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1 (COURT CONVENEED)

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

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

10 JUSTICE: Thank you.

11 Be seated, please, and good morning.

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

16 Mr. Benkendorf, would you please begin?

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

27

28 Submissions by Mr. Benkendorf

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

11                  So as you know --

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

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

28                  JUSTICE:        All right. Thank you.

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

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

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

20                   Rule 221(2) says: (as read)

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

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

28                   In this case, Canada has provided one

1 affidavit, the Viana affidavit, which speaks to  
2 jurisdiction only. It speaks about the grievance  
3 process, and elements relevant to the grievance process  
4 and its adequacy. The Plaintiffs, on the other hand,  
5 have provided us with 34 affidavits consisting of over  
6 6900 pages. Many were sworn at the time that the  
7 original Statement of Claim was served; all were sworn  
8 in 2023. None were sworn on the issue of jurisdiction  
9 or in response to the within motion; they all speak to  
10 what happened to each of the 34 Plaintiffs. In other  
11 words, they go to the merits.

12 On top of this, it is confusing because  
13 the Plaintiffs' argument only makes reference to a few  
14 of these affidavits. It's impossible to tell why these  
15 34 affidavits were put forward. It's not really fair to  
16 the Defendants or the Court to have to wade through all  
17 of them without knowing what use is to be made of them.  
18 But it does seem that they're being put forward to speak  
19 to the merits of the action.

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

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

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

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

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

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

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

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

28 MR. BENKENDORF: Oh, okay. I sent

1 over four hyperlinks to various decisions yesterday.

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

3 MR. BENKENDORF: Okay.

4 JUSTICE: -- come to my attention.

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

9 JUSTICE: Right. Thank you.

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

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

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

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

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

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

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

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

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

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



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

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

7 The respondents have provided  
8 additional evidence support -- to  
9 support their amended Statement of  
10 Claim.

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

16 My friend goes on to say: (as read)

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

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

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

4 Consistent with David Bull, above,  
5 and the need for an obvious fatal  
6 flaw, a notice of application for  
7 judicial review should not be  
8 brought on the basis of this  
9 objection unless the matter is  
10 clear. If, after discerning the  
11 true character of the application,  
12 the Court is not certain whether  
13 section 18.5 of the *Federal Courts*  
14 *Act* applies to bar the judicial  
15 review or if the Court is not  
16 certain whether --

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

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

28 The Supreme Court of Canada in

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

8 A claim will only be struck if it  
9 is plain and obvious, assuming the  
10 facts pleaded to be true, that the  
11 pleading discloses no cause --  
12 reasonable cause of action.

13 Another way of putting the test is  
14 that the claim has no reasonable  
15 prospect of success. Where a  
16 reasonable prospect of success  
17 exists, the matter should be  
18 allowed to proceed to trial.

19 The Court in *Shebib* went on at paragraph  
20 11 to say: (as read)

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

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

10                   That's the test we're dealing with.

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

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

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

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

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

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

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

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

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

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

7 JUSTICE: Paragraph 11?

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

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

13 This -- this Canadian Armed Forces  
14 -- CAF -- has abused its unique  
15 position in Canadian government  
16 for decades at the expense of the  
17 members of the CAF and the former  
18 members of the CAF (the  
19 "veterans"). This has emerged in  
20 previous cases before this Court  
21 concerning sexual misconduct and  
22 abuse, among other proven claims.  
23 In this case before the Court, the  
24 CAF's actions provide to the Court  
25 more evidence of further abuse of  
26 the power by the Chain of Command.

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

1 The Statement of Claims makes bald  
2 allegations for behaviour over  
3 decades against veterans by the  
4 CoC. Neither veterans or CoC are  
5 defined. Nowhere is it is alleged  
6 that the terms veterans includes  
7 the Plaintiffs or that CoC  
8 includes the Defendants. While  
9 the term CoC is used elsewhere in  
10 the Statement of Claim, it's never  
11 defined. Further, while the  
12 Statement of Claim makes no  
13 connection between the allegations  
14 against the CoC and the  
15 Defendants. If it was the  
16 invention of the Plaintiffs at  
17 this paragraph to establish a  
18 cause of action against the  
19 Defendants, it fails to do so.

