Court File No. A-20-25

FEDERAL COURT OF APPEAL

Proposed Class Proceeding

BETWEEN:

HIS MAJESTY THE KING

Appellant

and

STACEY HELENA PAYNE, JOHN HARVEY and LUCAS DIAZ MOLARO

Respondents

RESPONDENTS' MEMORANDUM OF FACT AND LAW

May 14, 2025

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OVERVIEW[1]

1. The appellant, the Attorney General of Canada, appeals from the order of Justice Southcott dated January 2, 2025. In that decision, Southcott J. largely dismissed the appellant's motion to strike the plaintiffs' Statement of Claim (the "Claim").

2. The Claim challenges the actions taken by the Treasury Board of Canada ("Treasury Board") in enacting the *Policy on COVID-19 Vaccination for the Core Public Administration Including the Royal Canadian Mounted Police* (the "Policy"). The plaintiffs allege that, in issuing the Policy, the Treasury Board unjustifiably infringed the plaintiffs' s. 2(d) *Charter* rights and committed the tort of misfeasance in public office.

3. After canvassing the relevant case law, Southcott J. found that the plaintiffs' *Charter* claim plausibly fell within the Federal Court's jurisdiction but that the misfeasance claim was barred by the *Federal Public Sector Labour Relations Act*, SC 2003, c 22, s 2 (the "*FPSLRA*" or the "*Act*"). However, Southcott J. found that the misfeasance claim was otherwise sufficiently pled. He accordingly granted the plaintiffs leave to amend the Claim to expand upon any allegations of misfeasance that may fall outside the ambit of the *Act*.

4. The appellant now seeks to reverse this decision and requests that the entire Claim be struck without leave to amend. It reiterates its arguments before Southcott J., arguing that neither of the plaintiffs' causes of action fall within the jurisdiction of the Federal Court. In so arguing, the appellant attempts to shift the burden at this

[1] Except where otherwise noted, emphasis is in the original quotation and internal citations are omitted

preliminary stage onto the plaintiffs to prove jurisdiction. This contention runs directly against the well-established test on a motion to strike: the defendant must show that it is "plain and obvious" that the Claim is fatally flawed.[2] This is the test that Southcott J. applied—correctly—in assessing the court's jurisdiction over the Claim.

5. Nor did Southcott J. commit palpable and overriding error in finding that both causes of action were sufficiently pled. He did not err in allowing the plaintiffs' s. 2(d) claim to proceed when the appellant never challenged this claim in the first place. Nor did he err in his consideration of the plaintiffs' misfeasance claim; the appellant's submissions in this regard either distort or adopt an overly restrictive view of the pleaded facts in an effort to identify reversible error.

6. Fundamentally, the appellant forgets that the decision under appeal is a preliminary and discretionary decision, supported by the facts before the court. As Southcott J. noted in his reasons for judgment:

> 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.[3]

7. The appellant has failed to identify any error—let alone palpable and overriding error—in the lower court's decision. Consequently, the plaintiffs request that this appeal be dismissed.

[2] *Canadian Frontline Nurses v Canada (Attorney General)*, 2024 FC 42 at para 122
[3] *Payne v Canada*, 2025 FC 5 [**RFJ**] at paras 34-35; **Appeal Book [AB], Tab 2, pp 23-24**

PART I – STATEMENT OF FACTS

8. The Policy was enacted by the Treasury Board on October 6, 2021, pursuant to ss. 7 and 11.1 of the *Financial Administration Act*, RSC 1985, c F-11 [*FAA*]. The Policy required all employees of the "core public administration," as defined in the *FAA*, to disclose their vaccination status and to be vaccinated against COVID-19, lest they be subject to discipline such as being placed on leave without pay.[4]

9. The plaintiffs filed the Claim on behalf of a proposed class of current and former federally regulated governmental employees, individuals who were subject to these disciplinary measures for failure to comply with the Policy (the proposed class members, unless otherwise indicated, are referred to herein as the "plaintiffs").

10. On October 6, 2023, the plaintiffs filed the Claim alleging that, among others:

a. the plaintiffs' employment agreements contained no terms stating (expressly or impliedly) that vaccination status be disclosed, that vaccination was required, and/or that employers could discipline employees for their failure to disclose or to become vaccinated;

b. the Treasury Board was aware that these agreements were the result of extensive negotiations with the plaintiffs' respective bargaining units, but nevertheless unilaterally imposed the Policy upon the plaintiffs;

c. the Treasury Board enacted the Policy with the stated objective of protecting the health and safety of employees by reducing the transmission of COVID-19, but that it knew or ought to have known that mandatory vaccination would not further these objectives; and

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[4] RFJ at para 6; **AB, Tab 2, p 11**

d. by enacting the Policy, the Treasury Board knowingly exposed the plaintiffs to potentially significant adverse consequences.

