

**Registry No.: T-1296-23**

**FEDERAL COURT**

BETWEEN:

**FRANCESCO GABRIELE QUALIZZA, and others**

Plaintiffs (Respondents)

and

**HIS MAJESTY THE KING IN RIGHT OF CANADA, and others**

Defendants (Applicants)

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**WRITTEN REPRESENTATIONS OF THE PLAINTIFFS (RESPONDENTS)**

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## PART I – OVERVIEW AND STATEMENT OF FACTS

### A. OVERVIEW

1. This is an action for misfeasance in public office and the intentional violation of human rights by failing to observe the law within the *National Defence Act* (“NDA”), Code of Service Discipline (“CSD”) and Queen’s Regulations and Orders (“QR&O”) on the grounds that the Applicants issued an unlawful order that abused their authority in addition to breaching several rights of the Respondents under the *Charter of Rights and Freedoms* (“Charter”). The subsequent malicious, unlawful actions of the Applicants within their public office and their subordinates were a civil wrong that justifies seeking an award of damages as well as declaratory relief from this Court.
2. The Applicants have moved to dismiss the Claims by essentially arguing the merits of the Respondents’ Claims but also that the Respondents are required to use the grievance process within the Canadian Armed Forces (“CAF”) both of which are an improper motion to dismiss. When the allegations of the Respondents are presumed to be true and reasonable, inferences are drawn in their favour, as they must be on a motion to dismiss. The Respondents plausibly allege wrongful actions within the Department of National Defence (“DND”) along with the Chief of Defence Staff (“CDS”) and the Chain of Command (“CoC”) for the CAF, using the COVID-19 Policy commenced in October 2021 as a clear example of the cavalier attitude within the Canadian military that they are not accountable to the laws of Canada.
3. The Applicants cannot establish that their actions toward the Respondents were lawful and followed the legislation, regulations, and policies that apply to every rank within the CAF. Accordingly, the Applicants’ motion should be denied.

## **B. STATEMENT OF FACTS**

4. For the purposes of the present motion, the essential facts are as follows:
5. The World Health Organization (WHO) declared a Public Health Emergency of International Concern on 30 January 2020. The WHO declared it to be a pandemic on 11 March 2020.
6. General J Vance was CDS during this time. Gen J Vance signed a Briefing Note recommending against mandatory COVID-19 vaccinations on or around 4 December 2020.
7. Vaccination in Canada began, in a meaningful manner, early in 2021.
8. Voluntary vaccination began in the CAF in or around January 2021. Moderna was the only vaccine offered by the medical units of the CAF.
9. On or around 6 January 2021, the Surgeon General, Major General M Bilodeau issued a statement to the CAF that there would be no mandatory vaccinations in the CAF. Gen J Vance did not mandate any COVID-19 vaccine for the members.
10. He announced his retirement from the post on or around 23 July 2020 with the change of command taking place on 14 January 2021.
11. Admiral A McDonald became CDS on or around 14 January 2021. On or around 11 February 2021, another briefing note was prepared for the CDS recommending against mandatory COVID-19 vaccination. Adm McDonald did not mandate any COVID-19 vaccine for the members. Adm McDonald was removed from his post on or around 24 February 2021.
12. Gen W Eyre was named Acting Chief of Defence Staff (“ACDS”) on or around 24 February 2021. On or around 10 March 2021, Gen Eyre signed the briefing note prepared on 11 February 2021.

13. In August 2021, ACDS issued a public statement to the CAF that there would be no mandatory vaccinations in the CAF. On or around 26 August 2021, Gen Eyre was given another briefing note recommending against mandatory COVID-19 vaccination.
14. On 8 October 2021, ACDS issued the first Directive making COVID-19 vaccination mandatory for members of the CAF. CAF members were also required to disclose their vaccination status in the Monitor Mass software. Accommodations, following a strict formatted process, were to be decided in less than two weeks from submission to decision by various members in the chain of command.
15. Gen Eyre became CDS on or around 25 November 2021.
16. On or about 5 November 2021, an updated Directive was issued which corrected errors in regulations and policies used to enforce the Directive. An Aide-Memoire was issued by Director Military Careers Administration on or around 9 November 2021.
17. On or around November 2021, members began to be released from the CAF directly related to the implementation of the Directives using administrative measures.
18. On or around 22 December 2021, a further update of the Directive was issued to correct errors and policies used to enforce the Directive.
19. Commanding officers implemented the Directives procedures under their own interpretation of the policy with different actions taken throughout the period of the Directives are in place.
20. On or around 11 October 2022, another COVID-19 Directive was issued which left the vaccination for COVID-19 mandatory for members. Some members who had not received any COVID-19 vaccine continued to serve in the CAF.

### **The Plaintiffs**

21. The Plaintiffs were all employed by the CAF when the COVID-19 pandemic event emerged among the general population. Some continue to serve in the CAF; others were

released from 2021 to 2024. At all relevant times, every Plaintiff was qualified for their position and performed their duties in a satisfactory, even exemplary, manner.

### **Defining a Veteran**

22. A careful reading of the ASoC reveals that the term “veteran” was briefly defined for the purposes of the present claim: “The 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”).” [*emphasis added*].<sup>1</sup> The individual summaries, highlighted from para 12 to 341 of the ASoC<sup>2</sup> However, this term was not used in a determinative fashion within the ASoC or the Reply to the Statement of Defence (“SoD”), and further debate regarding its meaning is not germane to the discussion about abuse of power, at the heart of the present claim.
23. The term “veteran” then applies to all Respondents who have served in the Canadian Armed Forces (“CAF”) regardless of their category of release. This status correctly identifies their status and their eligibility to bring a claim for wrongdoing within the CAF during their service.

### **The Chain of Command**

24. The Chain of Command (“CoC”) applies only to the CAF and not to the civilian government department of the Department of National Defence (“DND”). The Applicants include both the civilian administrators (Minister of National Defence (“MDN”) and Deputy Minister of National Defence (“DMND”) as well as the military administrators found within the CAF.
25. The CAF CoC has the Governor General as the Commander-in-Chief followed by the Chief of Defence Staff (“CDS”). Senior command positions as General/Flag officers follow for Commanders of the Royal Canadian Navy (“RCN”), Canadian Army (“CA”), Royal Canadian Air Force (“RCAF”), Canadian Joint Operations Command (“CJOC”), Military Personnel Command (“MILPERSCOM”), Canadian Forces Intelligence

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<sup>1</sup> Amended Statement of Claim, para 11 [TAB A at VLMR B2 53].

<sup>2</sup> Amended Statement of Claim, paras 12 to 341 [TAB A at VLMR B2 54-162].

Command (“CFINTCOM”), and Canadian Special Operations Forces Command (“CANSOFCOM”). Specific roles are also assigned to senior officers such as the Vice Chief of Defence Staff (“VCDS”), the Chief Professional Conduct and Culture (“CPCC”), the Surgeon General, the Chaplain General, and the Canadian Forces Provost Marshal (“CFPM”). The Judge Advocate General is outside this rank structure in the role of administering the military justice system outside the CoC as well as serving as legal advisor on law, regulations, and ethical and legal principles to the senior CoC.

26. The ranks of the CAF mark a person’s position in a hierarchical structure with responsibility and authority assigned to each rank. The formal rank structure gives the members of the CAF the ability to pass orders for force generation and force employment, clarity of command and maintenance of order and discipline. The ultimate accountability for the actions of the ranks below falls to the higher rank when there is a failure to challenge the legality of an order or directive and/or the actions of those under their command to implement such orders/Directives with flagrant disregard for the rule of law and the rights of those serving under their command. The accountability stops at the top.
27. The Applicants are included in the ASoC because of their direct roles in the malfeasance within their public offices in and around 2021 to the present day. In the most recent case of *Canada (Attorney General) v Power*, 2024 SCC 26 (“*Power*”<sup>3</sup>), the Court identified that 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 are eligible to be held to account in litigation such as this matter (*Power*<sup>4</sup>).

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<sup>3</sup> *Canada (Attorney General) v Power* 2024 SCC 26 at para 20 [“*Power*”].

<sup>4</sup> *Canada (Attorney General) v Power* 2024 SCC 26 at para 4 [“*Power*”].

