

IN THE COURT OF APPEAL OF MANITOBA

BETWEEN:

PETER JOHN NYGARD

(Plaintiff) Applicant

- and -

***CANADIAN BROADCASTING
CORPORATION, TIMOTHY SAWA and
APRIL TELEK***

(Defendants) Respondents

) ***W. Onchulenko***
) *for the Applicant*
)
) ***P. J. Rykes and***
) ***S. Garfinkel***
) *for the Respondents*
) *Canadian Broadcasting*
) *Corporation and T. Sawa*
)
) ***S. M. Garfinkel***
) *for the Respondent*
) *A. Telek*
)
) *Chambers motion heard:*
) ***April 9, 2026***
)
) *Decision pronounced:*
) ***April 22, 2026***

MAINELLA JA

Introduction

[1] The plaintiff moves for leave to appeal an interlocutory order dismissing his appeal of an order refusing to compel the production of answers to refused undertakings (see *The Court of Appeal Act*, CCSM c C240, s 25.2(1) [the *Act*]).

[2] For the following reasons, the motion is denied.

Background

[3] In 2023, the plaintiff commenced a defamation action against the defendants in relation to stories published by the defendant corporation, the Canadian Broadcasting Corporation (CBC), about the plaintiff's alleged sexual misconduct while he operated an international fashion business (the claim).

[4] Subsequently, each of the defendants moved to strike the claim on the grounds that it is scandalous, frivolous or vexatious; is an abuse of the process of the Court; or does not disclose a reasonable cause of action (see MB, *King's Bench Rules*, Man Reg 553/88, rr 25.11(1)(b)-(d) [*Rules*]).

[5] In support of their motions, the defendants relied on an affidavit of the defendant, Timothy Sawa (Sawa), a journalist with the CBC. That affidavit is almost 700 pages long, including attachments (the affidavit). The affidavit contains some of the journalistic history of reporting about the plaintiff's alleged sexual misconduct, alleged procedural irregularities of the claim, evidence as to the plaintiff's reputation in the community, assertions as to the plaintiff's improper use of the courts to intimidate, claims as to the likely truth of the sexual misconduct allegations relating to the plaintiff, and a history of the plaintiff's criminal proceedings in Canada and the USA.

[6] On March 10, 2025, the plaintiff cross-examined Sawa on the affidavit. Sawa provided twenty-five undertakings during the cross-examination. His counsel took under advisement eleven further requests for undertakings, which were later refused on the basis of relevance and that they

went beyond the proper scope of cross-examination (the refused undertakings). The refused undertakings give rise to this motion.

[7] The refused undertakings relate primarily to information sought by the plaintiff about the CBC's reporting in relation to a 1993 sexual assault allegation against the plaintiff, said to have occurred in Winnipeg, Manitoba, at his company's Canadian headquarters. This allegation gave rise to a criminal prosecution against the plaintiff, which was later stayed by the Provincial Court because of lost evidence (see *R v Nygard*, 2025 MBPC 64; *R v Nygard*, 2025 MBPC 43).

[8] The plaintiff moved for an order, in addition to other relief, compelling the production of answers to the refused undertakings arising from Sawa's cross-examination.

[9] On April 9, 2025, the associate judge dismissed the plaintiff's motion. In her reasons, she said that she was not satisfied that the requested production, prior to discovery, was appropriate or proportionate, as the information sought was not relevant to the issues on the motions to strike the claim.

[10] The plaintiff appealed the order of the associate judge to a judge of the Court of King's Bench (the judge).

[11] On October 30, 2025, the judge dismissed the plaintiff's appeal for reasons similar to that provided by the associate judge.

Discussion

Relevant Principles: Leave to Appeal

[12] This is not a case that engages the sterile and byzantine discussion of whether an order is “final” or merely “interlocutory” for the purposes of section 25.2 of the *Act*. The parties agree that the judge’s order dismissing the plaintiff’s appeal of the associate judge’s order refusing to compel the production of answers to the refused undertakings is an interlocutory order.

[13] Accordingly, before the plaintiff’s appeal to a panel of this Court can be heard and determined on its merits, leave to appeal is required. Section 25.2 of the *Act* provides as follows:

Leave required for interlocutory appeals	Appels interlocutoires — autorisation requise
25.2(1) Subject to subsection (2), an appeal must not be made to the court with respect to an interlocutory order of a judge of the Court of King’s Bench unless leave to appeal is granted by a judge or the court.	25.2(1) Sous réserve du paragraphe (2), il ne peut être interjeté appel devant le tribunal d’une ordonnance interlocutoire rendue par un juge de la Cour du Banc du Roi que si un juge ou le tribunal a accordé une autorisation d’appel.
Exceptions 25.2(2) Leave to appeal an interlocutory order is not required	Exceptions 25.2(2) Une telle autorisation n’est pas requise :
(a) in a proceeding involving the liberty of a person or the custody of a minor;	a) dans une instance concernant la liberté d’une personne ou la garde d’un mineur;
(b) if the order grants or declines to grant a stay or an interlocutory injunction; or	b) lorsque l’ordonnance accorde ou refuse d’accorder une suspension ou une injonction interlocutoire;
(c) in other cases specified in the rules.	

c) dans les autres cas prévus
par les règles.

