Federal Court  Cour fédérale

Date: 20220207

Docket: T-1718-21

Citation: 2022 FC 146

[ENGLISH TRANSLATION]

Ottawa, Ontario, February 7, 2022

PRESENT: Case Management Judge Mireille Tabib

BETWEEN:

JOCELYNE MURPHY AND SHERRY RAFAI FAR

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] The Applicants are employees of the Government of Canada, who are subject to the *Policy on COVID-19 Vaccination for the Core Public Administration Including the Royal Canadian Mounted Police* (the "Vaccination Policy"). The policy requires all employees in the public administration to be fully vaccinated against COVID-19 unless accommodation is warranted. The Applicants are not vaccinated and have not been granted any of the

accommodation measures provided for in the Vaccination Policy. As a result of their vaccination status, they have been placed on leave without pay as of November 15, 2021, until they comply with the Vaccination Policy.

[2] The Applicants have applied for judicial review in order to have the Vaccination Policy declared invalid, to be reinstated in their positions retroactively to November 15, 2021, and to be awarded damages under the *Canadian Charter of Rights and Freedoms*. In this motion, the Attorney General seeks to have the application for judicial review struck on the ground that it is premature, the Applicants having failed to exhaust the grievance process set out in the *Federal Public Sector Labour Relations Act*, SC 2003, c 22 (the "Act").

[3] For the following reasons, the motion is granted and the application is struck.

I. Summary of parties' submissions

[4] The Applicants recognize that as indeterminate term employees governed by the *Law Practitioner Collective Agreement*, they can avail themselves of the grievance process set out in the collective agreement and the Act. Each of them has in fact filed a grievance on December 6, 2021, essentially seeking the same remedies set out in their application for judicial review, except for a general declaration that the Vaccination Policy is unlawful. It is also admitted that the grievance has not yet been determined.

[5] The Attorney General argues that the case law has consistently held that, barring exceptional circumstances, an applicant's failure to exhaust all available administrative remedies justifies dismissing an application.

[6] In response, the Applicants submit:

A. that the case law on which the Attorney General relies only applies when it is demonstrated to the Court's satisfaction that the administrative process in question is available, adequate and effective, and that in these particular circumstances, the grievance process is neither available, nor adequate or effective; and

B. that in any event, the Court should allow the judicial review to proceed because of exceptional circumstances, including because the Courts have recognized that anyone directly affected by a government policy may challenge its lawfulness by judicial review at any time.

[7] The Court identifies as follows the issues to be determined in this motion:

A. Is the grievance process available, adequate and effective in the circumstances?

B. If the grievance process is available, adequate and effective, do exceptional circumstances exist that would justify proceeding with the judicial review?

II. Analysis

A. *Is the existing grievance process available, adequate and effective?*

(1) Motions to strike and the rule of exhaustion of alternative recourses

[8] Even though the parties agree on the general legal principles applicable to motions to strike for prematurity, it is helpful to set out the basic principles.

[9] *David Bull Laboratories (Canada) Inc v Pharmacia Inc*, [1995] 1 FC 588 (CA) establishes the Court's power to strike out a notice of application on a preliminary motion. The burden on the moving party, in this case, the Attorney General, is to establish that the notice of application is "so clearly improper as to be bereft of any possibility of success". This is a heavy onus, requiring the moving party to demonstrate that the application is so fatally flawed that it strikes at the root of the Court's power to entertain it (*Rahman v Public Service Labour Relations Board*, 2013 FCA 117 at para 8).

[10] An applicant's failure to exhaust all the effective administrative remedies available to them is such a fatal flaw which, absent exceptional circumstances, justifies the preliminary dismissal of an application: *CB Powell Limited v Canada (Border Services Agency)*, 2010 FCA 61, at para 31:

> Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some

> matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.

[11] However, and in accordance with the principle that a fatal flaw must be obvious, a notice of application may not be struck out as premature unless the Court is certain that there is recourse elsewhere, now or later, and that this recourse is adequate and effective (*Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, at para 91).