## C. BACKGROUND

### CAF Abuse of Authority by Mandatory Vaccination

28. The statutory and regulatory framework for an order to submit to vaccination in the CAF is Section 126 of the *NDA* and *QR&O* 103.58.<sup>5</sup> *QR&O* 1.03 establishes who is subject to the *QR&O* and that “all orders and instructions issued to the Canadian Forces under authority of the *National Defence Act*” apply to members of the CAF<sup>6</sup>. It is under the authority of the *National Defence Act* that such orders are made.
29. Neither of the statutory or regulatory processes (*NDA* Section 126 and *QR&O* 103.58), under which the CDS would have lawful authority to order vaccination, were implemented or referenced in the CDS COVID-19 vaccination Directives. Section 18 of the *NDA* is the legislated authority that creates the position of CDS and prescribes that he or she “be charged with the control and administration of the Canadian Forces”<sup>7</sup>.
30. This caveat is further exemplified in *QR&O* 1.23 – Authority of the CDS to Issue Orders and Instructions<sup>8</sup>. This *QR&O* states that the CDS “may issue orders and instructions not inconsistent with the *National Defence Act* or with any regulations made by the Governor in Council, the Treasury Board, or the Minister”, in the discharge of his duties under the *NDA* or in the explanation or implementation of regulations.
31. Section 126 of the *NDA* is clear that any CAF member who “wilfully and without reasonable excuse disobeys” such an order is “guilty of an offence”.<sup>9</sup> CAF members were accused of disobeying such a “direct order” in the remedial measures issued under the CDS COVID-19 Directives<sup>10</sup>. This accusation is contrary to Defence Administrative Orders and Directives (“DAOD”), which prohibits statements that a CAF member was

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<sup>5</sup> *QR&O* Volume II, Chapter 103, 103.58.

<sup>6</sup> *QR&O*, Volume I, Chapter 1, 1.03.

<sup>7</sup> *NDA*, s 18(1).

<sup>8</sup> *QR&O*, Volume I, Chapter 1, 1.23.

<sup>9</sup> *NDA*, s 126.

<sup>10</sup> Affidavit of V.S. Dessouroux, sworn Sept 8, 2023, Ref. Exhibit H & I [VLMR B1 TAB 1, p96 - 101]; Affidavit of M. Bill, sworn June 4, 2023, Ref. Exhibit G-J [VLMR B1 TAB 2, p185 - 192 ]; Affidavit T. Nordli, sworn Sept 13, 2023, Ref. Exhibit G [VLMR B1 TAB 3, p286 ] Affidavit of N. Crowder, sworn Sept 7, 2023, Exhibit L & Q [VLMR B1 TAB 3, p441 & 457 ]



found guilty of an offence or service infraction without proper findings of a Court Martial.<sup>11</sup>

32. The Court Martial Appeal Court of Canada has addressed Section 126 in *R v Kipling*, and found:

Section 126 does three things. First, it makes clear by implication that an order to submit to vaccination is an order authorized by Parliament under the *National Defence Act*. Secondly, it exposes to prosecution anyone who refuses to obey such an order. Thirdly, it allows that a person, if tried under section 126, to raise the defence of “reasonable excuse”.<sup>12</sup>

33. The regulation that was omitted from the CDS COVID-19 Directives was *QR&O* 103.58, which speaks to refusing immunization, emphasizes and refers to the legislation (s 126 of the *NDA*) but also provides amplification by way of three additional notes. As can be seen in the notes in *QR&O* 103.58 the main purposes of s 126 of the *NDA* is “to ensure that members of the Canadian Forces will not evade important service by refusing to submit to inoculation, etc., when failure to be inoculated would mean that they could not be sent on duty to a particular area”.<sup>13</sup>

34. For CAF members, the only initial option for redress is the CAF grievance system. Several of the Respondents submitted grievances related to the COVID-19 Policy. For example, on March 3, 2022 a CAF member and Plaintiff in the action, submitted grievance MG018685, in which they highlighted the concerns about the omission of both the legislation and regulation from the CDS Directives on CAF COVID-19 vaccination<sup>14</sup>.

35. On April 29, 2024, the CAF member received the Findings and Recommendations of the Military Grievance External Review Committee (“MGERC”)<sup>15</sup>. The MGERC concluded that the CAF member’s “rights protected under section 7 were infringed”,

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<sup>11</sup> Defence Administrative Orders and Directives [“DAOD”] 5019-4 at para 6.2.

<sup>12</sup> *R v Kipling*, 2002 CMAC 1 (CanLII), 6 CMAR 249, [“Kipling”], at para 19.

<sup>13</sup> *QR&O* Volume II, Chapter 103, 103.58.

<sup>14</sup> Grievance MG018685, [TAB C at VLMR B2 208].

<sup>15</sup> 2024 05 28 Findings and Recommendations of the Military Grievance External Review Committee [“MGERC”], [TAB D at VLMR B2 212].

due to arbitrariness, overbreadth, and disproportionate nature of the Directives. Through a series of Annexes, the MGERC also concluded that “the disputed provisions of the CAF vaccination policy are unconstitutional and, therefore, invalid.”<sup>16</sup>

36. In their analysis, the MGERC did address the authority of the CDS to issue orders and instructions provided for at s 18 of the *NDA* but it did not address that this is “subject to the regulations” nor did they address that those orders and instructions shall be “not inconsistent” with the *NDA* or with any regulations.<sup>17</sup>
37. It is a pillar of procedural fairness, as described in official CAF recourse resources, to have an unbiased decision maker. As the COVID-19 Directives were implemented by the CDS, and as the CDS is the Final Authority for grievances, there is no unbiased decision maker.
38. There are additional issues with the CDS COVID-19 Directives, in respect of existing regulations and orders such as in Canadian Forces Administrative Orders (“CFAO”) 15-2. CFAO 15-2 states that:

it is emphasized that the assignment of a release item occurs after the reason for release has been determined, and the purpose of such release items is to identify, for administrative purposes, the reason for, and conditions of, each release. Release items should not be applied to achieve a desired result, such as a form of punishment, a means of depriving a member of rehabilitation benefits, a means of attaching a stigma to a member’s release, or a means of attempting to increase a member’s terminal benefits.<sup>18</sup>
39. The CDS COVID-19 Directives pre-emptively imposed the 5(f) (unsuitable for further service) release item to achieve a desired result, in direct contradiction of CFAO 15-2.
40. Additionally, as addressed in the “Report of the Third Independent Review Authority to the Minister of National Defence” by the Honourable Morris J. Fish,

the Final Authority’s power of redress is limited. For example, the Final Authority cannot reinstate (with pay and benefits) members who were improperly released,

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<sup>16</sup> MGERC COVID-19 Vaccination Policy Analysis, Annexes I to IV.

<sup>17</sup> MGERC COVID-19 Vaccination Policy Analysis, Annex I

<sup>18</sup> Canadian Forces Administrative Orders [“CFAO”] 15-2 at pg 6 para 4 [TAB E at VLMR B2 277].

use its authority to make ex gratia payments to compensate a CAF member for the apparent limitations in any government instrument (act, regulation, policy, etc.), or settle claims against the Crown that arise in the context of a grievance.<sup>19</sup>

Even if the CDS were to find his own COVID-19 Directives to be unconstitutional, in agreement with the MGERC, the CDS would be unable to reinstate released members per section 30(4) of the *NDA*, because the legislated process for disobeying an order to be vaccinated was not followed by the CDS<sup>20</sup>. Had those members been sentenced to dismissal after a fair trial, section 30(4) of the *NDA* would allow reinstatement.

41. The MGERC acknowledges that the CDS can only invite members to re-enrol if they are still eligible to serve, making a reassessment of the constitutionality of the CDS COVID-19 Directives even more difficult to address. The CDS is also unable to remedy a violation of the *Charter* as a claim against the Crown “in the context of a grievance”.
42. Through numerous accesses to information requests submitted since 2021, additional issues have been uncovered in relation to the CDS COVID-19 Vaccination Directives. Informed Consent, religious freedoms, and medical advice were all voiced concerns by advisors to the CDS during the development of the COVID-19 Policy.
  1. A briefing note prepared for the CDS highlights issues with informed consent, concerns over the *Charter of Rights and Freedoms*, and the *Canadian Human Rights Act*<sup>21</sup>.
  2. Another briefing note advises that “ordering CAF members to accept COVID-19 vaccination... may not constitute a legal order”, while also addressing the “reasonableness” of the policy<sup>22</sup>.
  3. Emails from CAF’s top doctor, the Surgeon General, repeatedly advise against a vaccination mandate<sup>23</sup>.

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<sup>19</sup> *Report of the Third Independent Review Authority to the Minister of National Defence*, at page 171. [“Fish Report”]

<sup>20</sup> *NDA*, s 30(4).

<sup>21</sup> 2021 02 11 - BN to CDS - Informed consent, Chart Rights... & CHR Act. [TAB F at VLMR B2 314].

<sup>22</sup> DND/CAF ATIP File # A-2021-00418: Briefing Note for the CDS – COVID-19 Vaccination Requirements for the CAF dated 11 February 2021 [TAB G at VLMR B2 321].

<sup>23</sup> DND/CAF ATIP File # A-2022-00492, CAF Surgeon General Emails at 320-327 [TAB H at VLMR B2 328].

4. Meeting minutes from the National Health and Safety Policy Committee Ad-Hoc Meeting on August 26, 2021 highlight that “there are important legal issues that prevent the government from being able to officially mandate vaccination within the CAF”, and there is a “pre-defined list of religions and health causes” which will be accepted for exemption<sup>24</sup>.
43. It is very clear that the CDS was advised against a force-wide mandatory vaccination. General W Eyre proceeded with the Directives despite the existing legislation and regulations making his actions unlawful.

