Date: 20240108
Docket: CI 20-01-29208
(Winnipeg Centre)
Indexed as: Hahlweg et al. v. Women's Health Clinic Inc.
Cited as: 2024 MBKB 1

# COURT OF KING'S BENCH OF MANITOBA

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

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|---|---|---|
| KEN HAHLWEG AND DR. KEN HAHLWEG MEDICAL CORPORATION, | ) | Troy Harwood-Jones |
| | ) | Jeffrey King |
| | ) | for the plaintiffs |
| plaintiffs, | ) | |
| - and - | ) | Cynthia Lazar |
| | ) | Kelby Leoppky |
| WOMEN'S HEALTH CLINIC INC., | ) | for the defendant. |
| | ) | |
| defendant. | ) | Judgment Delivered: |
| | ) | January 8, 2024 |

## TOEWS J.

### INTRODUCTION

[1] This is a motion by the plaintiffs (an individual medical doctor and a medical corporation controlled by the individual plaintiff) requesting that I recuse myself from the action which the plaintiffs have brought against the defendant alleging numerous causes of action. As stated in the plaintiff's pre-trial conference brief (filed April 21, 2021), the individual plaintiff had been providing medical services and performing surgical abortions to patients at the defendant's place of business where the defendant carries on the business as a health clinic providing abortions and medical services to the public.

[2] On November 24, 2023, after hearing oral submissions and having reviewed the briefs of both parties, I dismissed the plaintiff's application for recusal with costs in favour of the defendant in any event of the cause. I indicated that reasons would follow in due course. These are those reasons.

## **BACKGROUND**

[3] In addition to a request by the plaintiffs for a mandatory injunction which seeks the disclosure and provision of numerous documents which the defendant states is not procedurally appropriate (see paras. 12 - 16 of the defendant's pre-trial brief filed on September 23, 2021), the numerous causes of action set out in the statement of claim in respect of the termination of the plaintiffs' relationship with the defendant, include:

a) Breach of contract (paras. 30 - 40 of the Statement of Claim);

b) That the defendant breached its "dependent contractor" relationship with the individual plaintiff and in that context failed to provide the individual plaintiff with reasonable notice of the termination of his status as a "dependent contractor" (paras. 41 - 48 of the Statement of Claim);

c) Wrongful termination of its contract with the plaintiffs which resulted in a "wrongful termination by way of constructive dismissal" (paras. 49 - 51 of the Statement of Claim);

d) Failure to provide the individual plaintiff in his capacity as a dependent contractor and the corporate plaintiff in respect of its contract with the defendant, "reasonable notice or pay-in-lieu of notice of termination". (paras. 52 - 57 of the Statement of Claim);

e) In breach of the statutory duties and obligations that governed the defendant, the defendant engaged in a multiplicity of activities, verbally and otherwise, harassing the plaintiff(s) in such a manner so as to endanger the "safety and welfare of the public and the health care system in the Province of Manitoba through an abuse of public office (paras. 58 - 61 of the Statement of Claim);

f) A breach of fiduciary duty by failing to deal with the plaintiff(s) in a "fair and even-handed" manner while allocating patient referrals (paras. 62 - 70 of the Statement of Claim); and

g) Defamation (paras. 71 - 78 of the Statement of Claim)

[4] The defendant filed a statement of defence in reply to the allegations, denying that they had breached their contractual or any other relationship they had with the plaintiffs, but on a good faith and without prejudice basis provided the plaintiff(s) with 90-days notice in writing prior to the termination of the contract of services with the plaintiff(s).

[5] At the first pre-trial conference held on September 30, 2021, the defendant signaled its intention in its pre-trial brief to request that those portions of the statement of claim alleging the defendant defamed the plaintiffs and breached statutory duties be struck. Furthermore, the defendant advised the court that it was considering applying for leave to apply for summary judgment, particularly in respect of the plaintiffs' constructive/wrongful dismissal action. However, while the possibility of a summary judgment leave application was raised at this pre-trial hearing, it was neither requested

nor considered at that time. As will be discussed, the possibility of summary judgment leave applications being brought was addressed at a future pre-trial hearing and the procedure to be followed was set out in the pre-trial memorandum dated June 2, 2022.

[6] The defendant also took the position at the first pre-trial that the motion for a mandatory injunction was not the proper vehicle to compel production of documents by the defendant. The defendant took the position that the proper procedure is found in the Court of King's Bench Rules applicable to discovery and production of documents.

[7] While the plaintiffs estimated the number of days required for trial to be 10-15 days, (para. 87 of the plaintiffs' pre-trial brief filed April 21, 2021), the defendant stated that it was unable to estimate how much time would be required for trial but that:

> … It hopes this pre-trial process will assist in significantly narrowing the issues in this case so that its merits can be decided in a streamlined and efficient manner.
>
> (para. 90 of the of the defendant's pre-trial brief filed on September 23, 2021)

[8] On September 27, 2021, the plaintiffs filed a motion for the disclosure of documents in the hands of a third party (King's Bench Document No. 8), returnable on September 30, 2021. The disclosure and/or production of the third-party documents raised by the motion was discussed and the matter was dealt with in the manner set out in both the original pre-trial memorandum and the amended pre-trial memorandum arising out of the September 30, 2021 pre-trial.

[9] At the September 30, 2021 pre-trial hearing, the defendant requested particulars in order to assist in the streamlining the action. Although a defence had already been filed, I considered and granted the request, given the particularly broad and diverse nature of the pleadings and the difficulties this was creating in respect of attempting to

expedite the setting of a trial date or providing a better focus on the issues and facts relevant to the determination of this action.

