

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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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

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

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

15 JUSTICE: Okay.

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

20 JUSTICE: Yeah, so I

21 MS. HUCAL: -- cases as needed.

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

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

26 JUSTICE: I have the electronic.

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

28 JUSTICE: Yes, no, I have the

1 electronic copy here, right, which has everything.

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

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

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

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

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

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

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

2 JUSTICE: Okay, that sounds like that
3 timing maps.

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

6 MR. SHEIKH: Yes.

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

11 So Ms. Hucal, just one thing I wanted to
12 alert you to that I'm interested in. This probably
13 won't be a surprise to you. But your principal
14 argument, if I could put it that way, turns on section
15 236 of the of the *Federal Public Service Labour*
16 *Relations Act* and, of course, the related provisions in
17 that statute. Mr. Sheikh responds with arguments, you
18 know, to the effect that it is arguable that section 236
19 doesn't apply to the entirety of the claim that he's
20 asserting, or that his clients are asserting. But he
21 also advances the argument that there are members of the
22 class, not the named plaintiffs themselves or the
23 representative plaintiffs, but members of the class
24 given the breadth of the class as described which would
25 not be caught by the right to grieve. And therefore
26 section 236 strikes me as the sort of argument that, for
27 instance, resonated in in the *Adelberg* case, if I'm
28 remembering the authorities correctly.

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

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

13 JUSTICE: Correct.

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

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

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

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

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

12 JUSTICE: Yes.

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

15 JUSTICE: Right.

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

28 JUSTICE: Right. And -- so it is

1 interesting I think.

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

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

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

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

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

28 JUSTICE: Okay. As yet unidentified?

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

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

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

16 JUSTICE: Right.

17 MS. HUCAL: So going to --

18 JUSTICE: Okay, please dig in.

19 **SUBMISSIONS BY MS. HUCAL:**

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

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

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

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

16 JUSTICE: I think that was *Adelberg*.

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

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

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

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

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

16 JUSTICE: Okay.

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

19 JUSTICE: Thank you.

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

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

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

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

6 JUSTICE: Sorry, 929?

7 MS. HUCAL: 929.

8 JUSTICE: Thank you.

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

11 JUSTICE: Okay.

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

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

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

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

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

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

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

13 JUSTICE: Okay.

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

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

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

1 is in private employment. The employment -- your terms
2 and conditions, your employment contract consists of the
3 terms in the collective agreement, but also those that
4 are provided in statute, which includes section 208 and
5 236, of the FPSLREA. That acronym gets longer and
6 longer.

7 So the plaintiff's recourse was that
8 provided under the grievance process, and that's in 208
9 of the FPSLREA, and that -- and as provided in section
10 236 of the same Act, it says where you can grieve under
11 208, you can't bring an action in the Federal Court.

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

14 JUSTICE: Sorry, *Vaughan*?

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

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

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

26 JUSTICE: And *Vaughan* --

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

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

4 JUSTICE: 146?

5 MS. HUCAL: Yes.

6 JUSTICE: Thank you.

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

19 "One, provision of a statute or regulation or
20 of a direction or other instrument made or
21 issued by the employer that deals with terms
22 and conditions of employment."

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

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

28 Arguably, that would apply. But regardless, they would

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

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

7 "The right of an employee to seek redress by
8 way of grievance for any dispute relating to
9 his or her terms or conditions of employment
10 is in lieu of any right of action that the
11 employee may have in relation to any act or
12 omission giving rise to the dispute."

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

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

25 JUSTICE: That's my memory as well.

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

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

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

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

17 JUSTICE: The federal court case is
18 which one?

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

21 JUSTICE: Okay, very good.

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

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

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

10 "The bar in Section 236..."

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

13 JUSTICE: I have section 56 in front
14 of me.

15 MS. HUCAL: Paragraph 56.

16 JUSTICE: Yes.

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

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

1 grievance."

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

3 Then at 57:

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

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

16 And at paragraph 57 after the reference
17 to Schedule A.

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

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

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

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

4 JUSTICE: Which paragraph are you
5 referring to there?

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

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

20 JUSTICE: Paragraphs 2 and 8?

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

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

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

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

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

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

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

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

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

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

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

28 JUSTICE: And that's the Federal Court

1 of Appeal decision?