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

23 After careful reading of the  
24 amended Statement of Claim,  
25 reveals the term veteran was  
26 briefly defined for the purposes  
27 of the present claim --

28 And she cites that paragraph 11.

1 Individuals -- then she says: (as read)

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

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

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

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



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

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

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

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

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

4                   End quote.

5                   (as read)

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

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

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

18                  End quote.

19                  (as read)

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

26                  Further -- quote: (as read)

27                  A plaintiff must plead in summary  
28                  form with sufficient detail the

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

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

9 In this case, the CAF shirked its  
10 own purposes and rushed the  
11 untested product onto its members,  
12 mislabelled this experimental gene  
13 therapy a "vaccine," knowingly  
14 made false statements of safety  
15 and efficacy, and facilitate its  
16 mandate with no option to restrict  
17 use, except for mandatory,  
18 permanent removal from service.  
19 Plaintiffs were given no way to  
20 meet the mandate, as the  
21 directives were written  
22 specifically to block any possible  
23 means of complying with them.

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

1 particularity that we don't have to guess.

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

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

10                   In this, the premature approval  
11                   and directives, the Defendants  
12                   have abused their powers, denied  
13                   members the procedural right to  
14                   seek redress via accommodations,  
15                   grievances, and administrative  
16                   measures, redefine the term  
17                   "vaccine" for military members in  
18                   violation of procedural due  
19                   process, failed to satisfactorily  
20                   articulate standards for assessing  
21                   the safety, efficacy, and  
22                   necessity for the vaccine, and  
23                   promoted the fraudulent use -- use  
24                   of biologics in violation of  
25                   Section 126 of the *National*  
26                   *Defence Act*.

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

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

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

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

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

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

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

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

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

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

16 If we read just the next paragraph  
17 underneath there for Anthony Duke, it says: (as read)  
18 He was a member of the CAF and  
19 held the rank of Master Corporal.  
20 He was infanteer, posted at the  
21 Royal Regina Rifles. He lives in  
22 Regina, Saskatchewan. He has  
23 served honourably for over 12  
24 years. Mr. Duke received one  
25 COVID-19 injection to keep his  
26 full-time employment with the CAF.  
27 He resigned his full-time class-B  
28 contract in the summer of 2022.

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

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

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

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

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

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

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



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

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

15 Now, there's some causes of action  
16 identified in the Statement of Claim. You have paragraph  
17 362 of the Statement of Claim. And this relates -- I  
18 won't go through it all, but basically relates to this  
19 notion that the Plaintiffs should have been court-  
20 martialed instead of having the administrative process  
21 applied to them. They say this is -- this is all  
22 improper.

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

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

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

11           Both disciplinary actions under  
12           the *Code of Service Discipline* and  
13           administrative actions are meant  
14           to address a CAF member's conduct  
15           for performance deficiency. They  
16           may operate independently, or they  
17           may complement one another.  
18           Disciplinary actions and  
19           administrative actions serve  
20           different purposes. Disciplinary  
21           actions possess a sanctioning  
22           aspect that administrative actions  
23           do not. Disciplinary actions  
24           initiate only if there is  
25           sufficient grounds to justify the  
26           laying of the charge under the  
27           *Code of Service Discipline* against  
28           a CAF member.

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

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

11                                   With respect to abuse of process,  
12                                   Corporal Hoffman submits that even  
13                                   though he was accused of  
14                                   harassment and improper conduct,  
15                                   the Canadian Forces failed to  
16                                   employ the adjudicative mechanisms  
17                                   created to address those types of  
18                                   allegations, namely the *Code of*  
19                                   *Service Discipline* and the  
20                                   *Canadian Forces Harassment*  
21                                   *Prevention and Resolution Policy*.  
22                                   These mechanisms would have  
23                                   enabled Corporal Hoffman to take  
24                                   part in a quasi-adjudicative  
25                                   process that would have permitted  
26                                   him to test the allegations  
27                                   against him, including by cross-  
28                                   examination of witnesses.

