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

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

| | | |
|---|---|---|
| BEVERLEY EERT, | ) | KARA D. J. MOORE |
| | ) | for the plaintiff |
| plaintiff, | ) | |
| | ) | |
| - and - | ) | |
| | ) | |
| BEN PETKAU, SARA GOLLING and KATHLEEN DEWITT, | ) | BEN PETKAU |
| | ) | No one appearing |
| | ) | |
| defendants. | ) | SHARNA NELKO |
| | ) | for the defendants Sara Golling |
| | ) | and Kathleen DeWitt |
| | ) | |
| | ) | KEVIN D. TOYNE |
| | ) | for the proposed Third Parties |
| | ) | |
| | ) | Judgment delivered: |
| | ) | January 8, 2025 |

## PERLMUTTER A.C.J.

### INTRODUCTION

[1] The defendants Sara Golling and Kathleen DeWitt move for an order granting leave to file a third party claim against Green Party of Canada ("GPC"), Federal Council of the

Green Party of Canada ("Federal Council"), and Green Party of Canada Fund (the "Fund"). The proposed third parties are opposed. The plaintiff takes no position.

## PROPOSED THIRD PARTY CLAIM

[2] In the proposed third party claim, these defendants claim contribution and indemnity pursuant to ***The Tortfeasors and Contributory Negligence Act***, C.C.S.M. c. T90 (the "***TCN Act***") and claim for breach of contract and negligent misrepresentation based on the proposed third parties' failure to honour an indemnity provision in a Bylaw of the GPC constitution (the "Indemnity Bylaw"). They rely on King's Bench Rules 29.01(a) and 29.01(b). The allegations in the proposed third party claim include:

- GPC is a political party registered under the ***Canada Elections Act***, S.C. 2000, c. 9.
- Federal Council is the governing body of GPC and as such, is responsible for the execution and administration of the GPC constitution.
- The Fund is a not-for-profit corporation and the Chief Agent for GPC under the ***Canada Elections Act***. The object of the Fund is to hold assets for the benefit of members of GPC, to support the operations of GPC, and to carry out its duties as Chief Agent of GPC, including responsibility for administering the finances of GPC. The Fund is also the agent/treasurer of Federal Council and the execution and implementation body for financial and legal matters on Federal Council's behalf.
- The GPC constitution governs the activities of GPC. As such, all persons operating on behalf of GPC reasonably expect that GPC will honour and

otherwise abide by the terms of the GPC constitution. The Fund is required to operate in keeping with the spirit and intent of the GPC constitution.

- The Indemnity Bylaw provides protection and indemnity to members of any committee or unit established by GPC.
- GPC's Ombuds and Appeals Committee ("OAC") is a volunteer-based committee established by GPC and made up of elected and constituted members. OAC is governed by a Bylaw of the GPC constitution (the "OAC Bylaw"). Pursuant to the OAC Bylaw, OAC is tasked with receiving complaints from GPC members regarding decisions made by GPC. When a complaint is received by OAC, it is required to investigate, issue a report, and inform Federal Council of its activities. OAC enacted its terms of reference pursuant to the OAC Bylaw. The OAC terms of reference include the mechanism for the investigation of complaints and reporting requirements.
- A published news article suggested that senior members of Federal Council were sabotaging the new GPC leader and creating a toxic environment within GPC. The news article identified the plaintiff as one of these senior members of Federal Council who was causing or contributing to the problem. OAC received a complaint regarding the issues identified in the article. OAC investigated the complaint, wrote a report, and provided this report to all parties to whom it was required to provide a copy under the OAC Bylaw.
- The members of OAC involved in preparing the report were these defendants and the defendant Ben Petkau. The plaintiff alleges she was defamed by the

defendants in the publication of the OAC report and they were negligent in their investigation and the writing of this report. The plaintiff seeks damages.

