Court File No.: A-33-25

FEDERAL COURT OF APPEAL

BETWEEN:

QUALIZZA, FRANCESCO GABRIELE, AND OTHERS

Appellants

and

HIS MAJESTY THE KING IN RIGHT OF CANADA, AND OTHERS

Respondents

MEMORANDUM OF FACT AND LAW OF THE RESPONDENTS

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TABLE OF CONTENTS

PART I – FACTS

1. The Appellants have appealed[1] the decision of the Honourable Mr. Justice Manson.[2] He had denied an application for an extension of time to appeal the decision of Madam Associate Judge Coughlan (the "Coughlan Decision").[3] Associate Judge Coughlan struck the within action.

2. Justice Manson noted that while the deadline to appeal a decision of a "prothonotary" is 10 days, the motion for an extension of time was brought 29 days after the Coughlan Decision.[4]

3. Justice Manson also noted significant deficiencies in the Notice of Motion and disregarded the affidavit of counsel that was tendered in support of the Motion.[5]

4. Justice Manson then applied the four part "*Hennelly*" factors (also referred to herein as the "test") and considered the interests of justice,[6] finding that:

   a. no evidence was tendered on the question of whether there was a continuing intention to appeal and that this element of the test was therefore not met;[7]

   b. the submissions of the Applicants (Appellants) were "silent" as to the merit of the appeal and therefore this element of the test was not met;[8]

   c. although the Respondents did not assert prejudice from the delay that had occurred to date, the future actions of the Appellants were unclear; the Appellants did not attach their proposed motion record but just promised to file some sort of motion by the end of January 2025 (the motion for an extension of

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[1] Notice of Appeal, Amended Appeal Book, tab A, pages 1-13.
[2] Order of Justice Manson, Amended Appeal Book, tab B, pages 15-24.
[3] Coughlan Decision, Amended Appeal Book, tab C, pages 26-57.
[4] Order of Justice Manson, Amended Appeal Book, tab B, page 19 at para 3.
[5] Order of Justice Manson, Amended Appeal Book, tab B, pages 19, 20.
[6] *Canada (Attorney General) v Hennelly*, 1999 CanLII 8190 (FCA) ("*Hennelly*").
[7] Order of Justice Manson, Amended Appeal Book, tab B, pages 21, 22.
[8] Order of Justice Manson, Amended Appeal Book, tab B, page 22.

time was filed December 12, 2024)[9]. Consequently, the Respondents were "almost certainly going to be prejudiced" and that this part of the test was not met;[10]

d. the fourth part of the *Hennelly* test was not met as there was no reasonable explanation for the delay;[11] and,

e. ultimately, the "interests of justice do not justify the Court allowing poorly prosecuted litigation to proceed forward when there is no likelihood of success."[12]

PART II – POINTS IN ISSUE

5. What is the appropriate standard of review?

6. Was the exclusion of the solicitor's affidavit correct?

7. Was the selection of the *Hennelly* test correct?

8. Did the Court commit a palpable and overriding error in the application of the *Hennelly* test?

PART III – SUBMISSIONS

A. STANDARD OF REVIEW

9. A decision on whether to grant an extension of time is discretionary.[13] In *Spectrum Brands* this Court noted that "unless an extricable question of law can

[9] Order of Justice Manson, Amended Appeal Book, tab B, page 19, at para 3.
[10] Order of Justice Manson, Amended Appeal Book, tab B, page 23, at para 21.
[11] Order of Justice Manson, Amended Appeal Book, tab B, page 23.
[12] Order of Justice Manson, Amended Appeal Book, tab B, page 23.
[13] *Spectrum Brands Inc v Schneider Electric*, 2021 FCA 51 ("*Spectrum Brands*") at para 7; see also *Koch v Borgatti Estate*, 2022 FCA 201 ("*Koch*") at para 39.

be identified… discretionary orders made by Federal Court judges are reviewed on the palpable and overriding standard."[14]

10. This Court went on to explain that establishing a palpable and overriding error is difficult:

> [7] The Motion Judge having identified the correct legal test, we must be satisfied, in order to intervene in this case, that he committed a palpable and overriding error in applying that test to the facts that were before him. It is trite that the palpable and overriding standard of review is a "highly deferential" one, which is "not easily met". To use the oft-quoted metaphor, it is not enough, when arguing palpable and overriding error, "to pull at leaves and branches and leave the tree standing [;] [t]he entire tree must fall."[15]

11. There are two "extricable questions of law" determined by Justice Manson. The first was whether to accept the affidavit sworn by counsel.[16] The second was the selection of the *Hennelly* test.

B. IMPROPER AFFIDAVIT

12. In support of the motion for an extension of time the Applicants relied on an affidavit sworn by counsel, Ms. Christensen.[17] This offends Rule 82, which reads:

> Use of solicitor's affidavit
>
> 82 Except with leave of the Court, a solicitor shall not both depose to an affidavit and present argument to the Court based on that affidavit.

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[14] *Spectrum Brands* at para 6; see also *Koch* at para 39 and *Alberta v Canada*, 2018 FCA 83 at para 19.
[15] *Spectrum Brands* at para 7.
[16] This is a question of law: *O'Grady v Attorney General of Canada*, 2016 FCA 221, at para 2.
[17] Motion Record of the Plaintiffs, Amended Appeal Book, tab D, page 77.

13. This Rule has been held to mean that lawyers "should not provide evidence in respect of contentious matters."[18] Ms. Christensen's affidavit speaks to the steps supposedly taken in an attempt to explain the delay and is therefore evidence on a fundamental question in the motion.

14. The Appellants now agree that "affidavit evidence should generally come from a party rather than counsel."[19] They explain that the affidavit was "prepared in good faith and was not contested in its factual accuracy."[20] However, they do not provide any caselaw or authority for the proposition that providing an affidavit in "good faith" would override the clear wording of Rule 82. Indeed, such an exception would render the Rule meaningless.

15. By relying upon the clear direction of the Rule and following the caselaw, Justice Manson correctly disregarded the Affidavit.

C. THE SELECTION OF THE *HENNELLY* TEST

16. There can be no doubt that Justice Manson's selection of the four part *Hennelly* test[21] was correct. This was the test relied on by the Appellants before Justice Manson.[22] Further, the Appellants have not argued that the use or application of the test was in error. Moreover, it is trite law that this test is used in assessing motions for an extension of time.

