IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *McEwan v. Canadian Hockey League,* 2025 BCSC 455

Date: 20250314
Docket: S190264
Registry: Vancouver

Between:

James Johnathon McEwan, as Representative Plaintiff

Plaintiff

And

Canadian Hockey League/ Ligue Canadienne de Hockey, Western Hockey League and, Canadian Hockey Association/ Association Canadienne de Hockey d.b.a. Hockey Canada

Defendants

Before: The Honourable Madam Justice Sharma

Reasons for Judgment

Counsel for the Plaintiff:	N.C. Hartigan D. Lennox
Counsel for the Defendants:	A.L.W. D'Silva S. Wright
Place and Date of Hearing:	Vancouver, B.C. December 13, 2024
Place and Date of Judgment:	Vancouver, B.C. March 14, 2025

[1] This judgment addresses an application filed by the defendants, Canadian Hockey League (the "CHL") and others, on July 22, 2024, seeking an order that:

a) I recuse myself from this action on the basis of there being a denial of procedural fairness and/or a reasonable apprehension of bias;

b) the two judgments already issued be set aside; or

c) in the alternative, I grant leave to the defendants to file supplementary evidence on the certification application.

[2] The plaintiff opposes the application and submits that the evidence falls short of meeting the accepted test to establish bias or procedural unfairness.

I. BACKGROUND

[3] This is a potential class action started by a notice of civil claim filed on January 9, 2019. I was appointed as the case management judge on February 14, 2020. The plaintiff's application for certification was filed on May 4, 2021, supported by four affidavits from former players in various hockey leagues falling under the CHL umbrella, and three experts.

[4] I have issued two judgements in relation to this matter:

a) *McEwan v. Canadian Hockey League*, 2022 BCSC 1104 [*RFJ #1*], which addresses an application by the defendants to strike, in whole or in part, affidavits filed by the plaintiff in support of his application for certification as a class proceeding on the basis that they were inadmissible.

b) *McEwan v. Canadian Hockey League*, 2023 BCSC 2272 [*RFJ #2*], which addresses and dismisses the application by the defendants for an order that the representative plaintiff, an expert and others who filed affidavits in support of certification be cross-examined on those affidavits.

[5] In *RFJ #1*, I described the parties and the actions at paras. 5–9, 11–12, and 16–17 as reproduced at para. 3 of *RFJ #2*:

[5] The action is grounded in negligence and breach of fiduciary duty. The plaintiff seeks damages for personal and physical injury, psychological injuries, special damages, cost of future care, and loss of income both past and future, and loss of housekeeping capacity.

[6] The defendant Canadian Hockey League/Ligue Canadienne de Hockey and the defendant Canadian Hockey Association/Association Canadienne de Hockey, doing business as Hockey Canada ("CHL") are federal corporations constituted under the *Canada Not-for-profit Corporations Act*, S.C. 2009, c. 23. The CHL has offices in Calgary, Ottawa, and Toronto and operates regional centres in Ontario and Québec.

[7] The CHL acts as an umbrella organization for the three major junior hockey leagues operating in North America. The leagues are for players 16 to 20 years of age. Those leagues are:

a) the defendant Western Hockey League ("WHL"), which is incorporated under the laws of Canada and has an office in Calgary with member franchise clubs in Alberta, Manitoba, Saskatchewan, British Columbia, and the states of Washington and Oregon.

b) the Ontario Hockey League ("OHL"); and

c) the Quebec Major Junior Hockey League.

[8] This proposed class action is brought by James McEwan on behalf of himself and the following proposed class of individuals: any person, or their estate, resident in Canada who played in the CHL from August 21, 1974, until a date to be fixed by this Court.

[9] In addition to Mr. McEwan's April 15, 2021 affidavit, the plaintiff relies on affidavits from proposed class members Myles Stoesz, Rhett Trombley, and Eric Rylands (collectively with Mr. McEwan, the "Players").

…

[11] The notice of civil claim also contains the following allegations:

a) It had been known for decades that multiple blows to the head can lead to long-term brain injury including memory loss, dementia, depression and related symptoms. It can also lead to chronic traumatic encephalopathy ("CTE"), which is a catastrophic disease that was long associated only with boxing. CTE, until recently, could only be confirmed through autopsy.

b) Scientific evidence has, for decades, linked brain trauma to long-term neurological problems, but this was not known by the players.

c) Medical evidence show that symptoms can reappear hours or days after the injury.

d) Once a person suffers a concussion, they are up to four times more likely to sustain a second one, and each successive concussion increases the seriousness of health risks and likelihood of future concussions.