[10] The authority to make orders and provide direction generally at a pre-trial is set out in King's Bench Rule 50.05 (3) and specifically at (4)(i) which provide:

> Pre-trial powers
>
> **50.05(3)** At a pre-trial conference, the pre-trial judge may, on motion by any party or on his or her own motion, without materials being filed, make any order or give any direction that he or she considers necessary or advisable to facilitate the just, most expeditious and least expensive determination or disposition of an action.
>
> **Examples of pre-trial orders and directions**
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> **50.05(4)** Without restricting the generality of subrule (3), the pre-trial judge may make an order or give a direction that
>
> (a) pleadings be amended or closed by a specified date;
>
> (b) motions be brought by a specified date;
>
> (c) any or all motions not proceed;
>
> (d) examinations for discovery and cross-examinations on affidavits be dispensed with or be limited in scope;
>
> (e) examinations for discovery and cross-examinations on affidavits be completed by a specified date;
>
> (f) establishes timelines for the completion of any step in the litigation process;
>
> (g) the parties exchange reports and resumes of any experts to be called at trial by a specified date;
>
> (h) limits the number of experts to be called at trial or the matters to be addressed at trial by experts;
>
> (i) simplifies the issues and eliminates frivolous claims or defences;
>
> (j) the parties make admissions respecting facts or documents;
>
> (k) directs a reference to be conducted on a specific issue;
>
> (l) the parties file an agreed statement of facts or an agreed book of documents;
>
> (m) makes provisional advance rulings on the admissibility of evidence;
>
> (n) evidence at trial, in whole or in part, be adduced by affidavit;
>
> (o) establishes reasonable limits on the time allowed to present evidence at trial;

> (p) requires a separate trial of a claim, counterclaim, crossclaim or particular issues;
>
> (q) establishes special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions or unusual proof problems; or
>
> (r) the parties prepare a trial brief and trial record, including specifying the contents of a trial brief or trial record and the timelines for filing these documents.

[11] The order to award the particulars, as well as the other directions provided at the pre-trial hearing appear to have had the desired effect of generally assisting in simplifying or expediting the matter. In a letter addressed to the court dated May 6, 2022, the plaintiffs advised:

> Since our last Pre-Trial Conference on September 30, 2021, the Motion by the Plaintiff's [sic] to have relevant documents , including the StratHR Report has been resolved, the Defendant's [sic] have filed a Request for Particulars and the Plaintiff's [sic] have provided Particulars, and Examinations for Discovery have substantially been completed.

[12] At a further pre-trial teleconference which took place on June 2, 2022, some of the issues were further narrowed because of the production of particulars by the plaintiffs and the plaintiffs advising the court that they were not proceeding with the cause of action in respect of the "breach of statutory duty". Clarification also was received from the parties in respect of the witnesses each party was intending to call, including whether expert witnesses were going to be relied upon.

[13] As a result of the forgoing discussions and decisions, some of the uncertainty caused by the breadth of the claims set out in the statement of claim was reduced and the court was able to conclude that a much shorter trial rather than the possibility of a

three-week trial raised by the plaintiff would be appropriate. Accordingly, a trial date for February 12 - 21, 2024 was set at the pre-trial on June 2, 2022.

[14] At the same time, a detailed schedule of pre-trial proceedings was also determined and set out in the pre-trial memorandum. The parties were advised to inform the court of any intention to bring a summary judgment application as it would have to be considered at a future pre-trial. At that time, I advised the parties that if a motion for leave to bring a summary judgment was brought forward by one or both of the parties, that:

> … [a] summary judgment date for hearing will be considered at the pre-trial and "[a] summary judgment date for hearing will be set at the pre-trial however, the court may decide to summarily dismiss an application for summary judgment at the pre-trial if it appears to the court that the matter on its face should proceed to trial.

[15] The possibility of settlement through the mechanism of a Judicially Assisted Dispute Resolution was also raised and noted in the pre-trial memorandum.

[16] On October 18, 2022, and subsequent to the second pre-trial which took place on June 2, 2022, the defendant provided a supplemental to its pre-trial brief filed September 23, 2021 and in support of the defendant's request for leave to file a summary judgment motion. (See para. 2 at p. 3 of the defendant's supplemental pre-trial brief)

[17] In the same paragraph and following, the defendant set out some of the apparently uncontested facts germane to an application for summary judgment in respect of the alleged breaches of contract, damages being limited to 90-days' notice, breach of fiduciary duty and defamation. The defendant also argued that the matter of notice should be determined prior to trial under Kings Bench Rule 21.01(1).

[18] In response to the defendant's request for leave to apply for summary judgment and the related trial of an issue, the plaintiffs stated in its supplemental brief filed on October 31, 2022, that this claim relates to "numerous interrelated issues, which cannot be simply decided in a vacuum as the Defendant suggests" and that the expense of bringing the applications is in summary "not proportionate and not in the interests of justice".

[19] A further pre-trial hearing took place on November 4, 2022, rescheduled with the consent of the court (see e-mail from Stephanie Brunner, Judicial Assistant, Court of King's Bench, dated September 27, 2022) to this earlier date from November 22, 2022 at the request of the plaintiffs by way of letter dated September 20, 2022.

[20] At the pre-trial hearing on November 4, 2022, I ordered that the individual plaintiff's claims of defamation were not suitable for summary judgment and "shall proceed to trial". At the same time, I granted leave for the defendant to bring a motion for summary judgment and/or alternatively a motion for a trial of an issue on the issues related to the limitation of the plaintiffs' damages to a 90-day notice period and whether the defendant owed a fiduciary duty to the individual plaintiff. The other causes of action, which had not been discontinued by the plaintiff, were not under consideration by the court at this pre-trial hearing and remained scheduled to proceed to trial on February 12 - 21, 2024.