11. On August 19, 2024, the appellant moved to strike the Claim without leave to amend. The appellant argued, in the main, that ss. 236 and 208 of the *FPSLRA* created a "comprehensive scheme" that entirely ousted the Federal Court's jurisdiction over the Claim "without any exception."[5] The appellant further argued, in the alternative, that the plaintiffs' claim for misfeasance in public office was "doomed to fail" as it did not "set out the material facts necessary to establish the tort."[6] In its motion to strike, the appellant did not take issue with the sufficiency of the plaintiffs' *Charter* claim.

12. In the decision below, Southcott J. dismissed the majority of the appellant's arguments. First, he rejected the appellant's contention that the *Act* posed a complete bar to the court's jurisdiction. After analyzing the relevant language in the *FPSLRA* and considering this Court's reasoning in *Adelberg v Canada,* 2024 FCA 106 [*Adelberg*], among others, he concluded that there were "parameters on the ouster of the Court's jurisdiction."[7] Consequently, the question before the court in determining jurisdiction was whether "essence of the Plaintiffs' claim… raises a matter that could have been the subject of a grievance under section 208 of the *FPSLRA*."[8]

13. Southcott J. first considered the plaintiffs' *Charter* claim. The parties were agreed that there was a "dearth of authority on whether an alleged violation of *Charter*

[5] Notice of Motion to Strike dated August 19, 2024 [**Notice of Motion**] at paras 8-9; **AB, Tab 5, pp 183-84**

[6] Notice of Motion at para 12; **AB, Tab 5, p 184;** *see also* Written Representations of the Defendant/Moving Party (Motion to Strike) dated August 19, 2024 [**Written Representations of the Defendant**] at paras 56, 63-64; **AB, Tab 7, pp 246, 248**

[7] RFJ at para 30; **AB, Tab 2, p 21**

[8] *Id* at para 32; **AB, Tab 2, p 22**

section 2(d) in particular can be grieved under section 208."[9] However, the court in *Québec (Commission des Droits de la Personne et des Droits de la Jeunesse) c Québec (Attorney General)*, 2004 SCC 39 [*Morin*] concluded that a similar allegation was arguably within the court's jurisdiction. Southcott J. found that the allegations in *Morin*—concerning the unlawful imposition of a term on unionized employees—were a "sufficient parallel" to those before him such that he "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."[10] The plaintiffs' *Charter* claim was thus allowed to proceed; Southcott J. did not consider whether it was sufficiently pleaded as this was not raised by the appellant.

14. Southcott J. then considered the plaintiffs' claim of misfeasance in public office. Here, he did accept that the *Act* barred this cause of action. As he wrote, the courts had already considered similar tort claims and found these fell outside their jurisdiction.[11] However, Southcott J. found that the Claim otherwise contained sufficient facts to satisfy the constituent elements of the tort.[12]

15. Consequently, Southcott J. allowed the plaintiffs leave to amend the Claim. Consistent with this Court's reasoning in *Adelberg* and *McMillan v Canada*, 2024 FCA 199 [*McMillan*], he found that the claim could be amended to show a proper cause of action on behalf of individuals "such as casual workers, students, and members of the

[9] RFJ at para 34; **AB, Tab 2, p 23**
[10] *Id* at para 38; **AB, Tab 2, p 25**
[11] *Id* at para 40; **AB, Tab 2, pp 25-26**
[12] *Id* at paras 42-53; **AB, Tab 2, pp 26-30**

RCMP, who are not afforded grievance rights by section 208 and whose claims are therefore not subject to section 236."[13]

PART II – POINTS IN ISSUE

16. This appeal raises for the following issues for this Court's determination:

a. Did Southcott J. apply the correct legal test on a motion to strike, namely, whether it was "plain and obvious" that the Claim was barred by ss. 236 and 208 of the *Act*?[14]

b. Did Southcott J. commit palpable and overriding error in finding that the essential character of the plaintiffs' s. 2(d) claim was arguably about the improper process by which the Policy was imposed upon the plaintiffs?

c. Did Southcott J. commit palpable and overriding error in finding that the Claim was otherwise sufficiently pled?

d. Did Southcott commit palpable and overriding error in granting the plaintiffs leave to amend their claim of misfeasance in public office?

