Court File No.: A-67-23

ID 14

FEDERAL COURT OF APPEAL

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COUR D'APPEL FÉDÉRALE
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BETWEEN:

KAREN ADELBERG, ET AL

Appellants

and

HIS MAJESTY THE KING, ET AL

Respondents

RESPONDENTS' MEMORANDUM OF FACT AND LAW

June 14, 2023

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RESPONDENTS' MEMORANDUM OF FACT AND LAW

OVERVIEW

1. The respondent, His Majesty the King in Right of Canada ("Canada") requests that the appeal be dismissed. The appellants' grounds for appeal are unfounded. They rely on incorrect statements of law and mischaracterization of the facts and evidence.

2. This is an appeal from the decision of a Federal Court judge striking the appellants' Statement of Claim in its entirety.[1] The Motion Judge found that two-thirds of the appellants were subject to the statutory bar of s. 236 of the *Federal Public Sector Labour Relations Act* (the "*FPSLRA*") based on the self-identification of their employment

[1] *Adelberg v Canada*, 2023 FC 252, **Appeal Book, Tab 3** [***Adelberg FC***].

in the pleadings.[2] As a result, their claims were struck in their entirety without leave to amend. These appellants did not satisfy the Motion Judge that their circumstances were an exceptional case to warrant the exercise of any residual jurisdiction, nor did they demonstrate any gap in the labour regime that would cause them a "real deprivation of ultimate remedy."[3]

3. The Motion Judge made no error in assessing that their claims related to "terms and conditions of employment" and were properly the subject of the labour regime established by Parliament. He found that s. 236 of the *FPSLRA* ousts the jurisdiction of the Court over those claims. The Motion Judge also found that the appellants failed to meet their onus and could not demonstrate any basis for the Court to exercise any residual jurisdiction over the claims advanced in the pleadings.

4. The appellants that were not barred by the *FPSLRA* were granted leave to amend their claims if they are able to allege a basis for the federal Crown's liability.[4] These appellants pleaded bare assertions and pleaded no material facts to ground their claims against the Crown. The Motion Judge also noted that much of the relief sought in the Claim is not available in a civil action.[5]

5. The Motion Judge made no error in identifying the deficiencies in the pleadings, namely the failure to provide any material facts to ground the legal claims and

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[2] *Federal Public Sector Labour Relations Act*, SC 2003, c 22, s 2 [***FPSLRA***].
[3] *Adelberg FC* at para 36; see also *Weber v Ontario Hydro*, 1995 CanLII 108 (SCC), [1995] 2 SCR 929 at para 57 [***Weber***]; *Vaughan v Canada*, 2005 SCC 11 at paras 22, 39 [***Vaughan***].
[4] *Adelberg FC* at para 55.
[5] *Adelberg FC* at para 45; *Federal Courts Act*, RSC 1985, c. F-7, s. 18.

the attempt to seek remedies unavailable in a civil action. There is no basis for this Honourable Court to intervene.

PART I – FACTS

A. APPELLANTS BROUGHT AN ACTION CHALLENGING THE TREASURY BOARD POLICY AND INTERIM ORDER

6. This is an appeal of the Federal Court's decision to strike the appellants' Statement of Claim in its entirety. The appellants' action included *Charter* claims, claims for tort damages, as well as remedies not available in the context of civil actions such as administrative and interlocutory remedies.[6]

7. Approximately two-thirds of the appellants are federal government employees who are subject to the *FPSLRA* and whose claims are barred by s. 236 of that Act.[7] The remaining Plaintiffs are not subject to the *FPSLRA* bar.[8] All of the claims of the appellants subject to the *FPSLRA* relate to terms and conditions of employment.[9]

8. The appellants brought their claims primarily against "vaccine mandates" and "vaccine passports", more specifically the Treasury Board of Canada's ("Treasury Board") *Policy on COVID-19 Vaccination for the Core Public Administration Including the Royal Canadian Mounted Police* (the "Treasury Board Policy") and Transport Canada's *Interim Order Respecting Certain Requirements for Civil Aviation Due to Covid-19, No. 61* (the "Interim Order").