[21] The plaintiffs filed this recusal motion on September 15, 2023, after a justice of the Manitoba Court of Appeal determined that the plaintiffs could not proceed with their Notice of Appeal which alleged, inter alia, that I was biased in permitting the defendant

to file a motion for leave for summary judgment and a trial of an issue in respect of certain issues. In its brief on the September 15, 2023 recusal motion, the defendant states at para. 16:

> It is unclear to the Defendant why the Plaintiffs have brought this recusal motion approximately 10 months after the last conduct complained of, and whether this was done as a result of the Manitoba Court of Appeal's refusal to proceed with an appeal that alleged, *inter alia*, that Justice Toews was biased.

[22] By this time, in view of the impeding trial date, and the unavailability of suitable dates to hear the motion for summary judgment, I determined and advised the parties that I was no longer prepared to consider whether the defendant's request for a hearing for summary judgment on the issues identified in my order of November 4, 2023 was an effective way of assisting in the resolution of the overall trial, even if the orders sought by the defendant were granted. The entire action was therefore set over to be dealt with in the context of the full trial scheduled for February 12 - 21, 2024.

## **THE RECUSAL MOTION**

[23] On September 15, 2023, and prior to the November 4, 2022 pre-trial conference, the plaintiffs had filed a motion that I recuse myself from this action and that a different justice be assigned and become seized of this action. The grounds for the motion included:

i. Despite his publicly-stated animus towards abortion, abortionists and "activist Judges", as well as his support for Judges with politically "favourable" adjudication "Justice Toews became seized";

ii. "At Pre-Trial Conference #1, his Lordship refused to schedule Summary Judgment or Trial, ordered Particulars (though [the defendant] had already filed a Defence) and referred to the Claim as "Frankenstein's Monster".

iii. The decision to grant leave to the defendant to bring a motion for summary judgment in respect of the issues set out in my November 4, 2022 order;

iv. The decision to order that the plaintiffs' action for defamation proceed to trial rather than proceeding to summary judgment resulted in "no avenue for adjudication [sic]the remaining causes of action in the Claim, effectively dismissing them without a hearing." and

v. That "[a]n informed person, viewing the claim realistically and practically and having thought the matter through would conclude it more likely than not that Justice Toews would (likely unconsciously) not decide the Claim fairly".

## THE LAW

[24] The governing legal principles and applicable test to be applied in determining a judge's recusal were recently considered in a decision of this court. In ***Johnson v. Miazga***, 2022 MBQB 80, [2022] M.J. No. 424 (QL), Peterson J. summarized those principles and the applicable test at paras. 29 and 30:

> [29] The governing legal principles and applicable test to be applied in determining a judge's recusal was summarized by Joyal J. (as he then was) in ***Kalo v. Manitoba (Human Rights Commission)***, 2008 MBQB 92 (CanLII), as follows:
>
> > [17] The determination concerning a judge's recusal is governed by well established legal principles which were recently restated by the Supreme Court of Canada in ***Wewaykum Indian Band v. Canada***, 2003 SCC 45, [2003] 2 S.C.R. 259:

> 60 In Canadian law, one standard has now emerged as the criterion for disqualification. The criterion, as expressed by de Grandpré J. in ***Committee for Justice and Liberty v. National Energy Board, supra***, at p. 394, is the reasonable apprehension of bias:
>
> > … the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

[18] The test had been previously reaffirmed in ***R. v. S. (R.D.)***, 1997 CanLII 324 (SCC), [1997] 3. S.C.R. 484, [1997] S.C.J. No. 84 (QL). In that case, the Supreme Court of Canada confirmed at para. 112 that Canadian law also requires that a real likelihood or probability of bias must be demonstrated and that a "mere suspicion" is not enough. Additionally, the reasonable person, about whom reference is made in the governing test, must be "informed". That is, a reasonable person must be informed not only of the relevant circumstances of the particular case, but also of the tradition of integrity and impartiality that are the backdrop for our judicial system and which are reflected in and reinforced by the judicial oath. In ***R. v. S. (R.D.), supra***, Cory J. stated:

> 116 Often the most significant occasion in the career of a judge is the swearing of the oath of office. It is a moment of pride and joy coupled with a realization of the onerous responsibility that goes with the office. The taking of the oath is solemn and a defining moment etched forever in the memory of the judge. The oath requires a judge to render justice impartially. To take that oath is the fulfilment of a life's dreams. It is never taken lightly. Throughout their careers, Canadian judges strive to overcome the personal biases that are common to all humanity in order to provide and clearly appear to provide a fair trial for all who come before them. Their rate of success in this difficult endeavour is high.
>
> . . .

[20] As there is a strong presumption in favour of judicial impartiality, the alleged grounds advanced to support recusal must be serious and convincing. In ***Wewaykum Indian Band,*** the Supreme Court of Canada stated:

> 59 … [W]hile the requirement of judicial impartiality is a stringent one, the burden is on the party arguing for disqualification to establish that the circumstances justify a finding that the judge must be disqualified.

[21] As the court noted in that case, there are no "textbook" cases of bias and in each case, the inquiry is highly fact-specific:

> 77 … Whether the facts, as established, point to financial or personal interest of the decision-maker; present or past link with a party, counsel or judge; earlier participation or knowledge of the litigation; or expression of views and activities, they must be addressed carefully in light of the entire context. There are no shortcuts.
> [emphasis added]

[30] Further, as Monnin JA. stated in ***R v Herntier***, 2019 MBCA 25 (CanLII):

> [9] … The inquiry into whether a decision-maker's conduct creates a reasonable apprehension of bias, as a result, is inherently contextual and fact-specific, and there is a correspondingly high burden of proving the claim on the party alleging bias: see *Wewaykum*, at para. 77; *S. (R.D.)*, at para. 114, per Cory J. As Cory J. observed in *S. (R.D.):*
>
> > … allegations of perceived judicial bias will generally not succeed unless the impugned conduct, taken in context, truly demonstrates a sound basis for perceiving that a particular determination has been made on the basis of prejudice or generalizations. One overriding principle that arises from these cases is that the impugned comments or other conduct must not be looked at in isolation. Rather it must be considered in the context of the circumstances, and in light of the whole proceeding. (Emphasis added; para. 141.)

