Court File No.: A-33-25

FEDERAL COURT OF APPEAL

BETWEEN:

FRANCESCO GABRIELE QUALIZZA and others

APPELLANTS

and

HIS MAJESTY THE KING IN RIGHT OF CANADA and others

RESPONDENT

APPELLANTS' MEMORANDUM OF FACT AND LAW

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PART I: PROCEDURAL BACKGROUND

1. On January 14, 2025, Justice Manson of the Federal Court dismissed the Appellants' motion[1] for an extension of time to appeal the order of Associate Judge Coughlan dated November 13, 2024,[2] which had struck the Appellants' Amended Statement of Claim[3] in its entirety. The Appellants respectfully submit that the procedural irregularities cited in that order do not justify foreclosing their appeal on the merits.

2. The Appellants acknowledge that the initial motion cited procedural rules applicable to the Federal Court of Appeal rather than those governing motions in the Federal Court under Rule 8 and Rule 369(1) of the *Federal Courts Rules*, SOR/98-106 [*Rules*].[4] This procedural misstep did not affect the substance of the relief sought or the legal foundation for the appeal.

3. The motion was supported by an affidavit from counsel, which the Federal Court declined to consider under Rule 82 of the *Rules*. While the Appellants recognize that affidavit evidence should generally come from the party rather than counsel, the affidavit was prepared in good faith to assist the Court and was not contested on its factual accuracy. The Appellants are prepared to provide direct evidence if required.

4. The Appellants further submit that the short delay in bringing this appeal is reasonably explained by the need to assess the implications of the striking order for a group of over 300 plaintiffs. Once the decision was reviewed and instructions were confirmed, the Appellants acted promptly to initiate the appeal. No meaningful prejudice to the Respondent has resulted from the brief delay.

5. The Appellants respectfully submit that the dismissal of the motion for extension of

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[1] Order of Hon Mr. Justice Manson dated January 14, 2025 **[TAB B at Amended Appeal Book ("AAB") p. 14]**.
[2] Judgment and Reason of A.J. Coughlan dated November 13, 2024 **[TAB C at AAB p. 25]**.
[3] Amended Statement of Claim (T-1296-23) dated July 28, 2023 **[Appellants' Factum, Appendix, TAB 1]**.
[4] *Federal Courts Rules*, SOR/98-106.

time rests on an unduly formalistic application of procedural rules and fails to give due weight to the seriousness of the constitutional issues raised. The Federal Court's conclusion that the appeal lacked merit is challenged in full below, and the Appellants submit that it was an error for the Court to assess the merits on an undeveloped record, especially where leave to amend had been denied.

6. Given the public importance of the constitutional claims advanced and the absence of any material prejudice to the Respondent, it is in the interests of justice that this appeal be heard on its merits.

PART II: INTRODUCTION

7. This appeal arises from the January 14, 2025, order of Justice Manson[5] dismissing the Appellants' motion for an extension of time to appeal the decision of Associate Judge Coughlan dated November 13, 2024,[6] which struck the Appellants' Amended Statement of Claim[7] in its entirety without leave to amend. The Appellants challenge both the procedural dismissal and the underlying substantive order. They seek to have their claim reinstated or, at a minimum, be granted leave to amend.

8. The Appellants are former and serving members of the Canadian Armed Forces ("CAF") who challenge a series of COVID-19 vaccination mandates imposed through Directives issued by the Chief of the Defence Staff ("CDS") between October 2021 and October 2022.[8] They allege that the CDS Directives violated their rights under

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[5] Order of Hon Mr. Justice Manson dated January 14, 2025 **[TAB B at AAB p. 14]**.
[6] Judgment and Reason of A.J. Coughlan dated November 13, 2024 **[TAB C at AAB p. 25]**.
[7] Amended Statement of Claim (T-1296-23) dated July 28, 2023 **[Appellants' Factum, Appendix, TAB 1]**.
[8] DIRECTIVES, CDS Directive on CAF COVID-19 Vaccination dated October 8, 2021 **[Appellants' Factum, Appendix, TAB 2A]**; DIRECTIVES, CDS Directive 002 on CAF COVID-19 Vaccination – Implementation of Accommodations and Administrative Action dated November 3, 2021 **[Appellants' Factum, Appendix, TAB 2B]**; DIRECTIVES, CDS Directive 02 on CAF COVID-19 Vaccination – Implementation of Accommodations and Administrative Action – Amendment 1 dated December 4, 2021 **[Appellants' Factum, Appendix, TAB 2C]**; DIRECTIVES, CDS Directive 003 on CAF COVID-19 Vaccination for Operations and Readiness dated October 11, 2022 **[Appellants' Factum, Appendix, TAB 2D]**.

sections 2(a), 2(d), 7, 8, and 15(1) of the *Canadian Charter of Rights and Freedoms* ("the *Charter*"),[9] and gave rise to actionable torts, including misfeasance in public office, negligence, breach of the public trust, and breach of the *National Defence Act* ("*NDA*").[10]

9. The Appellants contend that the Federal Court erred in law by failing to apply binding precedent concerning access to constitutional remedies, and by misapprehending the nature and legal significance of the pleadings – particularly by striking the claim on the ground that it improperly challenged decisions made within the military chain of command, despite raising systemic and constitutional issues that lie outside the remedial authority of the grievance system.

10. As explained by the Supreme Court in *Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62,[11] the focus of judicial review is to quash an invalid government decision, compel government action, or prohibit unlawful conduct through a time-sensitive and expedited process.[12] Judicial review is designed to ensure swift correction of administrative error. However, the Appellants who submitted grievances through the CAF grievance system are barred from judicial review by operation of law: they cannot seek judicial review until the Final Authority, the CDS, renders a decision[13] – and the CDS is not subject to any time limit.[14] All of the grievances submitted by the Appellants have been pending for over three years. As a result, judicial review is functionally unavailable.

11. The Appellants are thus procedurally suspended: unable to initiate judicial review and simultaneously denied access to constitutional remedies through the internal CAF system. This procedural trap stands in direct contrast to the access-to-justice

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[9] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [***Charter***].
[10] *National Defence Act*, RSC 1985, c N-5 [***NDA***].
[11] *Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62 (CanLII), [2010] 3 SCR 585 [***TeleZone***].
[12] *TeleZone* at para 26.
[13] *NDA*, s 29.15.
[14] *NDA*, s 29.11.

principle affirmed in *TeleZone*, where the Supreme Court cautioned against forcing claimants to pursue "procedural detours"[15] that serve no functional purpose. Section 24(1) of the *Charter* guarantees access to a court of competent jurisdiction for constitutional redress.[16] Where an administrative scheme cannot provide that forum, the superior courts must remain open. In this context, access to a superior court is not merely appropriate – it is essential.

PART III: SUMMARY OF THE FACTS

12. On October 8, 2021, the CDS issued Directive 001,[17] requiring all CAF members to attest to their COVID-19 vaccination status. Further CDS Directives in November and December 2021 imposed punitive administrative measures, including career restrictions and release from the CAF,[18] particularly under *Queen's Regulations and Orders* ("*QR&O*") table to article 15.01, Item 5(f) – Unsuitable for further service,[19] for those refusing vaccination. This broad mandate remained in effect until October 11, 2022, when another CDS Directive[20] reduced its scope to operational and high-readiness positions, as well as for deployments to areas with vaccination entry requirements.

13. The CDS Directives allowed only limited exemptions and did not accommodate conscientious objection. Many CAF members were disciplined or released despite

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[15] *TeleZone* at para 19.
[16] *Charter*, s 24(1).
[17] DIRECTIVES, CDS Directive on CAF COVID-19 Vaccination dated October 8, 2021 **[Appellants' Factum, Appendix, TAB 2A**.
[18] DIRECTIVES, CDS Directive 002 on CAF COVID-19 Vaccination – Implementation of Accommodations and Administrative Action dated November 3, 2021 **[Appellants' Factum, Appendix, TAB 2B**; DIRECTIVES, CDS Directive 02 on CAF COVID-19 Vaccination – Implementation of Accommodations and Administrative Action – Amendment 1 dated December 4, 2021 **[Appellants' Factum, Appendix, TAB 2C]**.
[19] *Queen's Regulations and Orders (QR&O)*, article 15.01, Release of Officers and Non-Commissioned Members.
[20] DIRECTIVES, CDS Directive 003 on CAF COVID-19 Vaccination for Operations and Readiness dated October 11, 2022 **[Appellants' Factum, Appendix, TAB 2D]**.

pending grievances. The Appellants allege that the Directives were not demonstrably justified as *bona fide* operational requirements, and that internal statements by the CDS and Director Force Health Protection ("DFHP") later confirmed that no such justification existed.

14. The Appellants filed a Statement of Claim on June 21, 2023,[21] and an Amended Statement of Claim on July 28, 2023.[22] Their pleadings include claims for *Charter* damages, declarations of constitutional invalidity, and tort claims. The Federal Court struck the claim in its entirety under Rule 221(1)(a), (c) and (f) on November 13, 2024,[23] without granting leave to amend, holding that the matter constituted an improper attempt to challenge decisions within the military chain of command, that the pleadings disclosed no reasonable cause of action, were frivolous or vexatious, and were otherwise an abuse of the process of the Court. A subsequent motion for extension of time to appeal was dismissed on January 14, 2025.[24]

15. The Appellants submit that the CAF grievance system is structurally incapable of resolving the systemic, constitutional, and tort-based claims raised. They cite multiple findings by the Military Grievances External Review Committee ("MGERC") of *Charter* breaches, the inability of the grievance process to grant meaningful remedies, and the fact that none of their grievances have been decided by the CDS to date – despite the passage of more than three years. Approximately 230 Appellants were unable to file grievances within the 3-month regulatory deadline[25] due to their expedited release from the CAF.

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[21] Statement of Claim (T-1296-23) dated June 21, 2023 **[Appellants' Factum, Appendix, TAB 3]**.

[22] Amended Statement of Claim (T-1296-23) dated July 28, 2023 **[Appellants' Factum, Appendix, TAB 1]**.

[23] Judgment and Reason of A.J. Coughlan dated November 13, 2024 **[TAB C at AAB p. 25]**.
[24] Order of Hon Mr. Justice Manson dated January 14, 2025 **[TAB B at AAB p. 14]**.
[25] *QR&O*, article 7.06(1).

PART IV: GROUNDS OF APPEAL

Issue One: Did the Federal Court err in treating the Appellants' claim as improperly bypassing the CAF grievance system, despite their inability to access judicial review or obtain constitutional remedies through that system?

16. The Federal Court erred in law by striking the Appellants' claim on the basis that it constituted an improper challenge to military administrative decisions that, in the Court's view, were subject to the internal grievance system. This mischaracterization failed to distinguish between individual employment grievances and the systemic, constitutional issues raised in the Amended Statement of Claim.[26]

17. The Appellants do not challenge individualized grievance outcomes but instead seek constitutional declarations and remedies about the CDS Directives' legality. The grievance process offers no ability to quash unconstitutional directives, nor to award public law remedies such as declaratory relief, damages under section 24(1) of the *Charter*, or tort compensation for misfeasance, breach of trust, or negligence.

18. As the Supreme Court held in *R v 974649 Ontario Inc*, 2001 SCC 81,[27] and in *Mills v The Queen*, [1986] 1 SCR 863,[28] a tribunal is only a "court of competent jurisdiction" under section 24(1) of the *Charter* if it has jurisdiction over the parties, the subject matter, and, critically, the power to grant the remedy sought. The CAF grievance system lacks the third requirement: it cannot award *Charter* damages or declarations of constitutional invalidity. Therefore, it is not a court of competent jurisdiction for these purposes.

19. The Federal Court conducted a detailed functional and structural analysis of the CAF

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[26] Amended Statement of Claim (T-1296-23) dated July 28, 2023 **[Appellants' Factum, Appendix, TAB 1]**.
[27] *R v 974649 Ontario Inc*, 2001 SCC 81 (CanLII), [2001] 3 SCR 575 at para 15.
[28] *Mills v The Queen*, 1986 CanLII 17 (SCC), [1986] 1 SCR 863 at para 52.

grievance process in *Bernath v Canada*, 2007 FC 104.[29] It concluded that the grievance process did not meet the requirements of a "court of competent jurisdiction" under section 24(1) of the *Charter*.[30] The Federal Court stated that "the grievance procedure does not provide for an adequate forum for addressing constitutional questions under the *Charter*, and no monetary compensation can be granted through this decision-making process",[31] and as such, it was "appropriate, even essential ... to have access to the courts in order to address such issues."[32]

20. As confirmed by the Supreme Court in *TeleZone* the existence of a parallel administrative remedy does not preclude a plaintiff from directly pursuing a civil claim for *Charter* damages or tort relief. The Court emphasized a "practical and pragmatic"[33] approach to forum selection, rooted in access to justice. The Court held that "if the claimant is content to let the order stand and instead seeks compensation for alleged losses … there is no principled reason why it should be forced to detour to the Federal Court for the extra step of a judicial review application … when that is not the relief it seeks."[34]

21. That reasoning applies with even greater force here. The Appellants seek both public and private law remedies: a declaration that the CDS Directives were unlawful and unconstitutional, and damages for the harms suffered. Ordinarily, a party seeking to quash an administrative decision would proceed by judicial review. However, CAF members are barred from initiating judicial review until the CDS, acting as the Final Authority under *QR&O*, article 7.16, has rendered a decision on their grievance. There is no statutory time limit for doing so. The Appellants who submitted grievances have waited years with no final determination — and thus no ability to seek judicial review under section 18.1 of the *Federal Courts Act*.

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[29] *Bernath v Canada*, 2007 FC 104 (CanLII) **[*Bernath FC 104*]**.
[30] *Bernath FC 104* at para 112.
[31] *Bernath FC 104* at para 109.
[32] *Bernath FC 104* at para 110.
[33] *TeleZone* at para 18.
[34] *TeleZone* at para 19.

22. The effect is to trap the Appellants in procedural limbo: they cannot proceed with judicial review and are simultaneously denied access to constitutional and civil remedies through the grievance system. The Federal Court's approach replicates the procedural dead ends that *TeleZone* expressly warned against.

23. The Federal Court failed to meaningfully engage with the Appellants' substantive *Charter* claims under sections 2(a), 2(d), 7, 8, and 15(1), or the systemic imbalance of power within the CAF. Its analysis dismissed the claim wholesale without adjudicating on the merits or considering the impact on access to justice for CAF members.

Issue Two: Did the Court err in concluding the CAF grievance system was an adequate alternative remedy?

24. Section 29 of the *NDA*[35] establishes a comprehensive, exclusive statutory scheme for resolving disputes between CAF members and the Crown regarding decisions, acts, or omissions in the administration of CAF affairs. As outlined in *Dunn v Canada (Attorney General)*, 2025 FC 652,[36] *MacLellan v Canada (Attorney General)*, 2014 NSSC 280 (CanLII),[37] and *Chua v Canada (Attorney General)*, 2014 FC 285,[38] the grievance process is generally mandatory and must be exhausted before judicial recourse is available.[39] However, *Dunn, Thomas v Canada (Attorney General)*, 2024 FC 655,[40] and *Chua* confirm that courts retain residual jurisdiction where the internal process is incapable of providing effective redress or in exceptional circumstances.[41] The Appellants submit that this exception applies to the current case. The grievance system lacks the authority to issue constitutional declarations, award *Charter* damages, or set aside unlawful Directives. It is also structurally compromised by the

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[35] *NDA*, s 29.
[36] *Dunn v Canada (Attorney General)*, 2025 FC 652 (CanLII) **[*Dunn*]**.
[37] *MacLellan v Canada (Attorney General)*, 2014 NSSC 280 (CanLII) **[*MacLellan*]**.
[38] *Chua v Canada (Attorney General)*, 2014 FC 285 (CanLII).
[39] *Dunn* at paras 137–40; *MacLellan* at paras 37 and 39–44; *Chua* at paras 11 and 16.
[40] *Thomas v Canada (Attorney General)*, 2024 FC 655 (CanLII) **[*Thomas*]**.
[41] *Dunn* at paras 146–7 and 151; *Thomas* at para 29; *Chua* at para 16.

fact that the CDS, who authored the impugned policies, is the final authority under *QR&O*, article 7.16[42] and *NDA*, section 29.11.[43]

25. Independent reports, such as those completed by the Right Honourable Antonio Lamer P.C., C.C., C.D.,[44] the Honourable Morris J. Fish, C.C., Q.C.,[45] and the Honourable Louise Arbour, C.C., G.O.Q.,[46] and findings by the MGERC[47] have identified deep structural deficiencies in the CAF grievance process. These include chronic, systemic delays, lack of transparency, the absence of enforceable remedies, and conflict of interest in having the CDS adjudicate grievances concerning their own policies.

26. The Federal Court accepted the Respondent's erroneous submission, based on *Moodie v Canada (National Defence)*, 2008 FC 1233,[48] that the CAF grievance process was an adequate alternative remedy and could provide reinstatement following wrongful administrative release.[49] As noted in the *Fish Report*, there is no statutory authority under the *NDA* for such reinstatement.[50] Subsection 30(4) of the *NDA* permits reinstatement only for wrongful disciplinary release.[51] Proposed amendments that would have extended this authority to administrative releases were

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[42] *QR&O*, article 7.16, Chief of the Defence Staff.
[43] *NDA*, s 29.11.
[44] National Defence, "The First Independent Review by the Right Honourable Antonio Lamer P.C., C.C., C.D. of the provisions and operation of Bill C-25, An Act to amend the National Defence Act and to make consequential amendments to other Acts, as required under section 96 of Statutes of Canada 1998, c.35" (September 3, 2003) at 86–8 and 93–107 **[*Lamer Report*] [Appellants' Factum, Appendix, TAB 4]**.
[45] National Defence, "Report of the Third Independent Review Authority to the Minister of National Defence, Pursuant to subsection 273.601(1) of the *National Defence Act*, RSC 1985, c N-5 - The Honourable Morris J. Fish, C.C., Q.C." (April 30, 2021) at iii–v and 168–85 **[*Fish Report*] [Appellants' Factum, Appendix, TAB 5]**.
[46] National Defence, "Report of the Independent External Comprehensive Review of the Department of National Defence and the Canadian Armed Forces – The Honourable Louise Arbour, C.C., G.O.Q." (May 20, 2022) at 143–6 **[*Arbour Report*] [Appellants' Factum, Appendix, TAB 6]**.
[47] Military Grievances External Review Committee ("MGERC"), "Revised Annex I - Constitutionality of the Canadian Armed Forces COVID-19 vaccination policy" (11 December 2024) **[*MGERC Revised Annex I*] [Appellants' Factum, Appendix, TAB 7]**.
[48] *Moodie v Canada (National Defence)*, 2008 FC 1233 (CanLII) at para 38.
[49] Motion to Dismiss Hearing Transcript dated 19 September 2024 at 40–2 and 102–4 **[Appellants' Factum, Appendix, TAB 8]**; Judgment and Reason of A.J. Coughlan dated November 13, 2024 at para 62 **[TAB C at AAB p. 25]**.
[50] *Fish Report* at 184.
[51] *NDA*, s 30(4).

introduced in 2013 but never brought into force.[52] This means that a grievor found to have been wrongfully released cannot be reinstated, restored to rank, or made whole through internal CAF mechanisms.