> [12] It is alleged that at all material times, the defendants should have known or ought to have known that multiple incidents resulting in blows to the head would lead to long-term brain injury.
>
> …
>
> [16] The plaintiff has filed two expert reports in support of the certification application. The first is from Dr. Virji-Babul, a physical therapist and neuroscientist at the University of British Columbia. The defendants do not challenge this affidavit.
>
> [17] The second expert affidavit was completed by Dr. Skye Arthur-Banning who is a professor within the Department of Parks, Recreation and Tourism Management at Clemson University in Clemson, South Carolina. He teaches Amateur Sport Management. The defendants challenge Dr. Arthur-Banning's report on the basis that he lacks the requisite expertise and/or it cannot meet the threshold of necessity. The defendants also submit that it is not relevant nor reliable.

[6] The defendants delivered their response to the certification application and supporting affidavits on March 23, 2023 (after *RFJ #1* was issued). It consists of 14 affidavits, including expert opinion from four experts.

[7] The defendants filed an application for leave to appeal *RFJ #2* on January 29, 2024. That application was set to be heard by the Court of Appeal on May 7, 2024, but instead, the defendants sought an order adjourning that appeal so that this application could be filed and heard. That adjournment was granted. The defendants filed this application on July 22, 2024.

[8] The defendants base their application that I recuse myself from this action on the following five grounds:

a) my comments during the hearing that led to *RFJ #1*;

b) the denial of the defendants' application for cross-examination after making comments the defendants say suggested that opportunity would be available;

c) my mischaracterizing or ignoring of central positions of the defendants;

d) the refusal to allow cross-examination based on a concern for delay when neither side advanced that argument; and

e) the limiting of the defendants' oral submission on this application in a manner that gives rise to reasonable apprehension that I have prejudged the application.

II. LEGAL PRINCIPLES

[9] The parties agree on the legal principles that apply to applications for recusal. The leading case is *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, where the Court summarizes the test as follows:

> [20] The test for reasonable apprehension of bias is undisputed and was first articulated by this Court as follows:
>
> > … 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. [Citation omitted.]

[10] The defendants stress that the apprehension of bias test is an objective one that focuses on the appearance of a fair adjudicative process. The defendants can succeed if they establish an apprehension of bias; they need not demonstrate actual bias. That is because, among other things, public confidence in the legal system must be rooted in a fundamental belief that those who make judgements must "always do so without bias or prejudice and must be perceived to do so": *Wewaykum Indian Band v. Canada*, 2003 SCC 45 at para. 57 [*Wewaykum*].

[11] The parties agreed that each case is highly fact-specific and must be examined contextually: *Taylor Ventures Ltd. (Trustee of) v. Taylor*, 2005 BCCA 350 at para. 7, summarizing *Wewaykum*. The plaintiff also referred to *Pereira v. Dexterra Group Inc.*, 2023 BCCA 201, which, in addition to citing the preceding quote, held there is a "strong presumption" of judicial impartiality that is not easily displaced, and therefore, a party seeking recusal has a high burden to meet: at paras. 11–12.

[12] The plaintiff also cited commentary that judges must not give in to the temptation to recuse themselves in the face of an allegation as that would amount to

"taking the easy way out": *Sawridge Indian Band v. Canada*, 2005 FC 607 at para. 153 [*Sawridge*]; see also *Broda v. Broda*, 2000 ABQB 948 at paras. 22–23. In both these cases, the courts affirmed the following words of McEachern C.J.B.C. from *G.W.L. Properties Ltd. v. W.R. Grace & Co. of Canada Ltd.*, 74 B.C.L.R. (2d) 283, 1992 CanLII 934 (C.A.):

> 13 A reasonable apprehension of bias will not usually arise unless there are legal grounds upon which a judge should be disqualified. It is not quite as simple as that because care must always be taken to insure that there is no appearance of unfairness. That, however, does not permit the court to yield to every angry objection that is voiced about the conduct of litigation. We hear so much angry objection these days that we must be careful to insure that important rights are not sacrificed merely to satisfy the anxiety of those who seek to have their own way at any cost or at any price. …

[13] The Court of Appeal also provided guidance in *Middelkamp v. Fraser Valley Real Estate Board*, 83 B.C.L.R. (2d) 257, 1993 CanLII 2884 (C.A.), which was cited by both courts in *Sawridge* and *Broda*:

> 11 … bias does not mean that the judge is less than unfailingly polite or less than unfailingly considerate. Bias means a partiality to one side of the cause or the other. It does not mean an opinion as to the case founded on the evidence nor does it mean a partiality or preference or even a displayed special respect for one counsel or another, nor does it mean an obvious lack of respect for another counsel, if that counsel displays in the judge's mind a lack of professionalism.
>
> 12 The relationship between bench and bar is sometimes difficult. If the system is to work, there must be restraint on both sides and also an understanding by the bar of the judicial process. The judges rarely come to anything with a closed mind.