[25] It is those legal principles, that test, and those considerations which I have considered in denying the plaintiff's motion for recusal.

## THE ARGUMENT OF THE PLAINTIFFS

[26] The plaintiff argues that I have demonstrated bias and created a reasonable apprehension of bias against the plaintiffs requiring recusal from this action based on:

i. my pre-judicial conduct; and

ii. my judicial conduct.

[27] In respect of my pre-judicial conduct, the plaintiffs note that I was an (elected) politician with the Conservative party of Canada and a member of the Executive, having been appointed the federal Minister of Justice in 2006. He states that in that context I delivered various speeches in which I allegedly and publicly "… expressed views against

abortion, abortion patients and abortionists." In the course of those speeches the plaintiffs submit that I, inter alia:

i. publicly expressed views against the courts and judges, particularly those hearing cases involving abortion and abortionists;

ii. criticized the Supreme Court of Canada;

iii. called "abortion rights" an "abuse of the ***Charter*** by the Supreme Court";

iv. criticized the Supreme Court of Canada's "radical agenda";

v. criticized the judicial appointment process;

vi. stated that Judges should adjudicate in a way that is "favourable to the social conservative viewpoint"; and

vii. condemned "activist judges".

[28] In support of these allegations, the plaintiffs rely primarily on the affidavit of Sara Domok, affirmed September 15, 2023, the legal assistant to the law firm retained by the plaintiffs in this action. In that affidavit, Ms. Domok cites a September 15, 2008 Hill Times article which speculates on why I was "quietly eased" out of the Justice portfolio and cites a public speech which I gave three years earlier, in my role as the Justice critic for the Official Opposition and elected member of Parliament. That speech was given approximately 20 years ago and is entitled "Abuse of the Charter by the Supreme Court." In that speech, I am quoted as apparently stating: "Do not look at the issue of abortion as an issue that stands alone. … this issue has a much broader significance in areas related to the policy of government … and the response of government to social problems generally."

[29] The article also alleges that I would seek to use the constitutionally enshrined "notwithstanding clause" to overturn Supreme Court decisions.

[30] In another speculative article attached as Exhibit E to the affidavit of Ms. Domok from approximately a decade ago entitled "Toews now a possible candidate for Supreme Court", I apparently praised the work of the American scholar Robert Bork, who said judges were imposing a set of values upon the American people" and that I also added "I submit that it's no different in Canada."

[31] Furthermore, the affidavit noted various criticisms leveled against me in respect advocating for "conducting hearings into the appointment of Supreme Court justices …"

[32] In the context of reviewing the various magazine and other published articles relied upon by the plaintiffs, I specifically asked counsel for the plaintiffs several times to refer me to any material in which I "expressed views against abortion, abortion patients, and abortionists" as alleged in the plaintiffs' brief. The short answer is, counsel was unable to do so.

[33] Assuming for the moment the accuracy of these media reports and even assuming that the issue of abortion is raised directly or even indirectly by the plaintiffs' claim (being mindful that this is in substance a wrongful dismissal suit), all the alleged comments attributed to me and relied upon by the plaintiffs deal with comments I made about the constitutional jurisdiction of the judicial arm of government to deal with matters of social policy, rather than voicing any personal opinion "against abortion, abortion patients and abortionists."

[34] In respect of my judicial conduct, plaintiffs' counsel argues that my alleged use of the term "Frankenstein" or "Frankenstein's monster" during our pre-trial discussions with reference to his pleadings indicates that I have prejudged the issues raised in his claim concerning the wrongful dismissal of the plaintiffs by the defendant.

[35] In his brief, counsel for the plaintiffs state that the use of the phrase "Frankenstein's monster" is a derogatory term used to refer to something that has been created "by the Devil". (para. 37 of the plaintiffs' brief) and that it has an "inherently evil connotation." (para. 47 of the plaintiffs' motion brief)

[36] In respect of the orders and directions I provided during the pre-trials I conducted, the plaintiffs took issue with the fact that I refused to schedule a summary judgment hearing or a trial date at the first pre-trial date and that I ordered particulars in this matter even though the defendant had filed a defence and had therefore "closed pleadings". The plaintiffs state that by ordering of particulars at this stage I was "demonstrating a lack of understanding or support for the Claim". (para. 43 of the plaintiffs' motion brief) Counsel submitted that "[o]rdering Particulars had the effect of delaying the Plaintiffs' prosecution of the Claim, impeding access to Justice." (para. 44 of the plaintiffs' motion brief)

[37] It is the plaintiffs' position that it was the court that unilaterally ordered these particulars. In the course of argument ,the plaintiffs stated at p. T38, lines 2 - 20:

> MR. HARWOOD-JONES: Okay, defence files a statement of defence, thereby cutting themselves off, under the rules, from the ability to later asked [sic] for particulars. Those are the rules. You come along, My Lord, and you say, "Nothwithstanding" - -
>
> THE COURT: Do you think I just came along and just said, you know, I think it would be a good idea to order particulars"

> MR. HARWOOD-JONES: Yes - - yes, exactly that is what you did and you ordered them violating the rules and delaying access to a trial. That's my submission.
>
> THE COURT: You mean the parties can't come and say, Look, we want particulars. And I can't say, You know, I think it's notwithstanding the close of pleadings, I think it is a good idea to order particulars in this case. You think that's a violation of the rules?
>
> MR. HARWOOD-JONES: I think it's a violation of the rule and it's appealable. …
>
> [Underlining added]

[38] The plaintiffs then proceeded to argue that because I ruled that the defamation was not suitable for summary judgment, I therefore dismissed all the other causes of actions raised by the plaintiffs and sent only the defamation suit forward to trial.