27. Even in cases where exhaustion of the internal grievance process is generally required, Canadian courts have carved out exceptions where that process is structurally incapable of providing effective redress. In *Thomas*, the Federal Court rejected the Crown's argument that it should decline residual jurisdiction with respect to a proposed class action against the CAF, concerning alleged systemic negligence and discrimination faced by CAF members with mental health disorders, due to the existence of the internal CAF grievance process.[53] The Federal Court found that, while such mechanisms exist, they are not necessarily capable of providing effective redress.[54] The Federal Court emphasized that the mere availability of internal processes does not preclude the Court's jurisdiction; instead, it must assess their actual effectiveness in the circumstances pleaded.[55] The Plaintiff in *Thomas* presented evidence, including affidavits, highlighting systemic delays, lack of confidentiality, fear of retaliation, and limited impartiality (worsened by the fact that final grievances were made by the CDS or their delegate).[56] These concerns, along with the fact that the class action included former CAF members who had no access to internal redress processes,[57] led the Court to conclude that there were exceptional circumstances, such as systemic claims, justifying the exercise of its residual jurisdiction.[58]

28. The principle regarding exercise of the Federal Court's residual jurisdiction was reaffirmed in *Dunn*, where the Court acknowledged that although the *NDA* provides an exclusive grievance scheme, residual jurisdiction remains with the courts where

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[52] *Fish Report* at 185.
[53] *Thomas* at para 29.
[54] *Thomas* at para 31.
[55] *Thomas* at para 32.
[56] *Thomas* at paras 31–2.
[57] *Thomas* at para 34.
[58] *Thomas* at paras 30–34.

the process is "demonstrably ineffective" or incapable of granting meaningful relief.[59]

29. As discussed in the Notice of Appeal,[60] the *Strickland v Canada (Attorney General)*, 2015 SCC 37[61] framework was improperly applied. The grievance process does not satisfy the threshold of adequacy required to displace judicial review. Adequacy does not require an identical remedy, but rather, hinges on whether or not the alternative remedy is "adequate in all the circumstances to address the applicant's grievance".[62] In this case, the Appellants allege that the CAF grievance system is not merely non-identical, but structurally incapable of addressing the substance of their *Charter* and tort claims.

30. Over 230 Appellants could not file grievances within the 3-month regulatory deadline due to their expedited release from the CAF.[63] Their claims are therefore not justiciable within the grievance system at all, further undermining the adequacy of the alleged alternative remedy.

Issue Three: Did the Court err in striking the Amended Statement of Claim without leave to amend under Rule 221?

31. The Federal Court struck the pleadings, without leave to amend, pursuant to Rule 221(1)(a), (c) and (f),[64] on the basis that they "do not disclose a reasonable cause of action, fail to plead material facts, and use vexatious language throughout",[65] and that "[s]ome of the assertions also constitute abuse of process."[66]

32. However, an imperfectly drafted Statement of Claim is not a lawful basis for

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[59] *Dunn* at paras 146–51.
[60] Notice of Appeal, filed on January 23, 2025 at para 4 **[TAB A at AAB p. 1]**.
[61] *Strickland v Canada (Attorney General)*, 2015 SCC 37 (CanLII), [2015] 2 SCR 713 **[*Strickland*]**.
[62] *Strickland* at para 42.
[63] Notice of Appeal, filed on January 23, 2025 at para 4 **[TAB A at AAB p. 1]**.
[64] Notice of Appeal, filed on January 23, 2025 at para 4 **[TAB A at AAB p. 1]**.
[65] Notice of Appeal, filed on January 23, 2025 at para 4 **[TAB A at AAB p. 1]**.
[66] Judgment and Reason of A.J. Coughlan dated November 13, 2024 **[TAB C at AAB p. 24]**.

summary dismissal. As stated in *Hunt v Carey Canada Inc*, [1990] 2 SCR 959,[67] pleadings should only be struck where it is "plain and obvious"[68] that they cannot succeed, assuming the facts pleaded are true and that there is some chance of success.[69] Complexity or novelty are not valid grounds to strike a claim at the pleadings stage.[70] Deficiencies in clarity, structure, or detail can and should be addressed through amendment. In *Jewish National Fund of Canada Inc v Canada (National Revenue)*, 2025 FCA 75,[71] this Honourable Court explained that:

> The governing principle is that an amendment should be permitted at any stage of a proceeding "if it assists in determining the real questions in controversy between the parties, provided it would not result in an injustice not compensable in costs and that it would serve the interests of justice"[72]

33. The Appellants maintain that such consideration is warranted, in the interest of supporting access to justice, given that their underlying claims engage complex and novel constitutional questions affecting hundreds of individuals. The claim raises serious and unresolved legal questions about the limits of executive power within the CAF and the scope of *Charter* protection for CAF members. It is supported by internal documents, policy directives, and third-party findings by the MGERC. This is not an attempt to relitigate individual grievances; it is a legitimate effort to secure accountability and legal redress related to systemic wrongs.

34. The Amended Statement of Claim[73] pleaded material facts capable of supporting multiple causes of action, including *Charter* claims (sections 2(a), 2(d), 7, 8, and 15) and procedural unfairness, negligence and breach of statutory duty, and

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[67] *Hunt v Carey Canada Inc*, 1990 CanLII 90 (SCC), [1990] 2 SCR 959 [***Hunt***].
[68] *Hunt* at 980.
[69] *Hunt* at 980.
[70] *Hunt* at 980.
[71] *Jewish National Fund of Canada Inc v Canada (National Revenue)*, 2025 FCA 75 (CanLII) **[*JNFC*]**.
[72] *JNFC* at para 6, citing *Canada v Pomeroy Acquireco Ltd*, 2021 FCA 187 (CanLII) at para 4, *McCain Foods Limited v JR Simplot Company*, 2021 FCA 4 (CanLII) at para 20, and *Teva Canada Limited v Gilead Sciences Inc*, 2016 FCA 176 (CanLII) at para 26.
[73] Amended Statement of Claim (T-1296-23) dated July 28, 2023 **[Appellants' Factum, Appendix, TAB 1]**.

misfeasance in public office. The pleading identified the impugned Directives, the authority under which they were issued, the timeline of implementation, and the direct harms experienced by the Appellants – including compulsory releases, denial of pay and benefits, and exclusion from religious and conscientious exemptions. These were not bare allegations, but structured claims linked to specific legal wrongs.

35. In *Payne v Canada*, 2025 FC 5,[74] the Federal Court declined to strike *Charter*-based claims at the pleading stage, even in a heavily regulated employment context, recognizing that the adequacy of grievance rights under the federal public service labour legislation could not be conclusively determined without a fuller record. While not a military case, *Payne* confirms that access to *Charter* remedies should not be foreclosed prematurely, particularly where administrative processes may not offer meaningful redress.[75]

36. The Appellants maintain that the procedural deficiencies identified by the Federal Court, focused on the form and acceptability of the pleadings and not on the substance of the legal rights being claimed, are curable. If leave to amend is granted, the Appellants are prepared to take action, following the instruction of this Honourable Court, to address the deficiencies of their pleading, including, for example:

    a. Removing evidentiary details and limiting the pleading to concise statements of material facts, in compliance with Rule 174, and avoiding conclusory or argumentative language unless directly supported by pleaded facts;
    b. Setting out each cause of action clearly (for example, *Charter* breach, misfeasance in public office, negligence), and identifying the elements of each cause and pleading facts sufficient to establish each one;
    c. Identifying which Defendant performed which act or omission, and avoiding

[74] *Payne v Canada*, 2025 FC 5 (CanLII) **[*Payne*]**.
[75] *Payne* at para 4.

undifferentiated group allegations against all Defendants;

d. Clarifying the meaning of terms such as "Chain of Command," "veteran," and "abuse" where used, and ensuring consistency and legal accuracy in terminology throughout the pleading;
e. Organizing Plaintiffs into coherent subgroups based on shared factual circumstances (for example, vaccination status, release type, grievance outcome), and linking each subgroup to specific causes of action and named Defendants;
f. Framing each cause of action within the Federal Court's jurisdiction under public law by linking it to the exercise of statutory powers or duties by federal actors; and
g. Using clear headings and subheadings to organize causes of action, and including a Plaintiff Matrix as a Schedule, linking each plaintiff to their factual basis, legal claim, and relevant Defendants.

37. Dismissing the claim outright risks setting a precedent that insulates executive misconduct within the CAF from constitutional scrutiny. The Appellants maintain that the Federal Court should have allowed the amendment of their claim to ensure that the core legal issues could be addressed on the merits.

PART V: ORDER REQUESTED

38. The Appellants respectfully request this Honourable Court:

a. Allow the appeal;

b. Set aside the Order of Justice Manson dated January 14, 2025, and the Order of Associate Judge Coughlan dated November 13, 2024;

c. Grant the Appellants leave to file their Notice of Appeal out of time;

d. Substitute an order dismissing the Respondents' motion to strike, or, in the

alternative;

e. Remit the matter to the Federal Court with directions to grant leave to amend the Statement of Claim;

f. Award pre- and post-judgment interest pursuant to the *Federal Courts Act*;

g. Award costs of the appeal and the motion below to the Appellants, including applicable taxes, on a substantial indemnity basis; and

h. Grant such further and other relief as this Honourable Court may deem just.

All of which is respectfully submitted.

Dated at St Albert, Alberta this 30th Day of May, 2025

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PART VI: LIST OF AUTHORITIES

Legislation

1. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
2. *Federal Courts Rules*, SOR/98-106.
3. *National Defence Act*, RSC 1985, c N-5.
4. *Queen's Regulations and Orders (QR&O)*, Chapter 7, Grievances.
5. *Queen's Regulations and Orders (QR&O)*, Chapter 15, Release.

Case Law

6. *Bernath v Canada*, 2007 FC 104 (CanLII).
7. *Canada v Pomeroy Acquireco Ltd*, 2021 FCA 187 (CanLII).
8. *Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62 (CanLII), [2010] 3 SCR 585.
9. *Chua v Canada (Attorney General)*, 2014 FC 285 (CanLII).
10. *Dunn v Canada (Attorney General)*, 2025 FC 652 (CanLII).
11. *Jewish National Fund of Canada Inc v Canada (National Revenue)*, 2025 FCA 75 (CanLII).
12. *Hunt v Carey Canada Inc*, 1990 CanLII 90 (SCC), [1990] 2 SCR 959.
13. *MacLellan v Canada (Attorney General)*, 2014 NSSC 280 (CanLII).
14. *McCain Foods Limited v JR Simplot Company*, 2021 FCA 4 (CanLII).
15. *Mills v The Queen*, 1986 CanLII 17 (SCC), [1986] 1 SCR 863.
16. *Moodie v Canada (National Defence)*, 2008 FC 1233 (CanLII).
17. *Payne v Canada*, 2025 FC 5 (CanLII).
18. *R v 974649 Ontario Inc*, 2001 SCC 81 (CanLII), [2001] 3 SCR 575.
19. *Strickland v Canada (Attorney General)*, 2015 SCC 37 (CanLII), [2015] 2 SCR 713.
20. *Teva Canada Limited v Gilead Sciences Inc*, 2016 FCA 176 (CanLII).
21. *Thomas v Canada (Attorney General)*, 2024 FC 655 (CanLII).

APPENDIX

TAB 1	Amended Statement of Claim (T-1296-23) dated July 28, 2023
TAB 2	DIRECTIVES
A	CDS Directive on CAF COVID-19 Vaccination dated October 8, 2021
B	CDS Directive 002 on CAF COVID-19 Vaccination – Implementation of Accommodations and Administrative Action dated November 3, 2021
C	CDS Directive 02 on CAF COVID-19 Vaccination – Implementation of Accommodations and Administrative Action – Amendment 1 dated December 4, 2021
D	CDS Directive 003 on CAF COVID-19 Vaccination for Operations and Readiness dated October 11, 2022
TAB 3	Statement of Claim (T-1296-23) dated June 21, 2023
TAB 4	National Defence, "The First Independent Review by the Right Honourable Antonio Lamer P.C., C.C., C.D. of the provisions and operation of Bill C-25, An Act to amend the National Defence Act and to make consequential amendments to other Acts, as required under section 96 of Statutes of Canada 1998, c.35" (September 3, 2003) [Lamer Report]
TAB 5	National Defence, "Report of the Third Independent Review Authority to the Minister of National Defence, Pursuant to subsection 273.601(1) of the National Defence Act, RSC 1985, c N-5 - The Honourable Morris J. Fish, C.C., Q.C." (April 30, 2021) [Fish Report]
TAB 6	National Defence, "Report of the Independent External Comprehensive Review of the Department of National Defence and the Canadian Armed Forces – The Honourable Louise Arbour, C.C., G.O.Q." (May 20, 2022) [Arbour Report]
TAB 7	Military Grievances External Review Committee ("MGERC"), "Revised Annex I - Constitutionality of the Canadian Armed Forces COVID-19 vaccination policy" (December 11, 2024) [MGERC Revised Annex I]
TAB 8	Motion to Dismiss Hearing Transcript dated September 19, 2024

File No. T-1296-23

FEDERAL COURT OF CANADA

B E T W E E N:

FRANCESCO GABRIELE QUALIZZA, JOEL THOMAS WILLIAM ELLIS, PATRICK MERCIER, JILL LYNE DUCHESNEAU, JOSEPH BENJAMIN STEWART, ERIC DAVID FAUCHER, SCOTT PETER BACON, STEPHEN TROY CHLEDOWSKI, AMANDA LEIGH BENHAM, JOSHUA MARTIN MCCULLOCH, KYLE CORRIVEAU, JOSEPH DANIEL ERIC LOUIS MONTGRAIN, DUSTIN SHANE WIEBE, STEPHEN WJ MORRIS, DAVID GARCIA VARGAS, MICHAEL JOSEPH LIS, NATASHA KATRINA LIS, SOLANGE SINE DJOUECHE, PETER VLASSOV, FREDERIC VILLENEUVE-NORMAND, ESTATE OF JONATHAN EMMERSON JENKINSON, VALENTIN LAVROV, MARIE-EVE LABONTE, JESSE DALE FRIESEN, TANIA CATHERINE NORDLI, ANDRZEJ SKULSKI, DENNIS JOHN PAUL TONDREAU, EMMY-LOU LAURIE FORGET, DALLAS ALEXANDER FLAMAND, CHELSEA ELAINE ROGAL, BARON HORDO, TAYLOR MICHAEL HARVIE, VANESSA RAE LAROCHELLE, JACQUELINE MARIE FRANCE BOEHME, JAMES PAUL DANIEL FORMOSA, KAITLYN E CAMPBELL, LUCAS TIMOTHY VANCUREN, JERMAINE SHERIDAN BURRELL, ANTHONY DAVID HIATT, MICHAEL ST-LAURENT, ARMAND EDWARD A. GARNER, AMIT SODHI, CAMILLE FELIX J TURGEON, SAMANTHA GWENDOLYN STYLES, CAROL-ANN MARY T OUELLETTE, ROBERT JAMES TEREMCHUK, NATHANIEL J P TONDREAU, NIKOLA J GUY TONDREAU, LISA PAULINE LEOPOLD, HAILEY NOELLE SCHRODER, DOMINIQUE LAUZIER, VALERIE OUELLETT OUELLET, JOHN M GILLIS, MORGAN CHRISTOPHER WARREN, MARK ANDREW GOOD, SEAN MICHAEL MARCOTTE, MARK ANDREW LOLACHER, GABRIEL VILLENEUVE, KIRA ANNE YAKIMOVICH, MATHIEU W PETIT-MARCEAU, KIMBERLY NEDRA ETTEL, CHRISTOPHER WILLIAM RAMBHAROSE, MICHAEL RYAN FRANK, EVAN JEFFERY MCFATRIDGE, PIERRE-ELIE LASNIER, ALESSANDRU WARD FORSTER BROWN, DANIS DOIRON, CARL JOSEPH D RIVEST-MARIER, JAROSLAW T CIESINSKI, STEPHEN WILLIAM HOLT, RANDOLPH RAYMOND JENKINS, ANDREW JOHN MACPHEE, VALERIE PALIN-ROBERT, ROGER CORY STOESZ, SHANE THOMAS WHITSON, CHRISTIAN KURT CARTER, MATTHEW JAMES ROWE, DAVE BOUCHARD, LAURIE C. BAKER, FREDERIC LAUZIER, LUCAS SHANE O'CONNOR, LAURA DIANNE ALLAN, GEORGE VRINIOTIS, SIENNA GERMAINE QUIRK, CHARLES BRUNO ALEXANDRE TURMEL, DEREK MARSHALL SPROULE, SHANE MICHAEL N. SINGER, JAROSLAW GRZEGORZ MARCZEWSKI, CHRISTOPHER NIGHTINGALE ANDERSON, FRANCIS JOSEPH