PART III – SUBMISSIONS

A. The appellant must establish palpable and overriding error in Southcott J.'s decision.

17. The parties agree that the standard of correctness applies to whether Southcott J. applied the correct legal test, and the standard of palpable and overriding error applies to (1) Southcott J.'s characterization of the Claim, (2) whether the Claim pleads

[13] RFJ at para 55; *see also* paras 27, 30; **AB, Tab 2, p 30, pp 20-21**
[14] *Canadian Frontline Nurses v Canada (Attorney General)*, 2024 FC 42 at para 122

sufficient material facts, and (3) whether the plaintiffs should be granted leave to amend.[15]

18. The parties further agree that the question of whether it is possible to grieve any *Charter* claim or intentional tort is one of the "'rare' extricable questions of law" that should be assessed on a standard of correctness.[16] However, the question as to whether this Claim falls within the grievance provisions of the *FPSLRA* is better characterized as a question of mixed fact and law—no different than determining, for instance, if pleaded facts fall within a known cause of action.[17]

19. Consequently, all issues raised by the appellant—other than whether Southcott J. applied the correct legal test—should be assessed on the palpable and overriding error standard. This is a heavy burden:

> Palpable and overriding error is a highly deferential standard of review . . . . "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.[18]

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[15] *See* Appellant's Memorandum of Fact and Law at paras 25-27

[16] *Ledcor Construction Ltd v Northbridge Indemnity Insurance Co*, 2016 SCC 37 at para 21; *see Ebadi v Canada,* 2024 FCA 39 at paras 16, 22 [***Ebadi***] (appellant arguing the question of law that intentional torts can never be subject to grievance)

[17] *Jenson v Samsung Electronics Co Ltd*, 2023 FCA 89 at para 43 (identifying the test the court must apply is a question of law but the application of that test is a mixed question of fact and law); *see also Ahamed v Canada*, 2020 FCA 213 at para 10 (despite argument that lower court failed to apply the correctly identified test, appellant actually challenging the court's application of the law to the facts)

[18] *Canada v South Yukon Forest Corporation*, 2012 FCA 165 at para 46

B. Southcott J. correctly identified and applied the relevant legal test.

20. The parties agree that s. 236 of the *Act* ousts the court's jurisdiction for matters that should be subject to a grievance; s. 208 of the *Act* defines the relevant grievance rights; and that s. 208 is a broad provision that encompasses *Charter* claims, among others.[19] The parties further agree that s. 236 does not represent a complete bar to the Federal Court's jurisdiction and that s. 208, while broad, is not all-encompassing.[20] As identified by both the appellant and Southcott J., the Federal Court has jurisdiction over the Claim if it relates to a matter that cannot be grieved under s. 208.[21]

21. What the appellant ignores, however, is the procedural posture of this case. Southcott J. was considering a motion to strike. On such a motion, the defendant has the "onerous" burden to show that, accepting the facts alleged as true, the claim is "so clearly improper as to be bereft of any possibility of success."[22] Therefore, despite the appellant's assertions to the contrary, the test before Southcott J. was not "whether the essential character of the plaintiffs' claim relates to a dispute that could be grieved under s. 208."[23] Rather, the question before Southcott J. was whether the Claim was "doomed to fail" because it was "plain and obvious" that it "fell within section 208 of the *FPSLRA* and is therefore not subject to the section 236 bar."[24]

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[19] Appellant's Memorandum of Fact and Law at paras 30-33, 43
[20] *See, eg, id* at paras 33, 41
[21] *See id* at para 34; *see also* RFJ at para 32; **AB, Tab 2, p 22**
[22] *Doan v Canada*, 2023 FC 968 at para 40; *Canadian Frontline Nurses v Canada (Attorney General)*, 2024 FC 42 at para 122
[23] Appellant's Memorandum of Fact and Law at paras 3, 24(a)(i), 28, 35-37, 40, 45.
[24] RFJ at para 38; **AB, Tab 2, p 25**; *Canadian Frontline Nurses v Canada (Attorney General)*, 2024 FC 42 at para 122

22. The appellant states that the plaintiffs need to establish jurisdiction at the motion to strike stage.[25] However, as stated by this Court in *Adelberg*:

> [40] … The plain and obvious test applies to both the discernment of whether a claim pleaded is justiciable and to the discernment of whether it falls within the jurisdiction of the Federal Court: *Berenguer* at para. 24; *Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54, [2016] 2 S.C.R. 617 at para. 24.[26]

23. Southcott J. correctly identified and applied this legal test when considering the Claim. He considered "the essential character of the dispute to determine if it raises a matter that could have been the subject of a grievance"[27] and reasonably concluded that "it is not plain and obvious that the Plaintiffs have grievance rights in relation to [their *Charter*] claims."[28]

i. Southcott J. did not treat *Morin* as determinative.

24. The appellant also submits that, instead of considering whether the Claim could be grieved under the *Act*, Southcott J. treated *Morin*—a decision "under a different legislative regime with a different right to grieve"—as "determinative."[29] In so arguing, the appellant fundamentally mischaracterizes Southcott J.'s analysis.

