Court File No. A-20-25

FEDERAL COURT OF APPEAL

Proposed Class Proceeding

B E T W E E N :

HIS MAJESTY THE KING

Appellant
(Defendant)

-and-

STACEY HELENA PAYNE, JOHN HARVEY and LUCAS DIAZ MOLARO

Respondents
(Plaintiffs)

APPEAL BOOK

March 14, 2025

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Proposed Class Proceeding

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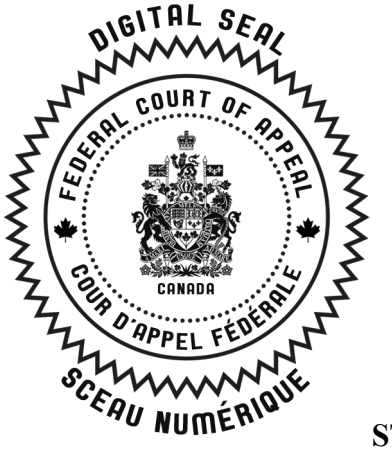

HIS MAJESTY THE KING

Appellant

- and -

STACEY HELENA PAYNE, JOHN HARVEY and LUCAS DIAZ MOLARO

Respondents

TO THE RESPONDENTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellant. The relief claimed by the appellant appears on the following page.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard at the Federal Court of Appeal in Toronto.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341 prescribed by the *Federal Courts Rules* and serve it on the appellant's solicitor, or where the appellant is self-represented, on the appellant, WITHIN 10 DAYS of being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341 prescribed by the Federal Courts Rules instead of serving and filing a notice of appearance.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

January 13, 2025

Issued by: 

(Registry Officer)

180 Queen Street West, Suite 200
Toronto, ON M5V 1Z4

TO: **THE ADMINISTRATOR**
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APPEAL

THE APPELLANT, THE ATTORNEY GENERAL OF CANADA, APPEALS to the Federal Court of Appeal from the Order of the Honourable Justice Southcott (the "Motion Judge") of the Federal Court dated January 2, 2025, in which he dismissed the Defendant's motion to strike the Statement of Claim.

THE APPELLANT ASKS that this Honourable Court:

1. Allow the appeal and set aside the Order of January 2, 2025;
2. Strike the Statement of Claim, without leave to amend;
3. Grant such further and other relief as counsel may advise and this Honourable Court may permit.

THE GROUNDS OF APPEAL are as follows:

4. The Motion Judge erred in law in taking jurisdiction over this matter and not striking the action in accordance with s. 236 of the *Federal Public Sector Labour Relations Act*, S.C. 2003, c. 22 ("*FPSLRA"*) by:

   (a) misapplying the robust body of jurisprudence related to s.236 being a statutory bar on any right of action an employee may have in relation to a grievable matter;

   (a) misunderstanding and misapplying Federal Court of Appeal jurisprudence, such as *Adelberg v Canada,* 2024 FCA 106, which determined that the *Policy on COVID-19 Vaccination for the Core Public Administration Including the Royal Canadian Mounted Police,* (COVID-19 policy) was an employment policy related to terms and conditions of employment and emphasized that it matters not the way the claim is characterized, whether as a *Charter* breach or tort;

(b) failing to consider evidence of the Plaintiffs' comprehensive use of the alternative remedial processes, including the grievance regime, to challenge the COVID-19 policy;

(c) misapprehending the applicability of the Supreme Court of Canada decision in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Quebec (Attorney General)*, 2004 SCC 39 [*Morin*] to the federal statutory grievance process and s. 208 of the *FPSLRA.*

5. The Motion Judge erred in finding that the Statement of Claim disclosed a reasonable cause of action for breach of s. 2(d) of the *Charter*:

(a) in assuming material facts necessary had been pled to satisfy the elements of the cause of action.

6. The Motion Judge erred in granting leave to amend the Statement of Claim to identify additional proposed representative plaintiffs:

(a) in assuming material facts necessary had been pled to satisfy the elements of the cause of action;

(b) by failing to justify departing from the horizontal precedential jurisprudence of the Federal Court which determined that no material facts had been pled to establish the tort of misfeasance in public office, based on deficiencies like those which underlie this claim, and which had been dismissed without leave to amend;

7. The Motion Judge erred in finding that the Statement of Claim disclosed a reasonable cause of action in tort for casual workers, students and RCMP members as there were no representative plaintiffs for any of these categories, nor had material facts necessary been pled and was based on a misapplication of the Federal Court of Appeal decision in *McMillan v Canada,* 2024 FCA 199.

8. Such further and other grounds as counsel may advise and this Honourable Court permit.

January 13, 2025

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Counsel for the Appellant, His Majesty the King

Federal Court  Cour fédérale

Date: 20250102

Docket: T-2142-23

Citation: 2025 FC 5

Ottawa, Ontario, January 2, 2025

PRESENT: The Honourable Mr. Justice Southcott

PROPOSED CLASS PROCEEDING

BETWEEN:

STACEY HELENA PAYNE, JOHN HARVEY and LUCAS DIAZ MOLARO

Plaintiffs

and

HIS MAJESTY THE KING

Defendant

ORDER AND REASONS

I. Overview

[1] This decision addresses a motion brought by the Defendant, His Majesty the King, pursuant to Rule 221(1)(a) of the *Federal Courts Rules*, SOR/98-106, to strike the Statement of

Claim [the Claim] in the underlying proposed class action [the Action] in its entirety, without leave to amend.

[2] The Claim asserts causes of action pursuant to section 2(d) of the *Canadian Charter of Rights and Freedoms,* Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*], related to the right of freedom of association, as well as the tort of misfeasance in public office, all in connection with the *Policy on COVID-19 Vaccination for the Core Public Administration Including the Royal Canadian Mounted Police* [the Policy] issued by the Treasury Board of Canada [Treasury Board] on October 6, 2021.

[3] The Defendant submits that the proposed representative Plaintiffs' claims fall outside the jurisdiction of this Court, as they are subject to grievance rights afforded by the *Federal Public Sector Labour Relations Act*, SC 2003, c 22 [*FPSLRA*], and that the pleadings disclose no reasonable cause of action in relation to the Plaintiffs' assertion of the tort of misfeasance in public office.

[4] For the reasons explained in greater detail below, this motion is granted in part. My Order will strike the portion of the Claim related to the Plaintiffs' assertion of the tort of misfeasance in public office, because the Plaintiffs are afforded grievance rights under the *FPSLRA* in relation to those claims, which therefore fall outside the jurisdiction of the Court. My Order will not strike the portion of the Claim related to the Plaintiffs' assertion of their *Charter* rights, as it is not plain and obvious that the Plaintiffs have grievance rights in relation to those claims. Also, in connection with the Claim's assertion of the tort of misfeasance in public office, my Order will

grant leave to the Plaintiffs to amend the Claim to identify additional proposed representative plaintiff(s), and to plead material facts in relation to claims by such plaintiffs, who are not afforded grievance rights by the *FPSLRA*.

II. Background

[5] The Action is a proposed class action brought by three individual Plaintiffs on behalf of a proposed class that, while described in varying ways in the Claim, in broad strokes appears intended to capture employees of the federal public service including the Royal Canadian Mounted Police [RCMP] who faced employment consequences as a result of the Treasury Board's issuance of the Policy.

[6] The Policy, issued under sections 7 and 11.1 of the *Financial Administration Act*, RSC 1985, c F-11 [*FAA*], required all employees of what is described as the core public administration (including the RCMP) to be vaccinated against COVID-19, with certain exceptions. The "core public administration" [CPA] is defined in subsection 11(1) of the *FAA* by reference to a list of departments named in Schedule I to the *FAA* and other portions of the federal public administration named in Schedule IV. Subject to exceptions set out in the Policy, employees of the CPA who were unwilling to be vaccinated or to disclose their vaccination status were placed on administrative leave without pay.

[7] The Plaintiffs filed the Claim in this Court on October 6, 2023. The Plaintiffs plead that they were former unionized employees of the CPA until either they were suspended or they resigned pursuant to the Policy. Stacey Helena Payne was an employee of the Department of

National Defence until she was suspended on December 15, 2021. John Harvey was an employee with the Correctional Service of Canada until he was suspended on March 11, 2022. Lucas Diaz Molaro was an employee of the Federal Economic Development Agency for Southern Ontario until he resigned on October 25, 2021.

[8] In the Claim, the Plaintiffs allege the Policy unjustifiably violated their rights to freedom of association under section 2(d) of the *Charter*, by imposing a new term and condition of their employment by the Treasury Board in the absence of collective bargaining or other agreement, consideration, or consent. The Plaintiffs further assert the tort of misfeasance in public office against the Treasury Board. They seek a declaration that the Policy violated their *Charter* rights and claim various categories of damages against the Defendant.

[9] On August 19, 2024, the Defendant filed the motion to strike the Claim that is the subject of this proceeding. The Defendant argues this Court does not have jurisdiction over the Claim due to the application of the *FPSLRA*. In particular, the Defendant submits that section 208 of the *FPSLRA* affords grievance rights to employees (as defined in the *FPSLRA*) that apply to the claims advanced by the Plaintiffs in the Claim. The Defendant argues that section 236 of the *FPSLRA*, which provides that the right to grieve under the *FPSLRA* replaces any right of action, therefore ousts the jurisdiction of the Court over the Claim.

[10] The Defendant further argues that the Plaintiffs' claims do not disclose a reasonable cause of action for the tort of misfeasance in public office. Specifically, the Defendant submits that the Plaintiffs have failed to plead material facts necessary to satisfy the elements of this cause of action.

III. Issues

[11] This motion raises the following issues for the Court's adjudication:

A. Are the Plaintiffs barred from bringing the Claim in this Court by section 236 of the *FPSLRA*?

B. Do the pleadings disclose a reasonable cause of action for misfeasance in public office?

C. In the event the Claim or portions of the Claim should be struck, should leave be granted to amend the Claim?

IV. Analysis

A. *Are the Plaintiffs barred from bringing the Claim in this Court by section 236 of the FPSLRA?*

[12] The Court may order that a pleading, or anything contained therein, be struck out on grounds enumerated under Rule 221(1), with or without leave to amend, including on the basis that the pleading discloses no reasonable cause of action (Rule 221(1)(a)). A statement of claim should not be struck unless it is plain and obvious that the action cannot succeed, assuming the facts pleaded in the claim to be true. In other words, the claim must have no reasonable prospect of success (*McMillan v Canada*, 2024 FCA 199 [*McMillan FCA*] at para 74). Expressed otherwise, a claim should not be struck unless it is doomed to fail (*Wenham v Canada (Attorney General)*, 2018 FCA 199 at para 33).

[13] The Defendant argues that the Claim is barred by section 236 of the *FPSLRA*, which provides as follows that grievance rights replace other rights 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.

Exception
(3) Subsection (1) does not apply in respect of an employee of a separate agency that has not been designated under subsection 209(3) if the dispute relates to his or her termination of employment for any reason that does not relate to a breach of discipline or misconduct.

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.

Exception
(3) Le paragraphe (1) ne s'applique pas au fonctionnaire d'un organisme distinct qui n'a pas été désigné au titre du paragraphe 209(3) si le différend porte sur le licenciement du fonctionnaire pour toute raison autre qu'un manquement à la discipline ou une inconduite.

[14] As the Defendant emphasizes, the Federal Court of Appeal [FCA] had occasion to apply the grievance provisions of the *FPSLRA* in the context of the Policy in its recent decision in *Adelberg v Canada*, 2024 FCA 106 [*Adelberg FCA*], leave to appeal to SCC requested. The term "grievance" employed in section 236 is a defined term in the *FPSLRA*, which separately defines "group grievances", "individual grievances", and "policy grievances" (*Adelberg FCA* at para 26). As was the case in *Adelberg FCA,* the Defendant's arguments in the matter at hand surround the right to pursue individual grievances. An "individual grievance" is defined in subsection 206(1) of the *FPSLRA* as meaning a grievance presented in accordance with either section 208 or section 238.24 of the *FPSLRA*.

[15] Subsection 208(1) of the *FPSLRA* provides as follows for grievance rights conferred upon employees in the public service:

Right of employee
208 (1) Subject to subsections (2) to (7), an employee is entitled to present an individual grievance if he or she feels aggrieved

(a) by the interpretation or application, in respect of the employee, of

(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

(ii) a provision of a collective agreement or an arbitral award; or

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

Droit du fonctionnaire
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) par l'interprétation ou l'application à son égard :

(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) soit de toute disposition d'une convention collective ou d'une décision arbitrale;

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

[16] The term "employee", as used in subsection 208(1), is in turn defined as follows in subsection 206(1), such that it excludes certain categories of persons employed in the public service:

employee means a person employed in the public service, other than

(a) a person appointed by the Governor in Council under an Act of Parliament to a statutory position described in that Act;

(b) a person locally engaged outside Canada;

(c) a person not ordinarily required to

fonctionnaire Personne employée dans la fonction publique, à l'exclusion de toute personne :

a) nommée par le gouverneur en conseil, en vertu d'une loi fédérale, à un poste prévu par cette loi;

b) recrutée sur place à l'étranger;

c) qui n'est pas ordinairement astreinte

work more than one third of the normal period for persons doing similar work;

(d) a person who is an *officer* as defined in subsection 2(1) of the *Royal Canadian Mounted Police Act*;

(e) a person employed on a casual basis;

(f) a person employed on a term basis, unless the term of employment is for a period of three months or more or the person has been so employed for a period of three months or more;

(g) a *member* as defined in subsection 2(1) of the *Royal Canadian Mounted Police Act* who occupies a managerial or confidential position; or

(h) a person who is employed under a program designated by the employer as a student employment program. (*fonctionnaire*)

à travailler plus du tiers du temps normalement exigé des personnes exécutant des tâches semblables;

d) qui est un *officier*, au sens du paragraphe 2(1) de la *Loi sur la Gendarmerie royale du Canada*;

e) employée à titre occasionnel;

f) employée pour une durée déterminée de moins de trois mois ou ayant travaillé à ce titre pendant moinsde trois mois;

g) qui est un *membre*, au sens du paragraphe 2(1) de la *Loi sur la Gendarmerie royale du Canada*, et qui occupe un poste de direction ou de confiance;

h) employée dans le cadre d'un programme désigné par l'employeur comme un programme d'embauche des étudiants. (*employee*)

[17] As explained in *Adelberg FCA* at paragraph 29, section 208 of the *FPSLRA* does not apply to members of the RCMP (see *FPSLRA*, s 238.02). However, section 238.24 of the *FPSLRA* provides as follows for grievance rights conferred upon RCMP members:

Limited right to grieve
238.24 Subject to subsections 208(2) to (7), an employee who is an RCMP member is entitled to present an individual grievance only if they feel aggrieved by the interpretation or application, in respect of the employee, of a provision of a collective agreement or arbitral award.

Droit limité de présenter un grief
238.24 Sous réserve des paragraphes 208(2) à (7), le fonctionnaire membre de la GRC a le droit de présenter un grief individuel seulement lorsqu'il s'estime lésé par l'interprétation ou l'application à son égard de toute disposition d'une convention collective ou d'une décision arbitrale.

[18] The Defendant submits that, for persons to whom the *FPSLRA* extends grievance rights, the effect of the *FPSLRA* is to set out an exclusive and comprehensive scheme for resolving employment-related disputes. The Defendant argues that such grievance rights extend to the claims asserted by the Plaintiffs in this Action, that such claims are therefore beyond this Court's jurisdiction, and that the Claim should therefore be struck.

[19] The Plaintiffs disagree with the Defendant's assertion. The Plaintiffs emphasize the principles governing a motion to strike, as referenced earlier in these Reasons, pursuant to which the Defendant has an onerous burden in seeking to strike the Claim (*Doan v Canada*, 2023 FC 968 [*Doan*] at para 40), particularly without leave to amend (*Al Omani v Canada*, 2017 FC 786 [*Al Omani*] at para 34), and the commensurately low threshold for the Plaintiffs to establish a cause of action at this stage in the proceeding (*Doan* at para 43).

[20] The Plaintiffs also argue that the Defendant's position is based on a mischaracterization of both the nature of the Claim and the nature of the legislative scheme under the *FPSLRA*. The Plaintiffs submit that the *FPSLRA* does not represent a complete bar to claims in circumstances such as those that give rise to the present proceeding, and they refer to authorities in which this Court's jurisdiction was not ousted by section 236 (*Adelberg FCA* at paras 47, 53; *Ebadi v Canada*, 2024 FCA 39 [*Ebadi FCA*] at paras 32-33, leave to appeal to SCC refused, 41260 (17 October 2024). The Plaintiffs emphasize the parameters imposed by the language of the relevant sections of the *FPSLRA*, which limit the ouster of the Court's jurisdiction (*McMillan v Canada,* 2023 FC 1752 [*McMillan FC*] at para 25, rev'd in part on other grounds 2024 FCA 199; *Suss v Canada*, 2024 FC 137 at para 45).

[21] In relation to the nature of the Claim, the Plaintiffs submits that it does not involve matters that can be grieved. The Defendant emphasizes subparagraph 208(1)(a)(i) of the *FPSLRA* that, *inter alia*, affords grievance rights in relation to the interpretation or application of a provision of a direction or other instrument made or issued by the employer that deals with terms and conditions of employment. The Plaintiffs argue that the essential character of the Claim does not concern the terms and conditions of their employment but rather concerns the process by which the Treasury Board implemented the Policy, without the benefit of collective bargaining or other agreement and therefore in breach of the Plaintiffs' rights under section 2(d) of the *Charter*.

[22] The Plaintiffs also submit that the breadth of the proposed class militates against the ouster of the Court's jurisdiction. They argue that the proposed class includes individuals who are not "employees" as defined in section 206 of the *FPSLRA* for purposes of section 208 grievance rights. The Plaintiffs assert that the Policy affected individuals such as casual workers, students, and members of the RCMP, who are not afforded grievance rights by section 208 and whose claims are therefore not subject to section 236.

[23] The Plaintiffs therefore submit that it is at least arguable that the Court has jurisdiction over the Claim and that, applying the principles governing adjudication of a motion to strike, the Defendant's motion should be dismissed, because it is not clear that the Claim is doomed to fail.

[24] As both parties rely on portions of the analysis in *Adelberg FCA* that they consider to favour their position, it is useful to canvass that authority in some detail. That matter involved a

mass tort claim, against His Majesty the King and others, advanced by a large number of individual plaintiffs employed in various departments, agencies, and other portions of the federal public administration. The plaintiffs claimed that the Policy issued by the Treasury Board, and similar vaccination policies issued by other federally regulated employers, violated their *Charter* rights and caused them harm because they chose to decline to be vaccinated against COVID-19.

[25] The plaintiffs in *Adelberg FCA* also asserted claims in relation to the *Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No. 61*, issued by Transport Canada on April 24, 2022 [the Interim Order]. Because the plaintiffs chose not to be vaccinated, the Interim Order prevented them from travelling by plane. They challenged the Interim Order, and other comparable measures applicable to train and marine travel, as violating their *Charter* rights.

[26] As in the case at hand, the defendants in *Adelberg FCA* moved to strike the plaintiffs' claims on the basis that they were barred by section 236 of the *FPSLRA*. At first instance (*Adelberg v Canada*, 2023 FC 252 [*Adelberg FC*]), Justice Simon Fothergill of this Court struck without leave to amend the claims of the plaintiffs who were employed within the CPA, finding that they were barred by section 236. The Court rejected the plaintiffs' arguments that their claims were not barred by section 236 because the constitutional remedies they sought were beyond the powers of a labour arbitrator to grant (at paras 31-36). Justice Fothergill noted that in *Ebadi v Canada*, 2022 FC 834 [*Ebadi FC*], aff'd 2024 FCA 39, Justice Henry Brown had rejected a similar argument and held at paragraphs 43-44 that alleged *Charter* violations may be addressed through the grievance process under the *FPSLRA*.

[27] In *Adelberg FCA*, the FCA allowed in part the appeal from *Adelberg FC*, including finding that the Federal Court had erred in concluding that section 236 of the *FPSLRA* applied to bar the claims of the plaintiffs who were employed by the RCMP (at paras 42, 48). As noted earlier in these Reasons, *Adelberg FCA* explained that section 208 of the *FPSLRA* does not apply to members of the RCMP (at para 29). Rather, section 238.24 provides for grievance rights conferred upon RCMP members. However, section 238.24 applies only to grievances arising under a collective agreement applicable to RCMP members who meet the statutory definition of "employee" in the *FPSLRA*. Based on the materials in the motion, it was not possible to ascertain whether any collective agreement applied. Therefore, the FCA concluded that it was not plain and obvious that the plaintiffs who were members of the RCMP possessed rights to grieve the Policy such that section 236 of the *FPSLRA* foreclosed their access to the Court (at paras 45-48).

[28] *Adelberg FCA* also found that the Federal Court had erred in concluding that the plaintiffs' claims related to the Interim Order and other travel-related measures could have been grieved and were therefore subject to section 236 of the *FPSLRA*. The *FPSLRA* grants grievance rights only in respect of employment-related matters, and the section 236 bar applies only to disputes relating to an employee's terms and conditions of employment. However, the Interim Order and other travel-related measures were general measures that applied to all Canadians. Therefore, they could not be grieved, and section 236 did not apply (at paras 49-53).

[29] As previously noted, the Plaintiffs in the case at hand reference these conclusions in *Adelberg FCA* as illustrations supporting their position that section 236 does not operate as a complete bar to all claims that may arise in circumstances similar to those in this proceeding.

The Plaintiffs similarly reference *Ebadi FCA*, in which the FCA upheld Justice Brown's decision in *Ebadi FC* but, in the course of its analysis, identified at paragraphs 32 to 33 two cases in which portions of the asserted claims were found not to fall within a labour arbitrator's jurisdiction. Those portions involved allegations of harassment after a claimant's resignation (*Martell v AG of Canada & Ors*, 2016 PECA 8) and an employer's involvement of the police in connection with a security investigation at a claimant's workplace and her resulting termination (*Joseph v Canada School of Public Service*, 2022 ONSC 6734).

[30] Consistent with these illustrations, I accept that the language of the relevant sections of the *FPSLRA* impose parameters on the ouster of the Court's jurisdiction (*McMillan FC* at para 25). However, other than the analysis in *Adelberg FCA* in relation to members of the RCMP (to which I will return later in these Reasons), none of these examples is particularly relevant to the Plaintiffs' claim. As explained in *Adelberg FCA*, in determining whether an issue is one that can be grieved, what matters is the essence of the claim made and not the way in which the claim is characterized in the statement of claim. The FCA emphasised that it does not matter that claimants allege a *Charter* breach or a tort claim. One must instead look to the essential character of the dispute to determine if it raises a matter that could have been the subject of a grievance (at para 56).

[31] *Adelberg FCA* upheld Justice Fothergill's decision to strike the claims of the plaintiffs who were employed in the CPA (at paras 54-59) other than, for the reasons explained above, plaintiffs who were employed by the RCMP (at paras 60-64). The FCA found that compliance with the Policy was a term and condition of employment for the plaintiffs employed by the

organizations included in the CPA and that the requirement to be vaccinated or face leave without pay could have been grieved by those plaintiffs (other than the RCMP employees) under section 208 of the *FPSLRA* (at para 57).

[32] Against that jurisprudential backdrop, the question for the Court's determination is whether the essence of the Plaintiffs' claim (or, expressed otherwise, the essential character of the dispute) raises a matter that could have been the subject of a grievance under section 208 of the *FPSLRA*. As previously noted, the Defendant emphasizes subparagraph 208(1)(a)(i), involving the interpretation or application of a direction or other instrument issued by the employer that deals with the terms and conditions of employment.

[33] As also noted above, the Plaintiffs submit that it is at least arguable (and therefore sufficient to survive the motion to strike) that their claims based on section 2(d) of the *Charter* raise a dispute the essential character of which does not involve the interpretation or application of the terms and conditions of their employment but rather involves the process by which the those terms were altered by the Policy in the absence of collective bargaining. The Plaintiffs recognize that claims based on the *Charter* can be grieved under section 208 of the *FPSLRA* (*Adelberg FCA* at para 56). However, they argue that, if the particular claim based on the *Charter* does not involve the interpretation or application of the terms and conditions of their employment, then section 208 does not afford grievance rights and section 236 does not bar access to the Court.

[34] The Plaintiffs further submit (and, at the hearing of this motion, the Defendant's counsel concurred) that there appears to be a dearth of authority on whether an alleged violation of *Charter* section 2(d) in particular can be grieved under section 208. However, the Plaintiffs refer the Court to other authorities, addressing grievance rights in the context of collective bargaining, that they submit demonstrate the strength of their position that the reasoning in *Adelberg FCA* does not apply to the particular claim advanced in the case at hand (*Quebec (Commission des droits de la personne et des droits de la jeunesse) v Quebec (Attorney General)*, 2004 SCC 39 [*Morin*]; *British Columbia Teachers' Federation v British Columbia*, 2015 BCCA 184, rev'd 2016 SCC 49; *AUPE v Alberta*, 2014 ABCA 43, leave to appeal to SCC refused, 36234 (26 March 2015)).

[35] In my view, the authority that carries the day for the Plaintiffs in the context of this motion is the decision of the Supreme Court of Canada [SCC] in *Morin*. That case considered whether a labour arbitrator's exclusive jurisdiction granted by provincial statute applied to an argument that a collective agreement was negotiated in a discriminatory manner, so as to include a discriminatory term, and thereby contravened the Québec *Charter of Human Rights and Freedoms*, RSQ, c C-12 [*Québec Charter*]. The majority decision, written by Chief Justice McLachlin, found that the grievance legislation did not confer exclusive jurisdiction on an arbitrator (and thereby did not oust the jurisdiction of a human rights tribunal to consider the claims under the *Québec Charter*), because the essential character of the dispute was not the interpretation or application of the collective agreement. The SCC found that the dispute did not concern how the relevant term in the collective agreement would be interpreted and applied but

rather whether the process leading to the adoption of the alleged discriminatory clause violated the *Québec Charter* such that the term was unenforceable (at paras 23-24).

[36] I note that *Morin* included a strong dissent, written by Justice Bastarache, which emphasized the public policy considerations underlying the assignment to labour arbitrators of the jurisdiction to rule on virtually all aspects of a case insofar as they are expressly or inferentially related to a collective agreement (at para 33). Justice Bastarache referenced at paragraph 43 the emphasis in paragraph 58 of *Weber v Ontario Hydro*, 1995 CanLII 108, [1995] 2 SCR 929 [*Weber*] of the benefits of affording exclusive jurisdiction to arbitrators and related restrictions on the rights of parties to proceed with parallel litigation in the courts. As the Defendant argues in the case at hand, *Weber* explained the need to avoid the ability of innovative pleaders to evade the legislative prohibition on parallel court actions by raising new and imaginative causes of action (at para 49).

[37] I am conscious of these considerations, which are echoed in the explanation in *Adelberg FCA* (at para 56) of the requirement (derived from *Weber*) to determine the essence of a claim, when assessing whether it can be grieved, such that it matters not whether the plaintiffs allege a *Charter* breach or various tort claims. To allow the artful pleading of workplace grievances as intentional torts or *Charter* breaches, in order to escape the operation of the *FPSLRA*, would undermine Parliament's intent (*Ebadi FCA* at para 36). However, the majority of the SCC in *Morin* took *Weber* into account and nevertheless concluded that the dispute, as to whether the process leading to the adoption of the alleged discriminatory clause in the collective agreement

violated the *Québec Charter*, did not relate to how the agreement should be interpreted and applied (at para 24).

[38] Obviously *Morin* is not on all fours with the matter at hand, as it involved different labour relations and human rights legislation and different allegations. However, both *Morin* and the case at hand involve assertions that the relevant term of employment is unenforceable or actionable because it was generated through an improper process (in the case at hand, a process that lacked the benefit of collective bargaining that the Plaintiffs argue was mandated by the *Charter*). The Defendant has not advanced a basis to distinguish *Morin*, and there is a sufficient parallel, between the reasoning in *Morin* and the Plaintiffs' arguments based on its allegations under section 2(d) of the *Charter*, that the Court cannot conclude that the Plaintiffs are doomed to fail in arguing that this aspect of the Claim does not fall within section 208 of the *FPSLRA* and is therefore not subject to the section 236 bar.

[39] As such, my Order will dismiss the Defendant's motion to strike the portion of the Claim based on section 2(d) of the *Charter*.

[40] However, this analysis does not apply to the Plaintiffs' assertion of the tort of misfeasance in public office. The jurisprudence is clear that disputes related to the terms and conditions of employment referred to in section 208 of the *FPSLRA* have been considered to encompass tort claims, including intentional torts (*Adelberg FCA* at para 56; *Ebadi FCA* at para 29). The Plaintiffs have advanced no arguable position that their claim in tort involves a dispute related to the process by which the relevant term of employment was generated, such as might

escape the application of sections 208 and 236 of the *FPSLRA* through the *Morin* reasoning. In my view, it is plain and obvious that the Plaintiffs' tort claim has no reasonable chance of success.

[41] As such, my Order will grant the Defendant's motion to strike the portion of the Claim based on the tort of misfeasance in public office. I will turn later in these Reasons to the question of whether the Plaintiffs should be granted leave to amend that portion of the Claim and, in that analysis, will address the Plaintiffs' argument that the proposed class includes individuals who would not have grievance rights under section 208 of the *FPSLRA*.

B. *Do the pleadings disclose a reasonable cause of action for misfeasance in public office?*

[42] Having found that the Plaintiffs' allegations of misfeasance in public office are barred by section 236 of the *FPSLRA*, the outcome of this motion can be determined without addressing whether the pleadings disclose a reasonable cause of action in relation to that tort. Nevertheless, for the sake of good order, I will turn briefly to this issue.

[43] As explained in *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227, leave to appeal to SCC refused, 36889 (23 June 2016), a plaintiff must plead material facts in sufficient detail to support the claim and relief sought (at para 16). The pleading must set out the constituent elements of the plaintiff's cause of action in sufficient detail, so that the defendant can understand the circumstances that are alleged to give rise to its liability (at para 19).

[44] In relation to the tort of misfeasance in public office, which forms part of the Claim in this matter, the parties largely agree on the constituent elements. As explained in *Anglehart v Canada*, 2018 FCA 115 [*Anglehart*] at paragraph 52, leave to appeal to SCC refused, 38294 (21 March 2019), misfeasance in public office is an intentional tort that is directed at the conduct of public officers in the exercise of their duties and includes the following elements: (a) deliberate, unlawful conduct in the exercise of public functions; (b) awareness that the conduct is unlawful and likely to injure the plaintiff; (c) harm; (d) a legal causal link between the tortious conduct and the harm suffered; and (e) an injury that is compensable in tort law.

[45] While it is not clear that the Defendant has conceded the following point, there is also jurisprudential support for the Plaintiffs' position that the required mental element can be satisfied in circumstances of reckless indifference to the illegality of the act and the probability of injury to the Plaintiffs (*Odhavji Estate v Woodhouse*, 2003 SCC 69 [*Odhavji*] at para 25).

[46] Relying on *Odhavji*, the FCA in *Anglehart* explained that there are two ways in which the tort of misfeasance in public office can arise (at para 53):

> … Category A involves conduct that is specifically intended to injure a person or class of persons. Category B involves a public officer who acts with knowledge both that she or he has no power to act in the way complained of and that the act is likely to injure the plaintiff.

[47] The Plaintiffs' counsel confirmed at the hearing of this motion that their allegations fall into Category B. While the portion of the Claim asserting the tort of misfeasance in public office is brief and somewhat lacking in precision, I interpret the pleading to be asserting that, in issuing and mandating implementation of the Policy, the Treasury Board acted with reckless indifference

or wilful blindness as to: (a) ineffectiveness of COVID-19 vaccines in achieving the objectives of the Policy; (b) potential risk of adverse events associated with vaccination; (c) absence of long-term safety data related to the vaccines; and (d) foreseeable harm to the Plaintiffs in the form of significant economic deprivation and emotional trauma.

[48] The Defendant argues that the Plaintiffs have failed to plead material facts sufficient to establish the constituent elements of the tort. In particular, the Defendant submits that the broad allegation against the Treasury Board lacks particularity as to the officials or offices that are alleged to have committed the tortious act, lacks specificity as to any particularized harm to any individual, and fails to plead a specific intention to deliberately cause harm to an individual by acting in a manner that an official knows to be inconsistent with their legal obligations.

[49] I disagree with the Defendant's position. In relation to the identity of the alleged tortfeasor, I appreciate that the Plaintiffs direct their allegation at the Treasury Board rather than at any particular individuals or offices therein. However, consistent with the reasoning in *Grand River Enterprises Six Nations Ltd v Attorney General (Canada)*, 2017 ONCA 526 at paragraphs 88-89, this is a matter in which there is no basis to expect that the Plaintiffs would be privy to information about the internal workings of the Treasury Board and the individual or individuals therein who were involved in the generation and issuance of the Policy. I do not find this aspect of the Plaintiffs' pleading to be insufficient.

[50] Nor am I convinced that the Claim is wanting for failure to identify the alleged harm to the Plaintiffs. The Claim pleads that the Plaintiffs were either suspended from their employment

or resigned as a consequence of the Treasury Board's issuance of the Policy, resulting in financial and emotional harm.

[51] In relation to the requirement to plead the tortfeasor's intention to deliberately cause harm by acting in a manner known to be inconsistent with the tortfeasor's legal obligations, the Claim pleads details of the product monographs applicable to COVID-19 vaccines that had been approved by Health Canada at the date the Policy was issued, as well as information related to safety and risk of adverse events associated with the vaccines. The Plaintiffs allege that the Treasury Board acted with reckless indifference or wilful blindness in issuing the Policy in that, based on the above information, it had no basis in fact to justify the Policy as a measure to prevent transmission of the virus, was aware of the risk of potential adverse events associated with vaccination, and did not have the benefit of any long-term safety data.

[52] I am satisfied that these allegations sufficiently plead facts intended to establish the elements of the tort of misfeasance in public office. In *Magnum Machine Ltd (Alberta Tactical Rifle Supply) v Canada*, 2021 FC 1112, Associate Chief Justice Jocelyne Gagné explained that, when considering a motion to strike, it is not important whether the arguments that a plaintiff wishes to advance are strong or accurate. Dismissing a motion to strike does not represent an endorsement of a plaintiff's claim. Notwithstanding that plaintiffs may face an uphill battle in proving their claim, they should not be deprived of the opportunity to do so, provided that their pleading satisfies the elements of the relevant cause of action (at paras 34-35).

[53] As such, were it not for the Court's conclusion that the portions of the Claim asserting the Plaintiffs' allegations in the tort of misfeasance in public office must be struck due to the effect of the *FPSLRA*, these portions of the Claim would survive the Defendant's motion to strike.

C. *In the event the Claim or portions of the Claim should be struck, should the Plaintiffs be granted leave to amend the Claim?*

[54] As noted earlier in these Reasons, Rule 221(1) affords the Court authority to strike a pleading, or anything therein, either with or without leave to amend. As explained in *Collins v Canada*, 2011 FCA 140 at paragraph 26, in order to strike a pleading without leave to amend, the defect that is identified in the pleading must be one that cannot be cured by amendment. As expressed in *Al Omani*, a pleading should not be struck without leave to amend unless there is no scintilla of a cause of action, such that it is clear that the claim cannot be amended to show a proper cause of action (at para 34).

[55] As explained above, I have decided to strike the portion of the Claim that advances the Plaintiffs' allegations related to the tort of misfeasance in public office, because that portion of the Claim is barred by section 236 of the *FPSLRA*. However, as also canvassed earlier in these Reasons, the Plaintiffs argue that the proposed class includes individuals who are not "employees" as defined in section 206 of the *FPSLRA* for purposes of section 208 grievance rights. The Plaintiffs assert that the Policy affected individuals such as casual workers, students, and members of the RCMP, who are not afforded grievance rights by section 208 and whose claims are therefore not subject to section 236.

[56] As the Plaintiffs' counsel noted in oral submissions, the Action is still some distance from a certification motion, and the parties have yet to litigate in any detail a proposed class definition. Indeed, the Claim describes the proposed class in more than one manner. However, that description includes the following at paragraph 8 of the Claim:

> The Class (to be defined by the Court) is intended to include all existing unionized employees and all persons hired within the core public administration of the Federal public service and the RCMP during the Class Period who were either subject to or subjected to discipline, including but not limited to suspension of employment and termination, pursuant to the Policy as a result of failing to disclose their vaccination status or failing to become vaccinated ("Class Members").

[57] This description is clearly broad enough to include members of the RCMP. It also appears broad enough to include other categories of individuals (such as casual workers and students) who do not meet the definition of "employees" for purposes of section 208 grievance rights. As such, I accept the Plaintiffs' position that the proposed class in this Action could include claimants whose entitlement to advance claims based on the tort of misfeasance in public office, akin to those asserted by the Plaintiffs in the Claim, would not be barred by section 236 of the *FPSLRA*.

[58] Of course, this analysis does not assist the Plaintiffs themselves in advancing their own allegations in the portion of the Claim based in tort, and the Defendant takes the position that, in the absence of material facts pleaded in relation to other members of the proposed class, there is no basis for the Court to exercise its discretion to grant leave to amend.

[59] However, in my view, this situation is similar to that in *McMillan FCA*, in which the FCA upheld the Federal Court's decision to strike the plaintiff's statement of claim, for failure to disclose a reasonable cause of action except in relation to certain members of the proposed class, but held that the Federal Court erred in denying leave to amend the statement of claim to advance allegations on behalf of other members of the proposed class (at paras 153-154).

[60] Some explanation of that authority is useful. Mr. McMillan, a former temporary employee of the RCMP, commenced a proposed class proceeding as a representative plaintiff, alleging systemic bullying, intimidation and harassment within RCMP workplaces. The proposed class included numerous categories of individuals who worked with the RCMP in a variety of capacities at different times and in different locations across Canada (*McMillan FCA* at paras 1-2).

[61] In *McMillan FC*, the Federal Court struck Mr. McMillan's statement of claim, without leave to amend, except to the extent that it related to Temporary Civilian Employees [TCEs] working in the RCMP's Kelowna Operational Communications Centre [Kelowna OCC] between January 1, 2003 and March 31, 2005. This time frame was a function of sections 208 and 236 of the *FPSLRA*, in that section 236 ousted the claims of any "employee" (as defined by section 206) arising after the statute came into force on April 1, 2005. The effect was that the claims of Mr. McMillan and other "employees" related to employment after April 1, 2005 were barred. Mr. McMillan's allegations of bullying and harassment that he had personally experienced did not date prior to April 1, 2005, but he did allege that other TCEs at the Kelowna OCC experienced

bullying and harassment prior to that date. The Federal Court therefore struck Mr. McMillan's claim but not that of the other TCEs at the Kelowna OCC (*McMillan FCA* at paras 3, 44-51).

[62] As noted above, the FCA upheld this aspect of the Federal Court's decision, except insofar as the Federal Court had denied leave to amend the statement of claim to assert claims on behalf of members of the broader proposed class. As the Federal Court had accepted that the statement of claim pleaded a reasonable cause of action with respect to certain individuals (other TCEs, specifically at the Kelowna OCC) in the period prior to April 1, 2005, the FCA concluded there was no reason to think that the statement of claim could not be amended to disclose a reasonable cause of action in relation to other categories of individuals, by providing material facts regarding their experiences with the RCMP (at paras 104-112).

[63] In the case at hand, the Claim advances tortious allegations, based on the vaccine product monographs, information concerning vaccine safety and risk of adverse events, and the Plaintiffs' personal experiences that they allege represent suspension or resignation pursuant to the Policy. As in *McMillan FCA*, there is no basis to think that the Claim could not be amended to advance similar allegations on behalf of other members of the proposed class that would not be barred by section 236 of the *FPSLRA* and, in connection therewith, to include additional representative plaintiff(s).

[64] As such, in connection with the Claim's assertion of the tort of misfeasance in public office, my Order will grant leave to the Plaintiffs to amend the Claim to identify additional

proposed representative plaintiff(s), and to plead material facts in relation to claims by such plaintiffs, who are not afforded grievance rights by the *FPSLRA*.

[65] As a final point, I note that if the Plaintiffs act upon such leave, the result may be a claim in which not all plaintiffs in this Action are asserting the same causes of action. The existing Plaintiffs' section 2(d) *Charter* claims, but not their tort claims, have survived this motion to strike, but the jurisprudence supports affording the Plaintiffs leave to amend the Claim to include additional plaintiffs who are in a position to advance such tort claims. The parties have made no submissions, and therefore the Court expresses no views, on the potential effect on this class proceeding or its eventual certification motion that would result from the inclusion in this Action of different sets of plaintiffs advancing different sets of causes of action.

V. Costs

[66] The Defendant seeks costs in the amount of $1500.00, payable forthwith. The Plaintiffs take the position that there should be no award of costs against them unless the Defendant is successful in dismissing the Claim in its entirety without leave to amend. The Plaintiffs submit that, if they are granted leave to amend on any claim, then success should be considered to be split between the parties, such that no costs award would be merited.

[67] I agree with the Plaintiffs' position and, as this motion is being granted only in part, the Court will award no costs.

ORDER IN T-2142-23

THIS COURT'S ORDER is that:

1. This motion is granted in part, and the portion of the Claim related to the Plaintiffs' assertion of the tort of misfeasance in public office is struck.

2. In connection with the Claim's assertion of the tort of misfeasance in public office, the Plaintiffs are granted leave to amend the Claim to identify additional proposed representative plaintiff(s), and to plead material facts in relation to claims by such plaintiffs, who are not afforded grievance rights by the *FPSLRA*.

3. This motion is otherwise dismissed.

4. No costs are awarded on this motion.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2142-23
STYLE OF CAUSE:	STACEY HELENA PAYNE, JOHN HARVEY AND LUCAS DIAZ MOLARO v HIS MAJESTY THE KING
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	DECEMBER 13, 2024
ORDER AND REASONS:	SOUTHCOTT J.
DATED:	JANUARY 2, 2025

APPEARANCES:

Umar Sheikh	FOR THE PLAINTIFFS
Kathryn Hucal	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Sheikh Law Barristers and Solicitors Victoria, British Columbia	FOR THE PLAINTIFFS
Attorney General of Canada Toronto, Ontario	FOR THE DEFENDANT

FEDERAL COURT OF CANADA
PROPOSED CLASS PROCEEDING
(Before the Honourable Mister Justice Southcott)

VANCOUVER, B.C.
December 13, 2024

T-2142-23
BETWEEN:

STACEY HELENA PAYNE, JOHN HARVEY and
LUCAS DIAZ MOLARO,

PLAINTIFFS;

AND:

HIS MAJESTY THE KING,

DEFENDANT.