- The defendants Golling and DeWitt say that if the plaintiff suffered loss as alleged and they are liable, they are entitled to be indemnified by the proposed third parties in respect of this liability under the ***TCN Act***. They also claim in contract on the basis that the GPC constitution constitutes a contract between GPC and its units, committees, and members, and as such, the Indemnity Bylaw constitutes a contractual term that the third parties are obligated to honour. By not doing so, these defendants say the proposed third parties committed a breach of contract, for which they sustained or will sustain loss. Finally, they claim in negligent misrepresentation as they say they reasonably relied on the representations made by the third parties in the Indemnity Bylaw, which were inaccurate, incorrect, and misleading.

## LAW

[3] The parties agree, as do I, on the two-part test for determining whether leave should be granted for filing the proposed third party claim. With reference to ***Loeppky et al. v. Taylor McCaffrey LLP et al.***, 2019 MBQB 59, in ***Vale v. Schwartz et al.***, 2021 MBQB 46, aff'd 2022 MBCA 51, Justice McCarthy set out this two-part test with related principles, as follows (para. 12):

> …The first part of the test is to determine if the defendants have established a *prima facie* cause of action against the proposed third party. If such a *prima facie* case is established, leave will generally be granted. The second part of the test involves consideration of the plaintiff's interests. The court may still decline to grant leave to add a third party if the plaintiff can establish either that the third party claim will, (a) cause the plaintiff to suffer prejudice that cannot be remedied

> by an award of costs and that outweighs the court's interest in avoiding multiplicity of actions, or (b) will unnecessarily delay the plaintiff's prosecution of its action against the defendant. At the leave stage, the court is to conduct only a limited weighing of the evidence and is not to consider the merits of any defence or affidavit evidence contradicting the allegations made in the proposed third party claim… [citation omitted]

## PARTIES' POSITIONS

[4] These defendants say they have established a *prima facie* case against the proposed third parties in their proposed third party claim.

[5] The proposed third parties submit that the proposed third party claim fails to disclose a reasonable cause of action and/or a *prima facie* cause of action against Federal Council and the Fund. Further, the proposed third parties submit leave should not be granted because all of the limitation periods that are potentially applicable to the proposed third party claims have expired. If leave is granted, the proposed third parties have suggested related terms. These suggested terms are largely acceptable to these defendants.

## ANALYSIS

### *A. Have these defendants established a prima facie cause of action against Federal Council and the Fund?*

[6] In support of their claim for contribution and indemnity, these defendants rely on section 2(1)(c) of the ***TCN Act***, which provides as follows:

> 2(1) Where damage is suffered by any person as a result of a tort, whether a crime or not,
>
> …
>
> (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person is entitled to recover contribution from any person entitled to

> be indemnified by him in respect of the liability in respect of which the contribution is sought.

[7] In ***Loeppky***, at para. 43, Edmond J. (as he then was) noted that the Manitoba Court of Appeal in ***Investors Group Trust Co. v. Gordon*** (1998), 131 Man. R. (2d) 243 (Man. C.A.), accepted that this section creates a statutory right of action.

[8] In the case at hand, these defendants allege that pursuant to the GPC constitution, the third parties created, authorized, mandated, and approved the processes that OAC followed in accepting the complaint, conducting the investigation, and writing and distributing the report. These defendants also allege the Indemnity Bylaw constituted representations made to them, on which they were intended to rely, that they would be protected and indemnified provided they acted honestly, in good faith, and exercised due diligence within the scope of their authority, which they allege they did. It is these allegations that are the basis for their proposed third party claim for breach of contract and negligent misrepresentation. The Indemnity Bylaw provides as follows:

> Protection/Indemnity: When acting honestly, in good faith, and exercising due diligence and within the scope of their authority under the Party's Constitution, Bylaws, and other duly passed Party rules, no lawfully sitting Unit member, volunteer, employee, officer, director, member of any committee established by the Party, Functionary, or any other person duly acting in any approved capacity on behalf of the Party shall be liable for any debts, actions, claims, demands, liabilities or commitments of any kind of the Party howsoever incurred. The Party shall indemnify and hold harmless each such person against any such debt, action, claim, demand, liability or commitment whatsoever.