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[18] *Toys "R" Us (Canada) Ltd v Herbs "R" Us Wellness Society*, 2020 FC 682 at paras 10-11, and *Cross-Canada Auto Body Supply (Windsor) Ltd v Hyundai Auto Canada*, 2006 FCA 133 at paras 4-5.
[19] Appellants' Memorandum of Fact and Law at para 3.
[20] Appellants' Memorandum of Fact and Law at para 3.
[21] *Hennelly*
[22] Motion Record of the Applicants, Amended Appeal Book, tab D, page 88. Note the Applicants relied upon *Muckle v Canada (Attorney General)* 2020 FC 1088, but the test is identical.

D. THE APPLICATION OF THE *HENNELLY* TEST

17. The Appellants must show that Justice Manson's application of the *Hennelly* test constituted a palpable and overriding error. They have not done so. In fact, counsel for the Appellants appears to misunderstand the purpose of an appeal.

18. Rather than pointing out areas where the Court erred or even arguing elements of the record or evidence before Justice Manson, the Appellants focus on attacking the Coughlan Decision. In fact, part of the relief sought includes setting aside the Coughlan decision, "dismissing the Respondents' motion to strike," or directing the Federal Court to "grant leave to amend the Statement of Claim."[23]

19. Instead, the focus should be on the consideration of the *Hennelly* test and how Justice Manson may have erred in his assessment. The Appellants' written submissions are essentially mute in this regard and the appeal should be dismissed on this basis alone.

20. The test for an extension of time is whether the applicant has demonstrated:

- A continuing intention to pursue his or her application;
- That the application has some merit;
- That no prejudice to the respondent arises from the delay; and,
- That a reasonable explanation for the delay exists.[24]

21. However, the failure to fulfil one of the criteria is not necessarily determinative and the overriding consideration is the interests of justice.[25]

1. Continuing Intention to Appeal

22. In arguing the test before the Court below, the Appellants' submissions were exceedingly short.[26] After setting out the *Hennelly* test, counsel's submissions consisted of 13 sentences, most of which essentially set out some facts, but do not apply them to the test.

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[23] Appellants' Memorandum of Fact and Law at para 38.
[24] *Hennelly*, at para 3.
[25] *Gambler First Nation v Ledoux,* 2020 FCA 204 at para 6.
[26] Motion Record of the Plaintiffs, Amended Appeal Book, tab D, pages 88-90.

23. Further, the only evidence put forward was the affidavit from counsel, which was properly disregarded. Moreover, as noted by Justice Manson, the affidavit is silent on the intention to appeal; there is no assertion from any of the Appellants (or even their counsel) that they always intended to appeal, just that the decision to appeal was made by December 11, 2024 (the deadline was November 23, 2024).

24. Before this Court, the Appellants also have not provided any submissions as to how this part of the test was met or how Justice Manson committed a palpable and overriding error. There is no basis to set aside Justice Manson's decision in this regard.

2. The Appeal has Some Merit

25. Virtually the entire written submissions of the Appellants before this Court focus on the "merits" of the appeal of the Coughlan Decision. However, as noted by the Court below[27] the affidavit and written submissions of the Appellants before Justice Manson were totally silent as to how that the Appeal might be successful – there simply was no argument made at all.[28] In fact, the Appellants did not even put the Coughlan Decision before Justice Manson.[29]

26. The Appellants cannot establish that Justice Manson made a palpable and overriding error in not considering an argument on the merits of the appeal when no such argument was made. It is not now open to the Appellants to make arguments on this point for the first time.

27. In the alternative, the new arguments attacking the Coughlan Decision contain a significant problem. This argument relies upon eight appendices of documents including the Amended Statement of Claim, various Directives, articles, and even the transcript of the hearing before Associate Judge Coughlan. None of

[27] Order of Justice Manson, Amended Appeal Book, tab B, page 22.
[28] Motion Record of the Plaintiffs, Amended Appeal Book, tab D, pages 88-90.
[29] Motion Record of the Plaintiffs, Amended Appeal Book, tab D, page 88-89. Note: it was provided by the Respondents.

these documents were before Justice Manson. Nor are they properly before this Court on appeal.[30]

28. The reliance upon these documents is even more problematic given the original motion before Associate Judge Coughlan was in part a motion to strike under Rule 221(1)(a). Except on issues of jurisdiction, evidence is not admissible on such a motion.[31] Further, the Appellants tried to rely upon these same sorts of documents on the motion to strike and Associate Judge Coughlan rejected them.[32]

29. In any event, as found by Justice Manson, the standard of review of the Coughlan Decision is palpable and overriding error.[33] As noted above, establishing such a standard is "not easily met."

30. It should be noted Associate Judge Coughlan found two separate bases to strike the action. The Appellants would need to convince a Justice of the Federal Court that the Coughlan Decision contains palpable and overriding errors (or errors of law) on both findings.

31. In responding to the Appellants on the second arm of the *Hennelly* test (the merits of the appeal) the Respondents will deal with each of the arguments raised. These are whether the Coughlan Decision contains a palpable and overriding error on the findings that a) the claim did not disclose a cause of action, b) the Court should not take jurisdiction over the action, and c) that the then Plaintiffs should not receive leave to appeal. These arguments are each dealt with herein in turn.

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[30] Appellants' Memorandum of Fact and Law, Appendix, page 19.
[31] *Federal Courts Rules*, SOR/98-106, rule 221(2).
[32] Coughlan Decision, Amended Appeal Book, tab C, page 33 and 34.
[33] Coughlan Decision, Amended Appeal Book, tab C, page 22, at para 17; *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology,* 2016 FCA 215, at para 79.

a. No Cause of Action

32. Associate Judge Coughlan first found that the Amended Statement of Claim did not disclose a cause of action.[34] In their written submissions before this Court, the Appellants have tacitly acknowledged the pleadings are deficient.[35] However, they have not argued how the Coughlan Decision represents a palpable and overriding error in this regard. In fact, this is the same approach they took at the hearing. As noted by Associate Judge Coughlan:

> [27] I pause to note that the Plaintiffs' written representations provide scant response to Canada's motion to strike. Much of the representations are directed at the merits of the underlying claim. At the hearing of the motion, I invited counsel for the Plaintiffs on two separate occasions to address Canada's submissions that the pleading fails to disclose a reasonable cause of action. Counsel did not avail herself of that opportunity. In consequence and as exhorted by the jurisprudence, I must read the pleading as generously as possible and not fasten onto matters of form to strike the pleading. To that end, I have undertaken a thorough review of the pleading with a view to addressing if not all of the potential causes of action, at least the majority.[36]

33. Consequently, the Appellants did not provide any real argument to Associate Judge Coughlan on why the Amended Statement of Claim disclosed a cause of action. They then failed to provide any argument to Justice Manson on why the Coughlan Decision was in error in finding there was no cause of action. Now before this Court, they have not argued how Justice Manson was in error in finding the second part of the *Hennelly* test was not met.

