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(Winnipeg Centre)
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COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

CRESCENT VIEW FARMS LTD. and KENNETH JOSEPH HILHORST,	)	Counsel/Appearances:
plaintiffs,	)	DEAN G. GILES for the plaintiffs
- and -	)	GABRIELLE C. LISI for the defendant
ULS INDUSTRIES LTD.,	)	
defendant,	)	BRIAN D. RHODES for the third party
- and -	)	DENIS G. GUÉNETTE for the Government of Manitoba
PETER GRIEGER and the said PETER GRIEGER, carrying on business as "SOUTH-MAN ENGINEERING (SME)",	)	JUDGMENT DELIVERED: December 21, 2020
third party.	)	

TURNER J.

I. INTRODUCTION

[1] In 2013, Crescent View Farms Ltd. (Crescent View Farms) entered into a contract with ULS Industries Ltd. (ULS) for the supply and construction of a manure storage facility (facility) on Crescent View Farms' land. Crescent View Farms sought and obtained a permit from the Government of Manitoba's Department of

Conservation and Water Stewardship (Manitoba Conservation) pursuant to the ***Livestock Manure and Mortalities Management Regulation***, Man. Reg. 42/98 (Regulation). A leak was discovered after the facility was built. As required by the Regulation, repairs to the facility had to be approved by Manitoba Conservation.

[2] On May 3, 2017, Crescent View Farms filed a statement of claim alleging that ULS breached the contract and acted negligently by not properly completing the repairs. On April 18, 2019, ULS filed a third party claim against Peter Grieger and "South-Man Engineering (SME)".

[3] ULS now seeks leave to amend its third party claim to add the Government of Manitoba. It also seeks to add Bereket Assefa, Jay Rackham, Tyler Kneeshaw, and Tracey Braun (collectively referred to as the Manitoba Conservation employees).

[4] ULS alleges that the Manitoba Conservation employees gave negligent advice regarding the repairs and as a result manure continued to leak from the facility. The leaked manure contaminated Crescent View Farms' land and drinking supply, which has affected farming operations and domestic life on the property. ULS says that the Government of Manitoba is vicariously liable for the actions of the Manitoba Conservation employees.

[5] The Government of Manitoba opposes being added as a third party. It acknowledges that the proposed amended third party claim provides some

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particularization of the claim against it; however, it says that it is not sufficient. It says that the proposed amendments to ULS's third party claim do not disclose a reasonable cause of action.

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[6] The trial dates on the substantive action are currently set for January 10 to 21, 2022.

II. THE LAW

[7] ULS's motion is pursuant to Queen's Bench Rule 26.01, which reads:

> **General power of court**
> **26.01** On motion at any stage of an action the court may grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

[8] In ***Ranjoy Sales and Leasing Ltd. et al. v. Deloitte, Haskins & Sells***, 1989 CanLII 7513 (MB QB), 62 Man. R. (2d) 65 at para. 7, the defendant relied on rule 26.01.

[9] Queen's Bench Rule 29.01 sets out the rule governing third party claims. It reads:

> **Where available**
> **29.01** A defendant may commence a third party claim against any person who is not a party to the action and who,
> (a) is or may be liable to the defendant for all or part of the plaintiff's claim;
> (b) is or may be liable to the defendant for an independent claim for damages or other relief arising out of a transaction or occurrence or series of transactions or occurrences involved in or related to the main action; or
> (c) should be bound by the determination of an issue arising between the plaintiff and the defendant.

[10] ULS submits that the low threshold for a third party claim to be commenced reflects the court's interest in securing the just, most expeditious and least expensive determination of an action and in avoiding a multiplicity of proceedings.

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III. ANALYSIS

A. Claims against the Manitoba Conservation Employees Personally

[11] The Government of Manitoba raises the preliminary issue of whether the Manitoba Conservation employees should be named personally in the proposed amended third party claim. It points to section 4(1)(a) of ***The Proceedings Against the Crown Act***, C.C.S.M. c. P140, which reads:

> **Liability of the Crown in tort**
> **4(1)** Subject to this Act, and notwithstanding section 49 of *The Interpretation Act*, the Crown is subject to all those liabilities in tort to which, if it were a person of full age and capacity, it would be subject
> (a) in respect of a tort committed by any of its officers or agents;

[12] Paragraph 3.5 of the proposed amended third party claim alleges that, at all material times, the Manitoba Conservation employees "were acting in the course of their duties as directors, officers and/or employees of Manitoba". Therefore, if, at the end of the trial, it is found that the Manitoba Conservation employees acted negligently, the Government of Manitoba will be liable pursuant to this section of ***The Proceedings Against the Crown Act***. It is unnecessary to name the Manitoba Conservation employees in their personal capacities.

