Citation: Bueti v Macintosh, 2026 MBCA 8
Date: 20260123
Docket: AI25-30-10209

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Jennifer A. Pfuetzner
Madam Justice Janice L. leMaistre
Madam Justice Lori T. Spivak

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

	)	***S. J. Thliveris** and*
	)	***D. J. Novosel***
DAVID BUETI	)	*for the Appellant*
	)	
(Applicant) Appellant	)	***N. M. Watson***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard and*
MAGGIE MACINTOSH	)	*Decision pronounced:*
	)	***January 12, 2026***
(Respondent) Respondent	)	
	)	*Written reasons:*
	)	***January 23, 2026***

SPIVAK JA (for the Court):

[1] The applicant appealed the decision of the application judge dismissing his application to compel the respondent, a reporter, to disclose the identity of a confidential journalistic source alleged to have made defamatory comments against him, which were published by the Winnipeg Free Press (the WFP).

[2] At the hearing, we dismissed the appeal with reasons to follow. These are those reasons.

[3] The applicant, a teacher, was charged with five counts of sexual assault and three counts of sexual interference involving students. Halfway through his trial, the charges against him were stayed.

[4] On July 12, 2022, prior to the trial, the respondent—who was employed by the WFP—wrote an article containing information about the applicant, his background and the charges. The article quoted a confidential source, identified as a former colleague of the applicant (the former colleague), who stated: "Students would tell me he would say things that aren't necessarily politically correct. The girls were scared of him... He gave off creepy vibes" (the statements). The former colleague provided the information to the respondent on an express promise of confidentiality and has declined to waive confidentiality.

[5] For the purposes of an intended action in defamation, the applicant sought disclosure of the identity of the former colleague pursuant to rule 31.12 of the MB, *King's Bench Rules*, Man Reg 553/88 [the *KB Rules*] and the equitable remedy known as a *Norwich* order (see *Norwich Pharmacal Co v Customs and Excise Commissioners*, [1973] UKHL 6; [1974] AC 133 (HL) [*Norwich*]). Both avenues allow for discovery before the commencement of proceedings. Rule 31.12(1) provides that the court may grant leave to examine for discovery, before the commencement of proceedings, any person who may have information identifying an intended defendant. Similarly, a *Norwich* order is a form of pre-action discovery that allows a rights holder to identify wrongdoers (see *Rogers Communications Inc v Voltage Pictures, LLC*, 2018 SCC 38 at para 18 [*Rogers*]).

[6] The application was made in the context of the respondent's assertion of journalistic source privilege. The applicant's position before the application judge was that he has a cause of action against the former colleague and that the public interest favoured disclosure over protecting journalistic source confidentiality. The respondent countered that the applicant did not have a "viable" defamation claim as it was statute-barred, and that the identity of the source in this case was privileged in accordance with the four-part Wigmore test, as the public interest in maintaining confidentiality outweighed the public interest in disclosure (see *Rogers* at para 18; *1654776 Ontario Ltd v Stewart*, 2013 ONCA 184 at para 77 [*Stewart*]; *Globe and Mail v Canada (Attorney General)*, 2010 SCC 41 at para 65; *R v National Post*, 2010 SCC 16 at para 53 [*National Post*]).

[7] In brief oral reasons, the application judge dismissed the application, holding that the respondent should not be required to identify a confidential journalistic source for a statute-barred claim. Specifically, he determined that, under the transitional provision of section 31(3) of *The Limitations Act*, SM 2021, c 44, s 53 [the *Act*], repealing *The Limitation of Actions Act*, RSM 1987, c L150 [the *LAA*], an action in defamation would have to have been commenced on the earlier of (a) two years after the *Act* came into force, i.e., by September 30, 2024; and (b) the expiration of the limitation period under the *LAA*, which was July 12, 2024, being two years after publication of the statements. As the limitation period expired on July 12, 2024, and no action was commenced by that date, the claim is statute-barred. Given the application judge's assessment of the "viability" of any cause of action, he dismissed the application.