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

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

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

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

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

22 JUSTICE: Do you have a paragraph
23 reference for that?

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

28 Now, while the plaintiffs here are

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

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

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

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

19 JUSTICE: Okay, let me see if it does.

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

22 JUSTICE: What --

23 MS. HUCAL: 1442.

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

26 MS. HUCAL: Yeah. Apologies.

27 JUSTICE: Right, right. Okay, 1442.

28 Yes, I'm there.

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

7 Now, in support of that complaint there
8 were a number of allegations that were asserted. They
9 are all outlined at paragraphs 34. And one of them that
10 I wanted to focus on was the allegation that the policy,
11 meaning the COVID policy, was outside the parameters of
12 the collective agreement and the respondent breached its
13 duty by not requiring that the Treasury Board negotiate
14 with it before implementing the policy. And I would
15 submit that that's akin to what the plaintiffs are
16 asserting here. And Ms. Payne -- well and Mr. Sheikh
17 was counsel for Ms. Payne in that matter, So Mr. Sheikh
18 on Ms. Payne's behalf made the argument -- or in making
19 this argument recognized that the -- like, this argument
20 that was being made, this was something for the Alliance
21 to be making. This is not something for an individual
22 to be making here. Even though they don't frame it as a
23 2(d) violation or characterize it as a 2(d) violation,
24 that's effectively what this is about. And Ms. Payne
25 and Mr. Sheikh knew that this was something that if it
26 was going to be addressed was to be addressed by their
27 bargaining agent.

28 JUSTICE: And you rely on what aspect

1 of the decision for that submission.

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

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

16 "The complainant's further allegations fault
17 the respondent for not having..."

18 in quotes,

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

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

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

5 It goes on to say:

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

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

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

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

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

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

10 MS. HUCAL: Is that correct? 2000?

11 JUSTICE: Yes.

12 MS. HUCAL: Okay, sometimes the page
13 numbers don't. So there at paragraph 16(a) and (b)
14 2004, page 2004 --

15 JUSTICE: Yes, okay.

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

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

23 MS. HUCAL: Yes.

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

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

1 but 2027.

2 JUSTICE: Okay, yes, I'm there.

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

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

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

16 JUSTICE: I understand, okay.

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

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

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

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

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

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

3 MS. HUCAL: Oh.

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

6 MS. HUCAL: So the tab is okay?

7 JUSTICE: Yes, it is.

8 MS. HUCAL: Okay.

9 JUSTICE: So I'm at *Ebadi*.

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

13 So the first paragraph obviously
14 identifies what the nature of the appeal is, and it is
15 an appeal of a strike of the Statement of Claim. So he
16 -- this was another challenge to COVID, and in paragraph
17 1, the court references sections 236, 208, and notes
18 "Together these provisions bar any civil recourse for
19 any dispute relating to terms or conditions of
20 employment which can be addressed through a grievance
21 process."

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

24 JUSTICE: Yes, I'm there.

25 MS. HUCAL: Okay and the court says:
26 "This interpretation aligns with the object of
27 the FPSLRA, which was to establish a
28 comprehensive and exclusive scheme for the

1 resolution of labor disputes."

2 And then they referenced *Vaughn*.

3 The court goes on to say:

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

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

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

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

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

1 These principles were reaffirmed by the
2 Court of Appeal 2024 in *Davis v. RCMP*. Now that was an
3 individual matter that was before the court, and it did
4 not deal with the COVID policy. That decision is at tab
5 20.

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

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

19 Then at 75:

20 "As noted at the outset of these reasons,
21 subsection (236(1) of the FPSLRA states
22 that '[t]he right of an employee to seek
23 redress by way of grievance for any dispute
24 relating to his or her terms or conditions of
25 employment is in lieu of any right of action
26 that the employee may have in relation to any
27 act or omission giving rise to the dispute."

28 There you see the court emphasized "any

1 dispute". And the court continues:

2 "Conflicts related to "terms or conditions of
3 employment" have been found "to encompass
4 allegations of defamation, discrimination,
5 harassment, malice and bad faith, Charter
6 breaches, and intentional torts"

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

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

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

27 JUSTICE: The same policy that's --

28 MS. HUCAL: Same policy. And so while

1 the JR was winding its way through the process, the
2 plaintiff -- or sorry, the applicant wanted a stay;
3 i.e., the policy doesn't apply until the JR has been
4 determined. And just as Fothergill found, ultimately,
5 you can't get by stay what you're seeking on the
6 ultimate decision or in the JR and notes at paragraph
7 26:

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

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

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

17 And then at paragraph 27 the court finds:

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

22 It says:

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

1 the *Charter*..."