MOTION

Mr. Sheikh, — Appearing for the Plaintiff;

Ms. K. Hucal,
Ms. R. Koilpillai, — Appearing for the Defendant.

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VANCOUVER, B.C.

December 13, 2024

(PROCEEDINGS COMMENCED AT 9:33 A.M.)

THE REGISTRAR: This sitting of the Federal Court of Canada in Vancouver, B.C. is now resumed. The Honourable Justice Southcott is presiding. Before the court, court file T-2142-23 between Stacey Helena Payne, John Harvey and Lucas Diaz Molaro v. His Majesty the King. Appearing for the plaintiffs, Mr. Umar Sheikh; for the defendant, Ms. Kathryn Hucal and Ms. Renuka Koilpillai.

JUSTICE: Good morning, everyone. Please be seated. Just bear with me for a moment while I get myself organized.

MS. HUCAL: I'll just stand, if that's okay.

JUSTICE: Of course. Okay, I'm logged on.

Good morning again, everyone. Before we begin. So, Ms. Hucal, are you standing because you have any housekeeping?

MS. HUCAL: Let me just move my chair over there just for the purpose of submissions, but I can --

JUSTICE: No, that's fine. Of course. We don't need to have you bouncing back and forth across the court room.

I have very little housekeeping before we

begin. I think the record is relatively straight forward for today. We have the defendant's moving submissions, the plaintiffs' submissions in response. I think the only evidence is the affidavit of Mr. Vézina with its attachments. And I have books of authorities from each side. Is that correct? Is there anything else that I'm missing?

MS. HUCAL: That's correct. The only thing I would add is there was -- we had some challenges connecting to the internet. That's fine. I have my oral submissions on my laptop, so I don't need to connect. My colleague has been here recently, so she can still get into links, like use the internet provided by the Federal Court.

JUSTICE: Okay.

MS. HUCAL: So she will have the book of authorities up and so I can access that, but it might take us some time. So we did provide to you the book of authorities with our case law so you could pull up --

JUSTICE: Yeah, so I

MS. HUCAL: -- cases as needed.

JUSTICE: Right. Do you mean a hard copy or you --

MS. HUCAL: No, no, no, just the electronic.

JUSTICE: I have the electronic.

MS. HUCAL: If you want a hard copy --

JUSTICE: Yes, no, I have the

electronic copy here, right, which has everything.

MS. HUCAL: It has all of the cases and at the end it has the affidavit of Charles Vézina.

JUSTICE: I see that. And the links seem to be working fine, as are the plaintiffs' links. So I think I'm all set with the authorities.

So I think, with that then, the only housekeeping I have to discuss is just timing for today. We've been set down for the full day should we need it. And, as I'm sure you both know, that translates into functionally about five and a half hours. 9:30 now, we typically conclude at 4:30. We'll take a break of approximately an hour for lunch. The precise timing of that can be organic, depending on how we proceed with the submissions. And we'll typically take a mid-morning break, midafternoon break, each of 15 minutes. So that breaks down to five and a half hours.

So I typically do like to try to map out as best we can at the beginning of the day the rhythm of the submissions, if I can put it that way.

So Ms. Hucal, obviously you or your colleague will begin and you'll have a right of reply after I've heard from Mr. Sheikh. But have you given thought to how long your principal submissions are likely to be?

MS. HUCAL: I am estimating an hour and a half. And my friend has told me he thinks he'll be an hour, around an hour, maybe a little bit more. So

I'm hopeful that we could be done by early afternoon.

JUSTICE: Okay, that sounds like that timing maps.

Mr. Sheikh, that's consistent with your thinking?

MR. SHEIKH: Yes.

JUSTICE: Okay, very good. So it sounds like we're fine with the time available. Any housekeeping from counsel then before we begin? No? Okay, very good.

So Ms. Hucal, just one thing I wanted to alert you to that I'm interested in. This probably won't be a surprise to you. But your principal argument, if I could put it that way, turns on section 236 of the of the *Federal Public Service Labour Relations Act* and, of course, the related provisions in that statute. Mr. Sheikh responds with arguments, you know, to the effect that it is arguable that section 236 doesn't apply to the entirety of the claim that he's asserting, or that his clients are asserting. But he also advances the argument that there are members of the class, not the named plaintiffs themselves or the representative plaintiffs, but members of the class given the breadth of the class as described which would not be caught by the right to grieve. And therefore section 236 strikes me as the sort of argument that, for instance, resonated in in the *Adelberg* case, if I'm remembering the authorities correctly.

So I imagine you're planning to speak to that, but of course, that wouldn't have been in your materials, because that's something raised for the first time in your friend's materials in response. So I just want to let you know that I'm interested in that point and will want to hear your thoughts on it over the course of your submissions.

MS. HUCAL: Well, before I begin, I'm happy to address that point. So I believe what you're making reference to is, I think there's a passing reference to casual employees, student employees, and RCMP.

JUSTICE: Correct.

MS. HUCAL: There are -- none of the representative plaintiffs fall into those categories, nor has any evidence been pled -- or, excuse me, nor is there any facts pled in the pleading that relates to RCMP students or casual employees. If one of the rep plaintiffs fell into one of those categories, that would be a different situation, but we have no facts relating to any employees or members when it relates to the RCMP. Nothing about that.

And so based on this pleading and the evidence that has been filed in this case, those claims just failed to survive.

JUSTICE: Okay, so -- and, again, perhaps you'll be speaking to this in more detail as we progress, in which case I may have more questions, but

my memory, this one was perhaps the *McMillan* case, rather than the *Adelberg* case, is that was a situation where Mr. McMillan, the named plaintiff, it was found that his claim would not survive and yet he was given leave to effectively go and see if there were others who would fall within the class, and potentially amend the statement of claim so as to advance allegations on behalf of members of the class who would not be caught by section 236. Am I remembering that case correctly?

MS. HUCAL: Yes. I mean, you're referencing a Federal Court of Appeal case --

JUSTICE: Yes.

MS. HUCAL: -- that was issued two weeks ago, maybe.

JUSTICE: Right.

MS. HUCAL: And so, Mr. McMillan was a TCE, temporary contract employee with the RCMP. It was interesting how that decision was worded, because his claim was struck. And so I think where the court speaks about giving leave to amend, it wouldn't be Mr. McMillan, even though it was referencing McMillan. He couldn't be a rep plaintiff, he couldn't be a member of the class. So I believe what would happen in that case, if one of the TCEs, the temporary contract employee, was found, like a new rep plaintiff could be found. That's how I understood practically that decision would work. But Mr. McMillan is out.

JUSTICE: Right. And -- so it is

interesting I think.

MS. HUCAL: I know the language says we give leave, but practically how that would work, I don't know.

JUSTICE: Okay. So, interesting that you raise that point. That was a question I had about that authority, in the sense that if the court grants leave to amend -- the court is granting leave to someone to amend, and I was interested in your submissions and I'll interested to hear from your friend as well on how that case is to be interpreted on that point. In other words, who is the recipient of the leave given that Mr. McMillan's -- in that case, Mr. McMillan's own claim was struck.

MS. HUCAL: Yes. I don't believe Mr. McMillan could continue as a member of the class or as a rep plaintiff. They found he was -- his action was barred by limitations. You can't actually -- like there's no evidence you can plead to change that. And for the -- yeah, for the portion of time where he had actually fled harassment, it was beyond -- I believe it was beyond the limitation period. Yeah. Yeah.

JUSTICE: So then how do you interpret that decision as to who was the recipient of the leave to amend, if I can put it that way?

MS. HUCAL: It would be an individual who was a member of the class.

JUSTICE: Okay. As yet unidentified?

MS. HUCAL: As yet unidentified, yes. Because the court found that, as it related to others, there may be facts, like for the TCEs, that would support the statement of claim because they don't have grievance, they don't have access to the grievance process.

JUSTICE: Okay, so let's leave that there for now, but I'll be interested in any further submissions you have on this point as you progress with your arguments or, indeed, in reply once we've heard from your friend.

MS. HUCAL: But that was -- I mean in reading *McMillan*, I know I spoke to a colleague who was directly involved and we were -- that point was interesting. It was very clear that was struck.

JUSTICE: Right.

MS. HUCAL: So going to --

JUSTICE: Okay, please dig in.

SUBMISSIONS BY MS. HUCAL:

MS. HUCAL: So this is a proposed class action and it has been grieved as a challenge to the COVID vaccination policy that was implemented across the federal public service. This class action is brought on behalf of members -- or members -- of those employed in the core public administration. And the three rep plaintiffs are all employed in the core public administration. Ms. Payne, I believe, is at the Department of National Defence. Mr. Harvey, I believe

is CSC. And the last individual, Mr. Molaro — I have it in my submissions — is at the agency -- the name of which I can't remember right now. But they are all employed in core public administration and as a consequence, they all have grievance rights.

JUSTICE: And just for my notes, or at least that it might be helpful in writing the decision, the core public administration, that concept appears where in the legislation or policy or otherwise?

MS. HUCAL: I believe it's in the *Financial Administration Act*, but I can find you the exact provision. The other thing is in -- I can't remember if it's *Adelberg*. But in one of the cases, one of the decisions from the Federal Court, there is an appendix that lists all of the departments.

JUSTICE: I think that was *Adelberg*.

MS. HUCAL: Yeah, and it lists all of the departments that fall under the core public administration. The essence of the claim in this case is a grievance. It's regarding the terms and conditions of employment, which is what the COVID policy was. It was impacting -- it was a condition, a term of employment, and that had been posed by the Treasury Board pursuant to its authority under section 7 and 11 of the *Financial Administration Act*. The intention of the policy was to keep safe the employees of the Government of Canada and prevent the spread of COVID in the federal government. Now the plaintiffs, in an

attempt to avoid or bypass the grievance process, have characterized the action as a violation of 2(d) of the *Charter*, or is misfeasance in public office.

Now, in doing this, they are doing the very thing which the Supreme Court of Canada warned against *Weber*. And *Weber* is the case that considered where there are alternative dispute resolution mechanisms, what was the force or effect of those mechanisms? And they concluded that where they exist, they should be accorded exclusive jurisdiction.

JUSTICE: *Weber* is one of the authorities in your book of authorities?

MS. HUCAL: I believe that *Weber* is not there. This is something that I was thinking about just when I was doing my opening.

JUSTICE: Okay.

MS. HUCAL: And it's for the point at paragraph 49. We'll get you the citation for *Weber*.

JUSTICE: Thank you.

MS. HUCAL: In that case, I wanted to take your attention to this point. This is what *Weber* was very clear about, that if you were not to accord exclusive jurisdiction to these alternative dispute mechanisms, and this is a quote:

> "It would also leave it open to innovative leaders to evade the legislative prohibition on parallel court actions by raising new and imaginative causes of such action."

And I wanted to highlight that in *Weber* because that is exactly what the plaintiffs are trying to do here.

So it's *Weber v. Ontario Hydro,* 1995, the neutral citation is 2 SCR 929.

JUSTICE: Sorry, 929?

MS. HUCAL: 929.

JUSTICE: Thank you.

MS. HUCAL: It's Weber, W-E-B-E-R, just one B.

JUSTICE: Okay.

MS. HUCAL: The second point -- well, to be clear, both the notion of a *Charter* breach or the misfeasance of public office is just an attempt or an innovative pleading to attempt to avoid the grievance process. Regardless of how this is characterized, this is a grievance about the COVID policy.

Our second argument is that the misfeasance in public office has not been adequately pled. The two steps of the test have not been met, and the *Charter* claim of denial of meaningful process of collective bargaining is without merit. And second, given these plaintiffs are all represented by a bargaining agents --

JUSTICE: Sorry, can I ask you about that last, that last point about collective bargaining?

MS. HUCAL: Oh, the second is the *Charter* claim that there's been a denial of a meaningful

process of collective bargaining. And we say that's without merit.

JUSTICE: I'm not sure that I'm remembering that. So that's one of the allegations in the statement of claim?

MS. HUCAL: Well, if you go, I'll just pull it up. It's at paragraph 44 where the plaintiffs set out what duty of the *Charter* provides, and then they talk about -- then, at 45, 46, 47, they reference the COVID policy, and effectively they say it's imposing a new term and condition of employment absent collective bargaining.

JUSTICE: Okay.

MS. HUCAL: My point on that was merely they are represented by a bargaining agent. And if there is any allegation that this is a matter that was properly part of bargaining, it would not be for the individual member to bring that. It would be for the bargaining agent. And therefore, on the point of misfeasance of public office and the *Charter* claim, there's no reasonable chance of success as pled.

And as an aside, no bargaining agent brought that grievance or complaint because it is a term and condition of employment that Treasury Board, pursuant to the authority under 7 and 11, can implement.

The situation for federal government employees, a unionized one, is their employment contract -- there isn't a written employment contract, as there

is in private employment. The employment -- your terms and conditions, your employment contract consists of the terms in the collective agreement, but also those that are provided in statute, which includes section 208 and 236, of the FPSLREA. That acronym gets longer and longer.

So the plaintiff's recourse was that provided under the grievance process, and that's in 208 of the FPSLREA, and that -- and as provided in section 236 of the same Act, it says where you can grieve under 208, you can't bring an action in the Federal Court.

And that provision follows the Supreme Court's decision in *Vaughan*.

JUSTICE: Sorry, *Vaughan*?

MS. HUCAL: Vaughan, V-A-U-G-H-A-N, which stands for that principle. Thereafter, the legislation was changed to ensure that the no action was clear. That once you have a grievance right, you cannot pursue an action in court.

JUSTICE: So *Vaughan* predates the current version of the legislative provisions is that what you're describing?

MS. HUCAL: *Vaughan* -- yeah, after *Vaughan* section, 236 -- the amendment to include 236 was made.

JUSTICE: And *Vaughan* --

MS. HUCAL: That's a little bit of history. I also have not -- I don't believe Vaughan is

in there, but the cite for *Vaughan* is 2005 SCC 11. Oh, sorry, that's not the neutral citation. The neutral citation is 2005 1 SCR 146

JUSTICE: 146?

MS. HUCAL: Yes.

JUSTICE: Thank you.

MS. HUCAL: And the FPSLREA, this section 208 is at tab two of our authorities. You don't need to turn it up unless you want to. That's just there. We have the right of an employee, and it sets out that an employee is entitled to present an individual grievance if he or she feels aggrieved. And it sets out -- if he or she feels aggrieved by the interpretation or application in respect of the employee of and then it sets out under Roman numerals, (i), (ii), then (b), the matters. There's two matters. There's two of these subsections that could apply in this instance.

> "One, 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."

That would be a basis upon which they could grieve the policy.

> "Or as a result of any occurrence or matter affecting his or her terms and conditions of employment."

Arguably, that would apply. But regardless, they would

have been able to grieve, as there were many grievances, as Ms. Payne and one other of the plaintiffs grieved in this matter.

Then under 236 of the same legislation, it's entitled -- that provision is entitled The "no right of action" provision, and it provides:

> "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."

And that goes on to say this section applies whether you use the grievance or not. It's not permissive. It's not whether you choose to, it applies if you use grievance or not.

So consequently, given the combined effect of those provisions, and that these plaintiffs are all employees in the core public administration, their recourse is through the grievance process, not a class action in this court. And as I go through my submissions, you will see, in fact, Ms. Payne pursued two grievances, and I believe it was Mr. Harvey who also pursued a grievance.

JUSTICE: That's my memory as well.

MS. HUCAL: Okay, and I think Mr. Molaro is no longer employed.

Now, on this point, I want to take you to

the jurisprudence. And what you'll see from the jurisprudence is the court must look at the essential character of the dispute, not the way the action is pled; i.e. whether it's an allegation of *Charter* breaches or misfeasance of public office. And that's why I started with *Weber*, because that was the origin of that reasoning: do not let innovative pleaders escape the requirement for the exclusive jurisdiction of the alternative dispute resolution mechanisms.

So here, the plaintiffs are trying to characterize the claims as something other than about terms and conditions of employment. That had been tried and rejected by the Federal Court of Appeal in *Adelberg*, and I believe it's Federal Court in *Wojdan*. And both of these cases deal specifically with the COVID vaccination policy.

JUSTICE: The federal court case is which one?

MS. HUCAL: *Adelberg* and *Wojdan*, I will take you to them.

JUSTICE: Okay, very good.

MS. HUCAL: And I'll give you the references. But both of those cases deal directly with COVID policy, and both reaffirmed that it was an employment policy, it was related to terms and conditions of employment, therefore do not come to court. You have a grievance process and that is where you should pursue any remedies.

The first case is *Adelberg*, and it's at tab 4B that's the Federal Court of Appeal decision. Sorry. *Adelberg* was 2024, these are all very recent cases.

And as I said, that's that tab 4B of our book of authorities. At paragraph 56 of that decision the Federal Court of Appeal was clear, what matters is the essence of the claim, not how it is characterized. Specifically, they say at 56,

> "The bar in Section 236…"

did you want -- I mean, perhaps you should pull up *Adelberg*.

JUSTICE: I have section 56 in front of me.

MS. HUCAL: Paragraph 56.

JUSTICE: Yes.

MS. HUCAL: So yes, there they say it:

> "…applies to matters that may be grieved, as opposed to those that may be adjudicated. In determining whether an issue is one that may be grieved, what matters is the essence of the claim made and not the way the claim is characterized in the Statement of Claim. Thus, it matters not that the plaintiffs allege a Charter breach or various tort claims; one must instead look to the essential character of the dispute to determine if it raises a matter that could have been the subject of a

grievance."

And there you see reference to *Vaughan* and *Weber*.

Then at 57:

"Here, compliance with the [Treasury Board] Policy was a term and condition of employment for the plaintiffs employed by the organizations listed in Schedule 'A' to the Federal Court's Reasons."

And there you will see reference to the same -- you'll see CSC, you'll see DND, and you will see the agency at which -- I can just look at the statement of claim. So Ms. Payne was a graphic design technician at DND; Mr. Harvey was at CSC; and Mr. Molaro the Federal Economic Development Agency, all of which are listed in Appendix A to the *Adelburg* decision.

And at paragraph 57 after the reference to Schedule A.

"The requirement to have been vaccinated against COVID-19 or face a leave without pay, could therefore have been grieved under section 208 of the FPSLRA by those employed in the organizations listed in Schedule 'A'."

And in *Adelberg*, I mean, there was an RCMP aspect that survived, that that reasoning doesn't apply here for the reasons I've already stated.

JUSTICE: Because there's no named plaintiff who's a member of the RCMP, is that your point?

MS. HUCAL: There's no facts pled as it relates to the RCMP, but for the one paragraph that was referenced.

JUSTICE: Which paragraph are you referring to there?

MS. HUCAL: I'll have to -- sorry. And, as you know, pleadings are important so the defendant knows the case it has to meet. And then on this point in particular, with the reference that was made to the RCMP, we don't know if it's subsumed by another proposed class action, we don't know if it's RCMP members who have grievance rights, we don't know if it would civilian members, whether it would be public service employees. So, as pled, it's entirely deficient for those reasons.

So there's a reference to the RCMP at paragraph 2, and I believe at paragraph 8. And my friend will correct me if I'm wrong. There's more references.

JUSTICE: Paragraphs 2 and 8?

MS. HUCAL: Yes. But again, the point is even if the word "RCMP" is used, there are no facts pled with regards to how it impacted the RCMP. And none of the rep plaintiffs are members -- or are members or employed by the RCMP. The pleading is just deficient for the purposes of determining reasonable cause of action with regards to RCMP casual, student employees because no facts are pled. Insofar as the RCMP is

referenced, it is a bare assertion. There's no material facts or it's not pled with any particularity.

Now, the court in *Adelberg* did acknowledge there is an exception to the exclusive jurisdiction accorded to the grievance process. And the court possesses discretion to hear if the internal grievance process does not or cannot provide an adequate remedy. And that's what was found in *Greenwood* at first instance. I believe it was on appeal.

But here, like here in *Payne*, there's no evidence about the deficiency or inadequacy of the grievance process. And similarly in *Adelberg,* they concluded at 59, the Federal Court had no evidence before it as to the efficacy of the grievance process. And so *Adelberg* was struck at first instance. And on appeal the court concluded that the Federal Court is not err in striking the claims related to the TB policy made by the plaintiffs who were employed by the organizations listed in Schedule A to the Federal Court's reasons. You know, excepting the RCMP. They go on to say:

> "It was incumbent on the plaintiffs to have filed evidence about the efficacy of the grievance process if they wished the Court to exercise its discretion to hear the claim, as the plaintiffs did in *Greenwood*. In the absence of any such evidence pointing to any inefficacy of the grievance procedure, it was open to the Federal Court to have reached the

conclusion that it did and to have struck, without leave to amend, the claims related to the TB Policy made by the plaintiffs employed by the organizations listed in Schedule 'A'…"

Because I have you at *Adelberg*, I'm just going to respond to an allegation in paragraph 35 of the plaintiff's factum. And there the plaintiff argues *Adelberg* is not determinative because in that case no argument was made -- I'm just pulling up the factum. At paragraph 35 of their factum they say:

"Despite the prolix and comprehensive nature of the claims, their claims, the plaintiffs in *Adelberg* neither allege misuse misfeasance of public office or a breach of section 2(d) of the *Charter*."

And misfeasance of public office is specifically pleaded in *Adelberg* and is referenced at paragraph 48 of the Federal Court decision.

JUSTICE: So, I guess your argument is that the plaintiff is arguing that *Adelberg* was not confronting an allegation of misfeasance of public office, that the plaintiff's just wrong that that was one of the allegations in *Adelberg*. Sorry, paragraph 48 of the Federal -- of the trial level decision.

MS. HUCAL: It's referenced there. And the *Adelberg* decision also clearly states that *Charter* issues can be grieved.

JUSTICE: And that's the Federal Court

of Appeal decision?

MS. HUCAL: I believe it's in both, but I will find that for you. I can find that for you on break.

JUSTICE: Okay, thank you. But with reference to *Charter* issues being subject to grievance, is that paragraph 56 to which you took me a moment ago? Or is there another portion of the decision you're talking about?

MS. HUCAL: Yeah, 56. I do like the streamlined nature of just a computer but I do miss not having all of my hard copy references. I'm not as adept and we don't get the iPad, so. And I apologize.

JUSTICE: Not at all. We have lots of time.

MS. HUCAL: So in that case *Adelberg* also clearly stated that *Charter* issues can be grieved. When I take you *Ebadi*, it also deals with that point. Which article of the *Charter* is raised is irrelevant. The *Adelberg* statement of claim did raise section 2 generally, while admittedly I don't think it was 2(d).

JUSTICE: Do you have a paragraph reference for that?

MS. HUCAL: Well, it's -- I believe it would be the same 56 paragraph. But we can find where it raised section 2. We can do the word search and find it for you.

Now, while the plaintiffs here are

attempting to claim that this is an issue in relation to their associated *Charter* rights or misfeasance of public office, there's no question that they're really trying to attack the terms and conditions of employment, the vaccination policy, the same challenge as in *Adelberg*.

Now, earlier I alluded to the grievances that had been filed by Ms. Payne. We include a decision in one of her grievances that she brought against her bargaining agent, the Public Service Alliance Canada. And the *Payne* decision is at tab 47 of our book of authorities, the grievance.

JUSTICE: Okay. I'm not sure that mine is -- electronic version is organized as tabs. Do you have a page reference? So Exhibit C to Mr. Vezina's affidavit is --

MS. HUCAL: Sorry, I'm looking at the index. It's number 47 in the index, if that does assist.

JUSTICE: Okay, let me see if it does.

MS. HUCAL: And then there should be a hyperlink in the index.

JUSTICE: What --

MS. HUCAL: 1442.

JUSTICE: Oh, this is in the book of authorities as opposed to the record?

MS. HUCAL: Yeah. Apologies.

JUSTICE: Right, right. Okay, 1442. Yes, I'm there.

MS. HUCAL: Okay. So this was a grievance that was brought by Ms. Payne on behalf of, I believe, 167 other employees. And the nature of the complaint was that their bargaining agent, the Public Service Alliance of Canada, breached its duty of fair representation.

Now, in support of that complaint there were a number of allegations that were asserted. They are all outlined at paragraphs 34. And one of them that I wanted to focus on was the allegation that the policy, meaning the COVID policy, was outside the parameters of the collective agreement and the respondent breached its duty by not requiring that the Treasury Board negotiate with it before implementing the policy. And I would submit that that's akin to what the plaintiffs are asserting here. And Ms. Payne -- well and Mr. Sheikh was counsel for Ms. Payne in that matter, So Mr. Sheikh on Ms. Payne's behalf made the argument -- or in making this argument recognized that the -- like, this argument that was being made, this was something for the Alliance to be making. This is not something for an individual to be making here. Even though they don't frame it as a 2(d) violation or characterize it as a 2(d) violation, that's effectively what this is about. And Ms. Payne and Mr. Sheikh knew that this was something that if it was going to be addressed was to be addressed by their bargaining agent.

JUSTICE: And you rely on what aspect

of the decision for that submission.

MS. HUCAL: Well, not -- I'll take you to what they found on that point. Not on the decision, but the fact that this was brought as a grievance against the union for what the union failed to do. So that acknowledges that if this was -- like, without getting into the merits of this complaint, that this was something not for an individual member but for the union itself to have been doing.

Now, the response, the Board ultimately found there was no breach of the duty, good faith representation -- yeah, fair representation, sorry. At paragraph 83 they respond to every of the -- to each of the allegations at 34. But I just want to take you to the one at 83 where the Board says:

> "The complainant's further allegations fault the respondent for not having…"

in quotes,

> "…'forced' the Treasury Board to negotiate the policy's implementation with it and for not insisting on mandatory testing as an alternative to the policy. The latter of the allegations is merely another attempt to challenge the policy itself and the complainants did not indicate how the respondent could enforce such a negotiation."

And I think that's an acknowledgement that this was not part of the terms of the collective

agreement but rather it's the terms and condition which are within the sole authority of Treasury Board to implement pursuant to 7 and 11 of the *Financial Administration Act*.

It goes on to say:

> "The documents filed or disclosed that the respondent did in fact object to how the Treasury Board proceeded when it adopted the policy. It also raised implementation concerns. No fault…"

Well, then it concludes that there's no fault raising to the level that arbitrariness, bad faith or discrimination can be alleged against a respondent that did not have the ability to control the events that occurred. Which, again, I think you can draw from that that this was not something that they could have bargained, it was something that was beyond their ability because it's solely within the discretion of Treasury Board as employer pursuant to section 7 and 11 of the *Financial Administration Act*.

And as I've already stated, but bears repeating, insofar as this is raised as a violation of the collective agreement or a denial of bargaining process, as these plaintiffs are all represented by a bargaining agent, it would have been a matter for the bargaining agent to raise, not these individual plaintiffs. And I think that's acknowledged by the fact that this group grievance that Ms. Payne brought on

behalf of herself and the other members against their bargaining agents.

In addition, Ms. Payne and Mr. Harvey filed individual grievances against the policy, which is referenced tab 65 where the Vézina affidavit is contained. Oh, sorry, it's 2000. Page 2000, does that line up with that you have?

JUSTICE: That's the beginning of Mr. Vézina's affidavit?

MS. HUCAL: Is that correct? 2000?

JUSTICE: Yes.

MS. HUCAL: Okay, sometimes the page numbers don't. So there at paragraph 16(a) and (b) 2004, page 2004 --

JUSTICE: Yes, okay.

MS. HUCAL: -- they attest to the status of the grievances at the state -- at the time of the swearing of this affidavit. And so they were both at the third level as of August 2024, when his affidavit was sworn.

JUSTICE: And (a) refers to the grievance of Ms. Payne; --

MS. HUCAL: Yes.

JUSTICE: -- (b) the grievance of Mr. Harvey?

MS. HUCAL: Correct. And in fact, the grievance of Ms. Payne regarding the COVID policy is attached to his affidavit. Page 35 of the affidavit,

but 2027.

JUSTICE: Okay, yes, I'm there.

MS. HUCAL: Interestingly at Appendix A -- page 2013 is where it begins. And then if you turn to 2031, I would just note that in there, while Ms. Payne didn't make the 2(d) arguments, she did raise *Charter* arguments. So whether she knew she could raise *Charter* arguments or not is not really the point, but it does further support that you can bring *Charter* arguments in your grievance process of which she was aware.

JUSTICE: Do we have decisions on those grievances? Or just the grievances themselves?

MS. HUCAL: Well, as of the date of the affidavit, August 2024, it was at the third level.

JUSTICE: I understand, okay.

MS. HUCAL: I'm not sure whether it's been (inaudible). I don't believe so.

The next case to which I want to take the court's attention is *Ebadi*. It's also a 2024 decision of the Federal Court of Appeal. Oh tab reference, sorry. It's 693.

JUSTICE: Actually, so I think for the authorities themselves, the tab references work. Do you have the tab --

MS. HUCAL: I do, it's 25.

JUSTICE: The tab references work for everything. Initially, I hadn't realized that when you

were taking me to the evidence that it was also in the book of authorities.

MS. HUCAL: Oh.

JUSTICE: That was the source of the confusion. But the links are all are all operating.

MS. HUCAL: So the tab is okay?

JUSTICE: Yes, it is.

MS. HUCAL: Okay.

JUSTICE: So I'm at *Ebadi*.

MS. HUCAL: Yeah, tab 25. So I'm going to take you two paragraphs. The first one at paragraph 36.

So the first paragraph obviously identifies what the nature of the appeal is, and it is an appeal of a strike of the Statement of Claim. So he -- this was another challenge to COVID, and in paragraph 1, the court references sections 236, 208, and notes "Together these provisions bar any civil recourse for any dispute relating to terms or conditions of employment which can be addressed through a grievance process."

And I would take you then to 30 -- paragraph 36 of that decision.

JUSTICE: Yes, I'm there.

MS. HUCAL: Okay and the court says:

> "This interpretation aligns with the object of the FPSLRA, which was to establish a comprehensive and exclusive scheme for the

resolution of labor disputes."

And then they referenced *Vaughn*.

The court goes on to say:

"To allow large categories of claims—such as any claim involving an intentional tort or Charter breach—to escape the operation of the FPSLRA would undermine Parliament's intent. Many if not all workplace grievances could, through artful pleading, be cast as intentional torts; …"

And then they give the examples of things that would fall into that category, and they conclude:

"To exempt these claims from the grievance process could effectively gut the scheme, reducing it to the most mechanical and administrative elements of employment relationships, such as hours of work, overtime, classification and pay."

Okay, paragraph 2, they dismiss the appeal, and they noted: "There was no persuasive evidence that the grievance process was futile or broken."

I took you to *Adelberg* and *Abadi* because they are the most recent pronouncements of the Federal Court of the Appeal on 208 and 236 as it relates to challenges to the COVID policy, are binding on this court and determinative of this matter. This class action should be struck on that basis alone.

These principles were reaffirmed by the Court of Appeal 2024 in *Davis v. RCMP*. Now that was an individual matter that was before the court, and it did not deal with the COVID policy. That decision is at tab 20.

But again, in that case, she was alleging unfair labor practices, harassment, unilateral changes to her employment contract, which aligns with the allegation here under 2(d), and the court found it was struck at first instance based on 236, a decision that was upheld on appeal. And I wanted to take the court's attention to two paragraphs. 60, in the Federal Court of Appeal advises that:

> "Judges should refrain from delving into the merits of a plaintiff's argument on a motion to strike, but should, rather, consider whether the plaintiff should be precluded from advancing the argument at all."

Then at 75:

> "As noted at the outset of these reasons, subsection (236(1) of the FPSLRA states that '[t]he right of an employee to seek redress by way of grievance <u>for any dispute relating to his or her terms or conditions of employment</u> 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."

There you see the court emphasized "any

dispute". And the court continues:

> "Conflicts related to "terms or conditions of employment" have been found "to encompass allegations of defamation, discrimination, harassment, malice and bad faith, Charter breaches, and intentional torts …."

So particularly noteworthy is conflicts related to terms or conditions of employment, and that that has been found to include *Charter* breaches.

They also reference *Adelberg* with approval at paragraph 86 and they also provide some guidance as to when a grievance process is found to be inadequate, and they -- because in those instances, that's when the court can exercise its discretion. They reference the New Brunswick Court of Appeals to say that discretion should be exercise where the grievance process is entirely corrupt. That is the standard. That is not central to the issues before you, because no assertion has been made. But if there was, it would have to be at that level.

Then another case dealing with the COVID policy is found at tab 62(b) of our authorities, and that's *Wojdan*. It's an older case at 2021 FC 1341, and this was different procedurally, because it was seeking a stay of the operation of the COVID policy pending decision on the JR challenge.

JUSTICE: The same policy that's --

MS. HUCAL: Same policy. And so while

the JR was winding its way through the process, the plaintiff -- or sorry, the applicant wanted a stay; i.e., the policy doesn't apply until the JR has been determined. And just as Fothergill found, ultimately, you can't get by stay what you're seeking on the ultimate decision or in the JR and notes at paragraph 26:

> "The *Charter* issues raised by the Applicants engage broad policy concerns, but these nevertheless form a component of a labour dispute. They, therefore, fall within the jurisdiction of a labour arbitrator."

And they reference the FCC in *Weber* at paragraph 60.

They also note that statutory tribunals may be deemed courts of competent jurisdiction to grant remedies under s 24(1).

And then at paragraph 27 the court finds:

> "The Applicants have failed to demonstrate that a labour adjudicator or the FPSLREB would be unable to determine the application of the Vaccination Policy to their employment."

It says:

> "If the Vaccination Policy were found to be invalid or inapplicable in the Applicants' personal circumstances, then a labour adjudicator or the FPSLREB could reinstate their employment and/or award compensation for lost wages, damages, and any infringement of

the *Charter*…"

And in that case, the applicants also were relying on residual jurisdiction or the discretion of the court, and at paragraph 29 the court concluded:

"…it remains a discretion to be exercised in accordance with the jurisprudence which instructs that resort to the grievance process is the first recourse."

Those would be -- those would conclude my submissions on the applicability of 206 and 236 and that is the full answer to the entire action.

JUSTICE: So you're moving on now to the tort, to the intentional tort?

MS. HUCAL: (inaudible).

So in addition to this being innovative pleading to avoid the grievance process, because this is a claim with regards to the COVID policy, this notion of misfeasance in public office has not been adequately pled. The plaintiffs simply fail to meet the test for establishing a reasonable cause of action for misfeasance in public office.

Now, for the test to be applied, I would take you to tab 42 and this is the seminal case on point. It's the SCC decision in *Odhavji Estate*.

JUSTICE: Yes, I'm there.

MS. HUCAL: Paragraph 30, to which I wanted to draw the court's attention. There the SCC notes what the underlying purpose of the tort is, and

they say it's

> "…to protect each citizen's reasonable expectation that a public officer will not intentionally…"

intention being the key,

> "…injure a member of the public through deliberate and unlawful conduct in the exercise of public functions."

And then to be successful, a malfeasant claim requires the plaintiff to establish that the public official engaged in deliberate and unlawful conduct in his or her capacity as a public official and the official was aware that the conduct was unlawful and likely to harm the plaintiff. And likely to harm the plaintiff.

In this case, no facts have been pled to support a subjective awareness. No individual has been identified against whom such a claim to be made. Their assertions have been pled against Treasury Board and Deputy heads of unknown departments -- unknown deputy heads of unknown departments.

It appears, and I will take you to the pleading, but it appears that the deliberate unlawful conduct is the bare assertion that Treasury Board ignored risk of side effects of COVID vaccine when it implemented the COVID policy. It seems that assertion is based on the fact that they implemented the policy, and so the implementation of the policy is what they rely on to say the side effects weren't considered, or

the risk of side effects weren't considered.

So on this, I'd also like to take you to another case. It's a recent decision of the Federal Court in *Qualizza*. This is a 2024 decision. I think it's in the last month. It's at tab 49. November, so just last month, November 13.

JUSTICE: Yes, I'm there.

MS. HUCAL: So this is specifically on point. This was a mass tort claim, and it was brought on behalf of current and former members of the Canadian Armed Forces. It was again about the implementation of the directive setting out the COVID 19 vaccination requirements for CAF members, and that was the basis upon which they were alleging misfeasance of public office. Then at paragraph 47 of --

JUSTICE: Is this a class action or --

MS. HUCAL: Mass tort. That's mass tort. I can't tell you how many.

JUSTICE: I see the long list. So sorry, which paragraph?

MS. HUCAL: 47.

JUSTICE: Yes, I'm there.

MS. HUCAL: "The tort of misfeasance in a public office consists of two elements. First, the plaintiff must show that a public officer engaged in deliberate and unlawful conduct while acting in the capacities as public officers."

So that traces what I took you to an *Odhavji*. Then it explains:

> "Unlawful conduct includes conduct that is in excess of the officer's powers, exercises an improper purpose or is a breach of statutory duty. The second element that the plaintiff must show is that the public officer was aware that the conduct in question was unlawful and it was likely to harm the plaintiff. This awareness requires that the public officer engaged in the unlawful conduct of bad faith."

And as I said, nothing, no facts have been pled to address either of those. And in that particular case, in *Qualizza*, at paragraph 48 the court found:

> "The alleged unlawful conduct at issue here is not clearly articulated in the pleading. Reading the pleadings generously, the unlawful conduct appears to be the implementation of the Directives by Canada. However, the manner in which the Directives are unlawful or were unlawfully ordered is not established. No material facts are pled to support this component of the tort."

And then the next paragraph, 49, the court also finds:

> "…the second element of the tort is not established. No material facts are pled to suggest bad faith on the part of Canada. The only indications of bad faith are found when

the pleadings baldly assert that among other claims, Canada failed to carry out safety and efficacy testing for the vaccine, and that the Directives were premature, 'promoted the fraudulent use of the biologics'."

And the court then makes reference to Rule 181 of the *Federal Court Rules* which applies equally here, and notes:

"This form of pleading is particularly problematic and runs afoul of Rule 181 because that requires the allegations of breach of trust and fraud be precisely particularized."

And that reasoning applies equally to the case before the court.

If you look to -- I'm not sure where you have the statement of claim.

JUSTICE: I've actually printed a hard copy.

MS. HUCAL: Okay, so paragraphs 42 and 43 --

JUSTICE: Yes.

MS. HUCAL: -- are the pleadings relating to misfeasance and (inaudible). And these pleadings suffer from the same deficit that was identified in *Qualizza*. The plaintiffs plead Treasury Board, at paragraph 42, acted with reckless indifference or willful blindness in issuing and enforcing the policy. That's not sufficient just using those words.

It then says, "Treasury Board has no basis in fact to justify the policy," and so they say, the plaintiffs and (inaudible) plead that "in perpetuating the stated objective of the policy to prevent transmission, Treasury Board was reckless or willfully ignored reality of the vaccine."

I mean, the stated intention that they quoted there contradicts what they need to do. That clearly shows there was no intention to do harm. The objective was to prevent transmission. That's a laudable objective. It's not evidence of breach of trust or fraud.

And then at (b) and (c), I think this is the only other class that we can point to in supporting this allegation that "they recklessly or willfully ignored known and potential risk of adverse events". Again, a bare assertion, and as well, that "there was no long term safety data available". But in addition, when you look at the facts as pled regarding the plaintiffs, which are contained at paragraphs 5, 6, 7 and 8. So, actually, it might be helpful just to quickly go through the claim.

So at page 3, they set out the (inaudible) that move on to page 4. Then they characterize the nature of the action which goes onto the next page, and then at bottom of that page, paragraph 5 to paragraph 9, they set out the parties, and they particularize the name of the party, in which

department or organization of the federal government they were employed, their union membership, and where they reside. Then they provide a cost definition.

And then at 7, they go on to standing. Then at 8, they describe the policy. That continues on to 9 and 10, and then at 11, they provide information about various vaccines, and then data at 12, again about risks associated with vaccine. And then they go on to misfeasance in public office, and then the *Charter*.

The reason I take you through all of that is there is nothing that relates misfeasance in public office to the plaintiffs. There's nothing suggesting how they have been affected by this misfeasance in public office, nor do they articulate any damages or harm that they suffered. The pleadings merely state their name, where they're employed, their union representation, and where they reside. There's just nothing to connect these plaintiffs to misfeasance in public office.

JUSTICE: Is there an allegation that they either were let go from their employment, or resigned from their employment as a result?

MS. HUCAL: Oh no, one individual did resign, but there's no allegation that was because of the policy. What is described is as -- and my friend will correct me if I'm wrong, but based on my review, it's what's set out -- the parties in the class. It speaks to the fact that they were suspended because they

didn't abide with the policy.

JUSTICE: Where are you now?

MS. HUCAL: If you look at paragraph 5, 6 and 7. Well, 7, Mr. Malero didn't get suspended, he resigned. Oh, he says pursuant to the policy. So I'm not sure what that means. I don't think there was an obligation to resign.

But as drafted, it sounds like there was, but there's nothing to suggest that policy required someone to resign and as found, I believe it was in Adelberg, leave without pay was found to be a reasonable response to those who couldn't comply with the policy.

Just further on what is required to be pled, at tab 38 we provide the 2024 decision in Federal Court of Appeal in *McMillan*, which we discussed, I think at the top, the outset, paragraph 67. It's at tab 38.

> "The pleading must tell the defendant the 'who, when, where, how…."

JUSTICE: Pardon me, which paragraph?

MS. HUCAL: Sorry, paragraph 67. I'm sorry, it was tab 38, paragraph 67.

JUSTICE: Yes, I'm there.

MS. HUCAL: I take you to that just because it clearly states what is required, and the pleading has to set out the who, the when, the where, the how, the what, which these pleadings do not. And that's -- and the court also references *Mancuso* for that point.

And then further on this point, further support, I would take you to tab 39, the 2010 Federal Court of Appeal decision in *Merchant Law Group*, and paragraph 35 of that case.

> "…the tort of misfeasance in public office requires a particular state of mind of a public officer in carrying out the impugned action; *i.e.*, deliberate conduct which the public officer knows to be inconsistent with the obligations of his or her office…"

JUSTICE: But one question. There's a -- it's described as an intentional tort, and the language of deliberateness is used in a lot of the cases. Your friend pleads in terms of recklessness and willful blindness. And I do recall there being some authorities that, that speak to that sort of language as well. Perhaps even the *Woodhouse* case. What I want to understand, is there a difference between your jurisprudentially on whether that sort of state of mind is sufficient or sufficient pleading.

