Pattison are adverse in interest in this proceeding given the City's crossclaim against Pattison. Having said that, the Pattison representative was also examined by the plaintiff, not by the City, and as such that examination transcript is also the plaintiff's property. I note that the City has not examined Pattison in this proceeding, and I have no evidence of an agreement that the transcript of the plaintiff's examination could be used interchangeably with the City. In those circumstances, the City cannot rely upon the Pattison examination transcript as against the plaintiff.

## **THE LAW**

### **Summary Judgment**

[16] Summary judgment motions are governed by Rule 20 of the *Court of King's Bench Rules*, M.R. 553/88, which provides as follows:

#### **Summary judgment motion**

20.01(1) A party may bring a motion, with supporting affidavit material or other evidence, for summary judgment on all or some of the issues raised in the pleadings in the action.

. . .

#### **Responding evidence**

20.02 In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest on the mere allegations or denials of the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial.

### **Granting summary judgment**

20.03(1) The judge must grant summary judgment if he or she is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence.

### **Powers of judge**

20.03(2) When making a determination under subrule (1), the judge must consider the evidence submitted by the parties and he or she may exercise any of the following powers in order to determine if there is a genuine issue requiring a trial:

- (a) weighing the evidence;
- (b) evaluating the credibility of a deponent;
- (c) drawing any reasonable inference from the evidence;

unless it is in the interests of justice for these powers to be exercised only at trial.

[17] The leading case on summary judgment is ***Hryniak v. Mauldin***, 2014 SCC 7,

where the court stated:

[49] There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[18] In ***Dakota Ojibway Child and Family Services et al. v. MBH***,

2019 MBCA 91, the court stated:

[108] At the hearing of [a summary judgment] motion, the moving party must first satisfy the motion judge that there can be a fair and just determination on the merits (i.e., that the process will permit him or her to find the necessary facts and to apply the relevant legal principles so as to resolve the dispute, and that proceeding to trial would generally not be proportionate, timely or cost-effective). In so doing, the moving party bears the evidential burden of establishing that there is no genuine issue requiring a trial.

[109] If those requirements are met, the responding party must meet its evidential burden of establishing "that the record, the facts, or the law preclude a fair disposition" (***Weir-Jones*** at para 32; and ***Stankovic v 1536679 Alberta Ltd***, 2019 ABCA 187 at para 22; see also ***Stankovic*** at para 29) or that there is a genuine issue requiring a trial (e.g., by raising a defence). In other words, the responding party must establish why a trial is required (see ***Hryniak*** at para 56). If the responding party fails to do so, summary judgment will be granted.

[110] The analysis contemplated by Karakatsanis J in *Hryniak* is itself a two-step analysis (see para 66). First, the motion judge must determine if there is a genuine issue requiring a trial based only on the evidence, without using any additional fact-finding powers. If there is such an issue, the second step requires the motion judge to determine if the need for a trial can be avoided by weighing the evidence, evaluating credibility, drawing inferences and/or calling oral evidence (see r 20.07(2)).

[111] There is no shifting onus; the standard of proof is proof on a balance of probabilities; and the persuasive burden of proof remains at all times with the moving party to establish that a fair and just adjudication is possible on a summary basis and that there is no genuine issue requiring a trial.

### **The Charter**

[19] Section 32(1)(b) of the *Charter* provides that it applies “to the legislature and government of each province in respect of all matters within the authority of the legislature of each province”. As the court stated in *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844 and *Dickson v. Vuntut Gwitchin First Nation*, 2024 SCC 10, this language explicitly contemplates that the *Charter* might apply to entities other than Parliament, the provincial legislatures, and the federal or provincial governments.

[20] The law is clear, however, that in the normal course the *Charter* does not apply as between private parties, which would include the relationship between the plaintiff and Pattison (see *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at paragraph 38). Having said that, as explained by LaForest J. in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 and cited with approval in *Dickson*, the *Charter* may be found to apply to a private entity on one of two bases:

[44] . . . First, it may be determined that the entity is itself “government” for the purposes of s. 32. This involves an inquiry into whether the entity whose actions have given rise to the alleged *Charter* breach can, either by its very nature or in virtue of the degree of governmental control exercised over it, properly be characterized as “government” within the meaning of s. 32(1). . . Second, an entity may be found to attract *Charter* scrutiny with respect to a particular activity that

can be ascribed to government. This demands an investigation not into the nature of the entity whose activity is impugned but rather into the nature of the activity itself. In such cases, in other words, one must scrutinize the quality of the act at issue, rather than the quality of the actor. If the act is truly "governmental" in nature -- for example, the implementation of a specific statutory scheme or a government program -- the entity performing it will be subject to review under the **Charter** only in respect of that act, and not its other, private activities.