[8] The applicant appealed, submitting that the application judge erred in dismissing the application for disclosure on the basis that his claim was statute-barred and in failing to consider the viability of the alternative cause of action of injurious falsehood.

[9] The application judge's decision was discretionary and is entitled to considerable deference. As such, this Court will not intervene unless the application judge misdirected himself or his decision is so clearly wrong as to amount to an injustice (see *Perth Services Ltd v Quinton et al*, 2009 MBCA 81 at paras 24-26).

[10] We are not persuaded that the application judge made any error warranting appellate intervention.

[11] To obtain an order for pre-action discovery under the *KB Rules*, rule 31.12(2)(a) states that an applicant is required to show that they "may have a cause of action against the intended defendant". Where the discovery is sought pursuant to the equitable remedy of a *Norwich* order, the applicant has to establish that he has a bona fide cause of action (see *Rogers* at para 18). On either basis, it was therefore appropriate for the application judge to assess whether the intended claim for defamation was statute-barred in assessing whether the applicant reached the applicable threshold.

[12] The application judge made no error in finding that the limitation period in respect of an action for defamation was governed by the *LAA* and expired on July 12, 2024. As the application judge properly considered, the transitional provisions contained in section 31(3) of the *Act* would apply to this claim as it was discovered before the *Act* came into force on September 30, 2022. We reject the applicant's argument that the limitation

period is governed by section 6 of the *Act*, as the claim was not discovered under the *LAA* because he did not know the specific identity of the person against whom the claim was to be made (see the *Act*, s 7(c)). The applicant was aware that he had a potential claim against the former colleague at the time of the publication of the statements regardless of the exact identity of that person. (We add that he took no steps to discover the identity of the former colleague until the filing of the application almost two years thereafter.)

[13] Accordingly, pursuant to section 31(3) of the *Act*, the applicant's claim had to be brought within the earlier of two years after the *Act* came into force (i.e., September 30, 2024) or the expiration of the limitation period under the *LAA*. Section 2(1)(c) of the *LAA* required the applicant to bring an action for defamation within two years of the publication of the defamatory matter, which would have been by July 12, 2024. No action was filed within this time frame.

[14] As reflected in his comments during submissions, the application judge was concerned that granting the application would be an "empty exercise" if the limitation period had expired. In these circumstances, the application judge was amply justified in concluding that the applicant failed to meet the threshold onus of showing that he may have a cause of action to justify granting leave for discovery under rule 31.12 of the *KB Rules*, or a bona fide action sufficient for a *Norwich* order.

[15] We are also not convinced that the application judge erred in failing to consider the viability of the alternative cause of action for injurious falsehood. Firstly, the only cause of action identified in the application was an action for defamation pursuant to *The Defamation Act*, CCSM c D20. The

possibility of an action for injurious falsehood was only raised by applicant's counsel in reply. Secondly, in an action for injurious falsehood, a plaintiff must prove that the statements were false, that the publication was made maliciously and that they suffered special damages attributable to the publication of the statements (see *Lysko v Braley*, 2006 CanLII 11846 at para 133 (ONCA)). On the record before the application judge, there was no evidentiary foundation to support the elements of an injurious falsehood claim.

[16] In addition to the underlying defamation claim being statute-barred, and the lack of evidence regarding a claim for injurious falsehood, the availability of other remedies to the applicant to pursue what is a private civil claim also weighs in favour of the public interest in upholding journalistic confidential source privilege in this case. The applicant could have brought an action against the respondent and the WFP (see *Stewart* at para 142). The public interest in free expression weighs heavily in the balance (see *National Post* at para 64). The benefit of disclosure when weighed against the injury to the public interest sought to be protected by the privilege is weakened when the contemplated litigation is not the only way for the applicant to achieve his purpose (see *Straka v Humber River Regional Hospital*, 2000 CanLII 16979 at paras 79-83 (ONCA)).

[17] There was no misdirection by the application judge, and his decision is not so clearly wrong as to amount to an injustice.

[18] For these reasons, we dismissed the appeal with costs in favour of the respondent.

Spivak JA

Pfuetzner JA

leMaistre JA