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[6] *Adelberg FC* at paras 31, 45, 53, and 54; Statement of Claim at paras 1-5, Tab 1 of Appellant's Motion Record, **Appeal Book, Tab 7** at p 314-322**.**
[7] *Adelberg FC* at para 6; Schedule "A".
[8] *Adelberg FC* at para 7; Schedule "B".
[9] *Adelberg FC* at para 31-32.

9. The Treasury Board Policy was issued pursuant to its authorities under ss. 7 and 11.1 of the *Financial Administration Act* (the "*FAA*") which provides human resources management responsibilities to it for the federal public administration, including the determination of the terms and conditions of employment. The policy required all employees of the core public administration to be fully vaccinated against COVID-19 unless they could not be due to a certified medical contraindication, religion or any other prohibited grounds of discrimination as defined in the *Canadian Human Rights Act*.[10]

10. One of the primary objectives of the Treasury Board Policy was to "take every precaution reasonable, in the circumstances, for the protection of the health and safety of employees."[11] Given that operational requirements may include ad hoc onsite presence, the policy stipulated, "all employees, including those working remotely and teleworking must be fully vaccinated to protect themselves, colleagues, and clients from COVID-19."[12]

11. The Treasury Board Policy was suspended effective June 20, 2022. Federal employees who were subject to administrative leave without pay because of the policy were able to resume regular work duties with pay.[13]

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[10] *Policy on COVID-19 Vaccination for the Core Public Administration Including the RCMP*, dated October 6, 2021, Affidavit of Gabriella Plati Trotto, Exhibit A, Tab B of the Respondent's Motion Record, **Appeal Book**, **Tab 6**, at pp 115-123 [**Treasury Board Policy**]; *Canadian Human Rights Act*, RSC 1985, c H-6.
[11] Treasury Board Policy, **Appeal Book**, **Tab 6**, at p 115.
[12] Treasury Board Policy, **Appeal Book**, **Tab 6**, at pp 116.
[13] Government of Canada News release titled "Suspension of the vaccine mandates for domestic travellers, transportation workers and federal employees", dated June 14, 2022, Affidavit of Gabriella Plati Trotto, Exhibit B, Tab B of the Respondent's Motion Record, **Appeal Book**, **Tab 6**, at pp 125-129.

12. The Interim Order, a regulation made under the *Aeronautics Act*[14] on April 24, 2022, set out conditions for boarding flights within or to and from Canada, including the requirement that persons boarding flights must not have COVID-19, or the signs and symptoms of COVID-19, within the previous 10 days.[15]

13. The Interim Order prohibited any person from boarding an aircraft for a flight departing from a specified airport in Canada unless they were fully vaccinated or fell under one of the many exceptions to the requirement. The exceptions included provisions explicitly to accommodate travelers who were not fully vaccinated due to medical contraindication and sincerely held religious beliefs.[16]

14. Effective June 20, 2022, the vaccination requirements for travelers and transportations workers ceased to have effect.[17]

15. The claims, as set out in the pleadings, arise from the decision of the workers to refuse vaccines and PCR testing and the consequences of that refusal in accordance with the Treasury Board Policy and Interim Order.

16. Notwithstanding the appellants' unfounded attempt at characterizing the claim as everything but an employment dispute, the true substance of the pleading is an ordinary workplace dispute.

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[14] *Aeronautics Act*, RSC 1985, c A-2, s. 6.41.
[15] *Interim Order Respecting Certain Requirements for Civil Aviation due to COVID-19, No. 61*, section 9, dated April 24, 2022, Affidavit of Gabriella Plati Trotto, Exhibit C, Tab B of the Respondent's Motion Record, **Appeal Book**, **Tab 6**, at p 138 [**Interim Order**].
[16] Interim Order, **Appeal Book**, **Tab 6**, at pp 142-144.
[17] *Interim Order for Civil Aviation Respecting Requirements Related to Vaccination Due to COVID-19, No. 3*, s. 36, dated June 14, 2022, Affidavit of Gabriella Plati Trotto, Exhibit G, Tab B of the Respondent's Motion Record, **Appeal Book**, **Tab 6**, at p 257.

17. To the extent that the appellants' *Charter* claims based on the requirements in the Interim Order for travel relate to their workplace or necessities of their jobs, these claims are also subject to the s. 236 statutory bar. Moreover, the appellants failed to include material facts or any particulars of the alleged infringements that necessary to support the *Charter* claims.