## **PART II – STATEMENT OF THE POINTS IN ISSUE**

44. It is plain and obvious that the Court should dismiss the Respondent’s Motion to Dismiss, pursuant to Rule 221 of the Federal Court Rules for four reasons:
- a. The Pleadings disclose a reasonable cause of action related to the CAF CoC’s misfeasance in public office, not to a challenge of the COVID-19 Policy implemented by the CAF in October 2021;
  - b. The Pleadings support the principles of judicial economic, consistency, finality, and the integrity of the administration of justice;
  - c. The case falls under jurisprudential exception to grievance; and,
  - d. The CAF’s statutory grievance scheme cannot provide the remedies requested

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<sup>24</sup> DND/CAF ATIP File # A-2022-00476, Minutes of the National Health and Safety Policy Committee Ad-Hoc Meeting Held on, August 26, 2021 (A-2022-00492), [TAB I at VLMR B2 336].

### PART III – MEMORANDUM OF FACT AND LAW OF THE RESPONDENTS

*“L’etat, c’est moi” and “trust us, we got it right” have no place in our democracy. In our system of governance, all holders of public power, even the most powerful of them—the Governor-General, the Prime Minister, Ministers, the Cabinet, Chief Justices and puisne judges, Deputy Ministers, and so on—must obey the law[.]*

– *Canada (Citizenship and Immigration) v Tennant* 2018 FCA 132 at para 23

#### A. GROUNDS TO STRIKE

##### Reasonable Causes of Action

45. It is settled law that in order to strike an action on the ground that it discloses no reasonable cause of action within the meaning of paragraph 221(1)(a) of the Rules<sup>25</sup>, the Court, assuming the alleged facts to be true, must be satisfied that it is plain and obvious that the action brought, even if interpreted generously, has no reasonable chance of success<sup>26</sup>.
46. The Applicants have based their Motion on a theory that the Amended Statement of Claim (“ASoC”) is a challenge of the COVID-19 Policy implemented by the CAF in October 2021. This is, in fact, not the case being made by the Respondents. The Respondents were all affected by that policy and the way the Directives were carried out by the CoC. This is common ground for all of them, as well as their service in the CAF during the affected period.
47. The CAF has suffered from an abuse of power problem for decades. The CoC holds a view that they are powerful commanders of lower ranking members who must obey every order and submit to any injustice without seeking any redress or compensation for wrongs done. The well-known events of Somalia in the 1990s, and the public discussions of sexual misconduct are two of the examples that managed to get past the wall of silence that is imposed on members who may want to come forward as

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<sup>25</sup> Federal Court Rules, SOR/98-106 [“Rules”], at para 221(1)(a).

<sup>26</sup> *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42, [2011] 3 SCR 45, at para 17; *Odhavji Estate v Woodhouse*, ; *Hunt v Carey Canada Inc*, 1990 CanLII 90 (SCC) [1990] 2 SCR 959, at page 980; 2003 SCC 69, [2003] 3 SCR 263, at para 15; *Hunt v Carey Canada Inc*, 1990 CanLII 90 (SCC) [1990] 2 SCR 959, at page 980

whistleblowers. The case of *Heyder v Attorney General of Canada*, 2019 FC 1477 (“*Heyder*”) serves as an example of collective litigation that leads the way for CAF members to hold the CDS and CoC accountable for decisions and actions for the first time in the Federal Court.<sup>27</sup>

48. The Directives imposed by General Wayne Eyre on the CAF in October 2021 was the “perfect storm” of a discrete, specific event that triggered actions by the CoC that exposed the many ways in which negative consequences can be brought down on the members of the CAF behind closed doors. The actions of CAF in 2021 offer a rare opportunity for the Court to assess the legality, fairness, and reasonableness of the CoC when presented with a situation that called for decision-making within the rule of law in Canada; the correct interpretation of, and reaction to, a lawful vs. unlawful order by the CoC; and the implementation of an order that created permanent, life-changing consequences on the members.
49. When the Court is asked to find that a statement of claim must be struck out as an abuse of process within the meaning of paragraph 221(1)(f) of the Rules<sup>28</sup>, the Court must be satisfied that allowing the litigation to proceed would “violate principles such as ‘judicial economy, consistency, finality, and the integrity of the administration of justice’...” (*British Columbia (Worker’s Compensation Board) v Figliola*, 2011 SCC 52, at para 33 [“*Figliola*”])<sup>29</sup>.
50. The principles underlying the approach to be followed to detect “abuse of the decision-making process” were summarized as follows at para 34 of *Figliola*<sup>30</sup>:
  - It is in the interests of the public and the parties that the finality of a decision can be relied upon (references omitted).
  - Respect for the finality of a judicial or administrative decision increases fairness and the integrity of the Courts, administrative tribunals, and the administration of justice; on the other hand, re-litigation of issues that have been previously decided in an appropriate forum may undermine confidence

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<sup>27</sup> *Heyder v Attorney General of Canada* 2019 FC 1477 [“*Heyder*”]

<sup>28</sup> Rules, at para 221(1)(f).

<sup>29</sup> *British Columbia (Worker’s Compensation Board) v Figliola*, 2011 SCC 52 [“*Figliola*”], at para 33.

<sup>30</sup> *Figliola*, at para 34

in this fairness and integrity by creating inconsistent results and unnecessarily duplicative proceedings (reference omitted).

- The method of challenging the validity or correctness of a judicial or administrative decision should be through the appeal or judicial review mechanisms that are intended by the legislature (references omitted).
- Parties should not circumvent the appropriate review mechanism by using other forums to challenge a judicial or administrative decision (references omitted).
- Avoiding unnecessary re-litigation avoids an unnecessary expenditure of resources (reference omitted).

### **This Case Falls Under a Jurisprudential Exception to Grievance**

51. This case falls within established circumstances in which Courts have held that a grievance is not adequate and, therefore, judicial proceedings can be heard. These recognized circumstances apply to this case:

- a) A grievance would be a meaningless and time-consuming exercise (*Gayler v Canada (Director Personnel Careers Administration Other Ranks, National Defence Headquarters)*, 1994 CarswellNat 1455 at para 14 [*“Gayler”*]<sup>31</sup>; *Loiselle v Canada (Attorney General)*, [1998] 161 FTR 232 (FC) at paras 2 and 14-18 [*“Loiselle”*]<sup>32</sup>);
- b) A grievance cannot lead to a consideration of the issues or an effective remedy (*Bernath v Canada*, 2007 FCA 400 at para 22 [*“Bernath FC”*]<sup>33</sup>; and
- c) “The interest[s] of justice to the parties [and] the most expeditious disposition of the matter” is through a hearing within the Court (*Hawco v Canada (Attorney General)*, 1998 CanLII 7996 (FC) at para 16)<sup>34</sup>.

52. The grievance process in this case, as outlined, has been a meaningless exercise. In addition, the circumstances of this case do not involve ordinary administrative decision-making within the CAF on service-related issues. Rather, this case involves decision-

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<sup>31</sup> *Gayler v Canada (Director Personnel Careers Administration Other Ranks, National Defence Headquarters)* 1994 CarswellNat 1455 [*“Gayler”*] at para 14.

<sup>32</sup> *Loiselle v Canada (Attorney General)*, [1998] 161 FTR 232 (FC) [*“Loiselle”*] at paras 2 and 14-18

<sup>33</sup> *Bernath v Canada* 2007 FCA 400 [*“Bernath”*] at para 22

<sup>34</sup> *Hawco v Canada (Attorney General)* 1998 CanLII 7996 (FC) at para 16

making by political actors, which abused the CAF administration process to avoid scrutiny by the judicial process.

53. The *Gayler* and *Loiselle* decisions are instructive. In both cases, military officers were subjected to decisions from the highest possible level of command. It was held that going through the grievance process only to reach the same decision-makers in the hopes that they would change their minds would be a meaningless and time-consuming exercise. The Courts allowed the judicial reviews to proceed on that basis.
54. The second recognized exception also applies here: a grievance cannot lead to an effective remedy because the decision cannot adjudicate or provide remedy for all the Respondent's claims. The case of *Bernath FC* is instructive. In that case, it was held that, because the grievance process could not address *Charter* issues and provide a monetary remedy for breach thereof, a judicial proceeding could be heard. Similarly, in this case the CAF and the CDS do not have the authority to make any determinations that pertain to the claims or provide any effective remedy.
55. *Bernath FC* held that, where the grievance process cannot address the issues at hand or provide a remedy, judicial proceedings are appropriate. Notably, the Federal Court held that the "grievance resolution process is not exclusive" (*Bernath FC* at para 16) and that "the grievance procedure does not provide an adequate forum for addressing constitutional questions under the *Charter*, and no monetary compensation can be granted through the decision-making process" (*Bernath FC* at para 109). This Court also held when the *NDA* leaves a statutory gap about the authority of the CAF vis-à-vis the grievance process, "it is not for this Court to fill the void that was left intentionally by the legislator" (*Bernath FC* at para 22). In summary, in this case, the grievance process cannot address the issues, provide an effective remedy, and it is not open for any Court to fill in this gap.
56. Moreover, the *Queen's Regulations and Orders for the Canadian Forces* Article 7.27 expressly provides that grievances can be suspended. This provision is not found in any other Canadian legislation or regulation. It constitutes a significant indication of the



possibility of initiating in other forums, such as this Court, proceedings related to the matter “giving rise to the grievance”.