[9] The proposed third parties submit that the proposed third party claim does not allege specific facts to support the existence of a contractual relationship between these defendants and the Fund or any facts to support any involvement of the Fund in the establishment, governance, or operation of OAC. They point out that under the

Indemnity Bylaw, it is GPC, not the Fund, that is to provide the indemnity. They also point out that these defendants do not come within the class of people (such as directors and officers) who could be indemnified by the Fund under the Fund's Bylaw (Article 49) or the indemnity provisions in the ***Canada Not-for-profit Corporations Act***, S.C. 2009, c. 23 (ss. 151(1), 151(3)). The proposed third parties argue the Fund is only being included as a third party because only it has assets. Similarly, with respect to Federal Council, the proposed third parties argue that there is no allegation that Federal Council agreed to indemnify anyone.

[10] An affidavit filed by the proposed third parties includes the GPC constitution, related Bylaws, By-Law No. 1 of the Fund, and pages from the GPC website entitled "Ombuds and Appeals Committee Recruitment". I am satisfied that in considering the question of leave, it is permissible and appropriate to consider these documents because they are incorporated by reference into the proposed third party claim and form an integral part of the proposed third party claim (***Del Giudice v. Thompson***, 2024 ONCA 70, paras. 18, 22, 23).

[11] The GPC constitution provides:

> This Constitution and Bylaws shall govern the activities of the Party, all persons operating on behalf of the Party, and the rights, responsibilities and duties of its recognized Units, committees and membership. [Article 2.1]
>
> . . .
>
> … Federal Council, on behalf of the membership, is responsible for the overall implementation of actions as called for in this Constitution, the Bylaws … [Article 6.4]
>
> . . .
>
> The Fund is the sole and exclusive agent for the financial operations of the Central Party. [Article 12.1]
>
> . . .

> The Fund shall operate within the spirit, terms and constraints of the Party's Constitution and Bylaws. [Article 12.6]

[12] The Fund By-Law No. 1 provides in Article 3, under "Mandate":

> The Fund is the Chief Agent of the Green Party of Canada and the Federal Council's agent/treasurer. The Fund is the execution and implementation body for financial and legal matters on Federal Council's behalf.

[13] As I will explain, based on the articles of the GPC constitution and Bylaws described above, in the context of the allegations in the amended statement of claim (that the plaintiff was defamed by the defendants in the publication of the OAC report and the defendants were negligent in their investigation and the writing of this report) and the proposed third party claim, as against ***all*** of the proposed third parties, I am satisfied that these defendants, on a *prima facie* basis, have established a reasonable cause of action for contribution that has a causal connection with the claim advanced by the plaintiff (***Loeppky***, para. 57). For these same reasons, they have also established against ***all*** of the proposed third parties a reasonable cause of action for breach of contract and negligent misrepresentation regarding a refusal to indemnify them under the Indemnity Bylaw.

[14] I agree with counsel for these defendants that, based on the GPC constitution and Bylaws, all three of the proposed third parties are interrelated and bound by the GPC constitution and Bylaws. On a *prima facie* basis, the following is apparent from the GPC constitution and the Bylaws outlined above in the context of the allegations in the amended statement of claim and the proposed third party claim.

[15] By virtue of the Indemnity Bylaw, GPC agreed and represented to its volunteers, unit members and committees established by GPC, which includes OAC, that they would

be indemnified if they met the conditions (such as act within the scope of their authority and in good faith), which these defendants allege they did. The GPC is a political party and cannot act on its own. It does not hold assets. That is, GPC cannot on its own administer the GPC constitution and Bylaws or provide the indemnification in the Indemnification Bylaw (as it does not hold assets). Federal Council is therefore responsible for the implementation of actions under the GPC constitution. It delegates the execution and implementation of GPC's financial and legal matters to the Fund. On a *prima facie* basis, this is also demonstrated by evidence included in the affidavit filed by the proposed third parties that when these defendants claimed indemnity from GPC and Federal Council, the denial was sent by the Fund, and not by GPC or Federal Council.

[16] Constitutions and related rules of volunteer associations like these have been held to create legal obligations which can be regarded as contractual (***Lakeside Colony of Hutterian Brethren v. Hofer***, [1992] 3 S.C.R. 165; 1992 CarswellMan 138, para. 45) (cited to Carswell).

