

**THE KING'S BENCH  
Winnipeg Centre**

BETWEEN:

**CINDY FRIESEN,**

Plaintiff,

- and -

**THE ATTORNEY GENERAL OF MANITOBA,**

**FILED NOV 27 2023**

Defendant.

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**Notice of Motion (To Strike)**

Associate Judge's Uncontested List  
Hearing Date: Friday, January 5, 2024 at 9:30 a.m.

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**MANITOBA JUSTICE**  
Legal Services Branch  
7th Floor, 405 Broadway  
Winnipeg, MB R3C 3L6  
Fax No: 204-948-2826  
File No: HE0100 (214)

Per: Tristan Sandulak / Charles Murray  
Phone No.: (204) 945-2832

**THE KING'S BENCH  
Winnipeg Centre**

BETWEEN:

**CINDY FRIESEN,**

Plaintiff,

- and -

**THE ATTORNEY GENERAL OF MANITOBA,**

Defendant.

**NOTICE OF MOTION**

THE DEFENDANT The Attorney General of Manitoba (hereafter, "The Government of Manitoba") will make a Motion before an Associate Judge on the Uncontested List, on **Friday, the 5<sup>th</sup> day of January, 2024 at 9:30 a.m.** or so soon thereafter as the Motion can be heard, at the Law Courts, 408 York Avenue, in Winnipeg, Manitoba.

**1. THIS MOTION IS FOR:**

- (a) An Order Striking the Statement of Claim in its entirety, without leave to amend.
- (b) In the alternative, an Order striking out all those parts of this claim relating to one or more of the following causes of action:
  - a. All allegations of "breach of fiduciary duty" made against the Defendant;
  - b. All allegations of "negligence" made against the Defendant;
  - c. All allegations of "misfeasance in public office" made against the

Defendant;

- d. All allegations of *Charter* breaches made against the Defendant.
- (c) Costs.
- (d) Such further and other relief as counsel may advise and this Honourable Court may permit.

2. **THE GROUNDS FOR THE MOTION** are as follows:

- (a) King's Bench Rule 25.11.
- (b) The claim discloses no reasonable cause of action:
  - a. Regarding the claim of "breach of fiduciary duty", the claim does not identify a pre-existing category of fiduciary relationship or plead the elements of an *ad hoc* fiduciary relationship. The claim fails to identify an undertaking by The Government of Manitoba in relation to the proposed class. Further, a special relationship with the proposed class would be contrary to the government's overriding obligation to consider the competing interests of its constituents.
  - b. Regarding the claim of "misfeasance in public office", the claim includes bare assertions of bad faith and misfeasance but does not plead any material facts to suggest a public officer acted with an improper motive, ulterior purpose, or without lawful authority.
  - c. Regarding the claim of "negligence", the claim fails to identify a pre-existing category of a duty of care and fails to plead material facts to satisfy the first step of the *Anns/Cooper* test as it relates to proximity, or foreseeability, or both.
  - d. Further regarding the claim of "negligence", the pleading is framed such that, even if a duty of care were recognized, it would be negated at the second step of the *Anns/Cooper* test by residual policy

considerations. On the facts pleaded imposing a duty of care would raise the spectre of unlimited liability to an unlimited class.

- (c) No action or proceeding may be advanced as a result of any act or omission under the *Public Health Act* CCSM c P210, including the issuance of the public health orders, unless said act or omission is made in bad faith. The claim includes bare assertions of bad faith but fails to particularize bad faith and pleads facts that are contrary to the assertion of bad faith.
- (d) The court may take judicial notice of facts that are so notorious that they are beyond reasonable dispute, including:
  - a. The fact of the COVID-19 pandemic;
  - b. That the COVID-19 pandemic was a novel situation;
  - c. That the quantity and quality of scientific data that informed the political and public discussions and decisions concerning the appropriate response to the COVID-19 pandemic evolved and expanded over the relevant time; and,
  - d. That The Government of Manitoba was required to make decisions throughout the period of the public health emergency caused by the COVID-19 pandemic based on the scientific data available at that time.
- (e) The governmental decisions in question were core policy decisions in the context of a public health emergency that are immune from liability and / or are non-justiciable.
- (f) Regarding the alleged *Charter* breaches, the pleading fails to particularize how there have been any breaches of sections 2(a), 7, 8, or section 12. Further, the claim impermissibly imports the private law threshold of a duty of care to a *Charter* analysis.

3. **THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of this Motion:

- (a) The Statement of Claim;
- (b) This Notice of Motion;
- (c) An affidavit, *to be filed*, containing the orders under the *Public Health Act* referred to in and thereby incorporated into the Statement of Claim;
- (d) Such further and other material as this Court may allow.

November 27, 2023

Per: Tristan Sandulak, Crown Counsel  
Charles Murray, Crown Counsel  
Manitoba Justice, Legal Services Branch  
730 – 405 Broadway Winnipeg MB R3C 3L6

TO: HOLLOWAY THLIVERIS LLP  
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Attention: Stephan J. Thliveris / Scott W. Cannon  
Counsel for the Plaintiff