57. Indeed, the Applicants have suspended the grievances of some (but not all) of the Respondents after this hearing was set before the Court.<sup>35</sup> It is worthy of note that the correspondence includes suspension of grievances submitted before the Directives and that are completely unrelated to the Directives. There are also suspensions of grievances where the grievance numbers do not match the named party and/or a Respondent in this matter. In reality, the grievances were not suspended and continue in the grievance process. The actions taken to suspend the grievances were a deliberate act of intimidation by the Applicants to interfere with this litigation.
58. For the reasons already outlined, the third recognized exception also applies to this case: a full hearing is in the interests of justice to the parties and is the most expeditious process for disposing of the matter.

### **Timeliness**

59. The grievance process does not apply to the claims made by the Respondents. If the Court, however, deems that it may apply, the expediency of the alternative remedy is a factor this Court must weigh in considering whether the grievance process is an adequate alternative remedy. The timeliness of the grievance process is not purely speculative as demonstrated by the evidence presented to the Court in this matter.
60. The Final Authority response letter<sup>36</sup> provided by the Applicants clearly shows that the grievance process took nearly three years. The Respondents who have filed a grievance (over 200 of them) have not received any decision and 58 of them have had their grievances “suspended” pending the litigation of this matter further delaying any resolution of their grievances.<sup>37</sup>

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<sup>35</sup> See: Motion Record for the Defendants, Affidavit of AM De Araujo Vaina, Exhibit “I” – Canadian Forces Grievance Authority Letter *RE: Suspension of Grievances*, at AGCMR 181-185

<sup>36</sup> See: Motion Record for the Defendants, Affidavit of AM De Araujo Vaina, Exhibit “K”, at AGCMR 196-207.

<sup>37</sup> See: Motion Record for the Defendants, Affidavit of AM De Araujo Vaina, Exhibit “I”, at AGCMR 181-185.

61. Given the known issues of delay in the grievance process (up to 18 years<sup>38</sup>), it is clear that a grievance – even if it could provide the remedies sought by the Respondents, which is not the case – could not possibly be concluded without the Respondents seeking relief in this Court. The burden to demonstrate that the grievance process would resolve the Respondents’ grievances fully and expeditiously was on the Applicants.

### **Take the Facts Pleaded as True**

62. The allegations in the ASoC relate to the actions of the Minister of National Defence, the Deputy Minister, the CDS and the CoC of abusing the authority of their office by:
- a) making a Directive which violated the rights of the Respondents;
  - b) acting without authority;
  - c) making an unlawful order; and
  - d) denying the Respondents any procedural fairness.
63. The Respondents have provided additional evidence to support their ASoC. If the Court does not consider it has enough information with which to decide the motion to dismiss given a lack of evidence, then the Court must decide it in the Respondents’ favour. As this Court held in *JP Morgan*:

[I]f the Court is not certain whether:

- there is recourse elsewhere, now or later;
- the recourse is adequate and effective; or
- the circumstances pleaded are the sort of unusual or exceptional circumstances recognized by the case law or analogous thereto;

then the Court cannot strike the notice of application for judicial review.<sup>39</sup>

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<sup>38</sup> Law Office of Rory G. Fowler, *Incompetence & Intransigence in Grievance Adjudication - Part I* (15 Mar 2024).

<sup>39</sup> *JP Morgan Asset Management (Canada) Inc. v Canada (National Revenue)*, 2013 FCA 250 (CanLII), [2014] 2 FCR 557, at para 91.

64. The Respondents seek a full and complete hearing of their evidence, which is already overwhelming before Examinations for Discovery, to prove their stated facts and support their claims.

### **Use of Resources and Process**

65. “Litigation of claims such as the ones raised in these proceedings is complex and expensive. Distributing the litigation costs across the [Respondents] may be the only mechanism for [them] to achieve access to justice”<sup>40</sup> (*Heyder*). The common issues for the Respondents allow for the claims to proceed without duplication of fact-finding and legal analysis. The common questions requirement constitutes a low bar (*Vivendi Canada Inc v Dell’Aniello*<sup>41</sup>) allowing the Court to have the matter proceed.
66. The number of Respondents is 330 people. They have consolidated their claims into one action to streamline the process of litigation and conserve their own resources as well as the resources of the Court. Each claim relies on common evidence. Presentation of the evidence in a single matter would be the most efficient means of having the claims heard in the Court rather than 330 separate trials taking years of legal work and time for all the parties and the Court thereby “promotes judicial economy, avoids inconsistent findings on common issues, and promotes behaviour modification” (*Heyder* at para 37). It is, therefore, in the best interests of all concerned for the matter to proceed without further delay.

### **Improper Substitute for the Code of Service Discipline**

67. The remedial measures state that the Respondents committed not one, but two, service infractions, contrary to QR&O articles 120.03(c) and (i). The CDS Directive on CAF Vaccination and CDS Directive 002 on CAF Vaccination – Implementation of Accommodation and Administrative Action were punitively applied separately.<sup>42</sup>

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<sup>40</sup> *Heyder*, para 37.

<sup>41</sup> *Vivendi Canada Inc V Dell’Aniello*, 2014 SCC 1 at para 72.

<sup>42</sup> Affidavit M. Bernard *sworn Sept 8, 2023*, Exhibit G [VLMR B1 TAB 5, p610]; Affidavit V. Palin-Robert *sworn 14 June 2023* Exhibit I [VLMR B1 TAB 6, p792]; Affidavit C. Ouellet *sworn Sept 21, 2023*, Exhibit M [VLMR B1 TAB 7, p1009]; Affidavit P. Lemay, *sworn May 30, 2023* Exhibit I [VLMR B1 TAB 8, p1161]; *QR&O*, 120.03(c) and (i).

Service infractions will rarely, if ever, be subject to judicial scrutiny. Certainly, they won't be scrutinized by courts martial. And judicial scrutiny will arise from applications for judicial review after the legislated review process is exhausted under QR&O Chapter 124.<sup>43</sup>

68. If the Respondents allegedly committed one or more service infractions, where are the charges? Isn't that why summary hearings were created? Under section 162.4 of the *NDA*, "[s]ervice infractions may be dealt with only by summary hearing."<sup>44</sup>
69. To find a CAF member guilty of a service infraction, one need only present proof that convinces the trier of fact on a balance of probabilities<sup>45</sup>. The summary hearing process was created expressly to try service infractions. Remedial measures – which are not a product of legislation, but a policy instrument issued under the CDS' general authority under s 18 of the *NDA*<sup>46</sup> – cannot be used to displace a statutory process expressly designed to deal with service infractions.
70. What is presented here is a compelling example of what has been happening for some time now: the CAF chain of command use remedial measures for the improper purpose of side-stepping the Code of Service Discipline to punish CAF members for alleged disciplinary misconduct. These Respondents provide object examples of the sort of abuse of process. The evidence supports a routine abuse of process for which most CAF members cannot obtain remedy because they must first exhaust the CAF grievance process that is controlled by the same chain of command that continues to permit the abuse of process like this to continue.

## **B. GRIEVANCES IN THE CAF**

71. The remedial measures experienced by the Respondents is an abuse of process not only in this matter but on a regular basis within the CAF for at least a couple of reasons:

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<sup>43</sup> *QR&O, Volume II, Chapter 124.*

<sup>44</sup> *NDA, s 162.4.*

<sup>45</sup> *NDA, s 163.1.*

<sup>46</sup> *NDA, s 18.*

- a. First, the Office of the JAG has a laissez-faire attitude to such abuses. They are not the CAF's "compliance officers" to ensure the CoC is doing their duty. However, if they are not, then nobody is upholding the myriad of laws, regulations and other frameworks that operate under the CAF; and
- b. Second, the CAF grievance process is used as a broad justification for inaction by the courts. As the Honourable Morris Fish has explained<sup>47</sup> (and the late Chief Justice Lamer<sup>48</sup> and the Honourable Patrick J. <sup>49</sup>[REDACTED] also previously explained), that process can take an inexorably long time. And, by the time the grievance is considered and determined, the damage will be done. It is often irreparable – but not according to the Applicants, who seem to think that the mere opportunity to bring a complaint in the grievance process is sufficient.

72. Moreover, in the CAF grievance process, the actions of the chain of command are reviewed by the chain of command. And even in circumstances in which the final authority renders an unreasonable or unfair decision, the recourse following judicial review (which the CAF member must pay for out of his or her own pocket) is simply referred back to the Final Authority so that they can reverse engineer a different justification for the impugned decision. It is rare for a CAF member to obtain actual, meaningful justice.

73. This problem is fully recognized by the Government of Canada and is best demonstrated by the government of Canada paying out over a billion dollars (including lawyers' fees) for sexual misconduct that arose in the context of the CAF.<sup>50</sup> The Crown did not rely on all the grounds that are routinely trotted out by the Attorney General of Canada to seek dismissal of actions (and some applications) brought by individual CAF members.