[39] The position of the plaintiffs was that the preliminary orders made during the pre-trials I conducted in this matter placed hurdles in the path of the plaintiffs and demonstrated that I did not have a "proper understanding of this case" and that "it represents a reasonable apprehension of bias for Your Lordship to put successive hurdles in the way of the plaintiff."

## THE ARGUMENT OF THE DEFENDANT

[40] The defendant states that it does not agree with the plaintiffs' contention that I showed bias during my decision-making, and further states that any of the justices of the court would have made the same procedural decisions I made.

[41] Furthermore, while taking no position in respect of the recusal motion itself, it did set out the law in its brief and provided certain background "to correct and clarify certain misstatements contained in the Plaintiffs' motion brief". In respect of the law, there is no dispute raised between the parties, both relying on the ***Johnson*** case referred to

earlier. However, the submissions of the defendant in respect of its understanding of what occurred at the pre-trial conferences is of assistance to the court as these pre-trial proceedings were conducted by teleconference and no formal transcript of the discussions and decisions exists, other than the record consisting of the pre-trial materials filed by the parties, the pre-trial hearing memoranda or any formal orders which might have been produced. That is the usual situation where all parties are represented by counsel.

[42] The defendant's motion brief comments on various matters in the plaintiffs' motion brief which it states, "mischaracterizes certain pre-trial management proceedings and decisions which the Defendant wishes to correct." These include statements by the plaintiffs that the court:

i. refused to schedule summary judgment at pre-trial conference no. 1;

ii. allowed the defendant to seek partial summary judgment/ trial of an issue at pre-trial conference no. 2;

iii. failed to provide any avenue for adjudication of certain causes of action in the claim, thereby effectively dismissing them without a hearing;

iv. improperly ordered particulars;

v. ordered partial summary judgment; and

vi. ordered that only defamation shall proceed to trial.

[43] Expanding on the above-noted, the defendant states in its brief that the court did not refuse to schedule a summary judgment hearing at pre-trial conference no. 1, but that summary judgment was neither requested nor considered at that pre-trial

conference. Furthermore, the defendant states that at pre-trial conference no. 2, no decision was made with respect to summary judgment, stating that the court advised that if one or both of the parties intended to bring an application for summary judgment, they were to contact the court by September 21, 2022, to set a further pre-trial hearing.

[44] The defendant states that at pre-trial no. 2, trial dates were scheduled, thereby providing an avenue for adjudication of all claims that remained outstanding at that time. In respect of the ordering of particulars, the defendant states that King's Bench Rule 50.05(4)(i) permits the pre-trial judge to make any order or direction that simplifies the issues and eliminates frivolous claims or defences. Following the ordering of particulars, the plaintiffs abandoned their claim for breach of statutory duty, thereby simplifying some of the issues.

[45] In respect of allegedly ordering partial summary judgment, the defendant points out that the only decisions that have been made at this point are procedural in nature. It notes that contrary to the position of the plaintiffs, partial summary judgment has not been ordered. In respect of a summary judgment application, the defendant points out that the defendant was granted leave to bring a motion for summary judgment or trial of an issue on certain issues.

[46] In respect of allegedly ordering that only defamation shall proceed to trial, the defendant states that the plaintiffs insisted that a clause be inserted into the order that stated that defamation proceed to trial and not that defamation only proceed to trial.

[47] Furthermore, the defendant argues that the plaintiffs' motion for recusal has not been brought in a timely manner. It states that overall, the plaintiffs' concerns appear

to arise from the ordering of the particulars and the order made at the pre-trial on November 4, 2022, granting the defendant leave to file a motion for summary judgment and a motion to request a trial of an issue on certain issues. The plaintiffs filed this recusal motion approximately 10 months after the last conduct complained of. The defendant relies on the decision of the Supreme Court of Canada in ***R. v. Curragh Inc.***, [1997] 1 S.C.R. 537, which held that a motion for disqualification should be brought within a reasonable time after discovery of the alleged bias or the formation of the perception of the apprehension of bias.

## **ANALYSIS AND DECISION**

[48] In dismissing the plaintiffs' motion to recuse myself from this action, I have considered the submissions of both parties. Although the defendant did not deal with the first argument of the plaintiffs, that being whether pre-judicial comments made by me amount to bias or a reasonable apprehension of bias, the defendant did make very helpful observations and submissions in respect of the plaintiffs' submission that my pre-trial procedural rulings were put in place to "impede Dr. Hahlweg's access to justice".

[49] I will deal with the objections raised by counsel for the plaintiffs to my pre-trial rulings first. As I noted earlier, where the parties are all represented by counsel, these pre-trial hearings are usually not formally recorded as is the case with open court trials, motions or applications. However, there is often some important information found in the pre-trial memoranda drafted by the court and reviewed by counsel upon their receipt. A pre-trial memorandum does not purport to be a transcription of the proceedings, but is rather, focused on putting into writing the general discussions and the directions provided

by the court. In some cases, the directions or rulings of the court are set out in a formal order.

[50] In my opinion, based upon the submissions of counsel, and the record and documents available to me, including my own notes taken at the pre-trial conferences upon which my memorandum are based, the plaintiffs' account of the procedural pre-trial rulings do not correspond with the documents and record available to the court in respect of the pre-trial hearings in this case.