[13] As such, leave is not granted to name the Manitoba Conservation employees personally in the proposed amended third party claim.

B. Claim against the Government of Manitoba

[14] In ***Moskal v. Costco Wholesale Corporation***, 2015 MBCA 108 (CanLII) at para. 21, the Manitoba Court of Appeal restated four factors that should be considered in determining whether a party should be added as a third party:

1. The seriousness of the prejudice to the other party;
2. Whether the prejudice that would result could be compensated for by costs or an adjournment;
3. Whether there was a delay on the part of the party moving for the amendment and, if so, whether the delay has been satisfactorily explained; and
4. The nature of the proposed amendment and whether it raises a valid, arguable point that has merit.

1. The seriousness of the prejudice to the other party

2. Whether the prejudice that would result could be compensated for by costs or an adjournment

[15] The Government of Manitoba says that if ULS's motion is granted, the Government will have to dedicate resources in defending against the claim. It says that the prejudice is serious because the claim, as pled, has no prospect of succeeding. A typical order of costs would provide only partial indemnity for legal expenses and would not compensate for the Government's litigation burdens as a party to the action.

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[16] ULS responds that the Government of Manitoba bears the burden of demonstrating, on a balance of probabilities, that it will be prejudiced if the motion to amend is granted: ***Manitoba Métis Federation Inc. v. Canada (Attorney General)***, 2002 MBQB 52 (CanLII) at para. 25. The Government of Manitoba has not provided any evidence of prejudice, let alone evidence of prejudice that could not be compensated for by costs. ULS says that every party who has ever been involved in litigation could assert prejudice when the party's actual legal costs were more than the recoverable costs under Tariff A of the Court of Queen's Bench Rules.

[17] Any party to a litigation has to dedicate resources in pursuing or defending against a claim. As outlined below, I cannot agree that the proposed amended third party claim against the Government of Manitoba is so weak that it has no prospect of succeeding. There is no evidence before me to show that the Government of Manitoba would suffer serious prejudice that could not be compensated for by costs.

3. Whether there was a delay on the part of the party moving for the amendment and, if so, whether the delay has been satisfactorily explained

[18] The Government of Manitoba does not argue that there has been any delay by ULS in seeking leave to amend its third party claim.

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4. The nature of the proposed amendment and whether it raises a valid, arguable point that has merit

[19] ULS and the Government of Manitoba both agree that this factor should be considered based on the motion to strike test. Queen's Bench Rule 25.11(1)(d) provides that the court may on motion strike out a pleading on the ground that the pleading or other document does not disclose a reasonable cause of action.

[20] The remedy of striking out a pleading is to be used sparingly and is reserved only for the "clearest of cases". A claim should be read generously notwithstanding any imprecision in the language used in it. (***Vitacea Company Ltd. et al. v. The Winning Combination Inc. et al.***, 2016 MBQB 180, aff'd 2016 MBCA 126 (CanLII))

[21] The Supreme Court of Canada in ***R. v. Imperial Tobacco Canada Ltd.***, 2011 SCC 42, [2011] 3 S.C.R. 45 at para. 17, set out that a claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action. The Court went on to state:

> [19] The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.
>
> . . .
>
> [22] A motion to strike for failure to disclose a reasonable cause of action proceeds on the basis that the facts pleaded are true, unless they are manifestly incapable of being proven: *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p. 455. No evidence is admissible on such a motion . . .. It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The

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> claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted.

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[22] More recently, the Supreme Court of British Columbia in ***Waterway Houseboats Ltd. v. British Columbia***, 2018 BCSC 606 (CanLII), noted:

> [28] Where there is doubt on either the facts or the law, the matter should be allowed to proceed for determination at trial.

[23] The moving party on a motion to strike, in this case the Government of Manitoba, bears a significant burden to demonstrate that the pleading has no prospect of success.

