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Docket: T-1296-23

Citation: 2024 FC 1801

Edmonton, Alberta, November 13, 2024

PRESENT: Madam Associate Judge Catherine A. Coughlan

BETWEEN:

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

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

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

**MONNIN, ELLIOT GAMACHE, NICHOLAS NEIL LLOYD CROCKER, ROBERT
ALLAN HENDERSON, GABRIEL GILLES RJ RAMSAY, DEVIN JAMES
MCKENNA**

Plaintiffs

and

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

Defendants

JUDGMENT AND REASONS

I. Overview

[1] The Defendants, represented by His Majesty the King in Right of Canada [Canada], bring this motion to strike the Plaintiffs' Statement of Claim without leave to amend, pursuant to Rule 221 of the *Federal Courts Rules*, SOR/98-106 [Rules].

[2] Canada argues that the Statement of Claim should be struck because it lacks the basic elements of a proper pleading and fails to disclose a reasonable cause of action. Further, Canada asserts that the Court should decline to exercise its jurisdiction to entertain the action in favour of the legislated grievance regime available to the Plaintiffs.

[3] The Plaintiffs oppose this motion. They argue that read holistically, the Statement of Claim discloses a reasonable cause of action and should not be struck. Moreover, the Plaintiffs argue that this Court ought to exercise its discretion to hear the action because the Canadian Armed Forces' [CAF] statutory grievance process cannot provide the requested remedies.

[4] For the reasons that follow, I am satisfied that the Statement of Claim fails to disclose a reasonable cause of action and must be struck without leave to amend. I am also satisfied that the Court should not exercise its residual discretion to entertain the action.

II. Background

[5] The within action is a mass tort claim brought on behalf of 330 current or former members of the CAF.

[6] Several Defendants are named in this action. They include Canada, the Chief of the Defence Staff and eight other senior members of the Defence Staff, the former Minister of National Defence, and the former Deputy Minister of National Defence. All Defendants are represented by Canada in this proceeding.

[7] In 2021, the COVID-19 vaccination requirements for CAF members were set out in a series of Directives. Together, the Directives mandated that all members of the CAF be fully vaccinated against COVID-19. Exemptions were articulated for individual CAF members on the grounds of certified medical contraindications, religious grounds, or other prohibited grounds of discrimination, as specified by the *Canadian Human Rights Act*, RSC, 1985 c H-6. Failure to comply with the Directives could result in CAF members facing administrative and remedial measures, including release from the CAF.

[8] The Plaintiffs filed an initial Statement of Claim on June 21, 2023. An amended Statement of Claim was filed on July 28, 2023. The amended Statement of Claim (the “pleading”) is at issue on this motion.

[9] The Plaintiffs’ pleading alleges that the vaccination requirements under the Directives infringed the *Canadian Charter of Rights and Freedoms* [Charter] rights under s.2(a), s.2(d), s.7, s.8, and s.15(1). The Plaintiffs assert that none of the breaches are justifiable under s.1 of the *Charter*. The pleading also makes a range of allegations against each of the individual Defendants, and seeks declarations of “unlawful acts” and “breach of public trust,” among others. The Plaintiffs seek damages of \$1 million for each Plaintiff, \$350,000 for failure to comply with various statutes, regulations, and administrative policies, as well as unspecified special damages.

[10] It is noteworthy that the personal circumstances of each of the 330 Plaintiffs varies considerably. For example, according to a chart prepared by Canada from the pleading, there are roughly 120 Plaintiffs who are currently members of the CAF, while others have left the service

voluntarily, or were discharged. Some members received a COVID-19 vaccine, while others did not. All the Plaintiffs appear to object, in some manner, to the vaccine mandate under the Directives.

[11] The pleading addresses the circumstances of each Plaintiff in individual paragraphs. Each paragraph identifies the individual Plaintiff and provides some details about their CAF service, including rank, service role, and length of service. The paragraph states whether the Plaintiff received a COVID-19 vaccine and whether they sought and received an exemption under the Directives. Allegations are made about the Plaintiff's experiences after receiving, or declining to receive, the vaccine. The paragraph also sets out some of the Plaintiff's personal circumstances, such as family situation and place of residence. Each paragraph closes by noting whether the individual remains with the CAF, has resigned, or has received a discharge. Where applicable, the grounds for discharge are provided.