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

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

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

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

14 MS. HUCAL: (inaudible).

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

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

25 JUSTICE: Yes, I'm there.

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

1 they say it's

2 "...to protect each citizen's reasonable
3 expectation that a public officer will not
4 intentionally..."

5 intention being the key,

6 "...injure a member of the public through
7 deliberate and unlawful conduct in the
8 exercise of public functions."

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

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

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

1 the risk of side effects weren't considered.

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

7 JUSTICE: Yes, I'm there.

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

16 JUSTICE: Is this a class action or --

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

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

21 MS. HUCAL: 47.

22 JUSTICE: Yes, I'm there.

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

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

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

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

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

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

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

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

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

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

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

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

17 JUSTICE: I've actually printed a hard
18 copy.

19 MS. HUCAL: Okay, so paragraphs 42 and
20 43 --

21 JUSTICE: Yes.

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

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

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

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

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

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

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

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

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

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

1 didn't abide with the policy.

2 JUSTICE: Where are you now?

3 MS. HUCAL: If you look at paragraph
4 5, 6 and 7. Well, 7, Mr. Malero didn't get suspended,
5 he resigned. Oh, he says pursuant to the policy. So
6 I'm not sure what that means. I don't think there was
7 an obligation to resign.

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

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

17 "The pleading must tell the defendant
18 the 'who, when, where, how...."

19 JUSTICE: Pardon me, which paragraph?

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

22 JUSTICE: Yes, I'm there.

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

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

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

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

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

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

28 MS. HUCAL: Well, because they use

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

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

25 JUSTICE: Duty being to implement the
26 policy.

27 MS. HUCAL: Exactly.

28 JUSTICE: Now you're not speaking on

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

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

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

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

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

23 JUSTICE: *Bigeagle*?

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

1 court is reflecting upon the motion judge's findings.

2 It said:

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

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

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

28 And that's paragraph 81. Then at paragraph 82

1 the court notes:

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

8 meaning the lower court judge,

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

16 And she noted:

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

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

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

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

28 "The plaintiffs must set out sufficient..."

1 JUSTICE: Remind me the --

2 MS. HUCAL: Sorry, tab 4B.

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

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

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

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

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

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

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

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

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

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

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

4 Those are my submissions.

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

7 MS. HUCAL: Subject to any questions.

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

16 MS. HUCAL: Whether leave should be
17 granted.

18 JUSTICE: Whether leave should be
19 granted, yes.

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

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

28 MS. HUCAL: Oh, were you talking about

1 casual (inaudible)?

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

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

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

28 MS. HUCAL: I understand the question,

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

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

14 MS. HUCAL: Yes.

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

25 MS. HUCAL: Thank you.

26 JUSTICE: Thank you, everyone.

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

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

1 JUSTICE: Please be seated, everyone.

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

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

8 JUSTICE: Okay, please.

9 **SUBMISSIONS BY MS. HUCAL, (Continued):**

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

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

14 MS. HUCAL: Sorry. I apologize.

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

17 MS. HUCAL: Yes, so the heading is,
18 "Did the Federal Court err in denying leave to Mr.
19 *McMillan* to amend", so it's responsive to your question.
20 It begins at paragraph 104, but the exact paragraph is
21 111, and it articulates why *McMillan* is different than
22 the case before you today. At 111:

23 "The Federal Court had accepted that Mr.

24 *McMillan's* statement of claim pleaded a

25 reasonable cause of action with respect to

26 certain individuals."

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

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

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

6 JUSTICE: Yes?

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

9 JUSTICE: Thank you.

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

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

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

17 JUSTICE: Okay.

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

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

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

28 JUSTICE: Okay, so *Adelberg* was a mass

1 action. *McMillan* was a class action?

2 MS. HUCAL: Correct.

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

5 MS. HUCAL: Thank you.

6 JUSTICE: Mr. Sheikh?

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

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

11 **SUBMISSIONS BY MR. SHEIKH:**

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

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

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

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

11 I quote from paragraph 122:

12 "...the Court uses the 'plain and obvious'
13 threshold, or 'doomed to fail' standard.
14 Taking facts pleaded as true, the Court
15 examines whether the application:

16 ...is 'so clearly improper as to be
17 bereft of any possibility of
18 success'.... There must be a 'show
19 stopper' or a 'knockout punch' - an
20 obvious, fatal flaw striking at the
21 root of the Court's power to entertain
22 the application."

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

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

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

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

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

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

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

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

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

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

1 this court's jurisdiction."

