SCS APPR0VED

No. 233427
Victoria Registry

In the Supreme Court of British Columbia

Between

JASON BALDWIN

Plaintiff

and

HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA and DR. BONNIE HENRY IN HER CAPACITY AS PROVINCIAL HEALTH OFFICER FOR THE PROVINCE OF BRITISH COLUMBIA

Defendants

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

NOTICE OF APPLICATION

Names of applicants: His Majesty the King in right of the Province of British Columbia (the "**Province**") and Dr. Bonnie Henry in her capacity as Provincial Health Officer for the Province of British Columbia (the "**PHO**") (collectively, the "**Defendants**")

To: the plaintiff

TAKE NOTICE that an application will be made by the Defendants to Justice Edelmann at the courthouse at 850 Burdett St., Victoria, B.C. on April 28, 2025 at 10:00 a.m., as arranged with Scheduling, for the orders set out in Part 1 below.

The Defendants estimate that the application will take 5 days, together with the other applications scheduled to be heard at the same time.

This matter is not within the jurisdiction of an associate judge.

Part 1: ORDERS SOUGHT

1. An order pursuant to Rule 9-5(1)(d) striking the amended notice of civil claim in its entirety, without leave to amend, and dismissing the action.

2. Alternatively, orders:

   a. pursuant to Rule 21-8(1)(a) and/or (b) striking paragraphs 40-45 of the amended notice of civil claim, without leave to amend, and dismissing the s. 2(d) *Charter* and breach of privacy claims; and,

   b. pursuant to Rule 9-5(1)(a):

      i. striking paragraphs 37-39, 44, and 45 of the amended notice of civil claim, without leave to amend, and dismissing the misfeasance in public office and breach of privacy claims; and

      ii. dismissing the action as against the PHO.

3. In the further alternative, an order pursuant to Rule 9-6 dismissing the misfeasance in public office claim.

4. Costs.

Part 2: FACTUAL BASIS

5. The plaintiff was a unionized employee of the Province within the BC Public Service. At all material times, his employment was subject to the collective agreement between his union, the B.C. General Employees' Union (the "**GEU**"), and his employer, the Province.

6. On November 1, 2021, the Minister of Finance issued "Human Resources Policy 25, COVID-19 Vaccination Policy" (the "**Vaccination Policy**"), pursuant to s. 5(4) of the *Public Service Act*.[1] On November 19, 2021, Cabinet enacted the *Public Service COVID-19 Vaccination Regulation* (the "**Regulation**"),[2] which stated that the Vaccination Policy is a term and condition of employment for employees and deemed any terminations under the Vaccination Policy to be dismissal for just cause.

7. The Vaccination Policy required that BC Public Service employees provide proof of full vaccination against COVID-19 by November 22, 2021, subject to exemptions based on medical conditions or other protected grounds under the *Human Rights Code*.[3] Employees who did not provide proof of vaccination or refused to disclose their vaccination status were placed on leave without pay,

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[1] R.S.B.C. 1996, c. 385.
[2] B.C. Reg. 284/2021.
[3] R.S.B.C. 1996, c. 210.

unless they had requested or been granted an exemption. After three months of being placed on leave without pay, employees who did not become at least partially vaccinated could be terminated.

8. The plaintiff failed to comply with the Vaccination Policy and was placed on leave without pay on January 10, 2022.[4]

9. On January 11, 2022, the GEU filed a grievance on behalf of the plaintiff, challenging the Province's decision to put him on leave without pay.[5] On August 15, 2022, the GEU notified the plaintiff that it was withdrawing his grievance because the GEU had determined the grievance did not have a reasonable chance of success.[6]

10. On September 16, 2022, the plaintiff filed an appeal of the GEU's decision to withdraw his grievance to the Area Grievance Appeal Committee, an internal GEU appeal body.[7]

11. On October 5, 2022, the plaintiff was terminated under the Vaccination Policy for just cause.[8] On October 13, 2022, the GEU filed a grievance on behalf of the plaintiff challenging his termination.[9]

12. On November 3, 2022, the GEU withdrew the plaintiff's termination grievance because the GEU concluded the grievance did not have a reasonable chance of success.[10] The plaintiff filed an appeal of this decision to the Area Grievance Appeal Committee.[11]

13. On December 22, 2022, the Area Grievance Appeal Committee dismissed the plaintiff's appeals on the basis that the grievances were unlikely to succeed.[12]

14. The plaintiff appealed the Area Grievance Appeal Committee's decision to the Provincial Executive Grievance Appeal Committee, a second internal GEU appeal body. On January 23, 2023, the Provincial Executive Grievance Appeal Committee denied the plaintiff's appeal on the basis that there were no grounds to

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[4] Affidavit #3 of Jason Baldwin, made August 21, 2024 ("**Baldwin #3**"), at para. 5.
[5] Baldwin #3 at para. 5, Ex. A.
[6] Baldwin #3 at para. 6, Ex. B.
[7] Baldwin #3 at para. 7.
[8] Baldwin #3 at para. 8.
[9] Baldwin #3 at para. 8, Ex. C.
[10] Baldwin #3 at para. 9, Ex. D.
[11] Baldwin #3 at para. 10.
[12] Baldwin #3 at para. 11, Ex. E.

allow an appeal to go forward to hearing.[13] On January 26, 2023, the GEU notified the plaintiff that it had withdrawn the plaintiff's grievances on a "without prejudice" basis.[14]

15. On February 7, 2023, the plaintiff filed a complaint with the B.C. Labour Relations Board (the "**Board**").[15] The plaintiff alleged the GEU had violated its duty of fair representation under s. 12 of the *Labour Relations Code*.[16] In reasons released on August 9, 2023, the Board dismissed the plaintiff's complaint against the GEU.[17]

16. On August 23, 2023, the plaintiff sought reconsideration of the Board's decision to dismiss his s. 12 complaint under s. 141 of the *Code*.[18] In reasons released on December 19, 2023, the Board dismissed the plaintiff's reconsideration application.[19] The plaintiff did not seek judicial review of the Board's decisions.