[12] On July 12, 2024, Canada filed the within motion to strike the pleading in its entirety, without leave to amend. The motion was originally scheduled to be heard on August 20, 2024. The hearing was adjourned because the Plaintiffs failed to meet the original filing deadlines prescribed by the Court. Late filing of the Plaintiffs' motion materials was accepted on August 15, 2024. As noted in my Written Direction of August 15, 2024, the materials submitted were not compliant with the *Rules*, but were nevertheless accepted for filing. My Direction provided that the noted anomalies in the filed materials were to be addressed at the hearing of the matter.

[13] The Court heard oral submissions from the parties on September 19, 2024 at Edmonton, Alberta.

III. Issues

[14] The issues to be decided on this motion are:

- (a) Should the pleadings be struck without leave to amend pursuant to Rule 221 of the *Rules*?
- (b) Should the Court decline to take jurisdiction over this action?

A. *Preliminary Issues*

[15] As noted above, a preliminary issue at the hearing of this matter was the improper filing of the Plaintiffs' motion materials.

[16] The form of motion materials is precisely prescribed by the *Rules*. Rule 363 provides that any facts to be relied upon by a party on motion should be set out in an affidavit. Rule 365(2) provides that appropriate sources may be referenced, attached to the affidavit, and included as part of the motion record. However, only affidavits and sources that are referred to in written submissions are to be included in the motion record.

[17] The Plaintiffs filed 34 affidavits of individual Plaintiffs with their motion materials. Some of these affidavits pre-date the filing of the initial Statement of Claim yet bear the style of cause and action number of the proceeding. Further, not all of the additional affidavits were referenced in the Plaintiffs' written representations.

[18] The Plaintiffs also attached secondary sources to their motion record. The secondary sources were styled as "Appendices" and were not attached to affidavits. Again, only some of the secondary sources included in the motion record were referenced in argument. At the hearing of this matter, Plaintiffs' counsel conceded that this is unacceptable under Rules 363 and 365.

[19] Because of the breach of Rules 363 and 365, I conclude that the affidavits and secondary sources were not properly before the Court on this motion. Accordingly, I did not consider them in my analysis.

B. *Do the Pleadings Disclose a Reasonable Cause of Action?*

(1) General Principles

[20] Pleadings serve a pivotal role in litigation: they identify the issues between the parties. The identification of the material facts in the pleadings allows parties to prepare appropriately for litigation because parties have a clear understanding of the cause of action and the issues at play: *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 at paras 16-17 [*Mancuso*]. Pleadings should inform the responding party of "who, when, where, how and what gave rise to

its liability”: *Mancuso* at para 19. As this Court has frequently said, parties cannot be left to speculate as to the cause of action being alleged: *Mancuso* at para 16.

[21] Rule 221(1)(a) provides that a pleading may be struck out if it is “plain and obvious” that it does not disclose a reasonable cause of action: *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 17. To establish a cause of action, a pleading must allege material facts adequate to establish all elements of the alleged cause of action: *Mancuso* at para 19. On a motion to strike, pleadings must be read as generously as possible. In determining whether a reasonable cause of action exists, the material facts alleged are taken to be true, unless they are manifestly false, incapable of being proven, assumptions, or speculations: *Operation Dismantle v The Queen*, [1985] 1 SCR 441 at p 455, 1985 CanLII 74 (SCC). If the material facts alleged disclose a reasonable cause of action with some chance of success, the pleading should not be struck.

[22] When pleading *Charter* claims, the requirements for material facts apply just as in pleading other causes of action. The Supreme Court of Canada [Supreme Court] has clearly defined the substantive content of each *Charter* right. Material facts must be pled to support each component of the right in question: *Mancuso* at para 25.

[23] A pleading may also be struck under Rule 221(1)(c) on the grounds that it is scandalous, frivolous, or vexatious. A pleading may be struck as vexatious where it is “replete with bare allegations and mere conclusory statements of law,” and fails to plead material facts, making it impossible for the opposing party to respond: *Pelletier v Canada*, 2016 FC 1356 at para 23.

[24] Finally, a pleading may be struck under Rule 221(1)(f) as an abuse of process. A pleading constitutes an abuse of process when bald, conclusory allegations of bad faith are made without any evidentiary foundation: *Merchant Law Group v Canada Revenue Agency*, 2010 FCA 184 at para 34.