MS. HUCAL: It's not. I'm sorry if I didn't make the point earlier, but just using adjectives saying TBS is reckless is not sufficient to meet the standard.

JUSTICE: I understand, but your argument is not it must be purely deliberate intention that that level --

MS. HUCAL: Well, because they use

reckless, and I think because you have to interpret the pleadings generously, I would say reckless, the notion of reckless is sufficient if there were underlying facts. It's not sufficient to use an adjective. You have to demonstrate what it is that you say amounted to this reckless conduct, and more specifically, who, when, where, how, and what.

And on this point in *Merchant Law Group* -- and again, there's reference to Rule 181. And I think this is the challenge. I don't know that this test could be met in these circumstances because it requires a particular state of mind of a public officer in carrying out the impugned action. And here, there's reference made vaguely to Treasury Board and then to deputy head. The policy at paragraph 2 of the statement of claim, the policy required all deputy heads of core public administration, the RCMP, to implement the policy as they were required to do so. I mean, I don't know who they're talking about here. That's very vague. But also they're required to apply policy. As a result, you could never demonstrate what's required here, which is breach of trust, malice, reckless indifference, whatever is the language that the plaintiffs used. Public service, complying with their duty.

JUSTICE: Duty being to implement the policy.

MS. HUCAL: Exactly.

JUSTICE: Now you're not speaking on

Treasury Board, but rather of the deputy heads who are in charge of implementing.

MS. HUCAL: Well, I mean the -- in implementing the policy Treasury Board is acting as employer in authority, in accordance with authority under the statute, and in the implementation, which is unclear, but I think that's what the plaintiff (inaudible) with, that was by the deputy heads.

Now, at 42 they say Treasury Board acted under the authority of the FDA issuing and mandating implementation. So they mandated the implementation, and then it was the head.

So I mean further, just to conclude on this point, there's no plea in this case that would allow courts to conclude that any public officer for whom the defendant would be responsible knowingly committed any unlawful act with the knowledge that the plaintiff would suffer injury.

And Justice, we talked, we just addressed, who is this allegation -- at who is this allegation aimed? Deputy heads, Treasury Board. I would take the court to tab 8B,

JUSTICE: *Bigeagle*?

MS. HUCAL: *Bigeagle.* It's a 2023, decision Federal Court of Appeal. And in that case, it was a proposed class action raising, amongst other allegations, misfeasance of public office and *Charter* breaches. And at paragraph 14 of that decision, the

court is reflecting upon the motion judge's findings. It said:

> "Regarding the claim of misfeasance in public office, the motion judge found the claim too broad. The material facts were directed at the RCMP as an organization and not at a particular division of attachment. A generalized allegation that the RCMP did not implement proper procedures or policy did not meet either branch of the test of the tort of misfeasance, there being no intentional conduct that could in any way be foreseen to harm the class. As no material facts of deliberate and unlawful conduct were pled. She concluded that this cause of action was doomed to fail."

Given the requirement for deliberate, I don't -- I mean, just going back to your earlier question, I don't know reckless indifference would constitute deliberate. Willful blindness, we meet that test, but using the language of reckless indifference, I think that begs the question of intention.

But again, it doesn't really matter, because the bigger point is this one. As in *Bigeagle*, there's no intentional conduct that could in any way be foreseen to harm the class. None was pled. Nor can I imagine that it could be pled.

And that's paragraph 81. Then at paragraph 82

the court notes:

"…other than general statements, there were no material facts pled of deliberate and unlawful conduct. The claims were directed at the RCMP as an organization across Canada…over an undefined period of time." She appropriately…"

meaning the lower court judge,

"…[noted] that while there was a generalized allegation that the RCMP did not implement procedures or policy, it was not sufficiently particularized and did not meet the required elements of intentional conduct and foreseeability. She properly distinguished *Merchant Law*…"

And she noted:

"While this Court found that in many cases it may be impossible for a plaintiff to name the particular individual responsible, it also indicated that some level of specification is needed. The motion judge was…"

Oh, the rest is just -- well, that's not of assistance.

The point is here, the pleadings are similarly vague, directed either at the whole of TB or various unknown deputies of unknown departments.

I wanted to take you to, again to the Federal Court of Appeal in *Adelberg*, paragraph 68:

"The plaintiffs must set out sufficient…"

JUSTICE: Remind me the --

MS. HUCAL: Sorry, tab 4B.

JUSTICE: I'm at paragraph 68, did you say? Okay, yes, I'm there.

MS. HUCAL: "…the plaintiffs must set out with sufficient particularity the facts they rely on in support of their claim, including details of how they were specifically impacted by the policies they impugn and the bases for and all material facts necessary to ground the claims advanced."

As in *Adelberg* the Statement of Claim, as drafted, is entirely devoid of these necessary material facts.

They plead misfeasance in public office in the broadest of terms, stating that there was no -- effectively their position is there's no basis for TB to issue and implement policy. They plead that the responsibility of implementation was deputy heads, but they don't link any particular conduct to the elements of the (inaudible).

So as in the *Bigeagle*, there's no specificity pled to any particularized harm to an individual arising out of the alleged misfeasance other than to employees at large. Failed to plead how each -- sorry. The facts as pled fail to demonstrate how each plaintiff was negatively impacted by the directives. No

particularization as to the harm, whether side effects, physical and emotional harm, economic deprivation. There has to be more than bare assertions.

And just finally on this point, and I've said this a couple times already, the plaintiffs did not and could not prove that Treasury Board intended to cause the plaintiffs any harm, particularly considering that the stated objective of the policy was to take every precaution reasonable in the circumstances for the protection of the health and safety of employees, and that Treasury Board policy is Exhibit A to the Vézina affidavit.

And the size of the class doesn't save the claim. If there is not a claim for an individual, the fact that it's a claim doesn't somehow enhance the cause of action. And this was confirmed by the Supreme Court in *Bisaillon*.

Bisaillon is at tab 9, paragraph 73, and again, it's referencing subsection 236(1) of the Act, noting it has been recognized as an exclusive (inaudible) of the court's jurisdiction. It is -- once it is established that matter must be the subject of grievance the grievance process cannot be circumstantial — my goodness — circumvented by relying on the court's residual jurisdiction.

And to sum up on this point, it's just plain and obvious, even assuming the facts that's pled to be true, that these claims have no reasonable

prospect of success. And with no reasonable prospect of success, the first criteria for certifying class action is not met. Simply, this claim should be struck.

Those are my submissions.

JUSTICE: Just before you sit down and perhaps you --

MS. HUCAL: Subject to any questions.

JUSTICE: Perhaps your intention is to address this in reply, but I note in your friend's material, he argues, as is typically argued in this kind of a matter, that in the event I were to decide to strike some or all of the claim that I should do so with leave to amend and have the benefit of any submissions you have in response to that either now or in the course of reply.

MS. HUCAL: Whether leave should be granted.

JUSTICE: Whether leave should be granted, yes.

MS. HUCAL: For the reasons that I've already stated, leave should not be granted. Any claim against the COVID policy is something that would be subsumed by the grievance process, and once -- you know whether you use it or you don't, then any action is barred.

JUSTICE: What do you mean claims by the name -- by the representative?

MS. HUCAL: Oh, were you talking about

casual (inaudible)?

JUSTICE: So I think your friend, we don't yet have the benefit of his submissions, but I'm anticipating his argument will be along those lines, that there are members of the class that would not be caught by Section 236. He also makes an argument that -- he appends to his written materials, proposed amendments to the Statement of Claim, I think, related to the tort of misfeasance in public office. So any arguments you have on that, obviously I want to have the benefit of.

MS. HUCAL: I would prefer to respond to that in reply, other than to say, on the first point, casual student, RCMP, that's an entire entirely different claim. It's not amending this claim. That's something else entirely. And with regards to -- sorry.

JUSTICE: Sorry, I want to flush out that argument for me, and in particular in the context of *McMillan*, where again the plaintiff's claim was being struck, and so I want to understand how that authority influences what I should do in a situation where the Federal Court of Appeal seemed to think that it was appropriate, even if the named plaintiff's action was entirely struck, to still grant leave to allow, effectively, other members of the proposed class to come forward who may not be statute barred in the way Mr. McMillan was. That's the way I interpret that decision.

MS. HUCAL: I understand the question,

and I would probably benefit from reviewing *McMillan* again, but what I remember and understand from *McMillan* is that there were sufficient facts pled with regards to the balance of the SCEs, that there was something to nourish a continued claim. Here there are no facts pled regarding the RCMP, casual or students. They just do not exist in this pleading. And I think that is a significant distinction from the case that was before the court in *McMillan*.

JUSTICE: Could I ask you, in the course of the break if you're going to review *McMillan* again, to identify for me the paragraphs in which you rely to distinguish *McMillan* in that way?

MS. HUCAL: Yes.

JUSTICE: Okay. Okay, thank you. I think those are all my questions. Obviously, I may have more questions for you in reply. I'm thinking, so we're now just over an hour and a half in. I think your timing was effectively correct. I suggest we take a 15-minute break now and then return with Mr. Sheikh's response at that stage. So let's break until, according to the clock on the wall, at least 20 after the hour. The clock may be a couple of minutes fast, but let's -- we'll return in 15 minutes.

MS. HUCAL: Thank you.

JUSTICE: Thank you, everyone.

(PROCEEDINGS ADJOURNED AT 11:03 A.M.)

(PROCEEDINGS RESUMED AT 11:22 A.M.)

JUSTICE: Please be seated, everyone.

Ms. Hucal, were you able to identify those paragraphs. It's useful to get those from you now, because they may benefit Mr. Sheikh as well in his response.

MS. HUCAL: Yes, I asked him if I would be able to respond and he --

JUSTICE: Okay, please.

SUBMISSIONS BY MS. HUCAL, (Continued):

MS. HUCAL: Paragraph 111 of *McMillan*, and the reason --

JUSTICE: Just one moment, until I'm logged on.

MS. HUCAL: Sorry. I apologize.

JUSTICE: Okay, *McMillan*, sorry, paragraph 111 you said?

MS. HUCAL: Yes, so the heading is, "Did the Federal Court err in denying leave to Mr. McMillan to amend", so it's responsive to your question. It begins at paragraph 104, but the exact paragraph is 111, and it articulates why *McMillan* is different than the case before you today. At 111:

> "The Federal Court had accepted that Mr. McMillan's statement of claim pleaded a reasonable cause of action with respect to certain individuals."

And that's the key difference. There is no reasonable cause of action pled here with regards to anyone.

And that is why in that case, the court went on to say there's no reason to think you couldn't amend it. But that is a key significant difference.

The other -- just to clean up, the "core public administration", that term, is defined at --

JUSTICE: Yes?

MS. HUCAL: -- in the *Financial Administration Act* Section 11(1) in Schedules 1 and 4.

JUSTICE: Thank you.

MS. HUCAL: And then just one last final point, *Adelberg* was a mass action, and there the RCMP claims.

JUSTICE: That was a mass action not a class action?

MS. HUCAL: It was mass, right? Yes, it wasn't a class action. It was mass.

JUSTICE: Okay.

MS. HUCAL: If I said class action, I'm sorry.

JUSTICE: No, it's not that. I think I had thought it was a class action. Okay, carry on.

MS. HUCAL: And there in the list of individuals were a number of RCMP plaintiffs. So there were actual RCMP plaintiffs to which the continued action could attach. I don't think that's the right language in terms of describing it, but that would be the basis why that survived

JUSTICE: Okay, so *Adelberg* was a mass

action. *McMillan* was a class action?

MS. HUCAL: Correct.

JUSTICE: Okay, very good. Thank you for that help.

MS. HUCAL: Thank you.

JUSTICE: Mr. Sheikh?

MS. HUCAL: I just want to make sure that was --

JUSTICE: No, thank you very much, Ms. Hucal. Mr. Sheikh?

SUBMISSIONS BY MR. SHEIKH:

MR. SHEIKH: Thank you. Mr. Justice. Thank you to my friend as well for her submissions. I will -- there's a lot to unpack, and I'll try and respond to all the points. And of course, I'll address *McMillan* and the representative plaintiff issue as well.

Just to present an overview, the defendants submit that neither of the plaintiff's claims fall within the jurisdiction of the Federal Court and that one of the claims, misfeasance, is insufficiently particularized. In so doing, the defendant relies on overly restrictive characterizations of the Federal Court's jurisdiction and a fundamental misunderstanding of the nature of the claim; and it's that which I'm going to spend the majority of my time on in trying to differentiate that.

The following -- the motion raises the following issues in our view. Have the defendants shown

that it is plain and obvious that any and all of the claim should be struck because it is doomed to fail? And if so, have the defendants established there is not even a scintilla of a cause of action such that no part of the claim can be cured by amendment. And in doing so, obviously, in pursuing, pursuing, under Rule 221, which governs this motion, I'd refer the court to the characterization made in *Canadian Front Line Nurses v. Canada*, which is a 2024 Federal Court Case that can be found at tab 21.

I quote from paragraph 122:

> "…the Court uses the 'plain and obvious' threshold, or 'doomed to fail' standard. Taking facts pleaded as true, the Court examines whether the application:
>
> > …is 'so clearly improper as to be bereft of any possibility of success'.… There must be a 'show stopper' or a 'knockout punch' - an obvious, fatal flaw striking at the root of the Court's power to entertain the application."

And it goes on to quote other cases that talk about that.

I'm going to skip the rest of my arguments on what the 221 motion should look like in terms of the test, I think it's described well in our submissions. Needless to say, that the motion is that it requires a high threshold on the part of the

defendants to establish that the claim is bereft of any possibility of success, whereas the plaintiffs in this case simply have to show that there is a reasonable cause of action, and that, read generously, the claim shows the defendant and allows them to understand the who, what, where, when and how the claims against him arose.

So let's move to the key part of their objection, which is on jurisdiction of the Court. So their main contention is that Section 208 and 236, are a complete ouster, without exception. In so characterizing it as such, I think they mischaracterized the nature of our claims in the scheme under the Act.

First, the *Federal Public Service Labor Relations Act* does not act as a complete bar to any and all claims that may arise in similar circumstances to these proceedings. Indeed, the Supreme Court of Canada has repeatedly warned not to over-extend the jurisdiction of labor arbitrators. The exclusivity of labor arbitration does not close the door of all legal actions involving the employer and unionized employees. And there I quote from *Northern Regional Health Authority v. Horrocks*, which can be found at tab 7. It's a 2021 Supreme Court decision. And in so quoting, they address *Weber* as well, but I'll explicitly address *Weber* in just a few moments.

Now, this notion is exemplified in the very cases upon which the defendant relies. In

Adelburg, which can be found at tab 13, the court explicitly found that, amongst other things, many actions have proceeded against the RCMP for workplace issues, including class actions for matters that could have been the subject of grievances and the trial court erred according to *Adelberg* in Court of Appeal in finding the plaintiffs' claims related to certain travel mandates that were subject to 236, of the *Public Service Labor Relations Act.*

In *Ebadi* — which is another case that's quoted by my friends, it's a 2024, Federal Court of Appeal case at tab 24 — the court described two additional cases that were found not to fall within the exclusive jurisdiction of labor arbitrators. Now I'm not going to go into those two cases at any great length, but needless to say, one dealt with an issue of police involvement and a breach of privacy, and the other involved issues that were bifurcated for when the individual was an employee and wasn't an employee. All that to say is that the determination of the question of jurisdiction is based on the central character of the dispute, and indeed, that's what *Adelberg* and the Court of Appeal looked at.

In *McMillan*, in the 2023 decision of *McMillan*, which can be found at tab 33, the Court wrote in paragraph 25 that:

> "It is clear from the language of Section 236 that there are parameters on the ouster of

this court's jurisdiction."

And reading from paragraph 25, the court outlined some of those parameters. The court stated:

"First, an 'employee' must bring the action. Second, that employee cannot be 'an employee of a separate agency that has not been designated under…209(3)'. Third, the dispute must be in relation to the employee's terms or conditions of employment." Fourth, the dispute must pertain to a matter that can be grieved…"

As noted by the defendant, the bar in section 236 only applies to matters that may be grieved. And so determining what those matters are, the court has to look to the essential character of the dispute to determine if it raises a matter that could be -- could have been, the subject of a grievance.

Here, in this present case, the essential character of the claim does not concern the terms and condition of the plaintiff's employment such that it must be exhausted through the grievance process. As described by the defendant itself, the claim alleges that the Treasury Board's conduct in issuing the policy is an unjustifiable violation of the plaintiff's *Charter* rights under section 2(d), and the alleged tort of misfeasance of public office by the Treasury Board for the enactment and enforcement of the policy. Their own description doesn't reference the terms and conditions of the plaintiff's employment, rather the defendant

described the dispute as arising out of the process by which the Treasury Board implemented the policy.

In a case called *Québec*, and my French is horrible, but it's called *Morin*, and it's at tab 11. It's a 2004 Supreme Court of Canada case. It's *Quebec Commission des droits*, also known as *Morin*. At paragraph 24 of that case when they were looking at matters fell under exclusive jurisdiction of an arbitrator, the court noted, the only question that arises is whether the process leading to the adoption of the clause held to be discriminary [sic] and inserted into the collective agreement contravenes the Quebec *Charter* thereby rending the clause inapplicable.

Again, here, the focus was on the process. So we respectfully submit that the claim of infringement of 2(d) as pled specific to unionized employees and the essential character of such a claim is not subject to grievance under 208. As a bit of context, the application of section 208, which determines matters that can come within grievance, is not just limited to unionized employees. So it applies to non-union individuals as well. And what I'm highlighting here is that unionized employee terms and conditions of employment are negotiated and exist within collective agreements. When terms and conditions of employment are unilaterally inserted absent collective bargaining or an adequate process then a claim of 2(d) infringement may be educed such that it's not -- such

that it does not fall within the purview of the Labour Relations Act.

So what does 2(d) do in operation? 2(d) challenges the process by which terms and conditions were unilaterally imposed, not the terms and conditions themselves. As the true character of such disputes do not arise under the collective agreements and are not in themselves a substantive challenge to the terms and conditions, they are a challenge to the process that brought about those terms and conditions.

The challenge or essential nature of such a claim is not one which concerns compliance with the policy or challenge the requirement to be vaccinated which arises under the policy, which is what *Adelberg* found in that case and we'll discuss that more later. The defendants mischaracterize the nature of this claim as a challenge to the policy and not -- rather, not look at what 2(d) is meant to assert, which is the conduct and process by which the policy arose.

So in support of that proposition I'm going to refer you to a case called *British Columbia Teachers' Federation v. British Columbia*. And this is a 2015 B.C. Court of Appeal case later affirmed by the Supreme Court of Canada. It can be located at tab 6 of the plaintiff's book of authorities.

JUSTICE: Yes, I'm there.

MR. SHEIKH: Okay. So I'm going to read from paragraph 72, because this presents a good

synopsis and I'll provide a bit of background in this case. So:

> "The Supreme Court of Canada has been clear that s. 2(d) protects a right to a process that permits employees to make collective representations in furtherance of their workplace goals. Given the nature of that right, it seems unavoidable that courts assessing legislation must examine the nature and quality of any pre-legislative consultations, the identity of the parties and the history of their bargaining relationship, the circumstances giving rise to any disputes… [as well as] the effect of any limitations on future bargaining and many other factors."

Such factors that -- and this is not a quote directly from the paragraph, but such factors would include how meaningful the terms and conditions were and how impactful they were on the individuals.

> "An examination of the content of the legislation is certainly an important part of the analysis."

JUSTICE: I'm just going to stop you for a moment. I'm not sure I'm in the right place. So, this is?

MR. SHEIKH: Paragraph 72.

JUSTICE: It's tab 6. I may have -- do you have a page reference? You don't have pinpoint

references for your paragraphs. Do you have a page reference in your book of authorities for me to get to that?

MR. SHEIKH: I will pull it up right now. It is at paragraph 26, I'm just -- I think I referred to the wrong paragraph.

JUSTICE: Oh, it's paragraph 26? Okay.

MR. SHEIKH: That's what I thought it was but it doesn't seem to be so. If you'll excuse me a moment, I'll --

JUSTICE: Take your time.

MR. SHEIKH: I'll get to the right -- it is a direct quote though from the case, I know that.

Mr. Justice, I will find the exact paragraph referenced. That is a quote. I can find it at the break if I can move on, or I can spend the time now.

JUSTICE: If you're going to make this submission on this paragraph now, I'd like to have it front of me. If you're going to defer the submission on it till afterwards then we can do that.

MR. SHEIKH: No, this is actually tied to --

JUSTICE: And actually what I'm seeing is it looks as if the *British Columbia Teachers' Federation* case, which is the one you're referring to, I don't think the entire case is there.

MR. SHEIKH: It's 2015 BCCA 184. I'm just going to find --

JUSTICE: I start to scroll through the case and once I get to the end of the headnote the next page seems to be *Northern Regional Health Authority*, the *Horrocks* decision.

MR. SHEIKH: It's a B.C. Court of Appeal decision, 2015 BCCA 184.

JUSTICE: Oh, it's not the Supreme Court of Canada case?

MR. SHEIKH: No, it was affirmed by the -- it's -- the quote is from the Supreme Court of Canada case in a case called *Health Services and Support Bargaining Sector*, but this was a case that reviewed that and commented on it. And it was included in our book of authorities, so I quoted it out of here.

JUSTICE: Okay. So just that I'm clear, is it the *B.C. Teachers' Federation* association case you're taking me to?

MR. SHEIKH: I am.

JUSTICE: Okay. And that's the one at tab 6?

MR. SHEIKH: It is, yes.

JUSTICE: And this is the Supreme Court of Canada decision, is it not?

MR. SHEIKH: It was adopted in 2016, affirmed then adopted in 2016 by the Supreme Court of Canada. But the text that I was looking at was from the

Court of Appeal decision itself.

JUSTICE: I see. Because the Supreme Court of Canada case simply says in one paragraph that the appeal is allowed. Is this correct?

MR. SHEIKH: Correct.

JUSTICE: Okay. And so I think at tab 6 I only have the Supreme Court of Canada case. Is the B.C. Court of Appeal case elsewhere?

MR. SHEIKH: It should have been included. If it's not in our package I'm happy to send you the citation. At this point I --

JUSTICE: Counsel, you're looking to rise?

MS. HUCAL: I think -- well, I'm sorry. I just think you're talking at cross purposes. So there is the *B.C. Teachers' Federation*, the Supreme Court decision. I believe my friend is referencing you to the B.C. Court of Appeal decision. And when he is referencing the Supreme Court decision it's the Supreme Court decision in Health Services that is referenced in the B.C. Court of Appeal decision in B.C. Teachers' Federation.

MR. SHEIKH: Correct.

JUSTICE: Okay. I guess the question is, is the paragraph you wish me to read in the materials in front of me, and if so could you take me there?

MS. HUCAL: Do you have his factum?

It's hyperlinked in his factum at footnote 45.

JUSTICE: Okay, I do. Okay, sorry, which paragraph?

MS. HUCAL: Footnote 45.

JUSTICE: Footnote 45. Okay, so at footnote 45 I see "See also *B.C. Teachers' Federation v. British Columbia*", and there's a British Columbia Court of Appeal citation at paragraph 32. Is that where I could be going, to that case?

MR. SHEIKH: Yes, sir. You should be going to that case, the Court of Appeal case, and it's paragraph 72 of that case.

JUSTICE: Just a moment. And thank you, Ms. Hucal, for your help.

MR. SHEIKH: Thank you very much.

JUSTICE: Okay, so I am now at paragraph 72.

MR. SHEIKH: Okay.

JUSTICE: Okay, please, if I could ask you to repeat those submissions as I didn't have the paragraph in front of me.

MR. SHEIKH: Absolutely. So, reading from paragraph 72:

> "The Supreme Court of Canada has been clear that s. 2(d) protects a right to a process that permits employees to make collective representations in furtherance of…workplace goals. Given the nature of that right, it

seems unavoidable that courts assessing legislation must examine the nature and quality of any pre-legislative consultations, the identity of the parties and the history of their bargaining relationship, the circumstances giving rise to any disputes or impasses, the effect of any limitations on future bargaining and many other factors."

And it was at this point that I had paused to intercede that some of those factors include how meaningful the provisions were.

"An examination of the content of the legislation is…an important part of the analysis. But an exclusive focus on the content of the legislation, at the expense of the circumstances in which it is enacted, impoverishes the infringement analysis and artificially renders important facts irrelevant. We consider that the trial judge erred by narrowing her focus in her s. 2(d) analysis to the content of the legislation. It is necessary to take a broad, fully contextual view…"

JUSTICE: So I appreciate here we have guidance on how to conduct a 2(d) analysis. But how do you get from there to a submission that an arbitrator who's considering a grievance under the *Federal Public Service Relations Act* cannot conduct this analysis, does

not have that jurisdiction as opposed to --

MR. SHEIKH: I'm getting right there. Part of setting up and getting to the BCTF case was dealing with the essential character of the dispute, which is what *Adelberg* defined as compliance for these particular individuals who were covered by Schedule 1 defined as compliance with the policy and the resulting characteristics of that. Whereas 2(d), what I'm saying, is not the same in terms of the essential character of the dispute. The essential character of a 2(d) dispute, and the reason I quoted the paragraph concerns the process by which those things came about, by which those terms and conditions were unilaterally put in. At the same time, there is some analysis into the content, which would be the same as what *Adelberg* assessed, but that is not the nature of the dispute as it arises under 2(d). That's not how it's characterized.

So as an example, in the *BCTF* case that we were just talking, and I'm going to paraphrase this, but it's all in the background facts of the case. But in the *BCTF* case, there were changes to the *School Act*, which changed resource allocation within the education portfolio. It changed class sizes. It changed impacts on salaries, composition of classes, technology, a whole host of things that were covered under the collective agreement.

There's no doubt that the issues of salaries or the issue of tech change or even class

composition could have been grieved by the BCTF under their collective agreement, and that grievance would have gone to a labor arbitrator. However, the challenge under 2(d) was not about those substantive terms and conditions, the essential character and nature of that challenge and the reason it stayed in the court system and didn't go to a grievance arbitration was because it dealt with whether the process undertaken by the government substantially interfered with the workers' freedom of association. That question did not arise under the collective agreement, and the essential character of that dispute was not the content of those terms and conditions. And when *BCTF* cites the health services case, that Supreme Court of Canada case that that was that was being cited in paragraph 72, in that case the government passed legislation inserting terms and conditions around --

JUSTICE: I'll stop you for a moment. So paragraph 72 where it says, "It's hardly surprising that context matters. The Supreme Court of Canada has been clear." That's the reference?

MR. SHEIKH: Yes.

JUSTICE: Thank you there. And that is to the case which is at which tab?

MR. SHEIKH: That case isn't in our book of authorities. It's referenced in that decision and so I was going to provide a bit of context as to what it was.

JUSTICE: And so I want to know what case it is, though.

MR. SHEIKH: It's called *Health Sector Support Services*. I'll just pull it up for you here.

Sorry, it's -- the case is *Health Services and Support — Facilities Subsector Bargaining Association* --

JUSTICE: More slowly. So *Health Services*?

MR. SHEIKH: "*and Support* --

JUSTICE: *Health Services and Support.*

MR. SHEIKH: -- dash *"Facilities Subsector Bargaining Association — Facilities Subsector Bargaining Association* --

JUSTICE: Okay.

MR. SHEIKH: -- *v. British Columbia.*

JUSTICE: Yes.

MR. SHEIKH: And that citation is 2007 SCC 27

JUSTICE: Okay, thank you.

MR. SHEIKH: So I raised that just as another example of a government action or a legislation that imposed terms and conditions in the health sector. Those terms and conditions concerned contracting out and laundry facilities and different types of work environments that were covered otherwise under collective bargaining. And when they did so, Health Sector, the bargaining association, launched a 2(d)

challenge and took it all the way to the Supreme Court of Canada and received a judgment on it. It wasn't stated that the exclusive jurisdiction of a labor arbitrator would be able to govern such a 2(d) challenge as the matter did not arise outside -- inside -- within the collective agreement.

In fact, when we get to *Weber*, which has been referenced a number of times by my friend, that that was the proposition in *Weber*. That it's those things that arise under the collective agreement.

JUSTICE: So the two cases you've just been referencing, the Supreme Court of Canada case and the B.C. Court of Appeal case, *British Columbia Teachers Federation*, do either of those deal with this point? In other words, do they speak to whether or not the arguments, the assertions in those cases could have been grieved or would have fallen within the jurisdiction of an arbitrator? Or you're just arguing based on the fact that they were heard by a court, that they must not have been within that jurisdiction?

MR. SHEIKH: Well, I'm arguing it's based on what was described as the essential character of the dispute under section 2(b), which was the process by which these provisions ended up coming in as terms and conditions of employment. That's the essential character. It's that process under 2(d) that's protected under that associative right.

And so when I get to a submission on what

I believe the essential character of this dispute is under our 2(d) argument, it's akin to that. It's that process.

JUSTICE: But your argument a moment ago was these cases found their way into the courts --

MR. SHEIKH: They did.

JUSTICE: -- in front of an arbitrator, because they were something that were really before the court --

MR. SHEIKH: Arise under the collective agreement.

JUSTICE: Right. Is there any analysis to that effect in either of these cases?

MR. SHEIKH: I don't know offhand. I can check at the at the break. There very well may be. There's another case I'm going to discuss that does have that analysis directly in it, that's coming up right after I discuss this case.

JUSTICE: Okay.

MR. SHEIKH: But I can certainly go back and re-read those at the break and provide that answer.

JUSTICE: Thank you. So is it taking me to the -- is it taking you to the *Weber* case now? Is that --

MR. SHEIKH: No, next we're going -- next we're going to a case called *AUPE*.

JUSTICE: And this is in your

authority?

MR. SHEIKH: It is. It's at tab 46, the 2014 Alberta Court of Appeal case.

JUSTICE: Yes, I'm there, thank you.

MR. SHEIKH: So *AUPE v. Alberta*, discussed the essential character of a 2(d) dispute, as well as a lack of arbitral jurisdiction over such a dispute. Now, the facts in that case involved the provision in the *Public Service Employee Labor Relations Act*, which excluded certain classes of employment, the parties to the relevant collective agreement that impacted were AUPE and the Government of Alberta. AUPE brought a grievance and challenged that under the grievance process. The Alberta Court of Appeal found that -- and they alleged by -- the AUPE alleged through the grievance process a 2(d) violation.

The Alberta Court of Appeal found that a 2(d) dispute was not one which arose under the collective agreement such that it was within the jurisdiction of a labor arbitrator, but rather the true character of the dispute was the alleged unconstitutional statutory provision upon which the 2(d) challenge was brought. The content of the statutory provision dealing with job classification, et cetera, was not central to that 2(d) analysis. It was the process that was undertaken.

JUSTICE: So paragraph references for these submissions?

MR. SHEIKH: I'll go to them right now. So paragraph 35, I'll take you to there,

JUSTICE: Okay, yes, I'm there.

MR. SHEIKH: "At the hearing of this appeal, we questioned counsel about AUPE's standing to bring the grievance on behalf of the excluded employees. As discussed above, a grievance is 'a difference arising out of the interpretation, application, operation or any contravention or alleged contravention of the Collective Agreement.' Thus, in order to have standing to pursue this grievance, AUPE must show that the dispute arises under the Collective Agreement. The excluded employees are not part of AUPE's bargaining unit and, by definition, they are not part of the Collective Agreement. If these employees are excluded from the Collective Agreement, they are also excluded from the grievance procedure. Accordingly, the Board does not have jurisdiction…; it only has jurisdiction over grievances filed by [bargaining unit members]."

And going to paragraph 36: "Further it is clear from *Health Services in Support*…" which is the case that we just referenced earlier, "…that the freedom of association under

section 2(d) belongs to the individual workers and not the union. From this point of view, AUPE does not have standing to challenge the constitutionality of that provision. The challenge belongs to the employees."

And I raise that in response to the assertions that only the union can bring a 2(d) challenge. It is not an aggregate right, it's an individual right under Section 2(d) of the *Charter*, and so the union can bring it, and has brought it in the past, in certain cases, but an individual can also bring that challenge.

I just -- I would also take you to paragraph 26.

JUSTICE: Yes, I'm there.

MR. SHEIKH: Again, describing the essential character of the dispute as not either expressly or impliedly about the interpretation, application or administration of the violation, rather about the constitutionality. And again, Mr. Justice, I raise those cases because of significant importance as to whether or not the essential character of dispute can be grieved under Section 208. The *Adelberg* case, which has been referenced a number of times, describes that essential character based on the dispute brought in *Adelberg*, which is not a 2(d) dispute specifically, but it describes that as having to do with the policy and the terms under the policy. A 2(d) analysis of any

claim of 2(d), the essential character has to do with the process that was followed, and were the protections afforded by 2(d) applicable.

And again, *AUPE* was raised for you to show a couple of issues around standing and issues around 2(d) analysis with labor arbitrator jurisdictions.

JUSTICE: And so your argument is that if one of your clients had attempted to grieve by advancing a 2(d) argument, that the arbitrator would not have had jurisdiction to handle that, is that right?

MR. SHEIKH: That's right.

JUSTICE: And now I recall your friend referencing the grievances which were brought by I think two of the named -- of the representative plaintiffs. Can you remind me, is 2(d) raised in either of those?

MR. SHEIKH: No. The question of associated rights, associative rights in the process followed to ensure those rights are not infringed upon. It's not raised specifically as a 2(d) argument. And I can also address -- while we're on the subject matter of grievances, I can certainly address the decision my friend referenced regarding the duty of fair representation complaint against the union by, by one of my clients. That's a -- I believe it's a section 37 complaint that alleges that the union acted in a manner that was either discriminatory, arbitrary or in bad faith. The employer is not party to that complaint.

That complaint against is from the union member as against the union. When submissions are made on that one of the things to demonstrate arbitrary conduct is to try and highlight avenues that were ignored that could reasonably have been followed up on by the union. However, it's not the board's role in that case to do a deep dive and make a decision on the evidence or the final determination of any arguments that you proffer, only whether the Union, in looking at those arguments, acted in a way that was arbitrary, discriminatory or in bad faith.

So in terms of applicability, the duty of fair representation complaint that was raised has no applicability whatsoever. The grievances that were filed were grievances against the policy. That is akin to *Adelberg*. That is where you're challenging the discipline or the mandatory nature of the vaccination that comes from the policy. Under the applicable labor test or even non-labor test, there are standards of review for policy when you challenge them on proportionality, reasonableness, et cetera. That's a policy based challenge.

A 2(d) challenge is not that. A 2(d) challenge goes to the heart of the process, as to whether or not that process was meaningful, whether it was fair, whether it impugned on your rights. It does require the adoption of a significant amount of evidence to understand if that 2(d) challenge is going to

succeed. So not in every case. It's not true that if an employer imposes terms and conditions, it's going to be a violation. There are many factors that you have to look at. So it doesn't create this super right that any term and condition imposed on your collective agreement is an automatic violation. But rather, you look at the circumstances of that, the process that was followed, how meaningful that was, and a whole host of other factors to try and determine whether or not that 2(d) violation occurred or whether that was infringed upon, that particular right.

JUSTICE: Can I butt in? Do you have any -- I appreciate you've raised the Alberta authority and I'll read that in more detail following the hearing. Of course, it deals with a different piece of legislation and it seems that whether or not the grievers in that case were parties to the collective agreement was significant to the court's analysis.

Do you have any authorities that deal with this question that is whether or not an arbitrator has jurisdiction to consider a 2(d) argument in the context of the legislation that we're dealing with, Federal Court legislation?

MR. SHEIKH: No, there are none. To my knowledge there are none. There hasn't been a single case, either from the Federal Court, that we could find, or the Public Sector Labour Relations Board that dealt with 2(d). There was a Federal Court case that dealt

with 2(d) which is footnoted in our submissions, that dealt with RCMP issues and allowed a 2(d) argument to proceed there. But it didn't assess 208 or apply on the same basis of the facts. This is --

JUSTICE: Which case was that?

MR. SHEIKH: I will find it for you. you. *Canada v. Greenw*ood.

JUSTICE: Is that at your authorities or your friend's?

MR. SHEIKH: It's in our written submissions. I'll just double check. We weren't going to take you to it, because the facts are -- it is in our authorities at tab 20.

JUSTICE: Okay, so the Court of Appeal's decision in *Greenwood*?

MR. SHEIKH: Federal Court of Appeal, yeah.

JUSTICE: Any paragraphs in it that you do consider to be relevant to your assessment? Or are you saying that the facts are --

MR. SHEIKH: No, it's just, it's on a different basis. The only reason we highlight it is because it's the only one we could even find that looked at 2(d). When we look at section 208, we're dealing with terms and conditions of employment. So if you're looking at a 2(d) analysis, the submissions we're making is this goes above that. This is prior to the terms and conditions of employment. This is not a substantive

inquiry into the terms and conditions themselves, but rather the process that brought those terms and conditions about.

And that's what *Health Sector* looked at, that's what the *B.C. Teachers' Federation* case looked at. It was what that process was. And that's why I had read you that long quote. We submit that our analysis or our 2(d) argument should fall within that characterization of the essential character of this dispute, rather than the characterization provided in *Adelberg*, which didn't address 2(d). There haven't been, in our knowledge again, any cases that have addressed 2(d) in the context of 208.

So moving on to misfeasance before I jump into *Adelberg*, just for a moment. So just an overarching backdrop on our misfeasance submissions. We say that a claim alleging misfeasance in public office -- and first of all, I do want to apologize to the court and to my friends. We misstated that. In fact we were wrong. *Adelberg* pleading did in fact have misfeasance in it. We had stated that it didn't. We don't have a defence for that, other than to say it was a very challenging pleading in *Adelberg* to go through and pick out what was in there.

Nevertheless, we say that as misfeasance in public office is predicated on deliberate and unlawful conduct — and we're going to take you to authorities later in our fulsome misfeasance submission

— the essential character of that inquiry is focused on the unlawful conduct and not the resultant provision or policy in this case that deals with the terms and conditions of employment. And notably, I would also suggest that other than *Adelberg*, which it's very unclear to what extent the initial Federal Court or even the Court of Appeal dealt with misfeasance, we don't have any other authorities that deal with this subject in the context of section 208.

So moving on substantively to *Adelberg*.

JUSTICE: So, that submission, is your argument there that an arbitrator acting under section 208 would not have authority to address the tort of misfeasance in public office?

MR. SHEIKH: No. Because what you're addressing under the tort of misfeasance is the conduct of the individual, you're not addressing the term and condition that flowed from that conduct. It's part of the analysis when you go to harm or ulterior purpose, which I'll talk about. But at its core, the essential dispute concerns the conduct of the individual in public office.

JUSTICE: So just so that I'm clear, your argument is that the arbitrator considering a grievance under 208 would not have the authority to address an assertion of a tort of misfeasance of public office, is that correct? I think that's what I'm hearing you say, but your answer to my question --

MR. SHEIKH: Not in, not in these circumstances. And certainly -- no, my answer would be no, that they wouldn't. And I'm going to come to section 208 and also deal with the issue of adjudication, which is the whole grievance process. Nevertheless, I understand *Adelberg* said it's predicated on the ability to grieve, not the ability to adjudicate. But I'm going to tie this in to help you understand, Mr. Justice, why we feel that way.

So we say that *Adelberg* is not authoritative on the issues on this motion. And we quote the Federal Court of Appeal in a case called *Brake v. Canada*, which is located at tab 16 -- sorry, 18 of our written submissions -- of our book of authorities.

JUSTICE: Okay, yes, I'm there.

MR. SHEIKH: So quoting from paragraphs 56 to 59.

JUSTICE: Yes, I'm there.

MR. SHEIKH: Court should be 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. Specifically, the court in *Brake* noted that 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. Each case is based on the particular evidentiary record filed and the specific

claims pleaded and this plaintiff sought to place a different evidentiary record before the court to support different claims.

So in *Adelberg*, the plaintiffs alleged, among various other things, that ministerial orders were a breach of the *Charter*, that the policies were a breach of the *Charter*, that there were *Criminal Code* violations, there were crimes against humanity, and a whole host of other things that were included in that pleading. Despite the prolix and comprehensive nature of their claims, the plaintiffs in *Adelberg* did not allege a breach of section 2(d). They seem to have gone to great lengths to, to make every and any allegation they felt they could in that circumstance, but they did not make an allegation of breach of 2(d) of the *Charter*.

So in the context of the *Adelberg* decision, we submit that 2(d) was not covered off in that analysis and that *Adelberg* is not controlling.

So quoting then from paragraph 57 of the Court of Appeal's decision in *Adelberg*. I've been referencing this throughout the submissions, but just to take you to the paragraph. The essential character of the dispute was one of compliance with the policy. As such:

> "The requirement to have been vaccinated against COVID-19 or face a leave without pay could therefore have been grieved under section 208 of the FPSLRA by those employed in

the organizations listed in Schedule 'A'…"

Mr. Justice, I would submit the following with the greatest deference in respect to my friends who drafted *Adelberg*. I'm not denigrating anybody.

JUSTICE: Who drafted the pleading in *Adelberg*?

MR. SHEIKH: Pleadings. And counsel on that case. The initial Federal Court decision in *Adelberg* that initially struck out all of the claims without leave to amend referenced a very similar pleading that was filed in British Columbia, known as *Action4Canada*. The court described -- in striking those claims, the court described it as "bad beyond argument". In fact, the B.C. Law Society has now included that case and that pleading as part of the PLTC training manuals on what not to do.

On a motion to strike, the standard, as we've discussed in our submissions, the courts read the pleadings generously. It's a pretty high bar to have the claim struck without leave to amend. And so the court have to look at the entire pleading to try and ascertain if there's a scintilla of a cause of action that could, that could go forward. So the court in *Adelberg* is faced with this particular pleading and determines that the essential character of the dispute, based on everything that's being pled, the way they've pled it, what they're stating as their facts, is compliance with the policy and requirement to be

vaccinated.

There's no basis for the court to point to the pleading and say, "Here's where the plaintiffs in that case characterized what that essential character of that dispute was." This is Court of Appeal in *Adelberg* concluding this is what it was, based on everything that they had.