[14] Section 25.2 reflects a policy choice by the Legislature to limit some forms of interlocutory appeals in order to husband limited judicial resources and to ensure proportionality in civil justice because such appeals often increase the delay, expense and complexity of litigation (see *Hapko v Boel*, 2024 MBCA 110 at para 26 [*Hapko*]; *Kinnarath v People's Party of Canada*, 2024 MBCA 2 at para 12).

[15] It is common ground that none of the exceptions set out in section 25.2(2) are applicable in this case.

[16] Section 25.2(1) provides little in the way of direction as to when leave to appeal should be granted or denied. What can be said is that the requirement to obtain leave to appeal is not a mere formality. The judge or court considering the question of leave has a wide discretion—so much so that a decision on leave to appeal cannot be the subject of an appeal or a request for a rehearing (see MB, *Court of Appeal Rules (Civil)*, Man Reg 555/88R, rr 46(3), 46.2(12); *Centra Gas Manitoba Inc v Public Utilities Board of Manitoba (The)*, 1997 CanLII 2417 (MBCA)).

[17] The common law has developed criteria to address the legislative void as to when leave to appeal should be granted or denied (see e.g. *Knight v Daraden Investments Ltd et al*, 2022 MBCA 69 [*Knight*]). While the judge or court considering the question of leave has a broad discretion, two criteria are of importance to the determination: (1) whether the proposed appeal has sufficient merit in light of the applicable standard of review, and (2) whether

the proposed appeal is of sufficient importance to warrant the attention of the highest court in the province (see *ibid* at para 15).

[18] As was explained in *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53, determination of the sufficiency of merit at the leave stage is often assessed on a preliminary basis, using the standard of “arguable merit” (at para 74). As Rothstein J explained, the “common thread” to the characterization of that standard in the case law is that “the issue raised by the applicant cannot be dismissed through a preliminary examination” (*ibid*), mindful of the applicable standard of review. If a proposed appeal survives a preliminary examination and has the potential to succeed and change the result, the proposed appeal can be said to have arguable merit, such that a more thorough examination by a panel of an appellate court may be required (see *Hapko* at para 31).

[19] In terms of the question of sufficient importance, historically, that criterion is assessed “not just for the immediate case, but in determining other similar disputes which are apt to arise in future” (*Wuziuk v Director of Social Services (No 2)* (1979), 3 Man R (2d) 81 at para 7, 1979 CanLII 3158 (MBCA)). This criterion should be assessed broadly beyond the confines of the particular litigation and the interests of the parties to it. Critical is whether the impact of the proposed appeal will develop the law or further the administration of justice. As was explained in *Re Sault Dock Co Ltd and City of Sault Ste Marie* (1972), 34 DLR (3d) 327, 1972 CanLII 572 (ONCA) [*Re Sault Dock Co*], “If the resolution of the question would largely have significance only to the parties and would not settle for the future a question of general interest to the public or a broad segment of the public, the requirements to obtain leave will not have been met” (*ibid* at 329).

[20] In a case such as this, where a litigant has already had one appeal, which proceeded as a “fresh hearing” (*Rules*, r 62.01(13)) of the procedural dispute, a court must be mindful of the appellate structure that governs this type of civil appeal (see *Re Sault Dock Co* at 328).

[21] The relevant appellate structure in the present case is that the plaintiff seeks a second level of appeal. While appeal rights for a first level of appeal are liberal in Canada, a second level of appeal is extraordinary. The general rule for rights of second-level appeals is that the interests of finality favour restricting the right of appeal to cases of broader significance to the public generally. This approach also ensures the proportionality of litigation. To do otherwise is to invite unnecessary appeals.

[22] Finally, while the common law has focused on leaves to appeal being decided based on the weighing of the two broad preconditions of sufficient merit and sufficient importance, the discretion to grant leave to appeal is always available where there is an obvious error in the lower court that has occasioned a miscarriage of justice (see *Re Sault Dock Co* at para 9; *Knight* at para 26).

Analysis

[23] In our system of civil justice, a party is entitled to their day in court on the merits of their claim, subject to the discrete pre-trial procedures set out in the *Rules* that are designed to fairly weed out cases that are hopeless or weak (see *MRF v KD*, 2005 MBCA 58 at para 37).

[24] Each of these discrete pre-trial proceedings—a motion for summary judgment (see *Rules*, r 20); a preliminary determination of a question of law

(see *ibid*, r 21); a special case (see *ibid*, r 22); and a motion to strike (see *ibid*, r 25.11(1))—serve a different purpose, are governed by different rules for admissible evidence and have different standards for relief. It is important for courts hearing such motions to not conflate the nature and purpose of the proceeding into something resembling a trial of the claim on its merits.

[25] Relevant to this motion is the nature and purpose of rule 25.11(1). Striking a pleading or other document under rule 25.11(1) is a rare remedy, reserved only for the clearest of cases (see *Grant v Winnipeg Regional Health Authority et al*, 2015 MBCA 44 at para 36 [*Grant*]).