B. EMPLOYEES WITH GRIEVANCE RIGHTS HAVE NO RIGHT OF ACTION

18. The *FPSLRA* entitles persons employed in the federal public service the right to grieve under s. 206(1) of the *Act*.[18] Section 208 sets out the broad type of grievances available to employees in the federal public service, which include allegations relating to the "terms and conditions of employment":

Right of an employee	**Droit du fonctionnaire**
208 (1) Subject to subsections (2) to (7), an employee is entitled to present an individual grievance if he or she feels aggrieved	**208 (1)** Sous réserve des paragraphes (2) à (7), le fonctionnaire a le droit de présenter un grief individuel lorsqu'il s'estime lésé:
(a) by the interpretation or application, in respect of the employee, of	**a)** par l'interprétation ou l'application à son égard :
(i) a provision of a statute or regulation, or of a direction or other instrument made or issued by the employer, that deals with terms and conditions of employment, or	**(i) soit de toute disposition d'une loi ou d'un règlement, ou de toute directive ou de tout autre document de l'employeur concernant les conditions d'emploi,**
(ii) a provision of a collective agreement or an arbitral award; or	**(ii)** soit de toute disposition d'une convention collective ou d'une décision arbitrale;

[18] *FPSLRA*, s. 206.

b) as a result of any occurrence or matter affecting his or her terms and conditions of employment.

[Emphasis added]

b) par suite de tout fait portant atteinte à ses conditions d'emploi.

[gras ajouté]

19. Section 236 of the *FPSLRA* provides that there is no right of action when the right to grieve exists. This is the case regardless of whether the employee avails himself or herself of the right to present a grievance.

No Right of Action

Disputes relating to employment

236 (1) The right of an employee to seek redress by way of grievance for any dispute relating to his or her terms or conditions of employment is in lieu of any right of action that the employee may have in relation to any act or omission giving rise to the dispute.

Application

(2) Subsection (1) applies whether or not the employee avails himself or herself of the right to present a grievance in any particular case and whether or not the grievance could be referred to adjudication.

Absence de droit d'action

Différend lié à l'emploi

236 (1) Le droit de recours du fonctionnaire par voie de grief relativement à tout différend lié à ses conditions d'emploi remplace ses droits d'action en justice relativement aux faits — actions ou omissions — à l'origine du différend.

Application

(2) Le paragraphe (1) s'applique que le fonctionnaire se prévale ou non de son droit de présenter un grief et qu'il soit possible ou non de soumettre le grief à l'arbitrage.

C. THE MOTION JUDGE STRUCK THE CLAIM IN IT'S ENTIRETY

20. In his Order dated February 21, 2023, the Motion Judge decided that the pleading was "bad beyond argument" and struck the claim in its entirety. The appellants subject to s. 236 of the *FPSLRA* were not granted leave to amend their pleading. For the remaining appellants, the Motion Judge granted leave to amend the pleading.[19]

21. The Motion Judge listed the employers of the appellants subject to s. 236 of the *FPSLRA* in Schedule A.[20] There is no dispute between the parties as to the accuracy of the Schedules.[21]

22. The Motion Judge held that s. 236 of the *FPSLRA* has been recognized as an "explicit ouster" of courts' jurisdiction.[22] In order to exercise any discretion to consider a proceeding, the appellants must meet the onus of demonstrating that theirs is an "exceptional cases" where the grievance process is "corrupt" and would not provide any remedy.[23]

23. The Motion Judge held that the appellants who enjoy statutory grievance rights "must exhaust the grievance process" before seeking redress in court.[24] He ultimately found that the appellants had not demonstrated that their circumstances

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[19] *Adelberg FC* at para 55.
[20] *Adelberg FC* at para 25, and Schedule "A".
[21] Email between counsel for the parties consenting to Schedules "A" and "B" to the decision, dated February 17, 2023, **Appeal Book**, **Tab 4**.
[22] *Adelberg FC* at para 13, *Bron v Canada (Attorney General)*, 2010 ONCA 71 [***Bron***].
[23] *Adelberg FC* at paras 17, 18, 26-28, 36; *Canada v Robichaud and MacKinnon*, 2013 NBCA 3 [***Robichaud and MacKinnon***].
[24] *Adelberg FC* at para 30.

