FORM 146B - Rule 146

SOLICITOR'S CERTIFICATE OF SERVICE

GREGORY HILL, BRENT WARREN, and TANYA LEWIS

Plaintiffs

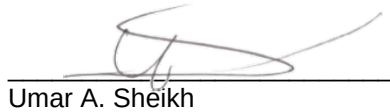
and

HIS MAJESTY THE KING

Defendant

SOLICITOR'S CERTIFICATE OF SERVICE

I, Umar Sheikh, Solicitor, certify that I caused the defendant, His Majesty the King, to be duly served with this document, by email to the Solicitor on record for the defendant, Shelan Miller of the Department of Justice, Canada, via shelan.miller@justice.gc.ca, on May 2, 2024.



Umar A. Sheikh
Lawyer for Plaintiffs

From:	Samantha Battams
To:	Miller, Shelan (she; her | elle; la)
Cc:	Redpath, Lisa (she; her | elle; la); Umar Sheikh
Subject:	RE: Hill, Gregory et al v. His Majesty the King - T-1081-23 - Written Submissions of Plaintiffs - Service of Document
Date:	May 2, 2024 9:56:00 AM
Attachments:	2024-05-02 Written Submissions of the Plaintiffs - FINAL.pdf image001.png 2024.05.02 LT S. Miller re Motion to Strike Response and Encl.- SIGNED.pdf
Importance:	High

Good morning, Ms. Miller,

Please see attached for service upon you the Plaintiffs' Written Submissions, as well as correspondence of today's date from Mr. Sheikh.

Thank you,

Samantha Battams
Legal Assistant
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No. T-1081-23

FEDERAL COURT
PROPOSED CLASS PROCEEDING

BETWEEN

GREGORY HILL, BRENT WARREN and TANYA LEWIS

Plaintiffs

AND

HIS MAJESTY THE KING

Defendants

MOTION RECORD OF THE PLAINTIFFS

Response to the Defendants' Motion to Strike
Without Leave to Amend

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WRITTEN REPRESENTATIONS OF THE PLAINTIFFS

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OVERVIEW[1]

1. The plaintiffs have filed an Amended Statement of Claim (the "Claim") requesting certification of a class proceeding on behalf of current and former employees within the federally regulated aviation industry that were subject to disciplinary measures contrary to their collective agreements. These disciplinary measures arose as a consequence of the mandatory COVID-19 vaccination order enacted by the Minister of Transport ("the Minister").

2. The defendants now seek to strike the entirety of the Claim without leave to amend. They submit that none of the plaintiffs' claims disclose a reasonable cause of action—and are indeed "doomed to fail"—such that they should be dismissed as an abuse of process. In so arguing, the defendants rely on overbroad characterizations and applications of various immunities and on rigid adherence to each element of each cause of action in the Claim. The defendants also rely heavily on the reasoning of the Quebec Superior Court in *Syndicat des métallos, section locale 2008 c Procureur général du Canada,* 2022 QCCS 2455 [*United Steelworkers*].

3. These arguments are fundamentally contrary to the approach that must be taken on a motion to strike. The test on this motion is not whether *other* plaintiffs have lost *other* claims based on *other* evidence against *another* (or even this) mandatory vaccination policy. Rather, the court must determine whether, assuming the facts pleaded as true, it is "plain and obvious" that the Claim is "bereft of any possibility of success."[2] The Claim should be struck if the defendants cannot understand, reading the pleading generously, the "who, when, where, how and what gave rise to [their] liability."[3]

4. Notably, the defendants have never argued that they are unable to understand the Claim or unable respond to the allegations found therein. Nor have they established a "fatal flaw" at the root of the Claim such that it is bound to fail or that the Claim is one of the "clearest of cases" where no facts could support the claimed causes of action.

5. Fundamentally, the defendants have not met their burden to justify the Claim's

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[1] Except where otherwise indicated, any emphasis in quotes is found in the original and internal citations have been omitted.
[2] *Canadian Frontline Nurses v Canada (Attorney General)*, 2024 FC 42 at para 122 (*citing Wenham v Canada (Attorney General),* 2018 FCA 199 at para 33) [*Canadian Frontline Nurses*]
[3] *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 at para 19 [*Mancuso*]

outright dismissal at this preliminary stage of the proceedings. The plaintiffs' Claim raises valid and critical issues that have yet to be decided. The plaintiffs thereby request that the defendants' motion to strike should be dismissed.

PART I – STATEMENT OF FACTS

6. The plaintiffs rely upon the facts as stated in the Claim. However, given the defendants' position that these facts are insufficient and/or do not support any cause of action, the plaintiffs seek clarify their position by restating the facts found in the Claim (albeit in a more summary form) below.

i) The Impugned Order and resultant policies

7. On August 13 and October 6, 2021, the federal government announced its intent to require mandatory COVID-19 vaccination for employees in certain federally regulated sectors.

8. On October 29, 2021, the Minister issued Interim Order Respecting Certain Requirements for Civil Aviation due to COVID-19, No. 43 (the "Impugned Order").

9. The Impugned Order was issued pursuant to s. 6.41 of the *Aeronautics Act*, R.S.C. 1985, c. A-2, which enables the Minister to make interim orders to, among others, "deal with a significant risk, direct or indirect, to aviation safety or the safety of the public."

10. The Impugned Order required air carriers to establish and implement a targeted and/or comprehensive mandatory COVID-19 vaccination policy effective from October 30, 2021. Under the Impugned Order, no unvaccinated employee could access aerodrome property or have in-person interactions with other employees, unless that employee fell within one of two limited exceptions. Further, under the Impugned Order, air carriers were required to collect and disclose information pertaining to their employees' vaccination status.

11. On August 25, 2021, Air Canada announced that it was mandating COVID-19 vaccination for its employees. Under this policy, employees would be required to disclose their vaccination status and be vaccinated by October 30, 2021. Employees who did not comply, unless they fit into one of the two limited exceptions, would not be able to work and would face consequences up to unpaid leave or termination.

12. On October 16, 2021, WestJet announced a similar policy mandating COVID-19 vaccination for its employees, absent which employees could be disciplined up to and including termination.

13. Both Air Canada and WestJet explicitly relied upon the Impugned Order in enacting these policies and were in fact induced by the Impugned Order to create these policies.

ii) The consequences to the plaintiffs

14. The plaintiffs are current and former employees of Air Canada and WestJet. They were subject to—and seek to represent a class of individuals that were also subject to—discipline, including suspension and termination, for failure to disclose their vaccination status and/or failure to become vaccinated as required by the Impugned Order (the proposed class members, unless otherwise indicated, are referred to herein as the "plaintiffs").

15. The plaintiffs' employment with Air Canada and WestJet and other relevant air carriers (the "Employers") were comprehensively and exhaustively covered by collective agreements. These collective agreements contained terms that had been previously negotiated by and between the Employers and the plaintiffs' bargaining units/unions.

16. None of the collective agreements between the plaintiffs and the Employers contain terms stating, expressly or impliedly, that:

a. Vaccination status be disclosed prior to the plaintiffs being able to perform their job duties;
b. COVID-19 vaccination or other medical procedures be undertaken prior to the plaintiffs being able to perform their job duties; or
c. The Employers could discipline the plaintiffs for failure to disclose vaccination status or failure to become vaccinated for COVID-19.

17. The Employers breached the collective agreements by requiring compliance with and by disciplining the plaintiffs based on terms of employment not found within these agreements.

iii) The Minister's knowledge and motivations

18. The Minister was or ought to have been aware of the existence of and terms within these collective agreements.

19. The Minister was therefore aware of and in fact intended that enacting the Impugned Order would lead the Employers to breach the relevant collective agreements.

20. The Minister was further aware that the collective agreements had been subject to extensive negotiations between the Employers and the plaintiffs' respective bargaining units.

21. Nevertheless, the Minister imposed the terms of the Impugned Order into the employment relationship between the plaintiffs and their Employers without the protections afforded by collective bargaining and without the plaintiffs' consideration or consent.

