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Court File No. T-1436-22

FEDERAL COURT

BETWEEN:

BERNARD ALBERT and others

Plaintiffs

and

CANADA POST CORPORATION, HIS MAJESTY THE KING IN RIGHT OF CANADA, THE ATTORNEY GENERAL OF CANADA

Defendants

RESPONDING MOTION RECORD OF THE PLAINTIFFS

(Canada's Motion to Strike pursuant to Rules 221, 359 and 400)

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30 January 2024

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BERNARD ALBERT and others

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CANADA POST CORPORATION, HIS MAJESTY THE KING IN RIGHT OF CANADA, THE ATTORNEY GENERAL OF CANADA

Defendants

WRITTEN REPRESENTATIONS OF THE RESPONDENTS

(Canada's motion to strike returnable 4-6 March 2024)

30 January 2024

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PART I – OVERVIEW

1. This is in response to the Defendant His Majesty the King in Right of Canada and the Attorney General of Canada (collectively the "**Crown**" or "**Canada**").

2. The Crown seeks an order pursuant to Rules 221(1)(a) and 221(1)(c) of the *Federal Courts Rules* (the "**Rules**") striking the Plaintiffs' Amended Amended Statement of Claim (the "**Claim**") as against Canada, or portions of it (the "**Crown Motion**").

3. The Respondents seek dismissal of the Crown Motion, with costs.

4. The Respondents rely on the facts as set out in the Claim, which, for the purposes of this motion, "must be deemed to have been proven."[1]

PART II – POINTS IN ISSUE

5. The issues to be determined are:

    a. Has Canada proven that the Plaintiffs lack standing or that the Claim lacks a causative connection to Canada?

    b. Has Canada met the high bar of proving that it is "plain and obvious" that the Claim discloses no reasonable cause of action, even assuming the facts alleged in the claim are true?

    c. Has Canada met its burden of proving that the Claim is scandalous, frivolous or vexatious?

PART III – SUBMISSIONS

a) Standing and causative connection to Canada

6. Canada asserts that the Plaintiffs do not have standing against Canada and that there is no causative connection to Canada. The Plaintiffs have both private and public standing. The Plaintiffs have private interest standing, otherwise referred to as direct standing, because they were directly affected by Canada's 6 October 2021 announcement (the "**Order**"). This Honourable Court has recently confirmed

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[1] *Bauer Hockey LTD v. Sport Maska Inc. D.B.A. CCM Hockey*, 2018 FC 1200 at para 8 [***Bauer***]; *Att. Gen. of Can. v. Inuit Tapirisat et al*., 1980 CanLII 21 (SCC), [1980] 2 SCR 735 at p 740 [***Inuit Tapirisat***].

"[w]hile…the words 'directly affected' should not be given a restrictive meaning, the evidence must show more than a mere interest in a matter".[2] The Order directly and profoundly impacted the Plaintiffs' lives as outlines in the Claim.

7. The Plaintiffs also have public interest standing. This very Court has stated that in exercising its discretion for public interest standing:

> the court must consider three factors: (1) whether there is a serious justiciable issue raised; (2) whether the plaintiff has a real stake or a genuine interest in it; and (3) whether, in all the circumstances, the proposed proceeding is a reasonable and effective way to bring the issue before the courts.[3]

8. The Plaintiffs raise serious justifiable issues of public import respecting the constitutionality of the Order which has created, contributed to, and sustained a deprivation of individuals' rights guaranteed under sections 2(a), 2(d), 7 and 15 of the *Charter*.

9. "As stated in *Council of Canadians with Disabilities* at para 40, the whole purpose of public interest standing is 'to prevent the immunization of legislation or public acts from any challenge'."[4] The Crown is seeking to do precisely this by attacking the Plaintiffs standing.

10. As for a causative connection, Canada claims that the Defendant Canada Post acted on its own accord, and that the Plaintiffs have no claim against Canada. Paragraphs 20-36, 70-76 and 88-107 of the Claim clearly articulate how this is false.

b) Rule 221(1)(a) - Reasonable Cause of Action

11. The Respondents disagree that the Claim can be struck on the basis of Rule 221(1)(a). The Applicants must convince this Court that it is "plain and obvious that the claim discloses no reasonable cause of action"[5] and further satisfy this Court that "the case is beyond doubt".[6] The Supreme Court of Canada summarized this