MICHEL ARCHAMBAULT, CHRISTOPHER RAYMOND AUSTIN, JOHN ANTHONY BAKLINSKI, DAVID GLEN BARKHOUSE, MICHAEL BARRETTE, DARRIN THOMAS BEATON, BOBAK BEHESHTI, ANDRES FELIPE BOCANEGRA BELTRAN, NATHAN KYLE JOHNSON, CONRAD JOSEPH BENOIT, MATHIEU BERNARD, BRIAN JAMES BEWS, MICHAEL CHRISTOPHER BILL, ROBERT STEWART BISHOP, JEFFERSON MALCOME BISSENGUE, STEVEN BOLDUC, THOMAS GILL BONNETT, CHARLES ANTHONY VALMHOR BORG, PATRICK JAMES BOSCHALK, KARLA RAE BOWLER, KENNETH SCOTT BRADLEY, DWAYNE ARMAND BRATZKE, RYAN DOUGLAS BREAU, CHARA LOREN BROWNE, WILLIAM FREDERICK BULL, MARK A CALOW, JAMES GREGORY CAMERON, BRETT GRANT GORDON CAMPBELL, DAMIAN RONALD CAYER, JESSE SHAYNE CHAMBERS, VLADIMIR CHARNINE, SHAUN KYLE CHARPENTIER, DANIEL ROBERT CHESHIRE, DAVE CIMON, CHARLES BENOIT-JEAN COTE, REMI COTE, MATTHIEU COULOMBE, REBEKAH KATHLEEN COURTNEY, MAVERICK JEREMY JOSEPH COWX, JONATHAN WAYNE CROUCH, NICOLE JOHNNA CROWDER, BARTLOMIEJ DAVID CYCHNER, BEATA MARGARET CZAPLA, SARA DARBY, BRADY DAMIEN DEDAM, VIRGIL SEVERIN DESSOUROUX, SEAN ROBERT DIXON, ROBERT ADAM DOLIWA, DANIEL PIERRE DROLET, SAMUEL DROUIN, BENJAMIN GRAHAM DUNBAR, MATTHEW ALEXANDER J. DURDA, STEPHEN ANDREW TERENCE ELLS, AUSTIN KARN FAULKNER, ERIC MICHEL C S FONTAINE, WILLIAM JOSEPH R FORGET, SEAN MICHAEL FRANCIS, KORY MICHAEL FRASER, JASON JOSEPH KEVIN FRECHETTE, CHRISTOPHER BENJAMIN FUELLERT, STEVEN JAMES GALLANT, STEVEN ROY GAMBLE, TANYA LEE GAUDET, EMILIE GAUTHIER-WONG, TOMMY GAUVREAU, NICOLAS ALEXANDER GLEIS, MARCEL JOSEPH G E GOBIEL GOBEIL, TAMMY DANIELLE GREENING, EUGENE PIETER GREYLING, KEVIN CLARENCE J GRIFFIN, DOMINIC JOSEPH S GUENETTE, DARCY WAYNE HANSEN, BRETT NEVIN WELLICOME, RORY ALEXANDER HAWMAN, JAMES ADAM HEALD, KYLE KEITH HEPNER, JASON STANLEY GILBERT IGNATESCU, THANARAJAN JESUTHASAN, KEVIN THOMAS JOHNSON, GARY ADAM JOHNSTON, RYAN GREGORY JONES, JAMIE ALEXANDER CURTIS JORSTAD, ATTILA STEPHEN KADLECSIK, DUSTY LEWIS KENNEDY, HUNTER ELMER KERSEY, LIAM OWEN KIROPOULOS, CHRISTOPHER ROBERT KNORR, EVAN VICTOR KOZIEL, MARTIN PHILIPPE LABROSSE, GERALD JN- FRITZ LAFORTUNE, ANDRE LAHAYE, KELLY-LEE MARIE LAKE, NICHOLAS EDWARD LANGE, SARAH-EMILIE LASNIER, DOMINIC JOSEPH M. LAVOIE, TARA LAVOIE, DRAKE MICHAEL LE COUTEUR, MARC LECLAIR, PIERRE LEMAY, JONATHAN JOSEPH A. LEMIRE, DANIEL PAUL LOADER, GARRETT CURTIS LOGAN, JORDAN TERRENCE LOGAN, ALEXANDRE GUY RICHARD LOISELLE, ADAM FERNAND C. LUPIEN, WALTER GEORGE LYON, JOSEPH

BREFNI W. MACDONALD, CHRISTIEN TAVIS ROGER MACDONNELL, JEAN JOSEPH MADORE, CHARLES JOSEPH J. MAGNAN, ANDREW ROBERT PAUL MALLORY, MARYLENE GINETTE S. MARTIN, MARCO MASTANTUONO, JAMIE RICHARD MCEWEN, JOHANNES WOUTER MULDER, TYLER EDWIN NEUFELD, LAURA LEE NICHOLSON, KERI MERRIAM NIXON, JONATHAN NOEL, JOSHUA BRUCE OLSON, CAROLINE MARY AUDREY OUELLET, JOSEPH ANTHONY PAPALIA, MELANIE MARIE I. PARE, ALEXANDRU PATULARU, JOSHUA ALEXANDER PICKFORD, AGNES PINTER-KADLECSIK, JEAN-SIMON PLAMONDON, KRISTER ALEXANDER POHJOLAINEN, AURA A. PON, BRODY ALLEN POZNIKOFF, STEFAN PRISACARI, MONICA A MONIKA ANNA QUILLAN, ROMAIN RACINE, DOMINIC LAURENS WILLIAM RAGETLI, STEPHANE RATTE, BRYAN THOMAS RICHTER, WILLIAM RIOS, JENNA LEIGH ROBERTS, JOSHUA CALVIN ROBERTS, LAURIE ROSE, RORY ALEXANDER DAVID ROSEN, SEBASTIEN SALVAS, CAMERON RAY S. SANDERS, CARL JEAN G. SAVARD, TORSTEN SCHULZ, PAUL RUSSELL SHAPKA, BLAKE ALEXANDER SHEEDY, QUINTON JAMES STENDER, CALEB ETHAN M. STENER, GABRIEL-ALEXANDRE ST-GELAIS, NICOLAS JOSEPH ST-GERMAIN, ROBERT CHRISTOPHER STULL, JAMES ROARK SUTER, DALEN DREW TANNER, JUSTIN MYLES TENHAGE, JACOB CYRIL THERIAULT, SIMON BOBBY H TILLY, JEAN-PHILIPPE TRUDEL, ALBERT JASON TSCHETTER, SHELLEY DIANE TULLY, MAGALI TURPIN, JULIAN PHILIP TUTINO, GREGORY VINCENT-WALKER, CADE AUSTIN WALKER, ASHLEY LYNN WATSON, BRENNEN BO ANTHONY WATSON, BENJAMIN KYLE WESTON, MATTHEW MAX WHICHER, JOSHUA JAMES WHITE, ANDREW ERNEST WILKOWSKI, DONALD JAMES WILLIAMS, CURTIS MALCOM WILSON, WADE GEORGE WILSON, ANDREW DEAN WYCHNENKA, MARC ZORAYAN, BRANDON TYLER PETER ZWICKER, WILLIAM H L LEVI WALL, KAREN PAIGE NIGHTINGALE, MARC-ANTOINE POULIN, KEEGAN MARSH, RYAN MICHAEL, THOMAS PATRICK HAYES, JAMES MARK CHARLEBOIS, HALSTON RANDAL NICHOLSON, MELISSA-JANE SARAH KRIEGER, GIANLUCA LUCHETTA, BENJAMIN JAMES WILCOX, MARK RONKIN, SERGE JOSEPH LEO FAUCHER, JACOB THOMAS FIDOR, LUCAS GERARD ZIEGELBAUER, SPENCER DANIEL LORD, IAN OCEGUERA, JOHN NESRALLAH, DANIEL NINIAN RODRIGUES, CORY JASON KRUGER, STEPHEN YOUNG SMITH, FOURAT YACOUB YOUSIF JAJOU, ANTHONY BILODEAU, JONATHAN MICHAEL RECOSKIE, THOMAS L. EDWARDS, LINDSAY ANNE MACKENZIE, SARAH EVELYN LAPRADE, DANY PILON, JAMES ANDREW COOK, DEREK JOHN GAUTHIER, DAVID ADAM DOBBIE, GABRIELLE CHARPENTIER, DANIEL JOHANNES RECKMAN, ZACHARY CLEELAND, MATEUSZ CAMERON KOWALSKI, TARA J. MACDONALD, PAUL DAVID WILSON, BRENDAN V. T. LEBERT, JOCELYN LAMOTTE, ANTHONY J. DUKE, RILEY MALCOLM MACPHERSON, KIM NOEL LAUZON,

KURTIS ROCKEFELLER RUTHERFORD, SERGIU GEORGE CANDEA, JESSE HENRY FIELD, WILLIAM EDWARD BRENDON, CAMERON SAMUEL NOBERT, DAVID HOUDE, ALYSSA JOY BLATKEWICZ, COLIN PERRY KAISER, FABRICE DOURLENT, CORY LANCE GARGIN, ANITA GRACE HESSLING, JENNIFER BETHANY FRIZZLEY, DAVID ANDREW BENSON, BRANDON JOHN ARMSTRONG, REJEAN BERUBE, JEAN-PHILIPPE JOSEPH BOUCHARD, DHILLON DAVID COLE, PIERRE-OLIVIER COTE-GUAY, IAN M MENZIES, ERIC MONNIN, ELLIOT GAMACHE, NICHOLAS NEIL LLOYD CROCKER, ROBERT ALLAN HENDERSON, GABRIEL GILLES RJ RAMSAY, DEVIN JAMES MCKENNA

Plaintiffs

- and -

HIS MAJESTY THE KING IN RIGHT OF CANADA, CHIEF OF THE DEFENCE STAFF GENERAL WAYNE EYRE, VICE CHIEF OF DEFENCE STAFF LIEUTENANT-GENERAL FRANCES J ALLEN, LIEUTENANT GENERAL JOCELYN J M J PAUL, VICE ADMIRAL ANGUS I TOPSHEE, AND LIEUTENANT GENERAL ERIC J KENNY, MINISTER OF NATIONAL DEFENCE, THE HONOURABLE ANITA ANAND, FORMER DEPUTY MINISTER OF NATIONAL DEFENCE JODY THOMAS, SURGEON GENERAL MAJOR-GENERAL JGM BILODEAU, CHAPLAIN GENERAL BRIGADIER-GENERAL JLG BELISLE, JUDGE ADVOCATE GENERAL REAR-ADMIRAL GENEVIEVE BERNATCHEZ, AND BRIGADIER GENERAL LIAM WADE RUTLAND

Defendants

PROCEEDINGS AT TRIAL
MOTION TO DISMISS

Held in the City of Edmonton, Province of Ontario, September 19, 2024, Madam Associate Judge Catherine A. Coughlan presiding.

C. Christensen	COUNSEL FOR THE PLAINTIFFS Valour Legal Action Centre
B. Benkendorf	COUNSEL FOR THE DEFENDANTS Attorney General of Canada

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(COURT CONVENED)

REGISTRAR: This sitting of the Federal Court in Edmonton is now open, with Associate Judge Coughlan presiding.

The Court calls file T-1296-23 between Francesco Gabriele Qualizza and others versus His Majesty the King in Right of Canada and others, with Ms. Christensen appearing on behalf of the Plaintiffs, and Mr. Benkendorf appearing on behalf of the defendant.

JUSTICE: Thank you.

Be seated, please, and good morning.

All right. We have the Crown's motion this morning, a motion to dismiss. We have three hours set for this motion. The time will be evenly divided, inclusive of the Crown's reply.

Mr. Benkendorf, would you please begin?

Ah, now, just to be clear. I have -- let's -- let's review the materials, because there was some confusion earlier on about the material. I have the pleadings in front of me. I have the written representations, both parties, in front of me in hard copy, and I have the motion records electronically. So to the extent that you intend to take me to pinpoint references, would you please provide me with the page number so that I can pull it up electronically? Thank you.

Submissions by Mr. Benkendorf

Thank you, My Lady, and good morning. Just a preliminary comment off the top. Understand that there's members of the Armed Forces or former member of the Armed Forces here, and likely in the -- in the World Wide Web, they're watching us. I want to make it clear that my comments today are attacking their Statement of Claim, the legal premise of their action. I'm not attacking them, and we appreciate their service. This is not personal. This is simply not a well-founded action.

So as you know --

JUSTICE: Perhaps -- perhaps on that point, Mr. Beckendorf, you might, before you get into your submissions, make a comment about the use of the terms in the rules of Court, “frivolous,” “vexatious.”

MR. BENKENDORF: Yes, I -- I -- again, we're not talking about the -- the individuals or what they've gone through. We're talking about the legal impact of their action in terms of it being frivolous, which means that there's not a legal basis for it, that if we proceeded to trial, it would not be successful. “Vexatious” is -- relates to some of the comments in the Statement of Claim that talk about conspiracy theory or biologics or various other things which, again, are not something that are going to be -- ultimately be able to be proven, and -- and we know that off the start.

JUSTICE: All right. Thank you.

MR. BENKENDORF: So this is a motion under Rule 221, which his important to understand. With all due to respect to my friend, I'm not sure that she does understand it, and I'll go through that. So we're going to focus on the amended Statement of Claim. I'm going to call it the Statement of Claim, because that's what it's called. It doesn't have the word "amended" in front of it in its title.

And the first argument is that there's no cause of action disclosed in that Statement of Claim. Second argument is that this Court is without jurisdiction or should not accept jurisdiction of this action because of the adequate alternative remedy, the grievance system.

I have a couple of preliminary issues. First of all, again, under Rule 221, it says under sub (1) sub (a), on a motion, the Court may order a pleading or anything in it to be struck out on the ground that it discloses no reasonable cause of action.

Rule 221(2) says: (as read)

> No evidence shall be heard on a motion for an order under paragraph (1)(a).

The exception is where there is an issue of jurisdiction, and as you know, in your decision of *Albert*, among other decisions, the Court has allowed evidence with respect to jurisdiction.

In this case, Canada has provided one

affidavit, the Viana affidavit, which speaks to jurisdiction only. It speaks about the grievance process, and elements relevant to the grievance process and its adequacy. The Plaintiffs, on the other hand, have provided us with 34 affidavits consisting of over 6900 pages. Many were sworn at the time that the original Statement of Claim was served; all were sworn in 2023. None were sworn on the issue of jurisdiction or in response to the within motion; they all speak to what happened to each of the 34 Plaintiffs. In other words, they go to the merits.

On top of this, it is confusing because the Plaintiffs' argument only makes reference to a few of these affidavits. It's impossible to tell why these 34 affidavits were put forward. It's not really fair to the Defendants or the Court to have to wade through all of them without knowing what use is to be made of them. But it does seem that they're being put forward to speak to the merits of the action.

On top of this, we have attached an appendix and secondary sources. So-called secondary sources are 23 hyperlinks to various newspaper articles, Government of Canada websites, and various opinions. There's the so-called LeSage, Fish, and Lamer reports. Some opinions from a lawyer named Rory Fowler. A few are referenced in the Plaintiffs' argument, but most are not. There's some reference to the directives, but these are before the Court in Canada's affidavit, the

Viana affidavit. None of the secondary sources are attached to an affidavit.

In addition to this, we have an appendix which consists of 690 pages of documents. These different documents relate to grievances, ATIP requests, e-mails, briefing notes, letters, screenshots, and various other issue -- other documents.

There's also appendix X, Y, and Z, which aren't -- there's no indication of who the author is or why they're being put forward. They appear to be further argument. Many of these things are referenced in argument. Certainly, appendix X, Y, and Z are not.

Now, the secondary sources and the appendix citings are not attached to an affidavit. This is completely unacceptable. Rule 363 of the *Federal Court Rules* provides that evidence on a motion that -- evidence on a motion. (as read)

> A party to a motion shall set out in an affidavit any facts to be relied upon by that party in the motion that does form part of the court file.

Now, I've provided you with -- with the *Fox* decision yesterday. My Lady, I don't know if you require -- I've got a copy of it here if you wish.

JUSTICE: Yes, please. I did not receive it.

MR. BENKENDORF: Oh, okay. I sent

over four hyperlinks to various decisions yesterday.

JUSTICE: I'm afraid they didn't --

MR. BENKENDORF: Okay.

JUSTICE: -- come to my attention.

MR. BENKENDORF: I'm not going to spend a lot of time with this decision, My Lady, but I'll bring your attention to paragraph 49 and 50 of that decision.

JUSTICE: Right. Thank you.

MR. BENKENDORF: At paragraph 49, it says: (as read)

> The plaintiff's written representations on this motion attach as schedule 1 an exchange of emails between counsel. The Defendants objected to the inclusion of these emails on the basis that they were not attached to an affidavit, and are protected by settlement privilege.

At paragraph 50, it's: (as read)

> Rule 363 is clear -- a party to a motion shall set out in an affidavit any facts to be relied upon by that party in the motion that do not appear in the Court file. E-mails are not in the Court file. As I indicated during

the hearing, I will not consider these emails on the basis of non-compliance with Rule 363.

In this context, we cannot put these documents before the Court. The -- the Defendants cannot put these documents in context, cannot cross cross-examine on them, test their value, determine whether they're genuine, and the opinions should be in expert report.

As I will discuss, and -- and I assume that you've read through the action. The action is confusing enough. The defendant should not have to wade through thousands of pages of documents to try and guess what use might be made of these documents, which -- many of which were not referred to in argument.

The bottom line is that because the -- the affidavits go to jurisdiction, they cannot be relied upon on a motion under Rule 221(a), and the documents not attached to the affidavits -- so the appendix and the secondary sources -- cannot be relied upon. None of these should be -- all of these should be disregarded by the Court.

The result of -- despite a blizzard of paper, the Plaintiffs have adduced no evidence whatsoever on this motion. That's the first big problem with the Plaintiffs' written argument.

The second argument, which I've hinted at, is that the Plaintiffs do not seem to understand the

nature of the motion under Rule 221 sub -- 221(1)(a). We're not here to argue about the merits. We're not here to put forward evidence. Instead, the issue is the sufficiency of the pleadings.

Now, my friend's argument, paragraph 63, my friend writes: (as read)

> The respondents have provided additional evidence support -- to support their amended Statement of Claim.

Again, that's not what we're here to do. We're not supposed to put forward additional evidence to support the Statement of Claim. The question is whether the Statement of Claim on its own sufficiently discloses the cause of action.

My friend goes on to say: (as read)

> If the Court does not consider it has enough information on which to decide the motion to dismiss, given the lack of evidence, then the Court must decide it in the respondents' favour. As the Court held in *JP Morgan* --

And they set out a test there. This reliance on *JP Morgan* is -- is, frankly, wrong. That case deals with whether a taxpayer can bring a judicial review application where there are other statutory mechanisms available. If we go to that decision, if I

can just read it to you, My Lady. This is what the -- the quote leading up to the test that my friend's put in her brief says. Paragraph 91: (as read)

> Consistent with David Bull, above, and the need for an obvious fatal flaw, a notice of application for judicial review should not be brought on the basis of this objection unless the matter is clear. If, after discerning the true character of the application, the Court is not certain whether section 18.5 of the *Federal Courts Act* applies to bar the judicial review or if the Court is not certain whether --

It set out the test. Has nothing to do with -- with what we're doing under Rule 221. It's -- it's -- the Court was concerned about a flood -- judiciary review applications in a tax context where there are other statutory mechanisms provided for under the *Tax Act* and other statutes. There's nothing to do with Rule 221.

