Court File number: 41415

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

Karen **Adelberg**, Matthew **Anderson**, Wyatt George **Baiton**, Paul **Barzu**, Neil **Bird**, Curtis **Bird**, Beau **Bjarnason**, Lacey **Blair**, Mark **Bradley**, John **Doe** #1 , Daniel **Bulford**, John **Doe** #2, Shawn **Carmen** , John **Doe** #3, Jonathan Corey **Chaloner**, Cathleen **Collins**, Jane **Doe** #1 , John **Doe #4**, Kirk **Cox**, Chad **Cox**, Neville **Dawood**, Richard **de Vos**, Mike **Desson**, Jane **Doe** #2 , Stephane **Drouin**, Sylvie **Filteau**, Kirk **Fisler**, Thor **Forseth**, Glen **Gabruch**, Brett **Garneau**, Tracy Lynn **Gates**, Kevin **Gien**, Jane **Doe** #3, Warren **Green**, Jonathan **Griffioen** , Rohit **Hannsraj**, Kaitlyn **Hardy**, Sam **Hilliard**, Richard **Huggins**, Lynne **Hunka**, Joseph **Isliefson**, Leposava **Jankovic**, John **Doe** #5, Pamela **Johnston**, Eric Jones-**Gatineau**, Annie **Joyal** , John **Doe** #6 , Marty (Martha) **Klassen**, John **Doe** #7, John **Doe** #8 , John **Doe** #9 , Ryan **Koskela**, Jane **Doe** #4, Julians **Lazoviks**, Jason **Lefebvre**, Kirsten **Link**, Morgan **Littlejohn**, John **Doe** #10, Diane **Martin**, John **Doe** #11, Richard **Mehner**, Celine **Moreau**, Robin **Morrison**, Morton **Ng**, Gloria **Norman**, Steven **O'Doherty**, David **Obirek**, John Robert **Queen**, Nicole **Quick**, Ginette **Rochon**, Louis-Marie **Roy**, Emad **Sadr**, Matt **Silver**, Jinjer **Snider**, Maureen **Stein**, John **Doe** #12, John **Doe** #13, Robert **Tumbas**, Kyle Van de **Sype**, Chantelle **Vien**, Joshua (Josh) **Vold** , Carla **Walker**, Andrew **Wedlock** , Jennifer **Wells**, John **Wells**, Melanie **Williams**, David George John **Wiseman**, Daniel **Young**, Gratchen **Grison**, (Officers with the **Royal Canadian Mounted Police)**

(style of cause to be continued…)

MEMORANDUM OF ARGUMENT

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- and –

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- and –

Stefanie **Allard**, Jake Daniel **Boughner**, Brent **Carter**, Brian **Cobb**, Laura **Constantinescu,** Sonia **Dinu**, Aldona **Fedor**, Jane **Doe** #7, Malorie **Kelly**, Matthew Stephen **MacDonald**, Mitchell **Macintyre**, Hertha **McLendon,** Marcel **Mihailescu**, Michael **Munro**, Sebastian **Nowak**, Diana **Rodrigues,** Natalie **Holden**, Adam Dawson **Winchester, (Canada Border Services Agency)**

-and-

Christine **Clouthier**, Debbie **Gray**, Jennifer **Penner**, Dale **Wagner,** Joseph **Ayoub, (Agriculture and Agri-food Canada)**

-and-

Jane **Doe** #8, **(Atlantic Canada Opportunities Agency)**

-and-

Melanie **DuFour, (Bank of Canada)**

-and-

#Jennifer **Auciello**, Sharon **Ann Joseph**, Eric **Munro**, **(Canada Mortgage and Housing Corporation)**

-and-

Jane **Doe** #9, **(Canada Pension Plan)**

-and-

Natalie **Boulard**, Beata **Bozek**, John **Doe** #14, Nerin **Andrea Carr**, Sara Jessica **Castro**, Debbie

(Dubravka) **Cunko**, Josée **Cyr**, Jane **Doe** #10, Carol **Gaboury**, Tania **Gomes**, Julita **Grochocka**, Monique **Harris**, William **Hooker**, Kirstin **Houghton**, Leila **Kostyk**, Michelle **Lamarre**, Nicolas **LeBlond**, Suana-Lee **Leclair**, Paulette **Morissette**, Jennifer **Neave**, Pierre-Alexandre **Racine**, Benjamin **Russell**, Robert **Snowden**, Aabid **Thawer**, Heidi **Wiener**, Svjetlana **Zelenbaba**, Nadia **Zinck**, Aaron James Thomas **Shorrock**, Deirdre **McIntosh**, **(Canada Revenue Agency)**

- and –

Tamara **Stammis**, **(Canada School of the Public Service)**

- and –

Jasmin **Bourdon**, **(Canadian Space Agency)**

- and –

Sharon **Cunningham**, Allen **Lynden**, Rory **Matheson**, **(Canadian Coast Guard)**
- and –

Tatjana **Coklin**, John **Doe** #15, Raquel **Delmas**, Jane **Doe** #11, Chelsea **Hayden**, Helene **Joannis**, Zaklina **Mazur**, Jane **Doe** #12, Jessica **Simpson**, Katarina **Smolkova**, **(Canadian Food Inspection Agency**)

- and –

Alexandre **Charland**, **(Canadian Forest Service)**

- and –

Catherine **Provost**, Kristina **Martin**, **(Canadian Heritage)**

- and –

Jane **Doe** #13, **(Canadian Institutes of Health Research)**

- and –

Beth **Blackmore**, Roxanne **Lorrain**, **(Canadian Nuclear Safety Commission)**

- and –

Rémi **Richer**, **(Canadian Radio-Television and Telecommunications Commission)**

- and –

Octavia **La Prairie**, (**Canadian Security Intelligence Service)**

- and –

Robert **Bestard**, **(City of Ottawa Garage Fed Regulated)**

- and –

Kimberly Ann **Beckert**, **(Core Public Service)**

- and –

Sarah **Andreychuk**, Francois **Bellehumeur**, Pamela **Blaikie**, Natasha **Cairns**, Angela **Ciglenecki**, Veronika **Colnar**, Randy **Doucet**, Kara **Erickson**, Jesse **Forcier**, Valérie **Fortin**, Roxane **Gueutal**, Melva **Isherwood**, Milo **Johnson**, Valeria **Luedee**, Laurie **Lynden**, Annette **Martin**, Craig **McKay**, Isabelle **Methot**, Samantha **Osypchuk**, Jane **Doe** #14, Wilnive **Phanord**, Alexandre Richer **Levasseur**, Kathleen **Sawyer**, Trevor **Scheffel**, **(Correctional Service of Canada)**

- and –

Jordan **St-Pierre**, **(Courts Administration Service)**

- and-

Brigitte **Surgue**, Jane **Doe** #15, **(Department of Canadian Heritage)**

- and-

Ghislain **Cardinal**, Heather **Halliday**, Paul **Marten**, Celine **Rivier**, Ngozi **Ukwu**, Jeannine **Bastarache**, Jane **Doe** #16, Hamid **Naghdian** Hamid **Naghdian-Vishteh**, **(Department of Fisheries and Oceans)**