[24] ULS says that the Government of Manitoba should be bound by the determination of whether the remedial work on the facility was done negligently because the Manitoba Conservation employees gave advice on, and ultimately approved, the remedial work. The main thrust of the third party claim is that the Government of Manitoba, through its employees, gave advice during one or more site visits to Crescent View Farms' property. The advice related to the nature and extent of the remedial repairs, in particular, the quantity of soil that needed to be removed, and from which locations, to eliminate the potential source of contamination.

[25] The Government of Manitoba replies that the proposed pleading simply alleges that the Government has a department and a branch (Manitoba

Conservation) that administer a program. The Government of Manitoba says that the allegation by ULS is that a bad result occurred, that someone at Manitoba Conservation should have done something, and, therefore, the Government should have to contribute if damages are awarded to the plaintiffs at the conclusion of the trial. It says that, based on the proposed amended third party claim, what should have been done (or not done) is unclear. Was it a legislated responsibility, power or obligation? Was it a course of conduct that was not actually contemplated in the governing legislation but triggered a common law duty anyway? If so, what was the course of non-legislated conduct and who undertook it?

[26] The Government of Manitoba adds that a civil action against the Crown is not simple. For a civil action to succeed against the Crown, liability must be established in accordance with the legislated civil liability principles. Crown immunity applies except where the immunity is displaced by legislation. As noted above, in Manitoba, that legislation is section 4(1)(a) of ***The Proceedings Against the Crown Act***. The Crown may be vicariously liable if any of its officers or agents committed a tort. Section 4(2) of ***The Proceedings Against the Crown Act*** goes on to state:

> **Liability of Crown for acts of its officers or agents**
> **4(2)** No proceedings lie against the Crown under clause (1)(a) in respect of any act or omission of an officer or agent of the Crown unless the act or omission would, apart from this Act, have given rise to a cause of action in tort against that officer or agent or his personal representative.

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[27] The Government of Manitoba acknowledges that section 46 of ***The Environment Act***, C.C.S.M. c. E125, contemplates that a civil action in negligence could be brought against a public officer, and, therefore by extension, against the Government through the principles of vicarious liability:

> **Exemption from civil liability**
> **46** No action lies or shall be instituted against any person acting under the authority of this Act, any employee or person acting as an agent for the Crown, including members of the board, commission, any advisory committee or panel appointed by the minister or Lieutenant Governor in Council or any person operating under an agreement with the minister, to recover any loss or damage alleged to have been suffered by any person as a consequence of any act or omission of the person, employee, agent or member in connection with the carrying out of the powers and duties given under this Act or the regulations to the person, employee, agent or member *unless the act or omission resulted from negligence or malice of the person, employee, agent or member* [emphasis added].

[28] The Government of Manitoba acknowledges that there can be civil liability for a tort committed in the context of an administrative function conferred upon a public officer. However, it argues that a breach of a statute is not, in and of itself, actionable as a tort. The opposing party must show that the act or omission of the person, employee, agent or member amounted to negligence.

a. Negligence

[29] The true starting point for any claim in negligence remains, as it has for decades, that one must take reasonable care to avoid acts or omissions that one could reasonably foresee would be likely to injure one's neighbour (***Donoghue v. Stevenson***, [1932] A.C. 562 (H. L. (Sc.))).

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[30] The traditional ***Donoghue v. Stevenson*** formulation can be challenging to apply when a party has been subject to a regulatory regime and seeks to apply the standard of care to public administrative actors. There is no equivalent relationship between private parties. It can be difficult for a court to determine what a reasonable course of conduct is for an administrative regime. The court must delve into understanding the legislative responsibilities, powers and obligations of the administrative body. To do that, the pleading must disclose:

- which legislative responsibility, power or obligation is being referred to
- who is empowered in relation to it, and
- to whom the duty is alleged to have been owed

[31] In the case at bar, in order to establish negligence by the Government of Manitoba, ULS must demonstrate that:

- the Government of Manitoba or its employees owed Crescent View Farms a duty of care
- the Government of Manitoba or its employees breached the standard of care
- Crescent View Farms sustained damage as a result of that breach

Therefore, in order to include the Government of Manitoba as a third party, each of the requisite elements must be properly pled.