22. The Minister was also aware that:

a. the scientific information underlying each of the approved COVID-19 vaccines did not reference or support the proposition that the vaccines prevented transmission of COVID-19;

b. there was evidence of a significant potential risk of adverse side effects arising from the majority of the approved vaccines; and

c. there was no information regarding long-term safety data of the approved vaccines, which was relevant information required prior to mandating vaccination.

23. The Minister's stated objective in enacting the Impugned Order was to reduce the transmission of COVID-19, even though the Minister knew that mandatory vaccination would not further this objective.

24. In enacting the Impugned Order, the Minister was responding to political pressures as opposed to acting within his statutory grant of authority—enacting measures to deal with safety—under the *Aeronautics Act*.

25. The Minister enacted the Impugned Order even though he was aware that the terms of the Impugned Order would pose a direct risk of substantial harm to the plaintiffs.

26. The plaintiffs were in fact harmed by the loss of pay and benefits pursuant to their valid collective agreements and the emotional harm arising from the loss of their ability to work and the coercive tactics employed by the Minister.

PART II –POINTS IN ISSUE

27. This application raises the following issues:

a. Have the defendants shown that it is "plain and obvious" that any or all of the Claim should be struck because it is "doomed to fail?"[4]

b. If so, have the defendants established that there is not even "a scintilla of a cause of action" such that no part of the Claim can be cured by amendment?[5]

28. For the absence of doubt, the plaintiffs are abandoning or are otherwise willing to concede that their tort claims in negligence, interference with contractual relations, and violations of privacy, along with the *Charter* claims relating to ss. 2(a), 7, 15, and 52, may be struck from the Claim.

29. However, the plaintiffs maintain that their claims concerning the defendants' inducement of breach of contract, misfeasance in public office, and violation of s. 2(d) of the *Charter*— justifying awards of general, special, exemplary, punitive, and *Charter* damages— have been sufficiency pled and/or are not an abuse of process. These claims should survive or, at a minimum, the plaintiffs should be granted leave to amend these claims.

PART III –SUBMISSIONS

A. THE LAW ON A MOTION TO STRIKE

i) The defendants must meet a high threshold to strike the Claim

30. The defendants have an "onerous" burden in seeking to strike the Claim, particularly without leave to amend.[6] As stated by the Supreme Court of Canada, "the motion to strike is a tool that must be used with care."[7] Courts "must" take a "generous approach" and "err on the side of permitted a novel but arguable claim to proceed to trial."[8]

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[4] *Canadian Frontline Nurses* at para 122
[5] *Al Omani v Canada,* 2017 FC 786 at paras. 32-35 [*Al Omani*]
[6] *Doan v Canada*, 2023 FC 968 at para 40 [*Doan*]
[7] *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 21
[8] *Id*

31. The parties agree that Rule 221(1) governs this motion. Under this Rule, the pleaded facts must be accepted as true. These do not include facts that are "patently ridiculous or incapable of being proved"[9] or are "inconsistent with common sense, the documents incorporated by reference, or incontrovertible evidence proffered by both sides for the purpose of the motions."[10] However, in the absence of any such allegations, the facts in the Claim must be taken as given, even though they will need to still be proven by the plaintiffs at trial.

32. The defendants specifically seek to strike the Claim under Rules 221(1)(a) and (f).[11] Under Rule 221(1)(a), all or part of a pleading may be struck if it "discloses no reasonable cause of action." To succeed on this ground, the defendants must show that it is "plain and obvious" that the claim is "doomed to fail."[12] Otherwise framed, even if the facts are accepted as true, the Claim must be:

> …"so clearly improper as to be bereft of any possibility of success": *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, 1994 CanLII 3529 (FCA), [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: *Rahman v. Public Service Labour Relations Board*, 2013 FCA 117 at paragraph 7; *Donaldson v. Western Grain Storage By-Products*, 2012 FCA 286 at paragraph 6; *cf. Hunt v. Carey Canada Inc.*, 1990 CanLII 90 (SCC), [1990] 2 S.C.R. 959.[13]

33. Under Rule 221(1)(f), all or part of a pleading may be struck if it is "an abuse of the process of the Court." The doctrine of abuse of process "engages the inherent power of the court to prevent misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or in some other way bring the administration of justice

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[9] *Gaskin v Canada*, 2024 CanLII 28268 (FC) at para 8
[10] *Doan* at para 50
[11] In their written submissions at para 26, the defendants also appear to argue that the Claim be struck as vexatious under Rule 221(1)(c). However, neither Rule 221(1)(c) nor vexatiousness is referenced elsewhere in their written submissions. Moreover, in their Notice of Motion and overview to their written submissions, the defendants only refer to Rules 221(1)(a) and (f). To the extent the defendants argue that the Claim should be struck for vexatiousness, the plaintiffs rely on the arguments found herein and also request that this argument be dismissed.
[12] *Canadian Frontline Nurses* at para 122 (*citing Wenham*)
[13] *Id*

into disrepute."[14] Abuse of process is most often applied when a plaintiff is attempting to relitigate the same dispute when earlier attempts have failed.[15] However, this doctrine is "characterized by its flexibility" and may consequently apply to other circumstances such as, for instance, "unreasonable delay that causes serious prejudice."[16]

34. Rule 221 notes that all or part of a pleading may be struck "with or without leave to amend." The defendants have a "heavy" burden in requesting that the court deny the plaintiffs leave to amend, as this should only be disallowed "in the clearest of cases" where "it is clear that the claim cannot be amended to show a proper cause of action" or "it is clear that the plaintiff cannot allege further material facts that [they know] to be true to support the allegations."[17] The general rule is that leave to amend should be granted "unless there is no scintilla of a cause of action."[18] Indeed, "however negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed, if it can be made without prejudice to the other side."[19]

ii) The low threshold and generous reading applied to pleadings

35. Conversely, at this preliminary stage in the proceedings, the threshold in establishing a reasonable cause of action "is quite low, as the right of action must be protected."[20] Per Rules 174 and 175, the Claim must merely "contain a concise statement of the material facts on which the parties relies," must not "include evidence by which those facts are to be proved," and "may raise any point of law."

36. As stated in *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 at para 19, the "material facts" that must be pled must be determined "in light of the cause

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[14] *Behn v Moulton Contracting Ltd*, 2013 SCC 26 at para 40
[15] *Id* at para 41; *see also Oleynik v Canada (Attorney General)*, 2014 FC 896 at para 23 (cited by defendants for proposition that failure to disclose a reasonable cause of action is an abuse of process; court rather relying on plaintiff's re-litigation of same issues)
[16] *Behn v Moulton Contracting Ltd*, 2013 SCC 26 at para 41
[17] *Al Omani* at para 34; *Yan v Daniel*, 2023 ONCA 863 at para 19
[18] *Al Omani* at para 34
[19] *Café Cimo Inc v Abruzzo Italian Imports Inc*, 2014 FC 810 at para 8 (internal emphasis omitted) (citing test to grant leave to amend, which—per *McCain Foods Limited v JR Simplot Company,* 2021 FCA 4 at para 20, mirrors the test applicable on a motion to strike)
[20] *Doan* at para 43 (considering motion to certify a class action which—as described at para 41—is the same test as on a motion to strike)

of action and the damages sought to be recovered":

> [18] There is no bright line between material facts and bald allegations, nor between pleadings of material facts and the prohibition on pleading of evidence. They are points on a continuum, and it is the responsibility of a motions judge, looking at the pleadings as a whole, to ensure that the pleadings define the issues with sufficient precision to make the pre-trial and trial proceedings both manageable and fair.

37. It should also be remembered that, for pleadings, "perfection is not the standard."[21] In essence, a statement of claim should "tell the defendant who, when, where, how and what gave rise to its liability."[22] This should be done "in a reasonably practical fashion;" "the court should only interfere with a party's organization of its pleading in the clearest of cases where the allegations are incapable of being understood."[23]

38. In particular, on a motion to strike, "[t]he court should not engage in a paragraph by paragraph examination of a pleading or insist on precise compliance with the rules of pleading."[24] Rather, the court "must read [the pleading] to get at its 'real essence' and 'essential character' by reading it 'holistically and practically without fastening onto matters of form.'"[25] As stated by the Supreme Court of Canada, in considering such a motion, the court is "obliged to read the statement of claim as generously as possible and to accommodate any inadequacies in the form of the allegations which are merely the result of drafting deficiencies."[26]

39. In this motion, the defendants submit that the Claim is so deficient that it both discloses no reasonable cause of action and amounts to an abuse of process. To succeed, they must meet the onerous test of striking the entirety of the Claim and the even heavier burden of denying leave to amend.