[14] The defendants emphasize, and I accept, that the application was only brought after careful consideration. They submit that the application is based on the cumulative effect of each of the factors identified above, rather than based on any single factor. Nevertheless, it was apparent that they placed particular emphasis on concerns relating to comments made during the hearing that led to *RFJ #1*.

III. ANALYSIS

[15] I will address each ground separately before considering whether their cumulative effect created an apprehension of bias.

A. Comments of the Court

[16] I find it convenient to combine the first two grounds raised by the defendants.

[17] The impugned comments relate to two issues. The defendants submit I made comments that revealed “preconceived views on whether the CHL has ‘enforcers’ or encourages players to fight”. In part, they argue the comments are objectionable because they related to something not at issue at the first hearing.

[18] Their position is based on the extracts from the hearing reproduced below. All comments come from a hearing that lasted one day. As noted, the issue at the application was whether substantial portions of the plaintiff’s affidavits should be struck as being inadmissible.

> COUNSEL: … Now, this is getting to the core of it. Okay, why did you feel encouraged? What was it? But to just to tell me that you felt encouraged...
>
> THE COURT: So your client is coming to court and saying that they didn't encourage – that fighting is not encouraged in minor hockey.
>
> COUNSEL: No. I'm saying -- what I'm saying is we're -- and again this, you know, an issue that we're going to have to deal with on the merits one way or the other. But what I'm saying is my client needs to be able, all right, to consider how…what they're saying has occurred, how it has occurred, and how we can address it…these may be localized examples, it may be broader but we just don't know, and what is the prejudice for them to identify and provide proper foundation for why they felt encouraged …
>
> THE COURT: Well, they -- the kind of evidence they're giving is I was the enforcer. I mean, we're talking about enforcers in hockey, that's not something unknown, is it? I mean, you're not trying to tell me that teams don't have enforcers, are you?
>
> COUNSEL: No, I'm saying that, all right, well, this is –
>
> THE COURT: Teams don't want -- don't recruit enforcers to be on their team, that's -- you're not challenging that aspect of their evidence, are you?

[19] The second comments relate to the defendants' assertion that the Court “repeatedly made comments and findings suggesting that the defendants' concerns with the admissibility” of the affidavits would be addressed through subsequent cross-examination.

[20] In support of this proposition, the defendants rely on my comments from the hearing reproduced below:

a) In response to the defendants' argument that Dr. Arthur-Banning's evidence should be struck because the studies underlying it may be unreliable:

> That's for you to cross-examine him on; right? I mean, you might be right. So then you -- then you would undermine his opinion by saying well, you relied on this study and you take him through it. It doesn't -- that goes perhaps to weight. How does it go to admissibility?

b) In response to the defendants' argument that the portions of the affidavits were inadmissible because the affiant did not attest to the identities of the coaches and trainers that pressured them to fight:

> So you can ask him in cross-examination; right?
>
> […]
>
> And their players say I was basically recruited to be an enforcer ... And does that prove the plaintiff's case? I don't know because it would have to be subjected to cross-examination. But in cross-examination you -- what they're saying in their affidavits is that's what I felt.
>
> […]
>
> Whether that's the league's fault you would test that in cross-examination […]

c) In response to the defendants' argument that the plaintiff's evidence that he was encouraged to fight lacked particulars:

> Isn't this a similar kind of thing. "I was trained and groomed to be an enforcer". So he can say that […] Because it necessarily incorporates a number of things that he can be cross-examined on then.
>
> […]
>
> Well, I think that's what his whole affidavit talks about […] I can't make any findings on that. Not saying that he does it well or that it's not very weak but he's telling the story, which he's allowed to do I think, of this is my experience in hockey […] should a judge at the end of the day place weight on that, I don't know because that will be tested.

[21] The defendants also rely on the July 24, 2024 affidavit of Aaron Kreaden, counsel who represented the defendants. He was involved in preparing the defendants' evidence in response to the certification application and argued the applications that led to *RFJ #1* and *RFJ #2*.