Part 3: LEGAL BASIS

Overview

17. The Defendants respectfully submit that:

a. the action is an abuse of process that should be dismissed under Rule 9-5(1)(d);

b. in the alternative,

i. the s. 2(d) *Charter* and breach of privacy claims should be dismissed under Rule 21-8(1)(a) and/or (b) for lack of jurisdiction; and,

ii. the misfeasance in public office claim, breach of privacy claim, and all claims against the PHO are bound to fail and should be struck under Rule 9-5(1)(a); and,

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[13] Baldwin #3, Ex. F at Appendix L.
[14] Baldwin #3, Ex. F at Appendix L.
[15] Baldwin #3 at para. 12, Ex. F.
[16] R.S.B.C. 1996, c. 244 [***Code***].
[17] Baldwin #3, Ex. G: *Jason Baldwin (Re)*, 2023 BCLRB 123.
[18] Baldwin #3 at para. 14, Ex. H.
[19] Baldwin #3, Ex. I: *Jason Baldwin (Re)*, 2023 BCLRB 197.

c. in the further alternative, the misfeasance in public office claim raises no genuine issue for trial and should be dismissed under Rule 9-6.

18. Although an order under Rule 9-5(1)(d) dismissing the action as an abuse of process would be dispositive of this application, and in that sense should be considered first, the jurisdictional problems provide a helpful introduction to the abuse of process argument. For that reason, the submissions below begin with the jurisdictional issue.

Charter and breach of privacy claims within exclusive jurisdiction of Board and should be dismissed under Rule 21-8(1)(a) and/or (b) for lack of jurisdiction

(a) Overview

19. The s. 2(d) *Charter* and breach of privacy claims should be dismissed under Rule 21-8(1)(a) and/or (b) for lack of jurisdiction. The essential character of these claims relates to the collective agreement and exclusive jurisdiction rests with the Board.

(b) Legal principles

20. The test under Rule 21-8(1)(a) in this context is whether, assuming the pleaded facts are true, it is plain and obvious that the court's jurisdiction has been ousted by the *Code* and the plaintiff's collective agreement.[20] Rule 21-8(1)(a) applies where the pleadings do not allege facts to establish the jurisdiction of the court. Rule 21-8(1)(b) applies where the evidence on the application fails to establish jurisdiction. Under Rule 21-8(1)(b), the burden on the plaintiff is to present an arguable case.[21]

21. Jurisdiction in this case is determined through the "essential character" framework set out by the Supreme Court of Canada in *Weber v. Ontario Hydro*.[22] The central question is whether the cause of action arises "from the interpretation, application or alleged violation of the [plaintiff's] collective agreement".[23] Plaintiffs cannot avoid arbitration by pleading causes of action or wrongs which are typically adjudicated outside the labour relations process. Rather, the central focus of the analysis is the <u>facts</u> of the complaint, not the legal form in which the complaint is

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[20] *Lewis v. WestJet Airlines Ltd.*, 2019 BCCA 63 at para. 1.
[21] *AtriCure, Inc. v Meng*, 2020 BCSC 341 at paras. 28, 31-32.
[22] [1995] 2 S.C.R. 929 [***Weber***].
[23] *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42 [***Horrocks***] at para. 47.

advanced.[24] Accordingly, *Charter* and tort claims fall within the exclusive jurisdiction of a labour arbitrator if their "essential character" relates to the interpretation and application of a collective agreement.[25]

22. The connection between the dispute and collective agreement does not need to be explicit or direct. Rather, defendants need only establish that the dispute arises "inferentially" out of the collective agreement to have it struck under Rule 21-8.[26] This is consistent with the Supreme Court of Canada's direction to adopt "a liberal position" under which the legislative intention to grant labour arbitrators "broad exclusive jurisdiction over issues relating to conditions of employment" is given effect.[27]

(c) *Charter* and breach of privacy claims within exclusive jurisdiction of the Board

23. In determining whether the s. 2(d) *Charter* and breach of privacy claims should be dismissed for lack of jurisdiction, the questions for the Court to consider are:[28]

a. What is the Board's exclusive jurisdiction under the *Code* and collective agreement?

b. What is the "essential character" of the dispute, and does it fall within the Board's exclusive jurisdiction under the *Code* and the collective agreement?

c. If so, can the arbitration process provide effective redress for the alleged wrong?