34. In the circumstances, there is simply no basis to find there is any merit to the Appeal in relation to the finding that the Amended Statement of Claim did not disclose a cause of action. This alone is sufficient to establish that the second part of the *Hennelly* test was not met.

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[34] Coughlan Decision, Amended Appeal Book, tab C, pages 34-45.
[35] Appellants' Memorandum of Fact and Law, page 15, para 36.
[36] Coughlan Decision, Amended Appeal Book, tab C, pages 36-37 at para 27.

b. No Jurisdiction

35. Aside from the lack of a cause of action, Associate Judge Coughlan found in the alternative that the Plaintiffs were obliged to follow the grievance process and that the Court should not exercise its residual jurisdiction over the action.[37]

36. Despite making no argument on the topic before Justice Manson as part of their submissions on the *Hennelly* test, the Appellants now argue "their inability to access judicial review or obtain constitutional remedies through [the grievance] system."[38]

37. In dealing with this argument, the Respondents again point out that the record before this Court is inadequate and the result is prejudicial to them. For example, as noted in the Coughlan Decision, the Applicants (now Respondents) relied upon an affidavit from Ann-Marie De Araujo Viana on the issue of jurisdiction.[39] That affidavit is not before this Court and cannot be relied upon to show that the Military Grievance External Committee and the Chief of the Defence Staff have both dealt with the constitutionality of the Covid 19 Directives.

38. In any event the Appellants' arguments are without merit. The grievance system under the *National Defence Act* (the "*NDA*") is broadly worded to capture the widest range of issues, which provides members the opportunity to seek redress for just about any issue which may arise during military service. The comprehensive scope of the grievance procedure under section 29 of the *NDA* has been described as one that:

> [a]ccommodates any and every wording, phrasing, expression of injustice, unfairness, discrimination, what-not. It covers everything. It leaves nothing out. It's exhaustively comprehensive […] there is no equivalent provision in any other statute of Canada in terms of the scope of the wrongs, real,

[37] Coughlan Decision, Amended Appeal Book, tab C, pages 46-49.
[38] Appellants' Memorandum of Fact and Law, page 8.
[39] Coughlan Decision, Amended Appeal Book, tab C, page 46 at paras 59-60.

> alleged, imagined wrongs that a person can get redress for, for anything. That is the difference between the civilian and the military person.[40]

39. Further, the Supreme Court of Canada has determined that tribunals may determine *Charter* complaints through the grievance process.[41] The Court stated the tribunals could do so provided they have jurisdiction through the parties, the subject matter of the dispute, and are empowered to make the orders sought.[42]

40. The Appellants rely on *Bernath*[43] for the notion that the grievance process is inadequate.[44] The reliance here is misplaced. In *Kleckner*[45] the Ontario Superior Court noted that since *Bernath* "the terrain has now changed."[46]

41. The Court went on to cite *Moodie,*[47] which distinguished *Bernath* given that the plaintiff had not exhausted the grievance process:

> [37] In my view, *Bernath* is distinguishable from the case at bar as the grievance procedure in that instance had been completed but was unable to provide the remedy which the plaintiff was seeking. Here, the applicant 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.

42. The Appellants here, like in *Kleckner* and *Moodie*, and more recently in *Dunn*[48] and *Doucette*[49] have not exhausted the grievance process. Like these decisions,

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[40] *Jones v Canada*, (1994) 87 FTR 190, paras 9, 10; cited in *Fortin,* at paras 25-26; *Jones v Canada (Chief of Defence Staff)* 2022 FC 1106 at para 21, ["*Jones*"].
[41] *Weber v Ontario Hydro,* 1995 CanLII 108 (SCC), [1995] 2 SCR 929 at para 60 – 66 ["*Weber*"]; *Canada v Greenwood*, 2021 FCA 186 at para 23 ["*Greenwood*"].
[42] *Weber* at para 66.
[43] *Bernath v Canada,* 2007 FC 104.
[44] Appellants' Memorandum of Fact and Law, pages 8-9.
[45] *Kleckner v Canada (AG)*, 2014 ONSC 322, ["*Kleckner*"].
[46] *Kleckner* at para 51.
[47] *Moodie v Canada (National Defence)*, 2008 FC 1233, at para 37.
[48] *Dunn v Canada (AG),* 2025 FC 652 at paras 138-140.
[49] *Doucette c Canada* (AG), 2018 CF 697 at para 28.

the finding of Associate Judge Coughlan that they were obliged to do so rather than coming to the court did not amount to a palpable and overriding error.

43. The Appellants also assert they are "in procedural limbo" and cannot proceed with judicial review.[50] However, this problem is of their own making. Any outstanding grievance filed by the Appellants is now being delayed due to the presence of the action; once the Appellants filed an action in Federal Court, their grievances have been suspended in accordance with QR&O 7.27(1).[51] They will remain suspended for as long as this action and appeal exist.

44. The Appellants also argue about the adequacy of the grievance process. In doing so they rely on the so-called *Fish Report*, which was not properly before Associate Judge Coughlan and is not properly before this Court.

45. They also rely on *Thomas*.[52] *Thomas* is a proposed class action involving claims that those with mental health issues were stigmatised while in the Canadian Armed Forces. Mr. Justice Zinn noted that the plaintiff had adduced evidence on the shortfalls of the grievance system in the circumstances, including that the system itself was part of the allegations. In the within action, which deals with those members who complain about the vaccine directives, no evidence was led by the Appellants.

46. The within action is an attack on the decision to establish a vaccine policy, to take administrative steps pursuant to that policy, and the potential (or actual) release from service. The Appellants' claims about the administrative process of implementing the vaccine mandate are central to their military service and are ideally managed through the grievance system. In the Amended Statement of Claim, none of the Appellants have alleged that the grievance process is the basis for their claim. Unlike the current finding in *Thomas*, there are no "exceptional

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[50] Appellants' Memorandum of Fact and Law, page 10, at para 22.
[51] *Queen's Regulations & Orders (QR&O)* Volume I – Chapter 7 Grievances 7.27(1).
[52] *Thomas v Canada (AG)*, 2024 FC 655, ["*Thomas*"]. It should be noted that *Thomas* was appealed (A-178-24) and the appeal was heard on April 1, 2025.

circumstances warranting the Court's residual discretion to exercise jurisdiction."[53]