[17] In ***Lagimodiere et al. v. The Wawanesa Mutual Insurance Company et al.***, 2020 MBQB 154, Justice Edmond found a *prima facie* cause of action had been made out for the purpose of granting leave to file a third party claim based on the relevant law governing corporate successor liability. Justice Edmond noted that this "does not mean that corporate successor liability is the law in Manitoba or that the facts and circumstances fall within one of the exceptions noted in the U.S. authorities" (para. 51). Justice Edmond also noted that in granting leave to file a third party claim, "the threshold is a relatively low one" (para. 51).

[18] In the case at hand, it may very well be that, once a full factual foundation has been laid at trial, there is no liability against one, some, or all of the proposed third parties. However, cognizant of the relatively low threshold for leave to file a third party claim, I am satisfied that the alleged facts, circumstances, and applicable legal principles are sufficient to demonstrate that these defendants have established a *prima facie* case against Federal Council and the Fund, and have, therefore, met their burden.

### ***B. Are the proposed claims statute-barred?***

[19] I now turn to the proposed third parties' position that the motion for leave should be dismissed because these defendants' proposed claims are statute-barred.

[20] The proposed third parties submit that the claims in the proposed third party claim have conclusively expired under both ***The Limitations Act (Manitoba)***, C.C.S.M. c. L150 (the "***new Act***") and the ***Limitation Act (British Columbia)***, [SBC 2012], Chapter 13 (the "***BC Act***"). Based on the proposed third party claim, they say that either Manitoba or British Columbia is the *lex loci delicti*, but assert in either case the limitation period has expired.

[21] In Manitoba, the ***new Act*** provides for a basic limitation period of two years from discovery of a claim, as follows:

> 6 Unless this Act provides otherwise, a proceeding respecting a claim must not be commenced more than two years after the day the claim is discovered.

[22] The ***new Act*** includes as part of the transitional provisions from ***The Limitation of Actions Act***, C.C.S.M. c. L150 (the "***former Act***") the following in s. 31(3):

> In the case of a claim discovered before the coming into force of this Act, a proceeding may be commenced under this Act if it is commenced before the earlier of

> (a) two years after the coming into force of this Act; and
>
> (b) the day the limitation period under the former Act expires or would expire.

[23] Section 28 of ***new Act*** provides the following applicable definitions:

> ***"claim"*** means a claim in respect of which there was a limitation period under the former Act.

[24] The proposed third parties say that the claim was discovered on January 2, 2022, when the statement of claim was served on the defendants. Therefore, the claim was discovered before the coming into force of the ***new Act*** on September 30, 2022. The relevant limitation periods under the ***former Act*** would all expire later than two years after the coming into force of the ***new Act***, September 30, 2024. Therefore, the proposed third parties submit the third party claim had to be commenced by September 30, 2024. It was not. The defendants' motion for leave was filed on October 4, 2024.

[25] The ***BC Act*** provides:

> 6 (1) Subject to this Act, a court proceeding in respect of a claim must not be commenced more than 2 years after the day on which the claim is discovered.
>
> …
>
> 16 A claim for contribution or indemnity is discovered on the later of the following:
>
> (a) the day on which the claimant for contribution or indemnity is served with a pleading in respect of a claim on which the claim for contribution or indemnity is based;
>
> (b) the first day on which the claimant knew or reasonably ought to have known that a claim for contribution or indemnity may be made.

[26] The proposed third parties argue time started to toll under the ***BC Act*** on January 2, 2022. For the purpose of s. 6 of the ***BC Act***, the proposed third party claims for breach of contract and negligent misrepresentation were discovered when these

defendants admitted service of the statement of claim on January 2, 2022. Likewise, for the purpose of s. 16 of the ***BC Act***, the first day on which these defendants knew or reasonably ought to have known that a claim for contribution and indemnity may be made against them was when they were served on January 2, 2022. Accordingly, it is the proposed third parties' position that the proposed third party claim is also statute-barred under British Columbia law because it ought to have been commenced no later than January 2, 2024.