24. Each of these questions is discussed in turn.

(i) *Code and collective agreement grant Board exclusive jurisdiction*

25. The *Code* grants the Board a broad scope of exclusive jurisdiction over labour disputes in British Columbia:[29]

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[24] *Horrocks* at paras. 20, 51.
[25] *Horrocks* at para. 19.
[26] *Stene v. Telus Communications Company*, 2019 BCCA 215 at para. 56.
[27] *Bisaillon v. Concordia University*, 2006 SCC 19 at para. 33.
[28] *Goldman v. Fraser Valley Aboriginal Children and Family Services*, 2020 BCCA 300 at para. 5.
[29] See *e.g.*, *Bruce v. Cohon*, 2017 BCCA 186 [***Bruce***] at paras. 28-32.

a. Section 84 mandates that every collective agreement contain a provision governing dismissal or discipline of an employee bound by the agreement and requiring that employers have a just and reasonable cause for dismissal or discipline of an employee.

b. Section 89 provides that the Board has "all authority necessary to provide a final and conclusive settlement of a dispute arising under a collective agreement". This includes (but is not limited to) making orders for monetary compensation for contravention of the collective agreement, reinstatement after dismissal in contravention of the collective agreement, and interpreting and applying any enactment intended to regulate the employment relationship of the persons bound by a collective agreement—even though the enactment may conflict with the terms of the collective agreement.[30]

c. Sections 136-137 provide that the Board has exclusive jurisdiction over labour disputes and precludes courts from taking jurisdiction over such disputes.[31]

26. At all material times, the plaintiff's employment was governed by either the 18th or 19th Main Public Service Agreement between the Province, represented by the BC Public Service Agency, and the GEU (collectively, the "**GEU Agreements**").[32] The GEU Agreements establish comprehensive and exclusive grievance and arbitration processes which interlock with the *Code*:

a. Article 2.2 designates the GEU as the exclusive bargaining agent for all employees subject to the GEU Agreements.

b. Article 8 sets out the grievance process under the GEU Agreements.

    i. Article 8.1(a)(2) provides that grievances may be filed with respect to the dismissal, discipline, or suspension of an employee bound by the Agreements. Article 8.1(b) provides that such grievances must be resolved following the procedure set out in the Agreements.

    ii. Articles 8.2-10 set out the steps and procedures for individual grievances.

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[30] *Code*, s. 89(a), (b), (g).

[31] See also, *Bruce* at paras. 31-32.

[32] Affidavit #1 of Jason Baldwin, made June 10, 2024 ("**Baldwin #1**"), Ex. F and G.

iii. Article 8.11 provides for “policy grievances”, wherein the GEU or employer may dispute the application, interpretation, or alleged violation of an article of the agreement or the application and interpretation of an employer policy.

c. Article 9 sets out the arbitration process under the GEU Agreements.

i. Article 9.1 provides that parties may submit a dispute on the interpretation, application, or administration of the Agreements to arbitration after the grievance process has been exhausted.

ii. Article 9.5 provides that the decision of the Board will be final, binding, and enforceable, and that the Board has the power to dispose of a dispute by “any arrangement it deems just and equitable.”

d. Article 10 covers dismissal, suspension, and discipline.

i. Article 10.1 puts the burden of proving just cause on the employer.

ii. Article 10.2 provides that a person authorized under the *Public Service Act* may dismiss an employee for just cause.

iii. Article 10.3 provides that a person authorized under the *Public Service Act* may suspend an employee for just cause.

iv. Article 10.4 provides that all dismissals and suspensions will be subject to the formal grievance procedure under Article 8.

27. Finally, the GEU Agreements include the following provisions:

a. Article 1.2 provides that, in the event that “any future legislation… materially alters any provisions of this agreement”, all other provisions remain in effect and the parties will negotiate a mutually agreeable provision to substitute for the altered provision.

b. Article 1.3 provides that, where there is a conflict between the agreement and a regulation made by, or on behalf of, the employer, the agreement takes precedence over the regulation.

c. Article 1.4 provides that the BC Public Service Agency will not "amend, repeal, or revise" regulations made under the *Public Service Act* that will affect the terms and conditions of employment covered by the GEU Agreements without first notifying the GEU of the nature of the proposal.

d. Article 6 provides that the employer retained the right to manage and direct employees, except as otherwise specified in the GEU Agreements.

e. Article 22.1 provides that "[t]here shall be full compliance with all applicable statutes and regulations pertaining to the working environment."

f. Article 22.12 provides that the GEU and employer "share a desire to prevent acquisition and transmission of communicable diseases" in the workplace.

28. Taken together, the *Code* and the GEU Agreements establish a comprehensive and exclusive scheme under which any and all disputes relating to the interpretation, application, and alleged violations of the GEU Agreements must be resolved by the Board.

(ii) *Essential character of claims falls within Board's exclusive jurisdiction*

29. This action, in its "essential character", is about whether the plaintiff's employer breached the GEU Agreements by enacting and/or enforcing the Vaccination Policy and/or the Regulation. The plaintiff tries to avoid this conclusion by artfully pleading *Charter* damages and tort claims. However, the Board's exclusive jurisdiction cannot be evaded on the basis of the legal theories advanced—the focus of the analysis is always on the facts of the complaint.[33] The facts of this case unambiguously arise out of the GEU Agreements:

a. At all material times, the plaintiff was a unionized employee of the Province and was bound by the GEU Agreements.

b. He was put on leave without pay, and ultimately terminated for just cause, because of his failure to comply with the Vaccination Policy.