The proper test of Rule 221 is set out in my brief at paragraph 32. This is from the *Shebib v. Canada* decision. I'll just read it briefly. This -- at paragraph 10 of *Shebib*. It says: (as read)

> The Supreme Court of Canada in

decisions such as *R. v. Imperial* Tobacco and *Hunt v. Carey*, has set out the manner in which the Courts should approach a motion to strike under -- Rule such as Rule 221(1). I repeat paragraph 17 of *Imperial Tobacco*:

A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no cause -- reasonable cause of action. Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial.

The Court in *Shebib* went on at paragraph 11 to say: (as read)

I temper these remarks with the later decision of the Supreme Court of Canada in *Hryniak*, as considered by the Federal Court of Appeal in *The Queen in Right of Manitoba v. The Queen in Right of Canada*. Both of these cases are concerned with summary judgment,

thus are -- thus are different from a motion to strike. However, the Courts are sensitive to the fact that not every case needs to proceed to a trial where, having regard -- justice to all parties and proportionality, the case may fairly be disposed of without the necessity of trial.

That's the test we're dealing with.

My friend also mentions in the written brief, in her overview, at paragraph 2, at page (INDISCERNIBLE) the applicants have moved to dismiss but -- the claim by essentially arguing the merits of the respondent's claims. Again, we're not here to argue the merits of the respondent's claims in terms of -- of evidence. First of all, there's only one claim, the Statement of Claim. We have not argued the merits, other than the legal consequences of their action and whether their claim discloses a Statement of Claim.

We're -- again, we're not here to decide whether Corporal Qualizza had something happen to him. We're here to decide whether the Statement of Claim discloses that something happened to him, and that that -- that is actionable in law.

Unfortunately, my friend doesn't seem to understand this, and so throughout her brief she continues to adduce evidence, much of it from the

appendix and the secondary sources, some from these affidavits, where she's imploring the Court to believe that whatever thing happened, happened. That's not what we're here to do.

So in her facts, like -- statement of facts on page 6, she has no citations to anything in the Statement of Claim. Much of what she has in her so-called facts are not actually things that are alleged in the Statement of Claim.

JUSTICE: Are they matters -- as I read myself, through that -- that list -- are they before me in the secondary sources? Because there's no pinpoint reference. Or are you suggesting that the statement of facts doesn't arise from the claim?

MR. BENKENDORF: The statement of facts -- much -- yeah, my point is that much of what's in the statement of facts is not actually pled in the Statement of Claim, so if it is in the secondary sources, we shouldn't care, because those secondary sources aren't properly before you, and you can't say, you know -- under Rule 221, we're trying to decide, is there a valid cause of action set out in the Statement of Claim? Not is there a valid cause of action somewhere out there in the world? Can we prove it through secondary sources? We don't care.

It's -- you know, that would be for summary judgment application, if you properly had affidavits in front of you. This is a motion to strike.

So many of the things that they allege in the statement of facts are -- in paragraph 6, simply aren't pled in the Statement of Claim. Some are.

We have -- at paragraph 11 of my friend's argument, he gets into this issue of defining a veteran and defining the Chain of Command.

JUSTICE: Paragraph 11?

MR. BENKENDORF: Sorry. Paragraph 22. I apologize. And so, maybe -- sorry, My Lady. If we could go to paragraph 11 of the Statement of Claim?

Paragraph 11 of the Statement of Claim says: (as read)

> This -- this Canadian Armed Forces -- CAF -- has abused its unique position in Canadian government for decades at the expense of the members of the CAF and the former members of the CAF (the "veterans"). This has emerged in previous cases before this Court concerning sexual misconduct and abuse, among other proven claims. In this case before the Court, the CAF's actions provide to the Court more evidence of further abuse of the power by the Chain of Command.

At paragraph 45 of my brief, I stated: (as read)

> The Statement of Claims makes bald allegations for behaviour over decades against veterans by the CoC. Neither veterans or CoC are defined. Nowhere is it is alleged that the terms veterans includes the Plaintiffs or that CoC includes the Defendants. While the term CoC is used elsewhere in the Statement of Claim, it's never defined. Further, while the Statement of Claim makes no connection between the allegations against the CoC and the Defendants. If it was the invention of the Plaintiffs at this paragraph to establish a cause of action against the Defendants, it fails to do so.

If we go to my friend's argument at paragraph 22, she then tries to explain this. Paragraph 22, she says: (as read)

> After careful reading of the amended Statement of Claim, reveals the term veteran was briefly defined for the purposes of the present claim --

And she cites that paragraph 11.

Individuals -- then she says: (as read)

> However, this term was not used in a determinative fashion with the amended Statement of Claim or the reply, the statement of defence, and further debate regarding its meaning is not germane to the discussion about abuse of power apart -- the present claim.

Well, with all due respect, you're supposed to use terms in a Statement of Claim and your reply that are determinative. We have to have a definition. We have to know what we're talking about so the Court can determine for the purposes of document production and if we're at trial what's relevant or not.

She then spends four paragraphs sort of trying to define the Chain of Command, and again she's put forward a whole bunch of evidence from various things and just allegations explaining what the Chain of Command is to assist the Court. Again, we're not here to look at what her view of what a Chain of Command is or how she could explain what it is. We need to look at the Statement of Claim. It's not defined.

You have page 10 of their argument, which is the next page, which goes into the so-called background, and their title is "CAF Abuse of Authority by Mandatory Vaccination." For the first few paragraphs, she makes reference to the *Queen's*

Regulations and Orders, which is fine. That's legislation. But then she goes into reliance upon affidavits, grievance matters, MGERC decision, the Court of former Justice Fish, briefing notes, ATIP documents, a whole variety of different things, again, in order to establish this abuse. It's not properly before the Court. We're here to look at what's in the Statement of Claim.

Now, in the interests of time -- because I've already blown through half an hour of my time -- I'm not going to go through the various chunks of the Statement of Claim. I'm going to leave that to the Court, terms of assessing them. I will speak to a couple of paragraphs, just because, again, we have an enormous Statement of Claim, and it would take a large amount of time to go through these various paragraphs.

And it's noteworthy that my friend hasn't actually said, oh, look at paragraph 358 of the Statement of Claim, it discloses a cause of action. Let's look at page or paragraph 401 of the Statement of Claim, it discloses a cause of action. That is nowhere in her written argument at all. So all you really have is my argument in that regard, and I think I've gone through that at some length in my brief.

I'm just going to briefly read out the test as set out in paragraphs 35 and 37 of the Crown's argument. Under Rule 174, Statement of Claim -- quote: (as read)

...shall contain a concise statement of the material facts upon which the party relies.

End quote.

(as read)

What constitutes a material fact is determined in light of the cause of action and the remedy sought. Rule 181 also requires pleads to contain particulars of every allegation contained therein.

Paragraph 37 means -- Defendants cannot be left to speculate -- quote: (as read)

...as to how the facts might be various arranged to support various causes of action.

End quote.

(as read)

While the plaintiff need not plea a particular label associated with the cause of action, the allegations and material facts (INDISCERNIBLE) give rise to the cause of action.

Further -- quote: (as read)

A plaintiff must plead in summary form with sufficient detail the

> constituent elements of each statement of action or legal ground raised so as to inform the defendant who, when, where, how, and what gave rise to its liability.

We go to page -- or, paragraph 358 of the Statement of Claim. It says: (as read)

> In this case, the CAF shirked its own purposes and rushed the untested product onto its members, mislabelled this experimental gene therapy a “vaccine,” knowingly made false statements of safety and efficacy, and facilitate its mandate with no option to restrict use, except for mandatory, permanent removal from service. Plaintiffs were given no way to meet the mandate, as the directives were written specifically to block any possible means of complying with them.

And we don't know who, when, where, how, or what was involved here. What gave rise to liability? And what cause of action does that disclose? We don't know. We could just -- we can guess, perhaps, but the Statement of Claim should be written in sufficient

particularity that we don't have to guess.

Again, these things are not cleared up by the individual claims that are set out for the 330 Plaintiffs. There's 330 paragraphs there, each consisting of about seven sentences, and they don't really explain any of this. They don't match up with the general allegations in the Statement of Claim.

If we look at paragraph 401 of the Statement of Claim, it reads: (as read)

> In this, the premature approval and directives, the Defendants have abused their powers, denied members the procedural right to seek redress via accommodations, grievances, and administrative measures, redefine the term "vaccine" for military members in violation of procedural due process, failed to satisfactorily articulate standards for assessing the safety, efficacy, and necessity for the vaccine, and promoted the fraudulent use -- use of biologics in violation of Section 126 of the *National Defence Act*.

Aside from that fact that that contains some vexatious language, how do we know that the

directive are premature? What procedural rights are they talking about? How didn't they articulate the standards properly? How is the Canadian Armed Forces or the Defendants involved in judging the safety of vaccines, and how is that wrong? They've used the F word, fraudulent, here, and generally, when you allude -- allege fraud, you should have the goods, and there's no -- no particulars here of how any of this would be fraudulent.

Now, I've gone through the Statement of Claim hundreds of times over the last year, and I still -- I have the general sense that they are attacking the vaccine mandate, but I don't have a good sense of exactly why, what the cause of action is, and certainly do not have any details as to what individual Defendants may have done.

If we go -- I'm -- I'm -- was going to go through some of the individual claims, but I'll just -- I'll just find a couple here.

We go to page 114 of the Statement of Claim. There's -- at the top, there's paragraph 315. It says: (as read)

> The plaintiff, Jocelyn Lamotte, was a member of the Canadian Armed Forces, and held the rank of Warrant Officer. He was a logistics planner posted at 2 Canadian Ranger Patrol Group

Montreal until he was released under 3(b) category OM1.

I think that's supposed to say "on 1 March 2022." (as read)

He lives in Saint-Lazare, Quebec. Has served honourable for over 29 years. Mr. Lamotte did not receive any COVID-19 injections. He received RM until his file was reviewed for service-related injuries.

That's all we know about Jocelyn Lamotte. It doesn't disclose the cause of action at all, so there's no way that the claim can proceed on behalf of Jocelyn Lamotte.

If we read just the next paragraph underneath there for Anthony Duke, it says: (as read)

He was a member of the CAF and held the rank of Master Corporal. He was infanteer, posted at the Royal Regina Rifles. He lives in Regina, Saskatchewan. He has served honourably for over 12 years. Mr. Duke received one COVID-19 injection to keep his full-time employment with the CAF. He resigned his full-time class-B contract in the summer of 2022.

He then applied for voluntary release effective 22 December 23. He was told by his CoC they would not able to support his newborn daughter because he would be kicked out of the army. He was restricted to orderly room for clerical work after the directives were implemented. He was -- applied for a religious accommodation and was denied.

Again, what -- what's the cause of action there? There's just -- there's no claim in law. He may feel like he was mistreated. Maybe he was. But we need to be able to look at the Statement of Claim and determine whether there's any claim there.

So I've set out in my brief -- I went through paragraph 50 of the statement -- or page 50 of the Statement of Claim. I won't go through that with you. If you look at MacPherson, which is next one here, at your leisure, same problem. This is just one page. You pretty much can take any page of the Statement of Claim and look at the -- at the allegations, and they do not disclose a cause of action.

If this was an action with the -- the general portions of the Statement of Claim, I guess, the common portions of the Statement of Claim -- and Jocelyn Lamotte, we almost -- it would be certainly struck. A

Court would say there's nothing here. We don't have any evidence of -- of what happened to Jocelyn Lamotte such that it would ground a cause of action. It doesn't change just because you put 330 in a Statement of Claim. Each one of these claims must stand on its own. This is not a class action.

If someone was mistreated, they need to identify who, and not some vague reference to CoC. How, when, and where, and how that would have been constituted cause of action. If they're complaining about a 5(f) release and saying it's not proper, again, we need the details. If they say they weren't properly accommodated, this requires a great deal of particulars. Can't simply say, I was not accommodated, and leave it at that. We have to know what the basis of your accommodation request was, what the decision that was made was, how that decision was illegal, improper, or contrary to the law. We need to understand how it discloses a cause of action. It just doesn't.

We have a Statement of Claim where this isn't a group of people. They all obviously have a problem with the vaccine mandate, but we have a group of them that were released. Some voluntarily retired. And this is all -- we've done up a chart, and -- and before my friend gets mad at me for providing that chart, it was just done by my legal assistant, just to assist the Court. All she did was go through and look at the Statement of Claim and say, okay, this person says they

were released, or this person says they're still in the Armed Forces, or this person made a -- filed a grievance, or this person didn't. And we just created a chart based on the allegations in the Statement of Claim because they're so numerous.

We have 120 of the Plaintiffs are still employed; 60 have retired for medical reasons. Again, we don't know what those medical reasons were or how they are tied to anything. I mean, if somebody had a heart problem, that has nothing to do with the COVID vaccine. How does that ground a cause of action? We have 100 who grieved, and about 60 that were vaccinated. So it's not a uniform group, and it just makes it that much harder to figure out what the claim's all about.

Now, there's some causes of action identified in the Statement of Claim. You have paragraph 362 of the Statement of Claim. And this relates -- I won't go through it all, but basically relates to this notion that the Plaintiffs should have been court-martialed instead of having the administrative process applied to them. They say this is -- this is all improper.

My friend makes the same argument in her brief at paragraphs 67 (INDISCERNIBLE). The -- again, they're just -- she's saying there that, you know, this is improper. They should have been (INDISCERNIBLE) they should have used the (INDISCERNIBLE) *Code of Service Discipline* or the court -- what's also called court

martial process instead of an administrative process. She says this is illegal. She doesn't seem to have any basis for that.

The reality is that the (INDISCERNIBLE) which is the (INDISCERNIBLE) which is attached to paragraph 64 of my argument. There's a hyperlink to -- to take you there. I don't think we need to do that. I can just read it here. It -- it specifically deals with the issue of administrative actions versus disciplinary actions. And it says, at 4.17: (as read)

> Both disciplinary actions under the *Code of Service Discipline* and administrative actions are meant to address a CAF member's conduct for performance deficiency. They may operate independently, or they may complement one another. Disciplinary actions and administrative actions serve different purposes. Disciplinary actions possess a sanctioning aspect that administrative actions do not. Disciplinary actions initiate only if there is sufficient grounds to justify the laying of the charge under the *Code of Service Discipline* against a CAF member.

So that seems to indicate that the -- that the CDS -- the Chief of the Defence staff -- can go either way. Choose to use administrative process here. There's -- there's no law anywhere that says that is improper.

In fact, if we look at the *Hoffman* decision -- that's at footnote 100 -- this is a decision of Madam Justice Rochester from 2023 of the Federal Court. At paragraph 18 and 19 of that decision, says: (as read)

> With respect to abuse of process, Corporal Hoffman submits that even though he was accused of harassment and improper conduct, the Canadian Forces failed to employ the adjudicative mechanisms created to address those types of allegations, namely the *Code of Service Discipline* and the *Canadian Forces Harassment Prevention and Resolution Policy*. These mechanisms would have enabled Corporal Hoffman to take part in a quasi-adjudicative process that would have permitted him to test the allegations against him, including by cross-examination of witnesses.

That is exactly what my friend argues. (as read)

> Corporal Hoffman submits that he has a legitimate expectation that the Canadian Forces would use a -- adjudicative mechanisms at their disposal rather than the non-adjudicative remedial measures which were ultimately used. In declining to proceed by way of *Code of Service Discipline*, Corporal Hoffman pleads that the Chain of Command acted with impunity and demonstrated -- demonstrated disregard for the rule of law.

Again, exactly what my friend has argued.

At paragraph 26 of the decision, Madam Justice Rochester disposes of those arguments. She says: (as read)

> I am mindful of the factors raised by Corporal Hoffman as to why, in the present context of the Canadian Forces, it is appropriate to wipe the slate clean and quash the initial remedial measures.

Remedial measures are the administrative

process, the -- one of the first steps. (as read)

> That being said, I am not satisfied that the factors raised are sufficient to warrant this Court's intervention in the manner in which Corporal Hoffman suggests. In particular, I have not been persuaded that the Canadian Forces were precluded from reviewing the allegations against Corporal Hoffman using the administrative process or that they were required to proceed by way of the *Code of Service Discipline*. Nor have I been persuaded that the administrative decision makers were precluded from imposing the most severe remedial measures from the outset.

Paragraph 29, she says: (as read)

> Given the foregoing, I do not find there is a basis upon which to conclude that Corporal Hoffman had a legitimate expectation that the Canadian Forces would proceed by way of the *Code of Service Discipline* or the *Canadian Forces Harassment Prevention and*

Resolution Policy. Nor do I find that, for this reason, there has been an abuse of process.

So to the degree that the Statement of Claim relies on this argument, there's not a basis in law for it. It's been -- it's been made before, and it's been rejected by this Court.

The plaintiff also complains about a breach of privacy rights. Again, I won't go through all of that. I'll just point you to paragraphs 417 and 418 of the Statement of Claim, which makes those allegations. But if you look at the allegations in the Statement of Claim and the few that are in the reply, all of them relate to an allegation that the *Privacy Act* provides the protection -- the *Privacy Act of Canada* -- and because they allege the *Privacy Act of Canada* was breached that they have a cause of action. Again, here is no such Statement of Claim.

I've provided -- one of the cases I provided yesterday to the Court and to my friend is called *Pinder*.

JUSTICE: Thank you.

MR. BENKENDORF: Paragraph one -- 107 of that decision says: (as read)

> The Plaintiffs advance a claim of breach of privacy and seek damages. Presently, the law does not recognize a common law tort

for breach of privacy. Some provinces have enacted legislation providing a right of action for privacy breach. I refer to the *Privacy Act* --

Of B.C.

So, again, the law is clear. You don't have a cause of action or breach of privacy. There might be a Statement of Claim for breach of privacy under provincial legislation, but that wouldn't relate to the Federal government in any event.

There's allegations in the Statement of Claim about breach of the *Charter*. They've alleged violations of paragraph -- of Sections 2(a), 2(d), 7, 8, and 15 of the statement of -- of the *Charter*. Sorry. Again, my friend, in going through her argument on the -- on the *Charter*, which begins at paragraph 80 of her brief, engages in improper introduction of facts and documents to try and support her claim. She doesn't -- she hardly mentions a Statement of Claim in her arguments.

She relies on four cases, beginning at paragraph 90 of her Statement of Claim or -- sorry -- of her -- of her argument. She relies on the decisions of *Dumont*, *Cotter*, and *Operation Dismantle* for broad principles that -- with respect to the application of the -- of the *Charter* and its importance. These are of no assistance. The fact that the *Charter* is to be

interpreted broadly doesn't mean that in every case there is a breach. They have not cited one case where someone in similar circumstances to the Plaintiffs was successful in a *Charter* claim.