40. On the other hand, the Claim must meet the relatively low threshold to survive this motion. Read generously, it must allow the defendants to understand the 'who, what, where, when, and how' of the claims alleged against them.

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[21] *Ponnampalam v Thiravianathan*, 2019 ONSC 5008 (Ont SCJ) at para 14
[22] *Mancuso* at para 19
[23] *Ponnampalam v Thiravianathan*, 2019 ONSC 5008 (Ont SCJ) at para 14
[24] *Id* at para 19
[25] *Canadian Frontline Nurses* at para 123
[26] *Operation Dismantle v The Queen* (1985), 1985 CanLII 74 (SCC) at para 14

B. THE CLAIM IS NOT 'DOOMED TO FAIL'

i) *United Steelworkers* is not decisive of the issues before this Court

41. The defendants cite the Quebec Superior Court's reasoning in *United Steelworkers* as authority for the propositions, *inter alia*, that the Impugned Order is protected by the government's "core policy immunity," that this Court does not have jurisdiction, and that the plaintiffs' claims of inducement to breach of contract, misfeasance in public office, and *Charter* claims must fail. However, this case is not binding on this Court nor decisive of the issues before it.

42. In *Brake v Canada (Attorney General)*, 2019 FCA 274, the Federal Court of Appeal explicitly cautioned against viewing another decision—even if legally and factually similar—as determinative of whether a plaintiff's claims disclosed a reasonable cause of action.[27] Specifically, the court noted that:

a. the plaintiff before them "did not consent to his claims being decided [elsewhere] as a 'lead case'" and "did not have an opportunity to make submissions or present evidence" in that proceeding;[28]
b. each case is "based on the particular evidentiary record filed and the specific claims pleaded;" [29] and
c. this plaintiff sought to "place a different evidentiary record before the Court to support different claims."[30]

43. In *United Steelworkers*, the plaintiffs requested a declaration of invalidity of various ministerial orders—one of which being the Impugned Order—for violation of those plaintiffs' s. 7 *Charter* rights. As in *Brake*, none of the plaintiffs here consented to have their claims decided, presented evidence, or otherwise participated in the *United Steelworkers* proceedings. Similarly, the plaintiffs here are pursuing different causes of action and are requesting different remedies from those requested in *United Steelworkers*. Furthermore, the plaintiffs here have the benefit of more fulsome evidence and information than that present when *United Steelworkers* was decided.

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[27] *Brake v Canada (Attorney General)*, 2019 FCA 274 at paras 56-59
[28] *Id* at para 57
[29] *Id* at para 58
[30] *Id* at para 58

44. As noted by at least one academic, the evidence relating to the need for and effectiveness of various measures aimed at combatting COVID-19 was "somewhat thin in the early days of the pandemic given the novelty of the virus."[31] However, the accumulation of scientific knowledge, over time, has the "potential for changing judicial assessment that have largely given the benefit of the doubt to legislatures and governments."[32]

45. To illustrate, in *Yardley v Minister for Workplace-Relations and Safety*, 2022 NZHC 291, the New Zealand High Court found that a governmental order mandating vaccination for police and military staff imposed a limitation on the applicants' rights that was not demonstrably justified. The court found that the objective of the mandate—ensuring continuity of public services—was not "materially advanced by the Order;" that there was "no evidence" that the number of affected staff "is any different from the number that would have remained unvaccinated and employed" under existing policies; and that the threat of COVID-19 infection "exists for both vaccinated and unvaccinated staff," particularly because the Omicron variant "is so transmissible."[33]

46. Given the "expert evidence before the Court on the effects of vaccination on COVID-19 including the Delta and Omicron variants," the court in *Yardley* was "not satisfied that the Order ma[de] a material difference."[34] Canadian grievance arbitrators have made similar comments on COVID-19 variants when assessing other challenges to mandatory vaccination policies.[35]

47. Furthermore, there has been "significant discrepancies" in the imposition and relaxation of various governmental vaccine requirements between different organizations and individuals. While the courts have not previously appeared willing to critique these distinctions, "this does not mean they will not in the future."[36] Indeed, grievance

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[31] John M Keyes, "Judicial Review of COVID-19 Legislation – How Have the Courts Performed?" (2022), Canadian Legal Information Institute, 2022 CanLII Docs 4339 at s 6 [*Keyes*]
[32] *Id*
[33] *Id*
[34] *Id*
[35] *See, eg, Rehibi v Deputy Head (Department of Employment and Social Development)*, 2024 FPSLREB 47 at paras 224-25 (citing cases) [*Rehibi*]
[36] *Keyes at s 6*

arbitrators have already found certain employer vaccination policies to be unreasonable due to such differential treatment.[37]

48. In sum, each case must be "decided on its own particular facts and the state of knowledge at the time the policy was implemented."[38] Contrary to the defendants' submissions, *United Steelworkers* does not constitute "a complete answer to the questions before" this Court.[39]

ii) This Court has jurisdiction—or arguably has jurisdiction—over the Claim.

49. The defendants also argue that, because the plaintiffs are or were members of certified trade unions, they are obliged under their collective agreements and the *Canada Labour Code,* RSC 1985, c L-2, to proceed with any dispute within the employment grievance process. In so arguing, the defendants fundamentally mischaracterize the nature of the Claim.

50. The Supreme Court of Canada has repeatedly warned not to overextend the jurisdiction of labour arbitration: the exclusivity of labour arbitration "does not close the door to all legal actions involving the employer and the unionized employee… This is so because the exclusive jurisdiction of a labor arbitrator applies only to 'disputes which arise expressly or implicitly from the collective agreement.'"[40]

51. Here, the Claim does not concern "the interpretation, application, administration, or alleged contravention of a collective agreement" such that it must be exhausted through the grievance process.[41] Rather, this dispute arises out of the Minister's implementation of the Impugned Order. The plaintiffs allege that the Impugned Order imposed terms on the plaintiffs' employment that were contrary to (and indeed uncontemplated by) the relevant collective agreements. Here, as in *Québec (Commission des Droits de la Personne et des Droits de la Jeunesse) c Québec (Attorney General)*, 2004 SCC 39 ("*Morin*"):

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[37] *See, eg, Parmar v Tribe Management Inc*, 2022 BCSC 1675 at para 123 (citing cases)
[38] *Id* at para 124
[39] *Rehibi* at para 225
[40] *Northern Regional Health Authority v Horrocks,* 2021 SCC 42 at para 22
[41] *Id* at para 25

> [24] … All parties agree on how the agreement, if valid, must be interpreted and applied. The only question that arises is whether the process leading to the adoption of the clause held to be discriminatory and the insertion of it in the collective agreement contravenes the *Quebec Charter*, thereby rendering the clause inapplicable.

52. Additionally, the defendants correctly note that (1) they are not parties to the relevant collective agreements that govern(ed) the plaintiffs' employment and (2) the proposed class also includes individuals who are not unionized. These facts further militate against the exclusive jurisdiction of arbitration. A "grievance arbitrator cannot claim to have authority over persons considered to be third parties in relation to the collective agreement and cannot render decisions against them," absent their consent.[42]

53. As reiterated by the Supreme Court of Canada: "[b]ecause 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."[43] Here, the lawfulness of the actions taken by the government—a non-party to the collective agreements—is not grounded in the collective agreements.[44] As such, it cannot be within the exclusive purview of a labour arbitrator.

iii) "Core policy immunity" does not apply—or arguably does not apply— in these circumstances.