[33] *Horrocks* at paras. 20, 51.

c. The plaintiff filed grievances both when he was put on leave without pay and when he was terminated.

d. The GEU withdrew the grievances based on its determination that the case was unlikely to succeed.

e. After the GEU withdrew the plaintiff's grievances, the plaintiff exhausted both the GEU's internal appeal process and the Board's s. 12 complaint process.

f. Having exhausted the labour-related dispute resolution processes available to him, the plaintiff commenced this action. Tellingly, many of the arguments the plaintiff advances in this action are substantially the same as those he made during the GEU's internal appeal process and at the Board:

    i. When the plaintiff engaged the GEU's internal appeal process, he argued the Province was required to consult with the GEU before it instituted the Vaccination Policy or the Regulation. The GEU disagreed. In the GEU's view, the Province had met its obligations under Article 1.4 of the GEU Agreements.[34]

    ii. When the plaintiff brought a complaint against the GEU under s. 12 of the *Code*, he again argued that the GEU was not sufficiently consulted. Moreover, as here, he argued that the Vaccination Policy and/or the Regulation violated s. 2(d) of the *Charter*.[35] He also made the same factual arguments relating to the product monographs of COVID-19 vaccines that he is making in this Court.[36]

30. The facts paint a clear picture: the plaintiff was aware that the grievance process was the means available to him to adjudicate his placement on leave and subsequent termination and availed himself of that process. Dissatisfied with the result, he now pleads the same facts and law and asks this Court to take jurisdiction. The plaintiff has not—and cannot—articulate a principled basis on

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[34] Baldwin #3, Ex. D.

[35] Baldwin #3, Ex. F.

[36] Baldwin #3, Ex. F at pp. 40-45; Amended Notice of Civil Claim, filed April 2, 2024 ("**ANOCC**") at paras. 18-26.

which both the Board and courts have jurisdiction to hear his complaints when they share factual and legal underpinnings.

31. Moreover, even if the plaintiff was not disputing the same factual and legal issues already raised in the grievance process, this Court would have to interpret and apply the GEU Agreements to adjudicate the causes of action raised.

32. First, the plaintiff alleges the Regulation violates s. 2(d) of the *Charter* because it imposes a new term and condition of employment outside of the collective bargaining process.[37] Section 2(d) of the *Charter* does not guarantee a certain outcome or process—what is protected is the right to associate in the pursuit of collective goals.[38] Accordingly, the ultimate question is whether the impugned law "substantially interferes" with the right to collectively bargain, such that the employees' efforts are rendered pointless or futile.[39]

33. This is a contextual and fact-driven analysis.[40] In this case, the necessary context involves the GEU Agreements. As noted above, the employer and GEU negotiated various provisions in the GEU Agreements which envision the enactment of legislation which affects the terms and conditions of employment:

a. Article 1.2 provides that, where "any future legislation… materially alters" the Agreement, all other provisions remain in effect and the parties will negotiate necessary amendments.

b. Article 1.3 provides that if there is a conflict between the Agreement and a regulation, the agreement takes precedence.

c. Article 1.4 provides that the PSA will not make regulations under the *Public Service Act* that affect the terms and conditions of employment in the GEU Agreements without first notifying the GEU.

d. Article 22.1 provides that "[t]here shall be full compliance with all applicable statutes and regulations pertaining to the working environment."

34. These provisions show that, when the GEU and employer negotiated the GEU Agreements, they accounted for—and permitted—<u>some</u> level of legislative

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[37] ANOCC at para. 42.

[38] *Fraser v. Ontario (Attorney General)*, 2011 SCC 20 [***Fraser***] at para. 46

[39] *Fraser* at para. 46.

[40] *Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 at para. 92; *Amalgamated Transit Union, Local 113 v. Ontario*, 2024 ONCA 407 at para. 39.

and quasi-legislative interference with the terms and conditions of employment. This raises the question: what level of interference with the terms and conditions of employment is permitted under the GEU Agreements? Resolving this question is essential in determining the plaintiff's *Charter* claim—his right to collectively bargain cannot be "substantially interfered" with if the impugned interference is permitted by the GEU Agreements. Since this determination inevitably requires interpreting the scope of the GEU Agreements, the plaintiff's *Charter* claim falls within the exclusive jurisdiction of the Board.

35. The same reasoning applies to the breach of privacy claim. The plaintiff's complaint appears to be that the requirement in the Vaccination Policy and/or Regulation to disclose his vaccination status to his employer was a tortious breach of privacy. One of the issues raised by this claim is whether the plaintiff's employer had the right to collect this information under the GEU Agreements. To answer this question, it would be necessary to interpret and apply provisions of the GEU Agreements (including but not limited to):

a. Article 6, which empowers the employer to direct and manage the workplace, including making health and safety policies.

b. Article 22.1, which provides that the employer and employees will comply with all workplace health and safety regulations.

c. Article 22.12, which affirms the employer and GEU's commitment to preventing the spread of communicable diseases.

36. Since it would be necessary for this Court to interpret and apply the GEU Agreements in order to resolve the common law breach of privacy claim, it falls within the exclusive jurisdiction of the Board.

(iii) *Arbitration provides effective redress for wrongs alleged*

37. The Board's remedial capacity is broad enough to address the wrongs alleged—and the relief sought—by the plaintiff. The fact that the plaintiff pleads torts and the *Charter* has no bearing: the Board has the ability to award damages for both.[41] Indeed, the plaintiff apparently took a similar view when he raised the same arguments before the Board.[42]

38. The fact that the plaintiff's grievances were not adjudicated on their merits by the Board similarly has no bearing. Unionized employees give up certain

[41] *Weber* at paras. 70-71.
[42] Baldwin #3, Ex. E-F.

individual rights in exchange for certain collective powers exercisable through unions.[43] This means that the GEU holds a "statutorily granted monopoly on representation" and has the sole authority to advance the plaintiff's rights in respect of the GEU Agreements.[44] To the extent the GEU's decision not to advance his grievance denies the plaintiff the opportunity to have his claim determined on the merits, this does not amount to unfairness: it is the proper functioning of a legislative scheme which is binding on both him and the courts.[45]

39. *Ashraf* is instructive here. In that case, the plaintiff was terminated from his employment and his union brought a grievance against the employer. However, the union withdrew the grievance when it determined the grievance had no reasonable prospect of success. The plaintiff subsequently brought a fair representation complaint against his union (under the federal equivalent of s. 12 of the *Code*). After the complaint was dismissed, he sought reconsideration. After the reconsideration application was dismissed, the plaintiff did not seek judicial review in Federal Court.