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[32] The Government of Manitoba submits that it is insufficient for ULS to plead that a department or branch generally erred when the regime in question assigns roles and responsibilities to particular public officers. It says that it is also insufficient to plead that a duty of care arose because an administrative regime deals with a general subject matter, such as the environment. Such an approach would deprive the Government of Manitoba of the ability to understand what is being alleged against it in two aspects: (1) it is unclear *who* is alleged to have committed the tort for which the Government is vicariously liable; and (2) it is unclear *what* administrative responsibility was performed negligently. It says that Queen's Bench Rule 25.06(4) is particularly applicable. It reads:

> **Act or regulation**
> **25.06(4)** Where a party's claim or defence is founded on an Act or Regulation, the specific sections relied on shall be pleaded.

[33] The Government of Manitoba says that the proposed amended third party claim is vague on both *the who* and *the what*. The proposed amendments allege only that it was the "Department" or the "Branch" that had certain responsibilities. The proposed amendments do not specify which administrative responsibilities were performed or not performed.

[34] ULS submits that, at this stage of the proceedings, all it has to do is plead the relevant elements of negligence. It says that I should look to the proposed pleading, not to the underlying evidence that is currently or potentially available.

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It says that the claim has always been based in negligence and that the required elements are properly pled in the proposed amended third party claim.

b. Duty of Care

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[35] ULS says that the duty of care is properly pled in paragraphs 11.6 and 11.6.1 of the proposed amended third party claim:

> 11.6 Grieger/South-Man and the Branch,[1] and its Employees,[2] (for whose acts or omissions Manitoba Conservation was and is responsible) were obligated to take reasonable steps – through testing or otherwise – to ensure that their advice, if followed, would eliminate any potential source of contamination and any risk to the plaintiffs' well and water supply and to ensure that the environment would be protected in the event of a structural failure of the manure handling and storage system.
>
> 11.6.1 Grieger/South-Man, the Branch and its Employees were in a special and proximate relationship with the plaintiffs and knew or ought to have known that if they failed to take reasonable steps – through testing or otherwise – to ensure that their advice, if followed, would eliminate any potential source of contamination and any risk to the plaintiffs' well and water supply, the plaintiffs would suffer damages as a result thereof. As a result, the third parties owed a duty of care to the plaintiff as outlined in paragraph 11.6.

[36] The circumstances in which a public body may owe a private law duty of care was addressed in ***Ruest et al. v. Manitoba (Water Stewardship Department) et al.***, 2019 MBCA 1 (CanLII):

> [18] The test for determining whether a public body owes a private law duty of care to an individual was described by the Supreme Court of Canada in *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42, as follows (at para 39): "[T]he question is whether the facts disclose a relationship of proximity in which failure to take reasonable care might foreseeably cause loss or harm

[1] The proposed amended third party claim refers to the Environmental Approvals Branch, of Manitoba Conservation as the "Branch" [footnote added].

[2] The proposed amended third party claim refers to the Manitoba Conservation employees as the "Employees" [footnote added].

> to the plaintiff. If this is established, a *prima facie* duty of care arises". See also *Rankin (Rankin's Garage & Sales) v JJ*, 2018 SCC 19 at para 18.

[37] ULS submits that paragraphs 11.2 and 11.2.1 of the proposed amended third party claim answer *the who* — it was the Manitoba Conservation employees who gave negligent advice:

> 11.2 The Environmental Approvals Branch, of Manitoba Conservation (the "Branch"), and its Employees were involved. Grieger/South-Man and the Branch, including the Employees, worked together to define the nature and scope of any repairs which were required, with particular emphasis by the Branch, through its Employees, on what ought to be done to "eliminate the potential source of contamination" which was created by virtue of the manure leak from the failed pipe and the damaged tank, including but not limited to the quantity of soil that needed to be removed and from which locations in order to "eliminate the potential source of contamination".
>
> 11.2.1 In the course of one or more site visits to the plaintiffs' property and the proposed project in or around October/November 2015, one or more of the Employees gave advice as to what ought to be done to "eliminate the potential source of contamination" which was created by virtue of the manure leak from the failed pipe and the damaged tank, including but not limited to the quantity of soil that needed to be removed and from which locations it was to be removed to "eliminate the potential source of contamination".

(1) To whom was the duty of care owed?

[38] The Government of Manitoba submits that the first element of the tort of negligence is not only that someone owes a duty of care, but that that someone owed it to someone else. It says that the proposed pleading does not outline *to whom* a duty of care was allegedly owed. The Government of Manitoba says that the proposed pleading does not identify whether the Government owed a duty of care to the plaintiffs (as the operators of the facility), to ULS (as the contractor), or to Mr. Grieger (as the professional engineer).