In our case, distinguished from that, we've been very clear, both throughout our pleadings and our submissions that this case has to do with the process by which section 2(d) rights were infringed upon by unilaterally inserting terms and conditions of compliance. That is what we say and we have described as the essential character of the dispute. Our pleadings are to be taken as true under the relevant test on this motion to strike.

JUSTICE: And so can you take me to that? You say the pleading is clear, that the argument --

MR. SHEIKH: Sure.

JUSTICE: -- is a process related argument, as opposed to --

MR. SHEIKH: Absolutely.

JUSTICE: -- it relates to the, I guess, the merits of the policy.

MR. SHEIKH: I'm just going to take you to the exact paragraphs. Paragraph 44 of the statement of claim.

JUSTICE: Yes, I'm there.

MR. SHEIKH: The plaintiffs -- and I'll quote from it:

> "The plaintiffs and class members plead that section 2(d) of the *Charter* provides for freedom of association, which guarantees the right of employees to meaningfully associate in the pursuit of collective workplace goals, which includes a right to collective bargaining. As such, laws or state actions that prevent or deny meaningful discussion and consultation about working conditions between employees and their employer may substantially interfere with the activity of collective bargaining, as may laws that unilaterally nullify significantly negotiated terms of the collective agreement."

Meaningful discussion, consultation. That is process. That is the same argument that was that existed in *Health Services* in the Supreme Court of Canada case. It's the same argument that existed in the *BCTF* case in describing the essential character of a 2(d) claim.

JUSTICE: So in that context, what is the significance of the pleadings related to the product monographs and --

MR. SHEIKH: Yes.

JUSTICE: -- and risk factors

associated with the vaccines are also --

MR. SHEIKH: Those go specifically to the misfeasance claim. And those paragraphs, in fact, are in support of the misfeasance argument and so when my friend has said that they are bare pleadings, and there's nothing in support of those conclusions. I'll take you exactly to those arguments. But those paragraphs above, when we talk about the product monographs -- for example, the product monographs, we take great lengths to list them all out and assert that none of the available COVID-19 vaccinations included a product monograph that said it would prevent viral transmission of COVID-19. That is significant as product monographs, which we would later describe it -- I'll describe for you right now, because it's not in there. But product monographs are a document that's filed with Health Canada on behalf of drug organization describing exactly what the drug does. It's almost like an expanded patent document.

And so when you look at those product monographs, what's conspicuously missing, in our view, is the is the issue of prevention of transmission of COVID-19. And so when you then go and develop a policy that says we're doing this to prevent the spread of COVID-19 to other employees, to other Canadians, to whomever, to keep you safe, we say, well, there's no reasonable basis for which you could have asserted that. There isn't any evidence, or was not any evidence at the

time that you made that decision that said it would prevent the spread. And then when we go into the issues of the adverse impacts in the studies, these are clinical studies from, for example, Pfizer, that were pulled directly from submissions to Health Canada and dated so they are -- they were in the possession of the federal government and PHAC, the Public Health Agency of Canada, and available certainly to the Treasury Board and anybody else who was making a decision. In fact, I think at some point there's a labor relations case that I'm going to discuss in our amendments.

But there was testimony given by Treasury Board in at least one case that described that they had gotten information on vaccines from PHAC. And so that relationship is there, that evidence is available to the federal government, they're an entity. And so we assert in those paragraphs around adverse impacts that there was a significant rate of adverse impacts and serious side effects that weren't disclosed and came with the vaccines.

So for example --

JUSTICE: Sorry, I don't want to distract you. You haven't yet moved to --

MR. SHEIKH: I haven't yet moved there.

JUSTICE: To misfeasance. So I don't want to distract you from that at the moment. I guess I just wanted to understand -- I think I do understand

that what you're now arguing is that all those factual allegations related to product monographs, adverse impacts and so on are not related to your section 2(d), *Charter* claim, but rather are related to the tortious claim.

MR. SHEIKH: Correct.

JUSTICE: Okay, thank you. That helps.

MR. SHEIKH: So just to conclude the 2(d) analysis, and we will come to the issues that were raised in *McMillan*, and I'm just going to highlight them to come back to following this misfeasance. But just to conclude the 2(d) analysis in our submissions, we say that the defendant has not met the burden to show that it's plain and obvious that a claim of 2(d), that within this jurisdiction of -- that it is or isn't within the jurisdiction of this court. It's not plain and obvious that it's in the jurisdiction of section 208. It's not plain and obvious that the claim is doomed to fail for lack of jurisdiction.

And again on that point, neither side has adduced any case law in any jurisdiction to be able to say that section 208 falls under the (inaudible).

So moving then to misfeasance in public office --

JUSTICE: So just before you move there, I raised a point with your friend earlier today, which is based on one of the arguments in your written

materials which I took to be related to 208 and your response to the defendant's 208 and 236 claim, related to the breadth of the class. You recall my questions of her this morning. You asserted in your written materials that the class would include casual employees, students. RCMP members, I think, are the particular ones that were referenced and that your friend referenced in her response. Did you wish to make any submissions on that point?

MR. SHEIKH: Well, that goes directly to your question on *McMillan* and the leave to amend in that case, right? So as a proposed class action there, there's a proposed class definition, and class period. In this case, the class definition includes folks who otherwise wouldn't have been covered under, let's say, the *Adelberg* ruling. If it's found that our representative plaintiffs aren't -- or our proposed representative plaintiffs aren't the appropriate representative plaintiff, such as was found in the 2024 *McMillan* decision, then, like any other class action that finds the representative plaintiffs not appropriate or unable to continue, you then simply go and propose a new representative plaintiff from within the class that can meet the test of certification under represented plaintiffs.

I would say this: At this stage, we're in a proposed class definition. It's a bit of a tricky situation, because you've got a proposed class action

and as part of that, there's an application for certification. Part of the application for certification test, one part is plain and obvious on the claims, but the other parts have to do with whether we have the appropriate class definition. Often that becomes quite iterative and flexible. Subclasses are created.

Then there's an assessment on whether or not your representative plaintiffs or class or subclasses have common issues or require individual determination of issues, in which case that would go against certification.

And so those arguments are then also fleshed out in that process, and then ultimately, the court decides what the final class definition is going to be and the court appoints the representative plaintiff as representative of the class. At this stage of the proceeding, they're proposed representative plaintiffs.

We haven't done an analysis on common issue determination, it just hasn't happened yet. This happens later on. We haven't fully dove into the appropriateness of the class definition of whether or not it's too broad, too narrow in scope or require subclasses. But right now, as per the proposed definition, certainly there are individuals who don't fall within the definitions of *Adelberg* in terms of Section 208, and so in any event, if the proposed class

was going to go forward, if this Court found that the representative plaintiffs weren't appropriate, such that in *McMillan*, then we would simply move to appoint additional or a different representative plaintiff and seek leave to amend the pleadings to reflect the facts as such.

JUSTICE: At the conclusion of your friend submission, she had arguments -- advanced arguments to the effect that that while *McMillan* allowed exactly that sort of an amendment, that these circumstances are distinguishable, and that if I were to strike the claims of the proposed representative plaintiffs, that I should not grant the sort of leave to amend that you just described. I want of the benefit of any response you have to that argument.

MR. SHEIKH: Well, it's not consistent with the 2024 *McMillan* decision. Yes, there were underlying findings of whether or not there was a reasonable cause of action in play, but in this case, amendments such as including specific facts on RCMP officers or students as different representative plaintiffs would easily cure some of the defects that have been alleged by my friend, and I think could allow that case to continue unabated of the *Adelberg* 208 analysis.

So to deny leave to amend, in effect, the court would be saying that there is no scintilla of a cause of action that could be made out from this claim,

even with that amendment, and we would argue that, as in *McMillan*, a different representative plaintiff in this situation with additional facts pled on those specific circumstances outside of the applicability of *Adelberg*'s 208 analysis would be sufficient amendments to allow the claim to proceed.

JUSTICE: Thank you, Mr. Sheikh, so you're going to move to misfeasance now?

MR. SHEIKH: I am. So just quickly going over the elements of misfeasance, I'd like to take you, sir, to *Anglehart v Canada*, which is a 2018 Federal Court of Appeal case. It's located at tab 15 of our submissions.

JUSTICE: Yes, I'm there.

MR. SHEIKH: Paragraph 52. To establish misfeasance in public office, the plaintiff must show:

> "(i) deliberate, unlawful conduct in the exercise of public functions; (ii) awareness that the conduct is unlawful and likely injure the plaintiff; (iii), harm; (iv) a causal link between the tortious conduct and the harm suffered; and (v) an injury that is compensable at tort law."

The defendant, my friend, argues that the claim insufficiently pleads the particular state of mind by a public official, and the intention to deliberately cause harm and the particular officials responsible for

the misfeasance.

And in the Statement of Claim, we plead the Treasury Board issued the policy under the authority of the *Financial Administration Act*. We then go on to state the policy's main objective, which is the protection of health and safety of employees. And then we further stated in the claim that rather than acting in the interest of employees' health and safety, the Treasury Board ignored the lack of evidence regarding the efficacy of the vaccines and the relatively high risk of adverse events and the need for long term safety data before mandating vaccination. And that it enacted the policy despite knowing the significant adverse effects that the policy would have on the plaintiffs.

And I can take you to those paragraphs. My friend has already taken you there, but I can take you there again, and that is paragraphs 42 and 43.

In our view, respectfully, these are sufficient allegations to adequately plead the elements of misfeasance. The Treasury Board knew, or should have known its discretion to enact a policy could not be based on considerations that are irrelevant, capricious or foreign to its stated purposes.

JUSTICE: And so what are the considerations that you're arguing or that you asserting in the Statement of Claim were irrelevant, capricious report?

MR. SHEIKH: Well, the considerations

were that the vaccines prevented transmission and posed no to little risk of serious adverse events. And we enumerate basis upon which we assert that, in the preceding paragraphs, which we discussed around product monographs and safety studies.

We say it enacted the policy with subjective recklessness or conscious disregard for the lawlessness of its conduct and the consequence to the plaintiff. There was a bit of discussion with my friend and this honorable court regarding this issue of willful blindness or subjective recklessness, I just want to take you to where that concept comes from.

So at tab 9 of our book of authorities is 2021 Supreme Court of Canada decision called *Ontario (Attorney General) v. Clark.*

JUSTICE: Yes, I'm there.

MR. SHEIKH: And reading from paragraph 23:

> "The unlawful conduct anchoring a misfeasance claim typically falls into one of three categories, namely an act in excess of the public official's powers, an exercise of a power for an improper purpose, or a breach of a statutory duty. The minimum requirement of subjective awareness has been described as 'subjective recklessness' or 'conscious disregard' for the lawfulness of the conduct and the consequences to the plaintiff."

JUSTICE: Just noting the description there of typically being one of three categories. What is your position as to which of those categories the allegations of this statement of claim fall?

MR. SHEIKH: Well, there's actually a specific misfeasance analysis that I think is better described in a different authority that can narrow down the category question that you're asking, so I'd just like to take you to another case to show you that, that is in our book of authorities.

JUSTICE: So you're probably talking about the one that refers to Category A and Category B. So is that correct?

MR. SHEIKH: That's correct.

JUSTICE: Okay, I am interested and, I was going to ask you about that, so that's a good place to go next. But if we were to focus on this language here, I'm interested in your response,

MR. SHEIKH: Exercise of power for an improper purpose.

JUSTICE: And that improper purpose is what?

MR. SHEIKH: The improper purpose is to impose terms and conditions of employment that are irrelevant to the power conferred through the statute to enact such provisions. For example, the power under -- the basis under the *Financial Administration's Act* that the Treasury Board acted based on their own statements,

was for the health and safety of employees. We say that doing this actually was the opposite, and therefore it was an improper purpose.

JUSTICE: Thank you. And if you -- Yes, if you could take me to that other case that talks about Category A and B.

MR. SHEIKH: Absolutely, I'm just, I just have to pull it up, because I wasn't in my oral submissions going to necessarily go there. But I'd be happy to.

JUSTICE: It might be the *Odhavji* --

MR. SHEIKH: I believe it is. I'm just making sure.

JUSTICE: I think it might be around paragraph 23 of *Odhavji?*

MR. SHEIKH: Yes, it is. Thank you.

JUSTICE: That's a reference to the two categories. It may be the preceding paragraph 22 that actually sets out what the two categories are.

MR. SHEIKH: So:

> "In Category B…"

quoting from paragraph 23:

> "…the plaintiff must prove the two ingredients of the tort independently of one another."

And the two ingredients as described in the same paragraph are first that the public officer must have engaged in deliberate and unlawful conduct in his or her capacity as a public servant, and then the second element

would be that the public officer must have been aware of both that his conduct was unlawful or was likely to harm the plaintiff.

JUSTICE: So this is, in your submission, a Category B version of this tort?

MR. SHEIKH: That's right, because Category A discusses acting for an express purpose to harm the individual. And so when we look at Category B and the element of engaged and deliberate and unlawful conduct, that is where we then cited *Anglehart* earlier -- or sorry, *Ontario (Attorney General) v. Clark* earlier, which also just cited *Odhavji* and talked about the minimum requirements for that subjective awareness, described as "subjective recklessness, or conscious disregard" to establish an element, an act in excess of the public officials powers or an exercise of power for an improper purpose.

JUSTICE: Thank you. So I think I think I distracted you, perhaps from the direction you were going, because I was interested in the answers to those questions. But --

MR. SHEIKH: No, that's quite all right.

JUSTICE: Please carry on.

MR. SHEIKH: That's quite all right. And so just quickly moving on:

> "So misfeasance may be found when a government official could have discharged his or her

public obligations, here basing the policy upon proper scientific and medical foundation and or with sufficient protection of *Charter* rights, yet willfully chose to do otherwise."

And that quote on comes from -- except for the policy portion of it comes from *Odhavji* again that we were just at, at paragraph 26 of that case.

And it's just the last sentence that begins paragraph 26 it says:

"The tort is not directed at a public officer who is unable to discharge his or her obligations because of factors beyond his or her control, but rather, a public officer who could have discharged his or her public obligations yet willfully chose to do otherwise."

So, we say discharging of those public obligations in the case of misfeasance in the Treasury Board would have been basing the policy or any decisions around COVID-19 vaccination on the proper scientific grounds and the evidence that was before the Government of Canada and Health Canada at the time that the policy was created. Yet they chose not to do that.

So turning then to the issue of the particulars that my friends say are missing in the pleading, we would say that at this preliminary stage of the claim, were as detailed and fact specific as we can be, since many of the necessary supporting facts are

within the government's knowledge and control and there's been no document production or discovery. In fact, the failure to name specific people within an organization may not result in a misfeasance claim being struck, and I just want to take you to where a court found that, and I'll just find it in our book of authorities here.

It's at tab 38, it's called *Grand River Enterprises v. The Attorney General of Canada*.

JUSTICE: Okay, yes, I'm there.

MR. SHEIKH: So if you could, please go to paragraph 60 and 61? I'm just going to get there as well.

JUSTICE: Yes, I'm there.

MR. SHEIKH: Apologize.

JUSTICE: Maybe those aren't the paragraphs.

MR. SHEIKH: Those are not the paragraphs. Paragraph 88. So reading from paragraph 88, the court --

JUSTICE: 88?

MR. SHEIKH: 88.

JUSTICE: Yes, I'm there.

MR. SHEIKH: "The court's decision in *Granite Power Corp. v. Ontario* (2004), leave to appeal refused, supports the argument that the failure to name specific people within an organization may not necessarily

result in a misfeasance claim being struck. In *Granite Power*, It was simply pled that the 'Minister and/or office and staff' had acted with misfeasance. This court concluded the claim should not be struck, even though it suffered from 'a lack of clarity and precision'…. This court held there existed a narrow window of opportunity for Granite to make out this claim of 'misfeasance' regardless of how difficult it would be to establish…."

and they.

"…should not be 'driven from the judgment seat' at [this] juncture…."

So in our view, this represents an acknowledgement that at the outset of litigation, a plaintiff may not be privy to the information about the internal workings of the organization and which particular individual or individuals within the organization may have taken or failed to take a particular action.

As support for the motion to strike, my friend raises a Federal Court of Appeal case called *Bigeagle v. Canada*, and it can be found at tab 17 of our book of authorities.

JUSTICE: Yes, I'm there.

MR. SHEIKH: In *Bigeagle*, we've reviewed the case and distinguish it as such. In

Bigeagle the claim was directed at an entire organization across Canada over an undefined period of time for general failures to implement policies. That was the nature of that misfeasance claim against the RCMP. And that can be found at paragraph 82 of the *Bigeagle* decision.

So it was extremely broad, it covered everybody and everything, and it was a general failure. So it lacked sufficient particularity. In our case, rather than *Bigeagle* in our claim, we particularize a specific government department which is responsible, where individuals could be readily identified, we identify the impugned conduct that was inconsistent with the statutory duties and circumstances and particular facts to establish or infer knowledge from the responsible individuals. And that's again, where we go to the product monographs and the studies. We submit this is more than an arguable basis upon which the plaintiffs can claim and recover against the defendants from misfeasance in public office.

So now just moving on to the arguments on leave to amend.

JUSTICE: Yes.

MR. SHEIKH: So to deny the leave to amend, the defendant must definitively show there's no scintilla of a cause of action possible arising from the claim. As explained above, the claim concerns the process by which the Treasury Board enacted the policy.

Such a cause of action falls, or at least, at a minimum, arguably falls outside the parameters of Section 208 and thus not is not -- the court's jurisdictions not outed by Section 236.

And again, it has not been considered in any of the cases cited by the defendant. And this is again referring to 2(d). And we submit that, in and of itself, without that, this motion should strike should not be granted.

Further as to misfeasance to the extent that that my friends submit and this court finds any particulars lacking, we have submitted an appendix with proposed amendments that we think would sufficiently betrust the claim and fill in additional gaps. I won't go through all of the amendments now. They're in our written submissions and are available for the court to review.

JUSTICE: I do have a question about those. So you do have them in front of you?

MR. SHEIKH: I do.

JUSTICE: So looking at, I guess it's 1, 2, 3, 4, 5, 6, so the question about the fifth bullet, but I'll come back to that. On the sixth bullet first, the proposed new allegation would be the Treasury Board's objective in enacting the policy was to reduce the severity, infection rates and transmission of COVID 19 among federally regulated employees. The Treasury Board knew, or ought to have known, that these goals

were not materially furthered by the policy and/or the policy was not necessary to meet these goals. The policy was not supported by scientific evidence and the policy was not proportionate to the infringement of plaintiffs and class members rates and interests.

So what I'm -- my question focuses on the fact that here you're referencing not only the transmission of COVID, but also the reduction of the severity and -- the severity of COVID and infection rates. And am I correct in thinking that those are new allegations that were not found in the original pleading?

MR. SHEIKH: I don't think they were particularized sufficiently. We added this to add additional particularity. But the claim that the vaccinations didn't prevent transmission, or we say didn't prevent transmission, never purported to, which would go directly to reduction of infection rates, or any data which would substantiate a reduction of severity of COVID 19 is non-existent. We would submit to this day is non-existent because to establish vaccines effect on severity of COVID 19, you would need two individuals who got COVID who were virtually identical, and you would determine which -- and one is vaccinated one is not. And then you would get to determine the severity of the impact.

There's not really any other way to do that, or at least there's no data that we've seen, or

nothing that the government's put forward that directly relates to how it impacts severity. They said it. They've colloquially spoke about it, but we haven't seen any data to establish that. We rely on the product monographs in terms of what the vaccines could be purported it to do, and then we require -- rely on the safety studies in terms of the adverse effects.

JUSTICE: But are there any material facts alleged in relation to this? My point is that in making the allegations related to transmission and I guess potential adverse effects, you rely upon the product monographs and other materials that you that you reference in your statement of claim, effectively to argue that the government should have known that (a) there would be adverse effects, and that transmission would not be -- rates of transmission would not be helped.

I don't see that you've identified anything comparable related to severity or infection rates.

MR. SHEIKH: Well, I would submit it's a clarification when we talk about efficacy of the vaccinations in terms of transmission. And it didn't prevent transmission. That is, that speaks to infection rates in my mind. There isn't a separate pleading we've proposed or have that specifically points to data on community infection rates with the vaccine, simply because our assertion is that it doesn't prevent

infection of COVID 19, doesn't prevent transmission of COVID 19, and that's based on our review of the product monographs.

JUSTICE: So you would rely on the product monographs --

MR. SHEIKH: We do.

JUSTICE: -- as the material facts related to these new allegations as well.

MR. SHEIKH: We would, yeah, it would be those paragraphs.

JUSTICE: I had a question about the previous bullet too. I didn't really understand its language, so I'll read that one out.

> "Specifically the Treasury Board knew or ought to have known that the product monographs for the approved vaccines only include information as to the absolute effectiveness of COVID 19 vaccination. Treasury Board knew, or ought to have known that information on the relative effectiveness of a vaccine was more relevant as to whether vaccination would prevent infection transmission or the severity of COVID 19 infection."

I didn't understand that paragraph. The difference between --

MR. SHEIKH: Absolute and relative. I'm going I'm going to go into it. The first thing I want to do is just correct the typo. So they're

interchanged. So only include information about relative effectiveness of the vaccination, and that information on absolute effectiveness was more relevant. So those two words need to be interchanged, and I apologize for that error.

In our review of the data and stats that were submitted on the limited clinical studies that were done, and we referenced those clinical studies in the pleading with respect to adverse events, there -- and this is a little difficult to explain, and it's not artfully pled in the pleading. But again, this would require a good stats expert as the claim proceeds to be able to properly inform the court of this, of this concept, but in basic form, as best as I can, in my novice ability put it forward to you, is this: If you give -- I'm just going to make up a quick scenario. I apologize to everybody, but it's completely made up. None of these numbers are real.

If you give ten people in a control group the, the COVID vaccine, and then you have ten people who don't have the COVID vaccine, and of the control group, two people get COVID. And in the non-control groups, so that's the vaccinated group, two people get COVID, and the non-control group, let's say four people got COVID. Based on the difference between two and four on a relative basis, you're going to determine that it's highly effective at doing its job, the vaccine.

The reality, in an absolute sense, is

that eight people in your control group didn't get COVID, and six people in the non-vaccinated didn't get COVID. That's the absolute statistical analysis. On an absolute basis, the efficacy number looks a lot smaller.

So when the government's out there and Pfizer is out there saying this is 98 percent effective, their studies reflected a statistical analysis on a relative basis, whereas studies on drugs and other product monographs, pick Tylenol, pick measles, rubella vaccines, whatever, any of those studies are based on absolute effectiveness of drugs. That's the standard, is -- that's what you report on.

By reporting relative effectiveness, you've essentially inflated your numbers and argued a greater efficacy than was even there in the first place for this particular crowd.

So that's the difference between absolute and relative efficacy. Now there are real numbers in in the data, and in fact, we do have an expert on this that that we have retained, that deals with these issues, and we have an affidavit from him that we were intending to adduce with the application for certification, which is the proper place for that to provide some basis in fact for this assertion. But that's what it is.

JUSTICE: Are there any material facts in support of any of that pleaded, either in the proposed amended pleading or in the original pleading? Do the product monographs, or any of the information

around adverse events speak to any of this?

MR. SHEIKH: No, no, there are not. And so that would be an additional amendment that we would propose, because it could be pleaded. It's not far.

JUSTICE: Okay, those are my questions on the proposed new pleading. Any other any other submissions before we break for lunch?

MR. SHEIKH: There is one. I'm questioning whether or not even it's appropriate to raise it because you don't have the case in front of you. *Adelberg* in the Federal Court of Appeal decision, referenced a case called *Rehibi v. Deputy Head (Department of Employment and Social Development)*. And that's a 2024 Federal Public Service labor relations case that dealt with the COVID policy. And in reviewing that part of Adelberg's decision, we had an occasion to turn our minds to what was happening in that Public Labor Relations Board decision, and the analysis that that decision provided on the *Charter*, on the remedial powers of the board, and all of this falls under the issue of adjudication.

Now, *Adelberg* correctly said, and the case law supports, and there's numerous case law that the 208 right to grieve is independent of the right to adjudicate the grievance. So we're not arguing that that was the case.

What we purport to show if, if we're

allowed or later we can make submissions and our friends can reply on this point, because I think it's a broader point that's come up in our review of the material and preparation for today. But, but in *Rehibi* be there's a few things that go on when the Federal Public Service reviews the COVID 19 vaccination policy. And I'll put them not as submissions, but as questions for further submissions in writing that my friends have a right to reply to, because I don't want to -- there's too much to surprise them with, and it's unfair to do that. But what I'd like to highlight from *Rehibi* that was quoted in *Adelberg*, was the proposition that the Board found that the COVID 19 policy was administrative.

Now, the reason that that's important is because an individual grievance cannot be adjudicated to the grievance process or have jurisdiction conferred to an adjudicator unless that grievance is related to a disciplinary action resulting in termination, demotion, suspension or financial penalty. And so when the Board did their analysis in *Rehibi*, in that case the, let's call them the plaintiff's applicants, argued that this was disguised discipline, that the leave without pay was discipline, et cetera, et cetera. The board ultimately concluded it wasn't discipline, and therefore it was administrative, and as such, they wouldn't have jurisdiction to advance the claim or to adjudicate the claim.

And I'll get to why that's important. I

just want to tie in a couple of points with that. In further discussion in *Rehibi* they noted that there isn't an independent residual jurisdiction of the Public Service Labor Relations Board to review *Charter* claims absent an underlying grievance that they can adjudicate. So you couldn't just take a 208 question simply on the *Charter* without -- a grievance under 208 simply on the *Charter* without an underlying disciplinary action that you would be able to make out that would then allow for adjudication.

So essentially they would say, look, the policy is not discipline, it's administrative. So there might be a *Charter* question here, but we can adjudicate. So effectively, where that comes to, based on that 2024, *Rehibi* decision, is if the plaintiffs in this case try and take, let's say, a 2(d) challenge, yes, in the event — and we don't agree that they can, but let's go with the argument for a moment that they can — in the event that they can take that challenge to 208 and it becomes a grievance, the possibility of any remedy of that grievance is gone. There's no way to remedy it if the underlying policy is determined to be administrative. There's no way for the Board to use its jurisdiction to simply answer a *Charter* question outside of that conduct that it gets under this adjudication through having a grievance that has a disciplinary component to it.

And so when we look at residual jurisdiction of the court, and we look at whether it's

completely ousted or whether a discretion of the court can be used in circumstances where the grievance process, I believe is the terminology, cannot produce a remedy, then the court could exercise its discretion, and we would argue that that at the very least we'd be allowed to make supplemental submissions on this point, and our friends respond on this point, because it's fairly material. It wasn't in our initial written submissions. It came up later, and again, I don't even want it considered if it's unfair to my friends. That's not the goal.

JUSTICE: Which paragraph of *Adelberg?*

MR. SHEIKH: Paragraph 55 of *Adelberg* the court notes, kind of down closer to the middle, starting with:

> "That said, the [Federal Public Sector Labor Relations Board] recently held in *Rehibi v. Deputy Head*…that a grievance challenging the application of the [Treasury Board] Policy…"

which is the same policy we're all discussing today,

> "…could not be referred to adjudication due to the fact that only a subset of matters that may be grieved under the [*Public Service Labor Relations Act*] may be referred to adjudication…"

And then, when you read that case as to what can be referred to adjudication under 209, that's where my submissions around the disciplinary nature come

in, and *Rehibi* found that the policy was not disciplinary despite the outcomes. And I can go through all the arguments, but it found it wasn't disciplinary, but rather administrative and therefore there was no ability to refer to adjudication. But at the same time, it did this *Charter* discussion. It discussed whether it can independently decide *Charter* claims without having conduct of the underlying grievance, which would be conferred by 209, which is the disciplinary section, and it found it could not.

JUSTICE: Okay. Ms. Hucal, if I could hear from you just on non-process. So your friend is raising an authority that hadn't been agued previously and is recognizing that it hadn't been argued previously, that you haven't had a chance to reflect on the submissions that he's making now on that authority. What are your thoughts on -- from a process perspective?

MS. HUCAL: Well, I don't think it changes anything. If you go to the second -- or to paragraph 56, the bar in section 236 applies to matters that may be grieved, as opposed to those that may be adjudicated. I mean we're talking apples and oranges. This is about can you send it to adjudication, not whether it's grievable. Certain matters are not grievable. And in terms of raising *Charter*, his -- Ms. Payne in her grievance, she says, "I'm submitting a grievance based on me being placed on leave without pay as an unreasonable consequence to non-compliance." I

mean that's the basis she raises *Charter* if this went to third level, so.

JUSTICE: So it sounds like you have a grasp of the argument.

MS. HUCAL: I don't need more time.

JUSTICE: Okay. That was really my question from a process perspective. So here's what I'm going to suggest we do. Did you have a sense of how long your reply will likely be, Ms. Hucal?

MS. HUCAL: Do you have specific questions or concerns that you want me to address on reply?

JUSTICE: I will. So certainly your friend, he raised these arguments in his written submissions as well, but I think he elaborated upon them today. The principal point that he emphasized, perhaps in more detail than in the written submissions, is to the effect that a *Charter* 2(d) claim, being a process claim, is not actually grievable. It doesn't fall within 208.

MS. HUCAL: Okay.

JUSTICE: So I certainly am going to want to hear reply on that.

MS. HUCAL: Yes.

MR. SHEIKH: And I did make a note that he referenced the *Alberta* decision. My note was paragraph 26 --

MS. HUCAL: Oh yes, about union rights

versus --

JUSTICE: About the essential nature, and so I'll want to hear from you on that.

MS. HUCAL: Yes. Yes.

JUSTICE: And I'll be interested in your response or your reply to the *Rehibi* arguments, since those weren't raised before me prior to now. I'm inclined to suggest that we break for lunch, rather than a brief break and have you reply, to give you time to, you know, to source that decision and then, and then come back. But if you're ready to go, I'm also happy to break for 15 minutes and begin.

MS. HUCAL: I think -- well, I'm not sure about the fatigue on the people on the other side, I'm happy to break for 15 and come back.

JUSTICE: I guess the question will be how long? Because the fatigue point is a fair one. If you were going to be 15 or 20 minutes, I'd be inclined to suggest we press on. If it's going to be longer than that, then maybe it is time, we should take a lunch break.

MS. HUCAL: I think I should be able to do it in close to 20.

JUSTICE: Okay. Then that really only runs us another half hour and then we can be concluded for the day.

MS. HUCAL: I think, yes.

JUSTICE: Yeah. Madam Registrar, does

that -- are you okay if we were to do that? Okay.

Then let's break for -- I'll say we'll return at, let's say, 20 after the hour. Okay? So roughly 15 minutes. Then we'll do reply. And I'd be grateful if somebody could get me a copy of the *Rehibi* case in the meantime, so that I have the benefit of that when I'm receiving your submissions.

Mr. --

MR. SHEIKH: It's on me, happy to do it.

JUSTICE: You're able to do that? Okay. Will you email it or will you have a hard copy? What's the --

MR. SHEIKH: I don't have access to a printer, but I can email it. Is there a particular email address it should be sent to?

JUSTICE: Ms. Stinson, what's the -- do you have the ability to receive something and send that to me?

Okay. Ms. Stinson is a contractor and doesn't have access to the facilities we normally have. For this purpose, so that we're being practical and efficient, I'll give you my email address with court, which is Richard.Southcott@FCT — so that's foxtrot, Charlie, tango — dash CF — Charlie, Alpha -- oh, sorry, Charlie, Fox — FCT-CF.ca. I need lunch obviously before I can work with the military alphabet.

MR. SHEIKH: So just to repeat, sir,

Richard Southcott at FCT.CF.ca?

JUSTICE: FCT-CF.ca. It's a cumbersome email address. And there's a dot between the "Richard" and the "Southcott".

MR. SHEIKH: Yes.

JUSTICE: Okay.

MR. SHEIKH: Absolutely.

And I can email it to you at the same time as well?

MS. HUCAL: We have a copy.

MR. SHEIKH: You have a copy? Okay.

JUSTICE: Okay, very good.

MR. SHEIKH: I'll still CC you on correspondence just in case.

MS. HUCAL: Yeah, thank you.

JUSTICE: Okay, we'll break until 20 after the hour and I'll look forward to your reply submissions, Ms. Hucal. Thank you.

MS. HUCAL: How long? 25?

JUSTICE: Twenty-five, absolutely.

MS. HUCAL: Yes. Yeah. Thank you.

THE REGISTRAR: Court is now in recess for 25 minutes.

(PROCEEDINGS ADJOURNED AT 1:06 P.M.)

(PROCEEDINGS RESUMED AT 1:27 P.M.)

JUSTICE: Please be seated everyone. Bear with me for a moment.

Mr. Sheikh, thank you for emailing me the

decision, the *Rehibi* decision. It was received successfully.

MR. SHEIKH: Mr. Justice, may just correct one thing before we continue? And I apologize, this is just I didn't make the fulsome argument that involved all of the factors in *Rehibi*. I don't want to mislead the court.

SUBMISSIONS BY MR. SHEIKH (Continued):

In *Rehibi* the court cited case law around the bar to independently considering *Charter* arguments without the underlying jurisdiction under 208. The court then went on to say that in exceptional cases, it could analyze an infringement of *Charter* rights and it seemed to imply that that meant in administrative actions. The court then looked at section 7 of the *Charter* as one of those exceptions to the cases. It's unclear as to whether that was an overruling of the existing Federal Court case law that was referred to in the case or whether this was a specific carve-out as one of those unique exceptions.

So when I referred to the rule that the court had some jurisdiction, I was referring to the federal case that was quoted in *Rehibi* as this was the rule. And I believe that I have the exact quote of what I was looking at.

JUSTICE: Which paragraph in *Rehibi* is that?

MR. SHEIKH: Paragraph 307 and 308.

JUSTICE: Okay.

MR. SHEIKH: So under -- sorry?

JUSTICE: Did you wish to say more or --

MR. SHEIKH: Yeah, I just wanted to make sure I clarify what I was quoting.

JUSTICE: Okay.

MR. SHEIKH: So the respondent in that case submitted that the Board didn't have jurisdiction to consider the *Charter* arguments before concluding the impugned action was indeed disguised as disciplinary action. It also submitted the Board had no residual jurisdiction. And then 308 says:

> "It is clearly established in law that the Board can resolve constitutional questions that are related to matters of which it is properly seized…"

And that's, again, referring to being able to adjudicate the grievance under the discipline issue. But then the Board goes on in a very lengthy analysis to talk about exception, which I'm not sure if it's created or if it's a one-off, and does a section 7 analysis. I didn't want to mislead. That is all in the decision. It's been sent to counsel and to the court. And so to the extent that I needed to clarify, I just wanted to add that.

JUSTICE: Okay, thank you, Mr. Sheikh. I appreciate that.

Ms. Hucal. And if you need a moment to look at the paragraphs, that --

REPLY BY MS. HUCAL:

MS. HUCAL: No, thank you. So before the break, you identified three areas that you wished me to address: process, the *AUPE v. Alta* decision and *Rehibi*. I'm going to begin with process.

I've done -- in fact, I think most of my practice has been directed at section 2(d). So *Health Services* was the first decision of the Supreme Court of Canada that recognized that freedom of association under 2(d) protected a right to a process of collective bargaining. I mean, there's a lot going on in *Health Services*, but that's sufficient.

B.C. Teachers', I also had the pleasure of being involved in that at one point, so I remember this very well. But *B.C. Teachers'* was a long, contentious process of collective bargaining that went back and forth, back and forth, back and forth. Ultimately, the province decided to introduce legislation. And the legislation that was introduced revoked either a term or terms in a collective agreement and then prohibited those matters from being collectively bargained for a particular period of time.

At first instance, the court found that in ripping open a collective agreement and eliminating terms that had been subject to a constitutionally protected process, that that constituted a violation of

the 2(d) right. The B.C. Court of Appeal said before government introduced the legislation, they spoke to the union or advised the union, and that was sufficient for consultation. Sort of something similar had happened in *Health Services*. It wasn't found sufficient in *Health Services*. B.C. Court of Appeal said yes. Supreme Court of Canada said no. They rendered their decision from the bench and said, no, it's wrong for the reasons stated by the trial judge.

JUSTICE: That was the one paragraph that I had mentioned earlier. Is this the one where there's just a one paragraph decision?

MS. HUCAL: Yeah, yes. I remember sitting there. They came back so fast and said yes. So we were trying to -- the position we were taking is that kind of consultation was sufficient for what was referred. It was found not to be. The point here is, in all of those instances, what they are talking about are terms that are subject to collective bargaining. And where there is a process where these terms have been bargained, you have to respect that process, otherwise you're in violation of 2(d).

Here, these terms were never part of the collective agreement. These are terms and conditions that Treasury Board has the authority to apply. And it's under Section 11(1) of the *Financial Administration Act* which is in our authorities at, I think it's tab 2.

So at 11.1(1)(f), the Treasury Board may:

"…establish policies or issue directives respecting the exercise of the powers granted by this Act to deputy heads in the core public administration and the reporting by those deputy heads in respect of the exercise of those powers…"

That's what Treasury Board gets to do. That's not something that the employees bargain. And I do not have this case in our authorities, but I will give you the reference. It's interpreting that provision. It's *AGC v. Public Service Alliance of Canada*, 2017 FCA 28

JUSTICE: Sorry. FCA 28?

MS. HUCAL: Sorry, 208. 2-0-8.

JUSTICE: Okay.

MS. HUCAL: At paragraph 14:

"Parliament has recognized the Treasury board's right to control and manage its workplace…"

It then references 11 and 7 of the *Financial Administration Act*.

"The employer's discretion in this respect can only be restricted by statute or provision of a collective agreement…"

Here there is no provision of the collective agreement referenced because there is no such thing. Treasury Board was acting within its powers pursuant to those sections.

Those are my submissions on the point of

process.

JUSTICE: So just before we leave that, your friend argues that there are no authorities that speak to whether or not a grievance can be raised and appropriately considered in connection with a section 2(b), argument.

MS. HUCAL: 2(d).

JUSTICE: Sorry, thank you. 2(d). 2 delta. Do you have any comments on that? Are there any authorities other than those to which, those which you emphasized already today, which speak to the point?

MS. HUCAL: I can't think -- I'm unaware of any authorities, but I also cannot think of the nature of the grievance that would raise a 2(d) argument because of what the scope of what that right protects, which is a process.

So I presume that if three unrepresented people came forward to bargain with Treasury Board and they wanted to raise some argument about that and they otherwise recovered by 208, they could come forward and bring those arguments. But because, I mean, I think almost all the core public administration, except for excluded employees, are covered by collective agreements, that's a theoretical proposition.

JUSTICE: Thank you. So you're now moving to the *Alberta* case?

MS. HUCAL: Yes, just -- I think that's it on that point.

So the *Alberta* case, there's no dispute that *Charter* rights do not belong to a corporation, they don't belong to a union, they belong to the employee. However, when those employees are members of a union, the union represents the interests of the employee. And so with regards to this notion that this was a unilateral imposition of a term in the collective agreement, if that was the case, it would be the union, on behalf of the employees who would bring it forward, not an individual member.

And just as referenced to back up that proposition, that is why in *B.C. Teachers* there was a revocation of a term that had been previously bargained. It was the B.C. Teachers Federation that brought that argument forward.

In *Health Services*, it was a number of unions in the health services area that brought the complaint forward, challenging the legislation. There was -- around 2008, there was a number of pieces of legislation which imposed wage restraint across the federal public service, and in those cases where that -- that was said to be a limit. So when you were bargaining collectively, you could only negotiate a wage increase within the limit set by statute. So if the statute said 2 percent you couldn't bargain more than that. So that was challenged, but it was all by Public Service Alliance, the Professional Institute, the Association of Justice Council. It's not something

where you're represented that you bring on an individual basis. So while the union is representing the employee, the process is one of collective bargaining. So it's typically brought by a union.

Now in the specific case of *AUPE v. Alberta*, what was factually at issue is that these were a number of unrepresented individuals — I think they were excluded — and the union wanted to represent them, and by definition, excluded employees aren't members of the union, so they couldn't represent them.

And then finally, about the reference to *Rehibi* in *Adelberg*. So at paragraph 55 of that decision --

JUSTICE: That's 55 of *Adelberg*?

MS. HUCAL: Yes, yeah. I'm not intending to take you to *Rehibi*. I think *Rehibi* is actually a red herring. So it just speaks about who was able to grieve under the FPSLRA other than the RCMP. And then they say, they reference -- the court references *Rehibi* and says that a grievance challenging the application of policy could not be referred to adjudication due to the fact that only a subset of matters could be grieved.

But that's not the question. The question isn't, if I grieve, does it go to adjudication? The question is, can I grieve? And so there's certain matters that go to the final level and they don't get referred. That doesn't matter. And so that's what's at

issue there, that certain matters can't be referred.

And in terms of, I know my friend got into a discussion about does *Rehibi* mean you can raise Charter? Can you not raise Charter? I mean, that's beside the point. There's no facts in this case that anybody couldn't -- no facts pled that anybody -- that Payne or the other two rep plaintiffs couldn't bring a grievance. In fact, in Ms. Payne's personal grievance, which is at -- it's in the Vézina affidavit, the last exhibit. And there's a copy of the Harvey grievance as well but --

JUSTICE: Last exhibit, so this is?

MS. HUCAL: Sorry, it's page -- Exhibit --. Do you have that open?

JUSTICE: Is it Exhibit D you're taking me to?

MS. HUCAL: C.

JUSTICE: Exhibit C. Okay, yes, I'm in Exhibit C.

MS. HUCAL: Okay and if you go to the last page, paragraph 45. I just take your attention to 45 because there Ms. Payne lists all of the recourse she is seeking with relation to her concerns or issues with the COVID policy.

So a disclosure -- like she says,

> "I have the following open and active investigations: a disclosure to the Office of the Public Sector Integrity Commissioner of

Canada; a right to refuse dangerous unsafe work; appealing the level 3 decision to not investigate in Federal Court; an accommodation;…"

She's waiting on a decision,

"…a harassment disclosure against my human resource rep;…"

et cetera, and that's not -- that's in addition to the grievance document within which she lists all of that.

So there is clearly alternative recourse available, which two of the rep plaintiffs have taken advantage of. All of which underlines, regardless of what you call this, it is a challenge to that policy that could have been pursued by way of grievance.

So there's no evidence that they could not grieve or that this matter couldn't have been considered by the PSLRB.

The are my submissions.