54. Contrary to some of the defendants' characterizations, there is no all-

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[42] *Bisaillon v Concordia University*, 2006 SCC 19 at para 40; *see also Bruce v Cohon*, 2017 BCCA 186 at para 84. Note that, in the grievances cited by the defendants at fn 75, the parties consented to the arbitrators' jurisdiction and, as noted by the defendants in fn 72, the parties in *United Steelworkers* specifically chose not to challenge the grievance arbitrator's jurisdiction (at para 57). As such, the defendants point to no case in which this issue of jurisdiction has yet been determined.

[43] *Morin* at para 11

[44] *See also British Columbia Teachers' Federation v British Columbia,* 2015 BCCA 184 at para 32 (affirmed and adopted 2016 SCC 49) [*BCTF*] ("the issue here is whether legislation which interfered with terms of a collective agreement and temporarily prohibited collective bargaining on certain topics substantially interfered with workers' freedom of association"); *AUPE v Alberta*, 2014 ABCA 43 at para 37 ("true character" of dispute "is about exclusion from the bargaining unit due to an allegedly unconstitutional statutory provision" and therefore does not arise under the collective agreement);

encompassing or "hard-and-fast rule that decisions made under a general public duty, government policy or core policy" are immune from tort liability.[45] In fact, the courts have been cautious to ensure that "[t]hose who wield public power cannot be a law unto themselves, immunized from truly independent review and shielded from meaningful scrutiny."[46] This remains the case even when addressing COVID-19: "as a society governed by the Rule of Law, our governments are obliged to observe the law even as they respond to a difficult apprehended emergent situation."[47]

55. Nevertheless, the defendants submit that the Impugned Order was a "core policy decision" under which the Minister should be shielded from liability. In order to make this argument, the defendants attempt to distinguish *Benrouayene c Procureur général du Canada,* 2023 QCCS 144 [*Benrouayene*].

56. In *Benrouayene*, the plaintiff disputed the legality of a provision in Interim Order 38 (a precursor to the Impugned Order, which also includes the same challenged provision) that required travelers from Morocco to leave from and obtain a negative COVID-19 test from a country other than Morocco. The court applied the test from *Nelson (City) v Marchi*, 2021 SCC 41 at para 68, and concluded that it was "impossible" to determine at this stage whether the impugned decision was a "core policy decision" such that it was immune from tort liability and/or whether an exception to the application of this immunity existed.[48]

57. In its reasoning, the court noted that, in "several rulings and judgments pronounced in similar circumstances," courts have concluded that the issue of state immunity was better decided by the trial judge.[49] This is in line with federal court jurisprudence, which have repeatedly found that "courts should be reluctant to dismiss a proposed class action as disclosing no reasonable cause of action 'based on policy reasons at the motion stage before there is a record on which a court can analyze the strengths and

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[45] *Paradis Honey Ltd v Canada (Attorney General)*, 2015 FCA 89 at para 104 [*Paradis Honey*]
[46] *Canadian National Railway Company v Emerson Milling Inc*, 2017 FCA 79 at para 10 (citing cases)
[47] *Humphries v AG Ontario,* 2020 ONSC 4460 at para 15
[48] *Benrouayene* at paras 29-32
[49] *Id* at para 39

weaknesses of the policy arguments.'"[50]

58. The defendants argue that the dispute in *Benrouayene* was focused on how the policy was implemented, as opposed to the policy itself. First, the court was arguably speaking in *obiter* when it wrote that the decisions at issue appeared to relate more to the 'operational' aspects of governmental decision-making.[51] The court had already concluded that there was an insufficient basis to conclude that Interim Order 38 was protected by any "core policy immunity."[52]

59. Next, the line between "operational" and "policy" decisions are notoriously blurry.[53] In *Benrouayene*, the plaintiff argued that the Minister erred in "not having provided alternatives to its decision."[54] This can be characterized both as and as challenging the policy itself and impugning the process by which the decision was implemented. Similarly, the Claim alleges both that the Impugned Order itself had no basis in fact and that it was enacted by the Minister upon an insufficient scientific basis and without sufficient consultations being held.

60. Finally, even assuming the Impugned Order was a "core policy decision,"[55] the Claim sufficiently pleads the exceptions of bad faith and irrationality. The Claim states that the Minister, *inter alia*:

a. "acted with reckless indifference or willful blindness in issuing and enforcing the [Impugned Order];"[56]

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[50] *Canada (Attorney General) v Jost*, 2020 FCA 212 at para 74; *see also John Doe v. Canada*, 2015 FC 916 at para 17 (rev'd on diff grounds 2016 FCA 191) (not "plain and obvious" that there is a legislative bar to any of the causes of action; "[t]he Defendant may rely on that position in defence or on some motion at a later date."); *Canada (Attorney General) v Whaling,* 2018 FCA 38 at para 12 [*Whaling*] (not "plain and obvious that the doctrine of legislative immunity is an absolute bar to the plaintiff's action")

[51] *Benrouayene* at para 35

[52] *Id* at paras 29-32

[53] *See, eg, Paradis Honey* at paras 107-110; *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 78; *Nelson (City) v Marchi*, 2021 SCC 41 at para 53

[54] *Benrouayene* at para 3

[55] This requires the corollary assumption that the plaintiffs were required to anticipate and address this argument in the Claim, because it is the defendants' burden to raise and establish this submission (*see Benrouayene* at para 34).

[56] Bad faith also "encompasses serious carelessness or recklessness." *Finney v Barreau du Québec*, 2004 SCC 36 at para 39.

b. had "no basis in fact to justify" same;
c. "either reckless[ly] or willfully ignored the reality of the vaccine in exercising his authority;"
d. "either recklessly or willfully ignored" the "[k]nown and unknown potential risk of adverse events" associated with the vaccine;
e. "acted in furtherance of political gain and expedience" as opposed to his proper mandate under the *Aeronautics Act*;
f. "intended to and caused and/or induced" the plaintiffs' employers to breach their relevant collective agreements with the plaintiffs, terms which were known to the Minister;
g. issued the Impugned Order "in bad faith through reckless disregard or willful blindness to the disproportional unsubstantiated impact of the Order;" and
h. engaged in conduct "that was calculated to produce harm and produce the consequences that flowed from the Order."[57]

61. Comparable pleadings have withstood judicial scrutiny on a motion to strike. For instance, in *Farrell v Attorney General of Canada*, 2023 ONSC 1474 [*Farrell*], the court found that the plaintiffs pled sufficient material facts of bad faith, abuse of power, or disregard for *Charter* rights to set aside any potential governmental immunity.[58] Specifically, the plaintiffs pleaded that the government "knew or was willfully blind" to the unconstitutional infringements brought about by their acts and, notably, that their conduct was "not necessary for safety or security reasons nor proportionate."[59]

62. Similarly, in *Paradis Honey Ltd. v Canada (Attorney General)*, 2015 FCA 89, the plaintiffs pled that the governmental guideline at issue was unreasonable because it was "not supported by any scientific evidence of a risk of harm" and that it was enacted for an improper purpose because it was induced by a faction motivated by their own financial advantage.[60] Stratas J.A. overturned the Federal Court's decision to strike these

[57] Claim at paras 67, 74, 77, 86
[58] *Farrell v Attorney General of Canada*, 2023 ONSC 1474 at paras 161-62
[59] *Id* at para 163
[60] *Paradis Honey* at para 85

pleadings, writing that these allegations of bad faith and improper purpose "can succeed in law."[61]

63. The defendants' application of the *Nelson* test does not definitively establish the existence and application of any "core policy immunity." This is particularly so when the court in *Benrouayene* applied the same test to an earlier version of the Impugned Order and determined that it was simply too premature to conclude that any immunity barred a claim.[62] As such, the Claim is 'bound to fail,' particularly when it includes facts (which must be accepted as true) that clearly displace any such immunity even if it were found to apply.

iv) The Claim contains a sufficient and arguable claim for inducement to breach of contract.

64. The essential elements of the tort of inducement to breach of contract have been articulated in a variety of ways.[63] However, these statements of the test generally comport with that given by the defendants. To succeed in this claim, the plaintiffs must establish (1) knowledge of the contract; (2) an intention to bring about a breach of contract; (3) conduct which results in the breach; (4) damage to the plaintiff; and (5) the lack of anything that might justify what the defendant did.[64]

65. Here, the defendants do not and cannot state that knowledge, intention, or damage have not been sufficiently pled. The defendants instead argue that the Claim does not specify an underlying breach of contract; the employers' policies were not solely based on the Impugned Order; and the defendants' actions were justified and/or lack of justification has not been sufficiently particularized.