- and –

Ishmael **Gay-Labbe**, Jane **Doe** #17, Leanne **James**, **(Department of Justice)**

- and –

Danielle **Barabe-Bussieres**, **(Elections Canada)**

- and –

Tanya **Daechert**, Jane **Doe** #18, Francois **Arseneau**, Chantal **Authier**, Nathalie **Benoit**, Aerie **Biafore** , Rock **Briand**, Arnaud **Brien-Thiffault**, Sharon **Chiu**, Michel **Daigle**, Brigitte **Daniels**,

Louise **Gaudreault**, Karrie **Gevaert**, Mark **Gevaert**, Peter **Iversen**, Derrik **Lamb**, Jane **Doe** #19, Anna **Marinic** , Divine **Masabarakiza**, James **Mendham** , Michelle Marina **Micko**, Jean **Richard**, Stephanie **Senecal** , Jane **Doe** #20, Ryan **Sewell**, Kari **Smythe**, Olimpia **Somesan**, Lloyd **Swanson**, Tyrone **White**, Elissa **Wong**, Jenny **Zambelas**, Li yang Zhu, Patrice **Lever**, **(Employment and Social Development Canada)**

-and-

Jane **Doe** #21, Brian Philip **Crenna**, Jane **Doe** #22, Bradley David **Hignell**, Andrew **Kalteck**, Dana **Kellett**, Josée **Losier**, Kristin **Mensch**, Elsa **Mouana**, Jane **Doe** #23, Jane **Doe** #24, Valentina **Zagorenko**, **(Environment and Climate Change Canada)**

- and –

Pierre **Trudel**, **(Export Development Canada)**

- and –

Stephen Alan **Colley**, **(Federal Economic Development Agency for Southern Ontario)**

- and –

Vladimir **Raskovic**, **(Garda Security Screening Inc)**

- and –

Mélanie **Borgia**, Jonathan Kyle **Smith**, Donna **Stainfield**, Annila **Tharakan**, Renee Michiko **Umezuki**, **(Global Affairs Canada)**

- and –

Dennis **Johnson**, **(Global Container Terminals Canada)**

- and –

Alexandre **Guilbeault**, Tara (Maria) **McDonough**, France **Vanier**, **(Government of Canada)**

- and –

Alex **Braun**, Marc **Lescelleur-Paquette**, **(House of Commons)**

- and –

Aimee **Legault**, (**Human Resources Branch)**

- and –

Dorin Andrei **Boboc**, Jane **Doe** #25, Sophie **Guimard**, Elisa **Ho**, Kathy **Leal**, Caroline **Legendre**, Diana **Vida**, (**Immigration, Refugees and Citizenship Canada)**

- and –

Nathalie Joanne **Gauthier**, **(Indigenous and Northern Affairs Canada)**

- and –

Christine **Bizier**,Amber Dawn **Kletzel**, Verona **Lipka**, Kerry **Spears**, **(Indigenous Services Canada)**

- and –

Sun-Ho **Paul Je**, **(Innovation, Science and Economic Development Canada)**

- and –

Giles **Roy**, **(National Film Board of Canada)**

- and –

Ray **Silver**, Michelle **Dedyulin**, Letitia **Eakins**, Julie-Anne **Kleinschmit**, Marc-Andre **Octeau**, Hugues **Scholaert**, **(National Research Council Canada)**

- and –

Felix **Beauchamp**, **(National Security and Intelligence Review Agency)**

- and –

Julia May **Brown**, Caleb **Lam**, Stephane **Leblanc**, Serryna **Whiteside**, **(Natural Resources Canada)**

- and –

Nicole **Hawley**, Steeve **L'italien**, Marc **Lecocq**, Tony **Mallet**, Sandra **McKenzie**, **(NAV Canada)**

- and –

Muhammad **Ali**, **(Office of the Auditor General of Canada)**

- and –

Ryan **Rogers**, **(Ontario Northland Transportation Commission)**

- and –

Theresa **Stene**, Michael **Dessureault**, John **Doe** #16, **(Parks Canada)**

- and –

Charles-Alexandre **Beauchemin**, Brett **Oliver**, **(Parliamentary Protective Service)**

- and –

Carole **Duford**, **(Polar Knowledge Canada)**

- and –

Joanne Gabrielle **de Montigny**, Ivana **Eric**, Jane **Doe** #26, Salyna **Legare**, Jane **Doe** #27, Angie **Richardson**, Jane **Doe** #28, **(Public Health Agency of Canada)**

- and –

Fay Anne **Barber**, **(Public Safety Canada)**

- and –

Denis **Laniel**, **(Public Sector Pension Investment Board)**

- and –

Kathleen Elizabeth **Barrette**, Sarah **Bedard**, Mario **Constantineau**, Karen **Fleury**, Brenda **Jain**, Megan **Martin**, Jane **Doe** #29, Isabelle **Paquette**, Richard **Parent**, Roger Robert **Richard**, Nicole **Sincennes**, Christine **Vessia**, Jane **Doe** #30, Pamela **McIntyre**, **(Public Services and Procurement Canada)**

- and –

Isabelle **Denis**, **(Registrar of the Supreme Court of Canada)**

- and –

Jane **Bartmanovich**, **(Royal Canadian Mint)**

- and –

Nicole **Brisson**, **(Service Canada)**

- and –

Denis **Audet**, Mathieu **Essiambre**, Alain **Hart**, Andrea **Houghton**, Natalia **Kwiatek**, Dany **Levesque**, David **McCarthy**, Pascal **Michaud**, Mervi **Pennanen**, Tonya **Shortill**, Stephanie **Tkachuk**, Marshall **Wright**, **(Shared Services Canada)**

- and –

Eve Marie **Blouin-Hudon**, Marc-Antoine **Boucher**, Christopher **Huszar**, **(Statistics Canada)**

- and –

Steve **Young**, (**Telestat Canada)**

- and –

Nathan **Aligizakis**, Stephen **Daniel**, Alain **Douchant**, Krystal **McColgan**, Debbie **Menard**, Clarence **Ruttle**, Dorothy **Barron**, Robert **McLachlan**, **(Transport Canada)**

- and –

Scott Erroll **Henderson**, Denis **Theriault**, **(Treasury Board of Canada)**

- and –

Josiane **Brouillard**, Alexandra **McGrath**, Nathalie **Ste-Croix**, Jane **Doe** #31, **(Veterans Affairs Canada)**