JUSTICE: Thank you, Ms. Hucal. Thank you to both of you. Thank you to everyone who contributed to the preparation of the submissions today. I'm grateful for your very, very capable and efficient submissions. As you probably anticipate my decisions reserved, but I'll get it to you just as quickly as I can, and then I look forward to seeing you on this or other matters as we proceed. Thank you very much.

(PROCEEDINGS ADJOURNED AT 3:41 P.M.)

I HEREBY CERTIFY THAT THE FORGOING
is a true and accurate transcript of
the recording provided to me, to the
best of my skill and ability.

D.A. Bemister, Court Reporter

February 19, 2025

Court File No.

FEDERAL COURT
PROPOSED CLASS PROCEEDING

B E T W E E N:

(Court Seal)

STACEY HELENA PAYNE, JOHN HARVEY and LUCAS DIAZ MOLARO

Plaintiffs

and

HIS MAJESTY THE KING

Defendant

STATEMENT OF CLAIM

TO THE DEFENDANT: HIS MAJESTY THE KING

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a solicitor acting for you are required to prepare a statement of defence in Form 171B prescribed by the *Federal Courts Rules*, serve it on the plaintiff's solicitor or, if the plaintiff does not have a solicitor, serve it on the plaintiff, and file it, with proof of service, at a local office of this Court

WITHIN 30 DAYS after the day on which this statement of claim is served on you, if you are served in Canada or the United States; or

WITHIN 60 DAYS after the day on which this statement of claim is served on you, if you are served outside Canada and the United States.

TEN ADDITIONAL DAYS are provided for the filing and service of the statement of defence if you or a solicitor acting for you serves and files a notice of intention to respond in Form 204.1 prescribed by the *Federal Courts Rules*.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO DEFEND THIS PROCEEDING, judgment may be given against you in your absence and without further notice to you.

October 4, 2023

Issued by:
Address of local office: Pacific Centre
P.O. Box 10065
701 West Georgia Street
Vancouver BC V7Y 1B6

TO: His Majesty the King
Office of the Deputy Attorney General of Canada
284 Wellington Street
Ottawa ON K1A 0H8

CLAIM

RELIEF SOUGHT

1. The Plaintiffs, Stacey Helena Payne, John Harvey, and Lucas Diaz Molaro, claim on their own behalf and on behalf of a proposed class of unionized employees of the Federal Government, who have been subjected to the *Policy on COVID-19 Vaccination for the Core Public Administration Including the Royal Canadian Mounted Police*, and as a result have had a unilateral term and condition of employment inserted into their employment contracts, leading to a breach of their employment contracts. ("Class" or "Class Members", to be further defined in the Plaintiffs' application for certification):

    a. An order certifying this action as a class proceeding pursuant to Rules 334.16 and 334.17 of the Federal Court Rules, SOR/98-106;

    b. An order pursuant to Rules 334.12, 334.16 and 334.17 of the Federal Court Rules appointing the Plaintiffs, or, alternatively, one of the Plaintiffs, as the representative Plaintiff(s) for the Class;

    c. General damages plus damages equal to the cost of administering the plan of distribution;

    d. Special damages in an amount to be determined, including but not limited to past or future loss of income, medical expenses and out of pocket expenses;

    e. General damages for Misfeasance in Public Office;

    f. Exemplary and punitive damages for Misfeasance in Public Office;

g. Damages pursuant to the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c. 11, s. 24(1) (the "Charter");

h. A declaration that the Treasury Boards conduct in issuing the *Policy on COVID-19 Vaccination for the Core Public Administration Including the Royal Canadian Mounted Police* violates the Plaintiffs' and the Class Members' rights to freedom of association to s.2(d) of the Charter, and this violation is not demonstrably justifiable under section 1 of the *Charter;*

i. Pre-judgment and post-judgment interest;

n. Costs; and

o. Such further and other relief as this Honourable Court may deem just.

Nature of this Action

1. On October 6, 2021, *pursuant ss. 7 and 11.1 of the Financial Administration Act*, the Treasury Board of Canada ("Treasury Board") issued the *Policy on COVID-19 Vaccination for the Core Public Administration Including the Royal Canadian Mounted Police* "RCMP") ("the Policy").

2. The Policy required all Deputy Heads of Core Public Administration and the RCMP to implement the Policy on departments listed under *schedules I and*

IV of the Financial Administration Act on employees as defined under as defined in *sections 7 and 11 of the Financial Administration Act* and included the following regardless of whether they work on-site or telework (full time or part-time):

a. Indeterminate employees;
b. Determinate employees;
c. Members and reservists of the Royal Canadian Mounted Police;
d. Internationally based public service employees;
e. Casual workers;
f. Students;
g. Visiting scientists working in Government of Canada laboratories;
h. Cadets, enrolled in the Royal Canadian Mounted Police Cadet Training Program, and other cadets/trainees (ab initio) enrolled in any federal public service training college or academy; and
i. Interchange Canada participants and volunteers.

(the "Federal Public Service Vaccination Mandate").

3. The Plaintiffs plead that the Policy violated the Plaintiffs' and Class Members' rights under s. 2d of the *Charter* and was not saved by s. 1, such pleading is further particularized below.

4. The Plaintiffs plead that in issuing the Policy, the Treasury Board committed the tortious conduct of Misfeasance in Public Office towards the Plaintiffs' and Class Members', such pleading is further particularized below.

The Parties and the Class

5. The Plaintiff Stacey Helena Payne ("Payne") had been an employee of the Department of National Defence ("DND") as a graphic design technician since 2018 and maintained an exemplary and unblemished record of employment until her suspension from employment on December 15, 2021.

Payne was suspended pursuant to the Policy. Payne was a member of the Public Service Alliance of Canada ("PSAC") and at all material times her employment was governed by the PSAC Technical Services Agreement between PSAC and Treasury Board. Payne is a resident of New Brunswick.

6. The Plaintiff John Harvey ("Harvey") had been an employee with Correctional Service Canada ("Corrections") serving as Corrections Officer since 2008 and maintained an exemplary and unblemished record of employment until his suspension on March 11, 2022. Harvey was suspended pursuant to the Policy. Harvey is a member of the Union of Canadian Correctional Officers ("UCCO") and at all material times his employment was governed by the UCCO- Treasury Board collective agreement. Harvey is a resident of Saskatchewan.

7. The Plaintiff Lucas Diaz Molaro ("Molaro") was an employee of the Federal Economic Development Agency for Southern Ontario ("FEDA") and served as Monitoring and Verification Officer. Molaro has been an employee of FEDA since 2019 and maintained an exemplary and unblemished record until his resignation October 25, 2021. Molaro resigned pursuant to the Policy. Molaro was a member of the Professional Institute of the Public Service of Canada ("PIPSC") and at all material times his employment was governed by the PIPSC- Treasury Board collective agreement. Molaro is a resident of Ontario.

8. The Class (to be defined by the Court) is intended to include all existing unionized employees and all persons hired within the core public administration of the Federal public service and the RCMP during the Class Period who were either subject to or subjected to discipline, including but not limited to suspension of employment and termination, pursuant to the Policy as a result of failing to disclose their vaccination status or failing to become vaccinated ("Class Members"). The Class Period is October 6, 2021, (when

the *Policy* came into force) to the date this action is certified as a class proceeding.

9. The Defendant, His Majesty the King ("Canada"), is liable for the acts, omissions, negligence and malfeasance of the employees, agents and management of Treasury Board, pursuant to the *Crown Liability and Proceedings Act*, R.S.C. 1985, c C-50.

Standing

10. The Plaintiffs and Class Members assert both private and public interest standing to bring this claim.

11. The Plaintiffs and Class Members have private interest standing because they are directly affected by the conduct of the Treasury Board in issuing the Policy and have been subjected to ensuing harm as a result of such conduct.

12. The Plaintiffs and Class Members also have public interest standing. They raise a serious justifiable issue of public importance respecting the constitutionality of the Policy which has created, contributed to, and sustained a deprivation of individuals' rights guaranteed under the Charter, s. 2d.

13. The Plaintiffs and Class Members have a real stake in the Treasury Boards' conduct and are both directly impacted and genuinely interested in the resolution of this claim.

14. This claim advances a reasonable and effective method of bringing the issues before the court in all relevant circumstances. As a result of the conduct of the Treasury Board, including but not limited to the enactment of the Vaccine Policy which was imposed as a contractual term within their employment agreement, impacted many individuals as a result, which included a breach to their employment contract and their Charter rights were infringed. These abhorrent acts committed by the Treasury Board also impacted the Plaintiff

and the Class's resources to bring forward such a claim.

Background on the Policy

15. On October 6, 2021, pursuant *to ss. 7 and 11.1 of the Financial Administration Act*, the Treasury Board issued the *Policy.*

16. The stated objectives of the Policy were, inter alia:

    a. "To take every precaution reasonable, in the circumstances, for the protection of the health and safety of employees. Vaccination is a key element in the protection of employees against COVID-19".

    b. "To improve the vaccination rate across Canada of employees in the core public administration through COVID-19 vaccination".

    c. "Given that operational requirements may include ad hoc onsite presence, all employees, including those working remotely and teleworking must be fully vaccinated to protect themselves, colleagues, and clients from COVID-19."

17. According to Treasury Board the expected results of the Policy were inter alia:

    a. "All employees of the core public administration are fully vaccinated unless accommodated based on a certified medical contraindication, religion, or another prohibited ground for discrimination as defined under the *Canadian Human Rights Act"*.

18. As per the Policy, Deputy Heads of departments of core public administration and the RCMP were responsible for, inter alia:

    a. Implementing this policy within their organization.

    b. Complying with directions received from the Treasury Board, the President of Treasury Board, the Secretary of the Treasury Board and other members or the Chief Human Resources Officer regarding how

to implement this policy.

c. Ensuring that their organization complies with any oversight, systems, information requirements, or reporting established by the Chief Human Resources Officer regarding the implementation of this policy, including:

    - Collecting and storing data and information regarding vaccine attestations, testing, and testing results in any system prescribed by the Chief Human Resources Officer.

d. Collecting and storing attestation and consent forms once signed for those unable to use the Government of Canada Vaccine Attestation Tracking System (GC-VATS).

e. Conducting audits on attestations and consent forms.

19. As per the Policy, employees were responsible for inter alia:

a. Providing truthful information for the implementation of all aspects of this policy and any procedures, standards, or directives associated with this policy. Failure to do so could constitute a breach of the *Values and Ethics Code for the Public Sector* and may result in disciplinary action.

b. Disclosing their vaccination and testing status accurately as required by this policy.

c. Complying with this policy regardless of whether they work onsite, remotely, or telework.

20. As a consequence for non-compliance with the Policy, the Policy stated:

a. For employees unwilling to be fully vaccinated or to disclose their vaccination status, as per Appendix A, the employer will implement the following measures:

    - Within 2 weeks of the attestation deadline, require

employees to attend an online training session on COVID-19 vaccination;

- At 2 weeks after the attestation deadline:
    - Restrict employees' access to the workplace, off-site visits, business travel and conferences; and,
    - Place employees on administrative Leave Without Pay advising them not to report to work, or to stop working remotely, and taking the required administrative action to put them on Leave Without Pay.

Covid -19 Vaccinations – Preventing Transmission

21. The Policy mandated Covid-19 vaccinations which were approved by Health Canada.

22. Health Canada regulatory approval decisions, product reviews, product monographs, and clinical study date on the Covid-19 vaccines was at all material times available to Treasury Board to inform the development, implementation, and enforcement of the Policy.

23. At the time the Policy was enacted all Health Canada approved COVID-19 vaccinations had filed product monographs which are available to inform the public of the effects of the vaccination. There were six (6) COVID-19 vaccines available to the public in Canada. Listed below is the manufacturer with the name of vaccine in brackets.

    a. Pfizer/BioNTech ("Comirnaty")

    b. Moderna ("Spikevax")

    c. Janssen and Johnson & Johnson ("Jcovden")

    d. AstraZeneca ("Vaxsevria")

e. Medicago (“Covifenz”)

f. Novavax (“Nuvaxovid”)

Each of the COVID-19 vaccines presented above have a Product Monograph.

24. A Product Monograph is a factual, scientific document on a drug product that, devoid of promotional material, describes the properties, claims, indications, and conditions of use for the drug, and that contains any other information that may be required for optimal, safe, and effective use of the drug.

25. The Product Monograph of the Pfizer vaccine, Comirnaty, does not include any information related to the transmission of COVID-19. Prevention of viral transmission is NOT an approved indication for Comirnaty. The word ‘transmission’ or any of its correlates indicating viral conveyance to another person, does not appear in this document and therefore the Plaintiffs plead that the Defendant cannot claim Comirnaty prevents viral transmission of COVID-19 to other people.

26. The Product Monograph of Moderna’s vaccine, Spikevax does not include any information or direction on the transmission of COVID-19 and therefore the Plaintiffs plead that the Defendant cannot claim Spikevax prevents viral transmission of COVID-19 to other people.

27. The Product Monograph of VAXZEVRA™, manufactured by AstraZeneca does not include any information or direction on the transmission of COVID-19 and therefore the Plaintiffs plead that the Defendant cannot claim VAXZEVRA™ prevents viral transmission of COVID-19 to other people.

28. The Product Monograph of JCOVDEN™, manufactured by Janssen, does not include any information or direction on the transmission of COVID-19 and therefore the Plaintiffs plead that the Defendant cannot claim JCOVDEN™ prevents viral transmission of COVID-19 to other people.

29. The Product Monograph of COVIFENZ™, manufactured by Medicago does not include any information or direction on the transmission of COVID-19

and therefore the Plaintiffs plead that the Defendant cannot claim COVIFENZ™ prevents viral transmission of COVID-19 to other people.

30. The Product Monograph of NUVAXOVID™, manufactured by Novavax does not include any information or direction on the transmission of COVID-19 and therefore the Plaintiffs plead that the Defendant cannot claim NUVAXOVID™ prevents viral transmission of COVID-19 to other people.

Covid-19 Vaccination – Safety and Risk of Adverse Events

31. On or about March 29, 2021, The National Advisory Committee on Immunization (NACI), recommended immediately suspending the use of the AstraZeneca-Oxford COVID-19 vaccine in Canadians under 55.

32. On June 26, 2021, Health Canada updated the product label for the Vaxzevra vaccine manufactured by AstraZeneca. Health Canada acknowledged that potential side effect of blood clots associated with low levels of platelets following immunization.

33. On November 18, 2020, Pfizer-BioNTech released and published updated results of their Phase 3 clinical trials, for the Pfizer and BioNTech Covid-19 vaccination. ("Study 1").

34. Study 1 showed that of 18,198 individuals in the Vaccination group, 5770 individuals (26.7%) had an adverse reaction.

35. On April 1, 2021, Pfizer-BioNTech released and published updated results of their Phase 3 clinical trials. ("Study 2").

36. Study 2 showed that of 21,923 individuals in the Vaccination group 5241 individuals (23.9%) had a "related adverse event" and 127 (0.6%) suffered "any serious adverse event".

37. On or about May 1, 2021, Health Canada announced it was stopping distribution of 300,000 doses of the Johnson & Johnson, Jcovden, vaccine to provinces and territories because the regulator had learned the active ingredient was made at a Baltimore facility where an inspection raised

concerns.

38. On or about May 3, 2021 NACI recommended the Johnson & Johnson, Jcovden, shot not be given to anyone under 30 because of the risk of extremely rare blood clots combined with low platelets, a syndrome dubbed vaccine-induced immune thrombotic thrombocytopenia (VITT).

39. Moderna submitted results of one phase III randomized trial in support of the emergency use authorization for their vaccines for use in adults. The Moderna trial exhibited a 6% higher risk of serious adverse events in vaccinated individuals compared to the placebo group. 136 per 10,000 versus 129 per 10,000 – risk difference 7.1 per cent per 10,000.

40. In the Moderna trial Serious Adverse Events of Interests ("AESI") showed 87 AESI (57.3 per 10,000) were reported in the vaccine group and 64 (42.2 per 10,000) in the placebo group, resulting in a 36% higher risk of serious AESI's.

41. The Medicago Covifenz COVID-19 vaccine was authorized on February 24, 2022, for use in Canada under the *Food and Drug Regulations*, however this vaccine was cancelled by the sponsor on March 31, 2023

Misfeasance in Public Office

42. The Treasury Board acting under authority of the Financial Administration Act issued and mandated implementation of the Policy. The Plaintiffs and Class Members plead that Treasury Board acted with reckless indifference or willful blindness in issuing and enforcing the Policy including:

    a. The Treasury Board had no basis in fact to justify the Policy as a measure to prevent transmission of COVID-19. As such the Plaintiffs' and Class Members plead that perpetuating the stated objective of the Policy to prevent transmission of Covid-19, Treasury Board was either reckless or willfully ignored the reality of the vaccine in exercising their authority under the Financial Administrations Act, with

foreseeable losses to the Plaintiffs' and Class Members.

b. Known and unknown potential risk of adverse events associated with the Covid-19 vaccination were either recklessly or willfully ignored and omitted by enactment and enforcement of the Policy under the Financial Administrations Act, with foreseeable losses to the Plaintiffs' and Class Members as a result of non-compliance with the *Policy*.

c. There was no long-term safety data available to the Treasury Board when enacting and enforcing the Policy on mandatory vaccinations and as such the Policy created a foreseeable and unreasonable risk of harm to the Plaintiffs' and Class Members.

d. The Plaintiffs' and Class Members plead that as a result of the Treasury Boards actions in enacting and enforcing the Policy on mandatory vaccinations, they suffered significant economic deprivation and emotional trauma and that such harm was foreseeable by the Treasury Board.

43. The Plaintiffs' and Class Members plead that the Treasury Board in exercising their statutory authority under the Financial Administrations Act committed the tort of Misfeasance in Public Office.

The Charter of Rights and Freedoms

44. The Plaintiffs' and Class Members plead that *s. 2d* of the *Charter* provides for Freedom of association which guarantees the right of employees to meaningfully associate in the pursuit of collective workplace goals, which includes a right to collective bargaining. As such Laws or state actions that prevent or deny meaningful discussion and consultation about working conditions between employees and their employer may substantially interfere with the activity of collective bargaining, as may laws that unilaterally nullify significant negotiated terms in existing collective agreements.

45. The Plaintiffs and Class Members all had freely negotiated, valid, and binding contractual employment agreements with the Treasury Board.

46. None of the Plaintiffs or Class Member contractual employment agreements called for disclosure of Covid-19 vaccination status nor mandatory Covid-19 vaccination.

47. The Plaintiffs' and Class Members plead that the Policy was a new term and condition placed upon their employment by the Treasury Board absent collective bargaining, memoranda of agreement, consideration, or consent.

48. The Plaintiffs' and Class Members plead that the imposition by Treasury Board of a new term and condition of employment absent collective bargaining, memoranda of agreement, consideration, or consent violates their protected right under s. 2d of the *Charter*.

49. The Plaintiffs' and Class Members plead that the action of the Treasury Board in imposing a new term and condition of employment absent collective bargaining, memoranda of agreement, consideration, or consent is not saved by s.1 of the *Charter* as the Treasury Board did not possesses the requisite justification based upon the objectives espoused by the Policy.

Aggravated and Punitive Damages

50. The Plaintiffs and Class Members plead that Defendants, by virtue of the conduct included in this Statement of Claim have inflicted mental and emotional distress by engaging in conduct:
    a. that constitutes conduct that is flagrant and outrageous;
    b. that was calculated to or foreseeably produced harm and produce the consequences that flowed from the Policy; and
    c. that resulted in injury to the Plaintiffs and Class members.

51. The Plaintiffs and Class Members plead that the conduct of the Defendants as outlined in this Statement of Claim demonstrates a wanton, high-handed and callous disregard for the interests of the Plaintiffs and Class Members.

This conduct merits an award of aggravated and punitive damages.

Remedies

a. The Plaintiffs and Class Members repeat the claims for relief sought set out in paragraph 1 above.

52. The Plaintiffs propose that this action be tried at the City of Vancouver, in the Province of British Columbia.

Umar A. Sheikh

October 5, 2023

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Solicitors for the Plaintiffs

I HERBY CERTIFY that the above document Is a true copy of the original *filed in* the Court on
October 6, 2023

Dated October 11, 2023
Ginette Lischenski

Digitally signed by Lischenski, Ginette
DN: cn=Lischenski, Ginette, c=CA, o=GC, ou=CAS-SATJ, email=ginette.lischenski@cas-satj.gc.ca
Date: 2023.10.11 14:35:40 -07'00'

SOR/2021-150, s. 12

Court File No.: T-2142-23

FEDERAL COURT
Proposed Class Proceeding

BETWEEN:

STACEY HELENA PAYNE, JOHN HARVEY AND LUCAS DIAZ MOLARO

Plaintiffs

and

HIS MAJESTY THE KING

Defendant

NOTICE OF MOTION
(Motion to Strike)

TAKE NOTICE THAT the Defendant will make a motion to the Federal Court on a date and time to established by the Case Management Judge, or as soon thereafter as the motion can be heard, at the Federal Court in Vancouver, British Columbia.

THE MOTION IS FOR:

i. The defendant requests that the Statement of Claim be struck in its entirety, without leave to amend, and the matter be dismissed.

ii. The respondent seeks its costs in the amount of $1500.00, payable forthwith; and,

iii. such further and other relief as counsel may request and this Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

1. The allegations set out by the plaintiffs in this claim are statute barred pursuant to s. 208 and s. 236 of the *Federal Public Sector Labour Relations Act* (*FPSLRA*). Section 236 is an explicit ouster of this Honourable Court's jurisdiction to adjudicate the matters in this proceeding.

2. Pursuant to Rule 221 of the *Federal Courts Rules* (the *"Rules"*), this Court may order that a pleading, or anything contained therein, be struck out on various enumerated grounds, including: that the pleading discloses no reasonable cause of action. Pleadings may be struck out with or without leave to amend.

3. On October 6, 2023, the Statement of Claim in the present matter was issued in Federal Court.

4. The Claim is brought by three plaintiffs who stat that they are all current or former unionized employees of the Government of Canada in the core public administration. The plaintiffs also state that they are or were unionized employees.

5. The essence of the claim relates to the Treasury Board of Canada ("Treasury Board") *Policy on Covid-19 Vaccination for the Core Public Administration Including the Royal Canadian Mounted Police* (the "Policy").

6. The Policy was a vaccination policy implemented by the Treasury Board on October 6, 2021, and was suspended on June 20, 2022.

7. The plaintiffs seek to recover under various heads of damages, and a declaration that the TB policy unjustifiably violated their *Charter* rights under section 2(d) (freedom of association). The plaintiffs allege that the vaccine requirement constituted a new unilateral term and condition of employment outside of their collective agreement, which they allege is a breach of contract. The plaintiffs also assert a claim for damages in tort for Misfeasance in Public Office.

8. The *FPSLRA* establishes a comprehensive scheme for resolving employment-related disputes in the federal public sector for employees in the core public administration and separate agencies. Section 236 states that "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."

9. Pursuant to s. 236, the procedures under the *FPSLRA* are the exclusive means for resolution of grievable employment-related disputes. The *FPSLRA* is an explicit ouster of the courts' jurisdiction. Section 236 bars the claims of all public servants who can grieve under s. 208 of the *FPSLRA*, without any exception.

10. All the plaintiffs were accorded grievance rights and the claims asserted were all grievable under the *FPSLRA* scheme. Indeed, two of the plaintiffs filed grievances in relation to the Policy. The plaintiffs are able to obtain the ultimate remedies they seek, including in respect of the *Charter* claims, through the exclusive and comprehensive grievance process of the *FPSLRA* scheme.

11. Bare conclusions without a factual basis are insufficient to support a cause of action. The requirement to plead material facts applies equally to *Charter* claims.

12. The plaintiffs asserted claim for misfeasance in public office is doomed to fail. The plaintiffs do not set out the material facts necessary to establish the tort of misfeasance in public office. Thus, the claim discloses no reasonable cause of action.

13. Allegations of misfeasance in public office must be pleaded with sufficient particulars. Broad allegations with insufficient specificity are not sufficient pleadings.

14. The Respondent relies upon the following legislation:

    a. *Federal Courts Act,* RSC, 1985, c F-7

    b. *Federal Courts Rules,* SOR/98-106

    c. *Federal Public Sector Labour Relations Act*, SC 2003, c 22, s 2

    d. *Financial Administration Act*, RSC, 1985, c F-11

THE FOLLOWING DOCUMENTARY EVIDENCE IS RELIED UPON IN SUPPORT OF THIS MOTION:

i. the Statement of Claim and proceedings taken in the within action;

ii. the Affidavit of Charles Vézina affirmed August 16, 2024; and,

iii. Such further and other material as counsel may advise and this Court may allow**.**

DATED at the City of Toronto, in the Province of Ontario this 19th day of August 2024.

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Court file No.: T-2142-23

FEDERAL COURT

BETWEEN:

STACEY HELENA PAYNE, JOHN HARVEY AND LUCAS DIAZ MOLARO

Plaintiffs

- and -

HIS MAJESTY THE KING

Defendant

AFFIDAVIT OF CHARLES VÉZINA

I, **Charles Vézina**, of the Municipality of Cantley, in the Province of Québec, SOLEMNLY AFFIRM THAT:

1. I am presently employed as the Executive Director, Labour Relations Operations, at the Office of the Chief Human Resources Officer of the Treasury Board of Canada Secretariat. I have worked in the federal public service for 24 years in a number of capacities in the field of human resources and labour relations.

2. I have personal knowledge of the facts deposed to in this affidavit except where I indicate otherwise. Where in this affidavit I state that I received information gathered by others, I confirm that I trust the accuracy of that information and believe it to be true based on the professional conduct and ability of those providing that information. Where I otherwise state my knowledge is based on information and belief, I believe the same to be true.

A. BACKGROUND – TREASURY BOARD POLICY

3. On August 13, 2021, the Government of Canada announced its intent to require all federal public servants to be vaccinated against COVID-19 as early as the end of September. The Treasury Board of Canada ("Treasury Board") is the employer for the departments and agencies identified as forming part of the Core Public Administration.[1] As such, Treasury Board is responsible for, and has the authority to establish the terms and conditions of employment for those portions of the federal public administration that form the core public administration.

4. On October 6, 2021, the Treasury Board's *Policy on COVID-19 Vaccination for the Core Public Administration Including the Royal Canadian Mounted Police* ("Treasury Board Policy"), issued pursuant to its authorities under ss. 7 and 11.1 of the *Financial Administration Act* (the "*FAA*")[2] took effect. Attached hereto, and marked as **Exhibit "A"** to this, my affidavit is a copy of the Treasury Board Policy. The Treasury Board Policy required that all employees of the core public administration had to be fully vaccinated against COVID-19 unless they could not be vaccinated due to a certified medical contraindication, religion, or any other prohibited ground of discrimination as defined in the *Canadian Human Rights Act*.[3] Employees unwilling to be fully vaccinated or to disclose their vaccination status were placed on administrative leave without pay.

5. 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." Given that operational requirements may include *ad hoc* onsite presence, the Treasury Board Policy stipulated that "all employees, including those working remotely and teleworking must be fully

[1] *Financial Administration Act*, RSC, 1985, c F-11, s. 11(1) and Schedules I, IV.
[2] *Financial Administration Act*, RSC, 1985, c F-11
[3] RSC, 1985, c H-6.

vaccinated to protect themselves, colleagues, and clients from COVID-19."

6. On June 14, 2022, the Government of Canada announced the suspension of vaccination mandates effective June 20, 2022, including the vaccination requirement for the core public administration as set out in the Treasury Board Policy. Attached hereto, and marked as **Exhibit "B"** to this, my affidavit is a copy of the Government of Canada News release titled "Suspension of the vaccine mandates for domestic travellers, transportation workers and federal employees."

7. As a result, effective June 20, 2022, federal employees of the core public administration were no longer required to be vaccinated as a condition of employment.

8. Further, as of June 20, 2022, federal public servants who were subject to administrative leave without pay because of the requirement to be vaccinated were able to resume regular work duties with pay and accommodation measures put in place under the Treasury Board Policy also came to an end.

B. EMPLOYMENT STATUS OF THE PLAINTIFFS

9. The Plaintiffs describe their place of work and the bargaining agents to which they belong in the Statement of Claim.

10. The Statement of Claim indicates that Stacey Helena Payne had been a graphic design technician since 2018 for the Department of National Defence ("DND"). The Plaintiff, John Harvey has been a Corrections Officer since 2008 with the Correctional Service Canada ("CSC"). The Plaintiff, Lucas Diaz Molaro had been a Monitoring and Verification Officer with the Federal Economic Development Agency for Southern Ontario ("FEDA") since 2019.

11. DND, CSC, and FEDA are all part of the core public administration as defined by the *Financial Administration Act* ("*FAA*").[4] DND is listed at Schedule I of the *FAA* and CSC and FEDA are listed at Schedule IV of the *FAA*.

C. RIGHT TO GRIEVE

12. The Treasury Board is the employer for the departments and agencies identified as forming part of the core public administration. As such, the Treasury Board is responsible for, and has the authority to establish the terms and conditions of employment of the federal employees who are part of the core public administration, which is to say, the Plaintiffs.

13. As employees in the core public administration, the Plaintiffs have broad rights to file grievances over a wide range of matters relating to their employment. Employees such as the Plaintiffs have the right to present a grievance, in particular if the employee feels aggrieved by the interpretation or application, in respect of the employee, of 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 as a result of any occurrence or matter affecting the employee's terms and conditions of employment (sections 208(1)(a)(i) and 208(1)(b) of the *Federal Public Sector Labour Relations Act* ("*FPSLRA*").

14. The *FPSLRA* sets out an exclusive and comprehensive scheme for resolving employment related disputes. Both unionized and non-unionized employees have the right to file a grievance under the *FPSLRA* scheme.

15. The right to grieve under section 208(1) of the *FPSLRA* is available to employees as that

[4] *Financial Administration Act*, RSC, 1985, c F-11, s. 11(1) and Schedules I, IV.

term is defined at section 206(1) of the *FPSLRA*. "Employee" means a person employed in the public service[5], subject to some exceptions. This definition of employee includes employees in the core public administration subject to the policies established by the Treasury Board.[6]

D. AVAILABLE RECOURSE MECHANISMS AND EXISTING GRIEVANCES

16. I verily believe that all the Plaintiffs are or were employees within the meaning of section 206(1) of the *FPSLRA*. As a result of their status as employees, the Plaintiffs have or could have filed a grievance in accordance with section 208(1) of the *FPSLRA* with respect to the Treasury Board Policy. More specifically:

a. I am advised by Audrey Brousseau, Acting Director, Labour Relations Operations at the DND and verily believe that Stacey Payne was an indeterminate full-time employee at DND since August 2018 and resigned in January 2023. She filed a grievance under the *FPSLRA* related to the Treasury Board Policy on or about February 22, 2022. I attached as **Exhibit "C"** a copy of the grievance. The grievance is at the third level of the grievance procedure.

b. I am advised by Kelly Connolley at CSC and verily believe that John Harvey is an indeterminate full-time CX-01 employees and that his start date was May 2008. John Harvey filed a grievance under the *FPSLRA* related to the Treasury Board Policy on or about March 28, 2022. I attach as **Exhibit "D"** a copy of the grievance. The grievance is at the third level of the grievance procedure.

[5] The public service is defined under section 2(1) of the *FPSLRA* as meaning the departments and agencies listed under Schedules I, IV, and V of the *Financial Administration Act (FAA).* This includes the Core Public Administration.
[6] See definition of "employer", *Federal Public Sector Labour Relations Act*, SC 2003, c 22, s 2, s. 2(1).

c. I am advised by Linda Nguyen, Senior Human Resources Advisor, Labour Relations at FEDA and verily believe that Lucas Diaz Molaro was an indeterminate full-time Verification and Monitoring Officer (CO-01) at FEDA since June 2019 and resigned on October 25, 2021. He did not file any grievance related to the Treasury Board Policy.

Affirmed before me at the City of Toronto, in the Province of Ontario on August 16, 2024, by Charles Vézina, at the City of Ottawa, in the Province of Ontario remotely in accordance with O. Reg. 430/20.

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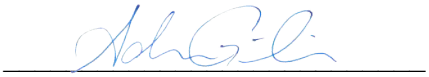
Digitally signed by Vezina, Charles
DN: C=CA, O=GC, OU=TBS-SCT, CN="Vezina, Charles"
Reason: I am the author of this document
Location:
Date: 2024.08.16 13:36:17 -04'00'
Foxit PDF Editor Version: 13.1.3

Adam Gilani (LSO#74291P)

Charles Vézina

This is Exhibit "A" referred to in the **Affidavit of Charles Vézina**
affirmed before me on the 16th day of August, 2024



Adam Gilani (LSO#74291P)
Commissioner for Taking Affidavits

Government of Canada | Gouvernement du Canada

Policy on COVID-19 Vaccination for the Core Public Administration Including the Royal Canadian Mounted Police

Note to reader

The *Policy on COVID-19 Vaccination for the Core Public Administration Including the Royal Canadian Mounted Police* is suspended, except for:

- Delegations of authorities under section 2.3.4
- Review of the need for the Policy at least every 6 months under section 4.5.2
- Treatment of key COVID-19 vaccination-related labour relations issues with organizations of the core public administration under section 5.1.2
- Maintenance and update of GC-VATS under section 5.1.5

1. Effective Date of this Policy

1.1 This policy takes effect on October 6, 2021.

2. Authorities

2.1 This policy is issued pursuant to sections 7 and 11.1 of the *Financial Administration Act*.

2.2 The Treasury Board has delegated to the President of the Treasury Board the authority to:

2.2.1 Issue, amend or repeal directives associated with this policy on the recommendation of the Secretary of the Treasury Board and the Chief Human Resources Officer, provided they are consistent with the overall intent of the Policy and there are no financial implications.

2.3 The Treasury Board has delegated authority to the Chief Human Resources Officer to:

2.3.1 Make technical amendments to this policy and related instruments.

2.3.2 Determine the effective dates of the instruments specified in paragraph 2.2.1, where the dates have not been specified by the Treasury Board or the President of the Treasury Board.

2.3.3 Issue, amend or repeal standards associated with this policy provided they are consistent with its overall intent and do not have financial implications.

2.3.4 Direct deputy heads with respect to:

2.3.4.1 Their responsibilities related to this policy.

2.3.4.2 Any oversight, systems, information requirements, or compliance and reporting in respect of those responsibilities.

2.3.4.3 Any appropriate action to address non-compliance issues.

2.3.4.4 Other measures to assess whether requirements of this policy or its supporting instruments have been met.

3. Objectives and Expected Results

3.1 The objectives of this policy are as follows:

3.1.1 To take every precaution reasonable, in the circumstances, for the protection of the health and safety of employees. Vaccination is a key element in the protection of employees against COVID-19.

3.1.2 To improve the vaccination rate across Canada of employees in the core public administration through COVID-19 vaccination.

3.1.3 Given that operational requirements may include ad hoc onsite presence, all employees, including those working remotely and teleworking must be fully vaccinated to protect themselves, colleagues, and clients from COVID-19.

3.2 The expected results of this policy are as follows:

3.2.1 All employees of the core public administration are fully vaccinated unless accommodated based on a certified medical contraindication, religion, or another prohibited ground for discrimination as defined under the *Canadian Human Rights Act*.

3.2.2 All organizations within the core public administration monitor implementation of this policy and report on its implementation to the Office of the Chief Human Resources Officer.

3.2.3 Personal information is only created, collected, retained, used, disclosed, and disposed of in a manner that respects the provisions of the *Privacy Act* and other applicable legislation.

4. Requirements

Deputy Heads

4.1 Deputy heads are responsible for the following:

Implementation

4.1.1 Implementing this policy within their organization.

4.1.2 Complying with direction received from the President of the Treasury Board, the Secretary of the Treasury Board, or the Chief Human Resources Officer regarding how to implement this policy.

4.1.3 Ensuring that their organization complies with any oversight, systems, information requirements, or reporting established by the Chief Human Resources Officer regarding the implementation of this policy, including:

4.1.3.1 Collecting and storing data and information regarding vaccine attestations, testing, and testing results in any system prescribed by the Chief Human Resources Officer.

4.1.4 Obtaining a waiver from the Chief Human Resources Officer if their organization is unable to comply with any oversight, systems, information requirements, or reporting established by the Chief Human Resources Officer regarding the implementation of this policy.

4.1.5 Providing training related to the requirements set out for employees pursuant to this policy and tracking records of attendance when applicable.

4.1.6 Collecting and storing attestation and consent forms once signed for those unable to use the Government of Canada Vaccine Attestation Tracking System (GC-VATS).

4.1.7 Conducting audits on attestations and consent forms.

Duty to Accommodate

4.1.8 Implementing this policy and the *Directive on the Duty to Accommodate* for persons unable to be fully vaccinated by:

4.1.8.1 Ensuring that employees are informed of:

- Their right to accommodation;
- Procedures to be followed when seeking accommodation;
- The employee's responsibilities when seeking accommodation;

- Any mandatory testing that needs to be undertaken as accommodation measures, where applicable; and
- The organization's approach to accommodation and privacy obligations to reassure employees that the workplace will be safe.

4.1.8.2 Ensuring that managers are informed of their responsibilities and obligations regarding:

- Addressing requests for accommodation on a case-by case basis, in a timely manner, and up to the point of undue hardship for employees who are unable to be fully vaccinated based on a certified medical contraindication, religion, or another prohibited ground of discrimination as defined under the *Canadian Human Rights Act*, which could also include employees who are partially vaccinated;
- The fulfilment of mandatory testing requirements as accommodation measures, where applicable; and
- The relevant confidentiality and privacy considerations.

4.1.8.3 Implementing measures for employees unwilling to disclose their vaccination status, or who choose not to be fully vaccinated, without an approved accommodation.

Respectful workplace

4.1.9 Ensuring a respectful, productive, inclusive, and equitable environment, including:

4.1.9.1 Ensuring that employees are aware that harassment or other prohibited conduct directed toward an individual for any reason, including based on their vaccination status, will not be tolerated.

Privacy

4.1.10 Ensuring that personal information is collected and managed in accordance with the *Privacy Act* and its related instruments and other applicable legislation, including the institution's enabling legislation:

4.1.10.1 Ensuring that their privacy breach plans and procedures are up to date;

4.1.10.2 Ensuring that privacy breach plans and procedures are readily available to employees and managers; and

4.1.10.3 Ensuring that privacy breach plans include:

- Immediate containment measures in the event of a privacy breach; and

- Contact information for the relevant officials.

Managers

4.2 Managers are responsible for:

4.2.1 Ensuring that employees who report to them know how to enter their vaccine attestations and any associated data or information in any system prescribed by the Chief Human Resources Officer (i.e., the GC-VATS);

4.2.2 Reviewing vaccine attestations and any associated data or information entered by employees who report to them, for the purpose of validating that the information complies with the requirements;

4.2.3 Responding to employees' requests for accommodation under the Duty to Accommodate, as outlined above, including:

- Informing the employee of their obligations;
- Gathering the relevant information;
- Making decisions as to whether the duty to accommodate applies;
- Implementing the decision by identifying the appropriate accommodation measures, which may include mandatory testing; and,
- Documenting the process.

4.2.4 Supporting the deputy head's responsibilities related to the protection of privacy under the *Privacy Act*and its related instruments and other applicable legislation, including:

4.2.4.1 Complying with responsibilities assigned to executives and senior officials who manage programs or activities involving the creation, collection, or handling of personal information under the *Directive on Privacy Practices*; and,

4.2.4.2 Ensuring that they are aware of and adhere to the requirements of the *Privacy Act* as well as the *Policy on Privacy Protection* and its related instruments and other applicable legislation.

4.2.5 Maintaining a respectful, productive, inclusive, and equitable environment.

Employees

4.3 Employees are responsible for:

4.3.1 Providing truthful information for the implementation of all aspects of this policy and any procedures, standards, or directives associated with this policy. Failure to do so

could constitute a breach of the *Values and Ethics Code for the Public Sector* and may result in disciplinary action.

4.3.2 Disclosing their vaccination and testing status accurately as required by this policy.

4.3.3 Informing their manager of their need for accommodation based on a certified medical contraindication, religion, or another prohibited ground of discrimination as defined under the *Canadian Human Rights Act* at the earliest opportunity or by the attestation deadline, if possible.

4.3.4 Providing their manager with complete and accurate information necessary to identify appropriate accommodation, including information on relevant limitations, restrictions, and if they are partially vaccinated.

4.3.5 Cooperating and collaborating in good faith with their organization's representative(s) to identify one or more means to accommodate such needs, which may include mandatory testing, and the reporting of the results, per Health Canada's testing protocol.

4.3.6 Notifying their manager if their accommodation needs change.

4.3.7 Informing themselves of and adhering to the requirements of the *Privacy Act,* as well as the *Policy on Privacy Protection* and related instruments and other applicable legislation.

4.3.8 Attending training as required.

4.3.9 Refraining from directing harassment or any other prohibited conduct toward an individual for any reason, including their vaccination status or accommodation measures.

Secretary of the Treasury Board

4.4 The Secretary of the Treasury Board is responsible for:

4.4.1 Using authorities under the Policy on People Management to effect any mandatory training requirements related to this policy.

Chief Human Resources Officer

4.5 The Chief Human Resources Officer is responsible for:

4.5.1 Prescribing any oversight, systems, information requirements, or reporting for the purpose of implementing this policy; and

4.5.2 Reviewing the need for this policy and the policy contents, at a minimum every 6 months, and reporting the results to the President of the Treasury Board.

5. Roles and Responsibilities of Other Government Departments

5.1 The Treasury Board of Canada Secretariat is responsible for:

5.1.1 Assisting organizations within the core public administration by providing direction, guidance, and tools to support the vaccination of public service employees by:

5.1.1.1 Communicating timely information to deputy heads on vaccination considerations, as appropriate; and

5.1.1.2 Liaising with bargaining agents at a national level.

5.1.2 Addressing key COVID-19 vaccination-related labour relations issues with organizations of the core public administration, such as the employer's obligations relating to occupational health and safety, work refusals, compensation, guidance on the use of leave, duty to accommodate, the collection, use and disclosure of personal information, general Information Management, and values and ethics.

5.1.3 Communicating guidance to organizations regarding the duty to accommodate, compliance with the *Canada Labour Code*, Part II and the *National Joint Council Occupational Health and Safety Directive*, specifically as it relates to COVID-19.

5.1.4 Providing support, advice, and guidance for the consistent implementation of this policy, including administrative measures related to unwilling employees.