25. As acknowledged by the appellant, Southcott J. explicitly considered how "*Morin* was not on all fours with the case before him."[30] Specifically, he noted that *Morin* "involved different labour relations and human rights legislation and different

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[25] Appellant's Memorandum of Fact and Law at para 34, fn 43
[26] *Adelberg* at para 40; *see also Ebadi* at para 92 (dissenting, but not on this point); *McMillan* at para 8; *Hill v Canada*, 2025 FC 242 at para 17
[27] *See, eg*, RFJ at paras 11, 30, 32; **AB, Tab 2, pp 13, 21-22**
[28] RFJ at paras 4, 38; **AB, Tab 2, pp 10-11, 25**
[29] Appellant's Memorandum of Fact and Law at paras 39-40
[30] *Id* at para 21 (*citing* RFJ at para 38; **AB, Tab 2, p 25**)

allegations.'"[31] Nevertheless, he found the reasoning in *Morin* to be sufficiently applicable to the facts before him such that the plaintiffs' *Charter* claims could survive the motion to strike.[32] He did not abdicate his assessment in favour of the majority's conclusion in *Morin*, but rather applied this reasoning as part of his overall consideration of the appellant's motion. As stated above, he repeatedly cited the correct test and thereby concluded that it was at least arguable that the essential character of the Claim did not fall within the *Act*'s grievance provisions.[33]

26. The appellant does not otherwise take issue with Southcott J. having referred to *Morin.* In analyzing jurisdictional issues, courts can and often do reference cases decided under different legislation.[34] Southcott J. drew a parallel to *Morin* not because of McLachlin C.J.'s interpretation of the statute in that case, but rather her reasoning when she found that:

> … [T]he dispute, viewed not formalistically but in its essential nature, engages matters which pertain more to the alleged discrimination in the formation and validity of the agreement, than to its 'interpretation or application,' which is the source of the arbitrator's jurisdiction" under the relevant legislation.[35]

27. Based on this reasoning, Southcott J. found that the plaintiffs' *Charter* claim arguably pertained more to the unlawful interference with the plaintiffs' rights to freedom of association than being a dispute about the terms and conditions of

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[31] Appellant's Memorandum of Fact and Law at para 21 (*citing* RFJ at para 38; **AB, Tab 2, p 25**)
[32] *Id*
[33] *See* RFJ at para 38; **AB, Tab 2, p 25**
[34] *See, eg, Morin* at para 21; *Villeneuve v AG Canada*, 2016 ONSC 6490 at para 44
[35] *Morin* at para 25

employment. This finding is in line with other case law[36] and was available on the facts as presented.

28. Further, Southcott J.'s conclusion was limited to the Claim before him. His decision does not stand "for a broad proposition that disputes over process are not grievable"[37] but rather reflects a discretionary assessment of the facts of this case. Southcott J. was aware and indeed explicitly discussed the public policy considerations and Parliamentary intent underlying the labour arbitration regime.[38] Far from "allow[ing] large categories of claims… to escape the operation of the FPSLRA,"[39] Southcott J. simply allowed this "novel but arguable" s. 2(d) claim to proceed beyond the motion to strike stage.[40]

C. The appellant has not shown palpable and overriding error in Southcott J.'s characterization of the essential nature of this dispute.

29. The appellant's concerns regarding the potentially broad application (*i.e.* the slippery slope) of Southcott J.'s decision was one of the many counterarguments that was raised by the dissent in *Morin.* In fact, the appellant's submissions appear to be directly pulled from Bastarache J.'s dissenting opinion in that case.

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[36] *See Pontbriand c Administration du régime de soins de santé de la fonction publique fédérale*, 2011 QCCA 157 at paras 23-25 (although claim concerned denial of benefits under employment health care plan, essence of dispute was more related to the administration of the plan, which fell outside the ambit of the *FPSLRA*); *Villeneuve v AG Canada*, 2016 ONSC 6490 at paras 46-47 (although plaintiffs' claims involved occupational health and safety as included in the collective agreement, the essential nature of the plaintiffs' claims were outside the scope of labour relations and therefore fell outside of the *FPSLRA*)

[37] Appellant's Memorandum of Fact and Law at para 39

[38] RFJ at paras 36-37; **AB, Tab 2, pp 24-25**

[39] Appellant's Memorandum of Fact and Law at para 45

[40] *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 21

30. For instance, the appellant argues that Southcott J. erred in his analysis by "allowing the legal framing of the causes of action – instead of the facts pled—to drive his assessment of the claim's essential nature."[41] Specifically, the appellant challenges Southcott J.'s differing conclusions regarding the plaintiffs' *Charter* and misfeasance claims. Southcott J.'s approach, however, is not without precedent.[42] Indeed, the appellant itself distinguished between the plaintiffs' *Charter* and misfeasance claims in its motion to strike: it argued that the misfeasance claim was insufficiently pled but took no issue with the sufficiency of the plaintiffs' s. 2(d) claim.

