Court of Appeal File No.:A-67-23

FEDERAL COURT OF APPEAL

B E T W E E N:

KAREN ADELBERG ET AL.

Appellants

- and -

HIS MAJESTY THE KING ET AL.

Respondents

APPELLANTS' MEMORANDUM OF FACT AND LAW

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MEMORANDUM OF FACT AND LAW

PART I - THE FACTS

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

2. The Appellants wish to point out that, as required under the ***Weber*** analysis, absolutely **no** evidence was tendered by the Respondents of the content(s) of the collective bargaining agreement(s) of the core administration employees.[2]

- Decision of the Federal Court, at paragraphs 19-22

- **Decision of Federal Court**

3. In its decision, the Federal Court ruled as follows:

   (a) that core administration employees Plaintiffs were barred to proceed with their tort action grounded in various misfeasances of public office and ***Charter*** violations grounded in misfeasance of public office, and struck the claim with prejudice;

   - **Decision of Federal Court, at paragraphs 8; 11-18; 25-36**

   (b) With respect to the rest of the Plaintiffs, stuck the claim in its entirety, with leave to amend, basing the decision on the ***Action4Canada*** decision of British Colombia.

   - **Decision of Federal Court, at paragraphs 8; 37-57**

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[1] ***A.G. Canada v. Inuit Tapirasat of Canada [1980] 2 S.C.R. 735; Nelles v. Ontario (1989) 60 DLR (4th) 609 (SCC); Operation Dismantle Inc. v. The Queen [1985] 1 S.C.R. 441; 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***

[2] ***Weber v. Ontario Hydro, 1995 CanLII 108 (SCC), [1995] 2 SCR 929***

PART II – THE ISSUES

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

5. Whether the Federal Court err, in both:

   (a) 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? and

   (b) in any event, 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:

   - Decision of Federal Court, at paragraph 32

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

      (ii) ignoring Superior 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?

6. Whether the Federal Court erred, in violating the Plaintiffs rights in choosing to ignore its duty to give reasons to the pointed submissions of the Plaintiffs?

7. Whether the Federal Court erred, in misapplying, in a perfunctory fashion, the ***Action4Canada*** case to this case thereby striking the claim in its entirety with leave to amend to one third of the non-core administration Plaintiffs?

PART III – LAW AND ARGUMENT

A/ Motion to Strike – The Jurisprudence – General Principles

8. 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:[3]

(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."
>
> - ***Nelles, supra,*** **p. 627**

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."
>
> - ***Dumont, supra.*** **p. 280**

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[3] ***A.G. Canada v. Inuit Tapirasat of Canada [1980] 2 S.C.R. 735; Nelles v. Ontario (1989) 60 DLR (4th) 609 (SCC); Operation Dismantle Inc. v. The Queen [1985] 1 S.C.R. 441; 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***

and further, that:

> "It is not for this Court on a motion to strike to reach a decision as to the Plaintiff's chance of success."
>
> **- *Hunt, supra (SCC)***

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.
>
> **- *Hunt, supra* p. 14**

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 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.**
>
> **- *R. v. Imperial Tobacco Canada Ltd., supra at para 21.***

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

- *Trendsetter Ltd*, *supra,* (Ont. C.A.).

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

- ***Nash v. Ontario (1995) 27 O.R. (3d) (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)***

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

- ***R.D. Belanger & Associates Ltd. v. Stadium Corp. of Ontario Ltd.*** (1991) 5 O.R. (3d) 778 (C.A.)

(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***";

- ***Dalex Co. v. Schawartz Levitsky Feldman*** (1994) 19 O.R. (3d) 463 (Gen. Div).

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

- ***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

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

(a) monetary damages;

-Statement of claim., Paragraph 3

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;

-Ibid., paragraph 1

(c) injunctive relief or relief in the nature of **mandamus**;

- Ibid., Paragraph 2

10. Contrary to what the Defendants posit, and the Federal Court ruled, nothing in the claim is based on any contract or 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

11. 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 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..,.
>
> ***- Dunsmuir v. New Brunswick, 2008 SCC 9, at Paragraph 31***

12. This 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.
>
> ***- Canada v. Solosky, [1980] 1 S.C.R. 821, @ p. 830***

13. 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*).
> …
> [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.
> …
> [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.

- ***Manitoba Metis Federation Inc. v. Canada (Attorney General), 2013 SCC 14***

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

14. 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.

15. 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***.

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

16. 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***:

- Jacob Puliyel Vs. Union of India & Ors.