5.1.5 Developing and managing the GC-VATS.

5.2 Health Canada's Public Service Occupational Health Program is responsible for:

5.2.1 Providing occupational health advice and guidance to the core public administration related to COVID-19; and

5.2.2 Supporting the Treasury Board of Canada Secretariat in the implementation of this policy by providing occupational health advice.

5.3 Health Canada's Testing Secretariat is responsible for:

5.3.1 Supporting the provision of testing (procurement and distribution);

5.3.2 Sharing information on testing supplies, guidance materials, and other relevant information as it relates to testing;

5.3.3 Establishing the testing protocol; and

5.3.4 Connecting organizations to share procedures, best practices, and lessons learned as it relates to testing.

5.4 Canada School of Public Service is responsible for:

5.4.1 Providing a learning platform for delivering COVID-19 information tools and or pre-recorded training sessions; and

5.4.2 Enabling course registration and completion tracking, including in each learner's account in GCcampus, if they have one.

6. Application

6.1 This policy applies to all employees as defined in Appendix A. The principles of this policy apply equally to Interchange Canada Participants and volunteers.

6.1.1 Employees must comply with this policy regardless of whether they work onsite, remotely, or telework.

6.2 This policy does not apply to:

6.2.1 Members of the public receiving services (e.g., Service Canada, Veterans Affairs Canada, Canada Revenue Agency).

6.2.2 Locally engaged staff at missions abroad.

6.2.3 Members of the Canadian Armed Forces.

7. Consequences of Non-Compliance

7.1 For employees unwilling to be fully vaccinated or to disclose their vaccination status, as per Appendix A, the employer will implement the following measures:

7.1.1 Within 2 weeks of the attestation deadline, require employees to attend an online training session on COVID-19 vaccination;

7.1.2 At 2 weeks after the attestation deadline:

7.1.2.1 Restrict employees' access to the workplace, off-site visits, business travel and conferences;

7.1.2.2 Place employees on administrative Leave Without Pay advising them not to report to work, or to stop working remotely, and taking the required

administrative action to put them on Leave Without Pay;

7.2 For employees who are partially vaccinated as per Appendix A:

7.2.1 Partially vaccinated employees will be placed on Leave Without Pay if they have not received their second dose by 10 weeks after their first dose;

7.2.2 Employees who have been placed on Leave Without Pay and who become partially vaccinated will resume work and have their pay reinstated;

7.2.3 Partially vaccinated employees may be subject to temporary measures for the period of time for which they remain partially vaccinated.

7.3 “Other Leave With Pay (699)”, is not available for employees unwilling to be fully vaccinated or unwilling to disclose their vaccination status.

7.4 The Chief Human Resources Officer may direct deputy heads to take appropriate action to address non-compliance issues or may impose any other measures deemed appropriate to assess whether requirements of this policy or its supporting instruments and mandatory procedures have been met.

7.5 The costs of measures that may arise because of errors or inappropriate application of this policy, associated instruments, and mandatory procedures, will be paid by the organization, in accordance with existing reference levels.

7.6 These measures may include recommendations by the Chief Human Resources Officer to the Treasury Board to add conditions to, modify, or revoke the authority of deputy heads, including any measures allowed by the *Financial Administration Act* that the Treasury Board may determine appropriate.

8. References

Legislation

- *Canadian Human Rights Act*
- *Canada Labour Code*
- *Canada Occupational Health and Safety Regulations*
- *Financial Administration Act*
- *Government Employees Compensation Act*
- *Privacy Act*
- *Privacy Regulations*
- *Work Place Harassment and Violence Prevention Regulations*

Related policy instruments

- *Directive on Interchange Canada*
- *Directive on Leave and Special Working Arrangements*
- *Directive on Privacy Practices*
- *Directive on Telework*
- *Directive on the Duty to Accommodate*
- *Policy on People Management*
- *Policy on Privacy Protection*
- *Policy on the Management of Executives*
- *National Joint Council Occupational Health and Safety Directive*
- *Values and Ethics Code for the Public Sector*

Additional information

- COVID-19 Vaccines: Authorized vaccines - Canada.ca
- Framework for implementation of the Policy on COVID-19 Vaccination for the Core Public Administration Including the Royal Canadian Mounted Police
- Framework on mandatory COVID-19 testing for implementation of the Policy on COVID-19 Vaccination for the Core Public Administration Including the Royal Canadian Mounted Police
- Information for Government of Canada employees: Coronavirus disease (COVID-19)
- National Advisory Committee on Immunizations Statement: Recommendations on the use of COVID-19 vaccines
- Public Service Occupational Health Program COVID-19 Guidance
- Provincial and Territorial Operating Condition (GCconnex)

9. Enquiries

9.1 Employees should direct enquiries to their manager.

9.2 Human resources advisors should direct enquiries about this policy to the office of their head of human resources, or their designate, who will contact the Office of the Chief Human Resources Officer, as required.

Appendix A: Definitions

Attestation deadline (date limite de présentation de l’attestation)

The date by which an employee’s attestations must be entered in the GC-VATS, or provided to managers if the employee does not have access to the GC-VATS:

- October 29, 2021, including for employees on “Other Leave With Pay (699)” for reasons related to the pandemic; or
- 2 weeks after return from leave if the return from leave is after October 15, 2021; or
- 2 weeks after the date on which an employee has been informed of their manager’s decision that the duty to accommodate does not apply; or
- For employees who, for reasons related to their current position, are unable to attest to their vaccination status, or do not have access to vaccines for the period extending from October 15th to October 29th, the attestation deadline is 2 weeks from the date they have access to each, as determined by their manager, and notwithstanding their leave status.

Clinical Trial Participants – Not fully vaccinated (as of October 6, 2021) (participants aux essais cliniques – pas entièrement vaccinés (à partir du 6 octobre 2021))

Employees who are participating, or have participated, in a Health Canada authorized COVID-19 vaccination study should be considered to be not fully vaccinated. Employees should use the accommodation process until such time that either:

- The study is completed, Health Canada authorizes the COVID-19 vaccine, and the employee can disclose that they are fully vaccinated as per this policy.
- The employee withdraws from the study or is informed they received a placebo, or Health Canada declines authorization of the study vaccine. At that time, the employee is expected to be vaccinated against COVID-19 with Health Canada authorized vaccine as per the Public Health Agency of Canada or the National Advisory Committee on Immunization (NACI) recommendations. The employee will be given 4 weeks from any of the preceding events occurring to begin their COVID-19 vaccine series unless they are eligible for a different accommodation. When they complete their primary vaccination, they should disclose this information as per this policy and will then be considered fully vaccinated and will no longer require accommodation.
- There may be additional exceptions that would need to be addressed on an individual basis (e.g., participants in clinical trials outside of Canada, employees who received non-Health Canada approved vaccines outside of work-related postings).

Definition will be adjusted if and as required when the National Advisory Committee on Immunization (NACI) makes any future recommendations.

Employees (employés)

For the purpose of this policy, “employees” is used throughout to simplify the text.

It means employees of the core public administration (i.e., departments listed under schedules I and IV of the *Financial Administration Act*) as defined in sections 7 and 11 of the *Financial Administration Act* and includes the following regardless of whether they work on-site or telework (full time or part-time):

- Indeterminate employees;
- Determinate employees;
- Members and reservists of the Royal Canadian Mounted Police; and

- Internationally based public service employees.

For the purpose of this policy, it also includes:

- Casual workers;
- Students;
- Visiting scientists working in Government of Canada laboratories;
- Cadets, enrolled in the Royal Canadian Mounted Police Cadet Training Program, and other cadets/trainees (ab initio) enrolled in any federal public service training college or academy; and
- The principles of this policy are applicable to Interchange Canada participants and volunteers.

These individuals are not entitled to certain benefits explained in this policy (e.g., leave provisions). Such benefits, and any other non-applicable terms, are not applicable to these individuals.

Unvaccinated employees are grouped in 3 categories

Partially vaccinated employees (employés partiellement vaccinés)

For the purpose of this policy “partially vaccinated employees” means employees who have received 1 dose of a Health Canada authorized vaccine, but who have not received a full vaccination series, and do not meet the definition of fully vaccinated below.

Employees unable to be fully vaccinated (employés qui ne peuvent pas être entièrement vaccinés)

For the purpose of this policy “employees unable to be fully vaccinated” means employees that cannot be fully vaccinated due to a certified medical contraindication, religion, or any other prohibited ground of discrimination as defined in the *Canadian Human Rights Act.*

Employees unwilling to be fully vaccinated (employés qui refusent d’être entièrement vaccinés)

For the purpose of this policy “employees unwilling to be fully vaccinated” means employees refusing to disclose their vaccination status (whether they are fully vaccinated or not), employees for whom accommodations for a certified medical contraindication, religion, or another prohibited ground of discrimination is not granted and where the employees are still unwilling to be vaccinated, and employees who have attested that they are unvaccinated.

Employer (employeur)

Under this policy, “employer” means a department or an agency of the core public administration including the Royal Canadian Mounted Police.

Full Implementation Date (date de mise en œuvre complète)

The date by which the testing regime will be in place for employees unable to be vaccinated, and at which consequences will begin to apply to those employees unwilling to be fully vaccinated.

Fully Vaccinated - COVID-19 (employees vaccinated in Canada as of October 6, 2021) (entièrement vacciné - COVID-19(employés vaccinés au Canada à partir du 6 octobre 2021))

People are considered fully vaccinated 14 days after they have either:

- Received both doses of a Health Canada authorized vaccine that requires 2 doses to complete the vaccination series (as of September 16, 2021): Pfizer-BioNTech Comirnaty COVID-19 vaccine, Moderna Spikevax COVID-19 vaccine, or AstraZeneca Vaxzevria COVID-19 vaccine.
- Received mixed dose vaccination series are accepted as long as it aligns with NACI Recommendations on the use of COVID-19 vaccines.
- Received 1 dose of a Health Canada authorized vaccine that only requires 1 dose to complete the vaccination series (as of September 16, 2021): Janssen (Johnson & Johnson) COVID-19 vaccine.
- For current residents of Quebec only, have had a laboratory-confirmed COVID-19 infection followed by at least 1 dose of a Health Canada authorized COVID-19 vaccine.

Definition will be adjusted if and as required when the National Advisory Committee on Immunization (NACI) makes any future recommendations.

Fully Vaccinated - COVID-19 (employees vaccinated outside of Canada as of October 6, 2021) (entièrement vacciné - COVID-19 (employés vaccinés à l'extérieur Canada à partir du 6 octobre 2021))

People are considered fully vaccinated 14 days after they have either:

- Received 1 additional dose of an mRNA vaccine at least 28 days after a complete or incomplete course/series of a non-Health Canada authorized vaccine (e.g., may be applicable for public servants who were posted abroad who received a non-Health Canada authorized vaccination and have now returned to Canada).
- Met the definition for fully vaccinated in the jurisdiction in which they currently reside (i.e., for public servants posted abroad who have not yet returned to Canada).
- Received 3 doses of any COVID-19 vaccine regardless if they are Health Canada authorized vaccines or non-Health Canada authorized vaccines.

Definition will be adjusted if and as required when the National Advisory Committee on Immunization (NACI) makes any future recommendations.

Government of Canada Vaccine Attestation Tracking System (GC-VATS) (système de suivi des attestations de vaccination du Gouvernement du Canada – SSAV-GC)

GC-VATS is a user-friendly web platform within the Treasury Board of Canada Secretariat Application Portal (TAP). The GC-VATS will allow employees to attest to the status of their COVID-19 vaccinations and store the attestations.

GC-VATS will centrally store the attestations and provide access to aggregated data to the Treasury Board of Canada Secretariat, in compliance with the *Privacy Act* and the security requirements. Similarly, deputy heads and departmental Heads of Human Resources will have access to

departmental-level aggregated data.

Vaccination (vaccination)

Vaccination is the term used for receiving a vaccine, usually through an injection.

Vaccine (vaccin)

A vaccine is a substance used to stimulate the immune system and provide immunity against one or several diseases, prepared from the causative agent of a disease, its products, or a synthetic substitute, treated to act as an antigen without inducing the disease.

Workplace (lieu de travail)

Means any place where an employee is engaged in work for the employee's employer, as per the *Canada Labour Code*, Part II. For the purpose of this policy, this includes employees working on site, remotely, and teleworking (full time or part time).

Date modified: 2023-01-17

This is Exhibit "B" referred to in the **Affidavit of Charles Vézina**
affirmed before me on the 16th day of August, 2024

Adam Gilani (LSO#74291P)
Commissioner for Taking Affidavits

Suspension of the vaccine mandates for domestic travellers, transportation workers and federal employees

From: Treasury Board of Canada Secretariat

News release

June 14, 2022 – Ottawa, Ontario – Treasury Board of Canada Secretariat and Transport Canada

Following a successful vaccination campaign, 32 million (or nearly 90%) of eligible Canadians have been vaccinated against COVID-19 and case counts have decreased. Canadians have stepped up to protect themselves and the people around them, and rates of hospitalization and deaths are also decreasing across the country, and Canada has one of the highest rates of vaccination in the world.

Vaccination continues to be one of the most effective tools to protect Canadians, including younger Canadians, our health care system and our economy. Everyone in Canada needs to keep up to date with recommended COVID-19 vaccines, including booster doses to get ready for the fall. The Government of Canada will continue to work with provinces and territories to help even more Canadians get the shots for which they are eligible.

Throughout the pandemic, the Government of Canada's response has been informed by expert advice and sound science and research. As the COVID-19 pandemic has evolved, so too have public health measures and advice, which includes vaccination requirements that were always meant to be a temporary measure.

As such, the government announced today that, as of June 20, it will suspend vaccination requirements for domestic and outbound travel, federally regulated transportation sectors and federal government employees.

While the suspension of vaccine mandates reflects an improved public health situation in Canada, the COVID-19 virus continues to evolve and circulate in Canada and globally. Given this context, and because vaccination rates and virus control in other countries varies significantly, current vaccination requirements at the border will remain in effect. This will reduce the potential impact of international travel on our health care system and serve as added protection against any future variant. Other public health measures, such as wearing a mask, continue to apply and will be enforced throughout a traveller's journey on a plane or train.

Travellers and transportation workers

- As of 00:01 EDT on June 20, 2022, the vaccination requirement to board a plane or a train in Canada will be suspended.

- In addition, federally regulated transport sector employers will no longer be required to have mandatory vaccination policies in place for employees.
- Due to the unique nature of cruise ship travel, vaccination requirements for passengers and crew of cruise ships will continue to remain in effect.
- Masking and other public health protection measures will continue to be in place and enforced on planes, trains, and ships.
- Current border measures, including the existing vaccination requirement for most foreign nationals to enter Canada, and quarantine and testing requirements for Canadians who have not received their primary vaccine series, remain in effect.

Federal public service

- Also on June 20, the *Policy on COVID-19 Vaccination for the Core Public Administration (CPA) Including the Royal Canadian Mounted Police* will be suspended.
- Employees of the CPA will be strongly encouraged to remain up to date with their vaccinations; however, they will no longer be required to be vaccinated as a condition of employment.
- As such, employees who are on administrative leave without pay for noncompliance with the Policy in force until now will be contacted by their managers to arrange their return to regular work duties.

Crown corporations and separate agencies will also be asked to suspend vaccine requirements, and the vaccination requirement for supplier personnel accessing federal government workplaces will also be suspended. With the suspension of vaccination requirements, employees placed on unpaid leave may return to work. The government and other employers will ensure that these employees can resume their duties as seamlessly as possible.

Furthermore, the Government of Canada is no longer moving forward with proposed regulations under Part II (Occupational Health and Safety) of the *Canada Labour Code* to make vaccination mandatory in all federally regulated workplaces.

The Government of Canada will not hesitate to make adjustments based on the latest public health advice and science to keep Canadians safe. This could include an up-to-date vaccination mandate at the border, the reimposition of public service and transport vaccination mandates, and the introduction of vaccination mandates in federally regulated workplaces in the fall, if needed.

Quotes

> “Throughout this pandemic, our government’s approach has been rooted in close collaboration with our provincial and territorial partners. We all have a role to play in keeping Canadians safe. Our government will continue to make decisions based on the best public health advice and adjust its measures accordingly.”
>
> - The Honourable Dominic LeBlanc, Minister of Intergovernmental Affairs, Infrastructure and Communities

"The mandatory vaccination requirement successfully mitigated the full impact of COVID-19 for travellers and workers in the transportation sector and provided broader protection to our communities. Suspending this requirement is possible thanks to the tens of millions of Canadians who did the right thing: they stepped up, rolled up their sleeves, and got vaccinated. This action will support Canada's transportation system as we recover from the pandemic."

- The Honourable Omar Alghabra, Minister of Transport of Canada

"As the country's largest employer, the Government has led by example to help protect the health and safety of the federal workforce, as well as those in the federally regulated travel sector. We are now in a much better place across Canada, and vaccination mandates helped us to get there. As we move forward, we will continue to take action to keep public servants safe, and all employees are strongly encouraged to keep their vaccinations current so they get all recommended doses."

- The Honourable Mona Fortier, President of the Treasury Board

"While the suspension of vaccine mandates reflects an improved public health situation in Canada, the COVID-19 virus continues to evolve and circulate in Canada and globally. The science is also perfectly clear on one thing: vaccination remains the single most effective way to protect ourselves, our families, our communities, and our economy against COVID-19. We don't know what we may or may not face come autumn, but we know that we must remain prudent, which is why our government continues to strongly encourage everyone in Canada to stay up to date with their COVID-19 vaccines, which includes recommended booster doses."

- The Honourable Jean-Yves Duclos, Minister of Health

Related products

- Backgrounder: Government of Canada suspends mandatory vaccination for the federal workforce
- Backgrounder: Suspension of the mandatory vaccination requirement for domestic travellers and federally regulated transportation workers
- Backgrounder: Preventing or limiting the spread of COVID-19 on cruise ships

Associated links

- COVID-19 vaccination for federal public servants

- COVID-19: Boarding flights, trains, and cruise ships in Canada
- COVID-19: Cruise ship travel
- COVID-19: Travel, testing, and borders
- COVID-19: Provincial and territorial resources

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Date modified:
2022-06-14

This is Exhibit "C" referred to in the **Affidavit of Charles Vézina**
affirmed before me on the 16th day of August, 2024

Adam Gilani (LSO#74291P)
Commissioner for Taking Affidavits

Treasury Board of Canada Secretariat | Secrétariat du Conseil du Trésor du Canada

PROTECTED WHEN COMPLETED
PROTÉGÉ UNE FOIS REMPLI

DEPARTMENT USE ONLY À L'USAGE DU MINISTÈRE

Reference No. N° de référence

INDIVIDUAL GRIEVANCE PRESENTATION (*PSLRA* s. 208)
PRÉSENTATION D'UN GRIEF INDIVIDUEL (*LRTFP* a. 208)

Please note:
In accordance with *PSLRA* s. 207, all departments and agencies within the core public administration have an informal conflict management system (ICMS) in place. Its existence does not affect an employee's right to file a grievance. However, managers, employees and bargaining agent representatives are encouraged to use the ICMS when appropriate, at any stage of the grievance process, in an attempt to informally address workplace differences.

Veuillez noter :
Conformément à l'article 207 de la *LRTFP*, les ministères et organismes de l'administration publique centrale ont établi un système de gestion informelle des conflits (SGIC). L'existence d'un tel système n'affecte pas le droit d'un employé à soumettre un grief. Toutefois, les gestionnaires, les employés et les représentants des agents négociateurs sont encouragés à se servir du SGIC, à n'importe quelle étape du processus de grief, afin de tenter de régler de façon informelle les problèmes en milieu de travail.

SECTION 1
TO BE COMPLETED BY EMPLOYEE À REMPLIR PAR L'EMPLOYÉ

A

Surname Nom de famille	Given names Prénoms	Home and work telephone No. N° de téléphone maison et travail
PAYNE	STACEY	613-888-7808

Home address Adresse du domicile	Job classification Classification du poste
92-B Campbell St., Trenton, ON K8V3A1	TC - GT3

Department or agency Ministère ou organisme	Branch/division/section Direction/division/section
Department of National Defence	RCAF - ATESS

Position title (and number) Titre du poste (et numéro)	Work location Lieu de travail	Shift Quart de travail	E-mail address Adresse électronique
Graphic Design Technician	CFB Trenton	Full Time	staceypaynedesigns@gmail.com

Collective agreement (if applicable) Convention collective (s'il y a lieu)	Expiry date Date d'expiration
TC	June 21, 2021

B

Grievance details: statement of the nature of each act or omission or other matter giving rise to the grievance that establishes the alleged violation or misinterpretation, including a reference to, as the case may be, (i) any provision of a statute or a regulation, or of a direction or other instrument made or issued by the employer, that deals with the terms and conditions of employment and that is relevant, or (ii) any provision of a collective agreement or an arbitral award that is relevant.

Énoncé du grief : exposé de la nature de chaque action, omission ou situation ayant donné lieu au grief qui permettra d'établir la prétendue violation ou fausse interprétation, y compris, le cas échéant, le renvoi à : (i) toute disposition pertinente d'une loi ou d'un règlement, ou toute directive ou tout autre document pertinents de l'employeur concernant les conditions d'emploi, (ii) toute disposition pertinente d'une convention collective ou d'une décision arbitrale.

I am submitting this grievance based on me being placed on leave without pay is an unreasonable consequence to non-compliance of the new COVID-19 Treasury Board Policy, for many reasons some of which include; my employer not providing any of the information I need to obtain informed consent, this policy being an unreasonable not agreed upon term and condition of my employment, along with me being an operational essential services employee.

Please see the attached Appendix A: Grievance Details, Appendix B - Table of Sources along with the attached sources.

C

Date on which each act, omission or other matter giving rise to the grievance occurred Date de chaque action, omission ou situation ayant donné lieu au grief

December 15th 2021

D

Corrective action requested Mesures correctives demandées

- Reinstated in my position
- Back pay
- Damages for undue duress & harassment
- Provided an accommodation to the policy which could include; an alternative teleworking arrangement & shift work, shields, a door to stop through traffic, masks, hand sanitizer, contact tracing, better training for staff and/or high-touch cleaning policy. Some of which I have been requesting for months.

01/21/2022

Signature of employee Signature de l'employé — Date

SECTION 2
TO BE COMPLETED BY BARGAINING AGENT REPRESENTATIVE WHERE APPLICABLE
À REMPLIR PAR LE REPRÉSENTANT DE L'AGENT NÉGOCIATEUR S'IL Y A LIEU

Approval for presentation of grievance relating to a collective agreement or an arbitral award, and agreement to represent employee are hereby given
Par la présente, j'autorise la présentation du grief relatif à une convention collective ou à une décision arbitrale, et j'accepte de représenter l'employé

Dennis Miluck — Signature of Bargaining Agent Representative / Signature du représentant de l'agent négociateur

01/23/2022 — Date

Bargaining agent Agent négociateur	Bargaining unit/component Unité de négociation/élément	
PSAC	UNDE	
Name of local bargaining agent representative / Nom du représentant local de l'agent négociateur Dennis Miluck	Telephone No. N° de téléphone 613 392 5543	Facsimile No. N°de télécopieur
Address for contact Adresse pour fins de communication 41 Roseland Drive Carrying Place ONT.		E-mail address Adresse électronique

SECTION 3
TO BE COMPLETED BY EMPLOYEE WHERE REPRESENTATIVE IS NOT A REPRESENTATIVE OF A BARGAINING AGENT
À REMPLIR PAR L'EMPLOYÉ, SI LE REPRÉSENTANT N'EST PAS CELUI DE L'AGENT NÉGOCIATEUR

I agree to act on behalf of the employee J'accepte d'agir au nom de l'employé

Signature of representative / Signature du représentant — Date

Name of representative Nom du représentant	Telephone No. N° de téléphone	Facsimile No. N° de télécopieur
Address for contact Adresse pour fins de communication		E-mail address Adresse électronique

SECTION 4
TO BE COMPLETED BY IMMEDIATE SUPERVISOR OR LOCAL OFFICER IN CHARGE
À REMPLIR PAR LE SUPÉRIEUR IMMÉDIAT OU LE CHEF DE SERVICE LOCAL

Name and title of management representative / Nom et titre du représentant de la direction	Date received Date de réception
Capt Jeff Chacko, Design Team Lead	14 Feb 21
Signature	

APPENDIX A: GRIEVANCE DETAILS

1. On October 6, 2021, Treasury Board ("TBS") issued its "Policy on COVID-19 Vaccination for the Core Public Administration Including the Royal Canadian Mounted Police"[1] (the "Policy"), pursuant to sections 7 and 11.1 of the Financial Administration Act, RSC 1985, c. F-11 and management rights provided for in our collective agreement.

2. The Policy is a set of unilaterally imposed rules by the employer that have changed the terms and conditions of my employment.

3. The Policy is an unreasonable exercise of management rights and is inconsistent with the collective agreement.[2]

4. This is a grievance is of the consequences of non-compliance taken against me in the Policy, specifically:

> 7.1 For employees unwilling to be fully vaccinated or to disclose their vaccination status, as per Appendix A, the employer will implement the following measures:
>
> > 7.1.1 Within 2 weeks of the attestation deadline, require employees to attend an online training session on COVID-19 vaccination;
> >
> > 7.1.2 At 2 weeks after the attestation deadline:
> >
> > > 7.1.2.1 Restrict employees' access to the workplace, off-site visits, business travel and conferences;
> > >
> > > 7.1.2.2 Place employees on administrative Leave Without Pay advising them not to report to work, or to stop working remotely, and taking the required administrative action to put them on Leave Without Pay;

A. Mandatory COVID-19 Vaccination is Unreasonable

Right to Voluntary Informed Consent for Medical Treatment

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[1] Policy on COVID-19 Vaccination for the Core Public Administration Including the Royal Canadian Mounted Police

[2] Lumber & Sawmill Workers' Union, Local 2537 and KVP Co. Ltd., (1965), 16 L.A.C. 73, para. 33, 34, 35

5. The principle of informed consent is that individuals have the right to make their own decisions about medical treatment after having been informed of the risks, potential benefits, and reasonably available alternatives. By requiring an individual's authorization for medical treatment, informed consent protects a person' right to bodily integrity and freedom in an individual's medical decisions.[3]

6. In Canada, the doctrine of informed consent is part of the common law.[4] Moreover, British-Columbia,[5] Manitoba,[6] Ontario,[7] and Quebec[8] have enacted statutes that provide for persons' right to decide whether or not they wish to undergo medical procedures.

7. The Supreme Court of Canada has found that the right to "security of the person" under s. 7 of the Canadian Charter of Rights and Freedoms (the "Charter") protects both the physical and psychological integrity of the individual.[9] Justice Wilson of the Supreme Court of Canada opined that state enforced medical or surgical treatment is an obvious invasion of physical integrity.[10] She further found that the decision to end a pregnancy was a matter of conscience, guaranteed by s. 2(a) of the Charter.[11] Similarly, the decision or not to undergo medical treatment such as vaccination is a decision of conscience of the individual protected by s. 2(a) of the Charter.

8. By forcing employees to be vaccinated against COVID-19, the Policy undermines employees' right to choose whether or not to undergo that medical procedure. Compulsory COVID-19 vaccination cannot be demonstrably justified in a free and democratic society as per s. 1 of the Charter. Consequently, the Policy breaches my liberty of conscience and liberty of right to security of the person, protected respectively by s. 2(a) and 7 of the Charter.

9. I completed the following procedures trying to obtain informed consent, none of which apprised me of any data or information that could assist me with my right to obtain informed consent;

---

3 Carl H. COLEMAN, The Right to Refuse Treatment for Infectious Disease, Springer, 2020, p. 171, 172.

4 Reibl v Hughes, [1980] 2 S.C.R. 880, 114 D.L.R. (3d) 1, 14 C.C.L.T. 1 (SCC);
Yola S. VENTRESCA, "Punctuating Social Trends: Re-Examining Reibl v Hughes and the Emergence of the Doctrine of Informed Consent in Canadian Law", (2017) 47:1 Advoc Q, 50.

5 Health Care (Consent) and Care Facility (Admission) Act, [RSBC 1996] c. 181, section 4.

6 The Health Care Directives Act, C.C.S.M. c. H27, sections 1 "directive", "maker", "treatment", 2 and 4.

7 Health Care Consent Act, 1996, S.O. 1996, [being Schedule A to the Advocacy, Consent and Substitute Decisions Statute Law Amendment Act, S.O. 1996, c. 2] section 11.

8 Civil Code of Quebec, CQLR c CCQ-1991, article 11. Act Respecting Health Services and Social Services, CQLR, c. S-4.2, section 9.

9 R v Morgentaler, [1988] 1 S.C.R. 30, p. 173.

10 R v Morgentaler, [1988] 1 S.C.R. 30, p. 173.

11 R v Morgentaler, [1988] 1 S.C.R. 30, p. 175-176.

a) On August 17th 2021, I asked my Human Resources Representative (“HR Rep”) Dianne questions about my contract[12] & my employers obligations to this contract I signed. I have yet to hear back about these questions, my HR Rep & Labour Relations only referred me back too an email I requested to be sent out to our unit to ensure members understood the implications at that time[13].

b) On August 18th 2021, I asked my health and safety committee a number of questions[14], none of which they had answers for. I requested my questions be sent up through the Royal Canadian Air Force (“RCAF”) chain of command. I have yet to hear an answer back from these questions.

c) On December 1st 2021, I invoked my right[15] to refuse dangerous[16] work. Based on my employer mandating and coercing me into administering an unproven hazardous substance[17] into my body in order to continue the duties I have been performing for the past 19 months without any issues in the workplace, pursuant to section 128 of the Canada Labour Code (R.S.C., 1985, c. L-2), PART II Occupational Health and Safety[18]. During this process none of my questions about safety or efficacy were answered, documents were falsified and my employer refused to conduct and in-person assessment of the current business resumption plan (“BRP") and Personal Protective Equipment (“PPE"), which has been in place loosely since June 2020, with me being at work since April 2020. The labour program also refused to investigate, I will be appealing this in federal court.

d) On December 14th 2021, pursuant to Public Servants Disclosure Protection Act (S.C. 2005, c. 46)[19], I submitted a disclosure to the Office of the Public Sector Integrity Commissioner of Canada **Reference Number:** DWEB2021-12-14-1639506157. Requesting an over arching department investigate the policy issues as a whole instead of each department addressing 1 issue at a time. The case is still open and

---

[12] August 17 - December 1 2021, Email chain about HR matters.

[13] August 24 - December 1 2021, Email chain about the mandatory vaccination policy announcement.

[14] My questions for the Health and Safety Committee & Chain of Command August 18, 2021.

[15] My Right to Refuse Details Version 2.0, Pages 1-6 presented at level 1 & the additional 7-15 at level 2, as none of my concerns were addressed in level 1.

[16] Canada Labour Code R.S.C., 1985, c. L-2, Part II Occupational Health and Safety “danger”.

[17] Canada Labour Code R.S.C., 1985, c. L-2, Part II Occupational Health and Safety “hazardous substance”.

[18] Canada Labour Code R.S.C., 1985, c. L-2, Part II Occupational Health and Safety, Section 128 “Right to Refuse”.

[19] December 14 2021, Email confirmation of Disclosure to Office of the Public Sector Integrity Commission.

awaiting an answer from the office as to whether they will investigate or not. The act states the following; which appears to me that I should be protected from disciplinary action until a decision about the investigation is made by the board;

> "Wrongdoings
>
> **8** This Act applies in respect of the following wrongdoings in or relating to the public sector:
>
> > **(a)** a contravention of any Act of Parliament or of the legislature of a province, or of any regulations made under any such Act, other than a contravention of section 19 of this Act;
> >
> > **(b)** a misuse of public funds or a public asset;
> >
> > **(c)** a gross mismanagement in the public sector;
> >
> > **(d)** an act or omission that creates a substantial and specific danger to the life, health or safety of persons, or to the environment, other than a danger that is inherent in the performance of the duties or functions of a public servant;
> >
> > **(e)** a serious breach of a code of conduct established under section 5 or 6; and
> >
> > **(f)** knowingly directing or counselling a person to commit a wrongdoing set out in any of paragraphs (a) to (e).
> >
> > **(g)** [Repealed, 2006, c. 9, s. 197]…
>
> **Period during which no disciplinary action may be taken**
>
> **(3)** For the purposes of subsection (1), the period during which no disciplinary action may be taken is the period that begins on the day on which the Commissioner sends the notice referred to in subsection 19.4(2) and ends on the earliest of
>
> > **(a)** the day on which the complaint is withdrawn or dismissed
> >
> > **(b)** the day on which the Commissioner makes an application to the Tribunal for an order referred to in paragraph 20.4(1)
> >
> > **(c)** in respect of the complaint, and(c) in the case where the Commissioner makes an application to the Tribunal for the orders referred to in paragraph 20.4(1)(b) in respect of the complaint, the day on which the Tribunal makes a determination that the complainant was not subject to a reprisal taken by the person."

e) January 19th 2022, as per the direction of my supervisor, I submitted a privacy complaint to the Office of the Privacy Commissioner, Reference:

PA-062010[20]. Requesting further details about the privacy policy that accompanies the attestation[21] for the COVID-19 Policy.

(a) The first concern is agreeing to genetic testing to continue a contract or agreement to provide services, which is illegal in Canada under the Genetic Non-Discrimination Act (S.C. 2017, c. 3)[22]. Why am I agreeing to something that is illegal in Canada, hidden into a Privacy policy?

(b) The second concern is agreeing to let my employer keep my private medical information on file in 2 information banks for what appears to me as the sole purpose of reporting, data collection and if I decide to look for alternative employment in the Federal Public Service. This is not the objective of the policy, which is to keep members safe at work. One of the information banks is still under construction as well, so again how can I agree to something that is still under construction?

Employer's Role is Limited to Reasonable Steps to Ensure Health and Safety

10. One of the Policy's stated objective is to "improve the vaccination rate across Canada of employees in the core public administration through COVID-19 vaccination.[23] However, it is not the employer's role to improve the vaccination rate of its employees.[24] Rather, it is the employer's role to "ensure that the health and safety at work of every person employed by the employer," is protected.[25]

11. To that effect, the employer is required to take all reasonable steps to ensure the health and safety of its employees, the standard being one of due care and diligence, not perfection.[26] As such, the employer is not required to ensure that all of its employees are vaccinated in an attempt to eliminate all risk of COVID-19 transmission in the workplace.[27] Further, there is no evidence that the vaccination rate needs to be further increased for employees to be protected.[28]

---

[20] January 19 2022, Email confirmation of Privacy complaint to the Office of the Privacy Commissioner.

[21] Policy on COVID-19 Vaccination for the Core Public Administration Including the Royal Canadian Mounted Police, attestation form.

[22] Genetic Non-Discrimination Act (S.C. 2017, c. 3) Page 2, Section 3.

[23] The Policy, section 3.1.3.

[24] Sault Area Hospital and Ontario Nurses' Association, 2015 CanLII 55643 (ON LA), paras. 314, 315.

[25] Canada Labour Code, R.S.C. 1985, c. L-2, section 124.

[26] Canadian National Railway Company v Teamsters Canada Rail Conference, 2016 OHSTC 20, paras. 74 to 78.

[27] Sault Area Hospital and Ontario Nurses' Association, 2015 CanLII 55643 (ON LA), para. 340.

[28] Sault Area Hospital and Ontario Nurses' Association, 2015 CanLII 55643 (ON LA), para. 314.

Low Likelihood of Potential Harm from Maintaining Voluntary Vaccination

12. The Policy's underlying assumption being that unvaccinated employees are unprotected and that being vaccinated fully protects themselves, their colleagues and their clients from COVID-19.[29]This assumption is unproven; it is not sufficient for an employer to assert that it reasonably relied upon experts with superb curricula vitae.[30]

13. On the contrary, it has been shown that fully vaccinated individuals have peak viral load similar to unvaccinated cases and can transmit infection to fully vaccinated contacts.[31] It has also been found that increases in COVID-19 were unrelated to levels of vaccination across 68 countries and 2947 counties in the United States.[32] At least one study argues that absolute risk reduction measures from COVID-19 vaccination are much lower than the reported relative risk reduction measures.[33] In addition, the Policy does not consider natural immunity, which has been found to be longer lasting and stronger protection against infection.[34] In light of this data, the mandatory vaccination Policy does not accomplish its stated goal.

14. Moreover, according to the Public Health Agency of Canada, 84.25% of eligible Canadians and 73.96% of the total population are fully vaccinated.[35] It has been announced that 95.3% of the public service is fully vaccinated.[36] Increasing the vaccination rate further is unlikely to meaningfully impact the risk of transmission.

15. The Policy's objective is to "protect the health and safety of employees."[37] It is important to examine the likelihood and magnitude of potential harm from employees who choose to remain unvaccinated. Public servants are eligible to retire between 55 and 65, depending on when they began service and their personal financial decisions. The vast majority of civil servants are under 65 years of age. This age group is not at high risk for COVID-19 deaths.

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29 The Policy, section 3.1.3.

30 Sault Area Hospital and Ontario Nurses' Association, 2015 CanLII 55643 (ON LA), para. 12.

31 Anika SINGANAYAGAM et al., "Community transmission and viral load kinetics of the SARS-CoV-2 delta (B.1.617.2) variant in vaccinated and unvaccinated individuals in the UK: a prospective, longitudinal, cohort study", The Lancet, (October 28, 2021).

32 S.V. SUBRAMANIAN and Akhil KUMAR, "Increases in COVID-19 were unrelated to levels of vaccination across 68 countries and 2947 counties in the United States", European Journal of Epidemiology, (17 August 2021).

33 Ronald B. BROWN, "Outcome Reporting Bias in COVID-10 mRNA Vaccine Clinical Trials", Medicina 2021, 57, 199 (26 February 2021).

34 Sivan GAZIT, "Comparing SARS-CoV-2 natural immunity to vaccine-induced immunity: reinfections versus breakthrough infections", preprint from medRxiv and bio Rxiv, (August 25, 2021).

35 COVID-19 vaccination coverage in Canada (November 5, 2021).

36 Information from unions.

37 The Policy, section 3.1.1.

16. Of the 9500 deaths that occurred between March and July 2020, 90% has at least one other cause, condition or complication reported on the death certificate.[38] More than 80% of COVID-19 deaths occurred in long-term care, a setting in which the age profile is older and dementia is common.[39] There were fewer than fifty COVID involved deaths among those under the age of 45 during that same period, which represents 0.00015% of Canada's population of 33,000,000.[40] Currently, there is a low presence of COVID-19 in Canada: as of November 5, 2021, there were 23,425 active COVID-19 cases across Canada, for a total of 0.07% of our population of 33,000,000.[41] At least one study questions the testing PCR testing process for diagnosing a COVID-19 case.[42]This, combined with the vaccination rates, leads to a low likelihood of potential harm for maintaining vaccination as voluntary among public servants.

17. While it may be argued that in the absence of knowing the actual number of people infected by unvaccinated employees, even a single person potentially infected warrants any and every measure possible. However, this an extreme perspective is equal to a pursuit of "no risk". Pursuing "no risk" of transmission comes at a high cost to all employees, who lose autonomy over their own bodies.

Employees Suffer from Compulsory Vaccination

18. When one is coerced into a decision, and acts against his will, one's dignity and self-respect is diminished. There are many reasons why someone may not want to take one of the available COVID-19 vaccines. With the backdrop of COVID-19's presence in Canada and morbidity statistics, an individual's right to self determination should prevail, even if the decision may appear mistaken in the eyes of others.[43]

19. One of the reasons individuals may choose not to get vaccinated against COVID- 19 is the risk of adverse effects, the amount of which is likely underreported.[44] A review of the clinical trials found that COVID-19 vaccines are not free of neurological side effects.[45] In fact, the following are reported occurring adverse effects of the available COVID-19 vaccines:

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[38] StatCan COVID-19: Data to Insights for a Better Canada, COVID-19 death comorbidities in Canada (November 16, 2020), p. 4.

[39] StatCan COVID-19 and deaths in older Canadians: Excess mortality and the impacts of age and comorbidity, (2021), p. 3.

[40] StatCan COVID-19: Data to Insights for a Better Canada, COVID-19 death comorbidities in Canada, (November 16, 2020), p. 5.

[41] StatCan COVID-19 daily epidemiology update (November 5, 2021), p. 1.

[42] Ronald N. KOSTOFF, "Why are we vaccinating children against COVID-19", Elsevier B.V. Toxicogology Reports, (14 September 2021).

[43] Malette v Shulman et al [1990] O.J. No. 450 (ON CA), section III.

[44] Government of Canada Health Info-Base Reported side effects following COVID-19 vaccination in Canada, report with data up to and including October 8, 2021, p. 10.

[45] Josef FINSTERER and Fulvio A. SCORZA, "SARS-CoV-2 vaccines are not free of neurological side effects, Acta Neurologica Scandinavica", 2021;144:109-110 (21 April 2021).

- Auto-immune diseases: Guillain-Barr syndrome and Thrombocytopenia.

- Cardiovascular issues: cardiac arrest, cardiac failure, myocardial infarction (heart attack), myocarditis / pericarditis (inflammation of the heart muscle and lining around the heart).

- Circulatory system issues: cerebral venous (sinus) thrombosis, cerebral thrombosis, cutaneous vasculitis, deep vein thrombosis, embolism, haemorrhage (bleeding), pulmonary embolism, thrombosis (blood clot), thrombosis with thrombocytopenia syndrome (blood clot with low platelets).

- Hepato-gastrointestinal and renal system issues: acute kidney injury, glomerulonephritis (kidney inflammation) and nephrotic syndrome (kidney disorder), liver injury.
- Nerves and central nervous system issues: Bell's Palsy / facial paralysis, cerebrovascular accident (stroke) Transverse myelitis (inflammation of spinal cord).

- Other system issues: anaphylaxis, COVID-19, multi-system inflammatory syndrome.

- Pregnancy issues: fetal growth restriction, spontaneous abortion.

- Respiratory system issues: acute respiratory distress syndrome.

- Skin and mucous membrane, bone and joints system: chilblains, erythema multiforme (immune skin reaction).[46]

20. These side effects can occur in anyone who takes the vaccine, and contrary to COVID-19, are not more prevalent in certain age groups. They can happen to anyone. Many of these side effects are irreversible. One of the adverse effects is death (cardiac arrest / cardiac failure). One analysis of United States data did not find the risk/benefit analysis in favor of inoculation for most people under 40 years of age.[47] There is an ethical difference between people becoming ill or dying from a disease occurring in nature, and people becoming injured or dying from a manmade vaccine.