(2) Position of the Parties

[25] Here, Canada argues that the pleading should be struck because it lacks the basic elements of a proper pleading and instead consists of bald allegations unsupported by facts; fails to connect the allegations with the named Plaintiffs; fails to plead sufficient facts to sustain *Charter* breaches; and makes unsupported allegations against the individually named Defendants. Further, Canada argues that the pleadings use vexatious language and should be struck on this ground as well.

[26] The Plaintiffs counter that the pleading, when read holistically, discloses a cause of action. The Plaintiffs rely on *Thomas v Canada (Attorney General)*, 2024 FC 655 [*Thomas*], for the proposition that a cause of action may be disclosed by a holistic reading of pleadings.

[27] I pause to note that the Plaintiffs' written representations provide scant response to Canada's motion to strike. Much of the representations are directed at the merits of the underlying claim. At the hearing of the motion, I invited counsel for the Plaintiffs on two separate occasions to address Canada's submissions that the pleading fails to disclose a reasonable cause of action. Counsel did not avail herself of that opportunity. In consequence and as exhorted by the jurisprudence, I must read the pleading as generously as possible and not fasten onto matters of

form to strike the pleading. To that end, I have undertaken a thorough review of the pleading with a view to addressing if not all of the potential causes of action, at least the majority.

(3) Charter Claims

(a) Claims under Section 2(a) of the Charter

[28] Section 2(a) of the *Charter* protects freedom of conscience and religion. To establish an infringement of s.2(a), the claimant must show “(1) that he or she sincerely believes in a practice or belief that has a nexus with religion, and (2) that the impugned state conduct interferes, in a manner that is non-trivial or not insubstantial, with his or her ability to act in accordance with that practice or belief”: *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at para 68.

[29] My reading of the pleading discloses that none of the Plaintiffs plead material facts disclosing a cause of action under s.2(a). Indeed, 174 of the 330 Plaintiffs allege that they applied for a religious exemption under the Directives. Some Plaintiffs were approved for a religious exemption, but the majority were denied. None of those who were denied a religious accommodation identify a specific religious belief or practice in which they sincerely believe. Indeed, only one Plaintiff alludes to a specific religious belief: At paragraph 19 of the pleading, Plaintiff Stephen Troy Chledowski claims that he applied for a religious accommodation as a “Pansexual Pagan.” No other material facts are pled to support his assertion. Plaintiff Troy Chledowski was one of the few Plaintiffs to allege receiving a religious accommodation under the

Directives. Further, none of the Plaintiffs identify how a religious belief was infringed or interfered with in a non-trivial manner by the Directives.

[30] I am satisfied that the pleading does not disclose a cause of action under s.2(a). The mere assertion that the Directives offend a religious belief is insufficient to support a cause of action. Material facts must be pled to support both components of the s.2(a) framework.

(b) *Claims under Section 2(d) of the Charter*

[31] Section 2(d) of the *Charter* protects freedom of association. To establish a breach of s.2(d), the claimant must show that the activities at issue fall within the scope of s. 2(d) and that “government action has substantially interfered with those activities, in purpose or effect”: *Société des casinos du Québec inc v Association des cadres de la Société des casinos du Québec*, 2024 SCC 13 at para 33.

[32] The pleading does not identify what specific activities are at issue. Rather, at paragraph 407 of the pleading reference is made to the Plaintiffs’ right “to associate in a process of collective action to achieve workplace goals and missions ... [and] meaningful discussion and consultation about working conditions between members and their [superior officers].” However, there are no material facts pled about a specific workplace group, activity, or consultation in the pleading. In any case, the Plaintiffs have failed to plead any material facts to establish that the Directives applied to constrain the unspecified associative activities.

[33] Accordingly, in the absence of material facts, no reasonable cause of action is disclosed under s.2(d) of the *Charter*.

(c) *Claims under Section 7 of the Charter*

[34] Section 7 of the *Charter* protects life, liberty, and security of person. To establish a breach of s.7, a claimant must demonstrate that state action interferes with, or deprives them of, their right to life, liberty, or security of person. The claimant must also show that the interference or deprivation was not in accordance with the principles of fundamental justice: *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 55.

[35] While some of the bare allegations in the pleadings suggest that s.7 might be engaged, the pleadings do not plead material facts that support and particularize the claims to establish a cause of action under s.7. For example, at paragraph 31 of the pleading, Plaintiff Frederic Villeneuve-Normand alleges that he suffered psychological and physical harms as a result of being “forced to be outside in severe winter conditions without shelter or adequate care for three consecutive months in the winter of 2021-2022.” While the pleading attempts to suggest that this was a form of punishment for failing to be vaccinated, there are no further material facts provided to support this allegation. The connection between this allegation and the vaccination Directives is not particularized. Without more material facts, no cause of action is disclosed.