[22] Mr. Kreaden deposed that he was aware that the defendants had challenged one of the plaintiff's experts during the hearing for *RFJ #1*. He also deposed that "in

response to submissions that had been made about Dr. Banning's evidence, Justice Sharma held at para. 211 of [*RFJ #1*] that 'it may be that other evidence or cross-examination of Dr. Arthur–Banning will impact the weight attached to his report'". Mr. Kreaden continued that "had we known at the time that the defendants would likely not have the opportunity to cross-examine Dr. Banning, we would have attempted to obtain further evidence by way of affidavit to address certain issues that would have otherwise been addressed on cross-examination".

[23] The plaintiff submits that the Court's comments about enforcers do not reveal a closed mind, but amounted to simply asking questions about the concept of enforcers to better understand the defendants' position. He added that the Court was not in a position to know what the defendants' evidence would be or what evidence of the plaintiff's the defendants expected to contest as they had not filed their affidavit material.

[24] However, the defendants argue the fact that the Court's comments were made in the absence of defence evidence heightens the perception of bias. Their point is that prior to seeing the evidence they were to file, the comments can be seen as suggesting the issue could not be contested. The defendants' submission, put it this way: in response to their argument that "portions of [players'] affidavits were rife with unattributable hearsay… which [they] could not meaningfully investigate… [the Court] responded by noting with some incredulity that the [d]efendants could not be contesting this evidence and by suggesting that she could take judicial notice of it".

[25] In my view, the defendants' submissions and evidence do not support the perception of bias.

[26] As a preliminary point, I do not agree the exchanges with the Court can be described as my making findings about the potential for cross-examination, since there is no procedural guarantee for that under the *Supreme Court Civil Rules*.

[27] Mr. Kreaden articulated a belief that his clients' position in the litigation had been prejudiced based on his perception that the Court signalled cross-examination was likely, while later refusing it. However, the Court's exchange with counsel at the first hearing was about the admissibility of the plaintiff's evidence and the basis for the defendants' objections.

[28] At all times counsel can be taken to have understood that cross-examination is not available as of right and, if pursued, would be the subject of a future application, on a fuller record that, by then, would include defence affidavits. On such an application and record, the defendants would need to satisfy the applicable test. Comments made in the course of testing a party's position on an earlier application, concerned with a different issue and based on a different record, would not suggest to an informed bystander that a judge would approach such future application with a closed mind, or in favour of one party over another.

[29] The plaintiff submits the defendants' choice to bring the strike application and cross-examination application separately was a strategic decision of their own choosing, which cannot give rise to an allegation of bias. They also contend the Court's comments do not amount to promises.

[30] The defendants agree the comments were not promises, but submit it amounted to "representations of the process that would likely be followed". They continue by submitting that having made that "representation", the Court's not allowing cross-examination gives rise to a perception of bias since the departure from that representation was "based on reasoning that suggests that the [Court] never intended to allow examinations in the first place" (emphasis added).

[31] I reject that allegation. As explained above, the comments about cross-examination were part of the Court's exploration of the basis for objections on admissibility. Additionally, they were made in the absence of any evidence being filed by the defendants. Viewed objectively in the proper context, there is no basis for the surprising submission that the Court's comments were made in bad faith.

[32] Considering all of the above, the situation is distinguishable from the facts discussed in *Osterbauer v. Ash Temple Ltd.*, 169 O.A.C. 301, 2003 CanLII 6614 (C.A.), upon which the defendants rely. That is because the applications that have proceeded in this action thus far are procedural motions under the class proceeding legislation. It is well settled that this stage of the litigation—prior to, or even at, certification—is procedural in nature. It does not involve an assessment of the merits of a pronouncement on the viability or strength of the action, but instead, it focuses on the form of the action to determine whether the action should proceed as a class proceeding: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 102 [*Pro-Sys*]. As a case management judge, I will not be making fact findings on the merits based on the allegations in pleadings filed thus far. The comments that caused concern in *Osterbauer* occurred during a trial where the trial judge would inevitably make factual determinations and a final disposition of the matter.

[33] Similarly, the defendants rely on *Truckair v. Canada (Attorney General)*, 2011 NSSC 398. The defendants point out that in finding a reasonable apprehension of bias, the court relied on the fact that the comments by the judge went directly to the issue before the judge and were made before the opposing party had made submissions on the issue.