40. Ultimately, the plaintiff filed an action in the B.C. Supreme Court naming his former employer and two former colleagues. He alleged wrongful dismissal, breach of fiduciary duty, and breach of the *Charter* (among other things), and sought punitive and aggravated damages. When the defendants applied to strike the claim—citing the exclusive jurisdiction of the federal labour relations board—the plaintiff argued that if the claim was struck, his claim would never be heard on the merits and he would be left without effective redress.[46] Justice Thomas rejected this argument. Citing the Court of Appeal's decision in *Driol*, he held that the union "had carriage of [the plaintiff's] grievance" and as a result "if the union decides not to proceed with a grievance, the union member affected must abide by that decision."[47] Accordingly, Justice Thomas struck the claim because it fell in the exclusive jurisdiction of a labour arbitrator.

41. *Ashraf* is apposite. In both *Ashraf* and the present case:

a. The plaintiff was dissatisfied when their union decided not to pursue their grievance, as the union had determined the grievance did not have a reasonable prospect of success.

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[43] *Driol v. Canadian National Railway Company*, 2011 BCCA 74 at para. 18.
[44] *Horrocks* at para. 38.
[45] *Ashraf v. Fraser*, 2023 BCSC 532 [***Ashraf***] at para. 47.
[46] *Ashraf* at para. 47.
[47] *Ashraf* at paras. 48-49, citing 2011 BCCA 74 at para. 18.

b. The plaintiff availed themselves of all review measures available to them at the applicable labour board.

c. The plaintiff did not judicially review the labour board's decision.

d. The plaintiff subsequently brought an action against their employer, alleging both torts and *Charter* violations.

42. Based on the foregoing, it is plain and obvious the plaintiff's *Charter* and breach of privacy claims are in the exclusive jurisdiction of the Board. They should be struck and dismissed under Rule 21-8(1)(a). Alternatively, the plaintiff has failed to present an arguable case that the Court has jurisdiction over the plaintiff's *Charter* and breach of privacy claims and they should be dismissed under Rule 21-8(1)(b).

Action an abuse of process that should be struck and dismissed under Rule 9-5(1)(d)

(a) Overview

43. This action is an abuse of process because the plaintiff is attempting to usurp the role of his union the GEU. The issues raised in this action could have been, and largely were, raised by the plaintiff's union through the mandatory grievance and arbitration processes set out in the GEU Agreements. The GEU ultimately withdrew the plaintiff's grievances, but that decision was for the union to make. Unions have "ownership" over grievance proceedings and the exclusive power to determine whether and how to proceed.[48] It is abusive for the plaintiff to attempt to effectively usurp the GEU's decision by bringing this action. The plaintiff's remedy—of which he availed himself—was a fair representation complaint under s. 12 of the *Code*.

(b) Legal principles

44. Abuse of process is a broad, flexible, and discretionary doctrine. Its primary purpose is to protect the integrity of the adjudicative functions of the Court and does not turn on the motives of the parties.[49] It is an abuse of process to submit a

[48] *Pereira v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2024 BCCA 158 at para. 83.

[49] *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at para. 51

dispute for resolution in one venue and, when dissatisfied by the result, bring a collateral attack in another forum.[50]

(c) Plaintiff attempting to usurp role of GEU

45. As noted above, the plaintiff's suspension and termination were both subject to grievances filed by the GEU. When the GEU decided the grievances had no reasonable prospect of success, the plaintiff availed himself of the internal appeal processes within the GEU and subsequently brought a fair representation complaint against the GEU, pursuant to s. 12 of the *Code*. In those proceedings, he challenged the GEU's handling of his grievances and argued they had failed to raise relevant arguments pertaining to the constitutionality and applicability of the Vaccination Policy and/or Regulation. In so doing, the plaintiff raised substantially the same arguments under s. 2(d) of the *Charter* he makes before this Court.

46. The plaintiff now seeks to attack the results of the labour arbitration process in this action. It is plain and obvious that this is an abuse of process: where a party utilizes the grievance processes available to them to challenge their terminations, they are bound by this choice. To attempt to circumvent this process is an impermissible collateral attack.

47. Justice Punnett's reasoning in *Pereira BCSC* is apposite. There, the plaintiff was a unionized employee who was disciplined and suspended by her employer. Her union grieved both the discipline and suspension. Ultimately, the union settled both grievances. Following settlement of the initial grievances, the plaintiff was terminated for conduct the employer alleged violated workplace policy. The union also grieved her termination. The termination grievance was referred to arbitration and ultimately settled by the union. In response to the union's decision to settle the discipline, suspension, and termination grievances, the plaintiff filed a fair representation complaint under s. 12 of the *Code*. When the initial application was dismissed, she sought reconsideration, which was also dismissed.