17. Moreover, it has already been established, in Canadian jurisprudence that any medical treatment without the informed, voluntary, consent violates s.7 of the ***Charter*** and not saved by s.1:

- Fleming v. Reid (1991), 48 O.A.C. 46 (CA)
- Carter v. Canada (Attorney General), 2015 SCC 5, [2015] 1 S.C.R. 331

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 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.).

Moreover, 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.

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

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

- Sgt. Julie Evans et al. v. AG Ontario et al.
- M.A. v. De Villa, 2021 ONSC 3828

19. 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.

- J.N. v. C.G., 2022 ONSC 1198

20. 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.

- Canadian Society for the Advancement of Science in Public Policy v. Henry, 2022 BCSC 724

21. 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: and

- Jacob Puliyel Vs. Union of India & Ors.

(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.

- Let Them Choose et al. v. San Diego Unified School District (2022)

E/ Errors of Federal Court

- ***Claim barred by s.236 of the FPSLRA***

22. 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.

- Weber v. Ontario Hydro, 1995 CanLII 108 (SCC), [1995] 2 SCR 929
- Northern Regional Health Authority v. Horrocks, 2021 SCC 42 (CanLII)

23. 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 from common-law, is not a bar to this action.

24. 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, 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;

- Let Them Choose et al. v. San Diego Unified School District (2022)
-Jacob Puliyel Vs. Union of India & Ors.

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.

- Carter v. Canada (Attorney General), 2015 SCC 5, [2015] 1 S.C.R. 331 at P.67
- Fleming v. Reid (1991), 48 O.A.C. 46 (CA)

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

25. With respect to Defendants' Written position, and 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 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.*
>
> ***- Weber v. Ontario Hydro, 1995 CanLII 108 (SCC), [1995] 2 SCR 929 at paragraph 54***

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 language of Estey J. in *St. Anne Nackawic* (at p. 723), is a "real deprivation of ultimate remedy".
>
> ***- Weber v. Ontario Hydro, 1995 CanLII 108 (SCC), [1995] 2 SCR 929 at paragraph 57***

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** be undertaken.

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

(a) Declaratory relief is the purview of the Superior Court; 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.

27. 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.

- Decision of Federal Court, at paragraphs 19-22.

28. 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.

29. The Plaintiff's 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.

30. 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.
>
> [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
>
> [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.**
>
> ***- Muirhead v. York Regional Police Services Board, 2014 ONSC 6817 at paragraph 5 - 7***

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. ….
> >
> > 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.** …..
>
> ***- Muirhead v. York Regional Police Services Board, 2014 ONSC 6817 at paragraph 62-63***

and further ruled:

> [81] In my opinion, however, in the circumstances of the Muirheads' case, **it remains to be determined whether Constable Muirhead has a claim for misfeasance in public office.** I appreciate that in *Heasman v. Durham Police Services Board* and in other cases claims for misfeasance in public office were precluded by the *Weber* principle, **but those cases might be distinguishable on the basis that it is a factual determination in every particular case about the fundamental nature of the dispute.**
>
> [82] The Court of Appeal in those cases concluded that the misfeasance in public office allegations essentially arose out of an employment relationship dispute, which may be true in a given case, and in those cases, the court's jurisdiction to decide the tort would be ousted, **but it does not follow that whenever there is an employment relationship between a plaintiff and defendant that the plaintiff's tort claims arise out of that employment relationship in a way that ousts the court's jurisdiction.**
> ….
>
> [85] As noted above, **the *Weber* principle does not inevitably oust the court's jurisdiction over tort claims because the facts include an employment relationship.** This thought brings the discussion to the tort of misfeasance in public office. In *Freeman-Maloy v. Marsden*, *supra*, Justice Sharpe described the nature of the tort of misfeasance in public office; he stated:
>
> > The tort of misfeasance in a public office is founded on the fundamental rule of law principle that those who hold public office and exercise public functions are subject to the law and must not abuse their powers to the detriment of the ordinary citizen. As Lord Steyn put it in *Three Rivers District Council v. Bank of England (No. 3)*, [2000] 2 W.L.R. 1220, at p. 1230 W.L.R.: "The rationale of the tort is that in a legal system based on the rule of law executive or administrative power 'may be exercised only for the public good' and not for ulterior and improper purposes." The "underlying purpose" of the tort of misfeasance in a public office "is to protect each citizen's reasonable expectation that a public officer will not intentionally injure a member of the public through deliberate and unlawful conduct in the exercise of public functions:" *Odhavji*, *supra*, at para. 30.

…..