66. First, the Claim unambiguously pleads an underlying breach of contract. Pursuant to the Impugned Order, the Employers forced the plaintiffs to disclose their private medical information, were placed on leave without pay, and/or were terminated for failure to disclose or failure to become vaccinated.[65] The plaintiffs' respective employments

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[61] *Id* at para 87
[62] *Benrouayene* at paras 29-32
[63] *See Sar Petroleum Inc v Peace Hills Trust Co*, 2010 NBCA 22 at paras 39-40 (describing eight elements) (cited in *Johnson v BFI Canada Inc et al*, 2010 MBCA 101 at para 52).
[64] *Canada Steamship Lines Inc v Elliot*, 2006 FC 609 at para 23
[65] *See* Claim at paras 71, 74

were governed by collective agreements. None of these agreements expressly or even impliedly included terms mandating vaccination, disclosure of vaccination status, or disciplinary measures for failure to comply with same.[66]

67. Contrary to the defendants' assertions, the plaintiffs do not need to point to a specific contractual provision to establish inducement to breach of contract.[67] A breach may occur when, as here, the relationship between the parties is comprehensively governed by the agreement and one of the parties acts in a manner entirely uncontemplated by same. In such situations, it is a breach for a party to have unilaterally imposed and enforced a term that is *not* found in the agreement.

68. Nor is there any requirement—and the defendants point to no authority—that a breach of contract be previously found by another tribunal before this cause of action can proceed. A breach is an element of this tort. It is well within this Court's ability to determine whether it is established.

69. Next, the defendants state that the employers introduced their respective mandatory vaccination policies not only due to the Impugned Order, but for other reasons as well. The defendants thereby acknowledge that the Impugned Order was a reason motivating the Employers to establish their mandatory vaccination policies. Indeed, this must be assumed as true given the explicit allegations in the Claim that the employers' vaccinations policies were the direct result of the Impugned Order.[68]

70. However, the defendants cite no authority for the proposition that the defendants' actions be the *sole or main* cause behind the inducement to breach of contract. All that is required for this element is that "the defendant's acts had a 'sufficient causal connection' to the breach of contract."[69] In fact, the court in *United Steelworkers* found that a "causal link" was sufficient to establish the government's potential liability for the infringement on the plaintiffs' *Charter* rights.[70]

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[66] *See* Claim at paras 29-31, 33-35, 44-46

[67] The plaintiffs note that the knowledge or intention element of the tort also does not require reference to the specific terms (or even contract) breached. *See Verchere v Greenpeace Canada*, 2004 BCCA 242 at paras 37-40; *369413 Alberta Ltd v Pocklington*, 2000 ABCA 307 at para 41.

[68] *See, e.g.,* Claim at paras 25-27, 36-40, 43

[69] *Himidan v 2646579 Ontario Inc,* 2018 ONSC 3537 at para 28

[70] *United Steelworkers* at para 177

71. Finally, the defendants argue that, if this Court finds that they 'ordered' the adoption of the employers' vaccination policies,[71] their conduct was justified and/or justification is insufficiently pled. Even assuming the plaintiffs need to plead lack of justification, this has been sufficiently alleged in the Claim.

72. Justification is frequently considered as a 'defence' to tortious inducement of breach of contract, rather than an element of the claim itself.[72] As such, it would be the defendants' onus to raise and particularize any such claim. In fact, it is illogical to require the plaintiffs to 'prove a negative,' particularly when the defendants are the party with the knowledge of any justification for their conduct.[73]

73. Nevertheless, lack of justification has been adequately pled by the plaintiffs in the Claim. Far from a bare allegation, as described above, bad faith and improper purpose—anathema to justification—have been amply particularized in the Claim.[74] The defendants' rigid focus on one line of one paragraph of the Claim is antithetical to the Supreme Court of Canada's direction that the pleadings be read "generously" on a motion to strike.

v) The Claim contains a sufficient and arguable claim for misfeasance in public office.

74. The parties agree that, to prove misfeasance in public office, the plaintiff must

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[71] As a preliminary matter, the Claim need only show that the defendants' conduct *induced* the employers to enact and enforce the unilateral vaccination mandates—not that it '*ordered*' same. To elaborate, the plaintiffs agree that the Impugned Order did not specifically require any particular disciplinary measure (such as suspension and/or termination). However, the purpose of the Impugned Order was to impose mandatory vaccination, with limited exception. As stated in the defendants' own written submissions, the Impugned order required that there be "consequences" as part of the Employers' COVID-19 vaccination policies (at para 52). Any such consequence would foreseeably breach and did in fact breach the rights and obligations as defined in the plaintiffs' collective agreements.

[72] *See, eg, Sar Petroleum Inc v Peace Hills Trust Co*, 2010 NBCA 22 at paras 39-40; *Zheng v Anderson Square Holdings Ltd*, 2024 BCSC 216 at para 93

[73] *See, eg, Khan v Lee,* 2014 ONCA 889 at para 13 ("The Defendants are in the position of knowing with great particularity what was done or not done"); *Trillium Power Wind Corp v. Ontario (Natural Resources)*, 2013 ONCA 683 at para 61 [*Trillium*] ("The appellant cannot provide more particulars now because many of the necessary supporting facts would be within Ontario's knowledge and control.")

[74] Ironically, just prior to alleging this lack of particularization, the defendants themselves state "there was justification" for the Minister's actions without any further detail (at para 59).

show "(i) deliberate, unlawful conduct in the exercise of public functions; (ii) awareness that the conduct is unlawful and likely to injure the plaintiff; (iii) harm; (iv) a legal causal link between the tortious conduct and the harm suffered; and (v) an injury that is compensable in tort law."[75] The defendants submit that the Claim insufficiently pleads the first two elements, specifically how the Minister "deliberately engaged in conduct that he knew to be inconsistent with the obligations of his office."

75. As stated in the Claim, the Minister issued the Impugned Order under s. 6.41(1) of the *Aeronautics Act*, which permitted the Minister to make interim orders "to deal with a significant risk, direct or indirect, to aviation safety or the safety of the public." As further stated in the Claim, rather than acting in the interests of safety, the Minister ignored the lack of evidence regarding the efficacy of the vaccines, the relatively high risk of adverse effects, and the need for long-term safety data before mandating vaccination. Rather than acting for the valid safety purposes under the *Aeronautics Act*, the Minister acted in furtherance of political gain and in response to political pressure.

76. These are sufficient allegations to show both knowledge and conduct for an improper purpose. As the Minister knew or should have known, his discretion under the *Aeronautics Act* cannot be in reliance "on considerations that are irrelevant, capricious or foreign to the purpose of the statute."[76] Misfeasance may be found when a Minister "could have discharged his or her public obligations" – here, basing any interim order upon a proper scientific and medical foundation and/or with sufficient exceptions as to protect *Charter* rights—"yet wilfully chose to do otherwise."[77]

77. Pleadings with similar allegations have withstood motions to strike. For instance, in *Canada (Attorney General) v Whaling*, 2018 FCA 38 [*Whaling*], the court found that the plaintiffs sufficiently claimed that the defendants unlawfully and in bad faith enacted unconstitutional legislation while "motivated by political self-interest."[78]

78. In *Trillium Power Wind Corp v Ontario (Natural Resources),* 2013 ONCA 683, the court reasoned that "political/electoral expediency" and political considerations

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[75] *Anglehart v Canada,* 2018 FCA 115 at para 52
[76] *Id* at para 73
[77] *Odhavji Estate v Woodhouse,* 2003 SCC 69 at para 26
[78] *Whaling* at paras 4, 12 (albeit in the context of *Charter* damages)

generally are an accepted and expected part of the policymaking process, and therefore could not, by themselves, constitute an allegation of bad faith.[79] However, the regulatory regime at issue in *Trillium* granted extremely broad discretion: decisions needed only to be made "in the public interest."[80] This must be contrasted with the Minister's mandate under the *Aeronautics Act*, requiring decisions be made to 'address aviation and public safety.' While political gain may be properly encompassed under a statutory mandate to act "in the public interest," it cannot be said to form part of the *Aeronautic Act*'s mandate of 'safety.'

