FEDERAL COURT
PROPOSED CLASS PROCEEDING

BETWEEN

STACEY HELENA PAYNE, JOHN HARVEY and LUCAS DIAZ MOLARO

Plaintiffs

AND

HIS MAJESTY THE KING

Defendant

MOTION RECORD 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.