[12] The Courts, starting with the Supreme Court of Canada in the leading case of *Vaughan v Canada*, 2005 SCC 11, have consistently held that the individual grievance procedure provided by section 208 of the Act is an adequate and effective recourse for dealing with labour relations disputes, even when a grievance cannot be referred for adjudication: *Gupta v Canada (Attorney General)*, 2021 FCA 202; *McCarthy v Canada (Attorney General)*, 2020 FC 930; *Nosistel v Canada (Attorney General)*, 2018 FC 618; *Bron v Canada (Attorney General)*, 2010 ONCA 71; and more recently, in the context of a motion for an interlocutory injunction, *Wojdan et al v Canada (Attorney General)*, 2021 FC 1341.

[13] The Applicants claim that this jurisprudence does not apply here because the grievance process under section 208 of the Act is not available to them as a result of the exceptions set out in subsections 208(4) and 208(6) of the Act, and because it would be ineffective, given the uncertainty surrounding their access to adjudication. The Applicants submit that, at the very least, the uncertainty as to whether these limitations apply means that it is not clear that effective

recourse is available to them, and that the Court should therefore refuse to strike the application on a preliminary motion.

[14] The first steps in the analysis is to understand the nature and extent of the administrative process at issue, and then, to identify the true nature of the present application. Indeed, only once that is properly understood will it be possible to determine whether the matter can be grieved and whether a grievance would provide adequate and effective relief.

(2) The process contemplated by the Act

[15] The Act provides several grievance mechanisms to resolve disputes that may arise in the context of civil servants' labour relations. Some grievances may only be brought by the union of which the employee is a member, some are open to civil servants on an individual basis, and others are available to them on a individual basis, but only when supported by the union. Once all levels of the grievance process are exhausted, the Act provides that some disputes may be referred to adjudication before an independent arbitrator.

[16] The provisions of the Act that are relevant to this case are section 208, which establishes the right to individual grievances, section 209, which allows some individual grievances to be referred to adjudication, and section 236, pursuant to which the right to grieve provided in the Act is in lieu of all other right of action the employee may have in relation to the circumstances giving rise to the grievance. These provisions read as follows:

208 (1) Subject to subsections (2) to (7), an employee is entitled to	**208 (1)** Sous réserve des paragraphes (2) à (7), le fonctionnaire a le droit de

present an individual grievance if he or she feels aggrieved

(a) by the interpretation or application, in respect of the employee, of

(i) a provision of a statute or regulation, or of a direction or other instrument made or issued by the employer, that deals with terms and conditions of employment, or

(ii) a provision of a collective agreement or an arbitral award; or

(b) as a result of any occurrence or matter affecting his or her terms and conditions of employment.

présenter un grief individuel lorsqu'il s'estime lésé :

a) par l'interprétation ou l'application à son égard :

(i) soit de toute disposition d'une loi ou d'un règlement, ou de toute directive ou de tout autre document de l'employeur concernant les conditions d'emploi,

(ii) soit de toute disposition d'une convention collective ou d'une décision arbitrale;

b) par suite de tout fait portant atteinte à ses conditions d'emploi.

. . .

. . .

(4) An employee may not present an individual grievance relating to the interpretation or application, in respect of the employee, of a provision of a collective agreement or an arbitral award unless the employee has

the approval of and is represented by the bargaining agent for the bargaining unit to which the collective agreement or arbitral award applies.

(4) Le fonctionnaire ne peut présenter de grief individuel portant sur l'interprétation ou l'application à son égard de toute disposition d'une convention collective ou d'une décision arbitrale qu'à condition d'avoir obtenu l'approbation de l'agent négociateur de l'unité de négociation à laquelle s'applique la convention collective ou la décision arbitrale et d'être représenté par cet agent.

. . .

. . .

(6) An employee may not present an individual grievance relating to any action taken under any instruction, direction

(6) Le fonctionnaire ne peut présenter de grief individuel portant sur une mesure prise en vertu d'une instruction,

or regulation given or made by or on behalf of the Government of Canada in the interest of the safety or security of Canada or any state allied or associated with Canada.

d'une directive ou d'un règlement établis par le gouvernement du Canada, ou au nom de celui-ci, dans l'intérêt de la sécurité du pays ou de tout État allié ou associé au Canada.

(7) For the purposes of subsection (6), an order made by the Governor in Council is conclusive proof of the matters stated in the order in relation to the giving or making of an instruction, a direction or a regulation by or on behalf of the Government of Canada in the interest of the safety or security of Canada or any state allied or associated with Canada

(7) Pour l'application du paragraphe (6), tout décret du gouverneur en conseil constitue une preuve concluante de ce qui y est énoncé au sujet des instructions, directives ou règlements établis par le gouvernement du Canada, ou au nom de celui-ci, dans l'intérêt de la sécurité du pays ou de tout État allié ou associé au Canada.