79. It bears repeating that, in the early stages of a proceeding, a pleading may lack detail but still may establish "'a narrow window of opportunity' to make out a misfeasance claim at trial."[81] Further, the Claim must be assessed not only by reference to its explicit wording but also to "common sense inferences that can reasonably be made."[82] As in *Trillium*, the Claim "is detailed and as fact-specific as the appellant can be at this stage of the proceeding," particularly since "many of the necessary supporting facts would be within [the government's] knowledge and control, and there has been no document production or discovery."[83] Here, the Claim particularizes the specific official (the Minister); his unlawful purpose in enacting the Impugned Order; and "circumstances, particulars or facts" sufficient to infer knowledge of the impropriety of his actions.[84] This is a more than arguable basis upon which the plaintiffs can claim and recover against the defendants for misfeasance in public office.

vi) The Claim contains a sufficient and arguable claim of infringement of s. 2(d) of the *Charter.*

80. Next, the defendants submit that the Claim does not allege the 'substantial interference' with collective bargaining, good faith negotiation, and/or consultation

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[79] *Trillium* at paras 52-54
[80] *Id* at paras 7-8
[81] *Carducci v Canada (AG),* 2022 ONSC 6232 at para 22
[82] *Sunderland v Toronto Regional Real Estate Board*, 2023 FC 1293 at para 135 (citing *Eurocopter v Bell Helicopter Textron Canada Limitée*, 2009 FC 1141 at para 19 (finding allegation that infringement was done "knowingly" to be sufficient under the *Rules*)).
[83] *Trillium* at paras 60-61
[84] *Carducci v Canada (AG),* 2022 ONSC 6232 at para 25

necessary to establish an infringement of s. 2(d) of the *Charter* and that no such interference can be alleged. This argument ignores the well-established law that the unilateral alteration of important employment terms in a collective agreement is a substantial interference that can infringe the rights under s. 2(d).

81. As stated in the seminal case of *Health Services and Support- Facilities Subsector Bargaining Assocn v British Columbia*, 2007 SCC 27, s. 2(d) does not protect any particular outcome, but rather protects the ability of employees to "unite, to present demands… collectively and to engage in discussions in an attempt to achieve workplace-related goals."[85] It also protects these rights by imposing upon employers the duty to meet and discuss these goals with employees.[86] Consequently, even though a legislative provision may not expressly curtail employees' right to unite and negotiate future terms in a collective agreement, it may still infringe s. 2(d) to the extent that it was imposed in a manner contrary to this process.[87] As stated in *British Columbia Teachers' Federation v British Columbia*, 2015 BCCA 184 (aff'd 2016 SCC 49):

> [285] The act of associating for the purpose of collective bargaining can also be rendered futile by unilateral nullification of previous agreements, because it discourages collective bargaining in the future by rendering all previous efforts nugatory…

82. Here, the Claim alleges that the Impugned Order unilaterally imposed terms into the plaintiffs' "existing and freely negotiated employment agreements."[88] Specifically, the Impugned Order mandated vaccination as a fundamental condition of employment, absent which the employee could not access aerodrome property or otherwise interact with other persons. As noted by the defendants, the Impugned Order required that there be "consequences" for the failure to follow this mandate.[89] It is indisputable that the types of terms imposed— concerning the ability of an employee to perform their job requirements and governing disciplinary consequences— are some of the "most essential protections provided to workers" and are "central to the freedom of

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[85] *Health Services and Support- Facilities Subsector Bargaining Assocn v British Columbia*, 2007 SCC 27 at para 89 [*Health*]
[86] *Id* at para 90; *see also* para 99 (duties to bargain in good faith under *Canada Labour Code)*
[87] *See, eg, id* at para 113
[88] Claim at para 79
[89] Written Representations of the Defendants at para 52

association."[90] There mere fact that the Impugned Order was time-limited does not affect the fact that it substantially altered previously-agreed upon terms that reflected the employees' core interests in collective bargaining.

83. Next, the Claim alleges that this unilateral imposition was done "absent collective bargaining, memoranda of agreement, consideration, or consent."[91] While the defendants note that the Impugned Order was enacted pursuant to consultations, this is not necessarily sufficient to protect the rights under s. 2(d).

84. In order to pass muster with the protections afforded by s. 2(d), the government must engage in pre-legislative consultation that includes "the exchange of information, explanation of positions or relatively equal bargaining power that is necessary to make consultations" "a meaningful substitution" for the traditional collective bargaining process.[92] The government in fact has a positive duty to engage in good faith consultations wherein employees are given "the opportunity to meaningfully influence the changes made, on bargaining terms of approximate equality."[93] As alleged in the Claim, any government consultations held prior to the Impugned Order did not rise to the necessary level of "collective bargaining."

85. Indeed, the preamble to the Impugned Order only states that "the Minister of Transport has consulted with the persons and organizations that that Minister considers appropriate in the circumstances." As noted in *Benrouayene*, this is hardly sufficient to indicate that "real" consultation on economic, social or political levels occurred, let alone the necessary level required for s. 2(d).[94] Further, while the court in *United Steelworkers* described the evidence of extensive consultations that were held for orders concerning maritime transportation safety, no such evidence or detail appeared to be available regarding consultation for interim orders in the air transportation sector.[95]

86. The Claim alleges that the Minister unilaterally imposed/required the Employers

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[90] *Health* at para 130
[91] Claim at para 79
[92] *Ontario English Catholic Teachers Assoc v His Majesty,* 2022 ONSC 6658 at para 198; *BCTF* at para 291
[93] *BCTF* at para 287; *see also Ontario (Attorney General) v Fraser,* 2011 SCC 20 at paras 68, 73
[94] *Benrouayene* at para 30
[95] *United Steelworkers* at paras 233-234

to unilaterally impose conditions of employment contrary to those found in the plaintiffs' collective agreements, without holding the necessary consultations required to preserve and vindicate the plaintiffs' rights to collective bargaining. This clearly meets the threshold for a reasonable cause of action in a violation of s. 2(d).

vii) The Claim contains a sufficient and arguable claim for lack of justification under s. 1 of the *Charter.*

87. The Claim states that the infringements of the plaintiffs' *Charter* rights cannot be justified pursuant to the criteria under s. 1 of the *Charter*, as they are not minimally impairing, proportionate, and the deleterious effects outweigh any salutary benefits. The defendants first argue that this should be struck because it is a bare pleading.

88. The Claim cannot be deficient for failure to further particularize any arguments under s. 1 because "[t]he plaintiffs were not required to so plead, and the defendant Attorney General of Canada has the burden on that issue."[96] Rather, the plaintiffs must sufficiently particularize—and have done so—the elements to establish an infringement of their s. 2(d) rights. Lack of justification is not an element of this test.

89. The particulars of justification should be elaborated upon by the defendants because these facts are within the specific knowledge of the defendants.[97] The plaintiffs could not properly assume the defendants would rely on the arguments made in *United Steelworkers*, particularly as that involved a different claim and factual matrix. Indeed, this Court has previously refused to dismiss *Charter* claims that were accompanied by similar statements of "no justification" on a preliminary motion.[98] Rather than strike their statement of claim for any failure to elaborate, the court should allow the plaintiffs to address any s. 1 arguments in their Reply.[99]

90. The defendants next argue that the plaintiffs' *Charter* arguments *cannot* succeed because of the "highly persuasive" findings in *United Steelworkers*, which the plaintiffs

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[96] *Henry v Canada (Attorney General)*, 2009 BCSC 213 at para 43
[97] *See, eg, Emerson Electric Co v. Canadian Tire Corporation, Limited,* 2016 FC 308 at para 27; *Stryker Corporation v Umano Medical Inc*, 2016 FC 378 at para 17; *Khan v Lee,* 2014 ONCA 889 at para 13
[98] *See, eg, Canada (Attorney General) v Nasogaluak*, 2023 FCA 61 at paras 70-74; *Araya v Canada (Attorney General)*, 2023 FC 1688 at paras 97, 105
[99] *See, eg, Enns v Goertzen*, 2019 ONSC 4233 at paras 421-422

are now attempting to "re-litigate."[100] To reiterate, the plaintiffs did not participate in *United Steelworkers* nor it is decisive of the issues on this motion.