48. After the plaintiff had exhausted the processes available to her under the *Code* and her collective agreement, she commenced an action against her employer for wrongful dismissal. The employer sought to have the claim struck on jurisdictional grounds and as an abuse of process. On the latter point, Justice Punnett accepted the employer's submissions and struck the claim under Rule 9-5(1)(d). He held that by pursuing the grievance procedures and filing her s. 12 complaint, "the plaintiff implicitly accepted that [the labour arbitration] forum was

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[50] *Pereira v. Dexterra Group Inc.*, 2021 BCSC 1484 [***Pereira BCSC***] at paras. 60-64; *Speckling v. C.E.P., Local 76*, 2006 BCCA 203 at paras. 43-47.

the appropriate one to address her claims."[51] Following the Court of Appeal's decision in *Speckling*,[52] Justice Punnett held as follows:

> [63] The plaintiff has, as a member of the Union, utilized the internal grievance procedure under the Collective Agreement and has brought two s. 12 applications to the Board. Her action in this Court is an attempt to re-litigate the matter. Such is a collateral attack, "offend(s) the legislative scheme" and is an abuse of process.

49. This reasoning is directly analogous to this action and is dispositive. The action relates to the enactment and enforcement of the Vaccination Policy and the Regulation and the plaintiff's leave without pay and termination thereunder. The plaintiff has previously grieved his leave and termination under the Vaccination Policy and Regulation through the labour arbitration process. He is not permitted to collaterally attack that process in the courts. The action is an abuse of process and should be struck under Rule 9-5(1)(d).

In alternative, misfeasance in public office claim, breach of privacy claim, and all claims against PHO should be struck under Rule 9-5(1)(a)

(a) Overview

50. In the alternative, the misfeasance in public office claim, breach of privacy claim, and all claims against the PHO are bound to fail and should be struck under Rule 9-5(1)(a).

(b) Legal principles

51. The test under Rule 9-5(1)(a) is whether, assuming the pleaded facts are true, it is plain and obvious the claim will not succeed. Allegedly "novel" claims do not benefit from a lower threshold.[53] Evidence is not admissible to challenge the veracity of the pleaded facts, but it is admissible: (a) to explain and contextualize the legislative scheme;[54] and (b) where parties have referred to documents or agreements in their pleadings.[55] In this case, the GEU Agreements fall into the latter category.[56]

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[51] *Pereira BCSC* at para. 60.

[52] 2006 BCCA 203 at paras. 43-47.

[53] *Atlantic Lottery Corp. v. Babstock*, 2020 SCC 19 at para. 19.

[54] *Hartt v. British Columbia (Attorney General)*, 2013 BCSC 264 at para. 26.

[55] *Bagri v. Quesnel (City)*, 2022 BCSC 2003 at para. 15; *Ahamed v The Great Canadian Landscaping Company Ltd.*, 2021 BCSC 197 at para 33.

[56] ANOCC at para. 1; Response to Civil Claim at paras. 1, 15-16.

(c) Misfeasance claim bound to fail

52. Misfeasance in public office is an intentional tort with two distinguishing elements: (a) deliberate unlawful conduct in the exercise of public functions; and (b) awareness that the conduct is unlawful and likely to injure the plaintiff.[57] A plaintiff must also prove that the tortious conduct was the legal cause of their injuries and that the injuries suffered are compensable in tort law.[58]

53. There are two types of misfeasance claims: "Category A" involves conduct that is specifically intended to injure a person or class of persons, whereas "Category B" involves a public officer who acts with knowledge both that they have no power to do the act complained of and that the act is likely to injure the plaintiff.[59]

54. The plaintiff does not identify whether he is alleging Category A or Category B misfeasance, but it appears that he is alleging Category B. Reading the pleading charitably, the claim appears to be that the PHO committed Category B misfeasance by advising Cabinet that vaccination against COVID-19 was a safe and effective means of reducing the risk of transmission while being reckless or willfully blind about alleged inefficacy and risks of vaccines.[60]

55. This misfeasance claim is fundamentally defective for the reasons set out by Justice Francis in *C&A Mink Ranch Ltd. v. British Columbia*.[61] In that case, five mink farming businesses filed actions seeking damages resulting from the Province's decision to shut down mink farms in British Columbia through an Order in Council [62] enacted by the Lieutenant Governor in Council (*i.e.*, Cabinet) amending the *Fur Farm Regulation* [63] under the *Animal Health Act*.[64] As here, the plaintiffs in *Mink Ranch* alleged the PHO committed misfeasance in public office in her role advising government on public health issues—specifically as it related to the nature and quality of advice she provided to Cabinet.

56. Justice Francis found that the claim against the PHO was bound to fail. Justice Francis held that the PHO, as a civil servant who provides advice to government, as a matter of law cannot have had a "causative impact" on Cabinet's

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[57] *Odhavji Estate v. Woodhouse,* 2003 SCC 69 [***Odhavji Estate***] at para. 32.
[58] *Odhavji Estate* at para. 32.
[59] *Odhavji Estate* at para. 22.
[60] ANOCC at paras. 37-39.
[61] 2024 BCSC 770 [***Mink Ranch***].
[62] Order in Council No. 639/2021.
[63] B.C. Reg. 8/2015.
[64] S.B.C. 2014, c. 16.

enactment of the impugned regulation.[65] Rather, Justice Francis properly recognized that Cabinet is an independent law-making body, over which the PHO had no responsibility or authority.[66] The PHO may advise Cabinet, but as a matter of law Cabinet is solely responsible for its decisions. Finally, Justice Francis rightly found that "it would be a significant departure from current jurisprudence, and highly problematic from a policy perspective, to find a viable cause could be brought against a civil servant for damages for the consequences of a quasi-legislative act of Cabinet."[67]

57. Here, the plaintiff's allegations are effectively identical to those Justice Francis rejected in *Mink Ranch*: he says that the PHO committed misfeasance in public office because she provided Cabinet with advice that she knew or ought to have known had no basis in fact, and therefore acted in bad faith. Even if these allegations are taken as true, *Mink Ranch* is a full answer. As a matter of law, there is no causal connection between the PHO's advice and Cabinet's independent decision to enact delegated legislation. Likewise, there is no authority in the case law to extend liability to encompass civil servants for the actions of quasi-legislative bodies.