1                                   That is exactly what my friend argues.

2       (as read)

3                                   Corporal Hoffman submits that he  
4                                   has a legitimate expectation that  
5                                   the Canadian Forces would use a --  
6                                   adjudicative mechanisms at their  
7                                   disposal rather than the non-  
8                                   adjudicative remedial measures  
9                                   which were ultimately used. In  
10                                  declining to proceed by way of  
11                                  *Code of Service Discipline*,  
12                                  Corporal Hoffman pleads that the  
13                                  Chain of Command acted with  
14                                  impunity and demonstrated --  
15                                  demonstrated disregard for the  
16                                  rule of law.

17                                  Again, exactly what my friend has  
18       argued.

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

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

28                                  Remedial measures are the administrative

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

2 That being said, I am not  
3 satisfied that the factors raised  
4 are sufficient to warrant this  
5 Court's intervention in the manner  
6 in which Corporal Hoffman  
7 suggests. In particular, I have  
8 not been persuaded that the  
9 Canadian Forces were precluded  
10 from reviewing the allegations  
11 against Corporal Hoffman using the  
12 administrative process or that  
13 they were required to proceed by  
14 way of the *Code of Service*  
15 *Discipline*. Nor have I been  
16 persuaded that the administrative  
17 decision makers were precluded  
18 from imposing the most severe  
19 remedial measures from the outset.

20 Paragraph 29, she says: (as read)

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

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

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

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

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

22                  JUSTICE:        Thank you.

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

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

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

6 Of B.C.

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

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

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

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

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

13 In your decision in *Albert*, you  
14 highlighted some of these decisions at paragraph 43 and  
15 44.

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

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

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



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

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

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

20 The present dispute arises from  
21 the employment relationship and  
22 falls within the dispute  
23 resolution scheme set out in the  
24 *PSSRA*.

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

28 The -- the third factor: (as read)

1                   The appellant's claim to ERI could  
2                   have been remedied in the Section  
3                   91 grievance procedure.

4                   (as read)

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

8                   Fourthly: (as read)

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

19                  The sixth factor is: (as read)

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

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

10 Seventh factor: (as read)

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

17 And then the eighth factor basically

18 says: (as read)

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

28 So just speaking to a couple of those

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

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

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

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

1 a related matter arising from the grievance process.

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

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

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

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

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

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

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

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

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

1 context, this Court has deferred to a grievance process.

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

4 Courts across Canada have  
5 consistently concluded that  
6 disputes regarding mandatory  
7 vaccination policies must be  
8 adjudicated within the grievance  
9 process.

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

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

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

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

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

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

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

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



1 MR. BENKENDORF: Neglected to write  
2 that down, but -- it's footnote 127 in my brief on page  
3 23.

4 JUSTICE: Ah, yes, I see it.

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

7 Mr. Chua relies heavily  
8 on the decision in  
9 *Bernath*.

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

12 The legislative landscape has  
13 changed since the decision in  
14 *Bernath*, above.

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

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

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

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

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

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

5 In my view, *Bernath* is  
6 distinguishable from the case at  
7 bar as the grievance procedure in  
8 that instance has -- had been  
9 completed but was unable to  
10 provide the remedy which the  
11 plaintiff was seeking. Here, the  
12 applicant has filed his action for  
13 damages prior to the final  
14 determination or completion of the  
15 grievance process. There has been  
16 no finding of error in any  
17 decision or action of the CAF  
18 respecting the applicant's career  
19 and no determination that a remedy  
20 is unavailable. This is not a  
21 case in which the grievance  
22 procedure has been found to be  
23 inadequate to the task but rather  
24 one in which the applicant seeks  
25 to circumvent that process.

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

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

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

18 And again, the -- there'll be --  
19 JUSTICE: The final authority doesn't  
20 have to accept that -- those recommendations.

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

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

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

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

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

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

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

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

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

21 JUSTICE: (INDISCERNIBLE).

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

24 JUSTICE: Thank you.

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

28 Thank you.

1                                 REGISTRAR:         Court is in recess.

2         (BREAK)

3                                 REGISTRAR:         All rise. Court is now  
4 resumed.

5                                 JUSTICE:         Thank you.

6                                 Ms. Christensen.

7

8         Submissions by Ms. Christensen

9                                 (INDISCERNIBLE).