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

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

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

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

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

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

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

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

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

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

20 So in support of that proposition I'm
21 going to refer you to a case called *British Columbia*
22 *Teachers' Federation v. British Columbia*. And this is a
23 2015 B.C. Court of Appeal case later affirmed by the
24 Supreme Court of Canada. It can be located at tab 6 of
25 the plaintiff's book of authorities.

26 JUSTICE: Yes, I'm there.

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

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

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

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

20 "An examination of the content of the
21 legislation is certainly an important part of
22 the analysis."

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

26 MR. SHEIKH: Paragraph 72.

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

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

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

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

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

12 JUSTICE: Take your time.

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

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

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

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

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

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

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

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

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

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

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

20 MR. SHEIKH: I am.

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

23 MR. SHEIKH: It is, yes.

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

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

1 Court of Appeal decision itself.

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

5 MR. SHEIKH: Correct.

6 JUSTICE: Okay. And so I think at tab
7 6 I only have the Supreme Court of Canada case. Is the
8 B.C. Court of Appeal case elsewhere?

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

12 JUSTICE: Counsel, you're looking to
13 rise?

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

23 MR. SHEIKH: Correct.

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

28 MS. HUCAL: Do you have his factum?

1 It's hyperlinked in his factum at footnote 45.

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

4 MS. HUCAL: Footnote 45.

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

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

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

15 MR. SHEIKH: Thank you very much.

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

18 MR. SHEIKH: Okay.

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

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

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

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

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

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

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

1 not have that jurisdiction as opposed to --

2 MR. SHEIKH: I'm getting right there.
3 Part of setting up and getting to the BCTF case was
4 dealing with the essential character of the dispute,
5 which is what *Adelberg* defined as compliance for these
6 particular individuals who were covered by Schedule 1
7 defined as compliance with the policy and the resulting
8 characteristics of that. Whereas 2(d), what I'm saying,
9 is not the same in terms of the essential character of
10 the dispute. The essential character of a 2(d) dispute,
11 and the reason I quoted the paragraph concerns the
12 process by which those things came about, by which those
13 terms and conditions were unilaterally put in. At the
14 same time, there is some analysis into the content,
15 which would be the same as what *Adelberg* assessed, but
16 that is not the nature of the dispute as it arises under
17 2(d). That's not how it's characterized.

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

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

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

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

22 MR. SHEIKH: Yes.

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

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

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

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

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

8 JUSTICE: More slowly. So *Health*
9 *Services?*

10 MR. SHEIKH: "and *Support --*

11 JUSTICE: *Health Services and Support.*

12 MR. SHEIKH: -- dash "*Facilities*
13 *Subsector Bargaining Association -- Facilities Subsector*
14 *Bargaining Association --*

15 JUSTICE: Okay.

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

17 JUSTICE: Yes.

18 MR. SHEIKH: And that citation is 2007
19 SCC 27

20 JUSTICE: Okay, thank you.

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

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

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

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

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

28 And so when I get to a submission on what

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

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

6 MR. SHEIKH: They did.

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

10 MR. SHEIKH: Arise under the
11 collective agreement.

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

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

19 JUSTICE: Okay.

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

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

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

28 JUSTICE: And this is in your

1 authority?

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

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

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

17 The Alberta Court of Appeal found that a
18 2(d) dispute was not one which arose under the
19 collective agreement such that it was within the
20 jurisdiction of a labor arbitrator, but rather the true
21 character of the dispute was the alleged
22 unconstitutional statutory provision upon which the 2(d)
23 challenge was brought. The content of the statutory
24 provision dealing with job classification, et cetera,
25 was not central to that 2(d) analysis. It was the
26 process that was undertaken.

27 JUSTICE: So paragraph references for
28 these submissions?

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

3 JUSTICE: Okay, yes, I'm there.

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

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

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

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

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

15 JUSTICE: Yes, I'm there.

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

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

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

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

12 MR. SHEIKH: That's right.

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

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

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

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

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

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

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

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

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

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

5 JUSTICE: Which case was that?

6 MR. SHEIKH: I will find it for you.
7 you. *Canada v. Greenwood*.

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

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

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

16 MR. SHEIKH: Federal Court of Appeal,
17 yeah.

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

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

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

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

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

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

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

10 So moving on substantively to *Adelberg*.

11 JUSTICE: So, that submission, is your
12 argument there that an arbitrator acting under section
13 208 would not have authority to address the tort of
14 misfeasance in public office?