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<sup>47</sup> *Fish Report*.

<sup>48</sup> *The First Independent Review by the Right Honourable Antonio Lamer PC, CC, CD 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 1988, c 35.* ["Lamer Report"]

<sup>49</sup> *Report of the Second Independent Review Authority to The Honourable Peter G. MacKay, Minister of National Defence.* ["Lesage Report"]

<sup>50</sup> *Heyder v Canada (Attorney General) (10 July 2019), Ottawa T-2111-16 (FCTD) (Final Settlement Agreement).*

74. Sexual violence and sexual misconduct can have a lasting impact on its victims. This, however, is not the only misconduct by which CAF personnel can be victimized. A CAF member who is subject to maladministration and abuse of process, like described by the Respondents (some of whom were sexual assault victims during their service<sup>51</sup> in their affidavits above, is no less a victim. And CAF members who are treated in such a remarkably unfair manner can also suffer considerable harm because a failure of procedural fairness leading to unreasonable decision-making is also a source of harm. It happens with alarming frequency in the CAF. Where there is little or no accountability for such maladministration, it will continue to fester. The administration of the affairs of the CAF is that such decisions should be left to the knowledge and expertise of the CAF's statutory decision-makers<sup>52</sup>, where there is often none, or worse, malicious intent to harm the member.
75. The judgment in *R v Bourque*, 2020 CM 2008 highlights the CDS' ongoing disdain for the rule of law<sup>53</sup>. The CAF has already largely abandoned the Code of Service Discipline as the principal means for maintaining discipline in the CAF. The CoC in the CAF has, for some time now, relied principally on administrative measures to punish and discipline CAF personnel.
76. Senior JAG staff advised against mandating vaccination with the mRNA injections<sup>54</sup>. Briefing notes submitted to two CDS<sup>55</sup>, including one to General W Eyre, also pointed out that the mandate was not supported in law. General W Eyre proceeded with the COVID-19 Directives despite this legal advice. The CoC then proceeded to implement the Directives as orders that must be followed and were "lawful" because they came

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<sup>51</sup> Affidavit of JL Duchesneau, sworn May 30, 2023, Exhibits G - I [VLMR B1 TAB 9, p1279 –1286]; Affidavit of ME Labonte, sworn Sept 13, 2023, [VLMR B1 TAB 10, p1290]; Affidavit of HN Schroder, sworn Aug 3, 2023, para 6, Exhibits G-H [VLMR B1 TAB 11, p1461- 1465]

<sup>52</sup> *Vaughan v Canada*, 2005 SCC 11 (CanLII), [2005] 1 SCR 146 at para 65

<sup>53</sup> *R v Bourque*, 2020 CM 2008

<sup>54</sup> Briefing Note to the CDS on COVID-19 immunization Campaign, dated Feb 2, 2021, [TAB K at VLMR B2 343]

<sup>55</sup> DND/CAF ATIP File # A-2020-01532: Briefing Note for the CDS/DM - COVID-19 Vaccine Prioritization, Distribution, and Immunization dated December 4, 2020 [TAB L at VLMR B2 346]; DND/CAF ATIP File # A-2021-00418: Briefing Note for the CDS – COVID-19 Vaccination Requirements for the CAF dated 11 February 2021 [TAB G at VLMR B2 321]; DND/CAF ATIP File # A-2021-01334: Information Note for the A/CDS / Associate DM / DM – COVID19 Vaccination and DND/CAF Workplace Safety dated 26 August 2021 [TAB M at VLMR B2 380].

from the CDS. Those who questioned the lawfulness of the Directives were quickly silenced, punished and/or removed.<sup>56</sup>

77. Colonel LW Rutland (now Brigadier General Rutland) went so far as to set up a review board comprised of CAF members with no clearance for having access to members' private medical and religious information<sup>57</sup>. This was done because the COs under his command were not implementing punishments and releases in the numbers and severity he deemed necessary to implement the Directives.
78. The sole recourse for a CAF member to challenge improper administrative actions, decisions, or omissions in the administration of the affairs of the CAF is the grievance process. The CDS is the final authority in that process and faces no time limit. And the first opportunity for a CAF member to obtain review by a constitutionally independent tribunal, via judicial review before the Federal Court, will often not arise for years based upon the current rate of resolution of grievances. Even then, the FA benefits from a significant margin of appreciation for most matters. Even if the Federal Court does quash an unfair or unreasonable decision by the final authority, the damage to a CAF member's career will invariably have been done.
79. The shift to using administrative measures as alternative punishments to the Code of Service Discipline is a dark harbinger of an era, in the 1990s, when the CoC acted outside boundaries. That misuse of administrative measures for disciplinary purposes was often cited as one of the principal justifications for the reform of the Code of Service Discipline at the end of the 1990s. If the current climate of disdain for the rule of law is any indicator, it does not bode well for future actions of the CAF CoC.

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<sup>56</sup> Affidavit of F.G. Qualizza, *sworn Aug 31, 2023*, Exhibit K [VLMR B1 TAB 12, p1617]

<sup>57</sup> Affidavit of S.M. Marcotte, *sworn June 4, 2023*, Exhibit J [VLMR B1 TAB 13, p1881]; Affidavit of M.A. Lolacher, *sworn Aug 14, 2023*, Exhibit P [VLMR B1 TAB 14, p2236]; Affidavit of J.A. Pickford, *sworn Sept 7, 2023*, Exhibit H [VLMR B1 TAB 15, p2509];

### C. CHARTER CLAIMS OF THE RESPONDENTS

80. The Respondents have brought claims that the CAF COVID Policy infringed on their protected rights under the *Charter of Rights and Freedoms*. Specifically, the rights that have been breached are:
- a. Section 2(a) freedom of religion and personal belief
  - b. Section 2(a) freedom of conscience
  - c. Section 2(d) freedom of association
  - d. Section 7 right to liberty and security of person
  - e. Section 8 right to privacy
  - f. Section 15 rights to equality
81. Section 2(a) freedom of religion and personal belief — the Respondents submit that the accommodation process infringed their freedom of religion and personal belief. CAF directly ordered their members to submit deeply personal and detailed statements of their beliefs to maintain their service. The Respondents were ordered under the Directives to reveal their religious and personal beliefs not only to their Chaplain but also to the CoC<sup>58</sup>, and, in some cases, to a review board consisting of members of the CAF<sup>59</sup> who should not have been able to access such information. Respondents who were Chaplains were denied accommodations based on religious belief being determined to not be sincere.<sup>60</sup> Respondents were denied accommodations based on a predetermined list of ‘acceptable’ religions for the CAF<sup>61</sup> in blatant disregard of the allowable enquiries by a government body and determination of religion or personal belief found in *Syndicat Northcrest v Amselem*.<sup>62</sup>

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<sup>58</sup> Affidavit of Sgt RR Jenkins, *sworn 27 Aug. 2023*, Exhibit H [VLMR B1 TAB 16, p2704]

<sup>59</sup> Affidavit of JA Pickford, *sworn 7 Sept 2023*, Exhibit H [VLMR B1 TAB 15, p2509]; Affidavit of A.J. Tschetter, *sworn 7 Sept 2023*, Exhibit O [VLMR B1 TAB 17, p3250];

<sup>60</sup> CAF Chaplain General, Letter – Suspension of Chaplain General Mandate Major S.W.J. Morris, 2 November 2021 [TAB O at VLMR B2 443]; Affidavit of S. Drouin, *sworn Sept 13, 2023* [VLMR B1 TAB 18, p3283]; Affidavit of R.C. Stoesz, *sworn Aug 8, 2023* [VLMR B1 TAB 19, p3434]; Affidavit of A. Skulski, *sworn May 31, 2023*, Exhibit E-F [VLMR B1 TAB 20, p3629 - 3667]

<sup>61</sup> Affidavit of S.R. Gamble, *sworn Sept 13, 2023*, Exhibit J [VLMR B1 TAB 24, p4596]; Affidavit of J.M. Gillis, *sworn Sept 11, 2023*, Exhibit G [VLMR B1 TAB 21, p3904].