[26] A motion to strike under rule 25.11(1) is subject to strict evidentiary rules. Those evidentiary rules form important legal context to deciding this motion because the admissible record to decide a motion to strike differs from that of a motion for summary judgment where the merits of the claim are of greater relevance.

[27] A motion to strike pursuant to rule 25.11(1)(d) for failing to disclose a reasonable cause of action or defence is to be determined only on the face of the pleading or other document sought to be struck. No other evidence is admissible. The pleading or other document should be read generously despite imprecise language and it should be assumed that the facts contained therein can be proven, save for facts that are patently ridiculous, incapable of proof or are bald assertions of misconduct without reasonable particulars (see *Dennis v The Attorney General of Canada et al*, 2020 MBCA 118 at para 8; *Grant* at paras 7, 37; *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 22; *Hunt v Carey Canada Inc*, [1990] 2 SCR 959 at 980, 1990 CanLII 90 (SCC)).

[28] Given that none of the affidavit is admissible for the purposes of the determination under rule 25.11(1)(d), I fail to see how the plaintiff's proposed appeal has any arguable merit or sufficient importance. A dispute about potentially missing but inadmissible evidence is not a matter of concern for a panel of this Court. Such an appeal lacks arguable merit and will do nothing to develop the law or further the administration of justice generally.

[29] The admissible record on a motion pursuant to rule 25.11(1)(b) or rule 25.11(1)(c) is different from the admissible record on a motion under rule 25.11(1)(d) (see *Vitacea Company Ltd et al v The Winning Combination Inc et al*, 2016 MBQB 180 at para 83, aff'd 2016 MBCA 126; *Bernier v Manitoba Agricultural Services Corporation et al*, 2009 MBQB 285 at para 13). In such cases, affidavit evidence may be introduced to demonstrate an action is frivolous or vexatious or otherwise an abuse of process.

[30] However, an important caveat to the parameters of the admissible record in such cases is that the fact-finding process is nevertheless circumscribed and not comparable to that of a trial or a motion for summary judgment. Once again, a court must be mindful that a motion to strike a pleading is not a trial or a motion for summary judgment; the discrete focus of the motion to strike must not be lost even in the face of parties who wish to enthusiastically get into the merits of a case (see *Baradaran v Alexanian*, 2016 ONCA 533 at paras 15-16). The comments of Master Clearwater (as she then was) in *Dowd et al v Skip the Dishes Restaurant Services Inc et al*, 2019 MBQB 63, are apt: "Further, even though evidence for a motion pursuant to Rule 25.11(1)(a-c) is permissible, it is not meant to be reviewed with the same lens as it would be pursuant to a motion under the summary judgment rules" (at para 46).

[31] In my view, the aspect of the plaintiff's proposed appeal in relation to rules 25.11(1)(b) and 25.11(1)(c) fails on the lack of sufficient importance, as there is no question of general importance that arises in this case beyond the interests of the parties (see *Knight* at para 25).

[32] For instance, there is no novel or unsettled point of law or practice raised by the proposed appeal in relation to the refused undertakings or the scope of permissible cross-examination of a deponent. Counsel agreed that the state of law in this area is already well settled.

[33] Moreover, I am not persuaded that resolution of the issues in this case will affect the determination of similar disputes. Affidavit evidence on a motion to strike is a matter of limited applicability. To repeat, a motion to strike cannot become a disguised form of trial or motion for summary judgment. For example, affidavit evidence setting out a detailed defence to an action in the absence of proper pleadings is beyond the scope of permissible evidence under rules 25.11(1)(b) or 25.11(1)(c).

[34] While I am not deciding the motion to strike the claim pursuant to rules 25.11(1)(b) or 25.11(1)(c), it will likely be a point of contention as to how much or how little of the affidavit will be admissible in that determination. In my view, little, if anything, will be gained generally from a panel of this Court hearing the proposed appeal in terms of either developing the law or assisting the resolution of like cases.

[35] I would also highlight that the plaintiff has already had one appeal, which proceeded as a fresh hearing. He now essentially seeks to re-argue the same points the judge rejected. Granting leave to appeal in the present circumstances is contrary to the architecture of the civil appeal process and,

in my view, would inappropriately disregard the principles of finality and the proportionality of litigation.

[36] Finally, despite the plaintiff not satisfying me that his proposed appeal has sufficient merit and is of sufficient importance, I have considered whether leave should nevertheless be granted to address an obvious error giving rise to a miscarriage of justice. Counsel for the plaintiff raises concerns as to paragraphs 15 to 17 of the judge's reasons, saying that he erred in determining the requested information was irrelevant, speculative or beyond the scope of proper cross-examination. In response, the defendants argue that the judge considered the correct legal principles and came to conclusions well-supported by the record. In my view, the judge gave thorough and thoughtful reasons in dismissing the plaintiff's appeal. I see no obvious error in the judge's decision, let alone one that gives rise to a miscarriage of justice.

Disposition

[37] In the result, the motion for leave to appeal is denied with costs.

JA