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

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

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

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

15 JUSTICE: Okay, yes, I'm there.

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

18 JUSTICE: Yes, I'm there.

19 MR. SHEIKH: Court should be cautioned
20 against viewing another decision, even if legally and
21 factually similar, as determinative of whether a
22 plaintiff's claims disclosed a reasonable cause of
23 action. Specifically, the court in *Brake* noted that the
24 plaintiff before them did not consent to his claims
25 being decided elsewhere as a lead case and did not have
26 an opportunity to make submissions or present evidence
27 in that proceeding. Each case is based on the
28 particular evidentiary record filed and the specific

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

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

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

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

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

1 the organizations listed in Schedule 'A'..."

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

5 JUSTICE: Who drafted the pleading in
6 *Adelberg*?

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

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

1 vaccinated.

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

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

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

20 MR. SHEIKH: Sure.

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

23 MR. SHEIKH: Absolutely.

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

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

1 JUSTICE: Yes, I'm there.

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

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

18 Meaningful discussion, consultation.
19 That is process. That is the same argument that was
20 that existed in *Health Services* in the Supreme Court of
21 Canada case. It's the same argument that existed in the
22 *BCTF* case in describing the essential character of a
23 2(d) claim.

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

27 MR. SHEIKH: Yes.

28 JUSTICE: -- and risk factors

1 associated with the vaccines are also --

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

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

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

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

21 So for example --

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

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

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

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

6 MR. SHEIKH: Correct.

7 JUSTICE: Okay, thank you. That
8 helps.

9 MR. SHEIKH: So just to conclude the
10 2(d) analysis, and we will come to the issues that were
11 raised in *McMillan*, and I'm just going to highlight them
12 to come back to following this misfeasance. But just to
13 conclude the 2(d) analysis in our submissions, we say
14 that the defendant has not met the burden to show that
15 it's plain and obvious that a claim of 2(d), that within
16 this jurisdiction of -- that it is or isn't within the
17 jurisdiction of this court. It's not plain and obvious
18 that it's in the jurisdiction of section 208. It's not
19 plain and obvious that the claim is doomed to fail for
20 lack of jurisdiction.

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

24 So moving then to misfeasance in public
25 office --

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

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

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

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

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

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

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

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

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

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

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

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

1 even with that amendment, and we would argue that, as in
2 *McMillan*, a different representative plaintiff in this
3 situation with additional facts pled on those specific
4 circumstances outside of the applicability of *Adelberg's*
5 208 analysis would be sufficient amendments to allow the
6 claim to proceed.

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

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

14 JUSTICE: Yes, I'm there.

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

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

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

1 the misfeasance.

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

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

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

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

28 MR. SHEIKH: Well, the considerations

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

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

13 So at tab 9 of our book of authorities is
14 2021 Supreme Court of Canada decision called *Ontario*
15 (*Attorney General*) *v. Clark*.

16 JUSTICE: Yes, I'm there.

17 MR. SHEIKH: And reading from
18 paragraph 23:

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

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

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

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

14 MR. SHEIKH: That's correct.

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

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

21 JUSTICE: And that improper purpose is
22 what?

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

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

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

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

11 JUSTICE: It might be the *Odhavji* --

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

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

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

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

20 MR. SHEIKH: So:

21 "In Category B..."

22 quoting from paragraph 23:

23 "...the plaintiff must prove the two ingredients
24 of the tort independently of one another."

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

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

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

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

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

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

24 JUSTICE: Please carry on.

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

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

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

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

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

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

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

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

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

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

10 JUSTICE: Okay, yes, I'm there.

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

14 JUSTICE: Yes, I'm there.

15 MR. SHEIKH: Apologize.

16 JUSTICE: Maybe those aren't the
17 paragraphs.

18 MR. SHEIKH: Those are not the
19 paragraphs. Paragraph 88. So reading from paragraph
20 88, the court --

21 JUSTICE: 88?

22 MR. SHEIKH: 88.

23 JUSTICE: Yes, I'm there.

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

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

12 and they.

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

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

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

26 JUSTICE: Yes, I'm there.

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

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

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

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

23 JUSTICE: Yes.

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

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

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

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

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

20 MR. SHEIKH: I do.

21 JUSTICE: So looking at, I guess it's
22 1, 2, 3, 4, 5, 6, so the question about the fifth
23 bullet, but I'll come back to that. On the sixth bullet
24 first, the proposed new allegation would be the Treasury
25 Board's objective in enacting the policy was to reduce
26 the severity, infection rates and transmission of COVID
27 19 among federally regulated employees. The Treasury
28 Board knew, or ought to have known, that these goals

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

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

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

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

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

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

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

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

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

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

6 MR. SHEIKH: We do.

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

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

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

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

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

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

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

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

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

28 The reality, in an absolute sense, is

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

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

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

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

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

1 around adverse events speak to any of this?