- and -

Olubusayo (Busayo) **Ayeni**, John **Doe** #17, Cynthia **Bauman**, Jane **Doe** #32, , Laura Crystal **Brown**, Ke(Jerry) **Cai**, Nicolino **Campanelli**, Donald Keith **Campbell**, Colleen **Carder**, Kathy **Carriere**, Melissa **Carson**, David **Clark**, Bradley **Clermont**, Laurie **Coelho**, Estee **Costa**, Antonio **Da Silva**, Brenda **Darvill**, Patrick **Davidson**, Eugene **Davis**, Leah **Dawson**, Marc **Fontaine**, Jacqueline **Genaille**, Eldon **Goossen**, Joyce **Greenaway**, Lori **Hand**, Darren **Hay**, Krista **Imiola**, Catherine **Kanuka**, Donna **Kelly**, Benjamin **Lehto**, Anthony **Leon**, Akemi **Matsumiya**, Jane **Doe** #33, Jane **Doe** #34, Jane **Doe** #35, Anne Marie **McQuaid-Snider**, Lino **Mula**, Pamela **Opersko**, Gabriel **Paquet**, Christine **Paquette**, Carolin Jacqueline **Paris** , Jodie **Price**, Kevin **Price**, Giuseppe **Quadrini**, Saarah **Quamina**, Shawn **Rossiter**, Anthony **Rush**, Anthony **Shatzko**, Charles **Silva**, Ryan **Simko**, Norman **Sirois**, Brandon **Smith**, Catharine **Spiak**, Sandra **Stroud**, Anita **Talarian**, Daryl **Toonk**, Ryan **Towers**, Leanne **Verbeem**, Eran

Vooys, Robert **Wagner**, Jason **Weatherall**, Melanie **Burch**, Steven **Cole**, Toni **Downie**, Jodi Stammis, **(Canada Post)**

- and –

Nicolas **Bell,** John **Doe** #18, John **Doe** #19**,** Jane **Doe** #36, John **Doe** #20**,** Paola Di **Maddalena**, Nathan **Dodds,** John **Doe** #21, Jane **Doe** #37, Nunzio **Giolti**, Mario **Girard**, Jane **Doe** #38, Jane **Doe** #39, You-Hui **Kim,** Jane **Doe** #40, Sebastian **Korak**, Ada **Lai**, Mirium **Lo,** Melanie **Mailloux**, Carolyn **Muir**, Patrizia **Paba,** Radu **Rautescu,** Aldo **Reano**, Jacqueline Elisabeth **Robinson**, John **Doe** #22**,** Frederick **Roy**, John **Doe** #23, Taeko **Shimamura,** Jason S**isk**, Beata **Sosin,** Joel **Szostak**, Mario **Tcheon**, Rebecca Sue **Thiessen**, Jane **Doe** #41, Maureen **Yearwood**, **(Air Canada)**

- and –

John **Doe** #24, JOSÉE **Demeule**, Jacqueline **Gamble**, Domenic **Giancola,** Sadna **Kassan,** Marcus **Steiner**, Christina **Trudeau**, **(Air Canada Jazz)**

- and –

John **Doe** #25**,** Emilie **Despres**, **(Air Inuit)**

- and –

Rejean **Nantel**, **(Bank of Montreal)**

- and –

Lance Victor **Schilka**, **(BC Coast Pilots Ltd)**

- and –

Elizabeth **Godler**, **(BC Ferries)**

- and -

John **Doe** #26**,** Jane **Doe** #42**,** Tamara **Davidson,** Jane **Doe** #43, Brad H**omewood**, Chad **Homewood,** Charles Michael **Jefferson,** John **Doe** #27**,** Janice Laraine **Kristmanson**, Jane **Doe** #44**,** Darren Louis **Lagimodiere**, John **Doe** #28, John **Doe** #29, Mirko **Maras,** John **Doe** #30**,** John **Doe** #31, John **Doe** #32**,** John **Doe** #33**,** John **Doe** #34**,** Jane **Doe** #45, John **Doe** #35**,** Kendal Stace- **Smith**, John **Doe** #36, Steve **Wheatley**, **(British Columbia Maritime Employers Association)**

- and –

Paul **Veerman**, **(Brookfield Global Integrated Solutions)**

- and –

Mark **Barron**, Trevor **Bazilewich**, John **Doe** #37, Brian **Dekker**, John **Gaetz**, Ernest **Georgeson**, Kyle **Kortko**, Richard **Letain**, John **Doe** #38, Dale Robert **Ross**, **(Canadian National Railway)**

- and –

Tim **Cashmore**, Rob **Gebert** , Micheal Roger **Mailhiot**, **(Canadian Pacific Railway)**

- and –

Karin **Lutz**, **(DP World)**

- and –

Crystal **Smeenk**, **(Farm Credit Canada)**

- and –

Sylvie M.F. **Gelinas**, Susie **Matias**, Stew **Williams**, **(G4S Airport Screening)**

- and –

Shawn **Corman**, **(Geotech Aviation)**

- and –

Juergen **Bruschkewitz**, Andre **Deveaux**, Bryan **Figueira**, David **Spratt**, Guy **Hocking**, Sean **Grant**, **(Greater Toronto Airports Authority)**

- and –

Dustin **Blair**, **(Kelowna Airport Fire Fighter)**

- and -

Hans-Peter **Liechti**, **(National Arts Centre)**

- and –

Bradley **Curruthers**, Lana **Douglas**, Eric **Dupuis**, Sherri **Elliot** , Roben **Ivens**, Jane **Doe** #46, Luke Van **Hoekelen**, Kurt **Watson**, **(Ontario Power Generation)**

- and –

Theresa **Stene**, Michael **Dessureault**, Adam **Pidwerbeski**, **(Parks Canada)**

-and-

John **Doe** #39, **(Pacific Pilotage Authority)**

- and –

Angela **Gross**, **(Purolator Inc.)**

- and –

Gerhard **Geertsema**, **(Questral Helicopters)**

- and –

Amanda **Randall**, Jane **Doe** #47, Frank **Veri**, **(RBC Royal Bank)**

- and –

James (Jed) **Forsman**, **(Rise Air)**

- and –

Jane **Doe** #48, **(Rogers Communications Inc)**

- and –

Jerrilynn **Rebeyka**, **(SaskTel)**

- and –

Eileen **Fahlman**, Mary **Treichel**, **(Scotiabank)**

- and -

Judah Gaelan **Cummins**, **(Seaspan Victoria Docks)**

- and –

Darin **Watson**, **(Shaw)**

- and -

Richard Michael Alan **Tabak**, **(SkyNorth Air Ltd)**

- and –

Deborah **Boardman**, Michael **Brigham**, **(Via Rail Canada)**

- and –

Kevin Scott **Routly**, **(Wasaya Airways)**

- and –

Bryce **Sailor**, **(Waterfront Employers of British Columbia)**

- and –

Joseph **Bayda**, Jamie **Elliott**, John **Doe** #40, Randall **Mengering**, Samantha **Nicastro**, Veronica **Stephens**, Jane **Doe** #49, **(WestJet)**

- and –

Melvin **Gerein**, (**Westshore Terminals)**

Applicants

AND:

His Majesty The King, Prime Minister Justin **Trudeau**, Deputy Prime Minister and Minister of Finance Chrystia **Freeland**, Chief Medical Officer Teresa **Tam**, Minister of Transport Omar **Alghabra**, Deputy Minister of Public Safety Marco **Mendicino**, Johns and Janes **Doe**

Respondents

MEMORANDUM OF ARGUMENT

PART I – OVERVIEW AND FACTS

1. The Plaintiffs rely on the facts as set out in the statement of claim, which, for the purposes of this motion, are required to be taken as proven[1].