In my argument at paragraph 65, I have cited numerous cases that have found no breach of Section 2(a), 7, 8, and 15 in similar circumstances. I don't think there's any cases on paragraph 2(d) of the *Charter* in this context, simply because nobody has made that argument. We look at the allegation, the Statement of Claim; again, it doesn't disclose the cause of action.

In your decision in *Albert*, you highlighted some of these decisions at paragraph 43 and 44.

So at the end of the day, we have -- the law is clear that there's no *Charter* breach arising from vaccine mandate. There's no privacy breach. We -- there's -- there's no valid claim with respect to using the administrative process rather than the court martial process. It's not evident what other cause of action there might be in the Statement of Claim.

So with respect to our first argument, the Plaintiffs' pleadings are woefully deficient. They do not disclose a cause of action, and even to the extent that causes of action are identified, they're not valid in law.

Now, My Lady, I'm going to go through my

second argument, which is the fact that this Court should take -- not take jurisdiction over this matter. The grievance process is set out in the Viana affidavit. The Plaintiffs have not contested the grievance process setup as set out in that affidavit, and I won't go through it.

As you are almost certainly aware, My Lady, the leading, sort of, case with respect to adequate alternative remedies is *Vaughan*. It's from the Supreme Court of Canada. And there are a number of principles set out in paragraph 33 of the *Vaughan* decision. And in that case, they were trying to determine whether the Court should defer to the -- what was then called the *PSSRA*, and the factors that they noted under -- under the heading "Why the Court Should Generally Decline to Exercise Its Jurisdiction in PSSRA Matters" are set out, and they set out eight factors.

I won't go through all of them, but the second factor is: (as read)

> The present dispute arises from the employment relationship and falls within the dispute resolution scheme set out in the *PSSRA*.

Here, this clearly arises from the plaintiff's employment, and it -- it clearly, as I will say -- point out -- falls within the grievance process.

The -- the third factor: (as read)

The appellant's claim to ERI could have been remedied in the Section 91 grievance procedure.

(as read)

What is important is that the scheme provide a solution to the problem.

Fourthly: (as read)

The appellant's legal position should not be improved by his failure to grieve the ERI issue. The dispute resolution machinery under Section 91 was there to be utilized. Efficient labour relations is undermined when the Courts set themselves up in contention with the statutory scheme.

The sixth factor is: (as read)

Where Parliament has clearly created a scheme for dealing with labour disputes, as been done in this case, Courts should not jeopardize the comprehensive dispute resolution process contained in legislation by permitting routine access to the Courts. While the absence of

independent third-party adjudication may in certain circumstances impact on the Court's exercise of its residual discretion (as in the whistle-blower cases) the general rule of deference in matters arising out of labour relations should prevail.

Seventh factor: (as read)

The fact that we are dealing with a labour dispute almost a decade old demonstrates that more informal dispute resolution procedures are generally faster, cheaper, and get the job done.

And then the eighth factor basically says: (as read)

If this simple ERI issue can be litigated in the courts, so can every other regulation-conferred benefit applicable to other -- over a quarter of a million employees of the federal public service. The outcome could give a new dimension to the concept of floodgates.

So just speaking to a couple of those

factors, this is in a labour relations context or employment context. The Court talked about faster and cheaper and get the job done. Here we have 330 Plaintiffs, and my friend says, oh, this will be what -- much more efficient to proceed through this action.

If we went through examination for discovery of each of the Plaintiffs for one day each, it would take over a year working every single day, working day, just to get through examination for discovery. We'd have a massive amount of document production to do. No doubt, we would have lots of contests over whether questions are properly asked or objections are properly -- properly asked. We'd have undertakings to comply with. We have another round of discovery, and then we'd go to trial.

Even if we spent just one day trying to figure out the story of each one of these Plaintiffs, a trial -- the trial would take well over a year, again, working every single working day. The prospect of this matter going to trial in the next five years is simply not a reality.

On the other hand, you'll see in the Viana affidavit that the MGERC -- the Military Grievance External Review Committee, has rendered some decisions, and there's also a decision from the Chief of the Defence staff that has been rendered, and this isn't -- isn't before you on the record, but my friend recently filed a judicial review for not one of these people, but

a related matter arising from the grievance process.

So, effectively, right now, we have this action --

MS. CHRISTENSEN: My Lady, he's bringing another action in (INDISCERNIBLE).

JUSTICE: Well, that's fine, but if it's a matter that's of public record I see no objection to -- to raising it. It is an issue, obviously.

MR. BENKENDORF: It's just an example. I'm not going to rely on that JR at all, but the reality is this Court has a juridical review arising from the grievance process dealing with the vaccine mandate, and we have this action, so we -- we -- a Court is going to be dealing with the same issues on Section 7 of the *Charter* or whatever's raised in the judicial review as raised in this action, and they're going to be able to deal with that judicial review in the next six to eight months because that's how fast judicial review applications happen.

This action, on the other hand, like I say, is going to take a very long period of time, so I'm turn -- going back to the *Vaughn* criteria of what's faster, cheaper, more efficient. Clearly, the grievance system and the judicial review by the Federal Court will be much more efficient, much less expensive.

Now, my friend relies on a couple of decisions called *Heyder* and *Vivendi* to say that the -- again, that this action would be more efficient. Those

cases are not applicable. They're class action matters. The issue before the Court in the class action matter in those cases was whether a class action would be more efficient than individual actions. The question here is whether the actions should be allowed to exist at all or whether it should go through the grievance process. This -- again, this is not a class action lawsuit.

Now, the application of the principles from *Vaughn* to the Canadian Armed Forces context -- so I'll just talk about the Canadian Armed Forces context, not involving the vaccine mandate, but in the Canadian Armed Forces context, this Court and other Courts have consistently deferred to the grievance system. So I've set those decision on page 25 of my brief. I won't go through all of them. There's *Velltree* (phonetic), *Sandiford*, *Graham*, the *Jones* 2022 Federal Court decision, *Fortin*, *Mcaboo* (phonetic), which we've -- we don't have a link for but we attached at the back. That, again, is one of your decisions. Those have all found that the Court should defer to the Canadian Armed Forces grievance system.

We have the *Wajdan* (phonetic) decision, which, again, I won't go through because of time. It -- in that case, the Federal Court -- it's not a Canadian Armed Forces context, but it's -- it -- the Court deferred to the Federal Public Sector Labour Relations and Employment Board rather than granting an injunction to stop a vaccine mandate. So in a vaccine mandate

context, this Court has deferred to a grievance process.

As -- as this Court said in *Albert* at paragraph 60: (as read)

> Courts across Canada have consistently concluded that disputes regarding mandatory vaccination policies must be adjudicated within the grievance process.

And then the Court there cited *National Organized Workers Union v. Sinai Health System*, which -- form the Ontario Court of Appeal. And then there's a number of decision set out there that make it clear that you have to defer to the grievance process in this context.

We also have a couple of decisions to assist the Court called *Neary* and *Jones*. Both of those cases are a Canadian Armed Forces context dealing with the vaccine mandate, dealing with injunctions, which is a little bit different than this, but the Court in both cases during their analysis said that the Plaintiffs need to defer to -- or the Court should defer to the grievance process.

Now, the *Lebrasseur* decision, which is at footnote 137 of my brief, makes it clear that in the face of all of this case law, that the Plaintiffs have the onus to show that it should not apply. In other words, this principle of adequate alternative remedy

should not apply to them. They've ignored all of the cases I've put forward in my brief. They have not sought to distinguish them, challenge them, even mention them. Instead, they rely on a couple of cases.

There's four cases: *Gaylor*, *Wazzelle* (phonetic), *Hocko* (phonetic), and *Bernath*. This is at paragraph 51 of their brief. *Gaylor*, *Wazzelle*, and *Hocko* were decided in the 1990s. They're not applicable. If you read through those decisions, they don't make any reference to the decision of the Supreme Court of Canada in *Weber*, which is one of the first cases that brought up this concept of adequate alternative remedy. Even -- in -- even the *Weber* decision was already rendered prior to -- or -- some of those decisions being made.

It cannot have dealt with *Vaughn* because *Vaughn* hadn't been decided, and *Vaughn* is, again, the leading case with respect to how we deal with the adequate alternative remedy in a federal employment or labour context. So those three cases are just of no assistance at all. They do not do anything to overrule those other decisions.

We -- we then have the decision of *Bernath*, which is closer to now, more recent. It also doesn't assist. And I think that the Court in *Chua* dealt with that quite well. And ...

JUSTICE: Where do I find the reference to *Chua*?

MR. BENKENDORF: Neglected to write that down, but -- it's footnote 127 in my brief on page 23.

JUSTICE: Ah, yes, I see it.

MR. BENKENDORF: So the Court in -- at paragraph 12 says: (as read)

> Mr. Chua relies heavily on the decision in *Bernath*.

At paragraph 13, the Court says: (as read)

> The legislative landscape has changed since the decision in *Bernath*, above.

And then goes on to paragraph 14, says: (as read)

> There are several recent decisions that support the point advanced in this case by the Ministers.

Then, goes onto discuss the decision of *Kleckner*, *Moodie*, and then dismisses the -- the action on the basis of the fact that Mr. Chua has to use the adequate alternative remedy. So it shows that *Bernath* doesn't apply.

There's the *Moodie* decision, which I, again, provided to the -- everyone yesterday. This is the last one. And I just -- I just attached the Federal Court of Appeal decision which I'm giving you -- not for

you to spend any time with it, just to show that the decision was upheld on appeal.

So the *Moodie* decision, at paragraph 37, says: (as read)

> In my view, *Bernath* is distinguishable from the case at bar as the grievance procedure in that instance has -- had been completed but was unable to provide the remedy which the plaintiff was seeking. Here, the applicant has filed his action for damages prior to the final determination or completion of the grievance process. There has been no finding of error in any decision or action of the CAF respecting the applicant's career and no determination that a remedy is unavailable. This is not a case in which the grievance procedure has been found to be inadequate to the task but rather one in which the applicant seeks to circumvent that process.

So it's clear that the *Bernath* decision is not applicable here, so we have no case law in support of the plaintiff's position that they should

somehow be exempt from the adequate alternative remedy. They've argued that because the CDS is the final decision maker that the process is -- they don't use the word bias, but that's the gist of what they're saying. Again, these -- that concept is dismissed in *Vaughn*, *Kleckner*, and *Bergeron*.

Further, as set out in the Viana affidavit, the -- the MGERC -- the Military Grievance External Review Committee -- actually found in favour of the griever in that context, and there seems to be -- if you read the decision of the CDS -- seems to be some conflict there as to what's -- you know, which is the right way to interpret everything. So that indicates that the grievance process is fulsome. This isn't just a rubber stamp where the grievance process is simply going to dismiss every grievance that comes in front of it.

And again, the -- there'll be --

JUSTICE: The final authority doesn't have to accept that -- those recommendations.

MR. BENKENDORF: Exactly. It has to -- if they don't accept those recommendations, it -- explain why. And then, ultimately, this Court will decide on judicial review who's right, or whether -- I guess that's probably not fair. The -- whether a decision was reasonable. So it's clear that the Court should exercise its discretion and the grievance process should be deferred to.

Just a few words on whether the plaintiff should get leave to amend. Dealt with that in my brief. If they have to use a grievance process, there's clearly no basis upon which it could be amended. Also, there's many claims that are not valid in law, as I've indicated, and they can't amend their claim to make invalid in law. There's clearly no *Charter* breach that'll be available, and no privacy breach.

I can speak to costs, My Lady, but I can also do that at the conclusion or at a different time, as you may --

JUSTICE: No, I'd like you -- to hear you on costs, please.

MR. BENKENDORF: Okay. So as you know, in -- in your direction of August 15th you indicated that we could speak to costs arising from the adjournment. I'm seeking, first of all, 400 -- $4500 for this action and this motion. So that -- there's item 2, I'm seeking seven units for filing a statement of defence. Item 11, two units for a pre-hearing conference. Item 14, three units for each hour in Court, so that's nine. Seven units for preparation of written argument, which is item 15. For a total of 25 units, times $180 per unit, is $4500.

Now, this is the top end of column 3 in the tariff. This is an action involving 330 Plaintiffs where they're seeking over $330 million in damages, and we've got a tonne of documents that have been dumped on

us during the course of this application. I would say that that's quite conservative and fair to the Plaintiffs that I could seek a higher column, but I'm seeking the top end of column 3.

Terms of the adjournment, the motion record was due August 9th. I was served an 89-page brief at the last minute on that day, then I was served with another 65-page brief on Monday, August 12th. Then we had various back-and-forths while the Plaintiffs had tried to get their brief in compliance with the rules, and that wasn't done, to my knowledge, until Thursday, August 15th. I wasted a lot of time going through these various machinations of the various versions of argument and dealing with the Court and the plaintiff in terms of trying to determine whether this action was going -- or, this application was going to be heard previously. So I'm asking for item 13, three units times $180, $540, which I think, again, is reasonable.

Those are all my submissions, My Lady. I -- I'm hoping I won't have much to say on reply --

JUSTICE: (INDISCERNIBLE).

MR. BENKENDORF: -- given I've used a good chunk of the time.

JUSTICE: Thank you.

I think at this point we will take a 15-minute break, and when we come back, Ms. Christensen, you'll resume.

Thank you.

REGISTRAR: Court is in recess.

(BREAK)

REGISTRAR: All rise. Court is now resumed.

JUSTICE: Thank you.

Ms. Christensen.

Submissions by Ms. Christensen

(INDISCERNIBLE).

JUSTICE: (INDISCERNIBLE).

MS. CHRISTENSEN: (INDISCERNIBLE).

Good morning. Today we are going to ask, should the Court decline to exercise jurisdiction in this matter. The case before the Court can be summed up in a simple sentence: the respondents claim the Department of National Defence and the Canadian Armed Forces have acted illegally to abuse their members using authority granted to them under current legislation, including the *Charter of Rights and Freedoms*, regulations and policy.

The applicants have failed to look at the amended Statement of Claim holistically and failed to distinguish material facts from -- material facts from evidence that will prove material facts. Indeed, the applicants appear focused on the claims made, being essentially a grievance of the COVID-19 policy. This case is not a challenge to that policy.

The actual case before the Court is the

misfeasance of the Chain of Command against their own troops. This case is different from those the applicant cites where the Plaintiffs in those cases alleged general harassment and other harms that could be proper -- properly addressed by the available internal mechanisms. Here, there are exceptional circumstances warranting the Court's residual discretion to exercise its jurisdiction as it did in *Thomas v. Canada*.

The alleged lack of independence of the internal process is central to its inadequacy. The Canadian Armed Forces cannot rely on internal processes that lack impartiality to provide the same redress sought under the proposed mass tort.

Article 7.14 of the *King's Regulation and Orders* states that a grievance is made within the member's Chain of Command unless the complaint is about that person, in which case it's referred to the next person in line. However, the *Arbour Report*, among others, identified that the final decision on grievance is made by the Chief of Defence Staff or their delegate. In other words, while there are efforts to ensure impartiality within the CAF's grievance system, there is evidence to suggest those efforts are not sufficient.

JUSTICE: Wait. What evidence are you referring to?

MS. CHRISTENSEN: I'm referring to the affidavits of the (INDISCERNIBLE) --

JUSTICE: All right. You're --

you're saying -- you're using “evidence” generically, then (INDISCERNIBLE) --

MS. CHRISTENSEN: Yes, I am.

JUSTICE: Okay. You referred to a report.

MS. CHRISTENSEN: The *Arbour Report*, yes.

JUSTICE: And that is one of the documents that your friend takes issue with, with respect to its admissibility because it's not placed under an affidavit.

MS. CHRISTENSEN: Yes. So this was dealt with in *Thomas* as well, where the Crown argued against using reports by Justice Fish and Justice Arbour. Paragraph 15 of the *Thomas* judgment says: (as read)

> The Plaintiff argues that these reports should be admissible for the truth of their contents since they are documents in possession of the Defendant and by virtue of the manner of their preparation as public documents.

And there they cite *British Columbia (Securities Commission) v. Branch*, *Grewal v. Khalsa Credit Union*. (as read)

> The Defendant argues the Plaintiff failed to establish that the

> public documents exception to the rule against hearsay should apply such as the reports for the truth of their contents. Instead, the Defendant argues that the reports are admissible only to the extent that they place the facts pled into context.

In the *Thomas* decision, the justice agreed with the plaintiff and admitted and relied on that evidence in addition to other evidence tendered by the parties.

JUSTICE: Okay. Can you take me to that -- that reference?

MS. CHRISTENSEN: Sure. Certainly. That's paragraph 16. And this was used: (as read)

> in determining whether the Court should decline to exercise its jurisdiction in this matter. Similar reports were admitted and considered for the truth of their contents in evaluating the jurisdictional issue in *Greenwood* --

And -- at the Federal Court level, and affirmed in *Greenwood* at the Court of Appeal level.

JUSTICE: I think what your friend's comment was this isn't in an affidavit.

MS. CHRISTENSEN: Correct.

JUSTICE: These documents, these reports appear to have been included in an affidavit and were accepted for the purposes of -- I -- I might add -- for certification, and we are speaking at a very low bar.

MS. CHRISTENSEN: Right.

JUSTICE: But in any event, they do -- this -- this decision does indicate they were admitted for the truth of their content in both *Greenwood* and in this case. But your documents aren't attached to an affidavit. They're not properly before this Court.

MS. CHRISTENSEN: Correct, My Lady.

Continuing with the grievance system as having the jurisdiction: (as read)

> In this litigation, the processes themselves form part of the allegations. That is, in the process of attempting to receive remedy for the alleged harms -- members may receive further harm on the same basis that they seek the remedy.

The members are also denied impartiality when the Chief of Defence Staff, who implemented the COVID policy, used as -- used as example of abuse of power, is the same final authority of the same policy.

As stated in -- in article 7.14 of the *King's Regulations and Orders*, a grievance should go to the next level of command. There is no next level of command after the Chief of Defence Staff has final authority.

The Canadian Armed Forces' internal processes are also limited to current CAF members. In contrast, this mass tort seeks to provide relief for current and former members. This is further support that the internal processes advanced by the applicant are not an adequate basis for the Court to defer jurisdiction.

As supported by this -- the Federal Court of Appeal in *Greenwood* and this Court in *Thomas*, the presence of internal mechanisms to address conflicts with the Canadian Armed Forces were not binding authority to limit the Court's exercise of residual jurisdiction. (as read)

> Question is not whether the existence of the -- these mechanisms in the abstract should prevent the Court from exercising its jurisdiction; rather, the Court must determine whether these internal mechanisms adequately address the pleaded claims in the pleaded circumstances.

And that is from paragraph 30 of *Thomas*.