> [87] **The tort of misfeasance in public office requires deliberate disregard of official duty coupled with knowledge that the misconduct is likely to injure the plaintiff**; the defendant must know what he or she is doing is wrongful and have a conscious disregard for the interests of those who will be affected by the misconduct in question: *Odhavji Estate v. Woodhouse*, *supra* at para. 29. Misfeasance in public office is an intentional tort; it is not directed at a public officer who inadvertently or negligently fails adequately to discharge the obligations of his or her office: *Odhavji Estate v. Woodhouse*, *supra* at para. 26. As an intentional tort, it requires proof of subjective awareness that harm to the plaintiff is a likely consequence of the alleged misconduct or reckless disregard to the possibility that harm was a likely consequence of the alleged misconduct: *Odhavji Estate v. Woodhouse*, *supra* at para. 38.
>
> ***- Muirhead v. York Regional Police Services Board, 2014 ONSC 6817 at paragraphs 81-82, 85, 87***

31. The above passages and jurisprudence were the subject of extensive submissions before the Federal Court, and not addressed in the Court's reasons.

32. It is respectfully submitted that, given, the jurisprudence in ***Weber***, and the Ontario Courts rulings in interpreting ***Weber*** on the same issues **in favor** of the Plaintiffs, that the Federal Court exceeded its 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.

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

> ***- Let Them Choose et al. v. San Diego Unified School District (2022)***
> ***-Jacob Puliyel Vs. Union of India & Ors.***

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.

- ***McIlvenna v. 1887401 Ontario Ltd., 2015 ONCA 830 (CanLII)***

35. It is respectfully submitted that, when the Federal Court ruled.

> [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).

- **Decision 2023 FC 252, at paragraph 32**

The Federal Court misstates, and ignores, the law as enunciated in ***Weber*** and decisions interpreting ***Weber*** whereby the question starts and ends by the deficient 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.

- **Federal Court's violation of duty to give reasons**

36. It is further submitted that the Federal Court erred, in its duty to give reasons, as required by the Supreme Court of Canada,

> ***Baker v. Canada*** **(Minister of Citizenship and Immigration),** [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39.

and, as ***Baker*** has been interpreted by the Courts of Appeal in Ontario:

> [47] The decision to surrender a fugitive to an extradition party is as important as the humanitarian and compassionate determination under s.114(2) of the ***Immigration Act***, R.S.C. 1985, c. I-2 (now s. 25 of the ***Immigrant and Refugee Protection Act***, R.S.C. 2001, c. 27), dealt with in ***Baker***. The appellant was entitled to reasons that were responsive to the factors relevant to his situation.
>
> ***USA v. Johnson*** (2002), 62 O.R. (3d) 327

and in British Columbia:

> [18]… In my view, the Minister's reasons in this case were not responsive to the applicant's submissions. More particularly, while he stated that he had given the matter full consideration, ***his reasons are conclusory and do not demonstrate that he performed his mandatory duty…***
>
> In other words, the Minister did not explain why he reached his conclusion. This amounts to a failure to afford the applicant procedural fairness: ***Baker v. Canada (Minister of Citizenship and Immigration)***, *supra.*
>
> ***USA v. Taylor***, 2003 BCCA 250 at para 18

and as reaffirmed by this Federal Court:

> [15] The duty to provide reasons is well established in law. This duty requires that the reasons be adequate. They must set out the findings of fact and must address the major points in issues …
>
> ***Thalang v. MCI,*** [2007] FCJ no. 1002 at para 15

37. It is respectfully submitted that the Federal Court did not address the submissions of the Plaintiffs with respect to ***Weber***, and its interpretation by other Courts, as it feeds into and applies to the test to be applied on a motion to strike. It is respectfully submitted that the Court performs a perfunctory exercise of starting and ending the analysis of whether the Plaintiffs are subject to a collective bargaining agreement under s .236 of the FPSLRA. This is not the test in ***Weber***. The Court perfunctorily applies its erroneous, own jurisprudence, with respect to the binding jurisprudence from the Supreme Court of Canada, and other Courts, and then exceeds jurisdiction by misapplying the test on a motion to strike.

- **Error of Law in Misapplication of Action4Canada case**

38. It is further submitted that., in striking the claim and it's entirely, with respect to the Plaintiffs, not barred by s.236 of the FPSLRA, The Court again perfunctorily applies a case from British Columbia, which was struck, with leave to amend, based on the fact that it was "prolix" and difficult to decipher because of its prolixity at 392 pages. That case is not applicable to the within case. It is submitted that the within statement of claim is clear, succinct, and discloses reasonable causes of action.

39. Again, The Federal Court gives no reasons for its bald conclusion, but to rely on ***Action4Canada***, which is not applicable.

PART IV - ORDER SOUGHT

40. The Plaintiffs respectfully request that:

(a) The decision of the Federal Court be set aside.