21. By making the COVID-19 vaccination mandatory, the employer risks doing the opposite of providing a healthy and safe work environment. Employees who do not want to undergo vaccination, risk adverse effects if they comply with the policy

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[46] Government of Canada Health Info-Base Reported side effects following COVID-19 vaccination in Canada, report with data up to and including October 8, 2021, p. 8, 9.

[47] Ronald N. KOSTOFF, "Why are we vaccinating children against COVID-19", Elsevier B.V. Toxicogology Reports (September 14, 2021).

against their true will. Each individual should be allowed to do their own risk-benefit analysis without jeopardizing their employment.

There are More Proportionate and Reasonable Alternatives to Balance all Interests

22. There has been no evidence of COVID-19 outbreaks on my work-site since March 2020. I have entered my worksite everyday excluding approximately 4 weeks of occasional teleworking shifts since April 2020. The underlying presumption of the Policy is that unvaccinated employees will infect colleagues and clients on the occasions they enter the worksite. If all employees stay home when they're sick, any type of transmission is unlikely, since asymptomatic transmission rates are much lower than symptomatic transmission rates.[48]

23. There has been no evidence of COVID-19 outbreaks on my work-site since March 2020. There has only been COVID issues at my workplace after the vaccine Mandate was into place fully. The base hospital had to close down due to staffing issues with COVID[49], asking them to use the local hospital instead, in-turn creating more of a strain on our hospitals rather than less of one, as set out in the policy. I have been entirely operational since April 2020. The underlying presumption of the policy is that unvaccinated employees will infect colleagues and clients at the worksite. If all employees stay home when they're sick, any type of transmission is unlikely, since asymptomatic transmission rates are much lower than symptomatic transmission rates.[50]

24. The Policy is not proportionate and the current less intrusive measures suffice. The employer can provide information on COVID-19 vaccination and its accessibility, without making it a condition of employment.

B. The attestation in GCVATS is unreasonable

25. Since the employee vaccination requirement is unreasonable, it follows that the collection of personal information related to COVID-19 vaccination status is unreasonable.

26. The attestation of vaccination status requirement, the use of the GCVATS system and the disciplinary consequences of non-compliance were not negotiated in the collective bargaining process. Consequently, the employer must bring itself within the scope of the management rights clause of the collective agreement.[51]

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[48] Allyson M. POLLOCK, James LANCASTER, "Asymptomatic transmission of covid-19", the BMJ (December 21, 2020); Shaun GRIFFIN, "Covid-19: Asymptomatic cases may not be infectious", Wuhan study indicates, the BMJ (December 1, 2020).

[49] November 25, 2021, Email from 24 Health Services about hospital staffing issue on base.

[50] Allyson M. POLLOCK, James LANCASTER, "Asymptomatic transmission of covid-19", the BMJ (December 21, 2020); Shaun GRIFFIN, "Covid-19: Asymptomatic cases may not be infectious", Wuhan study indicates, the BMJ (December 1, 2020).

[51] Communications, Energy and Paperworkers Union of Canada, Local 30 and Irving Pulp & Paper, Limited, [2013] 2 S.C.R. 458, para. 2.

27. The Supreme Court of Canada has said that, “When employers in a unionized workplace unilaterally enact workplace rules and policies, they are not permitted to promulgate unreasonable rules and then punish employees who infringe them.”[52]

28. In determining whether the exercise of management rights is reasonable, the question to be answered is whether the benefit to the employer from the attestation requirement is proportional to the harm to employee privacy.[53] To answer this question, one needs to address the risks that the employer intends to address by this policy.[54] The employer seeks to “protect the health and safety of employees.”[55]

29. However, the mere fact that COVID-19 exists as a virus is not sufficient to require disclosure of vaccination status against that virus. As previously stated:

    A. As of November 5, 2021, there were 23,425 active COVID-19 cases across Canada, for a total of 0.07% of its population of 33,000,000.[56]

    B. The vaccination rates in the Canadian population are high.[57]

    C. Asymptomatic transmission of COVID-19 is low.[58]

    D. Symptomatic vaccinated individuals can still transmit COVID-19.[59]

    E. There have been statistically insignificant COVID-19 deaths among the working age range of public servants.[60]

30. There is no evidence that disclosure of vaccination status will further reduce risk infection. There is no evidence that the workplace, which according to the Policy includes one’s remote work environment, has been a vector for fatal COVID-19

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[52] Communications, Energy and Paperworkers Union of Canada, Local 30 and Irving Pulp & Paper, Limited, [2013] 2 S.C.R. 458, para. 22.

[53] Communications, Energy and Paperworkers Union of Canada, Local 30 and Irving Pulp & Paper, Limited, [2013] 2 S.C.R. 458, para. 4, 43.

[54] Communications, Energy and Paperworkers Union of Canada, Local 30 and Irving Pulp & Paper, Limited, [2013] 2 S.C.R. 458, para. 44.

[55] The Policy, section 3.1.1.

[56] StatCan COVID-19 daily epidemiology update (November 5, 2021), p. 1.

[57] COVID-19 vaccination coverage in Canada (November 5, 2021).

[58] Allyson M. POLLOCK, James LANCASTER, “Asymptomatic transmission of covid-19”, the BMJ (December 21, 2020); Shaun GRIFFIN, “Covid-19: Asymptomatic cases may not be infectious”, Wuhan study indicates, the BMJ (December 1, 2020).

[59] Anika SINGANAYAGAM et al., “Community transmission and viral load kinetics of the SARS-CoV-2 delta (B.1.617.2) variant in vaccinated and unvaccinated individuals in the UK: a prospective, longitudinal, cohort study”, The Lancet, October 28, 2021.

[60] StatCan COVID-19: Data to Insights for a Better Canada, COVID-19 death comorbidities in Canada, (November 16, 2020), p. 4. StatCan COVID-19 and deaths in older Canadians: Excess mortality and the impacts of age and comorbidity, p. 3 (2021). SatCan COVID-19: Data to Insights for a Better Canada, COVID-19 death comorbidities in Canada, (November 16, 2020), p. 5.

transmissions. There is no evidence that the employer is required to further reduce risk of infection, as the employer's obligation to provide a healthy and safe work environment is limited to a reasonable steps.[61]Pursuing a no risk environment leads to negative consequences for all employees, in the loss of their bodily autonomy.

31. On the other side of the proportionality analysis, is the employee's right to privacy. The Supreme Court of Canada has stated in respect to section 7 of the Charter that, "security of the person has an element of personal autonomy, protecting the dignity and privacy of individuals with respect to decisions concerning their own body."[62] As such, the employer needs to justify that the request for disclosure is in accordance with principles of fundamental justice.

32. By implementing a policy that requires disclosure of vaccination status, employees are being discriminated against based on vaccination status. This outcome weighs heavily against the policy and s. 15 of the Charter protects against discrimination. Since a symptomatic vaccinated employees and symptomatic unvaccinated employees can both transmit the virus, the employer should refrain from unjustified discrimination against the unvaccinated.[63]

C. The Privacy Statement of Attestation Form is unreasonable

33. Since the mandatory vaccination policy is unreasonable, so is the use of the GCVATS system and its associated Privacy Statement. Nonetheless, if mandatory COVID-19 vaccination and use of GCVATS were found to be reasonable, the following aspects of the Privacy Statement are unreasonable.

34. The Privacy Statement states that, "The personal information will be used, in conjunction with additional COVID-19 preventative measures, including testing, to determine if you will be granted on-site access to the workplace and to determine whether you may report to work in person or remotely." The statement is unreasonable because:

Testing

A. The employer cannot differentiate an employee adversely based on the results of a genetic test in the course of employment.[64] Genetic characteristics are a prohibited ground for discrimination according to the

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61 Canada Labour Code, R.S.C. 1985, c. L-2, section 124;
Canadian National Railway Company v Teamsters Canada Rail Conference, 2016 OHSTC 20, paras. 74 to 78.

62 A.C. et al. v Director of Child and Family Services, [2009] 2 S.C.R. 181, para. 100.

63 Anika SINGANAYAGAM et al., "Community transmission and viral load kinetics of the SARS-CoV-2 delta (B.1.617.2) variant in vaccinated and unvaccinated individuals in the UK: a prospective, longitudinal, cohort study", The Lancet, October 28, 2021.

64 Canadian Human Rights Act, R.S.C. 1985, c. H-6, subsection 7(b).

Canadian Human Rights Act.[65] Where an employee refuses to undergo a genetic test or to disclose the results of a genetic test, the discrimination is deemed to be on the grounds of genetic characteristics.[66] The employer is required to prove that this discriminatory practice is based on a bona fide occupational requirement.[67]The employer has not done this and testing requirements would likely impose undue hardship on the employee.[68]

B. Every employee is entitled not to undergo or be required to undergo a genetic test.[69] The employer is only entitled to use the results of the genetic test if the employee provides written consent.[70]Most employees are unaware of their rights and cannot be expected to hire a lawyer or afford to hire a lawyer when dealing with their employer. Good faith on the employer's part requires that the Privacy Statement inform employees of their right not to undergo a genetic test and that by attesting, they are consenting to the employer's use of their genetic test results.

C. A reasonable, less invasive alternative to testing, requiring symptomatic employees to use sick days. Testing should not be a feature of the policy, because asymptomatic transmission of COVID-19 is very low.[71] An employer cannot automatically demand that an employee to submit to a medical examination, even if there were reasonable or probable grounds to believe that the employee presents a risk to health or safety in the workplace.[72] It must be reiterated that it cannot be assumed that because a person is unvaccinated, they present at risk to health and safety in the workplace – particularly, when a person does not have symptoms.

Remote Work Environment

D. An employee's remote work environment is most often an employee's home. An employees' vaccination status or genetic test results are particularly irrelevant while they are working in a remote work environment that does not belong to the employer and is usually their home. The collected personal information should not be used to determine whether an employee can report to work remotely.

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65 Canadian Human Rights Act, R.S.C. 1985, c. H-6, section 3.

66 Canadian Human Rights Act, R.S.C. 1985, c. H-6, subsection 3(3).

67 Canadian Human Rights Act, R.S.C. 1985, c. H-6, paragraph 15(1)(a).

68 Canadian Human Rights Act, R.S.C. 1985, c. H-6, subsection 15(2).

69 Canada Labour Code, R.S.C. 1985, subsection 247.98(2).

70 Canada Labour Code, R.S.C. 1985, subsection 247.98(6).

71 Allyson M. POLLOCK, James LANCASTER, "Asymptomatic transmission of covid-19", the BMJ (21 December 2020); Shaun GRIFFIN, "Covid-19: Asymptomatic cases may not be infectious", Wuhan study indicates, the BMJ (1 December 2020).

72 Canada (Attorney General) v Grover, 2007 FC 28, paras. 65, 66, conf. by Attorney General of Canada v Grover, 2008 FCA 97.

35. The Privacy Statement states that, “Your personal information will also be used by your organization and TBS to monitor and report on the overall impact of COVID- 19 and compliance with the vaccination program both within the organization and for the Core Public Administration, as described in standard personal information bank PSE 907, Occupational Health and Safety.”

36. The personal information collected should not be shared with TBS. The stated use of the information by TBS being “to monitor and report on the overall impact of COVID-19 and compliance with the vaccination program both within the organization and for the Core Public Administration” is not directly related to the operating program and activities of the institution to which I am employed.[73] Moreover, PSE 907, Occupational Health and Safety relates to the institution operating the activities and programs. It does not allow the information to be accessed by any institution other than the one who operates the program and activities related to my employment.

37. The Privacy Statement states that, “Personal information may also be used to facilitate personnel administration in the employing organization and to ensure continuity and accuracy when an employee is transferred to another organization as described in standard personal information bank PSE 901, Employee Personnel Record. The centralized collection, use, and disclosure of your personal information is described in TBS central personal information bank (under development).”

38. This use of the information is not directly related to the operating program and activities of the institution to which I am employed.[74] This use of the information does not meet any of the grounds for disclosure provided by subsection 8(2) of the Privacy Act.[75] This stated use is not the primary purpose for collection nor a consistent purpose.

39. The Privacy Statement states that, “Refusal to provide the requested information may result in employees being refused on-site access to the workplace, whether you may report to work in person or remotely and other administrative consequences such as employees being placed on leave without pay, until they are fully compliant.”

40. The statement is unreasonable because it outlines a potential disciplinary action should the employee not comply with the privacy policy, specifically refusal of access to the work, on-site or remote, and a financial penalty. It is inappropriate to provide for disciplinary action in a privacy policy. A privacy policy should relate to the collection, use, and disclosure of personal information. Employees and the

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[73] Privacy Act, R.S.C. 1985 c. P-21, section 4; Union of Canadian Correctional Officers and Attorney General of Canada, 2019 FCA 212, para. 38.

[74] Privacy Act, R.S.C. 1985 c. P-21, section 4; Union of Canadian Correctional Officers and Attorney General of Canada, 2019 FCA 212, para. 38.

[75] Privacy Act, R.S.C. 1985 c. P-21, section 8(2).

population in general do not read privacy policies and automatically accept them. As such, by putting a disciplinary action in a privacy policy, employees will unwittingly agree to contract to terms they otherwise would not have. This practice cannot be qualified as good faith contracting.

D. The Policy Should be Struck Down

41. The Policy is unreasonable and is inconsistent with the collective agreement. The exercise of management rights to implement the Policy is therefore unjustified.

42. Consequently, the terms and conditions of my employment should remain unchanged by the Policy.

E. Leave without pay is an unreasonable consequences of non-compliance

43. The policy states that employee's have 2 weeks to attest and 2 additional weeks to take training and provide their private medical information in order to keep their full pay strength in tact, if not employee's will be placed on Administrative Leave Without Pay[76]. Pursuant to DAOD 5016-0, Standards of Civilian Conduct and Discipline; "… financial and other penalties to be applied for breached of discipline or misconduct"[77]. It appears to me that I am being discipline for misconduct[78] because my management, employer and every department at the federal government do not have any answers to my many legitimate concerns and it is simply easier to send me home without pay, then take the time to do our due diligence for all public servants. When I returned from my sick leave October 14 - December 1, 2021[79], I was also only discriminated against and only awarded 2 weeks, not the full 4 weeks that are written into the policy, taking away 2 full weeks of pay away from an employee trying to obtain informed consent in order to make this decision.

44. The requirements of the DAOD 5016-0, Standards of Civilian Conduct and Discipline[80] state that delegated managers must impose appropriate disciplinary measures based on the nature of misconduct, operational requirements and the principles of corrective and progressive discipline as set out in the Guidelines for Civilian Discipline. First, I don't believe asking questions to obtain informed consent about a new intrusive policy I didn't agree to at the start of my employment contract, prior to complying would be considered misconduct at all. If fact as a health and safety representative I think it is very important to be asking these questions. Secondly, I am a Graphic Design Technician with DND. I hold airworthy

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[76] The Policy, section 7.1.

[77] DAOD 5016-0, Standards of Civilian Conduct and Discipline, Context: Section 3.3.

[78] December 3, 2021, Letter from management about the consequences of the policy, mis-representing the facts of my situation.

[79] October 14 - December 1, 2021, Doctors sick note.

[80] DAOD 5016-0, Standards of Civilian Conduct and Discipline, Requirements: Section 3.8.

qualifications (MI)[81] Manufacturing Inspector with RCAF. I am currently the only indeterminate employee in the entirety of the federal government certified and fully trained to manufacture Metalphoto labels which are operational requirements for aircraft safety in the RCAF. Missing labels could case aircraft to be grounded. Having our military aircraft operational vs answering legitimate safety and efficacy concerns seems like an easy decision for my employer. Finally I have an outstanding work record, along with commendations for my work manufacturing PPE during the pandemic, I have always gone above and beyond for my employer, I have not one single mark on my record. It appears to me that this consequence is over reaching, not justified and not inline with my collective bargaining agreement.

45. Finally I have the following open and active investigations; a disclosure to the Office of the Public Sector Integrity Commissioner of Canada[82]- waiting for the initial assessment; Right to refuse dangerous & unsafe work[83] - appealing the level 3 decision to not investigate in Federal Court; an accommodation[84] - waiting on a decision from HR and Labour Relations; a harassment disclosure against my HR Rep, my supervisor & my CO[85] - Have my initial meeting next week and a privacy complaint[86] - waiting for the initial assessment. With all of these open investigations some of the above process' have reprisal clauses, none of which my employer as taken into account, all of which I have made my employer aware of.

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81 My Manufacturing Inspector(MI) Qualification for the Department of National Defence.

82 December 14 2021, Email confirmation of Disclosure to Office of the Public Sector Integrity Commission.

83 December 30 2021, Letter confirmation from level 3 investigation decision, Labour Program Canada.

84 January 10 2022, Accommodation request email.

85 January 19 2022, Email confirmation from Harassment Advisors Office for submitting a notice of harassment and discrimination in the workplace.

86 January 19 2022, Email confirmation of Privacy complaint to the Office of the Privacy Commissioner.

This is Exhibit "D" referred to in the **Affidavit of Charles Vézina**
affirmed before me on the 16th day of August, 2024

Adam Gilani (LSO#74291P)
Commissioner for Taking Affidavits

GRIEVANCE PRESENTATION
PRÉSENTATION DE GRIEF

UCCO-SACC-CSN

PROTECTED WHEN COMPLETED
PROTÉGÉ UNE FOIS REMPLI

SECTION 1 TO BE COMPLETED BY EMPLOYEE
À REMPLIR PAR L'EMPLOYÉ

• PLEASE PRINT
• EN LETTRES MOULÉES

REFERENCE NO / N° DE RÉFÉRENCE: 67426

A

SURNAME / NOM DE FAMILLE	GIVEN NAMES / PRÉNOMS	TELEPHONE NO. N° TÉLÉPHONE
HARVEY	JOHN A	306-960-4783

HOME ADDRESS / ADRESSE DU DOMICILE	JOB CLASSIFICATION CLASSIFICATON DE POSTE
BOX 1992 PRINCE ALBERT, SK	CX I

Department of the Solicitor General of Canada
Ministère du Solliciteur Général du Canada

Correctional Service of Canada
Service Correctionnel du Canada

SECTION	WORK LOCATION / LIEU DE TRAVAIL	SHIFT / QUART DE TRAVAIL
CSC	JOSK PEN	Days - 5/2

B

DETAILS OF GRIEVANCE / DESCRIPTION DU GRIEF

I grieve the employer's decision to put me on leave without pay indefinitely. This decision, taken on **or about** 2021-03-11 (DATE), constitutes a disguised disciplinary measure, a suspension, a failure to accommodate **and is contrary to the collective agreement**.

My grievance is filed following the collective agreement, any act, decision, directive, regulation, policy, document, practice, the *Constitution Act*, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11, the *Canadian Human Rights Act*, RSC 1985, c H-6 and any other applicable law.

The employer's use of its managerial rights is abusive, contrary to the collective agreement, its legal obligations and constitutes a failure to accommodate my fundamental rights, which amounts to deliberate and repetitive acts of discrimination.

C

CORRECTIVE ACTION REQUIRED / MESURES CORRECTIVES DEMANDÉES

I request:
Compensation for all loss, notably any lost wages, shift and weekend premiums, lieu hours, allowances, Canada Pension Plan contributions, contributions to benefit plans, general pension, contribution, benefit loss, improper deduction and for all other consequences related to the employer's actions;
Interests in accordance with the laws of my province of residence, following the *Federal Courts Act*;
That the employer cease its unreasonable exercise of power;
That the employer respect its legal obligations;
A declaration that the employer engaged in a discriminatory practice;
Damages for the infringement of the collective agreement and the law, notably the *Constitution Act of 1982* and the *Canadian Human Rights Act*;
Punitive and exemplary damages for the infringement of my rights protected by the collective agreement and the law, notably the *Constitution Act of 1982* and the *Canadian Human Rights Act*;
Any other remedy to be presented or that the Board may deem fit;

To be made whole.

And all other rights that I have under the Collective Agreement and any other applicable legislations. As well as all real, moral or exemplary damages, to be applied retroactively with legal interest without prejudice to other acquired rights.

et tous les autres droits que me donne la convention collective de travail et toutes autres législations, ainsi que tous dommages réels, moraux ou exemplaires, et ce, rétroactivement avec intérêts au taux légal, sans préjudice aux autres droits dévolus.

SIGNATURE OF EMPLOYEE / SIGNATURE DE L'EMPLOYÉ

2022-03-28
DATE

SECTION 2 TO BE COMPLETED BY UNION REPRESENTATIVE
À REMPLIR PAR LE REPRÉSENTANT SYNDICAL

Wade Swales
SIGNATURE OF UNION REPRESENTATIVE / SIGNATURE DU REPRESENTANT SYNDICAL

2022-03-28
DATE

SECTION 3 TO BE COMPLETED BY THE MANAGEMENT REPRESENTATIVE
À REMPLIR PAR LE REPRÉSANTANT DE LA DIRECTION

TITLE OF MANAGEMENT REPRESENTATIVE / TITRE DU REPRÉSENTANT DE LA DIRECTION	DATE RECEIVED / DATE DE RÉCEPTION
Sherry Fast, LR Advisor	22-04-07
SIGNATURE: Fast	COPY / COPIE

Court File No.: T-2142-23

FEDERAL COURT
Proposed Class Proceeding

BETWEEN:

STACEY HELENA PAYNE, JOHN HARVEY AND LUCAS DIAZ MOLARO

Plaintiffs

and

HIS MAJESTY THE KING

Defendant

WRITTEN REPRESENTATIONS OF THE DEFENDANT / MOVING PARTY
(Motion to Strike)

August 19, 2024

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Lawyers for the Plaintiffs

OVERVIEW

1. The Statement of Claim ("Claim") should be struck in its entirety, without leave to amend because the pleading discloses no reasonable cause of action, and the claims fall outside the jurisdiction of this Honourable Court.

2. The three proposed plaintiffs ("plaintiffs") allege that they were suspended from employment (Stacey Helena Payne and John Harvey) or resigned (Lucas Diaz Molaro) because of the Treasury Board of Canada ("Treasury Board") *Policy on COVID-19 Vaccination for the Core Public Administration Including the Royal Canadian Mounted Police* ("Policy").[1] The essence of the claim relates purely to the plaintiffs' terms and conditions of employment.

3. This Claim is barred by s. 236 of the *Federal Public Sector Labour Relations Act* ("*FPSLRA*"), which provides that the statutory grievance rights accorded to employees are in lieu of any right of action they may have.

4. In *Adelberg* the Federal Court of Appeal confirmed that, "compliance with the [vaccination policy] was a term and condition of employment for the plaintiffs […] and could therefore have been grieved under section 208 of the *FPSLRA,*"[2] striking the claims of those employees in the core public administration with grievance rights under s. 208, without leave to amend.

5. The plaintiffs, who all are or were employees of the core public administration with grievance rights under s. 208 of the *FPSLRA* are statutorily barred from bringing this Claim.

PART I – FACTS

A. THE CLAIM AND THE PLAINTIFFS

6. On October 6, 2023, the Claim was issued in the Federal Court.

7. This is a proposed class action brought by three employees who worked in the core public administration.[3]

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[1] *Policy on COVID-19 Vaccination for the Core Public Administration Including the RCMP,* dated October 6, 2021 ["**Treasury Board Policy**"], Affidavit of Charles Vézina, Tab B of the Defendant's Motion Record. ["**Vézina Affidavit**"], Exhibit A.
[2] *Adelberg v Canada*, 2024 FCA 106 at paras 57.
[3] Core Public Administration, as defined in the *Financial Administration Act*, RSC, 1985, c F-11, s. 11(1) and Schedules I, IV

8. The plaintiffs in this action claim that the Treasury Board Policy violated their rights under s. 2 (d) of the *Charter*. The plaintiffs also assert a claim for damages in tort for misfeasance in public office.

9. The plaintiffs state that they are all current or former unionized employees of the Government of Canada in the core public administration. As employees in the core public administration, the plaintiffs are or were employees with grievance rights pursuant to s. 208 of the *FPSLRA*, and thereby are prohibited from bringing this claim by s. 236 of the *FPSLRA*.

B. BACKGROUND – TREASURY BOARD POLICY

10. On October 6, 2021, the Treasury Board, implemented a vaccination policy pursuant to its authority under ss. 7 and 11.1 of the *Financial Administration Act*[4] (the "*FAA*").[5] The Treasury Board Policy required all employees of the core public administration to be fully vaccinated against COVID-19 unless they could not be vaccinated due to a certified medical contraindication, their religion, or if to do so would constitute discrimination as defined in the *Canadian Human Rights Act*. Employees unwilling to be fully vaccinated or to disclose their vaccination status were placed on administrative leave without pay.

11. One of the primary objectives of the Policy was to "take every precaution reasonable, in the circumstances, for the protection of the health and safety of employees."[6] Given that operational requirements may include *ad hoc* onsite presence, the Policy stipulated that "all employees, including those working remotely and teleworking must be fully vaccinated to protect themselves, colleagues, and clients from COVID-19."[7]

12. On June 14, 2022, the Government of Canada announced the suspension of vaccination mandates effective June 20, 2022, including the vaccination mandate for the core public administration as set out in the Treasury Board Policy.[8]

13. As a result, effective June 20, 2022, employees of the core public administration were no longer required to be vaccinated as a condition of employment.

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[4] *Financial Administration Act*, RSC, 1985, c F-11.
[5] *Treasury Board Policy*, Vézina Affidavit, Exhibit A.
[6] *Treasury Board Policy*, Vézina Affidavit, Exhibit A
[7] *Treasury Board Policy*, Vézina Affidavit, Exhibit A.
[8] Government of Canada News release, "Suspension of the vaccine mandates for domestic travellers, transportation workers and federal employees", dated June 14, 2022, Vézina Affidavit, Exhibit B.

14. Further, as of June 20, 2022, federal public servants in the core public administration who were subject to administrative leave without pay because of the requirement to be vaccinated, were permitted to resume regular work duties with pay. Accommodation measures put in place under the Treasury Board Policy also came to an end.

PART II – ISSUES

15. The legal issues to be determined are:

a. whether this Court has jurisdiction over the claims in view of s. 236 *FPSLRA*; and,

b. whether the pleading discloses a reasonable cause of action for misfeasance in public office.

16. It is plain and obvious that the entire Claim should be struck, without leave to amend.

PART III – SUBMISSIONS

A. THE LAW – RULE 221 OF THE *FEDERAL COURTS RULES*

17. Pursuant to Rule 221 of the *Federal Courts Rules* (the *"Rules"*), this Court may order that a pleading, or anything contained therein, be struck out on various enumerated grounds, including: that the pleading discloses no reasonable cause of action; is scandalous, frivolous, or vexatious; and, is otherwise an abuse of process. Pleadings may be struck out with or without leave to amend.

18. Generally, no evidence is admissible on a motion to strike under Rule 221. However, evidence is admissible on a motion contesting the jurisdiction of this court under Rule 221(1)(a).[9]

19. The analysis and test for motions to strike under Rule 221 is settled law. The Supreme Court of Canada's leading cases are comprehensively summarized by this Court in *Shebib v Canada*:[10]

> [10] The Supreme Court of Canada in decisions such as *R v Imperial Tobacco Canada Ltd.*, 2011 SCC 42, at paragraph 17 and, *Hunt v. Carey Canada Inc.*, 1990 CanLII 90 (SCC), [1990] 2 SCR 959, at paragraph 33 has set out the manner in which the Courts should approach a motion to strike under a Rule such as Rule 221 (1). I repeat paragraph 17 of *R v Imperial Tobacco Canada Ltd.* without the intervening citations:

[9] *Oman v Hudson Bay Port Co.*, 2016 FC 1269 at para 10; *Chase v Canada,* 2004 FC 273 at para 6.
[10] *Shebib v Canada*, 2016 FC 539 at paras 10, 11.

> *A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action. Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial.*

20. The basis of the Court's assessment is the pleading itself.[11] The facts pleaded are assumed to be true,[12] unless they are manifestly incapable of being proven, such as bare assumptions, conclusions and speculations.[13]

21. The principal purposes of pleadings are to define clearly the issues between the parties and to give the other side fair notice of the case it must meet.[14] To ensure that they serve these purposes, the *Rules* impose on plaintiffs the obligation to put forth sufficient material facts that disclose a reasonable cause of action. Under Rule 174, a statement of claim "shall contain a concise statement of the material facts on which the party relies". What constitutes a material fact is determined in light of the cause of action and the remedy sought.[15] Rule 181(1) also requires pleadings to contain particulars of every allegation contained therein.

22. As stated by the Federal Court of Appeal, "plaintiff[s] must plead, in summary form but with sufficient detail, the constituent elements of each cause of action or legal ground raised".[16] To establish a reasonable cause of action, a statement of claim must "(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."[17]

23. Although a statement of claim is to be read generously to accommodate any drafting deficiencies, this does not exempt plaintiffs from setting out sufficient material facts in support of

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[11] *R v Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para 21.
[12] *R v Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para 22.
[13] *Operation Dismantle v The Queen*, 1985 CanLII 74 (SCC), [1985] 1 SCR 441, p 455; *Zbarsky v Canada*, 2022 FC 195 at paras 23-24.
[14] *Sivak v Canada*, 2012 FC 272 at para 11; *Mancuso v Canada,* 2015 FCA 227 at para 16.
[15] *Mancuso v Canada,* 2015 FCA 227 at para 19.
[16] *Mancuso v Canada,* 2015 FCA 227 at para 19.
[17] *Zbarsky v Canada*, 2022 FC 195 at para 13; *Bérubé v Canada*, 2009 FC 43 at para 24, aff'd 2010 FCA 276.

their claims.[18] Litigants, whether self-represented or not, do "not have an unqualified right to rely on defective pleadings".[19]

24. Pleading sufficient material facts is especially important in *Charter* cases because sufficiently pleaded facts are necessary for a proper and contextual consideration of the *Charter* issues.[20] As confirmed by the Federal Court of Appeal in *Mancuso*, this is no "mere technicality"; "rather, it is essential to the proper presentation of Charter issues…".[21]

25. Defendants cannot be left to speculate, "as to how the facts might be variously arranged to support various causes of action."[22] While a plaintiff need not plead the particular label associated with a cause of action, the allegations of material facts in the claim must, in substance, give rise to a cause of action.[23]

26. Neither the parties nor the Court is served when a meritless action is allowed to proceed down the path of expensive and futile litigation.

B. THIS CLAIM IS BARRED BY S. 236 OF THE *FPSLRA*

i. Section 236 bars the claims of all public servants who can grieve under s. 208 (without exception)

27. The *FPSLRA* sets out an exclusive and comprehensive scheme for resolving employment-related disputes. Consequently, this action is beyond the Court's jurisdiction and should be struck.

28. This proposed class action seeks a declaration that the Treasury Board's conduct in issuing the Policy is an unjustifiable violation of the plaintiffs' *Charter* rights under s. 2(d) [freedom of association] and seek damages for the alleged violation under s. 24(1) [court may order an individual remedy for a *Charter* violation that is appropriate and just in the circumstance]. The plaintiffs also seek damages for the alleged tort of misfeasance in public office by the Treasury Board for the enactment and enforcement of the Treasury Board Policy.

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[18] *Zbarsky v Canada*, 2022 FC 195 at para 15.
[19] *Brauer v Canada*, 2021 FCA 198 at para 14.
[20] *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 SCR 698 at para 51; *Mancuso v Canada,* 2015 FCA 227 at paras 21, 32; *Mackay v Manitoba*, 1989 CanLII 26 (SCC), [1989] 2 SCR 357 at 361–362.
[21] *Mancuso v Canada*, 2015 FCA 227 at para 21; *Adelberg v Canada*, 2024 FCA 106 at paras 68.
[22] *Mancuso v Canada,* 2015 FCA 227 at para 16.
[23] *Paradis Honey Ltd. v Canada (Minister of Agriculture and Agri-Food),* 2015 FCA 89 at paras 113-114, leave to appeal ref'd (October 29, 2015), Doc 36471 (SCC).

29. Section 236 of the *FPSLRA* is a complete ouster of the Court's jurisdiction and a complete bar to any right of action for employees who have the right to grieve.[24] Both unionized and non-unionized employees have the right to file a grievance under the *FPSLRA* scheme.

30. As the Court of Appeal in *Bron* held,[25] and as consistently affirmed by this Court,[26] the provision is "clear and unequivocal" and "explicitly ousts the jurisdiction of the court over claims that could be the subject of a grievance under s. 208 of [the *FPSLRA*]."[27]

31. The Federal Court of Appeal's decision in *Adelberg* held that the essential character of the impugned Treasury Board Policy relates to the terms and conditions of employment and upheld this Court's decision barring the claims of the employees who had grievance rights under section 208.[28]

32. Courts across Canada have consistently applied s. 236 to bar civil actions raising grievable issues,[29] expressly holding that the provision "completely ousts this Court's jurisdiction over certain disputes [and] leaves no room for residual jurisdiction".[30]

33. While some Courts have made *obiter* comments suggesting that it is possible that residual jurisdiction for a court to assume jurisdiction remains, but that if such a residual jurisdiction exists, it would be limited to exceptional circumstances where there is evidence to establish that the

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[24] *Bron v Canada*, 2010 ONCA 71 at paras 14–15; *Yeates v Canada*, 2011 ONCA 83 at para 3; *Goulet c Mondoux*, 2010 QCCA 468 at paras 5–6; *Nosistel v Canada,* 2018 FC 618 at para 66; *Price v Canada,* 2016 FC 649 at paras 26–31; *Green v Canada (Border Services Agency)*, 2018 FC 414 at para 16; section 236 has a single express exception at s. 236(3) [that it does not apply to employees of separate agencies designated under s. 209(3) for disputes relating to termination for non-disciplinary reasons] and thus, Parliament did not intend to permit any other exception.

[25] *Bron v Canada*, 2010 ONCA 71 at paras 29, 33.

[26] See, *Hudson v Canada,* 2022 FC 694, at para 73; *Adelberg v Canada,* 2023 FC 252, at para 13, aff'd on this point 2024 FCA 106 at para 58; *McMillan v Canada*, 2023 FC 1752, at para 24

[27] *Bron v Canada*, 2010 ONCA 71 at paras 29.

[28] *Adelberg v Canada*, 2024 FCA 106 at paras 9, 55-57, aff'g *Adelberg v Canada*, 2023 FC 252 at para 30.

[29] *Adelberg v Canada,* 2023 FC 252, var'd on other grounds 2024 FCA 106; *Wojdan v Canada,* 2023 FC 182; *Horsman v Canada,* 2023 FC 929; *Davis v Canada (Royal Mounted Police),* 2023 FC 280, aff'd 2024 FCA 115; *Price v Canada,* 2016 FC 649; *Thompson v Kolotinsky*, 2023 ONSC 1588; *Bron v Canada,* 2010 ONCA 71; *Yeates v Canada,* 2011 ONCA 83, *Martell v Canada (Attorney General) & Ors,* 2016 PECA 8; *Barber, Nadel et Procureur general du Canada c J.T.,* 2016 QCCA 1194, leave to appeal to SCC denied, 2017 CanLII 2712 (SCC); *Cyr c Radermaker,* 2010 QCCA 389; *Baxter v Harder,* 2011 ABQB 730; *Dufour c Bouchard,* 2013 QCCS 6544; *Bouchard c Procureure générale du Canada,* 2018 QCCS 1486, *Bouchard c Procureur général du Canada*, 2019 QCCA 2067, leave to appeal to the SCC dismissed 2020 CanLII 29400 (SCC); *Robinson v Canada (Parks Canada Agency),* 2017 FC 613; *Suss v Canada*, 2024 FC 137; *Doe v Canada*, 2023 BCSC 1701.

[30] *McMillan*, 2023 FC 1752 at para 24. See also *Suss v Canada*, 2024 FC 137 at para 44, this Court held that "section 236 of the FPSLRA completely ousts this Court's jurisdiction over the disputes that are captured by it".

grievance process is entirely corrupt and therefore unable to provide effective redress.[31] However, since the enactment of s. 236, no court has ever assumed jurisdiction over a labour dispute in that involves employees accorded grievance rights.[32]

34. As is abundantly clear from the wording of s. 236(2), the fact that one of the plaintiffs has not filed a grievance is not relevant.[33] As this Court held in *Green*, "as subsection 236(2) clearly contemplates, the Court shall defer to the grievance process whether or not the employee avails himself or herself of the right to present a grievance in any particular case…."[34]

35. Section 208 of the *FPSLRA* sets out the broad types of grievances available to the plaintiffs:

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;

[31] *Adelberg v Canada*, 2024 FCA 106 at para 58, aff'g on this point 2023 FC 252 at para 17; *Bron*, 2010 ONCA 71 at para 29; *Canada v Robichaud and McKinnon*, 2013 NBCA 3 at para 10.
[32] *Adelberg*, 2023 FC 252 at para 17, var'd on other grounds 2024 FCA 106; *Davis v Canada (Royal Canadian Mounted Police)*, 2024 FCA 115 at paras 88-89.
[33] Vézina Affidavit, at para 16.c.
[34] *Green v Canada (Border Services Agency)*, 2018 FC 414 at para 16.

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]

36. The term "employee" generally means a person employed in the public service with some exceptions such as casual employees or students and is defined at s. 206(1) of the Act. This definition of employee includes employees in the core public administration subject to the policies established by the Treasury Board.[35]

37. Section 236 of the *FPSLRA* provides that the right to grieve under the FPSLRA is in lieu of any right of action.

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.

[35] See definitions of "employee" and "employer", *Federal Public Sector Labour Relations Act*, SC 2003, c 22, s 2, s. 2(1).

ii. The claims asserted are grievable under s. 208

38. The plaintiffs, as employees in the core public administration, can obtain the ultimate remedies they seek, including in respect of the *Charter* claims, through the exclusive and comprehensive grievance process of the *FPSLRA* scheme.[36] The conclusive and consistent case law interpreting s. 236 holds that a court must look at the essential character of the dispute, even if the plaintiffs allege Charter breaches or other torts.[37] There is no challenge to the efficacy of the grievance process.

39. Plaintiffs cannot escape the application of the statutory bar in s. 236 by asserting that the claim is not an ordinary workplace dispute. As the Court of Appeal in *Bron* found, and affirmed repeatedly by this Court,[38] "[a]lmost all employment-related disputes can be grieved."

40. As the Federal Court of Appeal held in *Ebadi*,

> To allow large categories of claims—such as any claim involving an intentional tort or Charter breach—to escape the operation of the FPSLRA would undermine Parliament's intent. Many if not all workplace grievances could, through artful pleading, be cast as intentional torts: for example, a manager speaking harshly to an employee could be said to be intentionally inflicting mental harm, or the failure to be promoted an act of discrimination. To exempt these claims from the grievance process could effectively gut the scheme, reducing it to the most mechanical and administrative elements of employment relationships, such as hours of work, overtime, classification and pay.[39]

41. The decision in *Adelberg* is consistent with respect to the essence of the claim brought by these plaintiffs and the Federal Court of Appeal's decision is binding.[40] These plaintiffs were all employed by organizations within the category of organizations within the core public administration (listed in Schedule "A" to the Federal Court's reasons in *Adelberg*) with grievance rights under s. 208 of the *FPSLRA* and whose claims relating to the Policy were struck, without leave to amend.[41] This was also recently reaffirmed by the Federal Court of Appeal in *Davis*.[42]

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[36] *Adelberg v Canada*, 2023 FC 252 at para 34; *Wojdan v Canada*, 2021 FC 1341 at paras 23–26; *Weber v Ontario Hydro*, 1995 CanLII 108, [1995] 2 SCR 929, at paras 60-61 and *R v Conway*, 2010 SCC 22 at para 78.
[37] *Adelberg v Canada*, 2024 FCA 106 at para 56.
[38] *Adelberg v Canada*, 2023 FC 252 at para 32; *Davis v Canada (Royal Canadian Mounted Police)*, 2024 FCA 115 at para 68.
[39] *Ebadi v Canada*, 2024 FCA 39 at para 36.
[40] *Adelberg v Canada*, 2023 FC 252 at para 34; *Wojdan v Canada*, 2021 FC 1341 at paras 23–26; *Weber v Ontario Hydro*, 1995 CanLII 108, [1995] 2 SCR 929, at paras 60-61 and *R v Conway*, 2010 SCC 22 at para 78.
[41] *Adelberg v Canada*, 2024 FCA 106 at para 54 and 59.
[42] *Davis v Canada (Royal Canadian Mounted Police)*, 2024 FCA 115 at para 86.

42. The framing of the allegations as tort and *Charter* claims cannot circumvent the essence of the claim. As in *Adelberg*, claims brought by employees in the core public administration in relation to the Policy, should be struck even in the face of creative pleadings casting the claims as a tort or a *Charter* violation.[43]

C. THE CLAIM DISCLOSES NO REASONABLE CAUSE OF ACTION

43. Even if this Court were able to take jurisdiction to adjudicate this claim, notwithstanding the statutory bar in the *FPSLRA*, this claim does not disclose a cause of action for misfeasance in public office.

44. The plaintiffs fail to plead the necessary elements with respect to the allegation of misfeasance in public office.

45. Moreover, the allegation of misfeasance in public office is pleaded in a manner that lacks sufficient clarity to discern the elements of the claim.

i. General principles of proper pleadings

46. It is well established that pleadings should be struck if they are so confusing that it is difficult to understand what is being pled.[44]

47. A plaintiff must plead material facts in sufficient detail to support the claim and the relief sought.[45] The Court and opposing parties cannot be left to speculate as to how the facts "might be variously arranged to support various causes of action".[46] The pleading must tell the defendant who, when, where, how and what gave rise to its liability.[47]

48. The statement of claim fails to plead a reasonable cause of action with respect to the allegations of misfeasance in public office. The plaintiffs fail to "(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

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[43] *Adelberg v Canada*, 2024 FCA 106 at paras 68.
[44] See, for example, *kisikawpimootewin v Canada,* 2004 FC 1426 at paras 8-9; *Guillaume v Toronto (City),* 2010 ONSC 5045 at para 54; *Keremelevski v Ukranian Orthodox Church St. Mary Metropolitan,* 2012 BCSC 2083 at para 18.
[45] *Hudson v Canada*, 2022 FC 694 at para 68, citing *Mancuso v Canada (National Health and Welfare),* 2015 FCA 227 at para 16.
[46] *Hudson v Canada*, 2022 FC 694 at para 68.
[47] *Hudson v Canada*, 2022 FC 694 at para 69; *Doan v Canada*, 2023 FC 968 at para 46.