[51] My own recollection, and after a consideration of the available material and the submissions of both counsel, has led me to the conclusion that the submissions of counsel for the plaintiffs are erroneous in a number of respects. Some of those errors of fact are borne out by the consideration of the material before the court, including the plain reading of the pre-trial memoranda issued by the court in this action. Those errors have been articulated by counsel for the defendant who disagree with counsel for the plaintiffs that:

i. the court refused to schedule summary judgment at pre-trial conference no. 1;

ii. the court allowed the defendant to seek partial summary judgment/trial of an issue at pre-trial conference no. 2;

iii. the court failed to provide any avenue for adjudication of certain causes of action in the claim, thereby effectively dismissing them without a hearing;

iv. the court improperly ordered particulars;

v. the court ordered partial summary judgment; and

vi. the court ordered that only defamation shall proceed to trial.

[52] In my opinion, the defendant's submissions in this respect are a fair and accurate summation of those errors. There is no need to repeat in detail what those submissions are as they are set out in the context of the defendant's submissions above, as well as more extensively in its brief.

[53] These submissions are also consistent with my own recollection and notes in my bench book. For example, counsel for the plaintiffs submitted at this hearing that the order for particulars was made by the court on its own initiative and essentially "out of the blue". Counsel for the plaintiffs stated, at p. T29, lines 17 - 33:

> MR. HARWOOD-JONES: … There is your require[ment] for particulars to be filed, demonstrating, we submit, that you did not understand the claim and it needed to be further particularized.
>
> THE COURT: The counsel on the other side asked for particulars and I agreed.
>
> MR. HARWOOD-JONES: Counsel - -
>
> THE COURT: You - - are saying that they didn't - - you think I came out of the blue and said - -
>
> MR. HARWOOD-JONES: Yes.
>
> THE COURT: -- order particulars?
>
> MR. HARWOOD-JONES: Yes, because they filed a defence. They can't ask for particulars after they file a defence. No, that was your idea, My Lord.
>
> [Underlining added for emphasis]

[54] This error on the part of counsel for the plaintiffs is easily dealt with. My bench book notes from the pre-trial hearing on September 30, 2021, indicate that it was a particular counsel – Mr. Peter Mueller – one of two counsel (including Ms. Lazar) representing the defendant at that pre-trial who raised the issue of requesting particulars.

The court record itself discloses that at paras. 70-73 of the pre-trial brief filed by the defendant on September 23, 2021, the following submission was made:

> 70) The Statement of Claim does not set out the words, verbatim, that allegedly defamed the Plaintiffs, nor does it set out the identity of the person alleged to have made the statements, the identity of the person or persons to whom the statements are alleged to have been published, the circumstances of the alleged publication or the alleged defamatory meaning of the statements, all of which are required when pleading defamation.
>
> 71) As such, the Defendant intends to ask the Pre-Trial Judge to strike out those paragraphs in the Statement of Claim relating to the Plaintiff's defamation claim.
>
> 72) In the alternative, the Defendant will seek particulars so that it can properly respond to the allegations.
>
> 73) Such a motion can be considered even after a Statement of Defence has been filed.
>
> ***Davis v. Cote MBQB November 6, 2000***
>
> [Underlining added for emphasis]

[55] Rather than striking the plaintiffs' pleadings in this respect because of the failure to properly plead defamation as requested by the defendant, I took the more favourable approach insofar as the plaintiffs' position is concerned, by choosing instead to order particulars. This direction is set out in the amended pre-trial hearing memorandum dated September 30, 2021, and complied with by the filing of the particulars by the plaintiffs on October 15, 2021.

[56] In respect of other concerns about the accuracy of the submissions made by counsel for the plaintiff, I would refer, for example, to counsel's submission that I refused to schedule summary judgment at pre-trial conference no. 1 and that I effectively dismissed all the plaintiffs' other causes without a hearing when I ordered that the

defamation action brought by the plaintiffs was not amenable to a summary judgment hearing and that only the defamation action should proceed to trial.

[57] In response, I can state that the issue of scheduling hearings related to summary judgment was not raised at the first pre-trial by the parties, but was dealt with extensively in the second pre-trial memorandum.

[58] In respect of the plaintiffs' allegation that I effectively dismissed every cause of action brought by the plaintiffs other than the defamation action, I would note that the face of the order filed on December 21, 2022, states that the "claims of defamation are not suitable for summary judgment and shall proceed to trial". The other portion of that order, in accordance with the practice and rules of the court, simply grants leave to bring a motion for summary judgment or a motion for a trial of an issue on certain issues. The court did not, as argued by the plaintiffs, order partial summary judgment or in any way dispositively deal with the other claims.

[59] Furthermore, as is implicit if not express in the ruling of the Court of Appeal, the orders which the court made in respect of these matters were interlocutory and not dispositive of the causes of action brought by the plaintiffs in their statement of claim.

[60] There is no basis to suggest as counsel for the plaintiff did, that the procedural rulings I made were intended to create hurdles to deprive the plaintiffs of justice in that my conduct "became one-sided interference against the Plaintiffs and the *bona fide* adjudication of their Claim." (para. 63 of the plaintiffs' brief) As counsel for the defendant stated, any of the justices of the court would have made the same procedural decisions as I made.

[61] Before dealing with the issue of my pre-judicial comments creating bias or a reasonable apprehension of bias such as that calls for my recusal from this action, I specifically want to deal with the allegation over the alleged use of the word "Frankenstein" or "Frankenstein's monster" during one of the pre-trial hearings.

[62] The plaintiff did not file or otherwise produce any evidence that the word "Frankenstein" or the phrase "Frankenstein's Monster" was used by me during the pre-trial hearing. I have no recollection of the use of the word "Frankenstein" during the pre-trial hearing nor is the term "Frankenstein's monster" a phrase that I would use. However, I do clearly recall the concern I had in respect of the numerous causes of action melded together in the plaintiffs' statement of claim in respect of what was essentially a wrongful dismissal action and a breach of contract and the damages that flow from a breach of either.