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[2] *Canadian Frontline Nurses et al* v *The Attorney General of Canada* et al, 2024 FC 42 at para 159
[3] *Canadian Frontline Nurses et al* v *The Attorney General of Canada* et al, 2024 FC 42 at para 161
[4] *Canadian Frontline Nurses et al* v *The Attorney General of Canada* et al, 2024 FC 42 at para 190
[5] *Bauer* at para 8, quoting *Inuit Tapirisat* at p740.
[6] *Ibid*.

by saying that the pleading must have "no reasonable prospect of success".[7] Any doubt "must be resolved in favour of allowing the pleading or allegation to be proved at trial".[8]

12. The Supreme Court of Canada has twice admonished that motions to strike are "a tool that must be used with care"[9] and that "it is not determinative that the law had not yet recognized the particular claim."[10] Courts must take a generous approach and "err on the side of permitting a novel but arguable claim to proceed to trial."[11]

13. This very court newly released a decision in which it discussed the test for a motion to strike saying that in taking the facts pleaded as true, this Court examines whether the application:

> …is "so clearly improper as to be bereft of any possibility of success": David Bull Laboratories (Canada) Inc. v. Pharmacia Inc., [1995] 1 F.C. 588 at page 600 (C.A.). There must be **a "show stopper" or a "knockout punch"** – an obvious, fatal flaw striking at the root of this Court's power to entertain the application...[12]

14. The outcome of a trial in this matter is neither plain or obvious. In fact, there are very few lower court decisions that have examined the legality of COVID-19 vaccine mandates. Much remains to be seen as to whether workplace-initiated vaccine mandates were appropriate constitutionality, morally or legally, in both unionized workplaces and non-unionized workplaces.

15. There are serious questions of law, and questions of general importance have been raised. The Supreme Court of Canada has gone so far as to say 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."[13] The Respondents asset that this is such a case.

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[7] *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 17.
[8] *Bauer* at para 9.
[9] *Nevsun Resources Ltd. v. Araya,* 2020 SCC 5 at para 66 [***Nevsun***].
[10] *Ibid*.
[11] *Ibid*.
[12] *Canadian Frontline Nurses et al* v *The Attorney General of Canada* et al, 2024 FC 42 at para 122 citing *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 at para 47 [emphasis added]
[13] *Hunt v Carey Canada Inc*, [1990] 2 SCR 959 at p.14

16. The SCC has stated that "**actions that yesterday were deemed hopeless may tomorrow succeed**".[14] Much of Canada's argument relies on the assertion that because courts have ruled one way in the past, this Honourable Court must rule the same way on the case at bar. This is false. The world is in a profoundly different place now in regard to COVID-19 than it was when these other decisions, cited by the Crown, were decided.

17. What is determinative for this court is whether the claim has a reasonable chance of succeeding. There is no doubt that there are questions of the constitutionality, fairness/equity and legality of the Practice. Should a court be granted jurisdiction, a legal analysis of this would follow. There is scant precedent to follow to easily decide that the Claim plainly or obviously will fail.

18. The Ontario Superior Court has recently ruled that issues on Covid-19 measures are not to be dealt with pre-emptively, merely assuming or adopting the statements of public health officials, but rather based on a fulsome review.[15]

19. The novelty and complexity of the Respondents' Claims must not prejudice their ability to have answer. Rather than meaningfully responding to the Claim, the Crown is seeking to circumvent responsibility by providing its extensive opinion as legal conclusions. What they have essentially done is to claim that there is no evidence to support the action before the Plaintiffs have had any opportunity to present evidence in the case.

20. It is evident to the Respondents that the Crown's Motion, although ostensibly labeled as a motion to strike, substantively aligns more closely with the criteria and objectives of a summary dismissal. The essence of the Crown's argument hinges not on the procedural improprieties or deficiencies in the form of the pleadings but on the purported lack of evidence supporting the claims. This approach transcends the procedural scope of a motion to strike and ventures into the territory of evaluating the sufficiency of evidence that has not yet even been tendered.

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[14] *Knight v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 21 [***Knight***] [emphasis added]
[15] J.N. v C.G., 2022 ONSC 1198

c) Rule 221(1)(c) – Scandalous, frivolous or vexatious

21. The Respondents deny that the Claim is otherwise scandalous, frivolous or vexatious. The Crown states that the "Claim is unanswerable and should be struck".[16] The irony is that much of the lengthy Crown's Brief is in fact an answer to the allegedly unanswerable.

22. The Policy has affected the Plaintiffs' lives profoundly. They have lost their jobs. They risked not just their livelihoods, but the financial and mental well-being of their families. The COVID-19 pandemic, and the various questionable policies that stemmed from governments and employers to respond to it, would not be as contested between Canadians if there were not a profound issues to be determined.