[21] I appreciate that neither s. 32 nor the body of case law refer specifically to the application of the **Charter** to municipal governments such as the City, but in my view the City would undoubtedly be considered government by its very nature as contemplated in **Eldridge**, **Godbout**, and **Dickson**.

[22] I note also the following principles that have been established pursuant to case law:

- a) governments cannot avoid their **Charter** obligations by delegating or contracting out of those obligations (see **Eldridge**, paragraph 42; **Godbout**, paragraph 48; **Greater Vancouver Transportation Authority v. Canadian Federation of Students – British Columbia Component**, 2009 SCC 31, paragraph 22; and **Dickson**, paragraph 69);
- b) advertising on government-owned transit buses has been treated as an activity that attracts **Charter** scrutiny in many instances, albeit on a consent or unopposed basis (see **American Freedom Defence Initiative v. Edmonton (City)**, 2016 ABQB 555; **Canadian Centre for Bio-Ethical Reform v. Grande Prairie (City)**, 2018 ABCA 154; **Canadian Centre for Bio-Ethical Reform v. South Coast British Columbia Transportation Authority**, 2018 BCCA 344; **Lethbridge and District Pro-Life**

***Association v. Lethbridge (City)***, 2020 ABQB 654; and ***Guelph and Area Right to Life v. City of Guelph***, 2022 ONSC 43); and

- c) complex issues involving developing areas of the law and the ***Charter*** should not be decided on summary judgment (see ***Shell v. Barnsley***, 2006 MBCA 133, paragraph 14).

## **ISSUES**

[23] The main issues on this summary judgment motion are whether a trial is required to determine whether Pattison was acting as an agent or delegated decision-maker of the City when there was a refusal to run the Ads, and the extent to which s. 32 of the ***Charter*** applies to that refusal.

## **ANALYSIS**

[24] The law is clear that the court must decide a summary judgment motion on the basis of the evidentiary record before it, and that both parties must put their best foot forward (see ***Dakota***, paragraph 75).

[25] The City argued that Pattison was neither its agent nor its delegated decision-maker, and that the necessary facts which support this assertion are either in evidence or have been agreed upon. The City noted that the plaintiff included in his motion brief certain agreed facts<sup>1</sup> including:

15. Mr. Calahan [of the City] reviewed the Ads, but made no decision as to the acceptability of the Ads and provided no guidance to Pattison.

. . .

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<sup>1</sup> Despite these references in the plaintiff's brief, his counsel advised in oral submissions that whether the City was involved in the decision not to run the Ads or whether Pattison acted alone are contested issues and are not agreed facts.

17. Pattison, as a decision-maker with respect to the placement of advertisements for Winnipeg Transit, refused to place the Ads.

[26] The City also argued that Pattison, a private corporation, made the decision not to run the Ads, such that the **Charter** does not apply. It also submitted that it did not have the ability under the Contract to require Pattison to run the Ads. Rather, its authority under the Contract was limited to preventing Pattison from taking certain steps, including running certain advertisements.

[27] The plaintiff argued that the City failed to discharge its evidentiary burden on the motion, that s. 32 of the **Charter** applies, that Pattison was the City's delegated decision-maker, and that the City could not avoid its **Charter** responsibilities by entering into the Contract with Pattison.

[28] The Attorney General did not take a position on the merits of the motion, stating that it was not provided with the evidentiary record, including the Contract. Nevertheless, the Attorney General queried why, if Pattison was indeed the City's agent, the plaintiff did not apply for a judicial review of the decision to refuse to run the Ads and instead chose to apply for a remedy under the **Charter**. In response, the plaintiff submitted that he sought to run the Ads to coincide with the opening of the Museum during a specified timeframe, which could not be achieved after that timeframe elapsed, and that he was able to partially mitigate his damages by placing the Ads on bus shelters in Winnipeg in the fall of 2014.