constitute “exceptional cases”, or that there is a gap in labour adjudication that causes a “real deprivation of ultimate remedy”.[25]

24. The Motion Judge identified at Schedule B to the decision, the employers of those appellants who are not subject to the *FPSLRA*.[26] For these appellants the Motion Judge struck the Claim in its entirety because it disclosed no cause of action, lacked material facts, and sought remedies that are unavailable in a civil action.[27] He granted leave to amend the pleading for the Schedule B plaintiffs, if they can articulate a viable claim in an intelligible manner, in accordance with the rules of the Federal Court and if they can allege sufficient material facts to provide a basis for liability against Canada.[28]

25. The Motion Judge found that some remedies sought by the appellants, such as administrative remedies and injunctive relief, are unavailable in a civil action.[29] The Motion Judge held that the appellants failed to particularize the material facts necessary to ground the other claims, including by:

- failing to adequately plead the Charter claims;[30]
- failing to plead material facts pertaining to the personal circumstances of the appellants or their employment;[31] and,
- failing to engage with the substance of the Treasury Board Policy or the Interim Order, notably the various exceptions or accommodations.[32]

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[25] *Adelberg FC* at paras 28, 32, and 36.
[26] *Adelberg FC* at para 37.
[27] *Adelberg FC* at paras 43-47.
[28] *Adelberg FC* at paras 55-57, 59.
[29] *Adelberg FC* at paras 45, 54.
[30] *Adelberg FC* at para 46.
[31] *Adelberg FC* at para 47.
[32] *Adelberg FC* at para 48.

PART II – ISSUES

26. The Motion Judge did not err in striking the Statement of Claim in its entirety, with leave only to amend the part of the Claim relating to the appellants who are not subject to s. 236 of the *FPSLRA*.

PART III – SUBMISSIONS

A. STANDARD OF REVIEW

27. In order for this Court to intervene on discretionary decisions, such as on a motion to strike,[33] it must find that the Motion Judge erred on a question of law or committed a palpable and overriding error on a question of fact or mixed fact and law.[34] The standard of palpable and overriding error is a highly deferential standard.[35]

28. Pure questions of law, and questions which an issue of law is extricable from the facts, are reviewable on a correctness standard.

29. A palpable error is one that is plainly seen, and includes a finding made in the complete absence of evidence or drawn from primary facts that are the result of speculation rather than inference. An overriding error is one that goes to the root of the challenged finding of fact such that the fact cannot safely stand in the face of that error.[36]

30. The appellants allege that the Motion Judge erred by misapplying the legal test for a motion to strike and erred by failing to analyze the contents of collective agreements

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[33] *Feeney v Canada*, 2022 FCA 190 [***Feeney***].
[34] *Housen v Nikolaisen*, 2002 SCC 33 [***Housen***]; *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215.
[35] *Feeney* at para 4.
[36] *Housen* at para 10.

before striking the pleading.[37] Notwithstanding the appellant's claims, the Motion Judge correctly identified the law and made no error in applying the law to the facts of this case.[38]

31. The appellants' also argue that the Motion Judge further erred by "applying an absolute rule that there is no room for Superior Court action where a Plaintiff is a member of a collective bargaining agreement".[39] This allegation is entirely unfounded and directly contrary to the Motion Judge's decision and reasons.[40]

32. The appellants' allege that the Motion Judge failed to give reasons addressing the appellants' submissions with respect to the *Weber* decision,[41] however this allegation simply repeats their argument that the Motion Judge erred by misapplying the test on a motion to strike and by misapplying binding jurisprudence.

33. The alleged error of law in misapplying the *Action4Canada* case to strike the claim for the appellants that are not barred by s. 236 of the *FPSLRA*, with leave to amend[42] is entirely unfounded and directly contrary to the Motion Judge's decision and reasons.[43]

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[37] **Appellants' Factum** at paras 4-5.
[38] *Adelberg FC* at paras 13-17, 25, 30-32, 36, 39-43 and 56.
[39] **Appellants' Factum** at paras 5(b), 30.
[40] *Adelberg FC* at paras 26, 28, and 32.
[41] **Appellants' Factum** at paras 6, 36-37.
[42] *Action4Canada v British Columbia (Attorney General)*, 2022 BCSC 1507; **Appellants' Factum** at paras 7, 38-39.
[43] *Adelberg FC* at paras 39-44.