31. This submission concerning legal framing was one of the dissent's main arguments in *Morin*. In this opinion, Bastarache J.:

a. criticized the majority's reasoning as "determin[ing] the essence of the dispute by reference solely to the nature of the right invoked;"[43]

b. emphasized the importance of parliamentary intent and the broad jurisdiction accorded to labour arbitrators;[44]

c. discussed the lack of functional difference between process and substance in disputes subject to grievances;[45]

d. noted how *Charter* claims in similar factual contexts were found to be in the labour arbitrators' exclusive jurisdiction;[46] and

[41] Appellant's Memorandum of Fact and Law at para 49
[42] *See, eg, Joseph v Canada School of Public Service et al*, 2022 ONSC 6734 at para 32 (dismissing action for some torts but allowing others to proceed) (*cited in Ebadi* at para 33)
[43] *Morin* at para 56
[44] *Id* at paras 45-50
[45] *Id* at paras 62-64
[46] *Id* at para 56

e. invoked the remedy sought by the plaintiffs as further justification of labour arbitrator's jurisdiction.[47]

32. The appellant similarly argues that Southcott J. erred in his analysis by:

a. "allow[ing] the labels that the plaintiffs assigned to the conduct in question to drive his assessment of the essential nature of the dispute;"[48]

b. undermining the Parliamentary intent behind the federal public sector labour relations regime;[49]

c. distinguishing "between matters of process and matters of substance" when this is not found in the *Act*;[50]

d. ignoring relevant case law where disputes related to the Policy were found to be outside the court's jurisdiction;[51] and

e. failing to consider "the practical result sought" by the plaintiffs.[52]

33. These arguments were considered and rejected by five of the seven judges that heard the case in *Morin*. Moreover, Bastarache J.'s "strong dissent" was discussed by Southcott J. in his decision.[53] Southcott J. did not err—let alone commit palpable and overriding error—in rejecting these same submissions.

i. It is not plain and obvious that the Claim is grievable.

34. Finally, the appellant argues that, regardless of how its essential nature is characterized, the Claim falls within the labour arbitrator's jurisdiction. As support, it

[47] *Morin* at para 57
[48] Appellant's Memorandum of Fact and Law at para 52
[49] *Id* at paras 45, 62
[50] *Id* at para 42
[51] *Id* at para 55
[52] *Id* at para 50, 58
[53] RFJ at paras 36-37

points to the broad nature of ss. 236 and 208 and the fact that two of the representative plaintiffs did engage in the grievance process.[54]

35. In its motion to strike, the appellant argued that ss. 236 and 208 are a "complete ouster" of the Federal Court's jurisdiction, "without exception."[55] The appellant has now resiled from this position, acknowledging that the *FPSLRA* is not all-encompassing. While these provisions apply to "virtually any dispute relating to a public servant's employment,"[56] "there are parameters on the ouster of the Court's jurisdiction."[57] The mere fact that these provisions are broad does not necessarily mean that the Claim falls within their purview.

36. Similarly, the fact that some of the plaintiffs have engaged in the grievance process is not determinative as to whether the Claim is grievable. As stated in s. 236(2) of the *Act*:

> The right of an employee to seek redress by way of grievance … applies <u>whether or not the employee avails himself or herself of the right to present a grievance</u> in any particular case… (emphasis added)

37. Per the language of this section, whether an employee has filed a grievance (or not) is immaterial to the availability of that process. "Every provision of a statute should be interpreted as having a meaning and a function, and 'courts should avoid, as much as possible, adopting interpretations that would render any portion of a statute

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[54] Appellant's Memorandum of Fact and Law at paras 40-48

[55] *See, eg,* Written Representations of the Defendant at Heading B(i), para 29; **AB, Tab 7, pp 239-40**

[56] Appellant's Memorandum of Fact and Law at para 41

[57] *McMillan v Canada,* 2023 FC 1752 at para 25, rev'd in part on other grounds 2024 FCA 199 (*cited in* RFJ at para 20; **AB, Tab 2, p 17**); *see also Northern Regional Health Authority v Horrocks,* 2021 SCC 42 at para 22 (the exclusivity of labour arbitration "does not preclude <u>all</u> actions in the courts between [a unionized] employer and employee")

meaningless or pointless or redundant.'"[58] Fundamentally, whether an employee must avail themselves of the grievance process is a question for the courts, not the employee.

38. Consequently, Southcott J. did not commit palpable and overriding error by failing to mention that some of the plaintiffs had filed grievances. Even if these were relevant to his analysis—which they are not—Southcott J. "is presumed to have considered all the evidence before him."[59] As noted by this Court: "care must be taken to distinguish true palpable and overriding error on the one hand, from the legitimate by product of distillation and synthesis or innocent inadequacies of expression on the other."[60]

D. The appellant has not shown palpable and overriding error in Southcott J.'s finding that the Claim was sufficiently pled.

i. Southcott J. did not err by allowing the plaintiffs' *Charter* claim to survive the motion to strike.