[34] Those circumstances do not parallel the situation here. The issue before me on *RFJ #1* was whether the plaintiff's affidavits or portions of them were inadmissible. The issue on the second application was whether cross-examination should be ordered. However, both occur in the context of a case that had yet to have a certification hearing. Even at a certification hearing, the judge will not be making factual findings on the merits, but simply deciding whether the test for certification has been met.

[35] Querying counsel on a party’s position does not reveal predisposition. As the plaintiff points out, judges are permitted to intervene during proceedings: *Brouillard also known as Chatel v. The Queen*, [1985] 1 S.C.R. 39, 1985 CanLII 56; *Chippewas of Mnjikaning First Nation v. Chiefs of Ontario*, 2010 ONCA 47; and

District Director, Metro Vancouver v. Environmental Appeal Board, 2024 BCSC 1064.

[36] For those reasons, I do not find the defendants have established comments from the Court raised an apprehension of bias to a reasonable observer.

B. Mischaracterization of Position

[37] The defendants submit that I ignored serious evidentiary issues regarding Dr. Arthur-Banning, and that I ignored or mischaracterized the defendants' position during the hearings that led to both *RFJ #1* and *RFJ #2*. Specifically, they submit:

a) In *RFJ #1*, I ignored the defendants' arguments that Dr. Arthur-Banning's report raised concerns about bias and advocacy;

b) In *RFJ #2*, I described that the defendants only sought cross-examination on the affidavits of former players to discredit or discount them rather than to learn "how they came to fight and, by extension, whether their story could be indicative of a larger culture of fight and violence"; and,

c) In *RFJ #2*, I mischaracterized the defendants' position seeking to cross-examine Dr. Arthur-Banning as only for the purpose of discounting his evidence.

[38] They say the foregoing, combined with other incidents, creates a perception that I have not fairly addressed the defendants' positions.

[39] I do not agree. Trial judges are not required to mention every piece of evidence or every submission made during the course of an application in reasons for judgment. Moreover, I do not see how the omissions in question could lead to a perception of bias.

[40] The judgments issued must speak for themselves, and the defendants' remedy for these issues lies with the Court of Appeal.

C. The Concern about Delay

[41] Delay is a factor mentioned in the case law when considering whether to allow cross-examination (see *RFJ #2* at para. 18, citing *Pro-Sys* at para. 56).

[42] The defendants submit that my reliance on undue delay as one of the factors in deciding the cross-examination issue *(RFJ #2* at para. 41) lacked any basis in the record, and for that reason, it demonstrates or contributes to the perception of bias.

[43] In my view, a court can consider all factors outlined by the authorities in making a discretionary decision, even if the parties did not directly point to a specific factor. This is especially so in the context of proposed class proceedings where, as the plaintiff points out, courts are expected to, and do, play a much more active role in managing the process than in traditional litigation: *Smith v. Canadian Tire Acceptance Ltd.*, 1995 CarswellOnt 133 at para. 42, 1995 CanLII 7163 (S.C.).

[44] The defendants also submit that delay ought not to have been a concern because at the hearing for *RFJ #2*, the parties indicated they had agreed to a timetable that would accommodate cross-examination without disrupting what was then the date scheduled for the certification (in October 2023).

[45] The cross-examination application was heard on May 23, 2023, and *RFJ #2* was issued on December 29, 2023. Delay is addressed at para. 41:

> [41] I also find allowing cross-examination would unduly delay the progress of this litigation.

[46] The undue delay that I considered was the potential prospective delay if I were to allow cross-examination of the affiants, not the pace of the proceedings up to that point.

[47] The defendants also submit that it was an error to rely on delay because the delay was “caused by the Court”. They content the Court “used the delay that [it] caused as a mechanism *to* prejudice the [d]efendants”. Their position was summarized at para. 34 of the notice of application:

> The only argument for why cross-examinations might delay the action is that the parties could no longer rely on the Schedule because of the delay in the release of the Cross-Decision. But this explanation raises its own concerns. It is an error for a Court to prejudice a party through its delay and doing so without any explanation creates a perception that the Defendants are being unfairly held responsible for circumstances they did not create.

[48] In support of this position, they rely on *McPhee v. HMTQ re costs*, 2007 BCSC 1354, for the general proposition that a litigant should not be prejudiced by an act of the court.

[49] That case is distinguishable. It concerned an increase to the tariff of costs between the end of trial and the release of the judgment. The court decided entering judgment on the date it was rendered so as to attract the new tariff was prejudicial to the plaintiff who had to pay costs and, therefore, judgment was entered *nunc pro tunc* as of a date before the tariff came into effect.