B. THE MOTION JUDGE MADE NO ERROR IN FINDING THAT TWO-THIRDS OF THE PLAINTIFFS ARE BARRED FROM MAKING A CLAIM UNDER S. 236 OF THE FPSLRA

34. The *FPSLRA* provides for an explicit statutory ouster of any right of action when a grievance can be filed in accordance with that Act.

35. The jurisprudence was settled even before s. 236 was included in the *FPSLRA*.[44] The settled case law holds that, generally, where a statutory scheme grants exclusive jurisdiction to an administrative dispute resolution, grievance or arbitration process, it ousts the jurisdiction of the courts and courts should decline to intervene.[45] The courts discretion should only exercise discretion if they find a gap in the statutory scheme that results in "real deprivation of the ultimate remedy".[46]

36. Following the enactment of s. 236 of the *FPSLRA*, the only possible exception to this explicit ouster might be if the integrity of the grievance procedure is shown to be compromised based on the evidence presented in a particular case. The onus of establishing this lies with a plaintiff.[47]

37. Courts of Appeal in different jurisdictions have further clarified the law on a court's residual discretion. In particular, the Ontario Court of Appeal in *Bron v Canada* indicated that the residual discretion may exist if the internal grievance process does not provide an adequate remedy.[48] This Court, in *Lebrasseur v Canada*, in a case relating to the RCMP grievance process, noted that the onus is on the plaintiff to show that the court

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[44] See *Vaughan*; *Weber*.
[45] *Adelberg FC* at paras 13-15; *Hudson v Canada*, 2022 FC 694 at paras 73-75 [***Hudson***]; *Vaughan* at para 2.
[46] *Weber* at para 57.
[47] *Adelberg FC* at para 17.
[48] *Bron* at paras 29 and 32.

should exercise any residual jurisdiction.[49] Additionally, the New Brunswick Court of Appeal in *Robichaud and MacKinnon* held that any discretion is only to be exercised in "exceptional cases".[50] As the Québec Court of Appeal held, the grievance process cannot be circumvented by raising allegations of efficiency.[51] These concepts were also recently reiterated by the Federal Court in *Hudson* and Wojdan.[52]

38. The Motion Judge in this case correctly identified the relevant law and applied it to the facts of the case. As described in *Bron* and adopted by the Federal Court, s. 236 is an "explicit ouster" of the courts' jurisdiction.[53] The Court should only rely on any residual discretion if there is sufficient evidence that the internal grievance mechanisms are "incapable of providing effective redress."[54] In order to assess whether the grievance process is ineffective, "evidence as to the nature and the efficacy of the suggested alternate process" is required.[55]

39. The Motion Judge correctly held that any residual discretion should only be exercised in exceptional cases and that, "the truly problematic cases will be those where the grievance process is itself 'corrupt'".[56]

40. There were no palpable and overriding errors in the facts found by the Motion Judge or in his application of the facts to the applicable law.

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[49] *Lebrasseur v Canada*, 2007 FCA 330 at paras 18-19.
[50] *Robichaud and MacKinnon* at para 10.
[51] *Bouchard c Procureur général du Canada*, 2019 QCCA 2067 at para 1.
[52] *Hudson*; *Wojdan v Canada (Attorney General),* 2021 FC 1341 (appeal dismissed as moot, 2022 FCA 252).
[53] *Bron* at para 4; *Adelberg FC* at para 13; *Hudson* at para 73.
[54] *Adelberg FC* at para 15.
[55] *Adelberg FC* at paras 19-21.
[56] *Adelberg FC* at para 18.