91. As stated, the court in *United Steelworkers* was assessing fundamentally different claims than those alleged here. In *United Steelworkers*, the plaintiffs alleged that a variety of ministerial orders mandating vaccination for employees in the federally regulated maritime, air, and rail transport industries violated their s. 7 *Charter* rights.[101] Here, the plaintiffs are alleging that the Impugned Order violated their s. 2(d) rights. As stated in *R v Oakes*, 1986 CanLII 46 (SCC):

> [71]…A wide range of rights and freedoms are guaranteed by the *Charter*, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the *Charter* will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society.
>
> [emphasis added]

92. Even assuming that the same objective applies to the Impugned Order as in *United Steelworkers*, the analysis under s. 1 will differ because the *infringed right*—and thus the extent of the violation of that right—differs. For instance, in *United Steelworkers*, the court was considering whether the orders were minimally impairing on the plaintiffs' rights to make personal medical decisions without the threat of job loss. This is a necessarily different inquiry from whether the Impugned Order was minimally impairing of the plaintiffs' rights to meaningfully bargain for terms under which their employment would be governed.

93. In *United Steelworkers,* the court were also considering a variety of different ministerial orders in different sectors. As such, the court described the evidence of consultation that occurred before enacting the various maritime transportation orders but no detail was provided as to the levels of consultations held before mandatory vaccination policies were enacted for the air transport sector.[102] While perhaps the level of consultation, viewed as a whole, was sufficient for the purposes of the analysis in *United*

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[100] Written representations of the defendants at paras 110, 113-14
[101] *United Steelworkers* at paras 1-4
[102] *Id* at para

Steelworkers, it is possible that level of consultation in the air sector specifically does not pass constitutional muster. Moreover, the court was not considering the levels of consultations for the purposes of compliance with s. 2(d) of the *Charter.*

94. As stated in *United Steelworkers*, it is necessary to distinguish between s. 7 rights and the freedom of association protected under s. 2(d).[103] The defendants improperly attempt to frame the court's reasoning in a readily distinguishable case as a blanket rule. This is simply not the case, nor is it a basis upon which the Claim may be struck.

viii) The Claim contains a sufficient and arguable claim for *Charter* damages.

95. Finally, the defendants argue that the plaintiffs' claim for *Charter* damages must fail because does not plead material facts to support and otherwise cannot meet the threshold outlined in *Mackin v New Brunswick (Minister of Finance)*, 2002 SCC 13 [*Mackin*].

96. These claims are entirely addressed and entirely refuted by the court's reasoning in *Farrell*. In *Farrell*, the court certified the plaintiffs' class action requesting *Charter* damages for the government's enactment and conduct pursuant to allegedly unconstitutional legislation. The court rejected the governments' claims based on *Mackin*, writing:

a. "it is not settled law that regulations are subject to the *Mackin* immunity (or any other level of immunity as discussed in [*Vancouver (City) v*] *Ward* [2010 SCC 27]);"[104]
b. "it is not settled law that such immunity would apply if the impugned regulation was passed contrary to its enabling statute;"[105] and
c. "deciding the appropriate threshold without consideration of the evidence would be contrary to the procedural nature" of the motion before the court."[106]

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[103] *Id* at para 123
[104] *Farrell* at para 155
[105] *Id* at para 156
[106] *Id* at para 157. Note further that "it is not necessary to obtain a declaration that a law is unconstitutional to obtain *Charter* damages." *Farrell* at para 170.

97. These statements apply with equal force to this motion. As stated in *Conseil scolaire francophone de la Colombie-Britannique v British Columbia,* 2020 SCC 13 [*Conseil scolaire*] at para 290: "The applicability of *Mackin* immunity is not properly determined by applying hard and fast rules. It *may* apply in *many* contexts, but that is not to say it will necessarily apply with the same force."[107] Most notably, per *Conseil scolaire*, it is unclear as to whether and to what extent any immunity may apply to a regulation (such as the Impugned Order). [108]

98. Moreover, even assuming the *Mackin* threshold applies, the Claim includes material facts that arguably lift any immunity. As in *Farrell*, the plaintiffs allege that the government "knew or was willfully blind" to the illegality and/or unconstitutionality of their conduct and that their conduct was "not necessary for safety or security reasons nor proportionate."[109] Indeed, the Claim is similar to that in *Whaling*, where the Federal Court of Appeal found that the plaintiffs sufficiently pled a claim for *Charter* damages:

> … on the basis that the passage of the legislation with unconstitutional retrospective effect was done recklessly, in a grossly negligent manner, in bad faith and/or in abuse of the defendant's power by passing a bill into law which it knew, or ought to have known, was unconstitutional and would infringe the rights of those to whom it applied, and did so motivated by political self-interest. [110]

99. To conclude, "[g]iven the ever-evolving state of … *Charter* damages jurisprudence, it cannot be said" that the plaintiffs' claim for *Charter* damages is bound to fail.[111]

C. IN THE ALTERNATIVE, THE PLAINTIFFS SHOULD BE GRANTED LEAVE TO AMEND

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[107] In fact, the court in *Mackin* referenced some of these other standards, having dismissed the respondent's appeal on the basis that the government "did not display negligence, bad faith or wilful blindness with respect to its constitutional obligations" and that the respondent had not shown that "the legislation was enacted wrongly, for ulterior motives or with knowledge of its unconstitutionality" (at paras 82-83).
[108] *Farrell* at para 178
[109] *Id* at para 163; *see* Claim at paras 67, 74, 77, 86
[110] *Whaling* at paras 4, 12; *see also Whaling v Canada (Attorney General),* 2018 FC 748 at para 8
[111] *Brake v Canada (Attorney General*), 2019 FCA 274 at para 68

100. In the alternative, to the extent any of the causes of action or claims above are deficient and/or do not disclose a reasonable cause of action, the plaintiffs should be granted leave to amend.

101. The defendants state that leave should be denied when the plaintiffs have had the opportunity to further particularize the Claim but have not sufficiently done so.[112] However, 'the time or opportunity to amend' is not the test as to whether leave should be granted. To reiterate, the general rule is that leave should be granted, "however negligent or careless" the initial pleading or however late in the proceedings the proposed amendment.[113] To deny leave, the defendants definitively show that there is "no scintilla of a cause of action" possible arising from the Claim.[114] Reflecting this generous approach, courts have even allowed amendment to claims that should be otherwise be struck when the pleading involves other claims that need to be amended.[115]

102. To the extent any of the above claims are insufficiently particularized, the plaintiffs refer to Appendix A, which includes proposed amendments to the Claim. The proposed amendments should adequately bolster the plaintiffs' claims over the such that they constitute reasonable causes of action.[116] In light of this clarification and considering both the importance of the plaintiffs' claims and the importance of protecting their right of action, the plaintiffs request that the defendants' motion be dismissed.