[63] In particular, the issues raised by the following actions in the context of this statement of claim caused me concern about the ability to manage this trial in an efficient and effective manner:

i. Rather than utilizing the usual discovery procedures applicable to this kind of claim, the plaintiffs were advancing a claim for an interim, interlocutory and permanent injunction that the defendant be required to disclose and provide to the plaintiffs numerous classes of documents identified generally under six different sub-headings, allegedly in the possession of the defendant and in the possession of at least one third party (see para. 1 (a) (i) through (vi) of the statement of claim);

ii. Allegations of discrimination, and harassment of the individual plaintiff (para. 13 of the statement of claim);

iii. Breach of contract by the defendant;

iv. The individual plaintiff's claimed status as a "dependent contractor" as opposed to, presumably, an "employee" or a "contractor";

v. The constructive dismissal of the individual plaintiff either as an aspect of "wrongful dismissal" or as a cause of action on its own;

vi. Allegations of the breach of numerous statutes by the defendant in the context of advancing a breach of statutory duty cause of action, in respect of which the plaintiffs' claim cites numerous statutes, by-laws, codes, regulations and standards of practice, those being set out at para. 59 at sub-paragraphs a) through g) of the statement of claim;

vii. A breach of fiduciary duty by the defendant arising out of the professional relationship of trust with the individual plaintiff as well as a contractual relationship; and

viii. A defamatory "campaign" conducted by the defendant.

[64] In looking at the breadth of the allegations raised by and advanced within the statement of claim, it quickly became apparent to me at the first pre-trial that the defendant's inability to provide me with even a rough estimate of the time required for trial was well founded.

[65] In my opinion, aside from the unnecessary complexity that this multiplicity of actions presented, the claim for injunctive relief when the usual discovery procedures

were available, the multiplicity of statutory and regulatory provisions related to the action for breach of statutory duty, and the action for defamation without having properly pleaded the elements required to be particularized in a statement of claim, were of particular, although not of exclusive, concern.

[66] While it is true that the defendant could have asked for particulars in respect of the deficiencies in the plaintiffs' pleadings prior to filing its defence, given that the horse was out of the barn, so to speak, I came to the conclusion that instead of entertaining a motion to strike the claim, it would be much more cost and time effective to order the particulars requested by the defendant. Therefore, pursuant to the broad authority conferred by the rules, I proceeded to order the particulars.

[67] The order for particulars and the other orders or directions provided in the course of the pre-trial conferences resulted in a much more coherent and manageable trial process. Counsel for the plaintiffs produced the requested particulars, he apparently is not proceeding with a request for the equitable remedy of injunctive relief for the discovery of documents, he discontinued the very questionable, and, in this context, at least redundant statutory duty cause of action and agreed to a fixed and much shorter trial date that he originally proposed, within a reasonable period of time.

[68] Once the trial process and related procedural matters were clarified in this fashion, I also thought it appropriate to point out to the parties at the June 2, 2022 pre-trial hearing the availability of court supervised mediation which parties often voluntarily employ to reach a settlement. In this respect, I stated in the June 2, 2022 pre-trial memorandum after the notation that the plaintiffs advised that they were not proceeding

with the breach of statutory duty action: "If the parties intend to apply for a JADR [Judicially Assisted Dispute Resolution], they are to proceed in the usual manner by sending the appropriate letter to the Chief Justice **on or before June 30, 2022**."

[69] Assuming for the purposes of this argument that the word "Frankenstein" was used, the suggestion by the plaintiffs that the criticism of the plaintiffs' pleadings with the use of that word to describe the unwieldy and otherwise troublesome procedural matters raised by the plaintiffs' pleadings was somehow nefarious on my part or was anything more than a way to express concern over the troubling state of the pleadings and the future of the proceedings, is simply unfounded. If that word was used, perhaps my concern over the state of the pleadings and the future progress of the action, could have been more aptly expressed as a "hodge-podge", that is, a mixture of many, and not particularly cohesive or complimentary, ingredients. I would certainly not have used the word "Frankenstein", even during a relatively informal teleconference pre-trial hearing, to describe any of the parties in this action or as counsel for the plaintiffs speculates, to characterize the plaintiffs as "evil".

[70] In respect of public speeches and other statements which are relied upon by the plaintiffs, they have been improperly characterized by the plaintiffs as attacks on abortion, abortion patients and abortionists, or that abortion and abortionists should be illegal. When I asked counsel for the plaintiffs during the hearing to point out where I had ever made statements to that effect, he was unable to do so. He simply referred to the materials he had filed and stated those were the materials he was relying on.

[71] The materials themselves do not support the position and arguments of the plaintiffs. The materials repeatedly reiterate the position that I took while in political office, namely that it was the constitutional jurisdiction of the legislative and executive branches of government to legislate in respect of matters of social policy and that this jurisdiction should not be improperly appropriated by the third branch of government.

[72] Even the newspaper and magazine quotes attributed to me by the plaintiffs and relied upon in their material, including those from partisan political sites such as the Liberal Party website, were always made in the context of the relationship between social policy and the constitutional separation of powers. While the plaintiffs have chosen to limit the matters of social policy raised in the material being relied upon, this was a theme I spoke about publicly to numerous community, political, business, legal, religious and social organizations, in addition to parliamentary and legislative speeches virtually every month during my time in office while serving in the legislative and executive arms of government. My comments regarding the separation of the constitutional powers in Canada were not confined to the very narrow context of social conservative policy or only to audiences composed of people who supported social conservative views. For example, I took the same public position in respect of the "prisoners' voting" case decided by the Supreme Court of Canada in a 5-4 decision. (See ***Sauvé v. Canada (Chief Electoral Officer)***, 2002 SCC 68, [2002] 3 S.C.R. 519)

[73] The plaintiffs also raise other political positions that I espoused while I was a member of the legislative and/or executive branches of government. These appear to be unrelated to the main thrust of their argument about abortion or even tangentially

relevant to the case in any way. For example, the plaintiffs take issue with the position that I advanced almost 20 years ago that the executive branch of government in exercising its exclusive power to appoint Supreme Court of Canada justices, should hold public committee hearings. A hearing of this nature in fact was held in respect of the appointment of Mr. Justice Rothstein to the Supreme Court of Canada where in fact I participated in the all-party parliamentary committee struck for that purpose.