41. For the purposes of a Motion to Strike, the facts pleaded are accepted as true. The Motion Judge found that the appellants' self-identification of their employment status permitted the Court to ascertain those appellants that were employed in the federal public service and those that were not. The parties confirmed this in Schedule A to the Statement of Claim, which identifies the employers whose employees are part of the federal public service, and in Schedule B, those employers whose employees are not subject to the *FPSLRA*. There is no dispute that these are correct.[57] The Motion Judge made no error in identifying the appellants that were subject to s. 236 of the *FPSLRA*.[58]

42. Moreover, the Motion Judge made no error in finding that the appellants have not alleged that the internal grievance process is incapable of providing redress[59] and thus, "have not demonstrated that their circumstances constitute 'exceptional cases', or that there is a gap in the labour adjudication that causes a 'real deprivation of ultimate remedy".[60]

43. The Motion Judge properly rejected the appellants' argument that the claim should not be struck because some of the remedies they seek are not available through the internal grievance process. As the Judge correctly identified, "almost all employment-related disputes can be grieved under s. 208 of the *FPSLRA*."[61] It is also not necessary

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[57] See consent of the parties in "Letter dated February 17th, 2023 attaching Schedule A and B as directed by the Court", **Appeal Book**, **Tab 4**, at p 67-69.
[58] *Adelberg FC* at para 21-25.
[59] *Adelberg FC* at para 21.
[60] *Adelberg FC* at para 36; citing *Weber* at para 57; *Vaughan* at paras 22, 39.
[61] *Adelberg FC* at para 32; *Bron* at paras 14-15.

the exact remedies sought are available under the statutory regime, only that "real deprivation of ultimate remedy" must be avoided.[62]

44. The appellants' allegations that the declaratory relief sought including for the *Charter* claims could not be granted through the grievance or arbitration process were also properly rejected because the *FPSLRA* bars any right of action even when the preferred remedy is not available. In any event, the *Charter* claims could be addressed by the grievance procedure under the *FPSLRA*.[63]

45. Finally, contrary to the appellant's assertion, the Motion Judge did address all submissions raised by both the parties in their written representations and at the hearing. The Motion Judge addressed the appellant's mistaken and incorrect argument that *Weber* requires a review of the specific collective bargaining agreements in order to determine whether the appellants are subject to s. 236.

46. The task of the Motion Judge was to decide whether under s. 236 of the *FPSLRA* the Claim should be struck. In order to so decide, the Motion Judge needed to determine the true nature of the dispute, and whether it related to the "terms and conditions of employment" as prescribed in s. 236 of the *FPSLRA* for which a grievance under that act could be filed. As the Supreme Court of Canada put succinctly, the courts must determine the true the dispute "viewed with an eye to its essential character".[64] The Motion Judge found that the claims were indeed, ordinary workplace disputes relating to the terms and conditions of employment. It was open to the Motion Judge to find that the

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[62] *Weber* at para 57.
[63] *Adelberg FC* at paras 34-35.
[64] *Weber* at para 67.

allegations of harms suffered by employees because of COVID-19 policies and practices are properly the subject of grievances.[65]

47. In *Weber*, the collective agreement was relevant because the applicable legislative scheme referred to the collective agreement in the language of the provision at issue.[66]

48. Unlike the Ontario legislative scheme at issue in *Weber*, under the *FPSLRA* claims will be barred if they relate to any matter that can be the subject of a grievance under that Act. Pursuant to s. 236, a "grievance for any dispute **relating to his or her terms or conditions of employment** is in lieu of **any** right of action that employee may have" [emphasis added].[67] The Motion Judge made no error in determining that the claims were ordinary workplace disputes subject to the bar in the *FPSLRA*.[68]

49. As mentioned, the right to present a grievance under the *FPSLRA* is very broad. The scope of grievance rights for federal public service employees is defined in the *FPSLRA*. An assessment of collective agreements is not necessary in this matter.

50. Contrary to the appellants' argument, The Motion Judge did not find, nor did the defendants argue, that tort claims are never possible in the employment context.[69] However, s. 236 of the *FPSLRA* expressly prohibits any action at all if the dispute relates

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[65] *Adelberg FC* at para 35, citing *National Organized Workers Union v Sinai Health System*, 2022 ONCA 802 at para 39 and cases cited therein.
[66] *Weber* at para 37.
[67] *FPSLRA*, s. 236.
[68] *Adelberg FC* at paras 21-25.
[69] See **Appellants' Factum** at para 22.

to the terms and conditions of employment, as they do in this case with respect to the Schedule A appellants.