[36] Further, the pleading fails to plead a connection to a principle of fundamental justice. At no point in the pleading are material facts pled to support the statement that the Directives were, for instance, overbroad, and therefore contrary to the principles of fundamental justice.

[37] I am satisfied that a cause of action under s.7 of the *Charter* is not established because material facts are not pled to support the allegations. Parenthetically, I note that jurisprudence from this Court has established that s.7 of the *Charter* is not infringed by vaccination mandates, because the mandates are not contrary to the principles of fundamental justice: *Lavergne-Poitras v Canada (Attorney General)*, 2021 FC 1232.

(d) *Claims under Section 8 of the Charter*

[38] Section 8 of the *Charter* preserves an individual's right to be secure against unreasonable search and seizure. It recognizes the importance of privacy interests and protects against unjustified intrusions on privacy interests: *R v Ahmad*, 2020 SCC 11 at para 38.

[39] On my reading of the pleading, material facts are not pled to support a cause of action under s. 8. For example, at paragraph 412 of the pleading, the Plaintiffs allege that vaccination information was stored on “an unsecured network, known as Monitor Mass,” and was easily accessible. Once again, there are no material facts pled to support an intrusion upon the privacy interests of any Plaintiff. Similarly, at paragraphs 133, 149 and 332 of the pleading, three Plaintiffs allege that their belongings were searched or seized. Again, however, no material facts are pled to particularize these allegations, or to connect or establish a connection to the Directives.

[40] As with the other alleged *Charter* breaches, the pleading simply does not disclose a cause of action under s.8 of the *Charter* because of an absence of material facts.

(e) *Claims under Section 15(1) of the Charter*

[41] Section 15(1) of the *Charter* guarantees the equality of individuals under the law and protects against discrimination. To demonstrate a breach of s.15(1) of the *Charter*, the claimant must establish that “the impugned law or state action on its face or in its impact, creates a distinction based on enumerated or analogous grounds; and imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage”: *Fraser v Canada (Attorney General)*, 2020 SCC 28 at para 27.

[42] No material facts are pled to support a cause of action under s.15(1). Some Plaintiffs appear to suggest that they were subject to differential treatment by their colleagues and superiors as a result of declining to receive the vaccine. For example, at paragraph 217 of the pleading, Plaintiff Laura Lee Nicholson asserts that she was required to work from home. However, no material facts are pled to support this allegation. There are simply two bald statements: that Ms. Nicholson did not receive vaccinations and that she worked from home. The alleged distinction is not particularized, and no material facts are pled to establish a connection between the alleged distinction and the Directives. Further, no material facts are pled to indicate that a burden was imposed on any Plaintiff.

[43] Based on a lack of material facts pled, I conclude that the pleading fails to raise a cause of action under s.15(1).

(4) Other Claims

(a) *Unlawful Conduct Allegations*

[44] At paragraph 362 of the pleading, the Plaintiffs allege that the Chief of Defence Staff [CDS] improperly used administrative measures to punish CAF members who did not comply with the Directives rather than the adjudicative disciplinary process pursuant to the Code of Service Discipline. This, the Plaintiffs assert, denied them of the opportunity to be charged with a service offence and face a court martial before an independent tribunal.

[45] The Plaintiffs do not articulate the cause of action this conduct might give rise to. However, as Canada argued, paragraphs 4.16-4.18 of the Defence Administrative Orders and Directives [DAOD] 5019-4, Remedial Measures, provides that the CDS can choose either administrative or disciplinary processes. A recent case before this Court raised similar arguments and asserted that such conduct constituted abuse of process: *Hoffman v Canada (Attorney General)*, 2023 FC 1103 [*Hoffman*]. In that case, Justice Rochester confirmed that administrative decision makers were not precluded from using administrative measures or that they were required to proceed by way of the Code of Service Discipline: *Hoffman* at para 26. Accordingly, I find no basis in law for the Plaintiffs' argument and it too must fail.