[50] On the facts before me, delay was only one of the factors considered in deciding whether to allow cross-examination: see *RFJ #2* at paras. 37–44. Moreover, as noted above, the reference to delay was the prospective delay, not the delay occasioned between the hearing and delivery of judgment.

[51] In my view, the defendants' submission on this point provides no support for an allegation of bias.

D. The Manner in Which the Application Was Set for Hearing

[52] The defendants submit that they have been denied procedural fairness in the manner in which this application was scheduled. They rely on the history of the proceedings and communications they received from Supreme Court Scheduling ("SCS"), and by way of memorandum from me.

[53] The matter arose when the parties, on May 23, 2024, completed an online "request to appear" for a one-day hearing for "an application for an order recusing the [Honourable] Madam Justice Sharma from this proceeding and setting aside

certain of her prior decisions, or, in the alternative, an order granting leave to the Defendants to file supplementary evidence on the Plaintiff's certification application".

[54] On June 3, 2024, the parties were asked to provide an update about the status of the appeal. I had previously been notified, as is common practice, by the Court of Appeal, that an application for leave to appeal had been filed with regard to *RFJ #2*. When I received notice of the parties' request to appear before me, I was unaware that on May 7, 2024, Justice Horsman granted an order adjourning the defendants' application for leave to appeal *RFJ #2*.

[55] There were then further communications between counsel and SCS.

[56] As I understand the defendants' argument, the following sequence was procedurally unfair and/or raised a perception of bias: the parties had agreed that the application would occupy a full day; there followed a series of communications about different hearing dates; at one point, I asked the parties about their positions on whether a decision could be rendered after the receipt of written submissions, but the parties were not in favour of that approach; and, I ultimately directed that the matter be set down for a two-hour hearing, suggesting dates that I knew were available in my calendar.

[57] The defendants' submissions on this issue are based on assumptions and inferences unsupported by any evidence. It appears that the combination of the hearing being reduced by me from one day to two hours, and the offer of written submissions produced in the defendants a belief that I had pre-judged this application.

[58] These amount to complaints about process and scheduling the application and do not, in my view, support an allegation of pre-disposition or a reasonable perception of bias. In terms of the matter being set for two hours rather than one day, the court is not required in all cases to accept counsel's estimate of how long a court hearing will take: *Griffiths v. British Columbia*, 2003 BCCA 367 at para. 22. The

suggestion that the hearing proceed by way of written submissions was merely a suggestion, and not an uncommon one.

[59] The defendants have drawn conclusions about what happened with regard to scheduling this hearing based on a less than full appreciation of how SCS functions, both from an institutional point of view, and with regard to scheduling individual hearings before judges.

[60] In my view, nothing about how this application was scheduled could contribute to it being seen as procedurally unfair to either party, nor raising a perception of bias in the mind of an informed observer.

E. The Cumulative Effect of All Factors

[61] The defendants submit they do not rely on a single ground in support of their application for recusal. Their position is that looking at all the circumstances together, a reasonable apprehension of bias has been raised.

[62] The plaintiff's response, in part, is to suggest that there is a risk that recusal was being sought simply because of the defendants' dissatisfaction with prior rulings. That is a concern sometimes mentioned in the case law that underscores a trial judge's duty not to too easily agree to a recusal. The concern arises here since the defendants sought not only recusal, but a setting-aside of *RFJ #1* and *RFJ #2*.

[63] I rely on my analysis above about each factor, none of which, in my view, provide any support for a reasonable perception of bias. In addition, considering all of the factors together and cumulatively, I am unable to conclude that an informed person viewing the matter realistically and practically, and being apprised of all the relevant information, would perceive that I was biased, had prejudged any issue, or was unable to decide issues between the parties fairly.

[64] In the alternative to recusing myself and setting aside *RFJ #1* and *RFJ #2*, the defendants sought leave to file supplementary evidence on the certification application. Because I have concluded that the defendants have not met the test for establishing a perception of bias, there is no basis in this application for me to grant

that leave. However, the parties are free to either come to an agreement about filing further evidence or, if they cannot reach agreement, speak to that issue. The fact that I am not granting that relief now, because it was sought on the basis of bias, does not necessarily preclude the defendants from seeking to file additional evidence on some other basis.

IV. CONCLUSION

[65] I am not persuaded on a balance of probabilities that the grounds raised by the defendants, whether viewed individually or cumulatively, meet the test for a reasonable apprehension of bias.

[66] The application is dismissed.

"Sharma J."