2. This statement of Claim sets out that:

> 6. The Plaintiffs are all either:
>
> (a) Federal (former) Employees of various agencies and Ministries of the Government of Canada and servants, officials, and/or agents of the Crown;
>
> (b) Employees of Federal Crown Corporations; and
>
> (c) Employees of federally regulated sectors;
>
> As set out and categorized in the style of cause in the within claim.
>
> 7. Most of the Plaintiffs were sent home on "leave without pay" and/or subsequently fired for refusing to take the COVID-19 "vaccines" (inoculations) whether or not they were working from home, and/or further refused to multi-weekly PCR testing in order to continue working. All Plaintiffs were placed on leave without pay and fired pursuant to the purported dictate of the ***Financial Administration Act*** with respect to Covid-19 "vaccines", purportedly mandated by the Treasury Board.
>
> 8. Some Plaintiffs are/were on medical leave but declined to take the covid-vaccine, particularly of which will be furnished subsequent to the issues of the within Statement of Claim. Some Plaintiffs due to the coercive illegal and unconstitutional actions and dictates of the Defendants and their officials took, under that duress, early and unvoluntary retirement, particulars of which will be furnished subsequent to the issuance of the within Statement of Claim.
>
> 9. All the Plaintiffs possess a conscientious and/or physical /medical reason for refusing to take the COVID-19 "vaccines" (inoculations).
>
> 10. While "exemptions" to these "mandatory vaccine mandates" exist, in theory, all of the Plaintiffs who sought an exemption were arbitrarily denied without reasons. The

[1] *A.G. Canada v. Inuit Tapirasat of Canada,* [1980] 2 S.C.R. 735; *Nelles v. Ontario,* [1989] 2 S.C.R. 170; *Operation Dismantle v. The Queen*, 1985 CanLII 74 (SCC), [1985] 1 SCR441; *Hunt v. Carey Canada Inc*., [1990] 2 S.C.R. 959; *Dumont v. A.G. Canada,* [1990] 1 S.C.R. 279; *Trendsetter Ltd. v. Ottawa Financial Corp.,* (1989)32 O.A.C. 327 (C.A.); *Nash v. Ontario,* (1995) 27 O.R. (3d) 1 (Ont. C. A.).; *Canada v. Arsenault,* 2009 FCA 242; *B.C. v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473

Plaintiffs further state that there is no obligation to seek any exemption before refusing the vaccines.

11. All the Plaintiffs are ineligible for Employment Insurance benefits because they were dismissed for refusing the "vaccines" (Inoculations).

12. All of the Plaintiffs wish to exercise their ss. 6 and 7 of the ***Charter*** rights to travel within Canada, as well as abroad, which is barred to them by virtue of a non-possession of a "vaccine passport".[2]

3. The Honourable Chief Justice Marc Noel, of the Federal Court of Appeal, recognized that the challenge to government vaccine polices are "fraught with controversy" in September 2021 when he publicly stated:

> "The court's paramount responsibility, especially on an issue as controversial and unprecedented as this, is to ensure that Canadians are confident in this court's capacity and commitment to decide cases on the facts and the law and nothing else — not even any personal views and institutional policies we may happen to have."[3]

PART II – ISSUES

4. Whether the Federal Court and Federal Court of Appeal erred in misapplying the test on a motion to strike?

5. Whether the Federal Court of Appeal erred, in by-passing the requirement in ***Weber*** that requires an analysis of the contents of the collective bargaining agreement(s) before deciding whether to strike for adequate alternate remedies?

6. Whether the Federal Court of Appeal erred in applying an absolute rule that there is no room for Superior Court action where a Plaintiff is a member of a collective bargaining agreement and thus[4]:

(a) ignoring ***Weber*** and the cited exceptions therein to adequate alternate remedy; and

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[2] Application for Leave ("AFL"), Tab E1, Statement of Claim, at AFL, at Tab 4 Paragraphs 6-12
[3] AFL Tab E3, Affidavit of Amina Sherazee, "Exhibit A" at paragraph 6
[4] AFL Tab C1, Decision of Federal Court, at paragraph 32

(b) ignoring Superior and Federal Court jurisprudence where, applying the ***Weber*** exceptions, found that action for the torts misfeasance of public office can be brought in the Superior Court;

thus again misapplying the test on a motion to strike?

PART III – ARGUMENT

A/ Motion to Strike – The Jurisprudence – General Principles

7. It is submitted and tritely held, by the Supreme Court of Canada, and the Appellate Courts, that:

(a) the facts pleaded by the Plaintiffs must be taken as proven and fact:[5]

(b) it has been further held, that on a motion to strike, the test is a rather high one, namely that,

> "A Court should strike a pleading under Rule 126 **only in plain and obvious cases where the pleading is bad beyond argument.**
>
> **Furthermore, I am of the view that the rules of civil procedure should not act as obstacles to a just and expeditious resolution of a case.** Rule1.04(1) of the Rules of Civil Procedure in Ontario, O. Reg 560/84, confirms this principle in stating that "these rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits."[6]

and rephrased, re-iterated by the Supreme Court of Canada, in ***Dumont***, wherein the Court stated that,

> "***It cannot be said that the outcome of the case is 'plain and obvious' or 'beyond doubt'***.
>
> Issues as to the proper interpretation of relevant provisions…and the effect…upon them would appear to be better determined at trial where a proper factual base can be laid."[7]

and further, that:

---

[5] **Supra. Paragraph 1, Footnote 1.**
[6] *Nelles v. Ontario,* [1989] 2 S.C.R. 170 at page. 627
[7] *Dumont v. A.G. Canada,* [1990] 1 S.C.R. 279; page. 280

> "It is not for this Court on a motion to strike to reach a decision as to the Plaintiff's chance of success."[8]

and further that:

> **The fact that a pleading reveals "an arguable, difficult or important point of law" cannot justify striking out part of the statement of claim. Indeed, I would go so far as to suggest that where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed. Only in this way can we be sure that the common law in general, and the law of torts in particular, will continue to evolve to meet the legal challenges that arise in our modern industrial society.**
>
> …
>
> This brings me to the second difficulty I have with the defendants' submission. **It seems to me totally inappropriate on a motion to strike out a statement of claim to get into the question whether the Plaintiff's allegations concerning other nominate torts will be successful. This a matter that should be considered at trial where evidence with respect to the other torts can be led and where a fully informed decision about the applicability of the tort of conspiracy can be made in light of that evidence and the submissions of counsel.** If the Plaintiff is successful with respect to the other nominate torts, then the trial judge can consider the defendants' arguments about the unavailability of the tort of conspiracy. If the Plaintiff is unsuccessful with respect to the other nominate torts, then the trial judge can consider whether he might still succeed in conspiracy. Regardless of the outcome, it seems to me inappropriate at this stage in the proceedings to reach a conclusion about the validity of the defendants' claims about merger. I believe that this matter is also properly left for the consideration of the trial judge.[9]

and further that:

> [21] Valuable as it is, the Motion to Strike **is a tool that must be used with care.** The Law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.) introduced a general duty of care to one's neighbour premised on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. Before *Hedly Byrne & Co. v. Heller & Partners*, Ltd., [1963] 2 All E.R. 575 (H.L.), a tort action for negligent misstatement would have been regarded as incapable of success. The history of our law reveals that often new developments in the law first surface on motions to

[8] *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959

[9] *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at page. 14

> strike or similar preliminary motions, like that one at issue in *Donoghue v. Stevenson.* therefore, on a Motion to Strike, it is not determinative that the law has not yet recognized the particular claim. **The Court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.**[10]

and that "the court should make an order only in ***plain and obvious cases*** which it is satisfied to be beyond doubt";[11]

(c) (i) and that a statement of claim should not be struck just because it is "novel";[12]

(ii) that "matters law not ***fully settled*** by the jurisprudence should not be disposed of at this stage of the proceedings";[13]

(iii) and that to strike, the Defendants must produce a "decided case ***directly on point*** from the same jurisdiction demonstrating that the very same issue has been ***squarely dealt with and rejected***";[14]

(a) and that, in fact, the Court ought to be generous in the drafting of pleadings and not strike but allow amendment before striking.[15]

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[10] *R. v. Imperial Tobacco Canada Ltd*., supra at para 21
[11] *Trendsetter Ltd. v. Ottawa Financial Corp.,* (1989)32 O.A.C. 327 (C.A.), supra, (Ont. C.A.).
[12] *Nash v. Ontario,* (1995) 27 O.R. (3d) 1 (Ont. C. A.).; *Hanson v. Bank of Nova Scotia,* (1994) 19 O.R .(3d) 142 (C.A.); *Adams-Smith v. Christian Horizons,* (1997)14 C.P.C.(4th)78 (Ont. Gen. Div.); *Miller (Litigation Guardian of) v. Wiwchairyk,* (1997) 34 O.R. (3d) 640 (Ont.Gen.Div);
[13] *R.D. Belanger & Associates Ltd. v. Stadium Corp. of Ontario Ltd.,* (1991) 5 O.R. (3d) 778 (C.A.)
[14] *Dalex Co. v. Schawartz Levitsky Feldman,* (1994) 19 O.R. (3d) 463 (Gen. Div)
[15] *Grant v. Cormier – Grant, et. al,* (2001) 56 O.R. (3d) 215 (Ont. C.A.), *TD Bank v. Delloitte Hoskins & Sells,* (1991) 5 O.R. (3d) 417 (Gen. Div.)

B/ Nature of Plaintiff's Claim

8. The Plaintiffs, in their claim, seek the following:

(a) monetary damages;[16]

Based on the following torts:

(i) Misfeasance of public;
(ii) Conspiracy;
(iii) Intimidation;
(iv) Violations of ss.2,7, and 15 of the ***Charter***;
(v) Intentional infliction of mental anguish;

(b) Declaratory relief as to jurisdiction, legislation, regulations and executive action and inaction;[17]

(c) injunctive relief.[18]

9. Contrary to what the Defendants posit, and the Federal Court and Federal Court of Appeal ruled, the claim is **not** based on contract or a labour paradigm. The claim is solely based on common law and constitutional tort, with declaratory relief ancillary to those torts, particularly the constitutional torts (violations), **all** grounded in various forms of **misfeasance of public office.**

C/ The Constitutional Right to Declaratory Relief

10. The Plaintiffs submit that Declaratory relief goes to the crux of the constitutional right to judicial review, which right the Supreme Court of Canada has re-affirmed in ***Dunsmuir:***

> **31** The legislative branch of government cannot remove the judiciary's power to review actions and decisions of administrative bodies for compliance with the constitutional capacities of the government. Even a privative clause, which provides a strong indication of legislative intent, cannot be determinative in this respect (*Executors of the Woodward Estate v. Minister of Finance*, [1973] S.C.R. 120, at p. 127 [page213]). The inherent power of superior courts to review administrative action and ensure that it does not exceed its jurisdiction stems from

[16] **AFL, Tab E1 Statement of claim., Paragraph 3**
[17] **Ibid., AFL, Tab E1 at paragraph 1**
[18] **Ibid., AFL Tab E1 at Paragraph 4**

> the judicature provisions in ss. 96 to 101 of the *Constitution Act, 1867*: *Crevier*. As noted by Beetz J. in *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, at p. 1090, "[t]he role of the superior courts in maintaining the rule of law is so important that it is given constitutional protection". ***In short, judicial review is constitutionally guaranteed in Canada,*** particularly with regard to the definition and enforcement of jurisdictional limits..,.[19]

11. The Federal Court, in ***Singh v. Canada (Citizenship and Immigration), 2010 FC 757,*** re-affirmed the ample and broad right to seek declaratory relief, in quoting the Supreme Court of Canada in ***Solosky***:

> Declaratory relief is a remedy **neither constrained by form nor bounded by substantive content**, which avails persons sharing a legal relationship, in respect of which a "real issue" concerning the relative interests of each has been raised and falls to be determined.[20]

12. More recently, the Supreme Court of Canada, in the ***Manitoba Metis*** case reaffirmed the breadth of the right to declaratory relief to rule that it cannot be statute-barred:

> [134] This Court has held that although claims for personal remedies flowing from the striking down of an unconstitutional statute are barred by the running of a limitation period, courts retain the power to rule on the constitutionality of the underlying statute: *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3; *Ravndahl v. Saskatchewan*, 2009 SCC 7, [2009] 1 S.C.R. 181. ***The constitutionality of legislation has always been a justiciable question:*** *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, at p. 151. ***The "right of the citizenry to constitutional behaviour by Parliament" can be vindicated by a declaration that legislation is invalid, or that a public act is ultra vires:*** *Canadian Bar Assn. v. British Columbia*, 2006 BCSC 1342, 59 B.C.L.R. (4th) 38, at paras. 23 and 91, citing *Thorson*, at p. 163 (emphasis added). **An "issue [that is] constitutional is always justiciable**": *Waddell v. Schreyer* (1981), 126 D.L.R. (3d) 431 (B.C.S.C.), at p. 437, aff'd (1982), 142 D.L.R. (3d) 177 (B.C.C.A.), leave to appeal refused [1982] 2 S.C.R. vii (*sub nom. Foothills Pipe Lines (Yukon) Ltd. v. Waddell*).
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> …
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> [140] ***The courts are the guardians of the Constitution and, as in Ravndahl and Kingstreet, cannot be barred by mere statutes from issuing a declaration on a fundamental constitutional matter. The principles of legality, constitutionality and the rule of law demand no less:*** see *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 72.
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> …

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[19] *Dunsmuir v. New Brunswick,* 2008 SCC 9, at Para. 31
[20] *Canada v. Solosky,* [1980] 1 S.C.R. 821, at page. 830

> [143] ***Furthermore, the remedy available under this analysis is of a limited nature. A declaration is a narrow remedy. It is available without a cause of action, and courts make declarations whether or not any consequential relief is available***. As argued by the intervener Assembly of First Nations, it is not awarded against the defendant in the same sense as coercive relief: factum, at para. 29, citing *Cheslatta Carrier Nation v. British Columbia*, 2000 BCCA 539, 193 D.L.R. (4th) 344, at paras. 11-16.[21]

D/Jurisprudence on Covid-19 measures mitigating against striking claim

13. It is further submitted that jurisprudence, both in Canada and abroad, to the same claims and issues set out in the within claim, clearly weighs against striking this claim, whether in whole or in part.