<sup>62</sup> *Syndicat Northcrest v Amselem*, 2004 SCC 47 (CanLII), [2004] 2 SCR 551



82. Section 2(a) freedom of conscience – the Respondents submit that their ability to accept or refuse a medical treatment infringed on their freedom of conscience. They were denied the freedom to act upon their moral beliefs under the threat of being involuntarily released from the CAF and lose benefits and pensions.
83. Section 2(d)—the Respondents submit that the actions taken by the CoC under the Directives infringed on their freedom of association. The Respondents were barred from attending the workplace, the Messes for social occasions, and some were denied attendance at significant events such as funerals of members they served with or Christmas Mess dinners. Some of the Respondents were subject to solitary confinement at the workplace or in their quarters for extended periods of time.<sup>63</sup>
84. Section 7—the Respondents submit that their ability to accept or refuse a medical treatment infringed on their right to liberty and security of person. The CDS Directives, which ordered every serving member must be vaccinated to continue serving in the CAF, engages every Plaintiff’s right to liberty and security of person. This is a protected right under section 7 of the *Charter*. The right to liberty safeguards an adult with personal capacity to make their own decisions about their medical care and this includes the right to refuse a medical treatment. CAF directly ordered their members to submit to injections, a medical treatment, to maintain their employment in service to Canada. This mandatory requirement infringed on the bodily autonomy of the members but also breached several CAF policies.<sup>64</sup> There are Respondents who were subjected to solitary confinement by the CoC. Physical punishment resulting in injuries also occurred under the orders of the CoC. These Respondents experienced infringements to their security of person and liberty.
85. Section 8 – the Respondents submit that the accommodation process infringed their right to privacy. CAF directly ordered their members to submit medical information to a

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<sup>63</sup> Affidavit of B. Hordo, *sworn Sept. 16, 2023*, Exhibit P [VLMR B1 TAB 22, p4066]; Affidavit of J. Ellis, *sworn June 4, 2023*, Exhibit B,G,J,S,W,Y [VLMR B1 TAB 23, p4182, 4300, 4311, 4407, 4419, 4426]; Affidavit of J. Chambers, *sworn Sept 11, 2023* [VLMR B1 TAB 25, p4639]; Affidavit of D.J. McKenna, *sworn August 12, 2023* [VLMR B1 TAB 26, p4732]; Affidavit of A.G.R. Loiselle, *sworn May 29, 2023* [VLMR B1 TAB 27 p4854]

<sup>64</sup> CF H Svcs Gp Instruction, 3100-23, *Medical Administration of Pregnant Members*, [TAB P at VLMR B2 445]; CF H Svcs Gp Instruction, 4440-20, *Reproductive Hazards*, [TAB Q at VLMR B2 478].

publicly accessible software known as “Monitor Mass” to maintain their service.<sup>65</sup> All the Respondents had to post their vaccination status which was visible to anyone accessing the system.<sup>66</sup> If the member did not “attest”, their CoC would put their status into their system without their consent.<sup>67</sup>

86. The Respondents were ordered under the Directives to reveal their medical information to the CoC.<sup>68</sup> CAF policy until the Directives did not reveal medical information of individual members to the CoC. At CFB Edmonton, as previously stated, a review board was given access to members’ medical files which should not have been able to access such information.<sup>69</sup> Also at CFB Edmonton, several NCMs outside the CAF medical unit were given access to thousands of members’ complete medical files when the province required proof of vaccination cards.<sup>70</sup>
87. Section 15 — the Respondents ask the Court to determine the infringement of their right to equality before the law and to protection under the law. The Respondents found themselves experiencing discrimination when the CDS Directives were implemented by the CoC. Each Plaintiff faced discrimination at their workplace on grounds of:
  - a. Religion: having their religious and personal beliefs exposed to their CoC and peers left them vulnerable to discriminatory acts and harassment.<sup>71</sup>
  - b. Sex: women were discriminated against due to pregnancy and/or breastfeeding when they asked to delay vaccination until after the post-partum and breastfeeding period.<sup>72</sup> The requests based on established policies that predated the COVID-19 Policy and had not been superseded by it.<sup>73</sup>

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<sup>65</sup> CDS Directive 002, at para 5

<sup>66</sup> DND/CAF ATIP File # A-2021-02063, at 584-586, [TAB R at VLMR B2 510].

<sup>67</sup> Affidavit of J.J. Madore, sworn May 30, 2023, Exhibit H [VLMR B1 TAB 28, p4975].

<sup>68</sup> CDS Directive on CAF COVID-19 Vaccination, dated October 8, 2021, at paras 20.6.4. to 20.b.7., and paras 20.c.1.a. to 20.c.1.c.

<sup>69</sup> Affidavit of M.A. Lolacher, sworn August 14, 2023, Ref Affidavit and Exhibit P [VLMR B1 TAB 14, p2087-2108, 2236].

<sup>70</sup> Affidavit of B.M. Grossmith, sworn Jan 12, 2024. [VLMR B1 TAB 29, p5347].

<sup>71</sup> Affidavit of A.J. Tschetter, sworn Sept 7, 2023, Exhibit O [VLMR B1 TAB 17, p3250].

<sup>72</sup> Affidavit of C.E. Rogal, sworn August 14, 2023 [VLMR B1 TAB 30, p5506].

<sup>73</sup> Annex C to CF H Svcs Gp Instruction 4440-20, [TAB Q at VLMR B2 478].

- c. Mental and physical disability: members who were on Medical Employment Limitations that were in the process of releasing under a 3(b) Medical Release were ordered to take the vaccination even though they would not be serving for much longer<sup>74</sup> or had valid medical conditions exempting them from receiving this vaccine.<sup>75</sup> These members were threatened and/or released as 5(f) unsuitable for further service which denied them the additional benefits they were entitled to for being injured due their service.
88. The significance of the *Charter* within the CAF cannot be overstated. It reflects basic human rights that are recognized under both international human rights law and the law of armed conflict treaties. It is vital to note that members of the CAF do not surrender their rights as Canadian citizens upon enrollment in the CAF as a Non-Commissioned Member or as a Commissioned Officer. Their documentation contains no clause supporting a voluntary surrender of the *Charter* neither does their oath to the Monarch of Canada. Members of the CAF, therefore, have all the rights and protections as those of civilian citizens.
89. The Applicants have submitted a letter from the Final Authority, CDS General Wayne Eyre, dated 24 June 2024<sup>76</sup>, where he claims there was no infringement of section 7 *Charter* rights. This letter is irrelevant to these proceedings as the member who was sent this letter is not a Plaintiff in this action. This document exhibits an exercise in attempting to deceive the Court with false evidence of action to stop the litigation. It is yet another example of the lengths the CoC will go to outside their authority when their abuse of the troops is called out in a public forum.
90. In *Dumont v Canada*<sup>77</sup>, the Court allowed the Appellants to proceed with Charter claims in the Federal Court as section 24(1) of the Charter “commands a broad and purposive

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<sup>74</sup> Affidavit of H. Schroder, sworn Aug 3, 2023. [VLMR B1 TAB 11, p1369].

<sup>75</sup> Affidavit of S.G. Styles, sworn Sept 11, 2023, Ref Affidavit and Exhibit F [VLMR B1 TAB 31, p6117]; Affidavit of C.A.M.T. Ouellette, sworn May 29, 2023 [VLMR B1 TAB 32, p6266].

<sup>76</sup> See: Motion Record for the Defendants, Affidavit of AM De Araujo Vaina, Exhibit “K”, at AGCMR 196-207.

<sup>77</sup> *Dumont v Canada (FCA), 2003 FCA 475* [“*Dumont*”].

interpretation and that language of this provision appears to confer the widest possible discretion on a court to craft remedies for violations of Charter rights”<sup>78</sup>.

91. In *Bernath v Canada*, 2007 FC 104 (“*Bernath FC*”)<sup>79</sup>, it was held that, the grievance process could not address *Charter* issues and provide a monetary remedy for breach. In the same case, the CDS acknowledged he “lacks the authority to award monetary relief in the form of damages in a grievance proceeding under s 29”.<sup>80</sup> *Bernath v Canada*, 2007 FCA 400<sup>81</sup>, supported the findings of *Bernath FC* that the Court allowing the *Charter* claim to proceed was correct. Similarly, for the Respondents in this case, the CAF and CDS do not have the authority to make any determination that pertains to the *Charter* or to provide an effective remedy.
92. The case of *Canada (Prime Minister) v Khadr* (“*Khadr*”) makes it clear that government actors such as the Minister of National Defence, the Deputy Minister, the CDS and senior command officers are answerable to the *Constitution* of Canada and the *Charter* as “in a constitutional democracy, all government power must be exercised in accordance with the *Constitution*”.<sup>82</sup>
93. The Respondents seek recourse under section 24(1) of the Charter to provide remedy to enforce their rights and freedoms as guaranteed under the Charter. “In exercising its common law powers under the royal prerogative, the executive is not exempt from constitutional scrutiny: *Operation Dismantle v The Queen*.<sup>83</sup> It is for the executive and not the courts to decide whether and how to exercise its powers, but the courts clearly have the jurisdiction and the duty to determine whether a prerogative power asserted by the Crown does in fact exist and, if so, whether its exercise infringes the *Charter* (*Operation Dismantle*) or other constitutional norms<sup>84</sup> in *Khadr*.<sup>85</sup>

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<sup>78</sup> Dumont at para 77 (referring to *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 3 SCR 3

<sup>79</sup> *Bernath v Canada*, 2007 FC 104, [“*Bernath FC*”].

<sup>80</sup> *Bernath FC* at paras 95 and 55.

<sup>81</sup> *Bernath v Canada*, 2007 FCA 400.

<sup>82</sup> *Canada (Prime Minister) v Khadr*, 2010 SCC 3 [“*Khadr*”], at para 37.