47. The Appellants also state that "over 230 Appellants could not file grievances within the 3-month regulatory deadline."[54] They cite an allegation in the Notice of Appeal as proof of this. This is not evidence. In any event, the fact that an Appellant has not filed a grievance is not a basis to grant the Court jurisdiction. "To conclude otherwise would circumvent the intent of Parliament in establishing the …grievance process."[55]

c. Amendment

48. The Appellants also state that they should have been allowed to amend their pleadings. However, there are several reasons why this argument has no basis, including:

a) as noted by Associate Judge Coughlan, the "pervasive absence of material facts throughout the pleading is not a flaw that can be addressed by amendment;"[56]

b) she also noted that as the Court should not take jurisdiction, leave should not be granted;[57]

c) the Appellants never made this argument before Justice Manson; and,

d) there is no evidence before this Court that the Appellants ever sought, in any way, at any stage, to amend their pleadings. There was no motion, and no proposed amendments provided. In fact, to the extent that the transcript from the hearing before Associate Judge Coughlan is properly before this Court,

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[53] *Thomas* at para 32.
[54] Appellants' Memorandum of Fact and Law, page 13, at para 30.
[55] *Veltri v Department of National Defence Canada* dated January 4, 2018 T-1400-17 at paras 11-17**, [TAB A]**; *MacLellan v Canada*, 2014 NSSC 280 at para 50 citing *Lazar v Canada,* (1999) 168 FTR 11 at para 18 aff'd 2001 FCA 124; *Mugabo v His Majesty the King* dated March 23, 2023, T-922-21 at paras 14 and 18, **[TAB B].**
[56] Coughlan Decision, Amended Appeal Book, tab C, page 46 at para 57.
[57] Coughlan Decision, Amended Appeal Book, tab C, page 46 at para 57.

counsel for the Appellants never once mentioned the possibility of amending the pleadings in her submissions.[58]

d. Conclusion on the "Merits"

49. Overall, with respect to the so called "merits" of the appeal, the Appellants have not demonstrated a palpable and overriding error in Justice Manson's decision. This aspect of the *Hennelly* test is not met.

3. No Prejudice

50. The Appellants have made a bare statement to this Court about the lack of prejudice.[59] The Appellants make no argument on how Justice Manson's decision in this regard was in error.

51. In written submissions before Justice Manson the Appellants stated "the necessary documents for the Appeal require leave for a requested extension and provide the full motion record for an Appeal by January 31, 2025."[60] The submissions did not explain why the Appellants could not provide their motion record at the time of the request for an extension of time or what a "full motion record for an Appeal" would consist of.

52. In other words, the Appellants did not seek an extension of time to proceed with filing a motion record for an appeal immediately, but instead for some kind of "full" motion record by the end of January 2025. This was an additional six weeks from the date of the motion (December 12, 2024) and two and half months from the date of the Coughlan Decision (November 13, 2024).

53. Justice Manson made no error, let alone a palpable and overriding one, when he determined the Respondents would be prejudiced.

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[58] Appellants' Memorandum of Fact and Law, Appendix, Tab 8.
[59] Appellants' Memorandum of Fact and Law, page 3 at para 4.
[60] Motion Record of the Plaintiffs, Amended Appeal Book, tab D, page 89 at para 13.

4. Reasonable Explanation for the Delay

54. The Appellants also have made no argument as to how Justice Manson's decision on this aspect of the test contained a palpable and overriding error.

55. Having determined that the solicitor's affidavit was inadmissible Justice Manson properly found there was no evidence to explain the delay. He noted that even if he considered the affidavit, it did not explain the delay.[61]

56. The timeline under Rule 51 is tight. Presumably at least one of the Appellants could have been contacted within the 10 days to obtain instructions to file an appeal. Alternatively, counsel could have filed the appeal within the 10 days as a protective step and then discontinued the motion before the Respondents incurred any costs. There was simply no need to speak to each of the Appellants individually.

57. Further, as noted by Justice Manson,[62] there was no reasonable explanation for what the Applicants intended to do. If they intended on filing an appeal it made no sense that this would wait until January 31, 2025. This delay was clearly unreasonable. Justice Manson's decision in this regard contains no palpable and overriding error.

5. Interests of Justice

58. As is the constant theme in this matter, the Appellants made no submissions with respect to the overall justice of the matter before Justice Manson. Other than a bald assertion that the appeal needs to be heard on the merits,[63] they also have not made any submissions on this aspect of the test to this Court.

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[61] Order of Justice Manson, Amended Appeal Book, tab B, page 23 at paras 22 and 23.
[62] Order of Justice Manson, Amended Appeal Book, tab B, page 23 at para 23.
[63] Appellants' Memorandum of Fact and Law, page 4 at para 6.

59. Justice Manson found the interests of justice do not justify the Court "allowing poorly prosecuted litigation to proceed forward when there is no likelihood of success."[64]

60. The finding that the litigation has been poorly prosecuted is well-founded. The Amended Statement of Claim is poorly drafted and does not disclose a cause of action. The Appellants missed the appeal deadline. Moreover, counsel for the Appellants has consistently failed to comply with the *Federal Courts Rules* and does not make argument on the issues at hand. Granting an extension of time to continue this deficiently managed litigation, especially given the alternate recourse of the grievance system, is not in the interests of justice.

E. CONCLUSION

61. The Appellants did not make the necessary arguments about the elements of the *Hennelly* test before this Court or the Court below. They continue to ignore the elements of the test for a motion for an extension of time, or what is necessary to establish on appeal. Rather, they seek to re-argue the merits of their struck action, based largely on inadmissible documents.

62. There is simply no basis for this Court to set aside Justice Manson's discretionary decision.

[64] Order of Justice Manson, Amended Appeal Book, tab B, page 23 at para 24.

PART IV – ORDER SOUGHT

63. The Appeal should be dismissed with costs against the Appellants

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED this 19th day of June 2025 in the City of Edmonton, in the Province of Alberta.

DEPARTMENT OF JUSTICE CANADA

Per: Barry Benkendorf

Counsel for the Respondents

LIST OF AUTHORITIES

Statues and Regulations

1. *Federal Courts Rules*, SOR/98-106.
2. *Queen's Regulations & Orders (QR&O)* Volume I – Chapter 7 Grievances.

Case Law

3. *Alberta v Canada* 2018 FCA 83.
4. *Bernath v Canada,* 2007 FC 104.
5. *Canada (AG) v Hennelly*, 1999 CanLII 8190 (FCA).
6. *Canada v Greenwood*, 2021 FCA 186 (CanLII), [2021] 4 FCR 635.
7. *Cross-Canada Auto Body Supply (Windsor) Ltd v Hyundai Auto Canada*, 2006 FCA 133.
8. *Doucette c Canada* (AG), 2018 CF 697.
9. *Dunn v Canada (AG),* 2025 FC 652.
10. *Gambler First Nation v Ledoux,* 2020 FCA 204.
11. *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology,* 2016 FCA 215.
12. *Jones v Canada (Chief of Defence Staff)* 2022 FC 1106.
13. *Jones v Canada*, (1994) 87 FTR 190.
14. *Kleckner v Canada (AG)*, 2014 ONSC 322.
15. *Koch v Borgatti Estate* 2022 FCA 201 ("*Koch*").
16. *Lazar v Canada,* (1999) 168 FTR 11.
17. *MacLellan v. Canada*, 2014 NSSC 280.
18. *Moodie v Canada (National Defence)*, 2008 FC 1233.