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."[48]

49. In *Guillaume v Toronto (City),* Allen J. explained the importance of proper pleadings as follows:

> [54] The importance of clearly drafted and structured pleadings does not require much explanation. Pleadings should be drafted with sufficient clarity and precision so as to give the other party fair notice of the case they are required to meet and of the remedies being sought. The role of pleadings is to assist the court in its quest for the truth. Clearly, confusing, run on and poorly organized pleadings cannot accomplish those goals. Courts have held a pleading may be struck out on the grounds it is unintelligible and lacks clarity [Citations omitted].[49]

ii. The Claim does not disclose a cause of action for misfeasance in public office

50. To properly plead a tort the plaintiff must identify the tort – in this case, misfeasance in public office – and set out the material facts necessary to satisfy the elements of the tort.

51. To plead the tort of misfeasance in public office, the plaintiff must have "a pleading of a particular state of mind by a public official – deliberate, specific conduct which the official knows to be inconsistent with their legal obligations."[50] As in *Mancuso*, the plaintiffs assert the tort of misfeasance in public office but, "they do not link any particular conduct to the elements of the tort."[51]

52. While it may be impossible for a plaintiff to name the particular public servant responsible, generalized claims against an entire department, agency, or public body, in this case, the allegation broadly against the Treasury Board, is insufficient, "and amounts to just throwing out what is at best a 'Hail Mary' with no chance of success."[52] Some level of specification is necessary to plead misfeasance in public office, "such as identifying the job positions, the organizational branch, the office, or even the building in which those dealing with the matter worked."[53]

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[48] *Zbarsky v Canada*, 2022 FC 195 at para 13; *Bérubé v Canada*, 2009 FC 43 at para 24, aff'd 2010 FCA 276.
[49] *Guillaume v Toronto (City)*, 2010 ONSC 5045 at para 54.
[50] *Bigeagle v Canada*, 2023 FCA 128 at para 80; *Mancuso v Canada*, 2015 FCA 227 at para 26; citing *Odhavji Estate v Woodhouse*, 2003 SCC 69; *St. John's Port Authority v Adventure Tours Inc.*, 2011 FCA 198; *Merchant Law Group v Canada Revenue Agency*, 2010 FCA 184.
[51] *Mancuso v Canada*, 2015 FCA 227 at para 26.
[52] *Bigeagle v Canada*, 2021 FC 504 at para 192; *Merchant Law Group v Canada Revenue Agency,* 2010 FCA 184 at para 38.
[53] *Bigeagle v Canada*, 2023 FCA 128 at para 80, citing *Merchant Law Group v Canada Revenue Agency,* 2010 FCA 184 at para 38.

53. In the Statement of Claim, the plaintiffs make broad allegations against Treasury Board, without any further specificity.[54] This allegation is further mired in a lack of clarity because while the Policy was enacted by the Treasury Board, the plaintiff also alleges that misfeasance also arises out of the enforcement of the Policy.[55] However, elsewhere the plaintiffs plead that the enforcement of the Policy was the responsibility of the Deputy Heads of the departments in the core public administration.[56]

54. As in *Bigeagle*, there is also no specificity to any particularized harm to an individual arising out of the alleged misfeasance, other than to employees at large, across Canada.[57] This is not a sufficient pleading.

55. Finally, the plaintiffs have not pled a specific intention to deliberately cause harm to an individual that the official knows to be inconsistent with their legal obligations. At its highest, the plaintiffs allege that the "Treasury Board", when enacting and enforcing the Policy, "created a foreseeable and unreasonable risk of harm" without any particularization of the alleged harm, and "they suffered significant economic deprivation and emotional trauma and that such harm was foreseeable by the Treasury Board."[58] The plaintiffs did not and could not plead that the Treasury Board intended to cause the plaintiffs any harm, especially considering that the stated objective of the Policy was to "take every precaution reasonable, in the circumstances, for the protection of the health and safety of employees."[59]

56. The plaintiff's failure to the plead the material facts necessary for the elements of the tort makes it plain and obvious that the cause of action for misfeasance in public office is doomed to fail.

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[54] Statement of Claim issued October 6, 2024, at para 42.
[55] Statement of Claim issued October 6, 2024, at para 42, 42.b., 42.c., and 42.d.
[56] Statement of Claim issued October 6, 2024, at para 18.
[57] *Bigeagle v Canada*, 2021 FC 504 at para 191.
[58] Statement of Claim issued October 6, 2024, at para 42.c., and 42.d.
[59] *Treasury Board Policy*, Vézina Affidavit, Exhibit A.

iii. The expansive proposed class does not save the Claim

57. The normal rules of pleading also apply with equal force to a proposed class action. The launching of a proposed class action is a matter of "great seriousness", potentially affecting many class members' rights and the liabilities and interests of defendants. Complying with the Rules is not "trifling or optional; it is mandatory and essential".[60]

58. However, the fact that the plaintiffs bring this action as a proposed class action does not impact the statutory bar or alter the analysis under s. 236. As confirmed by the Supreme Court in *Bisaillon*, the class action mechanism cannot confer jurisdiction to a court over a group of cases that otherwise fall within the jurisdiction of another court or tribunal.[61] Courts, including this Court, have confirmed this principle,[62] and acknowledged that the grievance procedure cannot be circumvented, even for reasons of procedural efficiency.[63]

59. The Statement of Claim provides no factual allegations, that if taken to be true, form the basis for any reasonable cause of action. Without any such pleading, Canada has no information and cannot plead with respect to possible claims beyond the specific claims of the three plaintiffs, who are all unionized employees in the core public administration within the meaning of the *FPSLRA* and subject to grievance rights under s. 208.

D. THE COURT SHOULD NOT GRANT LEAVE TO AMEND

60. The Court should not grant the plaintiffs leave to amend because the deficiencies in the pleadings are so fundamental that they cannot be cured by an amendment.[64]

61. If a Court is satisfied that a plaintiff is "unwilling or unable to cure the defects in the statement of claim by way of amendment", that is a sufficient basis to deny granting leave to amend.[65]

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[60] *Hudson v Canada*, 2022 FC 694 at para 70 citing *Merchant Law Group v Canada Revenue Agency,* 2010 FCA 184 at para 40; *Bisaillon v Concordia University,* 2006 SCC 19 at para 17; *Doan v Canada*, 2023 FC 968 at paras 42-52.
[61] *Bisaillon v Concordia University,* 2006 SCC 19, at para 17.
[62] *Hudson v Canada,* 2022 FC 694, at para 73.
[63] *Bouchard,* 2018 QCCS 1486 at paras 50, 59.
[64] See, *Collins v Canada*, 2011 FCA 140 at para 26; *Simon v Canada*, 2011 FCA 6 at para 8.
[65] *Turmel v Canada*, 2022 FC 732 at para 37.

62. The claim should be struck because the plaintiffs have no right of action pursuant s. 236 of the *FPSLRA*; any amendment cannot repair this fundamental lack of jurisdiction.

63. The plaintiffs did not plead material facts necessary to establish a cause of action for misfeasance in public office. The plaintiffs have not and cannot meet the low threshold for pleading the cause of action and it is doomed to fail. There is also no indication that the plaintiffs can remedy this deficiency.

64. The Claim does not satisfy the bare minimum requirements of pleadings. The deficiencies in the Claim are not mere drafting deficiencies that could plausibly be remedied through amendment. Rather, they are symptomatic of an underlying problem in the Claim that is fatal. No amendment can cure the deficiency of this claim.

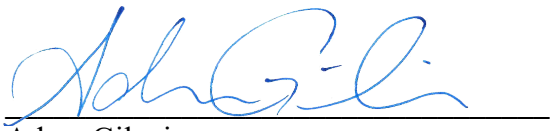
PART IV – ORDER SOUGHT

65. The defendant requests that the Statement of Claim be struck in its entirety, without leave to amend, and the matter be dismissed.

66. The respondent seeks its costs in the amount of $1500.00, payable forthwith.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of Toronto, in the Province of Ontario this 19th day of August 2024.



Adam Gilani

PART V – LIST OF AUTHORITIES

Appendix "A" – Statutes and Regulations

1. *Federal Courts Act,* RSC, 1985, c F-7
2. *Federal Courts Rules,* SOR/98-106
3. *Federal Public Sector Labour Relations Act*, SC 2003, c 22, s 2
4. *Financial Administration Act*, RSC, 1985, c F-11

Appendix "B" – Book of Authorities

5. *AstraZeneca Canada Inc. v Novopharm Limited*, 2010 FCA 112
6. *Barber, Nadel et Procureur general du Canada c J.T.,* 2016 QCCA 1194
7. *Baxter v Harder,* 2011 ABQB 730
8. *Bérubé v Canada*, 2009 FC 43, aff'd 2010 FCA 276
9. *Bigeagle v Canada*, 2021 FC 504
10. *Bigeagle v Canada*, 2023 FCA 128
11. *Bisaillon v Concordia University,* 2006 SCC 19
12. *Bouchard c Procureure générale du Canada,* 2018 QCCS 1486
13. *Bouchard c Procureur général du Canada*, 2019 QCCA 2067
14. *Brauer v Canada*, 2021 FCA 198
15. *Bron v Canada*, 2010 ONCA 71
16. *Canada v Robichaud and McKinnon*, 2013 NBCA 3
17. *Chase v Canada,* 2004 FC 273
18. *Collins v Canada*, 2011 FCA 140
19. *Cyr c Radermaker, 2010 QCCA 389*
20. *Davis v Canada (Royal Mounted Police)*, 2023 FC 280
21. *Davis v Canada (Royal Mounted Police)*, 2024 FCA 115
22. *Doan v Canada*, 2023 FC 968

23. *Doe v Canada*, 2023 BCSC 1701

24. *Dufour c Bouchard,* 2013 QCCS 6544

25. *Goulet c Mondoux*, 2010 QCCA 468

26. *Green v Canada (Border Services Agency)*, 2018 FC 414

27. *Guillaume v Toronto (City),* 2010 ONSC 5045

28. *Hudson v Canada,* 2022 FC 694

29. *Horsman v Canada,* 2023 FC 929

30. *Keremelevski v Ukranian Orthodox Church St. Mary Metropolitan,* 2012 BCSC 2083

31. *kisikawpimootewin v Canada,* 2004 FC 1426

32. *Mackay v Manitoba*, 1989 CanLII 26 (SCC), [1989] 2 SCR 357

33. *Mancuso v Canada,* 2015 FCA 227

34. *Marshall v Canada*, 2006 FC 51

35. *Martell v Canada (Attorney General) & Ors,* 2016 PECA 8

36. *McMillan v Canada*, 2023 FC 1752

37. *Merchant Law Group v Canada Revenue Agency,* 2010 FCA 184

38. *Nosistel v Canada,* 2018 FC 618

39. *Odhavji Estate v Woodhouse*, 2003 SCC 69

40. *Oman v Hudson Bay Port Co.*, 2016 FC 1269

41. *Operation Dismantle v The Queen*, 1985 CanLII 74 (SCC), [1985] 1 SCR 441

42. *Paradis Honey Ltd. v Canada (Minister of Agriculture and Agri-Food),* 2015 FCA 89

43. *Price v Canada,* 2016 FC 649

44. *R v Conway*, 2010 SCC 22

45. *R v Imperial Tobacco Canada Ltd.*, 2011 SCC 42

46. *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 SCR 698

47. *Robinson v Canada (Parks Canada Agency)*, 2017 FC 613

48. *Shebib v Canada*, 2016 FC 539

49. *Simon v Canada*, 2011 FCA 6

50. *Sivak v Canada*, 2012 FC 272

51. *Suss v Canada*, 2024 FC 137

52. *St John's Port Authority v Adventure Tours Inc*, 2011 FCA 198

53. *Thompson v Kolotinsky*, 2023 ONSC 1588

54. *Turmel v Canada*, 2021 FC 1095, aff'd 2022 FCA 166

55. *Turmel v Canada*, 2022 FC 732

56. *Turner v Canada*, 1992 CanLII 14782, [1992] 3 FC 458

57. *Weber v Ontario Hydro*, 1995 CanLII 108, [1995] 2 SCR 929

58. *Wojdan v Canada*, 2021 FC 1244

59. *Wojdan v Canada*, 2022 FCA 120

60. *Yeates v Canada*, 2011 ONCA 83

61. *Zbarsky v Canada*, 2022 FC 195

No. T-2142-23

FEDERAL COURT
PROPOSED CLASS PROCEEDING

BETWEEN

STACEY HELENA PAYNE, JOHN HARVEY and LUCAS DIAZ MOLARO

Plaintiffs

AND

HIS MAJESTY THE KING

Defendant

WRITTEN REPRESENTATIONS OF THE PLAINTIFFS

Response to the Defendant's Motion to Strike
Without Leave to Amend

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OVERVIEW[1]

1. The plaintiffs have filed a Statement of Claim (the "Claim") requesting certification of a class proceeding on behalf of current and former employees of the federal government that were subject to disciplinary measures for failure to disclose their COVID-19 vaccination status or for failure to be vaccinated. These disciplinary measures arose because of the mandatory COVID-19 vaccination order, the *Policy on COVID-19 Vaccination for the Core Public Administration Including the Royal Canadian Mounted*

[1] Except where otherwise indicated, any emphasis in quotes is found in the original and internal citations have been omitted.

Police (the "Policy").

2. The defendant now seeks to strike the entirety of the Claim without leave to amend. It submits that neither of the plaintiffs' claims fall within the jurisdiction of the Federal Court and that one of the plaintiffs' claims is insufficiently particularized. In so arguing, the defendant relies on overly restrictive characterizations of the Federal Court's jurisdiction and a misunderstanding of the nature of the plaintiffs' claim.

3. Moreover, the defendant's arguments are contrary to the approach that must be taken on a motion to strike. On this motion, the court must determine whether, assuming the facts pleaded as true, it must be "plain and obvious" that the Claim is "bereft of any possibility of success." [2] The Claim should only be struck if there is a "fatal flaw" at the root of the Claim such that it is bound to fail, for instance, if the defendant cannot understand, reading the pleading generously, the "who, when, where, how and what gave rise to [their] liability."[3]

4. Notably, the defendant here has never argued that it is unable to understand the Claim or that it is unable to respond to the allegations found therein. Rather, the defendant assumes that the plaintiffs' claims fall within certain provisions of the *Federal Public Sector Labour Relations Act*, SC 2003, c 22, s 2 ("*FPSLRA*" or the "*Act*") and that, despite clear commentary otherwise, these provisions are an absolute and non-discretionary bar to the Claim proceeding before this Court.

5. Fundamentally, the defendant has not shown that this is one of the "clearest of cases" justifying the Claim's outright dismissal at this preliminary stage of the proceedings.[4] The plaintiffs' Claim raises valid and critical issues that have yet to be decided. The plaintiffs thereby request that the defendant's motion to strike be dismissed.

PART I – STATEMENT OF FACTS

6. The plaintiffs rely upon the facts as stated in the Claim. However, given the defendant's position that some of the pleaded facts are insufficient, the plaintiffs seek to clarify their position by restating the facts found in the Claim—albeit in a more summary

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[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] *Id*; *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 at para 19 [*Mancuso*]
[4] *Al Omani v Canada,* 2017 FC 786 at para 34 [*Al Omani*]

form—below.

i) Implementation of the Policy

7. On October 6, 2021, the Treasury Board of Canada ("Treasury Board") issued the Policy pursuant to ss. 7 and 11.1 of the *Financial Administration Act*, RSC 1985, c F-11. The Policy required mandatory COVID-19 vaccination for employees in certain regulated departments of the federal public administration. The stated objectives of the Policy were, *inter alia*, "to take every precaution reasonable, in the circumstances, for the protection of the health and safety of employees."

8. The Policy required "deputy heads" (presumably as defined in the *Financial Administration Act*) to immediately implement the Policy's mandatory COVID-19 vaccination program within their respective organizations. Under the Policy, employees (defined broadly) that remained unvaccinated or that did not disclose their vaccination status were, among other possible consequences, restricted from accessing their workplaces and were placed on leave without pay unless that employee fell within one or two limited exceptions. Under the Policy, deputy heads were also required to collect and disclose information pertaining to employees' vaccination status.

ii) The consequences to the plaintiffs

9. The representative plaintiffs are current and former employees of federally regulated departments as described in the *Financial Administration Act.* They were subject to—and seek to represent a class of individuals that were also subject to—discipline for failure to disclose their vaccination status and/or failure to become vaccinated as required by the Policy (the proposed class members, unless otherwise indicated, are referred to herein as the "plaintiffs").

10. Prior to the Policy, none of the plaintiffs' employment agreements contained 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. Employers could discipline the plaintiffs for failure to disclose vaccination status or failure to become vaccinated for COVID-19.

iii) The Treasury Board's knowledge and motivations

11. The Treasury Board is responsible for human resources management in the plaintiffs' federally regulated sectors and therefore was or ought to have been aware of the existence of and terms of the plaintiffs' employment agreements.

12. The Treasury Board was further aware that these the majority of these agreements had been subject to extensive negotiations with the plaintiffs' respective bargaining units.

13. Nevertheless, the Treasury Board enacted the Policy without the protections afforded by collective bargaining and without the plaintiffs' consideration or consent.

14. The Treasury Board 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.

15. The Treasury Board's stated objective in enacting the Policy was to protect the health and safety of employees, presumably by reducing the transmission of COVID-19. However, the Treasury Board knew or ought to have known that mandatory vaccination would not further these objectives.

16. The Treasury Board enacted the Policy even though it was aware that the terms of the Policy would pose a direct risk of substantial harm to the plaintiffs.

17. The plaintiffs did in fact suffer significant economic and emotional harm arising from the loss of their ability to work and the coercive tactics employed by the Treasury Board.

PART II –POINTS IN ISSUE

18. This application raises the following issues:

a. Has the defendant shown that it is "plain and obvious" that any or all of the Claim should be struck because it is "doomed to fail?"[5]

b. If so, has the defendant 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?[6]

PART III –SUBMISSIONS

A. THE LAW ON A MOTION TO STRIKE

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

19. The defendant has an "onerous" burden in seeking to strike the Claim, particularly without leave to amend.[7] As stated by the Supreme Court of Canada, "the motion to strike is a tool that must be used with care."[8] Courts "must" take a "generous approach" and "err on the side of permitted a novel but arguable claim to proceed to trial."[9]

20. 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"[10] or are "inconsistent with common sense, the documents incorporated by reference, or incontrovertible evidence proffered by both sides for the purpose of the motions."[11] 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.

21. The defendant specifically seeks to strike the Claim under Rule 221(1)(a). Under this Rule, all or part of a pleading may be struck if it "discloses no reasonable cause of action." To succeed on this ground, the defendant must show that it is "plain and obvious"

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[5] *Canadian Frontline Nurses* at para 122
[6] *Al Omani* at paras 32-35
[7] *Doan v Canada*, 2023 FC 968 at para 40 [*Doan*]
[8] *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 21
[9] *Id*
[10] *Gaskin v Canada*, 2024 CanLII 28268 (FC) at para 8
[11] *Doan* at para 50

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]

22. Rule 221 notes that all or part of a pleading may be struck "with or without leave to amend." The defendant has 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."[14] The general rule is that leave to amend should be granted "unless there is no scintilla of a cause of action."[15] 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."[16]

ii) The low threshold and generous reading applied to pleadings

23. 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."[17] 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

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[12] *Canadian Frontline Nurses* at para 122 (*citing Wenham*)
[13] *Id*
[14] *Al Omani* at para 34; *Yan v Daniel*, 2023 ONCA 863 at para 19
[15] *Al Omani* at para 34
[16] *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)
[17] *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)

those facts are to be proved," and "may raise any point of law."

24. 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 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.

25. It should also be remembered that, for pleadings, "perfection is not the standard."[18] In essence, a statement of claim should "tell the defendant who, when, where, how and what gave rise to its liability."[19] 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."[20]

26. 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."[21] 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.'"[22] 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."[23]

27. In short, to succeed on this motion, the defendant must meet the onerous test of striking the entirety of the Claim and the even heavier burden of denying leave to amend. On the other hand, to survive this motion, the Claim must meet a relatively low threshold. Read generously, the Claim must allow the defendant to understand the 'who, what,

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

where, when, and how' of the claims alleged against them.

B. THE CLAIM IS NOT 'DOOMED TO FAIL'

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

28. The defendant's main contention is that ss. 208 and 236 of the *FPSLRA* are a "complete ouster" of this Court's jurisdiction, "without exception."[24] In so doing, the defendant mischaracterizes both the nature of the plaintiffs' claims and both the nature of the scheme under the *Act*.[25]

29. First, the *FPSLRA* does not act as a "complete bar" to any and all claims that may arise in similar circumstances to these proceedings. Indeed, the Supreme Court of Canada has repeatedly warned not to overextend the jurisdiction of labour arbitrators: the exclusivity of labour arbitration "does not close the door to all legal actions involving the employer and the unionized employee.'"[26]

30. This is exemplified in the very cases upon which the defendant relies. In *Adelberg v Canada*, 2024 FCA 106, the court explicitly found that, *inter alia*, "many actions have proceeded against the RCMP for workplace issues, including class actions for matters that could have been the subject of grievances" and that the trial court "erred in finding that the plaintiffs' claims related to [certain] travel-related measures… were subject to section 236 of the *FPSLRA*."[27] In *Ebadi v Canada*, 2024 FCA 39, the court described two cases in which part of the plaintiff's claims were found explicitly not to fall within a labour arbitrator's jurisdiction.[28] In *McMillan v Canada,* 2023 FC 1752 at para 25, the courts wrote that it was "clear from the language of section 236 that there are parameters on the ouster of the Court's jurisdiction."[29]

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[24] Written Representations of the Defendant at heading B(i); para 29
[25] The plaintiff also notes that the Vezina affidavit relied upon by the defendant (specifically paras 11-16) should be disregarded by this Court as it repeatedly states the legal conclusion that the plaintiffs' causes of action fall within the purview of s. 208 of the *Act*. *See De Luca v Geox SPA,* 2024 FC 1441 at para 22 (legal conclusions in affidavits are inadmissible (citing cases))
[26] *Northern Regional Health Authority v Horrocks,* 2021 SCC 42 at para 22
[27] *Adelberg v Canada,* 2024 FCA 106 at paras 47, 53 [*Adelberg*]
[28] *Ebadi v Canada*, 2024 FCA 39 at paras 32-33
[29] *See also Suss v Canada,* 2024 FC 137 at para 45 (same)

31. As noted by the defendant, the bar in s. 236 of the *Act* only applies to matters that may be grieved. In so determining, the court must look to the "essential character of the dispute to determine if it raises a matter that could have been the subject of a grievance."[30] Here, the essential character of the Claim does not concern "the terms and conditions of [the plaintiffs'] employment" such that it must be exhausted through the grievance process.[31] As described by the defendant itself, the Claim alleges:

> …that the Treasury Board's conduct in issuing the Policy is an unjustifiable violation of the plaintiffs' *Charter* rights under s. 2(d) [freedom of association] and… the alleged tort of misfeasance in public office by the Treasury Board for the enactment and enforcement of the Treasury Board Policy.[32]

32. The defendant's own description of the Claim fails to reference "the terms and conditions of [the plaintiffs'] employment." Rather, the defendant describes the dispute as arising out of the process by which the Treasury Board implemented the Policy. Here, as in *Québec (Commission des Droits de la Personne et des Droits de la Jeunesse) c Québec (Attorney General)*, 2004 SCC 39 ["*Morin*"], this question does not fall under the exclusive jurisdiction of the labour arbitrator:

> [24] … 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.[33]

The defendant further underplays the court's residual discretion if a dispute is grievable under s. 208. This authority is not found in mere *obiter* commentary. Rather, it is well-established that "the court retains residual discretion to hear actions related to employment disputes where remedies are not available by the statutory tribunal, where there is a legislative gap in the *FPSLRA* scheme… where certain events produce a difficulty unforeseen by the legislative scheme," and "if there is evidence that the grievance process if corrupt." *Howell v Sun Life Assurance Company of Canada*, 2024 ONSC 3908 at paras 21-22 (citing cases); *Canada v Greenwood*, 2021 FCA 186 at para 201 (upholding trial court's exercise of residual discretion)

[30] *Adelberg* at para 56 (citing cases)

[31] *FPSLRA* at s. 208

[32] Written Representations of the Defendant at para 28

[33] *See also Villeneuve v AG Canada,* 2016 ONSC 6490 at paras 43-44 (considering *FPSLRA* and collective agreement holistically, cannot characterize s. 236 as ousting the jurisdiction of the court over the plaintiffs' claims); *Bemister v Canada (Attorney General)*, 2017 FC 749 at para 3 (aff'd 2019 FCA 190) (question before the court is not about pension benefits but rather "the increase in the cost of PSHCP

33. Additionally, the proposed class itself militates against the exclusive jurisdiction of arbitration. The proposed class members does include individuals who are not "employees" as defined under s. 208 of the *FPSLRA.* The Policy affected certain hired individuals such as "casual workers" and "students" and members of the RCMP[34] that do not have grievance rights under s. 208 and therefore are not subject to the bar found in s. 236 of the *Act.*[35] A "grievance arbitrator cannot claim to have authority over persons considered to be third parties in relation to [a] collective agreement and cannot render decisions against them," absent their consent.[36]

34. In these ways and despite the defendant's assertions to the contrary, *Adelberg* is not authoritative on the issues on this motion. As stated by the Federal Court of Appeal in *Brake v Canada (Attorney General*), 2019 FCA 274, courts should be 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.[37] Specifically, the court in *Brake* 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;[38]
b. each case is "based on the particular evidentiary record filed and the specific claims pleaded;" [39] and
c. this plaintiff sought to "place a different evidentiary record before the Court to support different claims."[40]

35. In *Adelberg*, the plaintiffs alleged, among others, that various ministerial departments were liable for federally-regulated employers adopting measures including

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coverage for retirees, and it is about the course of conduct followed by the [Treasury Board] to achieve that increase")
[34] Claim at paras 2, 8; Written Representations of the Defendant at para 36
[35] *Adelberg* at paras 46-47; *Canada v Greenwood*, 2021 FCA 186
[36] *Bisaillon v Concordia University*, 2006 SCC 19 at para 40; *see also Bruce v Cohon*, 2017 BCCA 186 at para 84
[37] *Brake v Canada (Attorney General*), 2019 FCA 274 at paras 56-59
[38] *Id* at para 57
[39] *Id* at para 58
[40] *Id* at para 58

the Policies and those similar to it.[41] The plaintiffs' claims included several "improper allegations, including criminal conduct and 'crimes against humanity.'[42] Despite the prolix and comprehensive nature of their claims, the plaintiffs in *Adelberg* neither alleged misfeasance of public office nor a breach of s. 2(d) of the *Charter*.[43] Here, the Claim is simply comprised of different parties, claims, submissions, and evidence than in *Adelberg* such that it cannot be considered binding on this Court.

36. 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."[44] Here, the lawfulness of the actions taken by the Treasury Board arguably falls outside the disputes capable of being grieved under the *Act.*[45] Put simply, the defendant has not met its burden to show that it is "plain and obvious" that the Claim is "doomed to fail" for lack of jurisdiction.[46]

iv) The Claim contains a sufficient claim for misfeasance in public office.

37. To establish misfeasance in public office, the plaintiff must 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

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[41] *Adelberg* at para 5
[42] *Id* at para 13
[43] While *Charter* claims can be grieved under s. 208, no case could be located where the court declined jurisdiction over an alleged violation of s. 2(d) of the *Charter* due to s. 236 of the *FPSLRA*. In fact, in the only case where the court considered its jurisdiction over a claim under s. 2(d), the court found that it had jurisdiction over the dispute (albeit on a different basis than claimed here). *See Canada v Greenwood*, 2021 FCA 186
[44] *Morin* at para 11
[45] *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")
[46] *Canadian Frontline Nurses* at para 122

law."[47] The defendant appears to argue that the Claim insufficiently pleads the "particular state of mind by a public official," the "intention to deliberately cause harm," and the particular official(s) responsible for the misfeasance.[48]

38. As stated in the Claim, the Treasury Board issued the Policy under the authority of the *Financial Administration Act*. The Policy's stated objectives were, in the main, "the protection of the health and safety of employees." However, as further stated in the Claim, rather than acting in the interests of employees' health and safety, the Treasury Board 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. It also enacted the Policy despite knowing of the significant adverse effects that the Policy would have on the plaintiffs.

39. These are sufficient allegations to adequately plead the elements of misfeasance in public office. As the Treasury Board knew or should have known, its discretion to enact the Policy could not be based "on considerations that are irrelevant, capricious or foreign" to its stated purposes.[49] It enacted the policy with "subjective recklessness" or "conscious disregard" for the lawfulness of its conduct and the consequences to the plaintiffs.[50] Misfeasance may be found when a government official "could have discharged his or her public obligations" – here, basing any policy upon a proper scientific and medical foundation and/or with sufficient protection of *Charter* rights—"yet wilfully chose to do otherwise."[51]

40. 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."[52] Further, the Claim must be assessed not only by reference to its explicit wording but also to "common sense inferences that can reasonably be

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[47] *Anglehart v Canada,* 2018 FCA 115 at para 52
[48] Written Representations of the Defendant at paras 51-55
[49] *Anglehart v Canada,* 2018 FCA 115 at para 73
[50] *Ontario (Attorney General) v Clark,* 2021 SCC 18 at para 23
[51] *Odhavji Estate v Woodhouse,* 2003 SCC 69 at para 26
[52] *Carducci v Canada (AG),* 2022 ONSC 6232 at para 22 [*Carducci*]

made."[53] At this preliminary stage in the proceedings, 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."[54]

41. In particular, "the failure to name specific people within an organization may not necessarily result in a misfeasance claim being struck."[55] This "reflect[s] an acknowledgement that, at the outset of litigation, a plaintiff may not be privy to information about the internal workings of an organization and which particular individual or individuals within an organization may have taken or failed to take a particular action."[56]

42. Here, contrary to the allegations in *Bigeagle v Canada,* 2013 FCA 128, the claims are not directed at an entire "organization, across Canada, and over a undefined period of time" for general failures to implement policies or procedures.[57] Rather, the Claim particularizes a specific government department by which the responsible individuals can be readily identified; the impugned conduct that was inconsistent with statutory duties; and "circumstances, particulars or facts" sufficient to infer knowledge from the responsible individuals of the impropriety of their actions.[58] This is a more than arguable basis upon which the plaintiffs can claim and recover against the defendant for misfeasance in public office. Indeed, pleadings with similar allegations have withstood similar motions to strike.[59]

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[53] *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*))
[54] *Trillium Power Wind Corp v Ontario (Natural Resources),* 2013 ONCA 683 at paras 60-61
[55] *Grand River Enterprises Six Nations Ltd v Attorney General (Canada)*, 2017 ONCA 526 at para 88
[56] *Id* at para 89; *see also Gregory v Canada,* 2019 FC 153 at para 23 (not necessary to name Crown employees, provided that "their roles are described with sufficient precision to allow the Crown to investigate the claim and prepare a defence"); *Khadr v Canada,* 2014 FC 1001 at para 50 (plaintiffs may particularize the impugned official by referring to their department or position)
[57] *Bigeagle v Canada,* 2023 FCA 128 at para 82
[58] *Carducci* at para 25
[59] *See, eg, Magnum Machine Ltd (Alberta Tactical Rifle Supply) v Canada,* 2021 FC 1112 at paras 28-35 (misfeasance claim may be "confusing and hard to follow" but sufficient allegations that defendants acted without authority, knowing unlawfulness of actions, and

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

43. In the alternative, to the extent any aspect of the Claim is deficient, the plaintiffs should be granted leave to amend.

44. To deny leave, the defendant must definitively show that there is "no scintilla of a cause of action" possible arising from the Claim.[60] As explained above, the Claim concerns the process by which the Treasury Board enacted the Policy. Such a cause of action falls or, at a minimum, arguably falls outside the parameters of ss. 208 and 236 of the *FPSLRA*. It has not been considered in any of the cases cited by the defendant and these cannot be used to dismiss the Claim on this motion to strike. As to the claim in misfeasance, the defendant's bare assertion that this cause of action "could [not] plausibly be remedied through amendment" is insufficient to deny leave.[61]

45. 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.[62] 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.[63] For instance, despite heavily relying on the court's reasoning in that case, the defendant fails to mention that the appeal in *Adelberg* was granted in part because the trial court failed to grant the plaintiffs leave to amend.[64]

46. Consequently, to the extent their claim of misfeasance of public office is insufficiently particularized, the plaintiffs refer to the proposed amendments found in

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potential of injuring plaintiffs); *Grand River* at paras 70, 97 (misfeasance sufficiently pled by stating Ministers' course of conduct and failure to act was done having "knowingly exceeded their authority"); *Robertson v Ontario*, 2024 ONCA 86 at paras 60-64 (reckless conduct can provide circumstantial evidence from which bad faith can be inferred); *Carducci* at paras 24-28 (malice or bad faith sufficiently alleged when claim reviewed as a whole); *Robson v The Law Society of Upper Canada*, 2018 ONCA 944 at paras 21-24 (misfeasance sufficiently pled with allegations that defendant propagated facts that it knew to be inaccurate, deliberately acted contrary to incontrovertible direction, and deliberately ignored evidence to be contrary to its position)

[60] *Al Omani* at para 34; *Yan v Daniel*, 2023 ONCA 863 at para 19

[61] Written Representations of the Defendant at para 64

[62] *Café Cimo Inc v Abruzzo Italian Imports Inc*, 2014 FC 810 at para 8

[63] *John Doe v Canada*, 2015 FC 916 at para 46 (rev'd on diff grounds 2016 FCA 191).

[64] *Adelberg* at para 53

Appendix A. The proposed amendments should adequately bolster the plaintiffs' claim over the necessary threshold such that it constitutes a reasonable cause of action.[65] 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 defendant's motion be dismissed.[66]

D. COSTS

47. The plaintiffs submit that there should be no award of costs against them unless the defendant is 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.[67]

PART IV- ORDERS SOUGHT

48. Based on the foregoing, the plaintiffs request:

a. The defendant's motion to strike be dismissed;

b. In the alternative, the defendant's 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: October 1, 2024

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[65] *See Doan* at para 178 (proposals for amendment justifying leave to amend)
[66] The plaintiffs note that the defendant does not take issue with the sufficiency of their claim under s. 2(d) of the *Charter*
[67] *See, eg, Al Omani* at para 128

PART V – LIST OF AUTHORITIES

Statutes and Regulations
Federal Courts Act, RSC 1985, c F-7
Federal Courts Rules, SOR/98-106
Federal Public Sector Labour Relations Act, SC 2003, c 22, s 2
Financial Administration Act, RSC 1985, c F-11
Case Law- Supreme Court of Canada
Bisaillon v Concordia University, 2006 SCC 19
British Columbia Teachers' Federation v British Columbia, 2015 BCCA 184 (aff'd and adopted 2016 SCC 49)
Northern Regional Health Authority v Horrocks, 2021 SCC 42
Odhavji Estate v Woodhouse, 2003 SCC 69
Ontario (Attorney General) v Clark, 2021 SCC 18
Operation Dismantle v The Queen (1985), 1985 CanLII 74 (SCC)
Québec (Commission des Droits de la Personne et des Droits de la Jeunesse) c Québec (Attorney General), 2004 SCC 39
R v Imperial Tobacco Canada Ltd, 2011 SCC 42
Case Law- Federal Court
Adelberg v Canada, 2024 FCA 106
Al Omani v Canada, 2017 FC 786
Anglehart v Canada, 2018 FCA 115
Bemister v Canada (Attorney General), 2017 FC 749 (aff'd 2019 FCA 190)
Bigeagle v Canada, 2023 FCA 128

Brake v Canada (Attorney General), 2019 FCA 274
Café Cimo Inc v Abruzzo Italian Imports Inc, 2014 FC 810
Canada v Greenwood, 2021 FCA 186
Canadian Frontline Nurses v Canada (Attorney General), 2024 FC 42
De Luca v Geox SPA, 2024 FC 1441
Doan v Canada, 2023 FC 968
Ebadi v Canada, 2024 FCA 39
Eurocopter v Bell Helicopter Textron Canada Limitée, 2009 FC 1141
Gaskin v Canada, 2024 CanLII 28268 (FC)
Gregory v Canada, 2019 FC 153
John Doe v. Canada, 2015 FC 916 (rev'd on diff grounds 2016 FCA 191)
Khadr v Canada, 2014 FC 1001
Magnum Machine Ltd (Alberta Tactical Rifle Supply) v Canada, 2021 FC 1112
Mancuso v Canada (National Health and Welfare), 2015 FCA 227
McCain Foods Limited v JR Simplot Company, 2021 FCA 4
McMillan v Canada, 2023 FC 1752
Sunderland v Toronto Regional Real Estate Board, 2023 FC 1293
Suss v Canada, 2024 FC 137
Wenham v Canada (Attorney General), 2018 FCA 199

Case Law- Ontario
Carducci v Canada (AG), 2022 ONSC 6232
Grand River Enterprises Six Nations Ltd v Attorney General (Canada), 2017 ONCA 526
Howell v Sun Life Assurance Company of Canada, 2024 ONSC 3908
Ponnampalam v Thiravianathan, 2019 ONSC 5008 (Ont SCJ)
Robertson v Ontario, 2024 ONCA 86
Robson v The Law Society of Upper Canada, 2018 ONCA 944
Trillium Power Wind Corp v. Ontario (Natural Resources), 2013 ONCA 683
Villeneuve v AG Canada, 2016 ONSC 6490
Yan v Daniel, 2023 ONCA 863
Case Law- Other Jurisdictions
AUPE v Alberta, 2014 ABCA 43
Bruce v Cohon, 2017 BCCA 186

APPENDIX A— PROPOSED AMENDMENTS TO THE CLAIM

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

- The Treasury Board has the authority under ss. 7 and 11.1 of the *Financial Administration Act* to, *inter alia*, implement measures "for effective human resources management in the public service."
- The Treasury Board knows or ought to know that it implements these policies affecting human resources management in good faith.
- The Treasury Board stated that it enacted the Policy in the interests of furthering employee health and safety. However, it knew or ought to have known that a policy mandating vaccination would not materially further the interests of employee health and safety.
- The Treasury Board 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 Treasury Board knew or ought to have known that the Product Monographs for the approved vaccines only included information as to the absolute effectiveness of COVID-19 vaccination. The Treasury Board knew or ought to have known that information on the relative effectiveness of a vaccination was more relevant as to whether vaccination would prevent infection, transmission, or the severity of COVID-19 infection.
- Even if the Treasury Board's objective in enacting the Policy was to reduce the severity, infection rates, and transmission of COVID-19 among federally regulated employees, the Treasury Board knew or ought to have known that:
    - these goals were not materially furthered by the Policy and/or the Policy was not necessary to meet these goals;
    - the Policy was not supported by scientific evidence; and
    - the Policy was not proportionate to the infringement of the plaintiffs' and Class members' rights and interests.
- The Treasury Board knew or ought to have known that enacting the Policy was unconstitutional as it unilaterally altered terms fundamental to the plaintiffs' and Class members' employment that were previously negotiated through collective

bargaining and that it would likely result in compensable economic and emotional harm to the plaintiffs and Class members.

- The Treasury Board was recklessly indifferent, willfully blind, and/or otherwise unlawfully disregarded the unconstitutionality of the Policy and the foreseeable harm to the plaintiffs and the Class members.
- The Treasury Board deliberately failed to hold meaningful consultations with the plaintiffs' and Class members' respective bargaining units prior to enacting the Policy.
- At all times, the Treasury Board knew or ought to have known that enacting the Policy would have significant adverse consequences to the plaintiffs and Class members' employment and sense of well-being, including but not limited to suspension without pay and termination.

Court File No. A-20-25

FEDERAL COURT OF APPEAL
Proposed Class Proceeding

B E T W E E N:

HIS MAJESTY THE KING

Appellant
(Defendant)

-and-

STACEY HELENA PAYNE, JOHN HARVEY and LUCAS DIAZ MOLARO

Respondents
(Plaintiffs)

AGREEMENT TO CONTENTS OF APPEAL BOOK

Pursuant to Rule 343, the parties agree on the following contents for the Appeal Book:

1. Appendix A to this agreement: Appeal Book Table of Contents

2. Such other materials as this Honourable Court Shall permit.

February 12, 2025

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APPENDIX "A"

APPEAL BOOK TABLE OF CONTENTS

TAB	DESCRIPTION
1.	Notice of Appeal, issued January 13, 2025 in Court File No. A-20-25
2.	Order and Reasons of the Honourable Justice Southcott, dated January 2, 2025 in Court File No. T-2142-23
3.	Transcript of the Oral Hearing on the Appellant's Motion to Strike, dated December 13, 2024
4.	T-2142-23 – Statement of Claim issued October 6, 2023
Documents filed on behalf of the Appellant (His Majesty the King)	
5.	Notice of Motion to Strike, dated August 19, 2024
6.	Affidavit of Charles Vézina affirmed August 16, 2024
a.	Ex. A – Treasury Board Vaccination Policy
b.	Ex B – Suspension of the Vaccine Mandates
c.	Ex C – Grievance of Stacey Payne
d.	Ex D – Grievance of John Harvey
7.	Written Representations of the Defendant / Moving Party (Motion to Strike)
Documents filed on behalf of the Respondents (Payne, Harvey, and Molaro)	
8.	Written Representations of the Plaintiffs in Response to Motion to Strike
9.	Agreement to the Contents of the Appeal Book
10.	Certificate of Completeness of Appeal Book

Court File No. A-20-25

FEDERAL COURT OF APPEAL

B E T W E E N :

HIS MAJESTY THE KING

Appellant
(Defendant)

-and-

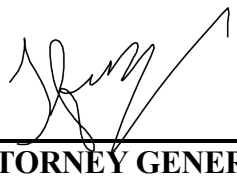
STACEY HELENA PAYNE, JOHN HARVEY and LUCAS DIAZ MOLARO

Respondent
(Plaintiffs)

CERTIFICATE OF COMPLETENESS OF APPEAL BOOK

I, **Tiffany Farrugia**, counsel for the Appellant, His Majesty the King, certify that the contents of the appeal book in this appeal are complete and legible.

Dated March 14, 2025



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