(b) *Tortious Claim: Misfeasance in Public Office*

[46] In oral argument, Plaintiffs' counsel argued that the underlying cause of action pled is the intentional tort of misfeasance in public office. Indeed, counsel argued that the case is not a

challenge to the vaccination Directives at all but is a claim of misfeasance arising from the illegal conduct of the CDS. Although this cause of action is not articulated with any clarity in the pleading, nor in the Plaintiffs' written representations on this motion, for completeness I will analyse the argument to determine if a tortious cause of action is established.

[47] The tort of misfeasance in a public office consists of two elements. First, the plaintiff must show that a public officer engaged in deliberate and unlawful conduct while acting in their capacity as public officers. Unlawful conduct includes conduct that is in excess of the officer's powers, exercises an improper purpose, or is a breach of statutory duty. The second element that the plaintiff must show is that the public officer was aware that the conduct in question was unlawful and that it was likely to harm the plaintiff: *Odhavji Estate v Woodhouse*, 2003 SCC 69 at paras 22-23. This awareness requires that the public officer engaged in the unlawful conduct in bad faith.

[48] The alleged unlawful conduct at issue here is not clearly articulated in the pleadings. Reading the pleadings generously, the unlawful conduct appears to be the implementation of the Directives by Canada. However, the manner in which the Directives are unlawful or were unlawfully ordered is not established. No material facts are pled to support this component of the tort.

[49] Further, the second element of the tort is not established. No material facts are pled to suggest bad faith on the part of Canada. The only indications of bad faith are found when the pleadings baldly assert that, among other claims, Canada failed to carry out safety and efficacy

testing for the vaccines, and that the Directives were premature and “promoted the fraudulent use of the biologics”: paragraph 401 of the pleading. This form of pleading is particularly problematic and runs afoul of Rule 181 which requires that allegations of breach of trust and fraud be precisely particularized.

[50] I am satisfied that no material facts are pled to establish the tort of misfeasance in public office. The pleading fails to establish a cause of action on this ground.

C. *Holistic Reading of the Pleadings*

[51] As noted earlier, the Plaintiffs rely on Justice Zinn’s decision in *Thomas* to suggest that the pleadings disclose a reasonable cause of action, if read holistically.

[52] While Justice Zinn does acknowledge that pleadings may be read holistically to “distinguish material facts from evidence that will prove the material facts,” *Thomas* does not assist the Plaintiffs. In *Thomas*, the Court concluded that the plaintiff had pled sufficient material facts to support each element of a claim of negligence: *Thomas* at paras 77-78. The same cannot be said of this case. Here, there are no material facts pled or evidence supplied to support the allegations. No cause of action is disclosed, either by a close reading or by a holistic reading of the pleading. Indeed, as set out at paragraphs 49 to 58 of Canada’s written representations, the lack of particulars for each of the Plaintiffs is fatal to the action. Moreover, the facts that are pled for each Plaintiff fail to show how each Plaintiff was negatively impacted by the Directives. In short, the limited material facts pled for each Plaintiff fails to tie the Plaintiffs to the general allegations of harm asserted.

D. *Other Bases for Striking the Pleadings*

[53] In addition to the absence of material facts, the pleading is also replete with vexatious language. For example, various COVID-19 vaccines are labelled an “experimental gene therapy” and “biologics,” without any basis for these statements established. The COVID-19 pandemic is also referred to as an “emergency” without any basis indicated for the use of the quotation marks.

[54] The pleading also consists of a number of bald assertions of bad faith, which constitute an abuse of process. For example and as discussed above, the pleading asserts that the Directives “promoted the fraudulent use of the biologics.” Similar statements are present throughout the pleading, such as in the statement that in implementing the Directives some officers committed acts that were “criminal in nature.” These statements are bald allegations with no material facts pled in support.

[55] Accordingly, I conclude that the pleading should also be struck under Rule 221(1)(c) and (f).

E. *Should Amendments be Permitted?*

[56] Rule 221(1)(a) contemplates granting leave to amend pleadings which have been struck. For leave to amend to be granted, the defect in the struck pleading must be curable by amendment: *Simon v Canada*, 2011 FCA 6 at para 8.

[57] The pervasive absence of material facts throughout the pleading is not a flaw that can be addressed by amendment. Moreover, as I conclude below, this Court should not take jurisdiction over this matter and accordingly, leave to amend should not be granted.

F. *Should the Court Decline to Take Jurisdiction Over the Action?*

[58] Given my conclusion that the action should be struck without leave to amend, there is no need for me to consider whether the Court should exercise its discretion to take jurisdiction over the proceeding. However, for the sake of completeness, I will address that issue briefly.