209 (1) An employee who is not a member as defined in subsection 2(1) of the *Royal Canadian Mounted Police Act* may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to

209 (1) Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, le fonctionnaire qui n'est pas un membre, au sens du paragraphe 2(1) de la *Loi sur la Gendarmerie royale du Canada*, peut renvoyer à l'arbitrage tout grief individuel portant sur :

. . .

. . .

(b) a disciplinary action resulting in termination, demotion, suspension or financial penalty;

b) soit une mesure disciplinaire entraînant le licenciement, la rétrogradation, la suspension ou une sanction pécuniaire;

236 (1) The right of an employee to seek redress by way of grievance for any dispute relating to his or her terms or conditions of employment is in lieu of any right of action that the employee may have in relation to any act or omission giving rise to the dispute.	**236 (1)** Le droit de recours du fonctionnaire par voie de grief relativement à tout différend lié à ses conditions d'emploi remplace ses droits d'action en justice relativement aux faits — actions ou omissions — à l'origine du différend.
(2) Subsection (1) applies whether or not the employee avails himself or herself of the right to present a grievance in any particular case and whether or not the grievance could be referred to adjudication.	**(2)** Le paragraphe (1) s'applique que le fonctionnaire se prévale ou non de son droit de présenter un grief et qu'il soit possible ou non de soumettre le grief à l'arbitrage.

(3) The nature of the Applicants' recourse

[17] In this case, the circumstances, the nature of the impugned decision and the remedies sought—even if they are not all available on judicial review—reveal the true nature of the application. The Applicants were placed on leave without pay because they refused to comply with the Vaccination Policy. In their notice of application, the Applicants are seeking to have the Vaccination Policy declared void *ab initio* and to be awarded the remedies resulting from such a declaration, including the retroactive reinstatement of their rights (including salary and benefits) and Charter damages.

[18] The essential character of the Applicants' claim therefore concerns the legality of the Vaccination Policy, but in the context of its application to them, which resulted in their being placed on leave without pay. The application therefore concerns the interpretation and

application of the Vaccination Policy in respect of the Applicants as a result of their being placed on leave without pay.

(4) The entitlement to grieve and the Applicants' arguments

[19] As the Vaccination Policy is a direction or instrument made or issued by the Applicants' employer, which affects their terms and conditions of employment, the subject-matter of the application clearly falls within subsection 208(1) of the Act and entitles the Applicants to file a grievance. The Applicants submit, however, that their grievance is precluded by two subsections of section 208, being subsections 208(4) and 208(6). Subsection 208(4) prevents an employee from presenting an individual grievance relating the interpretation or application of a provision of the collective agreement, unless it is approved by the union. The Applicants submit that their grievance concerns the validity of the Vaccination Policy in light of the interpretation or application of certain provisions of their collective agreement, but that their request for union support was expressly denied, such that subsection 208(4) bars their grievance. As for subsection 208(6), it precludes individual grievances relating to an action taken by the government in the interest of the safety or the security of Canada. The Applicants submit that this subsection applies, since, according to statements made by the Prime Minister and several other members of the government, the Vaccination Policy was made [TRANSLATION] "in the country's interest".

[20] Finally, the Applicants submit that they will only be able to claim Charter damages if they have access to the adjudication process under section 209 of the Act. However, to access it, their leave without pay must be characterized as a "disciplinary action resulting in [...] suspension or financial penalty", in accordance with paragraph 209(1)(b). According to the

Applicants, the consequence of not complying with the Vaccination Policy, namely, being placed on “leave without pay”, is a vague, undefined concept that cannot be clearly equated with disciplinary action, which makes the potential availability of adjudication ambiguous.

[21] The Court will begin by considering whether the possible inadmissibility of a grievance pursuant to subsections 208(4) or (6) of the Act is relevant to the determination of the availability of an administrative recourse.

[22] It will then consider whether the potential unavailability of the adjudication process would, in this case, render the grievance process inadequate or ineffective.

[23] Only after having determined these two issues will the Court consider, as needed, the merit of the Applicants’ position to the effect that subsections 208(4) and (6) acts as a bar to their grievance.