[29] I have reviewed the Contract, and I note that it contains the following provisions, *inter alia*:

- a) Pattison was an independent contractor and shall not be deemed to be an agent or representative of the City;
- b) in determining the acceptability of any advertisements, the City would be guided by the general principles of the **Code**;
- c) the City would not accept advertising that was likely to be considered of questionable taste or offensive in its style, content, or method of presentation;
- d) the City was the sole and final arbiter in all matters relating to advertising acceptance;
- e) the City could refuse or order the removal of any advertising material at any time, in its absolute discretion;
- f) the City would not accept advertising which in its discretion was determined not to be in the best interests of public transit;
- g) no advertisement would be accepted which promoted or posed "a specific theology or religious ethic point of view, policy or action";
- h) Pattison was responsible for interpreting and implementing "advertising guidelines" and should deal directly with potential advertisers;
- i) where Pattison and an advertiser were in a dispute regarding an advertisement's compliance with the "guidelines", Pattison would refer the advertisement to Advertising Standards of Canada for immediate adjudication under the **Code**, and to the City for adjudication of its internal advertising guidelines;

j) where the City received a complaint regarding advertising, it may send the complaint to Pattison to refer the advertisement for adjudication under the **Code**; and

k) the City, at its discretion, was the final arbiter on all matters relating to advertising.

[30] In other words, the Contract on its face provides that, *inter alia*:

- a) Pattison was not the City's agent or delegated decision-maker;
- b) Pattison would deal with advertising customers in the first instance;
- c) the City could become involved in advertising in certain circumstances; and
- d) the City retained ultimate decision-making power and control over advertising.

[31] Certainly, in this case, as the Contract contemplated, Pattison dealt with the plaintiff directly with respect to the Ads. Having said that, the City's representative agreed on their examination for discovery that Pattison was required to bring to the City's attention any advertisements that it deemed may be a problem. I agree with the plaintiff that this arrangement supports the argument that an agency relationship may have existed as between the City and Pattison at the material time.

[32] In addition, the evidence before me reflects that Pattison consulted with the City regarding the Ads and the City advised Pattison in writing that the Ads "may not comply with ... the **Code**". The evidence does not establish, however, the extent to which the City was involved in the decision to refuse to run the Ads or whether Pattison made that

decision alone, and if it did so, whether it was acting as the City's agent or delegated decision-maker at the time.

[33] I pause to note that the contractual provisions in this case are distinguishable from those in ***Sagen v. Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games***, 2009 BCCA 522, where the court stated that nothing in the agreement between government and VANOC (the Olympic organizing committee) provided that either the government or VANOC would play a role in determining what events would be selected for the Olympic games. That determination was to be made by another party, the International Olympic Committee, which was not subject to the ***Charter***. As such, the court determined that the government had not attempted to exercise its power through a contract.

[34] On the basis of the foregoing and for the purposes of this motion, I reject the City's argument that it did not have the ability to direct Pattison with respect to the Ads, and I accept that there is a contested factual issue regarding the extent to which the City was involved in the discussion and decision to refuse to run the Ads.

[35] I make this finding despite the plaintiff's initial agreement that Pattison acted alone, as referenced above. The brief in which the plaintiff made those admissions was filed after the City's affidavit evidence was on the record, but upon hearing the change in the plaintiff's position, the City could have sought to adjourn the motion<sup>2</sup> and supplement the evidentiary record, yet it did not do so.

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<sup>2</sup> The oral arguments on this motion were heard in two tranches: the motion was argued in the normal course and additional submissions were made after the Attorney General filed materials. As such, the City had the opportunity to seek to file additional evidence to support its position.

[36] In determining this motion, I must consider the evidence that is on the record before me, and upon which the City, as the moving party, relies. The reality is that the City filed little evidence in support of its motion, and that deficiency has been compounded by my findings that it cannot rely upon two of the examination transcripts that it filed.

[37] In addition, given that the City is, in general, subject to the ***Charter***, any decisions that the City made or declined to make under the Contract relative to advertising could be subject to ***Charter*** scrutiny. In other words, if in this case the City did not direct Pattison regarding the Ads, that decision would not necessarily be exempt from ***Charter*** scrutiny, and in my view this is not the type of question that should be decided summarily. Rather, it should be heard at a trial as commented upon by the court in ***Shell***, even if the facts do not necessarily involve a developing area of the law. Similarly, as the court in ***Dolphin Delivery*** stated, "it is difficult and probably dangerous to attempt to define with narrow precision that element of governmental intervention which will suffice to permit reliance on the ***Charter*** by private litigants in private litigation" (at pp. 36-37).

[38] I have concluded that the City did not put its best foot forward on this motion and has not met its evidential burden that there is no issue requiring a trial.

### **CONCLUSION**

[39] The issue of whether Pattison was acting as the City's agent or delegated decision-maker at the material time requires a trial.

[40] The issue of whether the refusal to run the Ads attracts ***Charter*** scrutiny requires a trial.

[41] The City's motion for summary judgment is dismissed.

[42] If costs cannot be agreed upon, counsel may request an appearance to make submissions.

*Original signed by Justice Grammond*

Grammond J.