[59] In support of its motion, Canada filed the affidavit of Ann-Marie De Araujo Viana (the “Viana affidavit”), Manager Professional Policies–Grievances, Canadian Armed Forces Grievance Authority. The Viana affidavit sets out the statutory and regulatory framework for the CAF grievance process established by sections 29-29.15 of the *National Defence Act* [NDA] and regulations. That framework is supplemented by the DAOD, specifically, DAOD 2017-0 *Military Grievances* and DAOD 2017-1 *Military Grievance Process*.

[60] Pursuant to subsection 29 of the NDA, CAF members who are aggrieved by any decision, act, or omission in the administration of the affairs of the CAF, for which no other process for redress is provided under the NDA, may submit a grievance. As set out in the Viana affidavit, the CAF grievance process has two levels of authority, the Initial Authority [IA] and the Final Authority [FA]. The CDS is the FA. In some circumstances there may be an independent review of the grievance by the Military Grievance External Review Committee [MGERC]. However, the CDS remains the final authority and is not bound by any findings or recommendation of the MGERC.

[61] Following a decision of the FA, dissatisfied CAF members may seek judicial review of the decision in this Court, including any appeal rights deriving therefrom.

[62] As this Court has noted on a number of occasions, the grievance process available under the NDA is broadly worded and comprehensive, capturing a wide range of issues and allowing members to seek redress for virtually any issues arising during the course of their service: *Jones v Canada*, (1994) 87 FTR 190 at paras 9-10 (TD); *Fortin v Canada (Attorney General)*, 2021 FC 1061 at paras 25-26; *Jones v Canada (Chief of Defence Staff)*, 2022 FC 1106 at para 21.

[63] As confirmed by the Supreme Court, when Parliament provides a specialized administrative scheme for the resolution of workplace conflicts, the courts should decline jurisdiction and defer to the statutory scheme in all but the most unusual circumstances: *Weber v Ontario Hydro*, [1995] 2 SCR 929 at paras 50-58 and 67, 1995 CanLII 108 (SCC); *Vaughn v Canada*, 2005 SCC 11 at para 2 [*Vaughn*].

[64] The Federal Court of Appeal has noted that once a defendant satisfies the Court that there is a legislative grievance scheme in place, the plaintiff bears the onus of establishing that the Court possesses residual jurisdiction that it ought to exercise: *Lebrasseur v Canada*, 2007 FCA 330 at para 19.

[65] Here, the Plaintiffs appear to argue that the grievance process is inadequate and cannot provide proper redress. For example, the Plaintiffs say that the process is not transparent because the CDS is both IA and the FA. However, as the Supreme Court found in *Vaughn*, the lack of third-party adjudication is not determinative in deciding whether a court should exercise its residual jurisdiction. Recently, the Federal Court of Appeal concluded that an allegation that the grievance process lacks independence requires evidence of bias: *Bergeron v Canada (Attorney General)*, 2022 FCA 209 at para 62.

[66] I am satisfied that the Plaintiffs have not pointed to any evidence of bias nor have they persuaded me that there are exceptional circumstances at play in this action. Quite the opposite. At the hearing, counsel argued that this action is not about the Directives but is about the larger issue of abuse of authority within the CAF. The Directives, the Plaintiffs' assert, are merely a springboard into the litigation. In my view, such broad and unfocussed assertions do not rise to the level of exceptional circumstances warranting this Court's intrusion upon the scheme devised by Parliament.

[67] Indeed, it is noteworthy that over 100 of the Plaintiffs have filed grievances arising from the Directives. At least one grievance was allowed by the MGERC though not supported by the

FA. This Court has consistently upheld the CAF grievance system and declined to exercise its exceptional jurisdiction: *Veltri v Department of National Defence Canada*, dated January 4, 2018, at paras 11-17 (Federal Court file no. T-1400-17); *Sandiford v Canada*, 2007 FC 225 at para 28-29; *Graham v Canada*, 2007 FC 210 at paras 22-23. In the present circumstances, I see no basis upon which I ought to exercise my residual jurisdiction to permit this action to continue.

G. Conclusion

[68] Based on the above analysis, I conclude the following:

1. The pleading should be struck in its entirety pursuant to Rule 221(1)(a), (c) and (f). The pleadings do not disclose a reasonable cause of action, fail to plead material facts, and use vexatious language throughout. Some of the assertions also constitute abuse of process.
2. Leave to amend should not be granted.
3. Further, there is no basis upon which this Court should exercise its residual jurisdiction to permit the action to proceed.