(5) The relevance of the potential application of subsections 208(4) and (6)

[24] The federal government has created an exhaustive grievance procedure for resolving disputes over the terms and conditions of employment of the quarter of a million civil servants in its employ (*Vaughan* at para 1). The courts have recognized the need to protect the integrity and effectiveness of these recourses by refusing to hear challenges in the field of labour relations as long as the grievance procedure has not been exhausted, and even then, only on the limited basis of judicial review (*Vaughan* at para 2). This principle, established in *Vaughan*, was confirmed and codified in 2003, by the introduction of section 236 of the Act. That section expressly states

that (save for an exception defined in subsection 236(3) that has no application here) an employee's right to grieve under the Act for any dispute relating to his or her terms and conditions of employment is in lieu of any right of action the employee may otherwise have had in light of these circumstances, whether or not the employee availed himself or herself of the right to present a grievance and whether or not the grievance could be referred to adjudication. According to *Bron*, this explicit privative clause deprives the Courts of their residual discretion to entertain disputes over the terms and conditions of employment of employees governed by the Act (*Bron* at paras 28 to 33; see also *Public Service Alliance of Canada v Canada (Attorney General)*, 2020 FC 481 at paras 64 and 65 (*PSAC 2020*)). The Court may exercise its inherent jurisdiction only when there is a gap in the statutory scheme or when events produce a difficulty which the scheme has not foreseen (*Bron* at para 32, *Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v Canadian Pacific Ltd.*, [1996] 2 SCR 495 at paras 8 and 10).

[25] In developing the grievance process set out in the Act, Parliament found it appropriate to impose certain limitations on section 208 rights. Just like the limitations imposed on the types of grievance that may be referred for adjudication, the limitations imposed by subsections 208(2) to (7) on the individual right to grieve are an inherent part of the grievance process. Interpreting these limitations and determining whether they apply in the particular circumstances of a grievance falls exclusively to the grievance authority. When a dispute is obviously related to an employee's terms and conditions of employment, the employee is required to use the grievance process to resolve it. It would be nonsensical and illogical to relieve an employee from that obligation on the ground that this very process deliberately provides certain limitations that could render the grievance inadmissible.

[26] The Applicants argue that they should be able to turn to the Courts directly because the admissibility of their grievance, as worded or in light of the objectives of the Vaccination Policy, is potentially restricted or limited by subsections 208(4) and 208(6) of the Act. They are therefore asking the Court to release them from the limitations explicitly contemplated in the Act and to grant them privileged access to the courts so that issues for which Parliament has explicitly precluded recourse can be debated. To the extent the true substance of this application cannot be grieved, it is not because of a gap in the legislation or a circumstance Parliament did not contemplate, but because of the application of the express provisions of the Act. Thus, even if the Applicants' grievance were dismissed, be it in whole or in part, by the operation of subsection 208(4) or (6) of the Act, it is not because the grievance procedure is inadequate or ineffective, but simply because the Act does not permit a challenge on the issues as they are framed in the grievance.

[27] In applying the test by which the Court may exercise its inherent jurisdiction or its residual discretion in cases where there is no adequate or effective administrative process, one should not confuse the capacity of the process to adequately resolve the dispute—and, if there is a right, to afford effective redress—with the guarantee that the employee will obtain the resolution or relief he or she is seeking. A dispute can be adequately resolved by a determination that it cannot be challenged and that the sought-after remedy cannot therefore be granted.

[28] The Applicants have drawn the Court's attention to a single decision in which the Court refused to summarily dismiss an application for judicial review in a matter involving labour relations under the Act on the ground that the availability of the grievance process was uncertain: *Public Service Alliance of Canada v. Canada (Attorney General)*, 2019 FC 892 (*PSAC 2019)*. It

should be noted, however, that this proceeding was instituted by a union, and not by an employee clearly entitled to present an individual grievance. The application concerned the interpretation of a memorandum of understanding (MOU) entered into by the union and the government to resolve several grievances. The MOU was neither a collective agreement nor an arbitral award, and the processes provided for in sections 215 and 220 of the Act to allow a union to present a grievance were not clearly applicable. The Court therefore took into consideration the fact that none of the Act's provisions set out a clear, mandatory process for dealing with the particular situation at hand. The matter before the Court here is completely different. The Applicants are employees who are clearly entitled to present an individual grievance under subsection 208(1), and moreover, are required do so pursuant to section 236. There is in this case no uncertainty as to the availability of the grievance process, only as to the admissibility of the grievance in light of the exceptions provided.