14. Thus, the United States Supreme Court, struck, as unconstitutional measures against barring church gatherings on constitutional provisions indistinguishable from s.2 of the Canadian ***Charter***. [22]

15. Recently, the Indian Supreme Court struck as unconstitutional, the Covid-vaccine, **coercive measures** as unconstitutional for offending a provision of their constitution protecting bodily integrity, indistinguishable from s.7 of the Canadian ***Charter***:[23]

16. Moreover, it has already been established, in Canadian jurisprudence that any medical treatment without informed, voluntary, consent violates s.7 of the ***Charter*** and not saved by s.1:[24] wherein, the Supreme Court of Canada, in ***inter alia, Carter*** ruled:

> [67] The law has long protected patient autonomy in medical decision-making. In A.C. v. Manitoba (Director of Child and Family Services), 2009 SCC 30, [2009] 2 S.C.R. 181, a majority of this Court, per Abella J. (the dissent not disagreeing on this point), endorsed the "tenacious relevance in our legal system of the principle that competent individuals are — and should be — free to make decisions about their bodily integrity" (para. 39). This right to "decide one's own

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[21] *Manitoba Metis Federation Inc. v. Canada (Attorney General),* 2013 SCC 14 at para 134, 140, 143

[22] *Roman Catholic Diocese of Brooklyn, New York V. Andrew M. Cuomo, Governor Of New York U.S.,* 592 (2020)

[23] *Jacob Puliyel vs Union of India,* 2 May, 2022

[24] *Fleming v. Reid, Carter v. Canada (Attorney General),* 2015 SCC 5 (CanLII)at para. 67

> fate" entitles adults to direct the course of their own medical care (para. 40): it is this principle that underlies the concept of "informed consent" and is protected by s. 7's guarantee of liberty and security of the person (para. 100; see also R. v. Parker (2000), 2000 CanLII 5762 (ON CA), 49 O.R. (3d) 481 (C.A.)). As noted in Fleming v. Reid (1991), 1991 CanLII 2728 (ON CA), 4 O.R. (3d) 74 (C.A.), the right of medical self-determination is not vitiated by the fact that serious risks or consequences, **including death, may flow from the patient's decision. It is this same principle that is at work in the cases dealing with the right to refuse consent to medical treatment, or to demand that treatment be withdrawn or discontinued**: see, e.g., Ciarlariello v. Schacter, 1993 CanLII 138 (SCC), [1993] 2 S.C.R. 119; Malette v. Shulman (1990), 1990 CanLII 6868 (ON CA), 72 O.R. (2d) 417 (C.A.); and Nancy B. v. Hôtel-Dieu de Québec (1992), 1992 CanLII 8511 (QC CS), 86 D.L.R. (4th) 385 (Que. Sup. Ct.).

Additionally, the Indian Supreme Court, ruled, under their equality provision, indistinguishable from s.15 of the ***Charter***, that, based on the scientific evidence, drawing a distinction or discriminating as between "vaccinated" and "unvaccinated" individuals is unconstitutional because the vaccinated could equally transmit and receive the Covid-19 virus. In fact, this Indian Supreme Court decision heavily relies on jurisprudence from other common-law jurisdictions including the USA, Australia and New Zealand.[25]

17. In Ontario, attempts at moving to strike applications, ***in limine***, challenging the Covid-measures, have been dismissed.[26]

18. The Ontario Superior Court has also recently ruled that these issues of Covid-measures are not to be dealt with on a perfumatory basis, assuming and adopting the baldly-stated positions of public health officials, but to be dealt with, like any other case, on the available evidence and material bearing on the issue(s) before the Court.[27]

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[25] *Roman Catholic Diocese of Brooklyn, New York V. Andrew M. Cuomo, Governor Of New York U.S.,* 592 (2020)
[26] *Sgt Julie Evans et al. v. AG Ontario et al.,* (2021); *M.A. v. De Villa,* 2021 ONSC 3828
[27] *J.N. v. C.G.,* 2022 ONSC 1198

19. It is further submitted that the B.C. Supreme Court recently dismissed a motion to strike B.C's Covid-measures, **albeit** on standing, pointing out the complexity of the issues that the Covid-measures present. [28]

20. Furthermore, with respect to the Defendants' bald and baseless assertion that the vaccine mandates are not "mandatory" but a "choice", albeit coercive in that the choice is "be vaxxed or be fired", the caselaw on this point defies the Defendant's postulation in that:

(a) the Indian Supreme Court ruled that coercive measures are as unconstitutional as mandating measures[29]: and

(b) the California Court of Appeal Fourth Appellate District recently ruled that a "choice" of vaccination or staying away from school was **not** a choice but a coercive, **de facto**, mandatory measure[30].

E/ Errors of Federal Court of Appeal – The Weber Issue(s)

21. The Supreme Court of Canada, as well as other Appellate courts, have continually and consistently held that the collective bargaining or employment context does NOT exclude an action for **tort** within that relationship.[31]

22. In the same way that an employee could not raise this basis for (sexually) assaulting an employee in the context of employment, the coercive and intimidation measures to violate bodily and psychological integrity contrary to s.7 of the ***Charter***, and at common-law, is not a bar to this action.