[27] These defendants dispute this. They argue the limitation periods under either act did not start to toll until, at the earliest, June 2023. The original statement of claim was pleaded only in defamation. It was not until the amended statement of claim, which included the claim in negligence, was proposed in June 2023 and ultimately filed on August 8, 2023 that they discovered a claim for contribution and indemnity. As such, they say these claims were not discovered before the coming into force of the ***new Act*** and for the purposes of s. 6 of the ***new Act*** and s. 6(1) of the ***BC Act***, were commenced less than two years after the day on which the claims were discovered.

[28] These defendants also say that under the ***TCN Act***, their claim for contribution and indemnity is not statute-barred as liability has not been established by a judgment. In ***Investors Group Trust Co.***, decided under the ***former Act***, Monnin J.A. concluded that an action for contribution and indemnity under s. 2(1)(c) of the ***TCN Act*** could be commenced no later than two years after liability is established (para. 17).

[29] Similarly, sections 7(a) and 8(f) of the ***new Act*** provide as follows:

> 7 **A claim is discovered** under this Act **on the day the claimant first knew or ought to have known** all of the following:
>
> (a) **that injury, loss or damage has occurred**;
>
> …
>
> 8 For the purpose of clause 7(a), the day an injury, loss or damage occurs is as follows:
>
> …
>
> (f) **in the case of a claim for contribution or indemnity** by one alleged wrongdoer against another, **the day the liability of the claimant**, in relation to the matter for which contribution or indemnity is sought, **is confirmed by a court judgment**, arbitration award or settlement agreement.
>
> [Emphasis added]

[30] Likewise, these defendants say their claims in contract and negligent misrepresentation were not discovered before the coming into force of the ***new Act*** and for the purposes of s. 6 of the ***new Act*** and s. 6(1) of the ***BC Act*** were commenced less than two years after the day on which the claims were discovered. In support of this assertion, they argue that it was the claim in negligence pleaded for the first time in the amended statement of claim that also led to their claim under the Indemnity Bylaw. These defendants made their claim under the Indemnity Bylaw on March 5, 2024, and it was denied on March 20, 2024. They argue that they could not have filed their claims for breach of contract and negligent misrepresentation until the breach occurred with this denial.

[31] While the proposed third parties concede that the original statement of claim was limited to defamation, they argue that damage was claimed "as a result of a tort", which is the triggering event for a claim under s. 2(1) of the ***TCN Act***; that the requisite material facts were pleaded in the original statement of claim; and that at the time of the original

statement of claim these defendants knew of their ability to claim under the Indemnity Bylaw. That is, in the timeframe shortly after service of the original statement of claim in January 2022, these defendants had a right to pursue their third party claim in the same format as now proposed and this right was not affected by the later addition of the negligence claim or their delay in claiming under the Indemnity Bylaw.

[32] The proposed third parties point to case law where claims filed outside the limitation period are dismissed as frivolous. They rely upon the power of a pre-trial judge under Rule 50.05(4)(i) to eliminate frivolous claims.

[33] Generally, a plaintiff is not required to affirmatively plead in a statement of claim that the action is within the applicable statutory limitation period. Nevertheless, in the unique circumstances of this case, the parties agree, as do I, that in considering whether to grant leave to file the third party claim, the question of the limitation date should be considered now in order to avoid a later motion to strike the third party claim on the basis that it alleges claims which are *prima facie* statute-barred.

[34] In the case law relied upon by the proposed third parties, where motions to strike claims succeeded for being frivolous, the terms used to describe the claims include "no probable justification at law"[1], "no chance of success"[2], and "cannot possibly succeed"[3]. For example, in ***Fogel v. The R. M. of St. Clements et al.***, 2012 MBQB 322, the defendants' motion to strike out an amended statement of claim under Rule 25.11 as

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[1] *Kreiner v. Auditor General (Man.)*, 2007 MBCA 154, para. 3; and *Nygard International Partnership v. Canadian Broadcasting Corporation et al.*, 2011 MBQB 124, paras. 12-13

[2] *Western Mercantile Financial Corporation Shrimp Projectors Inc. v. Ernst & Young Inc.*, 1999 ABQB 144, para. 26

[3] *Lin v. Griether et al.*, 2015 ONSC 1541, para. 5

disclosing no reasonable cause of action was granted because of the expired limitation date. In granting the motion, the court noted that the expiry of a limitation period is not normally to be considered on a motion to strike for disclosing no reasonable cause of action but accepted the defendants' argument that there was "no possible hope that the present statement of claim was filed within the appropriate limitation period" (para. 19). In ***Fogel***, unlike in the case at hand, the expiry of the limitation period was previously determined in an action filed years earlier.