<sup>83</sup> *Operation Dismantle v The Queen*, 1985 SCC 74

<sup>84</sup> *Air Canada v British Columbia (Attorney General)*, 1986 SCC 2.

<sup>85</sup> *Khadr*, at para 36

94. The Court is the correct jurisdiction to hear the claims of the Respondents to apply the legal tests to the Respondents *Charter* claims and decide on whether the CAF was in breach of the *Charter* rights of its members and if there is to be relief for any such breaches.

## D. PRIVACY RIGHTS

### Details of Privacy Breaches

95. The Applicants allege that the ASoC is devoid of material facts regarding the CAF Chain of Command's continuing disregard for their legal obligations related to protecting the privacy rights of CAF members. This is not an accurate assessment of the ASoC. The Respondents' ASoC and Reply to the SoD cite individual and systemic breaches that have occurred and continue to occur. In the ASoC, from paragraph 12 to 341, the individual summaries include numerous examples of both deliberate and inadvertent invasions of medical privacy experienced and witnessed by the Respondents, adding to their moral injury. In the Reply to the SoD, from paragraph 48 to 53, there is a section specifically dedicated to privacy breaches.

### Privacy Protection Responsibilities

96. In section 2 of the [Privacy Act](#) it is stated that “The purpose of this Act is to extend the present laws of Canada that protect the privacy of individuals with respect to personal information about themselves held by a government institution and that provide individuals with a right of access to that information.”<sup>86</sup> Section 3 of the *Privacy Act* and the relevant Schedule provide that DND (including the CAF) is considered to be a “government institution.”<sup>87</sup> CAF members are thus entitled to the protections conferred through the *Privacy Act*.
97. The Government of Canada’s [Directive on Privacy Impact Assessment](#) further articulates their commitment to ensure privacy protected and accounted for before any

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<sup>86</sup> *Privacy Act*, RSC, 1985, c. P-21, [“*Privacy Act*”], at s2.

<sup>87</sup> *Privacy Act*, at s3.

new policy is implemented. The Office of the Privacy Commissioner (“OPC”) confirmed that no privacy impact assessments were completed in relation to the CAF’s COVID-19 vaccination policy or any associated programs, activities or tools (inclusive of new and modified)<sup>88</sup>. The Applicants cannot show that privacy rights were respected.

### **Monitor MASS – Inappropriate Disclosure of Personal Information**

98. The Monitor MASS program was altered to track COVID-19 vaccination status, COVID-19 vaccination exemption request affidavits (and supporting religious, medical or other personal information), and COVID-19 testing attestations.
99. The CAF alleged that this data was protected by access controls and permission settings that limited visibility to members of the unit Chain of Command with a need to know.<sup>89</sup> The OPC found that Monitor MASS “had inadequate oversight to prevent unauthorized access to this personal information” and that DND declined to implement measures “to periodically ascertain that units properly review and revoke permissions that provide access to CAF [...] members’ sensitive information in Monitor-MASS where there is no longer, or never was, a need for access.”<sup>90</sup>
100. In fact, multiple instances have been documented of inappropriate access. Control and permission settings resulted in unauthorized access to Respondents’ personal information by other members outside the Chain of Command and, in many cases, outside of the unit.<sup>91</sup> At the time of vaccination status attestation, Monitor MASS was also not approved for storage of Protected B information<sup>92</sup> (e.g., medical information).<sup>93</sup>

### **Monitor MASS - Misuse of Personal Information**

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<sup>88</sup> ATIP File# OPC-A-2024-0007 / GV, Email (Confirmation of Nil Return and Agreement to Abandon) [TAB T at VLMR B2 518].

<sup>89</sup> ATIP File # A-2021-01838, pp. 11-12 and pp. 483-487, [TAB U at VLMR B2 521].

<sup>90</sup> Office of the Privacy Commissioner of Canada, *Protecting Privacy in a Pandemic*, at s3.

<sup>91</sup> DND-CAF ATIP File # P-2022-04156. [TAB V at VLMR B2 528]

<sup>92</sup> Department of Justice Guidelines on Security for Domestic Legal Agents: Protected Information and Assets.

<sup>93</sup> DND/CAF ATIP File # A-2022-01735, Response Letter – No Records RE: Monitor Mass, Approval for Protected B Information [TAB W at VLMR B2 541].

101. From October 8 to 29, 2021, CAF members were not told that their personal information, collected and uploaded to Monitor MASS, would be used to involuntarily release those unwilling to be fully vaccinated from the CAF. This was a conduct-related purpose, not a health and safety-related purpose as claimed and displayed on the Monitor MASS Splash Page during the attestation period.<sup>94</sup>
102. The first CDS Directive on CAF COVID-19 Vaccination mentioned the possibility, but not the certainty, of remedial measures. [DAOD 5019-4, Remedial Measures \(version May 28, 2021\)](#)<sup>95</sup>, referenced within the first CDS Directive, indicated that remedial measures occurred over many months. The first CDS Directive did not reference [DAOD 5019-2, Administrative Reviews \(version May 28, 2021\)](#)<sup>96</sup> or mention the administrative review process or the potential for release recommendations resulting from the administrative review process.

### **Vaccination Cards - Inappropriate Disclosure of Personal Information**

103. At CFB Edmonton, approximately one thousand medical charts were inappropriately reviewed by military members from outside the medical unit to create vaccination cards. This disclosure is not in line with the consistent uses described within [Personal Information Bank \("PIB"\) DND PPE 810, Medical Records](#)<sup>97</sup>, and was a breach of patient rights.
104. The Respondents have clearly shown that there was indeed evidence of a violation of privacy rights as determined by the *Privacy Act*. The *Privacy Act* is binding on the CAF, and the CDS, along with the CoC, would have known (or should have known through legal advice from JAG officers) that there was an egregious, deliberate violation of medical and personal information worthy of being tested in the Court.

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<sup>94</sup> Screenshot of Monitor MASS Splash Page, October 21, 2023, [TAB S at VLMR B2 517].

<sup>95</sup> [DAOD, 5019-4, Remedial Measures \(version May 28, 2021\)](#).

<sup>96</sup> [DAOD, 5019-2, Administrative Reviews \(version May 28, 2021\)](#).

<sup>97</sup> Government of Canada, [Info Source](#), at "Medical Records".

## PART IV – STATEMENT OF THE ORDER SOUGHT

105. The Respondents therefore ask this Court for an order that:

1. The motion to dismiss be dismissed;
2. In the alternative, the Respondents be allowed to proceed with their *Charter* claims;
3. In the alternative, the Respondents have leave to bring their claims on an individual basis or apply for status as a class action;
4. The Notice of Application of the Respondents be scheduled for hearing; and
5. The Respondents be granted their costs of this Motion.

### A. CONCLUSION

106. For the reasons submitted in this document, the Applicants' motion to dismiss should be denied.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 14th day of August, 2024.



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**TO:**

**His Majesty the King, et al.**  
c/o Department of Justice Canada  
Prairie Region



300, 10423 101 Street NW  
Edmonton, AB T5H 0E7

**Attention: Barry Benkendorf**

and

**Federal Court Registry**

## PART V – LIST OF AUTHORITIES

### Legislation

1. *The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11* [“*The Charter*”]
2. *Letters Patent Constituting the Office of the Governor General of Canada, 1947*
3. *Canadian Human Rights Act, RSC 1985, c H-6* [“*Human Rights Act*”]
4. *Criminal Code, RSC 1985, c C-46* [“*Criminal Code*”]
5. *Federal Courts Act, RSC 1985, c F-7*
6. *Financial Administration Act, RSC 1985, c F-11* [“*Financial Administration Act*”]
7. *Law Society Act, RSO 1990, c L.8*
8. *Privacy Act, RSC, 1985, c. P-21*, [“*Privacy Act*”].
9. *National Defence Act, RSC 1985, c N-5* [“*NDA*”]
10. *Privacy Act, RSC 1985, c P-21*
11. *Security of Information Act, RSC 1985, c O-5*
12. *Federal Courts Rules, SOR/98-106*
13. *Queen’s Regulations and Orders, c. 1, c. 4, c. 5, c. 7, c. 9, c. 15, c. 19, c. 103, c. 120, c. 124* [“*QR&O*”]
14. *Defence Administrative Orders and Directives 1000-7, Policy Framework for Military Personnel Management* [“*DAOD*”]
15. *DAOD 5012-0, Harassment Prevention and Resolution Policy*
16. *DAOD 5019-2, Administrative Review*
17. *DAOD 5019-4, Remedial Measures*
18. *DAOD 5061-1, Research Involving Human Subjects – Approval Procedures*
19. *DAOD 9005-1, Sexual Misconduct Response*
20. *A-PM-007-000/FP-001, Canadian Armed Forces Harassment Prevention and Resolution Instructions*
21. *Nuremberg Code*
22. United Nations, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (New York, 10 December 1984) [“*UNCAT*”].
23. United Nations, *International Covenant on Civil and Political Rights* (New York, 16 December 1966) [“*ICCPR*”].