23. There is no distinction between a sexual or common assault and a violation done to bodily integrity and psychological integrity under s.7 of the ***Charter***. At common law,

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[28] *Canadian Society for Advancement of Science in Public Policy v. Henry,* 2022 BCSC 724
[29] *Jacob Puliyel vs Union of India,* 2 May, 2022
[30] *Let them Choose et al. v. San Diego Unified School District,* (2022)
[31] *Weber v. Ontario Hydro*, 1995 CanLII 108 (SCC), [1995] 2 SCR 929 at para 54

and under the ***Charter***, mandating medical treatment is prohibited and coercive measures in furtherance of this is both a constitutional violation to bodily and psychological integrity,[32] as well as constitute the common-law, tort of intimidation, pleaded in the within claim. The prohibition against mandatory vaccination, or any medical treatment under constitutional jurisprudence, is not disputable.[33]

- ***Claim Discloses No Reasonable Cause of Action***

24. With respect to the Defendants' position, and the Court's **de facto** ruling on s.236 of the **FPSLRA**, the Plaintiffs state that, in analyzing the issue, the Supreme Court of Canada, in ***Weber*** ruled and guided as follows:

> 54 This approach **does not preclude all actions in the courts between employer and employee.** Only **disputes which expressly or inferentially arise out of the collective agreement** are foreclosed to the courts: *Elliott v. De Havilland Aircraft Co. of Canada Ltd.* (1989), 32 O.A.C. 250 (Div. Ct.), at p. 258, *per* Osler J.; *Butt v. United Steel workersofAmerica*, *supra*; *Bourne v. Otis Elevator Co.*, *supra*, at p. 326. **Additionally, the courts possess residual jurisdiction based on their special powers, as discussed** by Estey J. in *St. Anne Nackawic*, *supra.*[34]

and further ruled that:

> 57 **It might occur that a remedy is required which the arbitrator is not empowered to grant. In such a case, the courts of inherent jurisdiction in each province may take jurisdiction**. This Court in *St. Anne Nackawic* confirmed that the New Brunswick Act did **not oust the residual inherent jurisdiction of the superior courts to grant injunctions in labour matters** (at p. 724). Similarly, the Court of Appeal of British Columbia in *Moore v. British Columbia* (1988), 1988 CanLII 184 (BC CA), 50 D.L.R. (4th) 29, at p. 38, **accepted that the court's residual jurisdiction to grant a declaration was not ousted by the British Columbia labour legislation**, although it declined to exercise that jurisdiction on the ground that the powers of the arbitrator were sufficient to remedy the wrong and that deference was owed to the labour tribunal. What must be avoided, to use the

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and 57; *Northern Regional Health Authority v. Horrocks,* 2021 SCC 42 (CanLII)
[32] *Jacob Puliyel vs Union of India,* 2 May, 2022; *Let them Choose et al. v. San Diego Unified School District,* (2022)
[33] *Carter v. Canada (Attorney General),* 2015 SCC 5 (CanLII) at page. 67; *Fleming v. Reid,* (1991), 4 O.R. (3d) 74 (C.A.).
[34] *Weber v. Ontario Hydro*, 1995 CanLII 108 (SCC), [1995] 2 SCR 929 at para. 54

> language of Estey J. in *St. Anne Nackawic* (at p. 723), is a "real deprivation of ultimate remedy".[35]

In applying **Weber,** this Court has recently ruled:

> … However, not all actions in the courts between a unionized employer and employee are precluded, because an arbitrator's exclusive jurisdiction extends only to disputes that expressly or inferentially arise out of the collective agreement, and not every workplace dispute will fall within this scope. In addition, the exclusive jurisdiction of a labour arbitrator is subject to the residual curial jurisdiction to grant remedies that lie outside the remedial authority of a labour arbitrator.[36]
>
> …Weber does not stand for the proposition that labour arbitrators always have exclusive jurisdiction in employer-union disputes; rather, depending on the legislation and the nature of the dispute, other tribunals may possess overlapping jurisdiction, concurrent jurisdiction, or themselves be endowed with exclusive jurisdiction.[37]

No arbitrator has jurisdiction to grant the **in rem** declaratory and injunctive relief sought both under ss. 91-92 of the ***Constitution Act***, 1867 and under the ***Charter***. Moreover, the collective agreement(s) were **NOT** before the Court, thus the analysis in ***Weber*** could **not** have been undertaken, and the test on a motion to strike further in excess of jurisdiction.

25. The Supreme Court of Canada thus set out and ruled that:

(a) Declaratory relief is the purview of the Superior Courts; and

(b) An analysis of the **terms** of the collective bargaining agreement is necessary before the adequate alternative remedy is applied and a bar to access the Superior Court is applied.

26. There was **no** evidence of any collective bargaining agreement(s) before the Federal Court, and this issue was a matter of extensive submissions and argument before the Court which the Court, in the end, does not address in its reasons. [38]

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[35] *Weber v. Ontario Hydro*, 1995 CanLII 108 (SCC), [1995] 2 SCR 929 at para. 57
[36] *Northern Regional Health Authority v. Horrocks,* 2021 SCC 42 (CanLII)
[37] *Northern Regional Health Authority v. Horrocks,* 2021 SCC 42 (CanLII)

27. The Court, on a perfunctory basis, simply decides that, without any access to the collective agreements, that the collective agreements give rise to seek the remedies sought in the action, through the grievance mechanism of s. 236 of the FPSLRA.

28. The Plaintiffs' claim seeks Declaratory relief, constitutional declaratory relief both under ss. 91-92 and the Federal government's lack of a head of power to enact any medical treatment legislation or policy, as well as **Charter** violations grounded in the tort of misfeasance of public office.

29. The Ontario Courts, in interpreting ***Weber*** have further found that, **notwithstanding the existence of a labor regime in the context of a collective bargaining agreement**, this does **NOT** oust the Superior Court jurisdiction to adjudicate an action for the tort of misfeasances in public office. Thus, the Ontario Superior Court, in ***Muirhead*** ruled as follows:

> [5] For the reasons that follow, I strike the Muirheads' Statement of Claim **with leave to Constable Muirhead to plead a claim in misfeasance in public office,** the constituent elements of which are: (1) the defendant is a public official or public authority; (2) the defendant engaged in deliberate unlawful conduct in his, her, or its capacity as a public official or public authority; (3) the defendant had a culpable mental state; namely the public official or public authority was aware that: (a) the conduct was unlawful, and (b) that the conduct was likely to harm the plaintiff; (4) the conduct caused the plaintiff harm; and, (5) the harm is compensable under tort law.
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> [6] See *Odhavji Estate v. Woodhouse,* 2003 SCC 69 (CanLII), [2003] 3 S.C.R. 263; *Freeman-Maloy v. Marsden*, (2006), 2006 CanLII 9693 (ON CA), 79 O.R. (3d) 401 (C.A.), rev'g (2005), 2005 CanLII 14319 (ON SC), 253 D.L.R. (4th) 728 (S.C.J.), leave to appeal to the S.C.C. ref'd [2006] S.C.C.A. No. 201; *Reynolds v. Kingston (City) Police Services Board*, 2007 ONCA 166 (CanLII), [2007] O.J. No. 900 (C.A.), rev'g (2006), 2006 CanLII 16837 (ON SCDC), 267 D.L.R. (4th) 409 (Ont. Div. Ct.) restoring [2005] O.J. No. 3503 (Master); *Martineau v. Ontario (Alcohol and Gaming Commission)*, [2007] O.J. No. 1141 (C.A.); *Roncarelli v. Duplessis,* [1950] S.C.R. 121

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[38] **AFL Tab C1: Decision of Federal Court, at paragraphs 19-22.**