10                                JUSTICE:         (INDISCERNIBLE).

11                                MS. CHRISTENSEN:         (INDISCERNIBLE).

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

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

28                                The actual case before the Court is the

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

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

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

24           JUSTICE:       Wait. What evidence are  
25 you referring to?

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

28           JUSTICE:       All right. You're --

1 you're saying -- you're using "evidence" generically,  
2 then (INDISCERNIBLE) --

3 MS. CHRISTENSEN: Yes, I am.

4 JUSTICE: Okay. You referred to a  
5 report.

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

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

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

17 The Plaintiff argues that these  
18 reports should be admissible for  
19 the truth of their contents since  
20 they are documents in possession  
21 of the Defendant and by virtue of  
22 the manner of their preparation as  
23 public documents.

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

27 The Defendant argues the Plaintiff  
28 failed to establish that the



1 public documents exception to the  
2 rule against hearsay should apply  
3 such as the reports for the truth  
4 of their contents. Instead, the  
5 Defendant argues that the reports  
6 are admissible only to the extent  
7 that they place the facts pled  
8 into context.

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

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

15 MS. CHRISTENSEN: Sure. Certainly.  
16 That's paragraph 16. And this was used: (as read)  
17 in determining whether the Court  
18 should decline to exercise its  
19 jurisdiction in this matter.  
20 Similar reports were admitted and  
21 considered for the truth of their  
22 contents in evaluating the  
23 jurisdictional issue in  
24 *Greenwood* --

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

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

1 MS. CHRISTENSEN: Correct.

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

7 MS. CHRISTENSEN: Right.

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

14 MS. CHRISTENSEN: Correct, My Lady.

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

17 In this litigation, the processes  
18 themselves form part of the  
19 allegations. That is, in the  
20 process of attempting to receive  
21 remedy for the alleged harms --  
22 members may receive further harm  
23 on the same basis that they seek  
24 the remedy.

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

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

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

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

19 Question is not whether the  
20 existence of the -- these  
21 mechanisms in the abstract should  
22 prevent the Court from exercising  
23 its jurisdiction; rather, the  
24 Court must determine whether these  
25 internal mechanisms adequately  
26 address the pleaded claims in the  
27 pleaded circumstances.

28 And that is from paragraph 30 of *Thomas*.

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

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

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

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

1 injuries.

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

4 JUSTICE: Well, the --

5 MS. CHRISTENSEN: -- by --

6 JUSTICE: The difficulty I --

7 MS. CHRISTENSEN: Sorry.

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

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

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

1 remedial versus the more punitive measures.

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

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

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

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

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

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

28                   The hearing panel can impose a limited

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

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

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

20 Processes such as an administrative  
21 review under defence administrative orders and  
22 directives 509-2, remedial measures under DOAD 509-4,  
23 the harassment, prevention, and resolution policy under  
24 DAOD 5012-0, and sexual misconduct response, DOAD 9005-  
25 1, which bear many similarities to the regulation of  
26 civilian professions, are referred to as administrative  
27 processes, distinguishing them from the disciplinary  
28 processes under the *Code of Service Discipline*.



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

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

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

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

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

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

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

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

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

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

28           They -- by saying it was -- remedial

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

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

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

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

23                   MS. CHRISTENSEN:       Correct.

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

28                   MS. CHRISTENSEN:       Yes. So the

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

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

17                   One of the most significant examples of  
18 abuse authority is the use of -- Director Of Military  
19 Careers using what's called an administrative review,  
20 which is under DOAD 509-2, and it's used as an improper  
21 substitute for harassment investigation in 502-1.  
22 Multiple administrative reviews conducted by DMCA --  
23 I'll shorten that -- which is a Director of Military  
24 Careers -- which alleged misconduct contrary to DOAD  
25 5012 -- rely on untested disciplinary investigation as  
26 justification for significant adverse action taken  
27 without the benefit of true procedural fairness.

28                   There are commonalities in many of these

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

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

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

28                   When the CAF Chain of Command receives a

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

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

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

28                   An administrative review is not designed

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

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

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

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



1 legitimate expectations of the respondent are relevant  
2 concerns.

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

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

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

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

25 JUSTICE: Well, but that's --

26 MS. CHRISTENSEN: But --

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

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

7 JUSTICE: Well, let's take --

8 MS. CHRISTENSEN: -- referred to --

9 JUSTICE: Let's take a look at that.

10 MS. CHRISTENSEN: Lamotte.

11 JUSTICE: Let's take a look at that.

12 MS. CHRISTENSEN: So Lamotte --

13 JUSTICE: What paragraph is that at?

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

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

19 JUSTICE: Thank you.

20 MS. CHRISTENSEN: Thank you.

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

28 MS. CHRISTENSEN: So by citing that

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

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

7 MS. CHRISTENSEN: But --

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

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

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

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

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

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

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

28 The inverse, unfortunately, is equally

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

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

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

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

28 Acting with impunity, as seen during the

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

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

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

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

1                   After all, as per *Baker*, the statutory  
2 decision maker must make such decisions in a manner that  
3 is both procedurally fair and reasonable, commensurate  
4 with the nature of the decision being made and the  
5 processes followed (INDISCERNIBLE) making it, the nature  
6 of the statutory scheme, and the terms of the statute  
7 pursuant to which the body operates, the importance of  
8 the decision to the individual or individuals affected,  
9 the legitimate expectations of the person affected by  
10 the decision, and the choices of procedure made by the  
11 statutory decision maker. And that is at paragraphs 23  
12 through 27 of *Baker*.

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

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

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

28                   JUSTICE:       And what redress is that?

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

28                   JUSTICE:       Okay. I'm just going to

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

5 MS. CHRISTENSEN: Yes.

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

9 MS. CHRISTENSEN: Yes.

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

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

23 MS. CHRISTENSEN: The malice,  
24 My Lady, is how the Chain of Command imposed the COVID-  
25 19 policies, and we have abundant evidence. I know my  
26 friend was referring to our 6000 pages. That is .1  
27 percent of the evidence that we are prepared to bring to  
28 the Court to show that the actions of the Chain of

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

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

15 JUSTICE: (INDISCERNIBLE).

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

22 Regarding the vaccine directive as an  
23 order, in the context of the *NDA*, specifically Section  
24 126, a vaccine -- vaccination directive must be treated  
25 as an order rather than mandate to ensure enforceability  
26 and compliance. Section 126 states the personnel who  
27 receive an order to submit to inoculation or vaccination  
28 and wilfully disobey it without reasonable excuse are

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

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

14           Non-compliance with Section 126.  
15 Without issuing specific orders, the directives do not  
16 align with the *National Defence Act*, which requires an  
17 order to enforce compliance and address disobedience.  
18 The relevant legislation and regulations are Section 18  
19 1 of the *National Defence Act*, which outlines the  
20 appointment, rank, and duties of the Chief of Defence  
21 Staff, and indicating control and administration of the  
22 CAF must be conducted in accordance with the  
23 regulations.

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

28           *KR&O* 1.23 clarifies the authority of the

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

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

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

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

28 The vaccine directives issued by Chief



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

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

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

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

25                   JUSTICE:       Well --

26                   MS. CHRISTENSEN:       -- 1.23 --

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

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

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

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

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

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

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

14 MS. CHRISTENSEN: Well, not a same  
15 claim that would go through grievance system, because  
16 that's our argument, is that the grievance system -- the  
17 other factor here, My Lady, is that the grievance system  
18 is not the fast, efficient system that my friend  
19 presented it to you today. Even the -- the one that was  
20 offered took years to go through the system. None of my  
21 clients have -- who have grieved -- because I do have  
22 200 plus of these -- of these Plaintiffs have grievances  
23 in the system, and under article 7.27, they were --  
24 their -- some of their grievances were suspended when  
25 this hearing was booked, but then it wasn't really  
26 suspended because their grievances are still moving  
27 through the system and they're still getting replies  
28 from the system.

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

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

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

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

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

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

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

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

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

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

28                           On 15 November, you violated CDS

1 directive on CAF COVID-19  
2 vaccination and CDS directive 002  
3 on CAF COVID-19 vaccination,  
4 implementation of accommodation,  
5 and administrative action by -- in  
6 brackets -- select wording  
7 appropriate of the member's  
8 circumstances -- close bracket.  
9 'A'. Failing to provide an  
10 attestation of your COVID-19  
11 status to the Chain of Command.  
12 Or, 'B', refusing to be vaccinated  
13 for COVID-19. You have not  
14 provided the Chain of Command with  
15 proof that you're unable to be  
16 vaccinated in accordance with CDS  
17 directive 002. Your refusal to  
18 comply with this directive is  
19 considered failure to follow a  
20 direct order. This violates the  
21 DND and CAF *Code of Values and*  
22 *Ethics*, which includes the ethical  
23 principle to obey and support  
24 lawful authority.