The deprivation of an ultimately remedy, as seen in the applicant's letter from the final authority to an undisclosed Canadian Armed Forces member -- because the names are redacted -- who's not a part of this litigation demonstrates that the final authority will not offer redress on this specific policy, which only furthers the claims of the respondents for redress through the Court.

This cause of action alleges systemic wrongs where the common questions of law and fact will predominate. As cited in *Greenwood* and confirmed in *Thomas* at par 120, the question of whether the CAF should have responded differently to address the issues of COVID-19 in -- is general in nature and ties together all of the tort members, as the failed policy applied to them all.

Even though each member has individual issues, the relative importance of common questions of illegal acts by the Chain of Command causing physical and financial harm to the respondents predominates.

The applicants have also submitted the Section 9 of the Crown Liability and -- *Crown Liability Act*. Applies to some of the respondent's claims. It is not true that they apply to the respondent's claims, as Veterans Affairs Canada will only cover service-related injuries. Compensation for the harassment, abuse, bullying, discrimination, stigmatization, and other pleaded harms are not considered service-related

injuries.

The facts of this matter are also different from any harms covered --

JUSTICE: Well, the --

MS. CHRISTENSEN: -- by --

JUSTICE: The difficulty I --

MS. CHRISTENSEN: Sorry.

JUSTICE: -- have with that is we don't know what harms. The Statement of Claim does not disclose harms alleged to have been suffered by the 330 Plaintiffs.

MS. CHRISTENSEN: I believe it does, My Lady, by saying that -- when we're listing, for example, the *Charter* breaches. The harms would come from the disclosure of information, the denial of religious accommodation. And each example shows effects of the -- of the treatment of the -- the members of the lawsuit, and members in general, the Canadian Armed Forces, during this period, because, for instance -- I will use the examples that my friend used. Lamotte, remedial measures, he's saying that nothing happened there, but remedial measures were improper in law, and it speaks to that abuse of power by the Chain of Command.

JUSTICE: Well, we have jurisprudence that Mr. Benkendorf brought before us of Justice Rochester indicating that it was perfectly acceptable for the Chief of Defence to determine whether to select

remedial versus the more punitive measures.

MS. CHRISTENSEN: And I do actually address that in my -- my argument further down the line of why my clients don't agree that that is actually the process that should have been applied and why, therefore, the directives were unlawful orders (INDISCERNIBLE) again, unlawful orders would go to that misfeasance in public office, an illegal act that caused harm to my clients.

Regarding whether the clients -- my clients would actually be compensated by another system, its -- there is some indication that they could be covered by Veterans Affairs Canada. They do not -- Veterans Affairs Canada benefits do not extend to the types of relief sought in this case. It's not clear or obvious the VAC has or could compensate members for the same harms underlying common issues.

Regarding the Chain of Command, I cite the *Power* case for -- at paragraph 20, and I believe you have that one. That is number four of our case law. Tab 4. The applicants that are -- are mentioned in the amended statement of -- amended Statement of Claim are there because of their direct roles in the misfeasance within their public offices in and around 2021 to the present day. In *Power*, the Court identified government officials, such as the applicants, are public servants and are not granted absolute immunity for their engagement in policy development and advice to

government, and therefore eligible to held -- account in litigation such as this matter. Power also holds that the state is required to pay damages for policy which is clearly unconstitutional or was in bad faith of abuse of power.

The Crown is claiming that we have no case -- that we haven't established this unconstitutional -- I would put that that is a matter for trial to decide if we meet the -- meet the bar for unconstitutional.

Administrative and disciplinary decision making in the Canadian Armed Forces. A large body of public and administrative law concerns professional regulation. Governments of professions such as doctors, nurses, law enforcement officers, lawyers, and government officials has given rise to a wide array of case law regarding public administrative law. These government regimes are often described within respective professions as a disciplinary process. For example, licencee of the Law Society of Ontario is subject to a complaint relating to the Law Society's bylaws and rules of conduct. The licencee would find him or herself subject to an investigation and could eventually find him or herself before a hearing panel. When -- tribunal. Sorry. And -- which conduct regulatory hearings, which some people might refer to as a disciplinary process.

The hearing panel can impose a limited

range of penalties that -- other than a fine, typically revolve around licences -- licence or standing, such as a formal warning, temporary suspension of licence, or a revocation of licence, department.

Professional regulation is characterized as a disciplinary process, is markedly different from the Canadian Armed Forces *Code of Service Discipline*. The *Code of Service Discipline* more closely resembles a military criminal prosecution. Indeed, the *Code of Service Discipline* incorporates offences under the Criminal Code as well as other acts of Parliament. The powers of punishment are markedly like the powers of -- under the *Criminal Code*.

On -- while the sanctions under various forms of professional regulation focus principally on the licencee's standing or licence, the sanctions under the *Code of Service Discipline* are far broader and incorporate punishments up to and including imprisonment.

Processes such as an administrative review under defence administrative orders and directives 509-2, remedial measures under DOAD 509-4, the harassment, prevention, and resolution policy under DAOD 5012-0, and sexual misconduct response, DOAD 9005-1, which bear many similarities to the regulation of civilian professions, are referred to as administrative processes, distinguishing them from the disciplinary processes under the *Code of Service Discipline*.

There are many factors that distinguish CAF administrative processes from disciplinary processes. Administrative processes are subject to markedly less judicial scrutiny, and the limited judicial scrutiny that does arise typically under applications for judicial review brought before the Federal Court will arise much, much later in the process.

Moreover, Federal Court judges who scrutinize such decisions will typically afford the Canadian Armed Forces statutory decision maker a relatively healthy margin of appreciation under the reasonableness standard of review. These administrative decisions and actions are taken by statutory decision makers who are not independent of the Chain of Command. Indeed, they are take -- typically taken by the Chain of Command, and in many cases the decision maker will often have an arm's length relationship to the matter. For example, the directives regarding COVID were made by the Chief of Defence Staff who is then reviewing -- the reviewing authority of his own directives and orders.

The ranks of the Canadian Armed Forces mark a person's position in a hierarch of structure with responsibility and authority assigned to each rank. The formal rank structure gives the members the ability of the CAF to -- the ability to pass orders for force generation and force employment, clarity of command, and maintenance of order and discipline. Therefore, when a

member is given instruction or an order, they feel compelled to accept that order.

The administrative decisions and actions that are taken by statutory decision makers were not independent from the Chain of Command. In many of the cases, the decision maker will often not have the arm's length relationship in the matter, as I have recited with the CDS reviewing his own orders. Statutory decision makers thus have a much greater discretion regarding the action they might take and the absence of timely and meaningful judicial scrutiny can permit abuse of power or process.

Finally, when administrative measures are employed, there's less transparency for the military community and for the public, generally, and not infrequently for the CAF personnel affected by the decision making. The key point is that administrative decision making by CAF decision makers can be characterized as decision making under the *National Defence Act* that is distinct from decision making under the *Code of Service Discipline*, but that does not mean such decision making does not have a punitive element or intention behind it. Administrative decision making occurs across a broad spectrum of matters, and the Chain of Command of the Canadian Armed Forces generally has a very broad discretion in making such decisions. While these decisions are subject to constitutional and statutory constraints and limitations, a CAF member must

typically exhaust the -- the CAF grievance process before he or she can seek judicial scrutiny relating to the constraints or limitations.

It should be noted that disciplinary decision making and administrative decision making in the Canadian Armed Forces are not discrete and unrelated matters. These decisions are not only often made by the same or connected statutory decision makings, but decisions can also be made under both administrative and disciplinary processes based upon the same facts and allegations, and these decisions can be and often are made for similar reasons or to obtain a similar outcome.

JUSTICE: Then how do you say that it's unlawful? You -- you're just telling me they can -- they -- they -- there's an overlap, they can be co-extensive. So how is the -- how is your assertion of unlawfulness in using the administrative process -- how does that stand in the face of the submission you're just making?

MS. CHRISTENSEN: It's related to the key provisions of the *King's Regulations and Orders* regarding general duties and obligations of officers and non-commissioned members, and found within article 4.02 and article 5.01 of the *King's Regulation and Orders*. They regularly cite in support of the administration of the affairs of the CAF from remedial measures to the grievances and the *Code of Service Discipline*.

They -- by saying it was -- remedial

measures were, in the opinion of the Plaintiffs, applied unlawfully because the Chief of Defence Staff has the authority under the *National Defence Act*, Section 126, to order a vaccination and -- and inoculation. And I do address that in this and the leading case on that, which is *Kipling*, in my argument.

But by ignoring the Section 126, they deliberately circumvented the ability for my clients to challenge the policy and say -- and say no, and then be brought before an independent judicial authority, a military judge at court martial, and had the ability to offer reasonable excuse, which is -- which was offered. If -- had they been acquitted under reasonable excuse, their careers would have continued, there would have been not release, and they could have proceeded with their careers.

By deliberately ignoring that, he was -- he then abused the power by turning it into a remedial measures system, and then the remedial measures system was not followed as it is supposed to be followed.

JUSTICE: So if I understand your argument, you're saying that Section 126 was not used --

MS. CHRISTENSEN: Correct.

JUSTICE: -- ought to have been used, which had the effect of thwarting the Plaintiffs' right to the -- the remedies that are provided by way of the court martial process.

MS. CHRISTENSEN: Yes. So the

directives were very, very careful not to phrase the COVID-19 policy as an order, and that was deliberate language, because if it was an order, then they had -- to refuse the order would be a charge under the *Code of Service Discipline*. Not a single person was charged with a charge for disobeying a lawful order.

However, in their release paperwork, or in the process of remedial measures, they were threatened with charges, or told they did not follow a lawful order, or they disobeyed a lawful order from their Chain of Command. That wasn't true, because it -- the directive -- under the definitions, a directive is not -- technically not an order, but it was perceived as such by the Chain of Command and in -- and in the actions taken by the Chain of Command allowed for an abuse of power on false pretense that it was an order.

One of the most significant examples of abuse authority is the use of -- Director Of Military Careers using what's called an administrative review, which is under DOAD 509-2, and it's used as an improper substitute for harassment investigation in 502-1. Multiple administrative reviews conducted by DMCA -- I'll shorten that -- which is a Director of Military Careers -- which alleged misconduct contrary to DOAD 5012 -- rely on untested disciplinary investigation as justification for significant adverse action taken without the benefit of true procedural fairness.

There are commonalities in many of these

administrative reviews. Disciplinary investigations are conducted. Either unit -- a unit investigation -- conducted by unit personnel, or investigations by military police. No charges are laid, even though the alleged misconduct is characterized as being a very serious breach of disciplinary ethics. Instead, administrative action is either taken under DOAD 509-4, remedial measures, or DOAD 509-2, administrative review. In some cases, the untested disciplinary investigation will be used to justify a recommendation for a compulsory release followed by another administrative review.

The disciplinary investigations are often not disclosed to the CAF member who is subject to the administrative review. When the disclosure is offered, it's typically limited to an investigation summary. Witness statements are often not disclosed and it's rare of the entire untested disciplinary investigation to be disclosed to the member. The investigation summary is essentially a hearsay summary offered by the investigator.

These practices alone denote various shortcomings on procedural fairness. However, the principal shortcoming is the abuse of process that arises from a failure to use the process that the effective CAF member has a legitimate expectation will be used, the *Code of Service Discipline* or DOAD 502-0.

When the CAF Chain of Command receives a

complaint there is more than one course of action they can pursue. They can deal with it under the *Code of Service Discipline*, or they can deal with it using a non-disciplinary administrative process under DOAD 502-0. They can even use both, provided that the disciplinary process precedes the administrative process.

What typically happens, though, is they use a little bit from column A and a little bit from column B, in a disciplinary porridge that does not comply with either process. Typically, a disciplinary investigation will be conducted, charges won't be laid, then the untested investigation will be relied upon by the Chain of Command either to place the accused, which should correctly be phrased a respondent, on a remedial measure, which is typically called counselling and probation. Or, they'll proceed straight to an administrative review by the Director of Military Careers followed by a compulsory release.

The problem is that administrative review is not designed to test and weigh -- or -- weigh untested evidence, particularly when credibility and reliability is at stake. In contrast, disciplinary tribunals under the *Code of Service Discipline*, summary trials, or courts martial are designed precisely for that purpose, but those are often not used, and were never used during the COVID mandate period.

An administrative review is not designed

to be an investigation, and it is not designed to receive and weigh previously untested evidence. An administrative review is essentially a file review. It is an -- invariably a documentary review. The process reviews outcomes from other processes such as properly constitute -- tribunals, or at the very least, proper administrative processes designed to receive and evaluate evidence.

An administrative review can incorporate findings and sentences from the *Code of Service Discipline* proceedings if there has been one -- take place. It can incorporate findings from civilian courts. It can incorporate findings from harassment investigations. It can even incorporate prior recourse to remedial measures.

However, when the fairness of those prior remedial measures is challenged by grievances, DMCA needs to be cautious about relying on such potentially flawed outcomes if the grievance process has not yet run its course. The CAF grievance process is the adequate alternative remedy to litigation, and it's the CAF member's sole opportunity to challenge the asymmetric decision making authority of the Chain of Command.

However, administrative review is not a substitute for these processes. Since the respondent will bear the brunt of coercive powers granted by the Chain of Command under the *National Defence Act*, the

legitimate expectations of the respondent are relevant concerns.

JUSTICE: So as I understand your position, you object to the fact that the COVID directives were not orders. They were directives, *ergo*, they do not come under Section 126, and you say the Plaintiffs were denied the processes that would have played out under Rule 126; is that correct? So your -- your issue is -- goes right a back to the -- the selection of the term directive rather than order.

MS. CHRISTENSEN: Yes. And then the directive instigated an administrative process that led to most of my clients being released in one form or another. Some were coerced into voluntarily releasing to avoid what was known as a 5F release category.

JUSTICE: Well, the problem I've got with that, Ms. Christensen, you -- the Statement of Claim does not show that with respect to the individuals. We have some people who are still -- obviously, 100 -- over 100 are still with the employer, correct?

MS. CHRISTENSEN: At the time of the filing of the Statement of Claim. That has changed slightly.

JUSTICE: Well, but that's --

MS. CHRISTENSEN: But --

JUSTICE: That's not relevant for my purposes. My purpose is, what have you pleaded?

MS. CHRISTENSEN: So the issue is how they got there, and in the Statement of Claim, in each one, we -- I point out what happened to each person, because they were directly affected by what their Chain of Command interpreted from the directive from the Chief of Defence Staff. Even the one that my friend --

JUSTICE: Well, let's take --

MS. CHRISTENSEN: -- referred to --

JUSTICE: Let's take a look at that.

MS. CHRISTENSEN: Lamotte.

JUSTICE: Let's take a look at that.

MS. CHRISTENSEN: So Lamotte --

JUSTICE: What paragraph is that at?

MS. CHRISTENSEN: That was in our Statement of Claim.

MR. BENKENDORF: My Lady, the reference to Lamotte, it's on page 114 of the Statement of Claim.

JUSTICE: Thank you.

MS. CHRISTENSEN: Thank you.

JUSTICE: All right. So we have plaintiff Lamotte saying he was a member of the CAF and held the rank of Warrant Officer. He was a logistics planner. He -- he served honourably for over 29 years. He did not receive any COVID-19 injections. He received RM until his file was reviewed for service-related injuries. That's it. That's all we know about him.

MS. CHRISTENSEN: So by citing that

he was subject to remedial measures -- which is RM, which I have defined earlier in the Statement of Claim -- the remedial measures can't be inconsistent with the *KR&O* 1.23, and in this case, they were.

JUSTICE: We don't know that. I -- I'm going to ask you --

MS. CHRISTENSEN: But --

JUSTICE: -- not to fill in blanks. I'm going to ask you to deal with the document that I've got in front of me, not the document I might have had in front of me. This is what I have to deal with.

MS. CHRISTENSEN: M-hm. Well, the Statement of Claim, in my opinion, My Lady, shows that he was subject to remedial measures, which is what I am referring to in my argument, of the -- the process that was implemented from the director. And in Duke and Macpherson, which follow him, it -- they speak to the actions of the -- of the Chain of Command to abuse of power. All three of these, in my opinion, were exposed to wrongdoing by a public official and they were harmed financially and personally by those actions.

When a CAF decision maker such as the Director of Military Careers fails to use processes that are expressly created to deal with such matters in legislation and per regulation and policy, these decision makers infringe upon a CAF member's legitimate expectations. This is a procedural error that undermines procedural fairness of such decision making.

It constitutes an abuse of process. It is a manifestation of a failure to comply with article 4.02 of the *King's Regulations and Orders*.

And since DMCA typically takes adverse action against CAF personnel because of their failure to comply with the *NDA*, the *KR&O*, and other regulations, rules, orders, instructions -- pardon me -- that pertain to the performance of their duties, it gives rise to something else. It gives rise to hypocrisy.

Invariably -- invariably, the effectiveness of the Armed Forces will turn on the training, morale, cohesion and will of the personnel who comprise those Armed Forces. The skill, effectiveness, morale, and will of those who lead them. This is why maintenance of morale is one of the principles of war recognized in the training of the CAF. This is why, in modern manoeuvre warfare, military focuses on efforts -- focuses efforts on defeating the enemy's will and morale, and not just simply on the physical attrition of enemy's armed forces.

These factors, discipline and morale, are not mutually exclusive. In fact, they can be seen as mutually reinforcing. Effective discipline can enhance morale, and high morale can contribute positively to the maintenance of discipline and will typically ensure the maintenance of discipline will be more easily achieved.

The inverse, unfortunately, is equally

true. Poor morale can arise from ill -- an ill-disciplined unit, or subunit, and can make the maintenance of discipline and efficiency more difficult to achieve. Unfortunately, over the past few years, it appears the focus by the Chain of Command has been principally on the maintenance of discipline, sometimes to the detriment of the other two factors.

In the pursuit of discipline, albeit not always using the *Code of Service Discipline*, CAF decision makers appear to have often given short shrift to morale and efficiency. The evidence provided by the respondent shows distinct trends when CAF decision makers have cited, relied upon, or turned their attention to obligations under 4.02(1)(c) and 501(c) of the *King's Regulation and Orders*.

There's a clear emphasis on promoting discipline, specifically the negative or adverse context of punished alleged (INDISCERNIBLE) of discipline using either the *Code of Service Discipline*, administrative measures, or both, but not necessarily promoting moral -- morale or efficiency, save uttering those terms in a rote manner as a justification for a punitive action.

Misconduct of any nature if detrimental to morale, cohesion and effectiveness in the Armed Forces. Abuse of power can be particular pernicious and can undermine discipline, morale, and efficiency in a toxic manner.