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[39] ULS replies that paragraph 11.6.1 of the proposed amended third party claim (as reproduced above) pleads *to whom* the duty was owed. The duty was allegedly owed to the plaintiffs when the claim says, "any risk to the plaintiffs' well and water supply, the plaintiffs would suffer damages".

[40] I am satisfied that the proposed amended third party claim properly pleads the duty of care. ULS alleges that the Government of Manitoba through the Manitoba Conservation employees owed a duty of care to the plaintiffs in the context of the project at issue.

c. **Standard of Care**

[41] While a breach of a statutory duty does not, in and of itself, establish negligence, the applicable legislative standards and regulatory framework should inform the negligence analysis and the applicable standard of care. In ***Ryan v. Victoria (City)***, [1999] 1 S.C.R. 201, it states:

> [29] Legislative standards are relevant to the common law standard of care, but the two are not necessarily co-extensive. The fact that a statute prescribes or prohibits certain activities may constitute evidence of reasonable conduct in a given situation, but it does not extinguish the underlying obligation of reasonableness. See *R. in right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205. . . . Statutory standards can, however, be highly relevant to the assessment of reasonable conduct in a particular case, and in fact may render reasonable an act or omission which would otherwise appear to be negligent. This allows courts to consider the legislative framework in which people and companies must operate, while at the same time recognizing that one cannot avoid the underlying obligation of reasonable care simply by discharging statutory duties.

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[42] ULS says that the proposed amended third party claim properly pleads *the what*. Its claim against the Government of Manitoba has always been based in negligence, not in a breach of a statutory duty.

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[43] First, the statutory duties and responsibilities of the Government of Manitoba and its employees are pled at paragraphs 5.1, 5.2 and 6.1 of the proposed amended third party claim:

> 5.1 At all material times, Manitoba,[3] through various statutes and regulations, was legally responsible for the creation and enforcement of the requirements for manure storage facilities which it did through Manitoba's Department of Conservation and Water Stewardship ("Manitoba Conservation") pursuant to, among other enactments, the *Livestock Manure and Mortalities Management Regulation* (the "Regulation"). The Regulation provides in section 6 as follows: [sections 6(1) to 6(4) omitted].
>
> 5.2 An 11-page handout published by Manitoba Conservation, and available on its website, entitled "Obtaining a Permit for the Construction/Modification/Expansion of Manure Storage Facilities" provided as follows:
>
>> 4. The design of the manure storage facility including site plan, capacity for present and future needs, level of protection required, laboratory results of the soil sampling from the initial test holes, and all other pertinent information must be submitted to Manitoba Conservation and Water Stewardship as part of an Application for Permit. As well, a map of all lands available for manure spreading that outlines agricultural capability classifications, buffer areas and available spread acreage is required. In addition, a manure management plan is required. Signed agreements with the owners authorizing manure spreading on lands leased for this purpose must be attached.
>>
>> …
>>
>> 6. The completed Application for Permit and supporting information is reviewed by Environmental Approvals Branch of Manitoba Conservation and Water Stewardship to ensure

[3] The proposed amended third party claim refers to the Government of Manitoba as "Manitoba" [footnote added].

> compliance with all regulatory requirements and accepted construction standards.
>
> …
>
> 7. A Permit for the construction, modification or expansion of the manure storage facility will only be issued if the information is complete and the design is acceptable for the site conditions. Prior to any construction work, a permit must be obtained from Manitoba Conservation and Water Stewardship pursuant to Section 6 of the *Livestock Manure and Mortalities Management Regulation*.
>
> …
>
> 14. Periodic inspections of all permitted manure storage facilities are conducted by Environment Officers of Manitoba Conservation and Water Stewardship.

> 6.1 At all material times Manitoba Conservation and its Employees were required to take reasonable steps to, among other things:
>
> (a) ensure that the proposed project conformed to the siting and construction requirements set out in Schedule "A" of the Regulation, and any other regulatory requirements and accepted construction standards;
>
> (b) ensure that the proposed project was acceptable for the site conditions before issuing a permit;
>
> (c) perform periodic inspections of the permitted manure storage facility; and
>
> (d) ensure that the proposed project could be carried out in a manner that ensures that the environment is protected in the event of a structural failure.