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

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

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

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

28 What we purport to show if, if we're

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

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

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

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

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

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

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

12 JUSTICE: Which paragraph of *Adelberg*?

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

16 "That said, the [Federal Public Sector Labor
17 Relations Board] recently held in *Rehibi v.*
18 *Deputy Head*...that a grievance challenging the
19 application of the [Treasury Board] Policy..."
20 which is the same policy we're all discussing today,
21 "...could not be referred to adjudication due to
22 the fact that only a subset of matters that
23 may be grieved under the [*Public Service Labor*
24 *Relations Act*] may be referred to
25 adjudication..."

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

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

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

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

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

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

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

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

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

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

21 MS. HUCAL: Okay.

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

24 MS. HUCAL: Yes.

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

28 MS. HUCAL: Oh yes, about union rights

1 versus --

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

4 MS. HUCAL: Yes. Yes.

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

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

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

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

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

27 MS. HUCAL: I think, yes.

28 JUSTICE: Yeah. Madam Registrar, does

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

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

8 Mr. --

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

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

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

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

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

28 MR. SHEIKH: So just to repeat, sir,

1 Richard Southcott at FCT.CF.ca?

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

5 MR. SHEIKH: Yes.

6 JUSTICE: Okay.

7 MR. SHEIKH: Absolutely.

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

10 MS. HUCAL: We have a copy.

11 MR. SHEIKH: You have a copy? Okay.

12 JUSTICE: Okay, very good.

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

15 MS. HUCAL: Yeah, thank you.

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

19 MS. HUCAL: How long? 25?

20 JUSTICE: Twenty-five, absolutely.

21 MS. HUCAL: Yes. Yeah. Thank you.

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

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

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

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

28 Mr. Sheikh, thank you for emailing me the

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

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

8 **SUBMISSIONS BY MR. SHEIKH (Continued):**

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

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

26 JUSTICE: Which paragraph in *Rehibi* is
27 that?

28 MR. SHEIKH: Paragraph 307 and 308.

1 JUSTICE: Okay.

2 MR. SHEIKH: So under -- sorry?

3 JUSTICE: Did you wish to say more

4 or --

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

7 JUSTICE: Okay.

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

14 "It is clearly established in law that the
15 Board can resolve constitutional questions
16 that are related to matters of which it is
17 properly seized..."

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

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

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

3 **REPLY BY MS. HUCAL:**

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

8 I've done -- in fact, I think most of my
9 practice has been directed at section 2(d). So *Health*
10 *Services* was the first decision of the Supreme Court of
11 Canada that recognized that freedom of association under
12 2(d) protected a right to a process of collective
13 bargaining. I mean, there's a lot going on in *Health*
14 *Services*, but that's sufficient.

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

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

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

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

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

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

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

1 "...establish policies or issue directives
2 respecting the exercise of the powers granted
3 by this Act to deputy heads in the core public
4 administration and the reporting by those
5 deputy heads in respect of the exercise of
6 those powers..."

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

12 JUSTICE: Sorry. FCA 28?

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

14 JUSTICE: Okay.

15 MS. HUCAL: At paragraph 14:

16 "Parliament has recognized the Treasury
17 board's right to control and manage its
18 workplace..."

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

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

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

28 Those are my submissions on the point of

1 process.

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

7 MS. HUCAL: 2(d).

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

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

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

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

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

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

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

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

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

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

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

14 JUSTICE: That's 55 of *Adelberg*?

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

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

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

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

12 JUSTICE: Last exhibit, so this is?

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

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

17 MS. HUCAL: C.

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

20 MS. HUCAL: Okay and if you go to the
21 last page, paragraph 45. I just take your attention to
22 45 because there Ms. Payne lists all of the recourse she
23 is seeking with relation to her concerns or issues with
24 the COVID policy.

25 So a disclosure -- like she says,
26 "I have the following open and active
27 investigations: a disclosure to the Office of
28 the Public Sector Integrity Commissioner of

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

5 She's waiting on a decision,

6 "...a harassment disclosure against my human
7 resource rep;..."

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

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

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

18 The are my submissions.

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

27 **(PROCEEDINGS ADJOURNED AT 3:41 P.M.)**
28

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

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February 19, 2025