### Case Law

1. *Air Canada v British Columbia (Attorney General)*, 1986 CanLII 2 (SCC), [1986] 2 SCR 539
2. *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817
3. *British Columbia (Worker’s Compensation Board) v Figliola*, 2011 SCC 52 (CanLII)
4. *Canada (Attorney General) v Power*, 2024 SCC 26 (CanLII)

5. Canada (Attorney General) v TeleZone Inc, 2010 SCC 62 (CanLII), [2010] 3 SCR 585
6. Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65 (CanLII), [2019] 4 SCR 653
7. Canada (Prime Minister) v Khadr, 2010 SCC 3 (CanLII), [2010] 1 SCR 44
8. Divito v Canada (Public Safety and Emergency Preparedness), 2013 SCC 47 (CanLII), [2013] 3 SCR 157
9. Doucet-Boudreau v Nova Scotia (Minister of Education), 2003 SCC 62 (CanLII), [2003] 3 SCR 3
10. Health Services and Support - Facilities Subsector Bargaining Assn v British Columbia, 2007 SCC 27 (CanLII), [2007] 2 SCR 391
11. Hopp v Lepp, 1980 CanLII 14 (SCC), [1980] 2 SCR 192
12. Hunt v Carey Canada Inc, 1990 CanLII 90 (SCC), [1990] 2 SCR 959
13. Odhavji Estate v Woodhouse, 2003 SCC 69 (CanLII), [2003] 3 SCR 263
14. Operation Dismantle v The Queen, 1985 CanLII 74 (SCC), [1985] 1 SCR 441
15. Reibl v Hughes, 1980 CanLII 23 (SCC), [1980] 2 SCR 880
16. R v Généreux, 1992 CanLII 117 (SCC), [1992] 1 SCR 259
17. R v Imperial Tobacco Canada Ltd, 2011 SCC 42 (CanLII), [2011] 3 SCR 45
18. R v Oakes, 1986 CanLII 46 (SCC), [1986] 1 SCR 103
19. Syndicat Northcrest v Amselem, 2004 SCC 47 (CanLII), [2004] 2 SCR 551
20. Vaughan v Canada, 2005 SCC 11 (CanLII), [2005] 1 SCR 146
21. Vivendi Canada Inc v Dell'Aniello, 2014 SCC 1 (CanLII), [2014] 1 SCR 3
22. Bernath v Canada, 2007 FCA 400 (CanLII)
23. Canada (Citizenship and Immigration) v Tennant, 2018 FCA 132 (CanLII)
24. Dumont v Canada (FCA), 2003 FCA 475 (CanLII), [2004] 3 FCR 338
25. JP Morgan Asset Management (Canada) Inc v Canada (National Revenue), 2013 FCA 250 (CanLII), [2014] 2 FCR 557
26. Bernath v Canada, 2007 FC 104 (CanLII)
27. Fortin v Canada (Attorney General), 2021 FC 1061 (CanLII)
28. Gallant v The Queen In Right of Canada, 1978 CanLII 2084 (FC)
29. Gayler v Canada (Director Personnel Careers Administration Other Ranks, National Defence Headquarters) (TD), 1994 CanLII 3544 (FC), [1995] 1 FC 801
30. Hawco v Canada (Attorney General), 1998 CanLII 7996 (FC)
31. Heyder v Canada (Attorney General), 2019 FC 1477 (CanLII)
32. Heyder v Canada (Attorney General) (10 July 2019), Ottawa T-2111-16 (FCTD) (Final Settlement Agreement)
33. Loiselle v Canada (Attorney General), 1998 CanLII 8810 (FC)
34. R v Kipling, 2002 CMAC 1 (CanLII), 6 CMAR 249
35. R v Bourque DG (Major), 2020 CM 2008 (CanLII)

## Secondary Sources

1. Global News, *The West Block, Unvaccinated soldiers put others at risk: Gen. Eyre, 18 November 2021*
2. Government of Canada, CAF DMCA 2 Aide-Memoire – CDS Directive 002 on CAF COVID-19 Vaccination Implementation of Accommodations and Administrative Action
3. Government of Canada, CDS Directive on CAF COVID-19 Vaccination
4. Government of Canada, CDS Directive 002 on CAF COVID-19 Vaccination – Implementation of Accommodations and Administrative Action
5. Government of Canada, CDS Directive 02 on CAF COVID-19 Vaccination – Implementation of Accommodations and Administrative Action – Amendment 1
6. Government of Canada, CDS Directive 003 on CAF COVID-19 Vaccination for Operations and Readiness
7. Government of Canada, Department of Justice Guidelines on Security for Domestic Legal Agents: Protected Information and Assets
8. Government of Canada, “DND/CAF at a glance”
9. Government of Canada, Info Source, at “*Medical Records*”
10. Government of Canada, MGERC COVID-19 Vaccination Policy Analysis, Annexes I to IV
11. Government of Canada, *Policy on COVID-19 Vaccination for the Core Public Administration Including the Royal Canadian Mounted Police*
12. Government of Canada, *Directive on Privacy Impact Assessment*
13. Government of Canada, *Report of the Second Independent Review Authority to The Honourable Peter G. MacKay, Minister of National Defence* [“Lesage Report”]
14. Government of Canada, *Report of the Third Independent Review Authority to the Minister of National Defence* [“Fish Report”]
15. Government of Canada, *Report of the Veterans Ombudsman October 2012*
16. Government of Canada, Surgeon General CAF Vaccine Rollout Message
17. Government of Canada, *The First Independent Review by the Right Honourable Antonio Lamer PC, CC, CD 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 1988, c 35* [“Lamer Report”]
18. Law Office of Rory G. Fowler, *Canadian Forces’ COVID-19 Vaccination Policy*
19. Law Office of Rory G Fowler, *Duties of Officers and NCMs – Part II*
20. Law Office of Rory G Fowler, *Incompetence & Intransigence in Grievance Adjudication – Part I*
21. Law Office of Rory G Fowler, *The Canadian Forces’ COVID-19 Vaccination Policy*
22. *Law Society Tribunal*
23. Office of the Privacy Commissioner of Canada, *Protecting Privacy in a Pandemic*

## APPENDIX

<b>TAB</b>	<b>Description</b>	<b>Page No.</b>
A	Amended Statement of Claim	VLMR B2 41
B	DND/CAF ATIP File # A-2023-02119: CMP 2021-0013924	VLMR B2 180
C	Grievance MG018685	VLMR B2 208
D	2024 05 28 Findings and Recommendations of MGERC	VLMR B2 212
E	Canadian Forces Administrative Orders 15-2	VLMR B2 277
F	Briefing Note to CDS – Informed consent, Chart Rights... & CHR Act	VLMR B2 314
G	DND/CAF ATIP File # A-2021-00418: Briefing Note for the CDS – COVID-19 Vaccination Requirements for the CAF dated 11 February 2021	VLMR B2 321
H	DND_CAF ATIP File A-2022-00492, CAF Surgeon General Emails at 320-327	VLMR B2 328
I	DND/CAF ATIP File # A-2022-00476, Minutes of the National Health and Safety Policy Committee Ad-Hoc Meeting Held on, August 26, 2021	VLMR B2 336
J	DND/CAF ATIP File # A-2023-02354 at Page 289	VLMR B2 342
K	Briefing Note to the CDS on COVID-10 Immunization Campaign, dated Feb 2, 2021	VLMR B2 343
L	DND/CAF ATIP File # A-2020-01532: Briefing Note for the CDS/DM - COVID-19 Vaccine Prioritization, Distribution, and Immunization dated December 4, 2020	VLMR B2 346
M	DND/CAF ATIP File # A-2021-01334: Information Note for the A/CDS / Associate DM / DM – COVID19 Vaccination and DND/CAF Workplace Safety dated 26 August 2021	VLMR B2 380
N	CAF/DND ATIP File # A-2022-01926 (OIC Final Report and Order)	VLMR B2 440
O	CAF Chaplain General, Letter – Suspension of Chaplain General Mandate Major S.W.J. Morris, 2 November 2021	VLMR B2 443
P	CF H Svcs Gp Instruction, 3100-23, <i>Medical Administration of Pregnant Members</i>	VLMR B2 446
Q	CF H Svcs Gp Instruction, 4440-20, <i>Reproductive Hazards</i>	VLMR B2 478
R	DND/CAF ATIP File # A-2021-02063, at 584-586	VLMR B2 510
S	Screenshot of Monitor Mass Splash Page, October 21, 2023	VLMR B2 517
T	ATIP File# OPC-A-2024-0007 / GV, Email (Confirmation of Nil Return and Agreement to Abandon)	VLMR B2 518
U	ATIP File A-2021-01838, Pp. 11-12 and Pp.483-487	VLMR B2 521
V	DND-CAF ATIP File # P-2022-04156	VLMR B2 528

W	DND/CAF ATIP File # A-2022-01735, Response Letter – No Records RE: Monitor Mass, Approval for Protected B Information	VLMR B2 541
X	COVID Policy in the CAF	VLMR B2 542
Y	Additional Information on CAF Operations	VLMR B2 559
Z	CAF Definitions Applicable to this Matter	VLMR B2 610