51. The Motion Judge had no obligation to examine the terms of any collective agreement. It was also open to the Motion Judge to find, based on the (lack of) evidence that the appellants failed to demonstrate that their circumstances constitute "exceptional cases", or that there is a gap in labour adjudication that causes a "real deprivation of ultimate remedy".[70]

52. The appellants specifically rely on the decision of the Ontario Superior Court in *Muirhead* to allege that the Court should exercise its discretion to accept an action if the claim alleges the tort of misfeasance in public office.[71] However, the Court's decision *Muirhead* does not help the appellants' position. On the contrary, it further demonstrates that the jurisprudence is both settled and consistent with the decision of the Motion Judge in this matter.

53. In striking the claim in its entirety, the Court in *Muirhead* correctly identified that the essence of the claims related to an employment dispute over which the court's jurisdiction had been ousted. That court granted the plaintiff leave to amend the claim because of the possibility that the plaintiff could plead some claim that was outside of the scope of an employment dispute and would not be caught by the statutory ouster of the Court's jurisdiction in that particular case and statutory context.[72]

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[70] *Adelberg FC* at para 36.
[71] **Appellants' Factum** at para 30.
[72] *Muirhead v York Regional Police Services Board*, 2014 ONSC 6817 at paras 5-7 [***Muirhead***].

54. The appellants also cite *Muirhead* for the proposition that in determining whether a court's jurisdiction is ousted, it will require a "contextual fact-based analysis of the circumstances of each case."[73]

55. This is precisely the exercise conducted by the Motion Judge. He examined the circumstances of this case as well as the applicable statutory scheme and found that the entire claim of the Schedule A employees was subject to the explicit ouster of the courts jurisdiction under s. 236 of the *FPSLRA* and therefore were not granted leave to amend.

C. THE MOTION JUDGE MADE NO ERROR IN FINDING THAT THE STATEMENT OF CLAIM LACKED SUFFICIENT MATERIAL FACTS AND INCLUDED UNAVAILABLE RELIEF

56. Further to the jurisdictional objection precluding the claims of the appellants barred by s. 236, Canada also maintained that the Statement of Claim should be struck in its entirety because the Statement of Claim fails to disclose a reasonable cause of action.

57. Rule 221 of the *Federal Court Rules* provides for striking pleadings in an action.[74] The Federal Court in *Shebib v Canada* summarized the test for motions to strike under Rule 221: "A claim will only be struck if its plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action."[75]

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[73] *Muirhead* at para 63, cited in the **Appellants' Factum** at para 30.
[74] *Federal Courts Rules*, SOR/98-106, r. 221 [***Rules***].
[75] *Shebib v Canada*, 2016 FC 539 at para 10.

58. Pursuant to Rule 174, a statement of claim "shall contain a concise statement of the material facts on which the party relies".[76] In addition, under Rule 181(1), the pleadings must contain particulars of every allegation contained therein.[77]

59. Recently in *Zbarsky v Canada*, the Federal Court re-stated what is needed to establish a reasonable cause of action: "(1) allege facts that are capable of giving rise to a cause of action, (2) indicate the nature of the action which is to be founded on those facts, and (3) indicate the relief sought, which must be of a type which the action could produce and the court has jurisdiction to grant."[78]

60. It is a fundamental principle that the plaintiff in an action must plead material facts in sufficient detail to support the claim and relief sought. The pleadings play an important role in providing notice and defining the issues to be tried without leaving the court and opposing parties to speculate as to how the facts may be arranged to support various causes of action.[79]

61. The Motion Judge correctly identified the relevant rules regarding pleadings, particularly Rule 174 and Rule 181(1).[80] He then went on to articulate the law and cited this Court's decision in *Mancuso v Canada (National Health and Welfare)*, setting out the principle that "a plaintiff must plead, in summary form but with sufficient detail, the constituent

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[76] *Rules*, r. 174.
[77] *Rules*, r. 181.
[78] *Zbarsky v Canada*, 2022 FC 195 at para 13; *Bérubé v Canada*, 2009 FC 43 at para 24, aff'd 2010 FCA 276.
[79] *Mancuso v Canada (National Health and Welfare),* 2015 FCA 227 at para 16 [***Mancuso***].
[80] *Adelberg FC* at para 39.

elements of each cause of action or legal ground raised. The pleading must tell the defendant who, when, where, how and what gave rise to its liability."[81]