19. *Muckle v Canada (AG)* 2020 FC 1088.

20. *O'Grady v Attorney General of Canada* 2016 FCA 221.

21. *Spectrum Brands Inc v Schneider Electric* 2021 FCA 51.

22. *Thomas v Canada (AG)*, 2024 FC 655.

23. *Toys "R" Us (Canada) Ltd v Herbs "R" Us Wellness Society*, 2020 FC 682.

24. *Weber v Ontario Hydro,* 1995 CanLII 108 (SCC), [1995] 2 SCR 929.

APPENDIX

TAB A	*Veltri v Department of National Defence Canada* dated January 4, 2018 T-1400-17.
TAB B	*Mugabo v His Majesty the King* dated March 23, 2023, T-922-21.

TAB A

Federal Court  Cour fédérale

Date: 20180104

Docket: T-1400-17

Ottawa, Ontario, January 4, 2018

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

JESSE STEPHEN NICHOLAS VELTRI

Plaintiff

and

DEPARTMENT OF NATIONAL DEFENCE
CANADA

Defendant

ORDER

[1] The Court is being asked, on a motion in writing by the Defendant under rule 221 of the *Federal Courts Rules*, SOR/98-106 [the Rules], to strike the Plaintiff's Statement of Claim, without leave to amend.

[2] The Plaintiff, a former member of the Canadian Armed Forces [CAF], is claiming $30 million in damages for (i) loss of income and job stability, (ii) pain, suffering and mental distress and (iii) punitive damages. He also seeks declaratory relief on the basis of the CAF's alleged

violation of his equality rights under section 15 of the *Canadian Charter of Rights and Freedoms* [Charter].

[3] At its core, the Plaintiff's action appears to relate to the alleged denial of career progression while the Plaintiff was a member of the CAF and of employment opportunities when he left the CAF after having been released for medical reasons allegedly related to a major depressive disorder exacerbated by alcohol and drug abuse. It was filed about five years after the Plaintiff's release from the CAF.

[4] The Defendant claims that the Plaintiff's Statement of Claim, even with a generous reading, fails to advance any type of cause of action as there is no clear allegation of wrongful conduct on the part of the CAF, making it impossible thereby to properly respond to said Statement of Claim and for the Court to properly regulate this proceeding. The same goes, it says, for the Plaintiff's *Charter* claim, which is bereft of any material facts. The Defendant further contends that a pleading consisting entirely of alleged, incoherent facts, none of which correlate to a reasonable cause of action, as is the case here, is scandalous, frivolous and vexatious and ought, as a result, be struck. Finally, the Defendant submits that the Plaintiff's action is, in any event, an abuse of process as the Plaintiff has failed to exhaust alternate administrative remedies available to him under the *National Defense Act* [the Act], RSC 1985, c N-5 [the Act] before commencing his action before the Court.

[5] In response to the Defendant's motion, the Plaintiff, who is representing himself, claims that the only administrative remedy available to him as a former member of the CAF is to file a complaint with the Canadian Forces Ombudsman and reiterates that he was unjustifiably denied

occupational transfers while with the CAF and that, since his release from the CAF, he has been unable to obtain employment as his release documents indicate that he was an alcohol and cannabis abuser. He objects though, stating that he was never convicted of a civilian or military charge for alcohol or drug abuse.

[6] Rule 221 of the Rules allows the Court to strike a statement of claim where, among other things, it discloses no reasonable cause of action; it is scandalous, frivolous or vexatious, or it is otherwise an abuse of the process of the Court.

[7] The test applicable on a motion to strike for not disclosing a reasonable cause of action is well known: a claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action or, to put it another way, that it has no reasonable prospect of success (*R v Imperial Tobacco Canada Ltd*, [2011] 3 SCR 45, at para 17 [*Imperial Tobacco*]; *Hunt v Carey Canada Inc*., [1990] 2 SCR 959, at p 980; *Sivak v Canada*, 2012 FC 272, at para 15).

[8] While the Statement of Claim must be read as generously as possible with a view to accommodating any inadequacies due to drafting deficiencies (*Operation Dismantle v The Queen*, [1985] 1 SCR 441, at p 451), it is incumbent on the claimant to clearly plead the facts at the basis of his or her claim. Failure to do so may be fatal to the proceeding at hand. This is so because pleadings “play an important role in providing notice and defining the issues to be tried” so that the Court and the opposing party are not “left to speculate as to how the facts might be

variously arranged to support various causes of action" (*Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 at para 16 [*Mancuso*]).

[9] In other words, a claimant who fails to tell the defendant "who, when, where, how and what gave rise to its liability" and to define the issues with sufficient precision to make the trial process both manageable and fair is at risk of being told by the Court, on a motion to strike, that his or her statement of claim discloses no reasonable cause of action or is otherwise scandalous, frivolous or vexatious (*Mancuso* at paras 18-19). These requirements are no different when it comes to allegations of *Charter* infringement (*Mancuso* at paras 21).

[10] Here, as contended by the Defendant, there are indeed some serious issues with the sufficiency of the Plaintiff's pleadings, especially with respect to the *Charter* allegations where no facts that could support such a claim are pleaded.

[11] However, in my view, the main flaw with the Plaintiff's action is the Plaintiff's failure to resort to - and exhaust - all the administrative remedies available to him under section 29 of the Act before commencing the present action. This failure constitutes an abuse of process within the meaning of rule 221(1)(f) of the Rules. Indeed, this Court has repeatedly held that a party must exhaust the administrative procedures available to them, such as the grievance process available under section 29 the Act, before they may seek redress from this Court. (*Sandiford v Canada*, 2007 FC 225, at paras 26, 28-29, and 34 [*Sandiford*]; *Graham v Canada*, 2007 FC 210 at paras 19, 22, 23 [*Graham*]; *Moodie v Canada (National Defence)*, 2010 FCA 6, at paras 5- 6 [*Moodie*]).

[12] Section 29 of the Act provides for a comprehensive grievance system permitting the filing of a grievance in relation to any decision, act, or omission in the administration of the affairs of the CAF for which no other redress process is provided under the Act. That provision reads as follows:

Grievances	**Griefs**
Right to grieve	**Droit de déposer des griefs**
29 (1) An officer or non-commissioned member who has been aggrieved by any decision, act or omission in the administration of the affairs of the Canadian Forces for which no other process for redress is provided under this Act is entitled to submit a grievance.	29 (1) Tout officier ou militaire du rang qui s'estime lésé par une décision, un acte ou une omission dans les affaires des Forces canadiennes a le droit de déposer un grief dans le cas où aucun autre recours de réparation ne lui est ouvert sous le régime de la présente loi.
Exceptions	**Exceptions**
(2) There is no right to grieve in respect of	(2) Ne peuvent toutefois faire l'objet d'un grief :
(a) a decision of a court martial or the Court Martial Appeal Court;	a) les décisions d'une cour martiale ou de la Cour d'appel de la cour martiale;
(b) a decision of a board, commission, court or tribunal established other than under this Act; or	b) les décisions d'un tribunal, office ou organisme créé en vertu d'une autre loi;
(c) a matter or case prescribed by the Governor in Council in regulations.	c) les questions ou les cas exclus par règlement du gouverneur en conseil.
Military judges	**Juge militaire**
(2.1) A military judge may not submit a grievance in respect of a matter that is related to the exercise of his or her judicial	(2.1) Le juge militaire ne peut déposer un grief à l'égard d'une question liée à l'exercice

duties.	de ses fonctions judiciaires.
Manner and conditions	**Modalités de présentation**
(3) A grievance must be submitted in the manner and in accordance with the conditions prescribed in regulations made by the Governor in Council.	(3) Les griefs sont déposés selon les modalités et conditions fixées par règlement du gouverneur en conseil.
No penalty for grievance	**Aucune sanction**
(4) An officer or non-commissioned member may not be penalized for exercising the right to submit a grievance.	(4) Le dépôt d'un grief ne doit entraîner aucune sanction contre le plaignant.
Correction of error	**Correction d'erreur**
(5) Notwithstanding subsection (4), any error discovered as a result of an investigation of a grievance may be corrected, even if correction of the error would have an adverse effect on the officer or non-commissioned member.	(5) Par dérogation au paragraphe (4), toute erreur qui est découverte à la suite d'une enquête sur un grief peut être corrigée, même si la mesure corrective peut avoir un effet défavorable sur le plaignant.

[13] This grievance procedure has been described by the Court as the "broadest possible" and as "exhaustively comprehensive" (*Jones v Canada*, (1994) 87 FTR 190, 1994 CarswellNat 770 at para 9 [*Jones*]) and it has been consistently held to constitute an adequate alternative remedy that must be exhausted before an individual can turn to the Courts for redress (*Jones*, at paras 9-10; *Sandiford* at para 26; *Gallant v Canada* (1978), 91 DLR (3d) 695, [1978] FC.J No 1122 (FCTD), at paras 6-7; *Pilon v Canada* (1996), 119 FTR 269 (TD), 23 CCEL (2d) 267, 1996 CarswellNat 1698, at para 8; *Villeneuve v Canada* (1997), 130 FTR 134 (T.D.), 71 ACWS (3d) 669, 1997 CarswellNat 880 at paras 4-5; *Haswell v Canada (Attorney General)* (1998), 56 OTC 143 (Gen. Div), 77 ACWS (3d) 541 aff'd. (1998), 116 OAC 395 (CA), 1998 CarswellOnt 668 at

para 11;.*Anderson v Canada (Op. Officer, Fourth Maritime Op. Group)* (C.A.) (1996), [1997] 1 FC 273, 141 D.L.R. (4th) 54, at p 57; and *Chisholm v Canada (Attorney General)*, 2003 FCT 387, 231 FTR 155, at para 9 [*Chisholm*]).

[14] In the present case, there is no doubt that the Plaintiff had access to the grievance process available to him under section 29 of the Act for both his career progression issues with the CAF and for the issues related to his release from the CAF, and that he was required, as a result, to exhaust his remedies under this process before seeking redress from this Court. Those issues are all service-related issues coming within the purview of section 29 of the Act (*Chisholm*, at para 1; *Chua v Canada (Attorney General)*, 2014 FC 285, at para 4; *Graham*, at para 5; *Jones*, at para 10; *Moodie*, at para 5; *Sandiford*, at paras 2 and 31).

[15] The Plaintiff's allegations that since being released form the CAF, he has lost his house as well as custody of his son and continues to be plagued with mental health and addiction issues are all consequences of events which, according to his Statement of Claim, allegedly occurred while he was a member of the CAF. Again, any cause of action arising out of the Plaintiff's Statement of Claim, assuming there is one, is entirely service-related and was therefore subject to the grievance process established under section 29 of the Act.

[16] As there is nothing on file which would permit me to conclude that the Plaintiff has made any attempt at accessing the administrative remedies available to him with regards to his claim prior to seeking redress from this Court, I must conclude that his action is an abuse of the process of the Court. The fact that the Plaintiff is out of time to take advantage of these remedies or that his only administrative recourse at this point in time is to address a complaint to the CAF

Ombudsman, which, I assume, the Plaintiff considers not to be an adequate alternative remedy, is of no assistance to him.

[17] The fact that the Plaintiff did not pursue an available form of redress within the stipulated delays does not give him the right to now ask for redress from this Court. To conclude otherwise would circumvent the intent of Parliament in establishing the Act's grievance process (*Sandiford* at para 34). It is settled law that when Parliament creates a grievance process to address decisions made in an administrative context, this Court should not intervene until that process has been exhausted. A plaintiff's failure to pursue the remedies available through such process does not change that (*Lazar v Canada (Procureur Général)*, [1999] FCJ No 553 (QL) at paras 22-23; *Graham* at para 19). In other words, a plaintiff, whether it is a conscious choice or not, is not entitled to sit on a right and allow it to expire in order to avoid having to pursue his administrative remedies and seek redress instead directly from the Court (*Chisholm*, at para 14).

[18] This is the situation the Plaintiff finds himself in in this case with the result that he is not entitled, at this point in time at least, to seek redress from this Court for service-related incidents however damaging these incidents might have been for him.

[19] Therefore, the Plaintiff's Statement of Claim will be struck as being an abuse of the process of the Court. It will be struck without leave to amend as I am satisfied that its defects are beyond redemption and cannot be cured, as a result, by amendment (*Simon v Canada*, 2011 FCA 6, at para 8).

THIS COURT ORDERS that:

1. The Motion is granted;

2. The Statement of Claim be struck out; without leave to amend; and

3. Costs on this motion are awarded to the Defendant.

"René LeBlanc"
Judge

TAB B

Federal Court  Cour fédérale

Date: 20230323

Docket: T-922-21

Edmonton, Alberta, March 23, 2023

PRESENT: Madam Associate Judge Catherine A. Coughlan

BETWEEN:

DAVID MUGABO

Plaintiff

and

HIS MAJESTY THE KING

Defendant

ORDER

I. Overview

[1] This is a motion brought on behalf of the Defendant, His Majesty the King (Crown), dated January 23, 2023, in writing pursuant to Rule 369 of the *Federal Courts Rules*, SOR/98-106 as amended [*Rules*], for an order pursuant to Rule 221(1) of the *Rules*, striking out the Statement of Claim (Claim) in its entirety without leave to amend, and amending the style of cause.

[2] The Plaintiff's Claim alleges that while he was attending Basic Military Qualification (BMQ) Module 2 training at HMCS Chippawa in Winnipeg, Manitoba, he was subjected to "racial discrimination, harassment, intimidation, and degrading treatment." The Plaintiff seeks

$400,000.00 as punitive and aggravated damages for physical or emotional trauma alleged to be perpetrated by the Canadian Armed Forces (CAF) and Crown servants.

[3] For the reasons that follow, I conclude that the Claim must be struck without leave to amend.

II. Defendant's Position

[4] The Crown submits the Claim should be struck out as an abuse of process because the essence of the Plaintiff's Claim relates to a military grievance involving events arising in the workplace. As such, the Crown says the Plaintiff was required to avail himself of the comprehensive grievance process provided by section 29 of the *National Defence Act*, RSC 1985 c. N-5 [Act]. Relying on a long line of jurisprudence in this Court, the Crown argues that since the Plaintiff failed to utilize the statutory grievance scheme available, the Court should decline to exercise jurisdiction over the Claim: (*Sandiford v Canada*, 2007 FC 225 at paras 26, 28-29, [*Sandiford*]; *Graham v Canada*, 2007 FC 210 at paras 19, 22, 23 [*Graham*]; *Moodie v Canada (National Defence*), 2010 FCA 6 at paras 5-6 [*Moodie*]); *Veltri v The Department of National Defence*, unpublished, January 4, 2018 at para 18 [*Veltri*] (Federal Court File No. T-1400-17).

[5] Alternatively, the Crown says the claim for damages may be barred by section 9 of the *Crown Liability and Proceedings Act*, RSC 1985 c. C-50 and the action should be stayed until the Plaintiff makes an application for a pension under the *Veterans Well-being Act*, SC 2005, c-21 and that application is determined.

[6] In support of its position, the Crown filed the affidavit of William Hall, sworn January 19, 2023. Mr. Hall, a Paralegal with the Department of National Defence, deposed that he spoke with William Bolen, an Agent Supervisor with the office of the Director General Conflict Prevention and Resolution. Mr. Bolen advised Mr. Hall that he spoke with the Plaintiff, in respect of the matters in the Claim and whether the Plaintiff would like to file a grievance or a harassment complaint. Mr. Bolen advised Mr. Hall that the Plaintiff did not elect to do either to his knowledge and that he could not locate a grievance from the Plaintiff. Mr. Bolen also confirmed that the Plaintiff is a non-commissioned member of the CAF.

[7] Mr. Hall's affidavit exhibits the Defence Administrative Orders and Directives (DAOD) #2017-0, Military Grievances #2017-0 which sets the policy direction and responsibilities regarding the military grievance process established in the CAF pursuant to ss. 29(1) of the Act and DAOD #2017-1, which is the Military Grievance Process. Also attached as an exhibit is the Harassment Prevention and Resolution Process which provides the process by which harassment complaints are to be treated in the CAF.

III. Plaintiff's Position

[8] The Plaintiff advances a number of arguments to support this Court taking jurisdiction of his Claim. First, he says the training staff at HMCS Chippawa acted in their capacity as public servants when they breached his section 12 and 15 *Canadian Charter of Rights and Freedoms* [*Charter*] rights. As such he says that it is not accurate to say that the grievance process is the only recourse available to him. Second, he argues that the Federal Court has jurisdiction to address allegations of *Charter* breaches. Third, he asserts that the grievance process does not have

jurisdiction to award punitive and aggravated damages to CAF members who have experienced racial and gender discrimination, sexual misconduct and other unwanted behaviours that violate the *Charter*.

[9] Further, the Plaintiff says that he elected not to seek redress through the grievance process because the process has failed to eradicate systemic racism within the CAF ranks, in part, because "the individuals who conduct the CAF [grievance] process [lack] the training, expertise, resources and the capacity to assess and compensate CAF members who [experience] systemic racism and discrimination, and other unwanted behaviours that are outlawed by the Canadian Charter of Rights and Freedoms, and the National Defence Act." The Plaintiff asserts that electing not to utilize the grievance process is a constitutional right that cannot be taken away by the court, the government or the CAF.

[10] Finally, the Plaintiff argues that the Crown has failed to cite any cases in which the grievance process was able to settle and appropriately compensate current or former CAF members who experienced abuses to demonstrate that the grievance process constitutes an adequate alternative remedy that must be exhausted before an individual can turn to the Court for redress.

IV. Legal Framework

[11] At this juncture, it is useful to review the legal principles that inform a motion to strike in these particular circumstances.

[12] The tests on a motion to strike are well-known. To be struck, the statement of claim must be bereft of any chance of success or otherwise fails to disclose a reasonable cause of action. Put

another way, assuming the facts as stated to be true, is it "plain and obvious" that the claim discloses no reasonable cause of action and is certain to fail? See *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42, [2011] 3 SCR 45; *Hunt v Carey Canada Inc*, [1990] 2 SCR 959 at p. 980; *Canada v Greenwood*, 2021 FCA 186 at para 91 [*Greenwood*].

[13] Further, Rule 221(f) of the *Rules* permits the Court to strike out a statement of claim at any time on the ground that it is an abuse of process of the Court. The Court's authority to strike for abuse of process stems from its plenary power to redress abuses of its processes: see *Mazhero v Fox*, 2014 FCA 219.

[14] Where Parliament has created a comprehensive scheme for addressing labour disputes that scheme should not be jeopardized by permitting access to the courts: *Vaughan v Canada*, 2005 SCC 11, [2005] 1 SCR 146 at para 39 [*Vaughan*]. In such circumstances, the court should decline jurisdiction and defer to the statutory grievance scheme: *Vaughan* at para 2. Claims that ought to have been addressed through a statutory grievance process can be struck as an abuse of process and as having no prospect of success: *Sandiford* at para 34.

[15] While evidence is not generally admissible on a motion to strike on the basis of failing to disclose a reasonable cause of action, it may be admitted where a jurisdictional question is raised. Evidence as to the nature and efficacy of the statutory alternate process may be necessary to provide a basis for the Court's determination of whether it ought to decline jurisdiction in favour of the alternate administrative remedies: *Greenwood* at paras 95-96).

[16] However, as Madam Associate Judge Tabib held in *Murphy v Canada (Attorney General)*, 2022 FC 146, before determining whether to exercise any discretion to consider a proceeding, the Court must first be satisfied that the grievance process is not available and would not provide any remedy (at para 32, citing *Public Service Alliance of Canada v Canada (Attorney General)*, 2020 FC 481). Further, once it is established that a person has recourse to a statutory grievance scheme, that party has the onus to establish that the procedure is clearly not available: *Lebrasseur v Canada*, 2007 FCA 330 at para 19 [*Lebrasseur*].

V. Analysis

[17] Section 29 of the Act provides for a comprehensive system which permits the filing of grievances in respect of any decision, act, or omission in the administration of the affairs of the CAF for which no other redress process is provided under the Act: *Veltri* at para 12. That provision reads as follows:

Grievances	**Griefs**
Right to grieve	**Droit de déposer des griefs**
29 (1) An officer or non-commissioned member who has been aggrieved by any decision, act or omission in the administration of the affairs of the Canadian Forces for which no other process for redress is provided under this Act is entitled to submit a grievance.	29 (1) Tout officier ou militaire du rang qui s'estime lésé par une décision, un acte ou une omission dans les affaires des Forces canadiennes a le droit de déposer un grief dans le cas où aucun autre recours de réparation ne lui est ouvert sous le régime de la présente loi.
Exceptions	**Exceptions**
(2) There is no right to grieve in respect of	(2) Ne peuvent toutefois faire l'objet d'un grief :

(a) a decision of a court martial or the Court Martial Appeal Court;

a) les décisions d'une cour martiale ou de la Cour d'appel de la cour martiale;

(b) a decision of a board, commission, court or tribunal established other than under this Act; or

b) les décisions d'un tribunal, office ou organisme créé en vertu d'une autre loi;

(c) a matter or case prescribed by the Governor in Council in regulations.

c) les questions ou les cas exclus par règlement du gouverneur en conseil.

Military judges

(2.1) A military judge may not submit a grievance in respect of a matter that is related to the exercise of his or her judicial duties.

Juge militaire

(2.1) Le juge militaire ne peut déposer un grief à l'égard d'une question liée à l'exercice de ses fonctions judiciaires.

Manner and conditions

(3) A grievance must be submitted in the manner and in accordance with the conditions prescribed in regulations made by the Governor in Council.

Modalités de présentation

(3) Les griefs sont déposés selon les modalités et conditions fixées par règlement du gouverneur en conseil.

No penalty for grievance

(4) An officer or non-commissioned member may not be penalized for exercising the right to submit a grievance.

Aucune sanction

(4) Le dépôt d'un grief ne doit entraîner aucune sanction contre le plaignant.

Correction of error

(5) Notwithstanding subsection (4), any error discovered as a result of an investigation of a grievance may be corrected, even if correction of the error would have an adverse effect on the

Correction d'erreur

(5) Par dérogation au paragraphe (4), toute erreur qui est découverte à la suite d'une enquête sur un grief peut être corrigée, même si la mesure corrective peut avoir

officer or non-commissioned member.	un effet défavorable sur le plaignant.

[18] As the jurisprudence relied on by the Crown makes clear, this grievance procedure has been consistently held to constitute an adequate alternate remedy that must be exhausted before an individual may turn to the courts for redress: *Sandiford* at paras 26, 28-29; *Graham* at paras 19, 22, 23; *Moodie* at paras 5-6; *Veltri* at para 18.

[19] In the present case, I am satisfied that the Plaintiff's claims that he was not treated like other recruits, including not being accommodated for periods of illness; making false statements to have him discharged; threatening him with insubordination if he did not sign documents containing false or misleading allegations; not following recommendations of a Training Review Board and changing the timing of a training schedule which prevented re-testing, are all matters that could be addressed under the available grievance process.

[20] I agree with the Crown's submission that the factual subject matter of the Claim falls squarely within the scope of the grievance process. Had the Plaintiff pursued a grievance and been unsatisfied with the result, he would have been free to seek judicial review of that decision from this Court.

[21] In those circumstances, it is beyond doubt that the Plaintiff had a right of recourse through the grievance process but failed to avail himself of that statutory remedy. The Court should not, in those circumstances, exercise its discretion to intervene.

[22] In coming to that conclusion, I have rejected the Plaintiff's arguments. First, as rightly noted by the Crown in its reply submissions, the Claim does not plead or otherwise refer to the *Charter*. In its examination of whether the pleading discloses a reasonable cause of action, Rule 221(2) constrains the Court to the matters pleaded in the Claim itself. In other words, the Court must assess the sufficiency of a statement of claim that is on the record without speculating as to what may eventually be added to it through an amendment: *Lewis v Canada*, 2012 FC 1514 at para 21. Thus, the Plaintiff's arguments concerning *Charter* breaches are simply beyond the record before this Court.

[23] Secondly, the jurisprudence establishes that the grievance process is an adequate alternate remedy. While the Plaintiff argues that the process is not adequate, he has adduced no evidence in support of his position. Rather, he merely makes bald assertions that the redress process is inadequate because it has failed to eradicate systemic racism within the CAF ranks. The onus of establishing that there is room for the exercise of a court's residual discretion lies with the plaintiff (*Lebrasseur* at paras 18-19). In this case, the Plaintiff has failed to satisfy that onus.

[24] I also wish to note that the fact that the Plaintiff did not pursue a grievance within the appropriate timelines does not give him a right to now seek redress from this Court. To conclude otherwise would circumvent the intent of Parliament in establishing the Act's grievance process: *Veltri* at para 17; *Sandiford* at para 34.

[25] Therefore, the Plaintiff's Claim will be struck as an abuse of the process of this Court. Leave will not be granted to amend the Claim as I am satisfied that the jurisdictional defects cannot be cured by amendment.

[26] Given my conclusion that the Claim must be struck, there is no need to address the remainder of the Defendant's alternative arguments apart from noting that the style of cause ought to be amended to refer to His Majesty the King as the proper Defendant instead of the Attorney General of Canada.

THIS COURT ORDERS that:

1. The motion to strike the Statement of Claim is granted.

2. The Statement of Claim is struck out, without leave to amend.

3. There shall be no order of costs.

4. The style of cause is hereby amended, with immediate effect, to replace the name of the Defendant "Attorney General of Canada" with "His Majesty the King".

"Catherine A. Coughlan"
Associate Judge