[29] In conclusion, the true character of the claim concerns the application, in respect of the Applicants, of a directive issued by the employer that deals with terms and conditions of employment and that, as a result of the application of this directive in a manner that affects the Applicants' terms and conditions of employment. The Court is satisfied that, once the Attorney General has established that the Applicants are employees to whom the grievance process under subsection 208(1) is available, it has discharged its burden of establishing the availability of an adequate and effective process for resolving the claim, notwithstanding the possibility or even the certainty that the grievance may be dismissed by operation of one of the exceptions contemplated in subsections 208(2) to (7).

(6) Access to adjudication

[30] As for the Applicants' claim that the relief provided under the grievance process is not effective because, without access to adjudication, they would not be able to seek Charter damages, it is also unfounded. The Courts have consistently held that administrative processes do not have to offer all the remedies available before the Courts in order to be effective. It is enough for an administrative process to provide a solution to the problem (*Vaughan* at paras 35 to 36; *Weber v Ontario Hydro*, [1995] 2 SCR 929). It is not disputed that the grievance authority has jurisdiction to assess the constitutional arguments put forward by the Applicants or to award a remedy that is equivalent to retroactive reinstatement. The fact that the grievance authority cannot make a general declaration of invalidity or award Charter damages does not make the grievance process ineffective. Even the Federal Court does not have the power to award damages under section 24 of the Charter in the context of an application for judicial review (subsection 18.1(3) of the *Federal Courts Act*, RCS 1985, c F-7, *Collin v Lussier*, [1985] 1 FC 124).

(7) Analysis of the Applicants' argument as to the application of subsections 208(4) and (6)

[31] To the extent that the Court erred and that it was required to consider the possibility of a grievance being excluded by operation of subsection 208(4) or (6) in determining whether the grievance process is adequate and effective, the Court notes that the burden of establishing that the process is clearly not available falls to the Applicants.

[32] Indeed, in *PSAC 2020*, Justice Kane, dealing with the merits of the application for judicial review following *PSAC 2019*, found that doubts about whether or not an administrative recourse was available to the union were not enough to override the doctrine of exhaustion

(para 76). She noted, among other things, that the scope of the provisions granting the union or the employees a right to grieve had first to be determined through the processes provided by the Act (para 83). In her analysis, Justice Kane considered how the case law had evolved, concluding that "[b]efore determining whether to exercise any discretion to consider this Application, the Court must first be satisfied that the grievance process is not available and would not provide any remedy".

[33] Consequently, and as also suggested in *Lebrasseur v Canada*, 2007 FCA 330, at para 19, once it is established that a person has recourse to a statutory grievance scheme, it is up to the applicant, and not the respondent seeking to have the application dismissed as premature, to establish that the procedure is clearly not available. That is the necessary conclusion, since concluding otherwise and allowing access to the courts whenever the admissibility of a grievance is challenged would have the effect of bypassing the exhaustive scheme Parliament intended. It would amount to asking the Court to prejudge the admissibility of a grievance and to usurp the role of the grievance authority in respect of the interpretation and application of the provisions governing the grievance procedure.

[34] The Applicants have not discharged their burden of establishing that their grievances are clearly excluded by subsection 208(4) or (6) of the Act. Furthermore, and without prejudging the outcome of the grievance, the Applicants' arguments on the possible inadmissibility of their grievance under subsection 208(4) or (6) are of questionable merit.

[35] Subsection 208(4) prohibits individual grievances relating to the interpretation or application, in respect of an employee, of a provision of a collective agreement without the

union's support. The Applicants claim that, since their grievance raises issues concerning the validity of the Vaccination Policy in connection with certain provisions of their collective agreement, an individual grievance is either not available or unduly restricted. Yet the grounds they raise in the notice of application fall under three distinct categories: *Charter* breach, violation of their collective agreement, and invalidity on other administrative law grounds, such as a lack of jurisdiction, a breach of the principles of natural justice, or a decision made in a perverse, capricious, unreasonable manner or tainted by fraud or illegality.