62. In assessing the sufficiency of the pleadings, the Motion Judge made no error in finding that the Claim lacked material facts. Specifically, the Motion Judge noted that while the Claim seems to seek a declaration that "vaccine passports" violate the appellants right to move freely within Canada or to enter or leave Canada, the pleading does not particularize any facts suggesting that any of the appellants were prevented from travelling within or outside Canada.[82]

63. It was also open to the Motion Judge, and he made no error in finding that, although the Claim alleged misfeasance in public office by forcing "unwanted vaccinations" under the Treasury Board Policy and Interim Order, the appellants failed to engage with the substance of the Treasury Board Policy or the Interim Order; notably that their application did not force vaccination on any person, including any of the appellants.[83]

64. The Motion Judge also found that the *Charter* claims were bare allegations and failed to include material facts or particulars of the alleged infringements.[84] As the Motion Judge noted, the fact situation was similar to that in *Turmel*, a decision affirmed by this Court in which the appeal panel found "no reviewable error in the Case Management Judge's decision, agreeing with her observations regarding the lack of facts

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[81] *Adelberg FC* at paras 40-42; *Mancuso* paras 19-20.
[82] *Adelberg FC* at para 46.
[83] *Adelberg FC* at para 48.
[84] *Adelberg FC* at para 49.

necessary to support the appellant's claims under the *Canadian Charter of Rights and Freedoms*…"[85]

65. Lastly, the Motion Judge made no error in finding that many of the claims made in the pleadings are unavailable in a civil action, including administrative declarations and injunctive relief.[86] Pursuant to s. 18(3) of the *Federal Courts Act*, remedies including injunctions, writs of *mandamus*, declaratory relief, and others can only be obtained on an application for judicial review.[87] These "impermissible claims" are substantially similar to the claims in *Action4Canada v British Columbia (Attorney General)*, which was struck in its entirety for being prolix and "bad beyond argument".[88]

66. Contrary to the appellants' claim, the Motion Judge did not "perfunctorily" apply, or simply rely on the findings from that case. Rather, the Motion Judge identified the similarities between the two claims noting that his reasons for striking the Claim align with those made by the British Columbia Supreme Court.[89]

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[85] *Turmel v Canada*, 2022 FCA 166 at para 3.
[86] *Adelberg FC* at para 45.
[87] *Federal Courts Act*, s. 18.
[88] *Adelberg FC* at paras 51-52.
[89] *Adelberg FC* at paras 53-54.

PART IV – ORDER SOUGHT

67. The respondents request that the appeal be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of Toronto, in the Province of Ontario this 14th day of June 2023.

Adam Gilani / Renuka Koilpillai

Lawyer for the Respondents

PART V – LIST OF AUTHORITIES

A. STATUTES AND REGULATIONS

1. *Aeronautics Act*, RSC 1985, c A-2
2. *Federal Courts Act,* RSC 1985, c F-7
3. *Federal Courts Rules,* SOR/98-106
4. *Federal Public Sector Labour Relations Act*, SC 2003, c 22, s 2

B. AUTHORITIES

1. *Action4Canada v British Columbia (Attorney General)*, 2022 BCSC 1507
2. *Adelberg v Canada*, 2023 FC 252
3. *Bérubé v Canada*, 2009 FC 43
4. *Bouchard c Procureur général du Canada*, 2019 QCCA 2067
5. *Bron v Canada (Attorney General)*, 2010 ONCA 71
6. *Canada v Robichaud and MacKinnon*, 2013 NBCA 3
7. *Feeney v Canada*, 2022 FCA 190
8. *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215
9. *Housen v Nikolaisen*, 2002 SCC 33
10. *Hudson v Canada*, 2022 FC 694
11. *Lebrasseur v Canada*, 2007 FCA 330
12. *Mancuso v Canada (National Health and Welfare),* 2015 FCA 227
13. *Muirhead v York Regional Police Services Board*, 2014 ONSC 6817
14. *National Organized Workers Union v Sinai Health System*, 2022 ONCA 802
15. *Shebib v Canada*, 2016 FC 539
16. *Turmel v Canada*, 2021 FC 1095
17. *Vaughan v Canada*, 2005 SCC 11
18. *Weber v Ontario Hydro*, 1995 CanLII 108 (SCC), [1995] 2 SCR 929
19. *Wojdan v Canada (Attorney General),* 2021 FC 1341
20. *Zbarsky v Canada*, 2022 FC 195