D. COSTS

103. The plaintiffs submit that there should be no award of costs against them unless the defendants are successful on dismissing the whole Claim without leave to amend. If the plaintiffs are granted leave to amend on any claim, success would be split between the parties and no costs award would be merited.[117]

PART IV- ORDERS SOUGHT

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[112] The plaintiffs note that in *Al Omani* (cited by the defendants), the court did grant the plaintiffs leave to amend their claim relating to misfeasance of public office (at paras 51-53).
[113] *Café Cimo Inc v Abruzzo Italian Imports Inc*, 2014 FC 810 at para 8
[114] *Al Omani* at para 34; *Yan v Daniel*, 2023 ONCA 863 at para 19
[115] *John Doe v Canada*, 2015 FC 916 at para 46 (rev'd on diff grounds 2016 FCA 191).
[116] *See Doan* at para 178 (proposals for amendment justifying leave to amend)
[117] *See, eg, Al Omani* at para 128

104. Based on the foregoing, the plaintiffs request:

a. The defendants' motion to strike be dismissed;

b. In the alternative, the defendants' motion to strike be denied in part and the plaintiffs be granted leave to amend;

c. Costs;

d. Such further and other relief this Honourable Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Date: May 2, 2024

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PART V – LIST OF AUTHORITIES

Case Law- Supreme Court of Canada
Behn v Moulton Contracting Ltd, 2013 SCC 26
Bisaillon v Concordia University, 2006 SCC 19
British Columbia Teachers' Federation v British Columbia, 2015 BCCA 184 (affirmed and adopted 2016 SCC 49)
Conseil scolaire francophone de la Colombie-Britannique v British Columbia, 2020 SCC 13
Finney v Barreau du Québec, 2004 SCC 36
Health Services and Support- Facilities Subsector Bargaining Assocn v British Columbia, 2007 SCC 27
Mackin v New Brunswick (Minister of Finance), 2002 SCC 13
Nelson (City) v Marchi, 2021 SCC 41
Northern Regional Health Authority v Horrocks, 2021 SCC 42
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APPENDIX A— PROPOSED AMENDMENTS TO THE CLAIM

Concerning the proper forum or inappropriateness of the grievance procedure, the plaintiffs further plead that:

- The employment relationship between each Class member and their Employer was exhaustively and comprehensively governed by the respective collective agreements.
- In enacting the Order, the Minister induced the Employers to unilaterally impose terms of employment that were not previously contemplated by the parties or reflected in the collective agreements.
- The plaintiffs and Class members dispute the legality of the Minister's conduct in enacting and enforcing the Order, the adoption of which had unlawful collateral effects on the collective agreements.
- The plaintiffs and Class members do not challenge or dispute the interpretation, application, or administration of the negotiated terms of the collective agreements.

Concerning their claims in bad faith—which are applicable to (1) the plaintiffs' claims in tort and for *Charter* damages and (2) the defendants' arguments concerning its 'core policy immunity' and s. 1 of the *Charter*—the plaintiffs further plead that:

- In enacting the Order, the Minister was motivated by political pressure and/or political self-interest in that the government needed to appear responsive to COVID-19, regardless of the effectiveness of any such response.
- Even if the Minister's objective in enacting the Order was to reduce the severity, infection rates, and transmission of COVID-19 in the air transportation sector, the Minister knew or ought to have known that:
    - these goals were not materially furthered by the Order and/or the Order was not necessary to meet these goals;
    - the Order was not supported by scientific evidence; and
    - the Order was not proportionate to the infringement of the plaintiffs' and Class members' rights and interests.
- The Minister knew or ought to have known that enacting the Order:

    - was unconstitutional as it unilaterally altered terms fundamental to the plaintiffs' and Class members' employment that were previously negotiated through collective bargaining;
    - was not justified by considerations of 'aviation or public safety' and therefore was not lawfully within the scope of authority contemplated by the *Aeronautics Act*; and
    - likely would result in compensable economic and emotional harm to the plaintiffs and Class members.
- The Minister was recklessly indifferent, willfully blind, and/or otherwise unlawfully disregarded the unconstitutionality of the Order and the foreseeable harm to the plaintiffs and the Class members.

Concerning their claim of inducement to breach of contract, the plaintiffs further plead that:

- The Minister knew or ought to have known of the existence of the collective agreements, their terms, and the fact that these agreements exhaustively outlined the rights and obligations governing the plaintiffs, Class members', and Employers' employment relationships.
- The collective agreements were in fact breached when the plaintiffs were disciplined (through suspension, termination, or otherwise) and when the plaintiffs' personal medical information was collected in ways not previously authorized—either expressly or impliedly—under the collective agreements.
- These breaches were caused by the requirements of the Order and the consequences contemplated therein.
- The Minister knew that and intended for the requirements of the Order to cause the Employers to breach the collective agreements.
- As a result of these breaches, the plaintiffs and Class members suffered economic damages including the loss of pay, benefits, and/or employment and suffered emotional damages including the loss of the sense of self-worth, security, and satisfaction associated with the ability to work.
- The Minister enacted the Order with reckless indifference and willful blindness

to the plaintiffs' and Class members' rights and interests.

- The Minister enacted the Order in bad faith and/or for an improper purpose—namely, political gain and self-interest—outside the scope of the powers granted in the enabling statute.
- The Minister had no justification or lawful purpose in inducing the Employers to breach the collective agreements.

Concerning their claim of misfeasance in public office, the plaintiffs further plead that:

- The Minister knew or ought to have known that he could only enact interim orders for aviation or public safety.
- The Minister deliberately enacted the Order mandating vaccination, knowing that vaccination would not materially further the interests of aviation or public safety.
- The Minister in fact deliberately ignored the relevant safety information pertinent to the approved vaccines including their effectiveness and their heightened potential for adverse effects.
- Specifically, the Minister knew or ought to have known that the Product Monographs for the approved vaccines only included information as to the relative effectiveness of COVID-19 vaccination. The Minister knew or ought to have known that information on the absolute effectiveness of a vaccination was more relevant as to whether vaccination would prevent infection, transmission, or the severity of COVID-19 infection.
- The Minister also deliberately failed to hold meaningful consultations with the plaintiffs' and Class members' respective bargaining units prior to enacting the Order.
- At all times, the Minister knew or ought to have known that:
    - exercising his powers under the *Aeronautics Act* for a purpose unrelated to safety was unlawful;
    - enacting the Order would have significant adverse consequences to the plaintiffs and the Class members' employment and sense of well-being, including but not limited to suspension without pay and termination.

Concerning their claim of violation of s. 2(d) of the *Charter*, the plaintiffs further plead that:

- The terms concerning the plaintiffs' and Class members' ability to perform their job duties and concerning the manner and reasons for which they could be disciplined were fundamentally important to the plaintiffs and Class members.
- These terms formed the basis for previous negotiations between the plaintiffs and Class members' respective collective bargaining units and Employers.
- The Order unilaterally imposed terms contrary to the existing protections in the collective agreements, which limited the conditions of employment, the collection of information, and disciplinary measures to certain conditions unrelated to vaccination or vaccination status.
- The Minister failed to meaningfully engage with or consult the plaintiffs' bargaining units prior to enacting the Order.
- Specifically, the Minister did not give the plaintiffs' and Class members' respective bargaining units the opportunity to influence the Order nor did these bargaining units have relatively equal bargaining power to the Minister in any negotiations held concerning the Order.

Concerning their claim of lack of justification under s. 1 of the *Charter*, the plaintiffs further plead that:

- The Minister's main objective in enacting the Order was to assuage concerns that the government was not acting in a sufficiently urgent manner to address the COVID-19 pandemic, which is not a pressing and substantial objective as it is outside the scope under the *Aeronautics Act* by which he could enact an interim order.
- In the alternative, the Minister's main objective was to limit the transmission, infection rates, and severity of COVID-19 in the air transportation sector.
- The timeline for the Order's enactment belies any urgent circumstances requiring that the plaintiffs' s. 2(d) rights be infringed by the lack of meaningful consultations. The Minister did not and has not explained why he did not engage in these consultations or why these measures could not have been enacted through

the collective bargaining process. The process by which the Order was enacted was not minimally impairing.

- Nor did the Order result in benefits that were proportionate to its disadvantages. Scientific and medical evidence demonstrate that the incidence of COVID-19 was not meaningful lower in vaccinated populations as opposed to unvaccinated populations, particularly as it related to new COVID variants. The Minister did not and has not explained why other, less infringing and more effective, measures—such as testing— could not be employed instead of the Order.

Concerning their claim for damages under s. 24(1) of the *Charter*, the plaintiffs further plead that:

- The Minister acted recklessly, in a grossly negligent manner, in bad faith and/or in abuse of his power by enacting and enforcing an Order that he know or ought to have known was unconstitutional and that would unjustifiably infringe the rights of those to whom the Order applied.
- In enacting and enforcing the Order, the Minister acted in political self-interest as opposed to within the valid statutory purpose required by the *Aeronautics Act*.