Acting with impunity, as seen during the

directives for COVID, can often be problematic. Procedurally unfair decision making, substantive unreasonable decisions, and a lack of transparency and open-mindedness in pursuit of discipline, specifically in punishing alleged misfeasance, can be just as detrimental as doing nothing.

In seeking to reduce the adverse impact on morale, discipline, and efficiency, the -- especially in recent cases of sexual misconduct or other forms of misconduct, the Canadian Armed Forces leadership have replaced adverse catalysts with different yet similarly harmful factors. What happens when decision makers fail to follow the rules?

The primary focus of the amended Statement of Claim is the failure of the CAF statutory decision makers to follow the *National Defence Act*, its regulations, and other pertinent regulations, rules, orders, and instructions governing the conduct of any person subject to the *Code of Service Discipline*. The definition of a member of the Canadian Armed Forces.

This action demonstrates circumstances in which CAF statutory decision makers have taken adverse action against subordinates who have purportedly infringed all those same legislations and regulations, et cetera, governing the conduct, but -- but in so doing, have themselves failed to follow the obligations imposed on them by law and policy, and such decision making represents unlawful decision making.

After all, as per *Baker*, the statutory decision maker must make such decisions in a manner that is both procedurally fair and reasonable, commensurate with the nature of the decision being made and the processed follow (INDISCERNIBLE) making it, the nature of the statutory scheme, and the term of the statute pursuant to which the body operates, the importance of the decision to the individual or individuals affected, the legitimate expectations of the person affected by the decision, and the choices of procedure made by the statutory decision maker. And that is at paragraphs 23 through 27 of *Baker*.

Generally, a procedurally unfair or unreasonable decision by a statutory decision maker is an unlawful decision. This what permits a court of competent jurisdiction in its role of supervising the executive in its exercise of statutory powers to intervene and quash such decisions.

JUSTICE: Right, and that's in the context of judicial review where the lawfulness of the decision is properly addressed; is it not? Which would flow from the grievance process and dissatisfaction with that process and the outcome.

MS. CHRISTENSEN: The problem -- the biggest problem, My Lady, with the -- using the grievance process is the redress sought by my clients is not available to them in the grievance system.

JUSTICE: And what redress is that?

MS. CHRISTENSEN: For instance, the Chief of Defence Staff, even though in the submitted final authority letter, he talks about the *Charter*, he is not actually authorized to argue the *Charter*. The -- my clients are seeking some damages. He cannot give monetary damages in -- in the grievance system.

So what happens if an officer or non-commissioned member, acting under the *King's Regulations and Orders*, fails to follow the rules themselves? What is the appropriate response? And it's often said, if you don't like it, you can grieve it. It may not be the ideal response by an ethical leader who wishes to instill subordinates a respect for the rule of law, and it wishes to promote -- quote -- promote the welfare, efficiency, and good discipline of subordinates.

JUSTICE: But isn't -- isn't this exactly what Parliament intended by way of enacting an alternate process?

MS. CHRISTENSEN: The problem is -- is that the directives -- and the reason that we use the COVID-19 policy and directives is that it is a nice concrete example with hundreds of people affected by it, willing to bring a claim. There's -- they cannot contravene anything that is inconsistent with the *National Defence Act* under -- under *KR&O* 1.23. The CDS cannot act outside of the *National Defence Act* or any act of Parliament. My clients have claimed, for example, *Charter* breaches, which is -- they say he

contravened the *Charter of Rights and Freedoms*. That is acting outside of his authority of the *National Defence Act*, which he cannot do.

The -- another factor of -- you asked about redress -- is that when my clients had sought one of the claims -- is to ask for re-enrolment, or a change in release category. Because they chose administrative review, the CDS can't grant that as a final authority. He can -- they could be re-enrolled if they had been court-martialed under Section 126. Then the *National Defence Act* allows for them to be re-enrolled.

JUSTICE: But that doesn't apply to those who are continuing to serve.

MS. CHRISTENSEN: Correct, but the -- the issue that follows on that, that some -- this is the other factor, My Lady, is that the directives weren't applied consistently, so this is why we have people that slipped through the cracks and ended up still serving, or were on parental leave and then were maybe subject to it when they got back. Others were released in two weeks. And this is all found in the Statement of Claim. There was no consistency for the -- this directive to be implemented by the Chain of Command. And when I refer to the Chain of Command, I'm referring to anyone that is in the long line that would be in charge of a unit, a subunit, right on up to the Chief of Defence Staff.

And there are others. I know in the Statement of Claim where we've mentioned that they were

denied a -- or, they were supposed to get a medical release, which comes with a whole host of benefits, and instead they were forced to either voluntarily release, or they were involuntarily released and denied all those medical benefits that they would be entitled to. And even if they -- if they had time to grieve -- this is the other factor. Once -- the -- the day they are released, they can no longer grieve, and if you're released in two weeks to a month, you're not going to be -- have time to file a grievance. Most of the members of the Canadian Armed Forces have no idea on law or process. They were learning as they went. Some were told they couldn't grieve.

The other hazard was that the -- and I will go into it further -- on the Aide-Mémoire from DMCA to -- that was attached to the directives, basically, gave a boilerplate approach to remedial measures, to releases, and there -- so there weas no due process. Things were not individualized.

If the -- if a subordinate were to point out to a decision maker where the decision maker might have erred, perhaps the appropriate response should not be -- this isn't about the merit of my actions. It's about what you did wrong. Frankly, it sounds an awful lot like do as I do, not do as I say, and this isn't a very compelling sentiment.

In the respondent's view, the Chief of Defence Staff and other applicants cannot assert that

they were serving a just end, serving discipline and efficiency in the Canadian Armed Forces, reinforcing morale, as they failed to act in a just manner. The COVID-19 directives and subsequent actions of the Canadian Armed -- the chain -- Chain of Command -- sorry -- purported to uphold the rule of law while also simultaneously disregarding it. All too common, and unfortunately -- it is all too common occurrence in the Canadian Armed Forces.

As the respondents, the same subordinates whom the Chain of Command want to punish or correct seek to establish that the -- the Chief of Defence Staff and other applicants have also failed to comply with pertinent statute, regulation, policy instrument, or norm of behaviour. There is a dissonance of the applicants asserting that their subordinates must acknowledge and correct their shortcomings while the CDS and other applicants are not willing to acknowledge and correct their own.

The Court rules that complaints by members of the Canadian Armed Forces must first use the grievance system. It ties the hands of the Court and forces them to defer to the Canadian Armed Forces and the Chain of Command to interpret the law in areas not clarified under the *National Defence Act*. In essence, the -- the Court is -- has allowed the Canadian Armed Forces to use administrative measures to work around any scrutiny by the Court.

The evidence will show that the CDS and the Chain of Command ignored the military's own legal system. The respondents intend to argue that the CDS has no authority to rule on the -- on the constitutionality of his own directive. They also intend to argue that he has no authority to determine if his own directives breach the *Charter*.

Deference to the final authority decision letter in the applicant's materials in this case would be a folly, especially as mandating the COVID-19 vaccine was not recommended on several legal and medical grounds by his own senior officers.

The Court has deferred to the Canadian Armed Forces as being able to handle its own affairs. However, this is the first time that hundreds of members have come forward to show a failure of the Canadian Armed Forces to administer their internal justice system. The truth is, it doesn't work for claims like those of the respondents and is -- and it is badly abused by the Chain of Command who deem themselves above the law. This was also seen in the *Hader* case regarding sexual misconduct and abuse.

The main point of this litigation is that there is an abuse of power within the CAF that goes well beyond the well-known sexist or racist abuse. A military who sees themselves outside the laws of Canada and international law is a dangerous thing.

JUSTICE: Okay. I'm just going to

stop you there, Ms. Christensen, because I'm getting a little confused. I understood at the outset of your submissions that you say this -- that the cause of action is misfeasance in public office.

MS. CHRISTENSEN: Yes.

JUSTICE: Which requires unlawful conduct on the part of the government actor as well as a subjective knowledge that it will harm.

MS. CHRISTENSEN: Yes.

JUSTICE: And that subjective knowledge has an element of bad faith. Are you suggesting -- because I -- I don't see it in your pleadings -- that -- I see the -- your assertion of unlawfulness of the conduct, and I see that you've argued that, but I don't understand and I don't see anything in your -- your pleading about the second aspect. And of course, *Odhavji Estate* makes clear -- the Supreme Court makes clear that you've got to deal with both aspects of what is quite a rare and exceptional tort.

So what is the alleged bad faith of malice here? And -- and how do I find that?

MS. CHRISTENSEN: The malice, My Lady, is how the Chain of Command imposed the COVID-19 policies, and we have abundant evidence. I know my friend was referring to our 6000 pages. That is .1 percent of the evidence that we are prepared to bring to the Court to show that the actions of the Chain of

Command from the Chief of Defence Staff down were made in bad faith.

This is a system that is very closed, and a Chief of Defence Staff knows the implications of orders and directives that are issued down the Chain of Command. If he -- if he or she doesn't know them, they should know them, because that's going to have a ripple effect. There's going to be bad actors, and as far as my clients are concerned, implementing a mandatory vaccination directive, it goes against so many of the policies and so many of the require -- legal requirements of the Chief of Defence Staff that he may -- he and his Chain of Command needs to be held to account for it.

JUSTICE: (INDISCERNIBLE).

MS. CHRISTENSEN: In -- in essence, these respondents are whistleblowers who are asking the Court to hold the Canadian Armed Forces to account so that necessary changes can be made that will make military justice as answerable to the laws of Canada as the civilian justice system is expected to be.

Regarding the vaccine directive as an order, in the context of the *NDA*, specifically Section 126, a vaccine -- vaccination directive must be treated as an order rather than mandate to ensure enforceability and compliance. Section 126 states the personnel who receive an order to submit to inoculation or vaccination and wilfully disobey it without reasonable excuse are

guilty of an offence and subject to punishment under the *Code of Discipline*.

Here's the issues with the directives. There is a lack of specific orders. The directives focused on administrative and remedial actions rather than issuing clear, specific orders to comply with the vaccination requirement. There was an avoidance of the word order. The director strictly avoided using the word order. However, those subject to remedial measures were later told that they were disobeying a director order or disobeying a legal order, creating a discrepancy between the language of the directives and actions taken against personnel.

Non-compliance with Section 126. Without issuing specific orders, the directives do not align with the *National Defence Act*, which requires an order to enforce compliance and address disobedience. The relevant legislation and regulations are Section 18 1 of the *National Defence Act*, which outlines the appointment, rank, and duties of the Chief of Defence Staff, and indicating control and administration of the CAF must be conducted in accordance with the regulations.

King's Regulation and Order 103 specifies persons -- persons subject to the *KR&O*, emphasizing that all orders and instructions issued by the CAF must be under the authority of the *NDA*.

KR&O 1.23 clarifies the authority of the

Chief of Defence Staff to orders and instructions, ensuring they are consistent with the NDA and any regulations made by the governing counsel or Minister.

Consequences of the directive. Remedial measures misrepresented as orders. Those subject to the remedial measures were told they were disobeying a direct order or disobeying a legal order, even though it was not formally issued as per Section 126 requirements. There was also a lack of due process. Members were denied the ability to present a defence and have their case heard independently by passing procedural requirements for lawful orders under the *National Defence Act*.

To comply with Section 126, the vaccination directives should have been issued as a specific order to all personnel detailing the requirement to be vaccinated, and the consequences of non-compliance.

The current approach, focusing on remedial measures, does not meet the legal requirement of issuing an enforceable order. The purpose (INDISCERNIBLE) of the word order intentionally circumvented legal liability associated with issuing the formal order under Section 126. This allowed the Chain of Command to impose remedial measures without adhering to formal court martial procedure requirements and protections for the accused.

The vaccine directives issued by Chief

of Defence Staff, General Wayne Eyre, is inconsistent with both the *KR&O* and the *NDA*. The directives, framed as a mandate bypassed the legal requirement for issuing specific enforceable orders as required under the *National Defence Act*.

Additionally, *KR&O* 12 -- 1.23 states that orders and instructions have to be consistent -- must be consistent with the *NDA* and any regulations. In the respondent's opinion, the directors failed to adhere to this requirement and thus undermined its enforceability and legal standing.

Neither of the statutory or regulatory processes under the *NDA* Section 126 and *KR&O* 103.58, under which the -- the Chief of Defence Staff would have had lawful authority to order vaccination, were implemented or referenced in the -- the directives for COVID-19.

Section 18 of the *NDA* is a legislative authority that creates the position of CDS and prescribes that he or she may be -- quote -- charged with the control and administration of the Canadian Armed Forces. There is a caveat to that, that it must be subject to regulations and under direction of the Minister. This caveat is further exemplified in *KR&O* --

JUSTICE: Well --

MS. CHRISTENSEN: -- 1.23 --

JUSTICE: Ms. Christensen, I think you're getting very heavily into the merits, which is

not something that's before me. The only issue before me -- well, there are two issues. One we haven't addressed yet is Rule 221 argument from Mr. Benkendorf, and the other is should this Court exercise jurisdiction and find that there is no adequate alternate remedy within the grievance process? Those are really the only issues before the Court.

MS. CHRISTENSEN: Correct. I would put to the Court, My Lady, though, that I have addressed the grievance system. With your -- the issue we have before us is that in order to explain what is presented in the Statement of Claim to support why the grievance system is not the answer, require -- would require me to actually explain the entire process from the moment that someone is taken into the office and told they're going to be put under remedial measures through to filing a grievance. You -- we -- we don't have two hours for me to explain that to you, so I'm trying to be concise.

JUSTICE: But you need to address not the process, but the lack of adequacy of the process, because that's the issue. Parliament has already determined that there will be a grievance process. It is a large process, and it seems to include virtually any employment-related issue. So you have to explain to me why I should exercise any residual discretion I might have to hear this action.

MS. CHRISTENSEN: The biggest argument I have for that -- well, there's two. One is

that several members of this lawsuit would not be able to file a grievance if they wanted to, because they're no longer members of the Canadian Armed Forces and you cannot grieve if you have been released. The -- and the other factor in that is that the relief sought by my clients are not -- is not covered by the grievance system. The CDS does not have the authority to -- to compensate my clients for damages. They can't be re-enrolled.

JUSTICE: Well, some of them don't require re-enrolment, and that's the difficulty. You've lumped 330 people together and they don't all have the same claim.

MS. CHRISTENSEN: Well, not a same claim that would go through grievance system, because that's our argument, is that the grievance system -- the other factor here, My Lady, is that the grievance system is not the fast, efficient system that my friend presented it to you today. Even the -- the one that was offered took years to go through the system. None of my clients have -- who have grieved -- because I do have 200 plus of these -- of these Plaintiffs have grievances in the system, and under article 7.27, they were -- their -- some of their grievances were suspended when this hearing was booked, but then it wasn't really suspended because their grievances are still moving through the system and they're still getting replies from the system.

So the grievance system -- and the grievances that they filed were about the exact policy. They're grieving the COVID-19 policy. This lawsuit is not about the COVID-19 policy. This lawsuit is about the actions taken by the Chain of Command, using what they -- using the COVID-19 example, because it is a discrete, easily identifiable timeframe, and the actions taken by the members' Chain of Command is very obviously related to one specific thing. This is to make it easier to bring it into the Court versus trying to pull something from 1990 or 2003, different postings, different deployments.

JUSTICE: So if I understand you correctly -- and please correct me if I'm wrong -- you are saying the COVID-19 vaccination directives is simply the foundation for a larger concern about abuse of authority within the Canadian Armed Forces. Is that what I understand?

MS. CHRISTENSEN: Yes, ma'am. And that -- as well, that *Charter* rights of the Canadian Armed Forces members are not being respected by their Chain of Command. They do not give up their rights as Canadian citizens by swearing an oath to the King. That -- they never -- there is no documentation, there is no oath that says that I give up my rights as a Canadian citizen. So that alone cannot be addressed by the Chief of Defence Staff, especially on something that is his own order.

And I would remind you that it should have been a -- the remedial measures process is not just being used for COVID-19. It's being used for other examples as well. It just happened that this, as I said, was a discrete example.

The other issue is that it was an abuse of process because the remedial measures in the Aide-Mémoire presented boilerplate examples of various administrative processes that led to a compulsory release under item 5F of article 5 -- 1501 of the *KR&O*, if the CAF member refused vaccination. It included a recorded warning, which was the first step. Then counselling and probation under 509-4. Then a notice of intent to recommend release under article 15.21, 15.22, or 15.36 of the *KR&O*, depending on the rank -- the CAF member. Then an administrative review under 509-2 of the DOAD. And eventually, a compulsory release under chapter 15 of the *KR&O*. It not only lays out each step in the process, but it even went so far as to do the actual content of each of the documents.

Those -- that Aide-Mémoire characterized the subject matter as a conduct deficiency. It's an awkward characterization, but one that was shaped by the process -- shaped by the process that the leadership decided to employ here. It is a deficiency to be addressed by remedial measures, but it must -- if a deficiency is addressed, it is by performance deficiency or conduct deficiency. Characterizing this -- the

COVID-19 matters as conduct deficiency is a bit misleading. This doesn't involve a CAF member's tendency to abuse alcohol or be disruptive in the workplace, which would be a common thing for a conduct deficiency. This is not a deficiency where the Chain of Command was attempting to have -- correct a repeated tendency by a subordinate to behave in a manner incompatible with CAF object -- objectives and values.

The argument that the refusal to be vaccinated could be disruptive to the workplace represents in my -- in opinion of a conceptual stretch. It -- this matter concerns a discrete decision by select Canadian Armed Forces members who have chosen not to comply with a specific condition of service, and the way the CAF has chosen to respond, including the process that was chosen, both dictates that processes that must be used and complicates the use of those same processes.

The Aide-Mémoire is a marked example of the boilerplate approach, replete with checklists for statutory decision makers, and such checklists certainly make administration simpler and easier, and the DMCA and DMC staff appear to be of the view that it will convey procedural fairness to withstand judicial scrutiny.

The boilerplate examples in the annexes are as illuminating as the directives itself. Most of the content of the Aide-Mémoire is -- is the samples, and I'm going to -- I'll read one for you: (as read)

> On 15 November, you violated CDS

> directive on CAF COVID-19 vaccination and CDS directive 002 on CAF COVID-19 vaccination, implementation of accommodation, and administrative action by -- in brackets -- select wording appropriate of the member's circumstances -- close bracket. 'A'. Failing to provide an attestation of your COVID-19 status to the Chain of Command. Or, 'B', refusing to be vaccinated for COVID-19. You have not provided the Chain of Command with proof that you're unable to be vaccinated in accordance with CDS directive 002. Your refusal to comply with this directive is considered failure to follow a direct order. This violates the DND and CAF *Code of Values and Ethics*, which includes the ethical principle to obey and support lawful authority.