[74] The test in respect of the issue of impartiality has been set out earlier in these proceedings, but it is instructive to reproduce that test. As summarized by Joyal J. (as he then was) in ***Kalo v. Manitoba (Human Rights Commission)***, 2008 MBQB 92, 226 Man.R. (2d) 139 (QL):

> [18] The test had been previously reaffirmed in ***R. v. S. (R.D.)***, [1997] 3 S.C.R. 484, [1997] S.C.J. No. 84 (QL). In that case, the Supreme Court of Canada confirmed at para. 112 that Canadian law also requires that a real likelihood or probability of bias must be demonstrated and that a "mere suspicion" is not enough. Additionally, the reasonable person, about whom reference is made in the governing test, must be "informed". That is, a reasonable person must be informed not only of the relevant circumstances of the particular case, but also of the tradition of integrity and impartiality that are the backdrop for our judicial system and which are reflected in and reinforced by the judicial oath.

[75] In reflecting on the elements of that test, as well as the broader context of the allegations raised, I find there is no "real likelihood or probability of bias" that has been demonstrated by the plaintiffs in respect of the matters raised by this statement of claim or the parties who are set out in the style of cause. In my opinion, a reasonable person, informed of not only the relevant circumstances of this particular case, but also of the tradition of integrity and impartiality that are the backdrop for our judicial system and

which are reflected in and reinforced by the judicial oath would not come to the conclusion that there is a real likelihood or probability of bias.

[76] I have had the great honour and privilege of serving in all three constitutional branches of government during my career: the legislative, the executive, both at the provincial and federal level, and now as a member of the federal judiciary, appointed to a provincially created superior court. In respect of each of the three branches of government, I have also understood very clearly my constitutionally mandated responsibilities in respect of each office and made the appropriate public affirmation to that effect before taking office. When I left my provincial positions, both legislative and executive, where I had publicly affirmed to carry out my constitutional responsibilities, I subsequently publicly affirmed my obligation to carry out my federal constitutional responsibilities, first as a member of the legislative body of the federal Parliament and then some years later as a member of the federal executive branch of government, holding a number of cabinet positions. I understand and respect the significant constitutional distinction not only between the legislative branch of government and the executive branch of government generally, but conducted myself in a manner that was always mindful of my role in the federal executive and the federal Parliament in contradistinction to the legislative and executive offices I held previously in the provincial legislature. As an informed person understands, and which the judicial arm of government has repeatedly recognized, the provincial legislatures and our federal Parliament are also constitutionally entrenched courts that have distinct and separate constitutional responsibilities.

[77] My understanding of the legislative, executive and judicial responsibilities I undertook over the course of my career is also grounded in the legal positions I held prior to becoming a publicly elected official. This included the important responsibilities I exercised as a Crown prosecutor, with its important discretionary powers, and Crown counsel in a civil legal context, as well as the Director of Constitutional Law for the province.

[78] The legal, ethical and constitutional obligations and responsibilities I carry out in the context of my federal judicial appointment to a provincial superior court are significant and not lost on me. While exercising my judicial obligations and responsibilities, I very often deal with people whom I have met and interacted with in the context of my prior positions. These include former provincial and federal constituents (my federal riding had the largest population of any riding in Manitoba at the time), and non-elected and elected political participants (both from parties I was politically affiliated with and those who were active in other political parties) and other residents from across the province.

[79] Despite the significant prior interaction with members of the public in the context of my former positions in the other two branches of government, both provincially and federally as well as in my executive role as the regional federal cabinet minister for Manitoba, I have very rarely come to the conclusion - perhaps no more than three or four times over the course of almost 10 years on the bench - that recusal was necessary. I might add, those recusals have never been on account of political or even personal views which I may have held prior to coming to this branch of government. I made those decisions to recuse myself informally, and on my own initiative, based on essentially the

criteria set out in the case law which I have referred to in these reasons. In a province with a relatively small population, if being familiar with the people I have previously met or associated with, or on the basis of holding opinions which I may have publicly expressed in the context of my prior service with the other branches of government was the full scope of the test upon which I should consider recusing myself, my time on the bench would be a very unproductive if not empty tenure.

## **CONCLUSION**

[80] I have not addressed the somewhat puzzling position of the plaintiffs that I may be biased or give the appearance of bias in respect of the individual plaintiff doctor because he is performing a specific medical procedure and at the same time favouring the defendant medical clinic which arguably plays a much larger role in providing the necessary support to enable several doctors to carry out this same procedure. Considering my reasons, it is not necessary for me to do so.

[81] In any event, based on the evidentiary material filed, the jurisprudence submitted, the oral and written submissions made by counsel, I have concluded that it is not inappropriate for me to continue to preside over this matter, including presiding over the trial of the substantive causes of action being prosecuted by the plaintiffs and scheduled to take place within the next few months. The plaintiffs have not established any factual or legal basis requiring me to recuse myself. Accordingly, the motion of the plaintiffs is dismissed. The defendant shall have its costs on the usual tariff basis in any event of the cause.

_____ J.