[35] The approach in ***Fogel*** aligns with the legal principles governing motions to dismiss based on a limitation defence as discussed in ***Abas Auto Inc. v. Superior General Partner Inc.***, 2015 MBCA 104, which includes the following (para. 11):

> We also confirm previous jurisprudence of this Court that determination of a limitation defence should be on a motion for summary judgment or upon trial of an issue, but not on a motion to strike under r 25.11(d) unless the pleadings themselves, on their face, contain an admission or facts sufficient to conclude that the cause of action arose after the expiry of the limitation period.

[36] The implication of the third parties' submission is that I should either find the defendants discovered, or with diligence ought to have discovered, the existence of their third party claim shortly after service of the original statement of claim. At this leave stage, on the existing evidentiary record, this is neither possible nor appropriate. In my view, to make such a finding at this stage would be inconsistent with the principle that on a motion for leave, the court is not to consider the merits of any defence or affidavit evidence contradicting the allegations made in the proposed third party claim. For this same reason, it is not plain and obvious to me that the proposed third party claim is statute-barred.

[37] In this case, determining the merits of the proposed third parties' limitation defence should be made on the basis of the evidence at trial. The evidence at trial will also permit a proper determination about which legislation applies and its proper interpretation.

### *C. Has the plaintiff established either that the third party claim will, (a) cause the plaintiff to suffer prejudice that cannot be remedied by an award of costs and that outweighs the court's interest in avoiding multiplicity of actions, or (b) will unnecessarily delay the plaintiff's prosecution of its action against the defendants?*

[38] Since the plaintiff has not taken any position on this motion, I have no reason to conclude that if leave is granted to issue the third party claim, prejudice would be suffered by the plaintiff that outweighs the interest in avoiding a multiplicity of actions or that the third party claim will unnecessarily delay the plaintiff's prosecution of her action.

[39] As well, by granting leave, I see no procedural prejudice to the third parties. There is ample time before the trial dates of May 12 to 16, 2025, to engage in the related procedural steps that arise with the addition of the third parties, particularly with active pre-trial management and the terms on which the parties have agreed leave would be granted as outlined in the next paragraph.

### *D. Terms*

[40] The parties agreed, as do I, that with leave to file the third party claim granted, the following terms apply:

- The granting of leave is without prejudice to the third parties advancing expired limitation periods as substantive defences;

- Leave is granted to the third parties to examine the defendants for discovery;
- To the extent that the defendants seek to recover costs incurred by them on their past, current and/or future legal counsel, for the purpose of discovery and trial, the defendants and third parties will work cooperatively toward practical solutions to explore the reasonableness of these claims while respecting privilege issues; and
- To account for the addition of the third parties, in accordance with Rule 50.07(3), consideration will be given to lengthening the trial.

## **CONCLUSION**

[41] In conclusion, I find that these defendants have satisfied the two-part test for granting leave to file their proposed third party claim: they have established a *prima facie* case against the proposed third parties and the plaintiff's interests will not be prejudiced by granting leave. Accordingly, their motion for leave is granted on the terms outlined in the preceding paragraph.

[42] I would also direct that a further pre-trial conference be convened as soon as reasonably practicable.

[43] In light of these defendants' success, I am awarding them costs as against the third parties on the tariff in any event of the cause. While these defendants submitted that costs ought to be payable forthwith, given that this was an interlocutory motion, which was not dispositive, with no compelling justification otherwise, I decline to make this order. That is, these costs are only payable at the conclusion of the action.

_____ A.C.J.