[44] Second, ULS says that the standard of care applicable to the Government of Manitoba is pled at paragraph 11.6 of the proposed amended third party claim (as reproduced above), in particular:

> [The Manitoba Conservation employees] were obligated to take reasonable steps – through testing or otherwise – to ensure that their advice, if followed, would eliminate any potential source of contamination and any

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> risk to the plaintiffs' well and water supply and to ensure that the environment would be protected in the event of a structural failure of the manure handling and storage system.

[45] Finally, ULS says that the allegation of negligent advice by the Manitoba Conservation employees is pled at paragraph 11.9 of the proposed amended third party claim:

> 11.9 If in fact soil or other materials contaminated by the manure leak were not removed, this was because the third parties' advice was mistaken and negligently given. In particular, the third parties failed to take reasonable steps to: (a) ensure that the nature and extent of material removal recommended by them would eliminate the source of contamination; and (b) ensure that their advice, if followed, would eliminate any potential source of contamination and any risk to the plaintiffs' well and water supply.

(1) <u>Use of "Ensure" in the Legislation</u>

[46] The Government of Manitoba argues that ULS's theory of the Government's liability is not really rooted in any course of conduct taken, or not taken, in relation to specific legislative responsibility, power or obligation. It says that ULS's theory is principally grounded in the point that there is legislative provision at section 6(4) of the Regulation in which the word "ensure" appears and that it is this word that sets the standard of care for all administrative action taken by public officers under the Regulation.

[47] Section 6(4) of the Regulation sets out, in part, that a permit can be issued if "the director is satisfied that the construction, modification or expansion of the manure storage facility can be carried out in a manner that *ensures* that the

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environment is protected in the event of a structural failure of the facility" [emphasis added].

[48] The Government of Manitoba says that the use of "ensure" does not create a guarantee that the environment will be protected.

[49] ULS agrees that any reference to "ensure" is not intended to operate as a form of guarantee. It says that the statutory provisions outlined in paragraphs 5.1, 5.2 and 6.1 of the proposed amended third party claim simply inform the standard of care applicable to the Government of Manitoba and its employees. The standard of care is to be the measure of what would constitute reasonable conduct by the Government of Manitoba and its employees. (***Ryan*** at para. 28)

[50] ULS says that, in this case, Queen's Bench Rule 25.06(4) is not engaged because the third party claim is not founded on an Act or Regulation; it is founded in negligence. It argues that it is not required to plead under what authority a government actor was acting when it committed the alleged breach. This is not material to the claim of negligence and not within ULS's knowledge. ULS says that it has properly pled the regulatory context in which the negligence allegedly occurred, namely, ***The Environment Act*** and section 6 of the Regulation.

[51] ULS says that, ultimately, the standard of care imposed on the Government of Manitoba is very fact-driven. All that is required at this stage is that ULS pleads there has been a breach of the standard of care.

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[52] I am satisfied that ULS has properly pled the standard of care. ULS has pled that the Manitoba Conservation employees were required to take reasonable steps, including testing, to ensure that they were giving the proper advice in the context of their roles regarding the facility. ULS provides further information or context regarding the standard of care by pleading the statutory duties and responsibilities of the Regulation.

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d. Damages

[53] ULS says that damages are properly pled in the proposed amended third party claim at paragraph 11.9 (as reproduced above). It alleges that the plaintiffs suffered damages as a result of the mistaken and negligent advice given by the Manitoba Conservation employees. The Government of Manitoba did not argue or take issue with whether damages were properly pled; therefore, I do not need to make a determination on this issue.

IV. CONCLUSION

[54] At this stage of the proceedings, I am not determining whether the plaintiffs' action will be successful or whether ULS's proposed amended third party claim against the Government of Manitoba will be successful. I must consider whether the Government of Manitoba would suffer serious prejudice that could not be compensated for by costs and whether the proposed amended third party claim raises a valid, arguable point that has merit. I must keep in mind that a pleading should only be struck in the "clearest of cases", where it is plain and obvious that the claim does not raise a reasonable cause of action.

[55] The Government of Manitoba would not suffer such serious prejudice that could not be compensated for by costs.

[56] The proposed amended third party claim properly pleads the required elements of negligence against the Government of Manitoba and raises valid, arguable points that will have to be considered upon the evidence at the trial.

[57] Leave is granted for ULS to amend its third party claim to add the Government of Manitoba.

_____________________________J.

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