> [7] **As currently pleaded, Constable Muirhead's claim is a discipline dispute for which the court's jurisdiction has been ousted; however, it may be that he will be able to plead the material facts for a dispute that is about misfeasance in public office, which is an abuse of power dispute that must be adjudicated by a Superior Court.** It may be that the material facts of the circumstances of Constable Muirhead's **claim have crossed the line from being an employment relations dispute, which must be adjudicated by an arbitrator, to a dispute about abuse of power, bigotry, and racism by a public official or public authority against a citizen who happens to be an employee.** [39]

and further ruled:

> [62] In *Weber,* Chief Justice McLachlin (L'Heureux-Dubé, Gonthier, and Major JJ. concurring) discussed the matter of characterizing the dispute to determine whether or not the jurisdiction of the court was ousted, and she noted that **the fact that the parties are employer and employee may not be determinative and whether the court's jurisdiction was ousted would depend on the facts of each particular case.** She stated at paras. 52-54:
>
> > 52. **In considering the dispute, the decision-maker must attempt to define its "essential character", to use the phrase of La Forest J.A**. in *Energy & Chemical Workers Union, Local 691 v. Irving Oil Ltd.* (1983), 148 D.L.R. (3d) 398 (N.B.C.A.). T**he fact that the parties are employer and employee may not be determinative. Similarly, the place of the conduct giving rise to the dispute may not be conclusive; matters arising from the collective agreement** may occur off the workplace and conversely, not everything that happens on the workplace may arise from the collective agreement: *Energy & Chemical Workers Union, supra*, per La Forest J.A. Sometimes the time when the claim originated may be important, as in *Wainwright v. Vancouver Shipyards Co.* (1987), 38 D.L.R. (4th) 760 (B.C.C.A.), where it was held that the court had jurisdiction over contracts pre-dating the collective agreement. See also *Johnston v. Dresser Industries Canada Ltd*. (1990), 75 O.R. (2d) 609 (C.A.). In the majority of cases the nature of the dispute will be clear; either it had to do with the collective agreement or it did not. Some cases, however, may be less than obvious. The question in each case is whether the dispute, in its essential character, arises from the interpretation, application, administration or violation of the collective agreement.
> >
> > 53. Because the nature of the dispute and the ambit of the collective agreement will vary from case to case, it is impossible to categorize the classes of case that will fall within the exclusive jurisdiction of the arbitrator. ….

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[39] Muirhead v. York Regional Police Services Board, 2014 ONSC 6817, paragraph 5- 7

> 54. This approach does not preclude all actions in the courts between employer and employee. Only disputes which expressly or inferentially arise out of the collective agreement are foreclosed to the courts: *Elliott v. De Havilland Aircraft Co. of Canada Ltd.* (1989), 32 O.A.C. 250 (Div. Ct.), at p. 258, per Osler J.; *Butt v. United Steelworkers of America, supra*; *Bourne v. Otis Elevator Co., supra*, at p. 326. Additionally, the courts possess residual jurisdiction based on their special powers, as discussed by Estey J. in *St. Anne Nackawic, supra*.
>
> [63] **The recent decision of the Court of Appeal in *George v. Anishinabek Police Services*, *supra,* discussed further below, makes the point that to determine whether the court's jurisdiction has been ousted will require a contextual fact-based analysis of the circumstances of each case.** ….. [40]

and further ruled that the tort in misfeasance of public office could proceed.[41]

30. The Federal Courts have also similarly ruled.[42]

31. The above passages and jurisprudence were the subject of extensive submissions before the Federal Court, and not addressed in the Court's reasons, nor in the Federal Court of Appeal.

32. It is respectfully submitted that, given the jurisprudence in ***Weber*** and ***Horracks***, and the Ontario and Federal Courts rulings in interpreting ***Weber*** on the same issues **in favor** of the Plaintiffs, that the Federal Court and Court of Appeal exceeded jurisdiction, **on a motion to strike**, as opposed to a motion for summary judgment, on proper evidence, in determining that it is "plain and obvious, beyond argument" that the case cannot succeed when in fact it **has** succeeded in other cases. The lower Courts, have misinterpreted **Weber** to a perfunctory question of whether the Plaintiff is unionized and go no further.

33. The Courts have also ruled, in the COVID-19 context that **coercive measures** to vaccinate constitute a violation of bodily and psychological integrity of the person, and that to treat the vaccinated an unvaccinated differently, in the face of the scientific and

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[40] *Muirhead v. York Regional Police Services Board,* 2014 ONSC 6817 at para. 62-63
[41] *Muirhead v. York Regional Police Services Board,* 2014 ONSC 6817 at para. 81-82,85, 87.

medical data that shows that vaccination does not prevent transmission, discriminates and violates equality of treatment.[43]

34. These coercive measures, under common law, not only violates s.2, 7 and 15 of the ***Charter***, but further constitute the **tort** of intimidation under common law.[44]

35. It is respectfully submitted that, when the Federal Court ruled, and Court of Appeal upheld, that:

> [32] The Plaintiffs cannot escape the operation of s 236 of the FPSLRA by pleading that their claims are not ordinary workplace disputes, or that some of the remedies they seek are not available through the internal grievance process. As the Ontario Court of Appeal held in Bron, the right to grieve is "very broad" and "[a]lmost all employment-related disputes can be grieved under s 208 of the FPSLRA" (at paras 14-15).[45]

This misstates, and ignores, the law as enunciated in ***Weber, Horracks*** and decisions interpreting ***Weber***. For the Federal Court and Court of Appeal the question starts and ends by the deficient singular question of whether a Plaintiff is covered by a labour arbitrator regime. This is perfunctory, and in excess of jurisdiction on a motion to strike. It does not comply with the ***Weber*** analysis as enunciated and interpreted.

- **Granting of Leave**

36. It is respectfully submitted that the Applicants have met their onus and should be granted leave in that they raise issues of natural and public importance which include:

(a) A clarification of this Court's decision in **Weber** particularly in the context of a motion to strike**:**

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[42] *Edwards v. Canada,* (2000) 181 F.T.R. 219
[43] *Jacob Puliyel vs Union of India,* 2 May, 2022; *Let them Choose et al. v. San Diego Unified School District,* (2022)
[44] *McIlvenna v. 1887401 Ontario Ltd.,* 2015 ONCA 830 (CanLII)
[45] AFL, Tab C1, Decision of the Federal Court, at paragraph 32

(b) Whether the **Weber** analysis is restricted to the sole issue of membership in a union and subject to a collective bargaining unit:

(c) Whether the **Weber** analysis can be undertaken in a vacuum without regard to the context of the collective bargaining agreement; and

(d) Whether this Court need not put its mind to exercising its residual discretion and jurisdiction in all the circumstances of the case.

PART IV– SUBMISSIONS CONCERNING COSTS

37. The Applicants seek their costs on this Application for Leave.

PART V– ORDER(S) SOUGHT

38. The Applicants therefore respectfully requests:

(a) a granting of leave to appeal the Decision of Federal Court of Appeal in docket # A-67-23, made on June 7th, 2024;

(b) costs of this application for leave and any such further or other order as counsel may advise and this Court deems appropriate.

All of which is respectfully submitted, this 30th day of August , 2024.

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