[36] It is plain that the individual grievance process would allow the Applicants to present their *Charter* arguments and their administrative law grounds. It is unclear on what grounds the Applicants rely to claim that an individual grievance is completely unavailable to them because one of the three possible grounds of attack comes within subsection 208(4). The Applicants have neither argued nor established that their arguments on the collective agreement are so intertwined with the other grounds of attack that the latter cannot be raised or disposed of without reference to the collective agreement. Two of the three provisions of the collective agreement they raise are clarifying clauses, establishing that all the rights and authority which have not been specifically abridged or modified by the collective agreement are retained by the employer (clause 5.01), and that nothing in the collective agreement shall be construed as an abridgement or restriction of constitutional rights (clause 6.01). The third provision is a general clause guaranteeing that there shall be no discrimination, harassment or disciplinary action with respect to a lawyer by reason of the individual characteristics enumerated in the clause (clause 36.01). The Applicants have not specified which of the rights guaranteed by this clause, and not otherwise protected by the *Charter*, are infringed by the Vaccination Policy. Consequently, the Applicants' claim as to a breach of the collective agreement seems tangential at best, and at

worst, one of those instances of artful drafting designed to make the issue appear as relating to the collective agreement when that is clearly not the case.

[37] Subsection 208(6) of the Act also excludes grievances relating to any action taken by the Government of Canada "in the interest of the safety or security of Canada or any state allied or associated with Canada". The Applicants' argument that their grievance might be barred under this provision is not based on any conclusive assertion in the Vaccination Policy, but on statements made by the Prime Minister and other members of the government to the effect that the Vaccination Policy aims to protect "the health and safety" of public servants, their families, their neighbours and the communities in which they live, or even more broadly, of "Canadians". The Applicants' argument seems to conflate the health and safety of citizens with the safety and security of the country. The Supreme Court examined the phrase "safety or security of Canada" in *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at paras 84 to 86. Even though the context in which the phrase was used was quite different from labour relations, the Supreme Court distinguished issues involving the security of Canada and public security. The former relates to the security of Canada as a state and therefore the security of its constitution, its institutions, its government, its territory, its independence, or to peace with other countries, while the latter refer to the security of the people. According to the Supreme Court, while the concepts may overlap, they are nonetheless distinct.

[38] The Applicants find support for their argument in a third-level decision on a grievance filed by another public servant. In that grievance, the decision-maker did indeed refer to a provision of the collective agreement that appears to faithfully reproduce the wording of subsection 208(6) of the Act, in the same breath as he mentioned that the purpose of the

government's Vaccination Policy was to [TRANSLATION] "protect the health and safety of public servants and the communities where they live and work". Contrary to what the Applicants allege, it is not at all clear that the decision-maker concluded that this provision applied to defeat the grievance. Indeed, the decision-maker merely mentions the relevant provision from the collective agreement and the purpose of the Vaccination Policy, without however drawing a conclusion, and then goes on to state, [TRANSLATION] "That being said, I have carefully examined the information presented in your grievance". The decision-maker finally concludes: [TRANSLATION] "Consequently, in light of the information you have provided me with, I dismiss your grievance and reject the remedies you are seeking at the third level."

[39] The Court is therefore satisfied that, even if one considers the arguments raised by the Applicants regarding the possible application of subsection 208(4) or (6) of the Act, the grievance process provided for in the Act is not clearly precluded. Absent exceptional circumstances, the application is doomed to fail, as the Applicants were required to avail themselves of the grievance process before applying to the Federal Court for judicial review.

B. *Are there any exceptional circumstances that would justify allowing the judicial review to proceed?*

[40] The Applicants have raised several factors which, in their view, constitute exceptional circumstances that would justify proceeding with the judicial review: the importance of the legal issue to be resolved; the grievance authority's limited specialized expertise in Charter rights; the benefit of quickly disposing of an issue that affects many employees in Canada's public and private sectors; the lengthy multi-level grievance procedures, including a potential challenge to the union's refusal to file a policy grievance or to support the individual grievance; the financial

and moral prejudice suffered by the Applicants while waiting for the outcome of the proceeding; and the fact that having to comply with the Vaccination Policy by getting vaccinated is irreversible.

[41] As stated at paragraph 33 of *CB Powell*, "very few circumstances qualify as 'exceptional'. […] Exceptional circumstances are best illustrated by the very few modern cases where courts have granted prohibition or injunction against administrative decision makers before or during their proceedings. Concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances allowing parties to bypass an administrative process […]".