39. Next, Southcott J. did not commit palpable and overriding error in his consideration of the plaintiffs' *Charter* claim. Indeed, he did not engage in any such analysis <u>because the sufficiency of the plaintiffs' s. 2(d) claim was not even challenged by the appellant.</u> The appellant's motion materials include several references to the insufficiency of the plaintiffs' misfeasance claim, but includes no such reference to the plaintiffs' s. 2(d) claim.[61]

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[58] *Heritage Capital Corp v Equitable Trust Co*, 2016 SCC 19 at para 40
[59] *Teva Canada Limited v Novartis Pharmaceuticals Canada Inc*, 2013 FCA 244 at para 12
[60] *Canada v South Yukon Forest Corporation*, 2012 FCA 165 at para 51
[61] *See* Notice of Motion; **AB, Tab 5**; Written Representations of the Defendant; **AB, Tab 7**; Written Representations of the Plaintiffs in Response to Motion to Strike at fn 66; **AB, Tab 8, p 267**; RFJ at paras 3, 10; **AB, Tab 2, pp 10, 12**

40. There is a "stringent" test for allowing new arguments on appeal: a new issue should only be considered "where [the Court] is able to do so without procedural prejudice to the opposing party and where the refusal to do so would risk an injustice."[62] The appellant has failed to identify any "exceptional circumstances" permitting it to challenge this cause of action for the first time on appeal.[63] Nor has it explained how Southcott J. committed palpable and overriding error by not considering an argument that the appellant itself did not raise.

41. Further, any such arguments would have failed as the plaintiffs' have pled an arguable *Charter* claim. The appellant here takes an unduly narrow view of the Claim contrary to the holistic and generous approach required in interpreting pleadings on a motion to strike.[64]

42. As stated in the seminal case of *Health Services and Support- Facilities Subsector Bargaining Assocn v British Columbia*, 2007 SCC 27, s. 2(d) does not protect any particular outcome, but rather protects the ability of employees to "unite, to present demands… collectively and to engage in discussions in an attempt to achieve workplace-related goals."[65] It also protects these rights by imposing upon employers the duty to meet and discuss these goals with employees.[66] Consequently, even though legislation may not expressly curtail employees' right to unite and negotiate future terms in a collective agreement, it may still infringe s. 2(d) to the extent that it was

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[62] *Guindon v Canada*, 2015 SCC 41 at para 22
[63] *R v JF*, 2022 SCC 17 at para 40
[64] *See Operation Dismantle v The Queen* (1985), 1985 CanLII 74 (SCC) at para 14; *Grand River Enterprises Six Nations Ltd v Attorney General (Canada)*, 2017 ONCA 526 at paras 97-98 [***Grand River***] (claim should not be read in isolation)
[65] *Health Services and Support- Facilities Subsector Bargaining Assocn v British Columbia*, 2007 SCC 27 at para 89
[66] *Id* at para 90

imposed in a manner contrary to this process.[67] As stated in *British Columbia Teachers' Federation v British Columbia*, 2015 BCCA 184 (aff'd 2016 SCC 49):

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

43. Therefore, in order to pass muster with the protections afforded by s. 2(d), the government must engage in pre-legislative consultation that includes "the exchange of information, explanation of positions or relatively equal bargaining power that is necessary to make consultations" a meaningful substitution for the traditional collective bargaining process.[68] In fact, the government has a positive duty to engage in good faith consultations wherein employees are given "the opportunity to meaningfully influence the changes made, on bargaining terms of approximate equality."[69]

44. Here, the Claim alleges that the Policy unilaterally imposed a term contrary to the plaintiffs' freely negotiated collective agreements.[70] In so doing, the Treasury Board substantially altered previously-agreed upon terms that reflected the employees' core interests in collective bargaining. This unilateral imposition was done "absent collective bargaining, memoranda of agreement, consideration, or consent."[71] This is

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[67] *See, eg, Health Services and Support- Facilities Subsector Bargaining Assocn v British Columbia*, 2007 SCC 27 at para 113

[68] *Ontario English Catholic Teachers Assoc v His Majesty,* 2022 ONSC 6658 at para 198 (rev'd in part on diff grounds 2024 ONCA 101); *British Columbia Teachers' Federation v British Columbia*, 2015 BCCA 184 (aff'd 2016 SCC 49) [***BCTF***] at para 291

[69] *BCTF* at paras 287-290; *see also Ontario (Attorney General) v Fraser,* 2011 SCC 20 at paras 68, 73

[70] Statement of Claim at paras 1, 45-48; **AB, Tab 4, pp 168, 180**

[71] *Id* at paras 47-49; **AB, Tab 4, p 180**

sufficient to support a reasonable cause of action that the plaintiffs' *Charter* rights were violated.

ii. Southcott J. did not err in finding that the plaintiffs' misfeasance claim was sufficiently pled.

45. The appellant similarly adopts an unduly narrow interpretation of both the plaintiffs' claim of misfeasance and the applicable case law.