All CAF members who received a recorded warning received a document that reiterated this text verbatim. In fact, some CAF members received a recorded warning with the -- the text in parentheses clearly

meant as guidance and not intended as actual text.

Some received recorded warnings with the information of other members. It just didn't apply to their circumstances.

JUSTICE: But that's not pleaded.

MS. CHRISTENSEN: Sorry?

JUSTICE: That's not pleaded for each individual plaintiff.

MS. CHRISTENSEN: I'm sorry, My Lady. I didn't hear --

JUSTICE: I said, that has not been pleaded with respect to each individual plaintiff.

MS. CHRISTENSEN: It has -- I would argue it has been pleaded of the Plaintiffs to which that applies. All of the -- the Plaintiffs were exposed to remedial measures. They -- they all started down the same path. Some ended up off the path sooner than others, whether voluntary release or, in some cases, an accelerated timeline. Normally, it would take six months for a recorded warning, counselling and probation, and then administrative review.

The Aide-Mémoire -- you had to do your first action within three days, the second action within seven days, and in some cases, people were already released within 7 to 14 days. This is why the lawsuit is about that abuse of power, that they would take this example and then misapply it in so many different ways that all subjected my clients to the actions of bad

actors and, as well, result in harm.

Even the --

JUSTICE: Is the --

MS. CHRISTENSEN: -- clients --

JUSTICE: -- Aide-Mémoire in front of me?

MS. CHRISTENSEN: Yes, I believe it is.

JUSTICE: (INDISCERNIBLE) attached as one of the exhibits?

MS. CHRISTENSEN: It would have been attached (INDISCERNIBLE). Yeah, it would have been attached to the affidavit of Joel Ellis. That is affidavit -- affidavit at tab 23 of our book 1.

So the established monitoring periods were largely irrelevant in terms of the pace of the remedial measures that were imposed, and the inconsistency is part of the abuse, because no two members were treated exactly the same, but they were all subject to the directives and how they were applied by different Chain of Command.

The annexes to the Aide-Mémoire. I anticipate that CAF members who didn't comply with the directive would be replaced on a recorded warning in late November '21 and then placed on counselling probation in December of '21. This, as I said, did not happen, as each command in the country interpreted and carried out this step on its own whims.

Members were subsequently served with a notice of intent to recommend release under 5F, which is a unsuitable for service category, and then be subject to an administrative review by the DMCA. In other words, the refusal to comply with what they were in the Aide-Mémoire they were calling an order for vaccination resulted in that compulsory release. Or, if members stayed in, it had long-term career implications for them, and they were not allowed to proceed in their careers.

In the -- the CAF could argue that each member received procedural fairness insofar as the Chain of Command followed the boilerplate checklist of the Aide-Mémoire, but the process of a foregone conclusion is not a fair process. It also predetermined the release category for those undergoing the administrative process, but the release policy of CFAO 15-2 does not allow a release category to be determined prior to administrative review by the DMCA. The directives and the DMCA and -- and Aide-Mémoire fail to apply this policy.

Also of note, in the directive they -- there are CAF policies that had nothing to do with refusal to be vaccinated, such as DOAD 509-1, personal relationships and fraternization; 15019-3, Canadian Forces drug control program; 15019-6, academic misconduct; 5019-8, private debts; 5044-4, family violence; 9004-1, use of cannabis by CAF members; 9005-

1, sexual misconduct response; and CAF military personnel instruction 01/20, hateful conduct; and a -- what's called a CANFORGEN, so a Canadian Forces general order, 090-20, hateful conduct.

So the -- these boilerplate policies and processes tended to promote rote decision making that lacked deliberative thinking shown by, for example, accidentally including irrelevant information or information of other members.

Another issue is the possibility of accommodation, in the CDS directives, was largely non-existent, and present in the directives, principally, to satisfy an objective requirement, any personnel policy must comply with public law constraints, so they were encouraged to apply for accommodation. However, 87 percent of the accommodation requests that were made were rejected.

The language of the Aide-Mémoire refers to a conduct deficiency, as I have mentioned, which tends to signal that the subject matter is one that should be addressed potentially under or -- under either or both the *Code of Service Discipline* and remedial measures. The language in the sample remedial measures speaks of disobeying lawful authority and disobeying lawful orders, and such disobedience can have an adverse effect on discipline.

Certainly, the impression given is that the CAF members who refused to be vaccinated were

failing to demonstrate a habit of obedience that the *Code of Service Discipline* is designed to instill and enforce. Then again, the same Aide-Mémoire that refers to CAF policy on sexual misconduct, alcohol misconduct, *et cetera* --

JUSTICE: Yes, Mr. Benkendorf.

MR. BENKENDORF: My Lady, my friend is continuing to repeat these interpretations of different policies that were put in place, imputing various things relating to it without any evidence --

JUSTICE: (INDISCERNIBLE) I know.

MR. BENKENDORF: -- that's properly before the Court. It doesn't -- it's not put in the Statement of Claim anywhere, so I think we're just kind of wasting our time here. I would just ask if maybe we -- you know, given the time, that we could get to the point here and focus on the issues that I've raised rather than getting into a big soliloquy about how bad the Armed Forces are.

JUSTICE: Well, I typically, Mr. Benkendorf, allow counsel to make the submissions that they choose to make. I have indicated to Ms. Christensen that there -- as far as I'm concerned, there are two issues before the Court at this point, and you have very limited time left, Ms. Christensen. You have not addressed Rule 221 at all.

MS. CHRISTENSEN: (INDISCERNIBLE).

JUSTICE: And I've also indicated

that you've delved into the merits quite considerably, which are not before me.

MS. CHRISTENSEN: So dealing with the effect of evidence not before the Court -- and my friend had submitted the *Fox* case regarding that. First of all, that case should be distinguished because it was in the context of a request for a protective order to prevent disclosure of confidential information.

Skimming through what I submitted, I would put that there were no e-mails between lawyers because paragraph 49 submits that there were -- represent -- e-mails between counsel. That certainly doesn't apply in this case.

And a lot of the evidence that I've been referring to, the reason the affidavits are so long is because the submitted affidavits do include evidence such as the Aide-Mémoire, which is speaking about -- and those are --

JUSTICE: But those -- those affidavits were not sworn in support of this motion, and as I set out in my directive, I was concerned that, in fact, some of those affidavits seem to have been sworn before the action was even commenced.

MS. CHRISTENSEN: And that's reflective of my clients, My Lady. Some would not be accessible to swear those affidavits, either from being deployed, or some of them have passed away or become disabled and would not be able to swear an affidavit, so

it was important to secure the evidence at the time that it was received. So that is why the affidavits are dated those dates, was to preserve the evidence.

And certainly, my friend would be welcome to cross-examine those clients that are able to be cross-examined, and certainly, the ones that are deployed could be cross-examined by video conference, if necessary.

So I would argue that the evidence submitted is -- a great deal if it is properly before the Court.

Certainly, my friend would have been aware of reports such as Fish and Arbour, those are well-known reports that I'm sure my friend is aware of.

Regarding the *Amuda* case, the plaintiff was -- in that case was also seeking remedies that were outside the authority of CDS De Grant (phonetic), but it was wrongly distinguished from Bernath on the basis that the grievance process was not completed, and the grievance system had not been determined to be incapable of providing remedy.

The primary -- and in that case at para 38, the Court states: (as read)

> The primary remedy that the applicant seeks is a declaration that he's been wrongfully released from the office and an order restore -- restoring him to office

in the CAF -- is clearly a form of redress he could obtain through the grievance process.

That statement is actually incorrect. The inability of reinstatement to reinstate members is highlighted in the *National Defence Act* under Bill C-15, subsection (34) of the *Act*, subject to regulations by the Government Council, defence staff may cancel the release or transfer.

My -- my friend also referred to the *Fortune* application. I would remind the Court that while that was denied at the court -- Federal Court level, it was accepted for appeal, and therefore remains -- the issue remains open because we never actually got to hear that appeal because they settled.

Regarding my -- my friend's referral to how long this would take, I would remind the Court that if they expected my clients to use -- those that could use the grievance system, because there are those that would not -- be -- they are denied that. Five hundred grievances all coming for judicial review. Are we really saving the Court any time?

JUSTICE: Well, you've just told me that you've got 200 grievances in the (INDISCERNIBLE) right now.

MS. CHRISTENSEN: Correct. For this particular matter, My Lady. There are other grievances out there.

JUSTICE: M-hm.

MS. CHRISTENSEN: And that many judicial reviews, we're not saving the Court any time, because if we put them all together, it's that many cases to be heard. Similarly --

JUSTICE: Well --

MS. CHRISTENSEN: The --

JUSTICE: But -- but can't -- can't certain precedence be set by way of a decision taken on judicial review and perhaps taken up to the Court of Appeal that would inform other cases that are in -- in the process?

MS. CHRISTENSEN: That's a possibility, My Lady, but that is not a guarantee that that is -- so it will happen. We could --

JUSTICE: Well, you would have some sense, wouldn't you, in very -- in very short order as to the lawfulness of the decision that was made?

MS. CHRISTENSEN: Correct, but then that also doesn't address the actions of the Chain of Command in enforcing that policy, which is essentially what this case is about. The -- that's why I encouraged my clients to file grievances on the actual policy, because the actual policy is not subject of this lawsuit. As I said, it's being used as a concrete, discrete example to show the abuse of power present within the Canadian Armed Forces.

This is also why I believe Section 126

was not used, because they couldn't handle a tsunami of court -- courts martial with only four -- four court martial judges in the military system.

So my clients were basically left with not an ability to defend themselves, challenging a decision by a person -- same person who issued the order, and not able to seek other redresses, such as compensation for damages. Careers that were cut short of some of the Plaintiffs, they -- so they lost out on increased income, they lost out on pensions, they lost out on benefits. The ones that were -- were supposed to be medically released that were not, they ended up losing all of those extra benefits, and none of that can be recovered through a grievance. I would -- I would submit that it was done deliberately to avoid judicial scrutiny of the directive.

And in conclusion, My Lady, I would submit that my clients have submitted a valid Statement of Claim for the -- the claims that were proposed in the Statement of Claim. It was not to challenge the COVID-19 policy. My clients -- those that chose to do so, chose to use the grievance process for that. The redress sought by my clients from this Court are not available to them in the grievance process, even those that are still serving, and therefore, the case should be allowed to proceed in order to have judicial scrutiny of how the Canadian Armed Forces implement directives and orders against their -- against their members.

It takes an exceptionally rare event for higher level commanders to be -- to hold other commanders to account for abuse of authority and deprivation of rights. Even more significant is when the Chief of Defence Staff is the one abusing the authority of the office or depriving members of their rights as there is no higher commander to hold him or her to account unless the governor general or the monarch chooses to do so. Even sexual misconduct cases and racial discrimination cases have been so badly bungled that members were forced to come to the Court to seek hearing and redress.

One result has been to remove sexual misconduct and assault cases from the CAF legal system and place them in civilian legal system, although CAF is still finding ways to keep cases they wish to pursue.

JUSTICE: Ms. Christensen, your time is almost up. I'd like you --

MS. CHRISTENSEN: Yes.

JUSTICE: -- to address the issue of costs.

MS. CHRISTENSEN: Yes, ma'am.

We are seeking $5000 in costs for the respondents. The -- part of that has to do with the number of respondents and dealing with that evidence. Part of it was dealing with new case law submitted by opposing counsel less than 24 hours before the hearing, despite a long adjournment.

In response to the request for costs from the Crown, there was an issue of the size of the pleadings. I would like to remind the Court that that is 0.1 percent of the actual documents that we now hold that would be prepared for evidence for cross-examination and trial if it was necessary.

I've already dealt with the issue of affidavits sworn prior to the filing of Statement of Claim, and the respondents recognize the adjournment was granted due to the technical aspects of the respondent's materials as well as the amount of materials submitted in this action.

We would argue of using *Arial v. Canada*, of 2017, that the Court can exercise its discretion under Rule 400 and not award costs to the respondents should the be unsuccessful.

Further to any questions, My Lady, those are my submissions.

JUSTICE: (INDISCERNIBLE).

Mr. Benkendorf, reply?

Submissions by Mr. Benkendorf

I'll try and be brief, My Lady.

I'm surprised that my friend got up and started immediately relying on *Thomas*. The *Thomas* decision doesn't appear in her written submissions anywhere. She hasn't provided it to me. She said, oh, somebody will e-mail it to me, but we don't have access

to it here. I do have -- I did read the decision in July. It is referenced in my materials at paragraph 109, but certainly I would have spent a great deal more time on my submissions in that regard had my friend actually referred to the decision in her written submissions.

I do recall from reading in July that it's Justice Zinn, it's a certification issue, and that the -- there was evidence led in that matter, and that the issue involved the stigmatization of the -- of the class representative, discrimination, ostracization, harassment, and abuse, and evidence were led in that regard. In this case, we don't have those allegations in the Statement of Claim, and we certainly don't have any evidence before you with respect to that. So the *Thomas* decision isn't going to assist us at all here.

It is noteworthy that my friend, despite the urging of the Court, has still not mentioned Rule 221 at all. Has not distinguished any of the cases that I provided in that regard, has not even tackled that, has only made a cursory review of it in the written submissions. So I don't really have anything that I can take issue there with in terms of them actually, you know, putting forward a good defence to that part of my application. They just haven't done that at all. They've refused to talk about it.

There was much discussion about the DMCA, the Dimka (phonetic). She's -- my friend was

taking a little bit from column A and column B, and some sort of porridge. There's just no evidence of any of this stuff. It's just sort of her submission on how the directives were created, how the different administrative procedures were handled, and that there's some sort of nefarious intention behind all of this. She hasn't led any evidence of that, and it's certainly not in her Statement of Claim.

And I'm -- I'm a bit taken aback at -- at her suggestion that this is just sort of like an example of the wider problems with the Chain of Command in the Armed Forces, that there's -- all this evidence is going to come out about all these wide violations and everything else, and this is just an example of it.

But we're -- they're not actually -- I think she finished off by saying this isn't about the policy. This action is not about the policy, despite what we read in the Statement of Claim. And so, if it's about something else, for god's sakes, we should -- the defendant should be able to know what that is. It's not even pled anywhere in the Statement of Claim.

It looks like an attack on the -- on the directives, on the vaccine mandate, and that administrative process, and people are seeking damages as a result of those decisions, best as we can tell, not from anything else. So if we're talking about something happened ten years before, certainly, they have to plead that. I'd be right back here bringing a summary

judgment application based on limitations. So they don't even seme to be able to elucidate anybody on exactly what their claim is about.

And again, my friend, despite an hour and a half's worth of submissions, didn't actually talk about her Statement of Claim anywhere. She didn't take you to their Statement of Claim once. So it's just -- it doesn't -- there's just no merit to that.

Now, she did say that one issue was that -- whether the matter was properly -- directives were used rather than orders. She talked about procedural errors, abuse of process. She talked about procedural fairness a couple of times. Again, these things are not raised in the Statement of Claim. But those are the kind of issues that this Court can deal with on judicial review.

And certainly, if my friend spent a bunch of time talking about whether there was two weeks given, whether they're given adequate notice of their ability to grieve, whether they understood the processes, whether they were accommodated properly, that requires particulars, facts, material facts, in order for the Court to grapple with that. That is best dealt with during the administrative process of each one of these people through the grievance process.

She spent a lot of time talking about morale, manoeuvres, sort of the impact this was going to have on the Armed Forces more generally. Well, who's

better to sort of deal with that? Who's an expert on that subject? The Court or the MGERC and the CDS? Those are the experts on those subject matters, and so the Court should be deferring to them.

And if there's a -- truly is an issue with respect to law, the directives are somehow improperly brought in, the Courts can certainly deal with that issue on a correctness test on judicial review. So it -- it -- and they'll do that a lot faster. So, certainly, when we're talking about having point one of percent of the documents that are going to be brought forward in this litigation, my goodness. This litigation is not -- not going to be dealt with in a big hurry.

She mentioned that the -- the CDS can't deal with the *Charter*. Clearly, that's wrong.

She talked about the fact that the grievance process can't give the Plaintiffs the relief that they seek. She didn't actually specify what that is. Didn't point us to any evidence of that. Meanwhile, we have the decision so *Chua*, *Kleckner*, the 2022 decision in *Jones*, *Neri*, *Moodie*. All of these decision in this context all say that there's adequate alternative remedy through the grievance process. There's a whole chunk of other decision where people made similar arguments in the CAF context, and I've cited those in my brief as well.

The Court has very, very clear that in

this -- in a Canada Armed Forces context you have to use a grievance process. The only exception is the *Thomas* decision, which is under appeal, which according to my friend means it's of no value, based on her latest comment. But again, it's involving somebody that actually led evidence in a certification matter, and the merits haven't been dealt with, so that's of no assistance to us here.

Terms of somehow there's -- the -- the Plaintiffs should be allowed to proceed with the lawsuit because some of them didn't have the opportunity to file a grievance. *Vaughn* and its -- and a bunch of other cases have been clear that you cannot avoid the grievance process by not filing a grievance. That's not a defence to this at all. There's a multitude of cases in that regard.

In terms of her distinction of the *Fox* decision, *Fox* decision is right on point, and Rule 363, which she didn't mention, is exactly on point. That's pretty clear. The context of the *Fox* decision doesn't change the reality that if you show up with a whole bunch of documents which are not attached to an affidavit, you cannot lead them as evidence before the Court. There's a pretty basic evidentiary foundation to that rule.

She attempted to -- to say that the Moodie case was -- I think she said wrongfully distinguished from *Bernath*. Well, the Federal Court of

Appeal says otherwise. They upheld the *Moodie* decision.

So in terms of that, I think those are my submissions.

In terms of the costs, you know, I -- we're both in the same range, so you can do what you want with that.

JUSTICE: Right. Thank you.

MR. BENKENDORF: Those are my submissions. Thank you.

Decision Reserved

JUSTICE: All right. Thank you.

All right, counsel. I'm going to take the matter under reserve, as you might have anticipated. You'll have my decision in due course.

Thank you for your submissions.

REGISTRAR: This sitting is now concluded.

(COURT CONCLUDED)

LEGAL TRANSCRIPTIONIST'S CERTIFICATE

I, MARK DOERKSEN, Legal Transcriptionist, hereby certify that the foregoing pages contain a true and correct transcription of the recorded proceedings taken herein to the best of my knowledge, skill and ability.

"*Mark Doerksen*"

MARK DOERKSEN

Legal Transcriptionist

January 7, 2025