58. Accordingly, the misfeasance in public office claim should be struck without leave to amend and dismissed under Rule 9-5(1)(a).

(c) Breach of privacy claim bound to fail

59. The breach of privacy claim appears to be that the requirement in the Vaccination Policy and/or Regulation for the plaintiff to disclose his vaccination status to his employer was a tortious breach of privacy.

60. Subparagraph 2(2)(c) of the *Privacy Act* provides that conduct is not a violation of privacy if the conduct was authorized or required by law. The Province was authorized under the Regulation to require employees to disclose their vaccination status. This conduct therefore cannot constitute a tortious breach of privacy. The *Privacy Act* claim is bound to fail.

61. It is unclear whether the plaintiff is also attempting to advance a common law tort related to breach of privacy. For completeness, the analysis set out above would be equally application to such a claim.

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[65] *Mink Ranch* at paras. 41-44.
[66] *Mink Ranch* at para. 42.
[67] *Mink Ranch* at para. 43.

62. Accordingly, the breach of privacy claim should be struck without leave to amend and dismissed under R. 9-5(1)(a).

(d) PHO has statutory immunity

63. All claims against the PHO are bound to fail for a further reason: it is plain and obvious that s. 92 of the *Public Health Act* immunizes her from any claim for damages, including damages under s. 24(1) of the *Charter*.[68]

64. Although the plaintiff seeks declaratory relief reading down s. 92 of the *Public Health Act* to avoid its application to *Charter* damages,[69] no factual or legal basis is pleaded to support a challenge to the constitutionality of s. 92 of the *Public Health Act*. The plaintiff's notice of application is silent on this point, which amounts to abandonment of the challenge to the constitutionality of s. 92.

65. Accordingly, all claims against the PHO should be struck pursuant to Rule 9-5(1)(a).

In further alternative, misfeasance claim should be dismissed under Rule 9-6 because there is no genuine issue for trial that vaccines are effective and safe

(a) Overview

66. Alternatively, the misfeasance in public office claim should be dismissed under Rule 9-6. As demonstrated by the expert report of Dr. Kindrachuk, Canada Research Chair in Molecular Pathogenesis of Emerging Viruses, there is no genuine issue for trial that COVID-19 vaccines are effective and safe. Given that COVID-19 vaccines are effective and safe, the PHO cannot have committed misfeasance in public office by advising Cabinet while reckless or willfully blind about alleged inefficacy and risks of vaccines.

(b) General principles

67. An application under Rule 9-6 "is a challenge on a limited review of evidence".[70] Defendants will succeed "by showing the case pleaded by the plaintiff is unsound or by adducing sworn evidence that gives a complete answer to the plaintiff's case".[71] The court is not permitted to weigh evidence on a Rule 9-6

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[68] *Ernst v. Alberta Energy Regulatory*, 2017 SCC 1; *Weisenburger v. College of Naturopathic Physicians of British Columbia*, 2024 BCSC 1047 at paras. 106-123.
[69] ANOCC at para. 28.
[70] *Beach Estate v. Beach*, 2019 BCCA 277 [***Beach Estate***] at para. 48.
[71] *Beach Estate* at para. 48.

application beyond determining whether it is “incontrovertible”.[72] If the defendant meets their burden, the claim must be dismissed.

68. While the court cannot weigh evidence on a Rule 9-6 application, it must be satisfied that evidence parties rely on to establish a genuine issue for trial is admissible.[73] Likewise, to the extent a plaintiff argues their evidence controverts that of the defendant, the court is entitled to consider whether there is a genuine contradiction in the evidence.[74]

69. Proposed class action proceedings enjoy no special status and, until certified, are treated as any other individual action.[75] As a result, “[i]t is appropriate, and in the interests of justice, for a summary disposition to be heard in conjunction with a class action certification application.”[76] Resolving some or all proposed common issues via summary procedure advances the purposes of the *Class Proceedings Act* [77] and is consistent with the court’s gatekeeping function, as it narrows the scope of the claim and promotes efficiency and judicial economy.[78]

(b) No genuine issue for trial that vaccines are effective and safe

70. The plaintiff alleges that, in advising Cabinet, the PHO acted with reckless indifference or willful blindness to alleged inefficacy and risks of vaccination against COVID-19.[79] However, as demonstrated by Dr. Kindrachuk’s expert report, there is no genuine issue for trial that COVID-19 vaccines are effective and safe.

71. Dr. Kindrachuk is an Associate Professor at the University of Manitoba and Canada Research Chair in Molecular Pathogenesis of Emerging Viruses. His field of expertise is the investigation of emerging viruses, the infections they cause, and their impact on global health. He has been actively involved in emerging virus research since 2009 with a focus on those viruses that are considered global health threats, including ebolaviruses, influenza viruses, and coronaviruses. Dr. Kindrachuk has served as an elected member of the Executive Committee of the Canadian Society for Virology for multiple terms. He has also been a member of

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[72] *Beach Estate* at para. 48.

[73] See *e.g.*, *Vanguard Mortgage Investment Corporation v. Dietterle*, 2022 BCSC 1512 at paras. 40-52; *Williams v. Audible Inc.*, 2022 BCSC 834 at paras. 78-88.