IV. Costs

[69] Both parties seek costs on this motion.

[70] The Plaintiffs seek \$5,000 in costs for this motion. As justification, the Plaintiffs cite the large number of individual claimants in the action, and the resultant preparation requirements for evidence on this motion. The Plaintiffs also note Canada's late submission of additional case law.

[71] Canada seeks \$4,500 in costs for this motion and an additional \$540 because the hearing was adjourned. Canada acknowledges that this is the top end of Column 3 of the Tariff, but submits that the sum is justified in this instance because the Plaintiffs filed an improper and voluminous motion record. As a result, in preparing for this motion, Canada has been required to review unnecessary and improperly filed documents. Canada also suggests that the quantum of costs sought is appropriate in light of the damages sought by the Plaintiffs.

[72] As costs are entirely within the discretion of the Court, I am persuaded that Canada is entitled to its costs as the successful party on the motion. As to quantum, Canada's request is reasonable and will be ordered.

JUDGMENT in T-1296-23

THIS COURT'S JUDGMENT is that:

1. The motion is allowed.
2. The action is struck without leave to amend.
3. Canada shall have costs fixed in the amount of \$5,040, inclusive of taxes and disbursements, payable jointly and severally from the Plaintiffs.

"Catherine A. Coughlan"

Associate Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:

T-1296-23

STYLE OF CAUSE:

FRANCESCO GABRIELE QUALIZZA, JOEL THOMAS WILLIAM ELLIS, PATRICK MERCIER, JILL LYNE DUCHESNEAU, JOSEPH BENJAMIN STEWART, ERIC DAVID FAUCHER, SCOTT PETER BACON, STEPHEN TROY CHLEDOWSKI, AMANDA LEIGH BENHAM, JOSHUA MARTIN MCCULLOCH, KYLE CORRIVEAU, JOSEPH DANIEL ERIC LOUIS MONTGRAIN, DUSTIN SHANE WIEBE, STEPHEN WJ MORRIS, DAVID GARCIA VARGAS, MICHAEL JOSEPH LIS, NATASHA KATRINA LIS, SOLANGE SINE DJOUECHE, PETER VLASSOV, FREDERIC VILLENEUVE-NORMAND, ESTATE OF JONATHAN EMMERSON JENKINSON, VALENTIN LAVROV, MARIE-EVE LABONTE, JESSE DALE FRIESEN, TANIA CATHERINE NORDLI, ANDRZEJ SKULSKI, DENNIS JOHN PAUL TONDREAU, EMMY-LOU LAURIE FORGET, DALLAS ALEXANDER FLAMAND, CHELSEA ELAINE RO GAL, BARON HORDO, TAYLOR MICHAEL HARVIE, VANESSA RAE LAROCHELLE, JACQUELINE MARIE FRANCE BOEHME, JAMES PAUL DANIEL FORMOSA, KAITLYN E CAMPBELL, LUCAS TIMOTHY VANCUREN, JERMAINE SHERIDAN BURRELL, ANTHONY DAVID HIATT, MICHAEL ST-LAURENT, ARMAND EDWARD A. GARNER, AMIT SODHI, CAMILLE FELIX J TURGEON, SAMANTHA GWENDOLYN STYLES, CAROL-ANN MARY T OUELLETTE, ROBERT JAMES TEREMCHUK, NATHANIEL J P TONDREAU, NIKOLA J GUY TONDREAU, LISA PAULINE LEOPOLD, HAILEY NOELLE SCHRODER, DOMINIQUE LAUZIER, VALERIE OUELLET, JOHN M GILLIS, MORGAN CHRISTOPHER WARREN, MARK ANDREW GOOD, SEAN MICHAEL MARCOTTE, MARK ANDREW LOLACHER, GABRIEL VILLENEUVE, KIRA ANNE YAKIMOVICH, MATHIEU W PETIT-MARCEAU, KIMBERLY NEDRA ETTTEL, CHRISTOPHER WILLIAM RAMBHAROSE, MICHAEL RYAN

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TULLY, MAGALI TURPIN, JULIAN PHILIP TUTINO,
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PLACE OF HEARING:

DATE OF HEARING:

SEPTEMBER 19, 2024

JUDGMENT AND REASONS:

COUGHLAN A.J.

DATED: NOVEMBER 13, 2024

APPEARANCES:

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