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

1 meant as guidance and not intended as actual text.

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

5 JUSTICE: But that's not pleaded.

6 MS. CHRISTENSEN: Sorry?

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

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

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

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

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



1 actors and, as well, result in harm.

2 Even the --

3 JUSTICE: Is the --

4 MS. CHRISTENSEN: -- clients --

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

7 MS. CHRISTENSEN: Yes, I believe it  
8 is.

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

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

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

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

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

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

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

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

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

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

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

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

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

6 JUSTICE: Yes, Mr. Benkendorf.

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

11 JUSTICE: (INDISCERNIBLE) I know.

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

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

27 MS. CHRISTENSEN: (INDISCERNIBLE).

28 JUSTICE: And I've also indicated

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

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

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

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

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

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

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

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

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

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

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

22 The primary -- and in that case at para  
23 38, the Court states: (as read)

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

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

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

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

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

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

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

1 JUSTICE: M-hm.

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

6 JUSTICE: Well --

7 MS. CHRISTENSEN: The --

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

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

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

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

28 This is also why I believe Section 126



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

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

17           And in conclusion, My Lady, I would  
18 submit that my clients have submitted a valid Statement  
19 of Claim for the -- the claims that were proposed in the  
20 Statement of Claim. It was not to challenge the COVID-  
21 19 policy. My clients -- those that chose to do so,  
22 chose to use the grievance process for that. The  
23 redress sought by my clients from this Court are not  
24 available to them in the grievance process, even those  
25 that are still serving, and therefore, the case should  
26 be allowed to proceed in order to have judicial scrutiny  
27 of how the Canadian Armed Forces implement directives  
28 and orders against their -- against their members.

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

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

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

19                   MS. CHRISTENSEN:       Yes.

20                   JUSTICE:       -- to address the issue of  
21 costs.

22                   MS. CHRISTENSEN:       Yes, ma'am.

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

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

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

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

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

19                   JUSTICE:           (INDISCERNIBLE).

20                   Mr. Benkendorf, reply?

21

22 Submissions by Mr. Benkendorf

23                   I'll try and be brief, My Lady.

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

1 to it here. I do have -- I did read the decision in  
2 July. It is referenced in my materials at paragraph  
3 109, but certainly I would have spent a great deal more  
4 time on my submissions in that regard had my friend  
5 actually referred to the decision in her written  
6 submissions.

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

17 It is noteworthy that my friend, despite  
18 the urging of the Court, has still not mentioned Rule  
19 221 at all. Has not distinguished any of the cases that  
20 I provided in that regard, has not even tackled that,  
21 has only made a cursory review of it in the written  
22 submissions. So I don't really have anything that I can  
23 take issue there with in terms of them actually, you  
24 know, putting forward a good defence to that part of my  
25 application. They just haven't done that at all.  
26 They've refused to talk about it.

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

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

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

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

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

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

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

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

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

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

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

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

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

17           She talked about the fact that the  
18 grievance process can't give the Plaintiffs the relief  
19 that they seek. She didn't actually specify what that  
20 is. Didn't point us to any evidence of that.  
21 Meanwhile, we have the decision so *Chua*, *Kleckner*, the  
22 2022 decision in *Jones*, *Neri*, *Moodie*. All of these  
23 decision in this context all say that there's adequate  
24 alternative remedy through the grievance process.  
25 There's a whole chunk of other decision where people  
26 made similar arguments in the CAF context, and I've  
27 cited those in my brief as well.

28           The Court has very, very clear that in

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

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

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

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



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

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

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

7 JUSTICE: Right. Thank you.

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

10

11 Decision Reserved

12 JUSTICE: All right. Thank you.

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

16 Thank you for your submissions.

17 REGISTRAR: This sitting is now  
18 concluded.

19 (COURT CONCLUDED)

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LEGAL TRANSCRIPTIONIST'S CERTIFICATE

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

"*Mark Doerksen*"

MARK DOERKSEN

Legal Transcriptionist

January 7, 2025