46. First, the appellant submits that the plaintiffs did not plead that the Treasury Board knew (or was recklessly indifferent to the fact) that it had no power to enact the Policy or was otherwise acting illegally in enacting the Policy. This is easily disproven. When read as a whole,[72] the Claim adequately describes how the Treasury Board "could have discharged [its] 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."[73]

47. As written by Southcott J., the plaintiffs alleged "that the Treasury Board acted with reckless indifference or wilful blindness in issuing the Policy in that… it had no basis in fact to justify the Policy as a measure to prevent transmission of the virus."[74] Specifically, the Claim states that the Treasury Board mandated vaccination for the stated purpose of preventing transmission of COVID-19 but, in so doing, ignored the potential inefficacy of the vaccines, the potentially serious adverse effects, and the significant detriment that could have been suffered by the plaintiffs, among others. The incongruity between the Treasury Board's knowledge and its stated intention is

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[72] *Grand River* at paras 97-98

[73] *Odhavji Estate v Woodhouse,* 2003 SCC 69 at para 26

[74] RFJ at para 51; **AB, Tab 2, p 29**; Statement of Claim at paras 16, 42; **AB, Tab 4, pp 173, 178-79**

demonstrative of bad faith and/or dishonesty. Similar pleadings have been found to meet the standard of reasonable pleadings on a motion to strike.[75]

48. Next, the appellant argues the Claim does not identify the tortfeasers with sufficient particularity because it fails to list the titles of any Treasury Board personnel responsible for the alleged misfeasance.

49. This interpretation is not borne out by the authorities, including the case law cited by the appellant. The plaintiffs need only "identif[y] a class of persons"— for instance, an "organizational branch"—that allegedly committed the misfeasance.[76] The Claim is not directed at the "Government" writ large (as in *Merchant Law Group v Canada Revenue Agency,* 2010 FCA 184 at para 33) or at an entire "organization, across Canada, and over an undefined period of time" (as in *Bigeagle v Canada,* 2023 FCA 128 at para 82). Courts have accepted allegations against the "Minister and/or his offices and staff" and allegations against the "Minister of National Revenue, the Solicitor General of Canada, the Minister of Public Safety and Emergency Preparedness, [and] the Minister of Justice" as being sufficiently pled.[77] The "Treasury Board," identified in the Claim, is as specific as these latter examples.

E. The appellant has not shown palpable and overriding error in Southcott J.'s decision to allow the plaintiffs to amend the Claim.

50. Lastly, the appellant argues that leave to amend should not have been and cannot be granted in this case. Once again, the appellant reiterates its argument at the

[75] *See Grand River* at para 81; *Hill v Canada*, 2025 FC 242 at para 13

[76] *Grand River* at para 90; *Merchant Law Group v Canada Revenue Agency,* 2010 FCA 184 at para 38

[77] *Granite Power Corp v Ontario*, 2004 CanLII 44786 (ONCA) at para 34, *Grand River* at paras 85-90

motion stage: the Claim ought to have been grieved. Southcott J. considered and rejected this argument. He found that it was plausible that the Federal Court had jurisdiction, at least over the *Charter* allegations, such that the Claim could survive this preliminary motion.

51. Notably, the appellant does not request that leave be denied if the court has jurisdiction over the Claim. In those circumstances, even if the Claim is insufficiently pled, the appellant cannot show that this is one of "the clearest of cases" where "the claim cannot be amended to show a proper cause of action."[78] The appellant simply cannot show that "the plaintiff cannot allege further material facts that [they know] to be true to support the allegations."[79] 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.[80]

52. Even if any part of the Claim is grievable, the appellant has not identified any error with Southcott J.'s discretion in allowing the plaintiffs the opportunity to amend the Claim.

53. In granting leave to amend, Southcott J. drew a parallel to this Court's reasoning in *McMillan*.[81] Contrary to the appellant's assertions, the fact that this Court was also considering a motion for certification in *McMillan* does not affect its salience to this

[78] *Al Omani v Canada,* 2017 FC 786 at para 34
[79] *Yan v Daniel*, 2023 ONCA 863 at para 19
[80] *Café Cimo Inc v Abruzzo Italian Imports Inc*, 2014 FC 810 at para 8. At a minimum, the plaintiffs should be granted leave to amend their s. 2(d) claim if this Court finds it is inadequate. The appellant did not challenge the sufficiency of this claim at the motion stage and therefore the appellant has not had the opportunity to plead sufficient facts.
[81] RFJ at paras 59-62

case. In *McMillan,* this Court allowed the plaintiffs to expand upon the other proposed class members' claims in their pleadings, without any reference to certification:

> [111] … There is no reason to think that the statement of claim could not be amended to disclose a reasonable cause of action insofar as other categories of individuals are concerned, by providing material facts regarding their experiences with the RCMP: *Adelberg*, above at para. 53.

Following this reasoning, Southcott J. allowed the plaintiffs leave to amend the Claim to plead further details as to other proposed class members' claims.