23. Thousands of Canadians attended protests in February 2022; in their minds they had had enough of the lockdowns and COVID-19 measures and restrictions put in place, and vaccine mandates that prevented their ability to feed their families. These protests were broadcast throughout the world, regardless of whether they were legally justifiable. The Respondents find themselves in a similar position, but rather than blockading trade passages, or shutting down downtown streets, they seek a decision from the Court.

24. There is an information gap in Canada about the true danger that COVID-19 posed to communities, the safety and effectiveness of COVID-19 vaccines and whether responses to address these dangers were justified. The science is evolving, and it is inappropriate for a court to take judicial notice of the severity of COVID-19 or the efficacy of COVID-19 vaccines, especially at this point in time.

25. The questions to be tried in the Claim are complex and novel. A court will need to review complex scientific evidence, some of which is controversial as it goes against one political narrative or the other. Novel and complex questions should not prejudice the Respondents' ability to have answer, or to be denied any opportunity to even present their case on its merits for adjudication.

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[16] Memorandum of Fact and Law of HMK and the AGC at para 58 [the "**Crown's Brief**"]

26. Because of the novelty of the claims arising from mandatory vaccination policies during an unprecedented pandemic, it is incorrect to assume that the outcome of a trial is plain or obvious. The Supreme Court of Canada has gone "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."[17]

27. Serious questions of law of general importance have been raised. To say that the constitutionality of COVID-19 vaccine mandates, and damages to the Respondents do not touch on questions of general importance is fundamentally misleading and inaccurate.

28. The Crown seeks to use the lack of evidence presented in the Claim as a reason for its motion to succeed. Pleadings do not contain evidence, but rather put the Defendant on notice of the allegations against them. The appropriate course of action is for the parties to enter the discovery phase where evidence can be presented to support the claims.

29. The Crown has provided ample argument as to why it believes the facts of the Claim are false. However, for the purposes of this motion, the facts of the Claim "must be deemed to have been proven."[18]

d) Conclusion

30. Based on the foregoing, the Respondents submit that the Claim must not be struck, as it discloses a reasonable cause of action. The Crown's Motion seeks to have this Honourable Court make determinations as to the veracity of the Claims, before the Plaintiffs have any opportunity to present evidence.

31. This Honourable Court is not "to reach a decision as to the Plaintiff's chance of success."[19] The test for a motion to strike is a high bar. When the Plaintiff's Claim is

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[17] *Hunt v Carey Canada Inc*, [1990] 2 SCR 959, 1990 CanLII 90 (SCC) at p14 [***Hunt***]
[18] *Bauer Hockey LTD v. Sport Maska Inc. D.B.A. CCM Hockey*, 2018 FC 1200 at para 8 [***Bauer***]; *Att. Gen. of Can. v. Inuit Tapirisat et al*., 1980 CanLII 21 (SCC), [1980] 2 SCR 735 at p 740 [***Inuit Tapirisat***].
[19] *Hunt* at p.

assumed to be true, as required by law, the outcome is complex and unclear. The Crown's Motion ought to be dismissed with costs.

32. The Respondents further say that in weighing the prejudice of striking the action, there is great prejudice to the Respondents. Conversely, there is little or no prejudice to the Crown, which could at any subsequent stage in the proceedings bring a motion for summary dismissal and seek their costs.

PART IV – ORDER SOUGHT

33. The Respondents seek an Order:

    a. Dismissing the Crown's Motion;

    b. Granting costs against the Defendants; and

    c. Such other relief as this Honourable Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 30th day of January, 2024

30 January 2024

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PART V – LIST OF AUTHORITIES

1.	*Bauer Hockey LTD v. Sport Maska Inc. D.B.A. CCM Hockey*, 2018 FC 1200
2.	*Att. Gen. of Can. v. Inuit Tapirisat et al.*, 1980 CanLII 21 (SCC), [1980] 2 SCR 735
3.	*Canadian Frontline Nurses et al* v *The Attorney General of Canada* et al, 2024 FC 42
4.	*R v Imperial Tobacco Canada Ltd*, 2011 SCC 42
5.	*Nevsun Resources Ltd. v. Araya*, 2020 SCC 5

6.	*Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250
7.	*Hunt v Carey Canada Inc*, [1990] 2 SCR 959
8.	*Knight v Imperial Tobacco Canada Ltd*, 2011 SCC 42
9.	J.N. v C.G., 2022 ONSC 1198