(b) That the matter be remitted to the Federal Court to proceed to trial in accordance with the ***Rules:***

(c) costs of the motion and the within appeal to the Plaintiff, and, in accordance with ***Native Women's Assn. of Canada vs. Canada [1994] 3 SCR 627***, such further and other relief as this Honourable Court deems just.

All of which is respectfully submitted

Dated this 19th day of May 2023.

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PART V - AUTHORITIES

- **Statutory Provisions**

1. ***Federal Courts Act.***

2. ***Constitution Act, 1982, ss. 2, 7, 15, 24, 52.***

3. ***Constitution Act, 1867, ss. 91, 92.***

- **Jurisprudence**

1. ***A.G. Canada v. Inuit Tapirasat of Canada [1980] 2 S.C.R. 735;***
2. **Adams-Smith v. Christian Horizons (1997)14 C.P.C.(4th)78 (Ont. Gen. Div.)**
3. ***B.C. v. Imperial Tobacco Canada Ltd., [2005] 2 S.C.R. 473***
4. ***Baker v. Canada* (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39.**
5. ***Canada v. Arsenault 2009 FCA 242;***
6. ***Canada v. Solosky, [1980] 1 S.C.R. 821, @ p. 830***
7. ***Canadian Society for the Advancement of Science in Public Policy v. Henry, 2022 BCSC 724***
8. ***Carter v. Canada (Attorney General), 2015 SCC 5, [2015] 1 S.C.R. 331***
9. ***Dalex Co. v. Schawartz Levitsky Feldman* (1994) 19 O.R. (3d) 463 (Gen. Div).**
10. ***Dumont v. A.G. Canada [1990] 1 S.C.R. 279;***
11. ***Dunsmuir v. New Brunswick, 2008 SCC 9, at Paragraph 31***
12. ***Fleming v. Reid (1991), 48 O.A.C. 46 (CA)***
13. ***Grant v. Cormier – Grant, et. al* (2001) 56 O.R. (3d) 215 (Ont. C.A.)**
14. **Hanson v. Bank of Nova Scotia (1994) 19 O.R .(3d) 142 (C.A.)**
15. ***Hunt v. Carey Canada Inc [1990] 2 S.C.R. 959;***
16. ***J.N. v. C.G., 2022 ONSC 1198***
17. ***Jacob Puliyel Vs. Union of India & Ors.***
18. ***Let Them Choose et al. v. San Diego Unified School District (2022***
19. ***M.A. v. De Villa, 2021 ONSC 3828***
20. ***Manitoba Metis Federation Inc. v. Canada (Attorney General), 2013 SCC 14***
21. ***McIlvenna v. 1887401 Ontario Ltd., 2015 ONCA 830 (CanLII)***
22. **Miller (Litigation Guardian of) v. Wiwchairyk (1997) 34 O.R. (3d) 640 (Ont.Gen.Div)**
23. ***Muirhead v. York Regional Police Services Board, 2014 ONSC 6817***
24. ***Nash v. Ontario (1995) 27 O.R. (3d) 1 (Ont. C. A.).***
25. ***Native Women's Assn. of Canada vs. Canada [1994] 3 SCR 627***
26. ***Nelles v. Ontario (1989) 60 DLR (4th) 609 (SCC);***
27. ***Northern Regional Health Authority v. Horrocks, 2021 SCC 42 (CanLII)***
28. ***Operation Dismantle Inc. v. The Queen [1985] 1 S.C.R. 441;***
29. ***R. v. Imperial Tobacco Canada Ltd.,***

30. ***R.D. Belanger & Associates Ltd. v. Stadium Corp. of Ontario Ltd.*** **(1991) 5 O.R. (3d) 778 (C.A.)**
31. Roman Catholic Diocese of Brooklyn, New York V. Andrew M. Cuomo, Governor Of New York U. S. 592 (2020)
32. Sgt. Julie Evans et al. v. AG Ontario et al.
33. ***TD Bank v. Delloitte Hoskins & Sells*** **(1991) 5 O.R. (3d) 417 (Gen. Div.)**
34. ***Thalang v. MCI*****, [2007] FCJ no. 1002**
35. Trendsetter Ltd. v. Ottawa Financial Corp. (1989)32 O.A.C. 327 (C.A.);
36. ***USA v. Johnson*** **(2002), 62 O.R. (3d) 327**
37. ***USA v. Taylor*****, 2003 BCCA 250**
38. Weber v. Ontario Hydro, 1995 CanLII 108 (SCC), [1995] 2 SCR 929

Registry No.A-67-23

IN THE FEDERAL COURT OF APPEAL

B E T W E E N:

KAREN ADELBERG ET AL.

Appellants

- and -

HIS MAJESTY THE KING ET AL.

Respondents

MEMORANDUM OF FACT AND LAW

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