54. The appellant has identified no authority for its contention that a proposed class proceeding should be treated as an individual action before certification.[82] The Federal Court has routinely considered the sufficiency of the claims brought by proposed class members prior to certification.[83] Indeed, even though a proceeding is not a "class proceeding" until it is certified, according to the *Federal Court Rules*, "a member of a class of persons may commence an action or application on behalf of the member of that class…"[84] The *Rules* thereby clearly contemplate representative plaintiffs acting on behalf of a broader class prior to certification.

55. As Southcott J. wrote, the court should only deny leave to amend if "there is no scintilla of a cause of action."[85] The appellant failed to meet this burden on the motion

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[82] Appellant's Memorandum of Fact and Law at para 81
[83] *See, eg, McMillan* at paras 103-152
[84] *Federal Courts Rules,* SOR/98-106, s 334.12(1); *see also Logan v Canada (Minister of Health)*, 2004 CanLII 184 (ONCA) at para 23 (an intended class proceeding is brought "on behalf of people similarly situated claiming relief in respect of a common wrong;" "[i]t is not an individual action that metamorphosises to a class proceeding when certified")
[85] RFJ at para 54; **AB, Tab 2, p 30** (citing *Al Omani v Canada,* 2017 FC 786 at para 34)

below and fails to show any error—let alone palpable and overriding error—with Southcott J.'s reasoning in this appeal.

PART IV – ORDER SOUGHT

56. The plaintiffs and respondents in this appeal thus respectfully request:

a. This appeal be dismissed and the judgment of Southcott J. dated January 2, 2025 be upheld;

b. In the alternative, if any or all of the Claim is struck, the plaintiffs be granted leave to amend;

c. Costs; and

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

All of which is respectfully submitted, this 14th day of May, 2025 at Vancouver, British Columbia.

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PART V – LIST OF AUTHORITIES

A. LEGISLATION/REGULATIONS

1. *Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11
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

B. CASE LAW

1. *Adelberg v Canada,* 2024 FCA 106
2. *Ahamed v Canada*, 2020 FCA 213
3. *Al Omani v Canada,* 2017 FC 786
4. *Bigeagle v Canada,* 2023 FCA 128
5. *British Columbia Teachers' Federation v British Columbia,* 2015 BCCA 184 (aff'd and adopted 2016 SCC 49)
6. *Café Cimo Inc v Abruzzo Italian Imports Inc*, 2014 FC 810
7. *Canada v South Yukon Forest Corporation*, 2012 FCA 165
8. *Canadian Frontline Nurses v Canada (Attorney General)*, 2024 FC 42
9. *Doan v Canada*, 2023 FC 968
10. *Ebadi v Canada*, 2024 FCA 39
11. *Grand River Enterprises Six Nations Ltd v Attorney General (Canada)*, 2017 ONCA 526
12. *Granite Power Corp v Ontario*, 2004 CanLII 44786 (ONCA)
13. *Guindon v Canada*, 2015 SCC 41
14. *Health Services and Support- Facilities Subsector Bargaining Assocn v British Columbia*, 2007 SCC 27

15. *Heritage Capital Corp v Equitable Trust Co*, 2016 SCC 19

16. *Hill v Canada*, 2025 FC 242

17. *Jenson v Samsung Electronics Co Ltd*, 2023 FCA 89

18. *Joseph v Canada School of Public Service et al*, 2022 ONSC 6734

19. *Ledcor Construction Ltd v Northbridge Indemnity Insurance Co*, 2016 SCC 37

20. *Logan v Canada (Minister of Health)*, 2004 CanLII 184 (ONCA)

21. *McMillan v Canada,* 2023 FC 1752 (rev'd in part on other grounds 2024 FCA 199)

22. *Merchant Law Group v Canada Revenue Agency,* 2010 FCA 184

23. *Northern Regional Health Authority v Horrocks,* 2021 SCC 42

24. *Odhavji Estate v Woodhouse,* 2003 SCC 69

25. *Ontario (Attorney General) v Fraser,* 2011 SCC 20

26. *Ontario English Catholic Teachers Assoc v His Majesty,* 2022 ONSC 6658 (rev'd in part 2024 ONCA 101)

27. *Operation Dismantle v The Queen* (1985), 1985 CanLII 74 (SCC)

28. *Payne v Canada*, 2025 FC 5

29. *Pontbriand c Administration du régime de soins de santé de la fonction publique fédérale*, 2011 QCCA 157

30. *Québec (Commission des Droits de la Personne et des Droits de la Jeunesse) c Québec (Attorney General)*, 2004 SCC 39\

31. *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42

32. *R v JF*, 2022 SCC 17

33. *Teva Canada Limited v Novartis Pharmaceuticals Canada Inc*, 2013 FCA 244

34. *Villeneuve v AG Canada,* 2016 ONSC 6490

35. *Wenham v Canada (Attorney General),* 2018 FCA 199

36. *Yan v Daniel*, 2023 ONCA 863