[74] See *e.g.*, *Latifi v. The TDL Group Corp.*, 2024 BCSC 832 at paras. 88-94.

[75] *Dussiaume v. Sandoz Canada Inc.*, 2023 BCSC 795 [***Dussiaume***] at para. 21.

[76] *Dussiaume* at para. 21.

[77] R.S.B.C. 1996, c. 50.

[78] *Dussiaume* at paras. 21-23.

[79] ANOCC at para. 47.

World Health Organization committees, including the WHO Technical Advisory Group on Virus Evolution. He has a PhD in biochemistry.[80]

72. To understand the expert report of Dr. Kindrachuk, it is necessary to distinguish between SARS-CoV-2 and COVID-19. SARS-CoV-2 is the virus which causes the infection and disease known as COVID-19.[81]

73. Vaccination reduces the likelihood that a person will become infected with SARS-CoV-2. If an individual does become infected, vaccination reduces the likelihood that they will develop severe disease.[82] By definition, a person who is not infected cannot transmit the virus.[83] Therefore, by preventing infection, the vaccine prevents transmission.[84] There is also evidence that infected individuals who have been vaccinated are less likely to transmit the virus to others than infected individuals who have not been vaccinated.[85]

74. With respect to safety, only 0.0011% of the more than 100 million vaccine doses that have been administered in Canada have led to a serious adverse event. The vaccines are safe.[86]

(c) Cassels affidavit inadmissible

75. The plaintiff has purported to adduce expert evidence from Mr. Alan Cassels. However, his report (and affidavit) is inadmissible.

76. Mr. Cassels is unqualified to provide expert testimony on the efficacy or safety of vaccination. Mr. Cassels has no scientific or medical training. Indeed, by his own admission, Mr. Cassels' professional experience relates to "studying pharmaceutical policies and reporting on medical evidence", and his roles have been limited to "research" and "journalism". He does not possess any relevant expertise which allows him to authoritatively opine on the meaning of scientific data or the efficacy, effect, or safety of vaccination.[87] Mr. Cassels' affidavit is inadmissible.

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[80] Kindrachuk Report, pp. 1-2.
[81] Kindrachuk Report, p. 4.
[82] Kindrachuk Report, pp. 8-16.
[83] Kindrachuk Report, pp. 8-16.
[84] Kindrachuk Report p. 9.
[85] Kindrachuk Report, pp. 6-8.
[86] Kindrachuk Report, pp. 16-22.
[87] *S.E.T. v. J.W.T,* 2023 ONSC 5416 at para. 9. See also, *R. v. Mohan,* [1994] 2 S.C.R. 9 at 25; *White Burgess Langille Inman v. Abbott and Haliburton Co*., 2015 SCC 23.

Part 4: MATERIAL TO BE RELIED ON

i. The pleadings filed in this action;

ii. Affidavit #1 of K. Tsui made September 27, 2024;

iii. Affidavit #1 of Dr. Emerson made October 7, 2024;

iv. Affidavit #1 of K. McLean made October 10, 2024;

v. Affidavit #2 of K. McLean, made October 21, 2024;

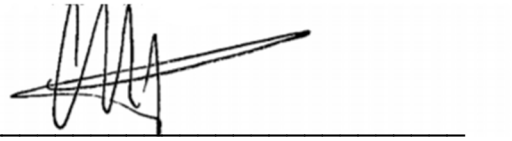
vi. Affidavit #1 of Dr. Brodkin made October 21, 2024;

vii. Affidavit #1 of A. Blackstock made October 22, 2024;

viii. Expert report of Dr. Kindrachuk dated October 14, 2024; and

ix. Such further and other materials as counsel may advise and this Honourable Court may permit.

Date: October 28, 2024



Signature of lawyer for the Defendants
Chantelle Rajotte
Emily Lapper
Trevor Bant
Rory Shaw

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to the application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

(a) file an application response in Form 33,

(b) file the original of every affidavit, and of every other document, that

(i) you intend to refer to at the hearing of this application, and

(ii) has not already been filed in the proceeding, and

(c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:

(i) a copy of the filed application response;

(ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on the person,

(iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7 (9).

To be completed by the court only:

Order made

[ ] in the terms requested in paragraphs ..... of Part 1 of this notice of application

[ ] with the following variations and additional terms:

.....

.....

.....

Date: .....[*dd/mmm/yyyy*]..... .....

Signature of [ ] Judge [ ] Associate Judge

This **NOTICE OF APPLICATION** is prepared by Chantelle M. Rajotte, Barrister & Solicitor, of the Ministry of Attorney General, whose place of business and address for service is 1301 - 865 Hornby Street, Vancouver, British Columbia, V6Z 2G3; Telephone: (604) 660-6793; Email Address: chantelle.rajotte@gov.bc.ca.

APPENDIX

[*The following information is provided for data collection purposes only and is of no legal effect.*]

THIS APPLICATION INVOLVES THE FOLLOWING:

[*Check the box(es) below for the application type(s) included in this application.*]

[ ] discovery: comply with demand for documents

[ ] discovery: production of additional documents

[ ] other matters concerning document discovery

[ ] extend oral discovery

[ ] other matter concerning oral discovery

[ ] amend pleadings

[ ] add/change parties

[X] summary judgment

[ ] summary trial

[ ] service

[ ] mediation

[ ] adjournments

[ ] proceedings at trial

[ ] case plan orders: amend

[ ] case plan orders: other

[ ] experts

[ ] none of the above