[42] The Applicants submit that paragraph 42 of *Strickland v Canada (Attorney General)*, [2015] 2 SCR 713, qualifies the criteria identified in *CB Powell* enough to allow the Court to consider "the convenience of the alternative remedy; the nature of the error alleged; the nature of the other forum which could deal with the issue, including its remedial capacity; the existence of adequate and effective recourse in the forum in which litigation is already taking place; expeditiousness; the relative expertise of the alternative decision-maker; economical use of judicial resources; and cost". The Applicants have misread this paragraph: the factors listed by the Supreme Court in this excerpt are the factors the Court must consider to determine whether an adequate alternative remedy exists and not to determine whether there are exceptional circumstances to justify bypassing that other remedy. The Applicants are also misguided in invoking the concept of the balance of convenience as part of the analytical framework to

determine the existence of exceptional circumstances. There is no case law to support this argument, which is clearly contrary to *CB Powell*.

[43] According to the case law, of all the factors raised by the Applicants, only those entailing an urgency to act and irreparable harm might meet the high threshold for exceptional circumstances. None of the other factors raised by the Applicants have ever been cited as a justification for the Court's early intervention.

[44] The facts upon which the Applicants rely to establish urgency and irreparable harm are no different from those raised—unsuccessfully—in support of the motions for an interlocutory injunction in *Wojdan*, above, and in *Lavergne-Poitras v Canada (Attorney General)*, 2021 FC 1232. In both cases, workers subject to mandatory vaccination policies claimed that vaccination would cause irreparable harm. In both cases, the Court noted that the impugned policies, just like the Vaccination Policy, did not force employees to get vaccinated, but simply to choose between getting vaccinated and losing their salary and benefits, or even their job in the case of *Lavergne-Poitras*. In both cases, the Court concluded that loss of wages or employment does not constitute irreparable harm, as such losses can be compensated by way of monetary damages. As for the Applicants' assertions that this situation is causing them stress, anxiety and distress, these are, as found by the Court in *Lavergne-Poitras*, merely general assertions, assumptions, or speculation that are not sufficient to establish a degree of harm to their mental health that would qualify as irreparable *(Lavergne-Poitras* at para 87).

[45] The Court is therefore satisfied that the Applicants have not established that exceptional circumstances exist that would justify bypassing their obligation to follow the grievance procedure available to them.

[46] Finally, the Applicants submit that challenging the legality of a government policy creates an exception to the doctrine of exhaustion. This argument has no merit.

[47] The Applicants have cited—out of context—excerpts from *Moresby Explorers Ltd v Canada (Attorney General)*, 2007 FCA 273 at para 24, and *Browne v Canada (Attorney General)*, 2021 FC 389, to the effect that "an illegal policy can be challenged at any time", in an attempt to have these decisions say something they are clearly not saying. The question that arose in those cases, to which the cited excerpt answers, was whether a person who might be affected by a policy had to wait for the policy to be applied to them before being able to challenge it. The Court's full conclusion in *Moresby Explorers* was that "an illegal policy can be challenged at any time; the claimant need not wait till the policy has been applied to his or her specific case". It is interesting to note that in *Browne*, the Court concluded that there wasn't actually a "policy" to be challenged, but added that if there were, the application for judicial review was premature because the Applicants were required to exhaust the grievance procedures available to them (*Browne* at paras 62 and 77).

[48] For these reasons, the Court is satisfied that the application is bereft of any possibility of success, as the Applicants are required to avail themselves of the grievance procedure set out in the Act and as there are no exceptional circumstances that would allow the Court to depart from the doctrine of exhaustion by agreeing to hear the application.

ORDER

THIS COURTS ORDERS as follows:

1. The motion is granted, and the application for judicial review is struck.

"Mireille Tabib"
Case Management Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1718-21
STYLE OF CAUSE:	JOCELYNE MURPHY AND SHERRY RAFAI FAR v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING :	JANUARY 17, 2022
REASONS FOR ORDER AND ORDER:	TABIB P.
DATED:	FEBRUARY 7, 2022

APPEARANCES:

Jocelyne Murphy Sherry Rafai Far	FOR THE APPLICANTS FOR THEMSELVES
Pierre Marc Champagne Gregory Tzemanakis	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Jocelyne Murphy Sherry Rafai Far Ottawa, Ontario	FOR THE APPLICANTS FOR THEMSELVES
Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT