

Federal Court



Cour fédérale

**Date: 20221025**

**Docket: T-1729-21**

**Citation: 2022 FC 1449**

**Ottawa, Ontario, October 25, 2022**

**PRESENT: The Honourable Mr. Justice Bell**

**BETWEEN:**

**PRANOY CHOWDHURY**

**Plaintiff**

**and**

**HIS MAJESTY THE KING**

**Defendant**

**JUDGMENT AND REASONS**

I. Nature of the Matter

[1] The Plaintiff, Mr. Chowdhury, brings a motion pursuant to Rule 51 of the *Federal Courts Rules*, SOR/98-106 [“Rules”] by which he appeals the April 12, 2022 Order of Prothonotary Tabib (as she then was). In the remainder of these reasons, she will be referred to as Associate Judge. Mr. Chowdhury requests this Court find that the Associate Judge erred in striking out his Statement of Claim without leave to amend, with costs.

[2] For the reasons set out below, I dismiss this motion and affirm the Associate Judge's Order. Mr. Chowdhury has not established that Associate Judge Tabib committed an error of law, or a palpable and overriding error regarding a question of fact or a question of mixed fact and law, in the circumstances.

## II. Facts

[3] Mr. Chowdhury is a self-represented plaintiff.

[4] On November 15, 2021, Mr. Chowdhury filed a Statement of Claim in which he challenged the constitutionality of Canada's mandatory vaccination requirements for air travellers (the "vaccine mandate"). The Statement of Claim constitutes 114 pages containing 369 paragraphs. In addition, the Statement of Claim contains 43 footnotes, some of which provide citations of cases and others of which refer to, *inter alia*, various government of Canada department websites and publications, various government of Ontario department websites and publications, the Canadian Judicial Council and press releases from various sources. Mr. Chowdhury sought the following remedies:

- a) declarations that the vaccine mandate violates ss. 6(2), 7, 8, 2(a) and 15(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 ["*Charter*"], s. 12 of the *Canadian Human Rights Act*, RSC 1985, c H-6, the *Privacy Act*, RSC 1985, c P-21, Ontario's *Health Care Consent Act*, 1996, SO 1996, c 2, Sched A, and several international conventions and instruments;

- b) a declaration that the vaccination mandate “was done in bad faith and abuse of power for partisan political self-interests”;
- c) a declaration that the vaccine mandate is of no force and effect;
- d) \$20,000 in remedies “for coercion of an invasive medical procedure and privacy violation”;
- e) \$70,000 in remedies for “mental distress, repeated injury to dignity, feelings, self-respect, and denial of services incurred as a result of the discrimination, scapegoating, stigmatization and dehumanization”; and
- f) costs, prejudgment and post-judgement interest.

[5] The Statement of Claim did not name the specific order, regulation or statute being challenged. The Associate Judge, however, took judicial notice that a federal vaccine mandate for air travel was in force at the time of issuance of the Statement of Claim, namely, the *Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No. 45* [“*Interim Order No. 45*”]. Amendments were made to the vaccine mandate 14 times between the issuance of the Statement of Claim and the time of the Associate Judge’s Order. Importantly, *Interim Order No. 45* provided air travellers with the option of producing a negative molecular test result rather than proof of vaccination. The version in force at the time of the Associate Judge’s Order required that all air travellers over the age of 12 be fully vaccinated. Both versions also provided several exemptions.

[6] The Defendant filed a motion to strike the Statement of Claim and dismiss the action, on the basis that it disclosed no reasonable cause of action, and was vexatious. The Defendant also sought costs.

[7] On January 31, 2022, the Associate Judge issued a Direction to the parties to provide supplementary submissions arising from the Court's concern that the Statement of Claim sought both a declaration of invalidity and damages. In responding to the Associate Judge's Direction, the Defendant contended that Mr. Chowdhury's claim for declaratory relief, within the context of an action for damages, ran afoul of section 18(3) of the *Federal Courts Act*, RSC, 1985, c F-7 ["Act"]. That section provides that injunctive and declaratory relief "...may only be obtained on an application for judicial review made under section 18.1". In his supplemental submissions, Mr. Chowdhury restated his desire to have the matter proceed as an action.

### III. Order Subject to Appeal

[8] The Associate Judge granted the Respondent's motion, struck Mr. Chowdhury's Statement of Claim without leave to amend and dismissed the action, with costs awarded against Mr. Chowdhury.

[9] The Associate Judge concluded the Statement of Claim was premised on a fallacy. Contrary to that asserted by Mr. Chowdhury, *Interim Order No. 45* provided the option of producing a negative molecular test result rather than proof of vaccination. She recognized that the vaccine mandate in force at the time of her Order did not include this option. She nonetheless concluded the Statement of Claim could not be saved by an amendment, which might refer to the

then current mandate. The Associate Judge concluded that Mr. Chowdhury failed to plead facts capable of establishing that he would not be entitled to an exemption. It followed that the alleged *Charter* breaches were entirely hypothetical (*Zbarsky v Canada*, 2022 FC 195 at paras 33–39).

[10] The Associate Judge observed that while the Statement of Claim was lengthy, it was short on facts upon which the Court might find that Mr. Chowdhury's *Charter* or privacy rights had been breached, or how he has personally been affected by, or suffered damage from, the vaccine requirement (*Turmel v Canada*, 2021 FC 1095 at para 4). She concluded as follows:

- With respect to s. 2(a) of the *Charter*, the Statement of Claim sets out Mr. Chowdhury's sincere personal convictions regarding vaccination, but there are no allegations that the vaccine requirement prevents him from holding or expressing these convictions;
- With respect to s. 6(b) of the *Charter*, Mr. Chowdhury does not allege that he had any intention or plan to move to, or work anywhere other than Ottawa, his place of residence. Pleading that the vaccine requirement would prevent him in general terms from pursuing the gaining of a livelihood elsewhere is not the same as pleading that it has frustrated a specific undertaking;
- With respect to s. 7 of the *Charter*, Mr. Chowdhury does not allege that the vaccine mandate had the effect of compelling him to receive the vaccine or endangered him; that he chose to take any allegedly unsafe or illegal alternative modes of transportation to visit his family and friends in Toronto and Saskatchewan; or that he suffered psychological injury or harm from having been unable to visit family or friends. He only speaks in

general terms about how the vaccine mandate violates the fundamental right to liberty and security of the person.

- With respect to s. 8 of the *Charter*, there are no allegations to the effect that as a result of the enforcement of the vaccination mandate, Mr. Chowdhury was compelled to reveal personal information about his health;
- With respect to s. 15(1) of the *Charter*, Mr. Chowdhury alleges adverse-effect discrimination; namely, that in its application, the vaccine mandate imposes a burden on certain segments of the population not borne by others or fails to ensure that all benefit equally from a service offered to the public. The Associate Judge observed that Mr. Chowdhury improperly pled discrimination suffered by others. She notes that Mr. Chowdhury asserts adverse-effect discrimination based on age, because the “young” are less likely to suffer severe illness or death from COVID-19 and are more likely to suffer adverse effects from the vaccine. The Statement of Claim does not define “young”. Also, the only facts pleaded in support of this allegation relate to the Moderna vaccine. Mr. Chowdhury makes no such allegations about the other vaccines approved under the vaccine mandate. All other allegations set out in the Statement of Claim regarding the risks associated with vaccines are neither age, nor sex specific, or are merely bald conclusory statements that youth are more at risk of side effects. In the Statement of Claim, Mr. Chowdhury also advances a claim of adverse-effect discrimination on grounds “analogous” to the prohibited grounds of discrimination, namely, perceived disability, because the vaccine mandate is based on the presumption or perception that unvaccinated people are infectious. The Associate Judge drew a distinction between allegations that the vaccine mandate is “based” on presumptions or perceptions and that it

might “create” a presumption or perception of infectiousness. The Associate Judge rightly pointed out that the Statement of Claim did not contain allegations to the effect that the vaccine mandate “creates” a presumption of infectiousness, categorizes people on the basis of real or perceived infectious status, or applies differently based on any perception of the infectious status of any person. The Associate Judge observed that while Mr. Chowdhury contends that the defendant’s decision to implement the vaccine mandate was based on the perception that only the unvaccinated are afflicted with, and spread COVID-19, this allegation is purely speculative. In any event, according to the Associate Judge, this would not suffice to establish a cause of action, as “the law does not judge the constitutionality of legislation and government actions on the basis of legislative intent alone”.

[11] The Associate Judge further found that there is no cause of action arising from alleged infringements of the *Canadian Human Rights Act*, RSC 1985, c H-6, the *Privacy Act*, RSC 1985, c P-21, Ontario’s *Health Care Consent Act*, 1996, SO 1996, c 2, Sched A and other international instruments. I note that, for purposes of this appeal, Mr. Chowdhury has abandoned these claims under other statutes and instruments.

[12] Lastly, the Associate Judge concluded that, even if she were wrong in finding that Mr. Choudhury failed to plead sufficient material facts to support a cause of action for breach of *Charter* rights or to articulate any other cause of action, the action seeks remedies that are only available by way of an application for judicial review. Mr. Chowdhury acknowledged this in his supplementary submissions, but contended that the Court possesses the residual discretion to

allow the claim to proceed if “at its core”, it is more about a cause of action for damages than determining the legality of the vaccine mandate. The Associate Judge, however, found that Mr. Chowdhury’s claim for damages is unsupported by any material fact. She observed that he remains unvaccinated; has not attempted to board an aircraft and has therefore not been required to disclose any of his personal information; did not allege that he experienced any mental distress or injury to his dignity, feelings or self-respect; and, that he did not plead he had planned a visit to friends and family which was frustrated by the vaccine mandate.

[13] The Associate Judge found that Mr. Chowdhury’s claim for damages was devoid of any possibility of success and that the action was essentially a request for judicial review. She noted that given the serious defects as to the content and nature of the allegations set out in the Statement of Claim, it would not be appropriate to allow the originating procedure to continue as an application for judicial review.

#### IV. Relevant Provisions of the *Act* and the *Rules*

[14] The relevant provisions are ss. 51(1), 57 and 221(1) of the *Rules*, and s. 18 of the *Act*:

***Federal Courts Rules,  
SOR/98-106***

**Appeal**

51 (1) An order of a prothonotary may be appealed by a motion to a judge of the Federal Court.

**Wrong originating document**

***Règles des Cours fédérales,  
DORS/98-106***

**Appel**

51 (1) L’ordonnance du protonotaire peut être portée en appel par voie de requête présentée à un juge de la Cour fédérale.

**Non-annulation de l’acte introductif d’instance**



57 An originating document shall not be set aside only on the ground that a different originating document should have been used.

57 La Cour n'annule pas un acte introductif d'instance au seul motif que l'instance aurait dû être introduite par un autre acte introductif d'instance.

**Motion to strike**

**Requête en radiation**

221 (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it

221 (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :

(a) discloses no reasonable cause of action or defence, as the case may be,

a) qu'il ne révèle aucune cause d'action ou de défense valable;

(b) is immaterial or redundant,

b) qu'il n'est pas pertinent ou qu'il est redondant;

(c) is scandalous, frivolous or vexatious,

c) qu'il est scandaleux, frivole ou vexatoire;

(d) may prejudice or delay the fair trial of the action,

d) qu'il risque de nuire à l'instruction équitable de l'action ou de la retarder;

(e) constitutes a departure from a previous pleading, or

e) qu'il diverge d'un acte de procédure antérieur;

(f) is otherwise an abuse of the process of the Court,

f) qu'il constitue autrement un abus de procédure.

and may order the action be dismissed or judgment entered accordingly.

Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.

***Federal Courts Act, RSC 1985, c F-7***

***Loi sur les cours fédérales, LRC 1985, c F-7***

**Extraordinary remedies, federal tribunals**

**Recours extraordinaires : offices fédéraux**

18 (1) Subject to section 28, the Federal Court has exclusive original jurisdiction	18 (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :
(a) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal; and	a) décerner une injonction, un bref de certiorari, de mandamus, de prohibition ou de quo warranto, ou pour rendre un jugement déclaratoire contre tout office fédéral;
(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.	b) connaître de toute demande de réparation de la nature visée par l'alinéa a), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral.

[...]

**Remedies to be obtained on application**

(3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.

**Exercice de recours**

(3) Les recours prévus aux paragraphes (1) ou (2) sont exercés par présentation d'une demande de contrôle judiciaire.

[...]

V. Issues as framed by Mr. Chowdhury and the Standard of Review

[15] While Mr. Chowdhury's written submissions are lengthy and the issues somewhat unwieldy, I consider the following to be a fair summary. The Associate Judge:

- a) failed to consider that Mr. Chowdhury acknowledged the negative molecular test alternative to vaccination;
- b) failed to consider that the exemptions to mandatory vaccination were not listed on Government of Canada websites when the Statement of Claim was issued;
- c) failed to consider that the vaccine mandate was “inaccessible” (not published on any Government of Canada website);
- d) erroneously concluded that “the law does not judge the constitutionality of legislation on the basis of legislative intent alone”;
- e) failed to accord appropriate weight to the chilling effect of the vaccine mandate on his rights;
- f) erroneously concluded that Mr. Chowdhury cannot plead discrimination suffered by others.

[16] On appeal from a discretionary order of an Associate Judge, this Court is called upon to apply the test set out in *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235, as adopted in *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 FCR 331, [*Hospira*] at paras 64 and 66. As stated by the Federal Court of Appeal in *Bennett v Canada*, 2022 FCA 73, at para 7 “The test for setting aside a decision for palpable and overriding factual error is an exacting one. An error is only palpable if it is obvious or plainly seen and only overriding if it affects the result reached”.

[17] In order to reverse the Associate Judge, I must be satisfied that her decision was incorrect in law or based upon a palpable and overriding error in regard to the facts [*Hospira, supra*, at 64].

## VI. Legal Principles Applicable to Motions to Strike

[18] Rule 221(1)(a) provides that a pleading, or anything contained therein that “discloses no reasonable cause of action” may be struck out, with or without leave to amend. In *Theriac v Canada (Attorney General)*, 2022 FC 722 at para 14, the Court summarized the applicable test and the underlying principles to a finding that a Statement of Claim discloses no reasonable cause of action:

A. To strike a claim on the basis it discloses no reasonable cause of action, it must be plain and obvious that the claim discloses no reasonable cause of action or has no reasonable prospect of success (*Hunt v Carey Canada Inc*, 1990 CanLII 90 (SCC), [1990] 2 SCR 959 at para 36 [Hunt]; *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 17);

B. All facts plead must be accepted as provided unless patently ridiculous or incapable of proof: *Hunt* at paras 33 and 34; *Edell v Canada*, 2010 FCA 26 at para 5; *Operation Dismantle v The Queen* (1985), 1985 CanLII 74 (SCC), 18 DLR (4th) 481 (SCC) at 486-487 and 490-491 [*Operation Dismantle*]);

C. The statement of claim is to be read generously and in a manner that accommodates drafting deficiencies (*Operation Dismantle* at para 14);

D. That to disclose a cause of action the pleading must (1) allege facts capable of giving rise to the action; (2) disclose the nature of the action; and (3) indicate the relief sought – the statement of claim is to contain a concise statement of the material facts to be relied upon but not the evidence by which the facts are to be

proved (*Oleynik v Canada (Attorney General)*, 2014 FC 896 at para 5; Rule 174 of the Rules);

E. What constitutes a material fact is to be determined by the cause of action and the relief sought. The pleading must disclose to the defendant the who, when, where, how and what, that give rise to the claimed liability – a narrative of what happened and when will rarely suffice and neither the court nor opposing parties are to be left to speculate as to how the facts support various causes of action (*Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 at para 19; *Simon v Canada*, 2011 FCA 6 at para 18).

[19] A plaintiff who relies on the *Charter* must plead sufficient material facts to satisfy the criteria applicable to the provision he or she alleges was violated (*Van Sluytman v Canada*, 2022 FC 545 at para 25).

## VII. Analysis

### A. *Overview*

[20] As already noted, Mr. Chowdhury's Statement of Claim constitutes of 114 pages, 369 paragraphs and 43 footnotes. His Majesty the King is the only Defendant. However, Mr. Chowdhury takes issue not only with the conduct of the Federal Government and its representatives, but also with the conduct of provincial governments and even pharmaceutical companies. The remedies sought by Mr. Chowdhury all relate to the COVID-19 vaccination mandate for air travellers (previously defined as the "vaccine mandate"). However, the allegations contained in the Statement of Claim are much broader and mainly consist of Mr. Chowdhury's opinions or bare assertions regarding the purpose for which COVID-19 vaccines were developed, their effectiveness, and the political motivations behind the various vaccine mandates. Mr. Chowdhury contends that the COVID-19 vaccines do not fit the definition of

“vaccines”; that the Government of Canada used outdated data to approve COVID-19 vaccines; that COVID-19 vaccines do not prevent one from being infected by, or from transmitting COVID-19; that the implementation of the vaccine mandate suspiciously coincides with the announcement of federal elections, such that the mandate is “partisan political” in nature; that the vaccine mandate is “building the infrastructure of a technological surveillance state”; that vaccine manufacturers have “significant” criminal records; and that various politicians and other government officials have violated COVID-19 prevention measures. In addition to being frivolous, it is unclear how these arguments or assertions relate to the constitutionality of the vaccine mandate or to the damages Mr. Chowdhury alleges he has suffered in consequence of the vaccine mandate.

[21] In his Motion record, Mr. Chowdhury takes issue with isolated statements made by the Associate Judge. He also tries to cure the deficiencies in his Statement of Claim by presenting new facts and adducing new evidence that were not before the Associate Judge. However, he does not demonstrate how the Associate Judge erred in finding that the Statement of Claim discloses no reasonable cause of action. He does not demonstrate how the Associate Judge erred in finding that he failed to plead facts sufficient to establish that he would not be entitled to seek an exemption, that he failed to plead sufficient facts to support the alleged *Charter* breaches, that his Statement of Claim is procedurally flawed as it seeks remedies which can only be obtained by way of an application for judicial review; and, that his claims for damages are unsupported by any material allegation of fact. Mr. Chowdhury has failed to identify an error of law, or a palpable and overriding error regarding a question of fact or a question of mixed fact and law, that would justify intervention by the Court.

B. *No palpable and overriding error in finding that the Statement of Claim is premised on a fallacy.*

[22] Mr. Chowdhury is correct when he says that the Statement of Claim recognizes that on November 30, 2021, the negative molecular test alternative to vaccination was going to be removed from the vaccine mandate. However, that assertion does not change the fact that on the date the Statement of Claim was issued, the vaccine mandate (*Interim Order No. 45*) provided the option of a negative molecular test. Mr. Chowdhury challenged the constitutionality of the vaccine mandate largely on the basis that he and other Canadians were required to be vaccinated against COVID-19, in order to board an airplane. However, that was clearly not the case at the time his Statement of Claim was issued. It follows that the Associate Judge did not err in finding that the Statement of Claim was based on a misconception.

C. *Mr. Chowdhury's contention that the Associate Judge failed to consider that the exemptions to mandatory vaccination were not listed when the Statement of Claim was issued, is without merit.*

[23] Mr. Chowdhury asserts that the Associate Judge's finding that his Statement of Claim fails to recognize or mention the existence of several exemptions to the vaccine mandate, is inaccurate. He bases his assertion on the fact that the exemptions were not listed on the Defendant's website. However, the fact that exemptions may not have been listed on the Defendant's website on the day the Statement of Claim was issued does not render the Associate Judge's finding in that regard inaccurate. In fact, she was perfectly correct.

[24] Mr. Chowdhury also takes umbrage with the fact that at page 3 of the Order, the Associate Judge observes that the *Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No. 59* [*“Interim Order No. 59”*] – which is the version of the vaccine mandate that was in force at the time her Order was issued – provides several exemptions to mandatory vaccination. In making such an observation, the Associate Judge did not, contrary to that asserted by Mr. Chowdhury, fail to consider that the exemptions were not listed on the Defendant’s website on the date the Statement of Claim was issued. *Interim Order No. 59* was not in force at the time the Statement of Claim was issued.

[25] Mr. Chowdhury further pleads that the process of obtaining an exemption is cumbersome and that he is not eligible for any exemption. He attempts to cure deficiencies in his Statement of Claim by adducing new facts regarding efforts to board a plane, on this motion. The general rule is that an appeal is to be decided based upon the material before the original decision-maker. Only in exceptional circumstances, may new evidence be admitted (*David Suzuki Foundation v Canada (Health)*, 2018 FC 379 at para 36 [*David Suzuki*]; *Palmer v The Queen*, 1979 CanLII 8(SCC), [1980] 1 SCR 759 at 776–777). New evidence may be admissible, where: it could not have been made available earlier; it will serve the interests of justice; it will assist the Court; it will not seriously prejudice the other side; and, if believed, when considered in light of the other evidence adduced at trial could reasonably be expected to have affected the result. The evidence supporting the facts Mr. Chowdhury now wishes to assert in his Statement of Claim could easily have been obtained prior to the hearing before the Associate Judge. Those facts were reasonably discoverable. I am not satisfied exceptional circumstances exist which would justify the admission in to evidence, on this appeal, of the proposed new evidence.



D. *Mr. Chowdhury's argument that the vaccine mandate was inaccessible is without merit.*

[26] Mr. Chowdhury says that he should not be penalized because of the Defendant's "continued refusal" to specify or name the specific order, regulation or statute under which the vaccine mandate is being enforced on [the Government's] website. First, it is unclear as to how Mr. Chowdhury has been penalized or suffered any prejudice in this regard. His failure to refer to the exact legal instrument under challenge played no role in the Associate Judge's decision. She undertook all the research necessary and included appropriate references to the impugned instrument in her decision. Second, the alleged inaccessibility to the actual vaccine mandate does not help identify any error of law or any palpable and overriding error of fact or of mixed fact and law.

E. *The Associate Judge committed an error of law by stating: "the law doesn't judge the constitutionality of legislation on the basis of legislative intent alone". However, nothing turns on this error.*

[27] At page 11 of her Order, the Associate Judge states:

*"The allegations of the statement of claim are to the effect that the government's decision to impose the vaccination requirements was based on the perception that only the unvaccinated catch and spread COVID-19. Even assuming that the perception of infectiousness motivated the adoption of the vaccine requirement, it would not suffice to establish a cause of action in the absence of actual discrimination or adverse effect. **The law does not judge the constitutionality of legislation and government actions on the basis of legislative intent alone, but on the basis of the actual substance and effect of the legislation or actions at issue.**"*

[Emphasis is mine.]

[28] Mr. Chowdhury is correct. The Associate Judge’s statement that “the law does not judge the constitutionality of legislation and government actions on the basis of legislative intent alone” is incorrect. Either an unconstitutional purpose or an unconstitutional effect can invalidate legislation (*R v Big M Drug Mart Ltd*, 1985 CanLII (SCC), [1985] 1 SCR 295, at para 80). A breach of s. 15(1) may be established by demonstrating either that legislation has a discriminatory purpose or that its effects are discriminatory (*Vriend v Alberta*, 1998 CanLII 816 (SCC), [1998] 1 SCR 493 at para 92–93).

[29] However, nothing turns on this error. The Associate Judge made that statement in the hypothetical context that the perception of infectiousness motivated the adoption of the vaccine mandate. Furthermore, it was made as an alternative to the correct finding already made by the Associate Judge that Mr. Chowdhury erred in stating that discrimination on the basis of perceived illness or infection status is analogous to discrimination based on disability. As a result, the observation was clearly obiter. Mr. Chowdhury’s bald assertion that the perception of infectiousness motivated the adoption of the vaccine mandate is insufficient to establish a reasonable cause of action. Furthermore, it is pure speculation. Because of the speculative nature of the assertion, it cannot be saved by the well-established principle that facts set out in a Statement of Claim are presumed to be true (*Fitzpatrick v. Codiac Regional RCMP Force, District 12*, 2019 FC 1040 at para 16).

F. *The Associate Judge did not commit a palpable and overriding error in weighing the evidence.*

[30] Mr. Chowdhury pleads that the Associate Judge did not give appropriate weight to the “moral coercion” exercised by the Defendant on unvaccinated individuals. To the extent that Mr. Chowdhury is challenging the Associate Judge’s weighing of the evidence, he has failed to identify a palpable and overriding error. The Associate Judge properly applied the law to the facts before her. Mr. Chowdhury made assertions of breaches of ss. 2(a), 6(2), 7, 8 and 15(1) of the *Charter*. Associate Judge Tabib examined whether the Statement of Claim contained sufficient material facts to satisfy the criteria applicable to each provision, and found that it did not. There is no evidence of any factual error on the part of the Associate Judge, let alone one that is palpable and overriding.

G. *The Associate Judge did not err in stating that Mr. Chowdhury cannot plead discrimination suffered by others.*

[31] A breach of s. 15(1) of the *Charter* will be established if:

- 1) the government action (in the form of legislation, regulations, directions, policies, and others), on its face or in its impact, creates a distinction based on an enumerated or analogous ground; and
- 2) the distinction creates a disadvantage by perpetuating prejudice or stereotyping.

(*R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 at para 17).

[32] It is trite law that to plead adverse-effect discrimination, a claimant must establish that he or she has been denied a benefit that others are granted, or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1) (*Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 SCR 396). The Associate

Judge's observation that Mr. Chowdhury cannot plead discrimination suffered by others is consistent with this principle.

[33] Mr. Chowdhury contends on appeal that he belongs to the "unvaccinated and unwilling to disclose private medical information" group. However, the Associate Judge expressly found that he failed to plead sufficient material facts to establish that he was part of a group that faces discrimination on a prohibited ground. His disagreement with the Associate Judge's assessment of the evidence is insufficient to establish a palpable and overriding error (*Apotex Inc v Janssen-Ortho Inc*, 2009 FCA 212 at para 102).

[34] Lastly, Mr. Chowdhury says that he should be allowed to "invoke the Charter rights of others" because the issues raised in this case are of great public importance. However, Mr. Chowdhury has not requested that he be granted public interest standing. Even if such a request had been made, I question whether Mr. Chowdhury would have met the test established in (*Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 524 at para 37) regarding public interest standing, namely that: (1) there is a serious justiciable issue raised; (2) he has a real stake or a genuine interest in it; and (3) in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts. As such, he has no standing to "invoke the Charter rights of others". Furthermore, the Associate Judge did not have before her a certification application for a class action, nor did Mr. Chowdhury assert such a claim.

H. *Mr. Chowdhury has not demonstrated that the Associate Judge erred in refusing to allow the procedure to continue as an application for judicial review.*

[35] It is clear that some of the remedies sought by Mr. Chowdhury in his Statement of Claim may only be obtained by way of an application for judicial review pursuant to s. 18.1 of the *Act*. Rule 57 may be invoked to convert an action to an application for judicial review (*Chiasson v Canada*, 2001 FCT 511, [2001] 4 FC 66 at para 39). The Court's decision to allow a proceeding to continue under another type of proceeding pursuant to Rule 57 is discretionary (*Docherty v Canada (Public Safety and Emergency Preparedness)*, 2013 FCA 89 at para 14). When it is established that a Statement of Claim cannot succeed in its current form, the Court, dealing with a motion to strike, must ask itself whether there is nonetheless a live issue between the parties and whether it is not plain and obvious that the plaintiff cannot succeed in the context of another appropriate proceeding (*Besse v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 1003 [*Besse*] at para 44, citing *Rosenberg v Canada (National Revenue)*, 2015 FC 549 at para 35).

[36] In *Besse*, the Court exercised its discretion to allow the plaintiff's action to continue as an application for judicial review, largely on the basis that "there appear[ed] to be some potential merit to the application, raising as it does substantial issues with respect to the potential impact of the [policy] on Charter and other rights" (at para 76). In the present case, the Associate Judge concluded that Mr. Chowdhury's action was essentially a request for judicial review without even a thin veneer of an action for damages. Given the "serious defects" as to the content and the merits of Mr. Chowdhury's claim, she concluded that it would not be appropriate to allow the proceeding to continue as an application for judicial review.

[37] Mr. Chowdhury has failed to raise any argument as to why the Court should interfere with the Associate Judge's finding. To the contrary, in the reply submissions filed on this motion, Mr. Chowdhury continues to assert that this matter should proceed as an action. Furthermore, during the hearing held on May 18, 2022, the Court directed the parties to provide additional written submissions on the issue of converting this action to an application for judicial review. However, Mr. Chowdhury's submissions did not address this issue in any substantive way. As a result, the Court finds no reason to interfere with the Associate Judge's conclusion in this regard.

VIII. Conclusion

[38] The motion is dismissed with costs of \$250.00, all- inclusive of taxes and disbursements, payable by the Plaintiff to the Defendant.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the motion to appeal is dismissed with costs of \$250.00, all-inclusive of taxes and disbursements, payable by the Plaintiff to the Defendant.

**"B. Richard Bell"**

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1729-21

**STYLE OF CAUSE:** PRANOY CHOWDHURY v HIS MAJESTY THE KING

**PLACE OF HEARING:** HEARD VIA VIDEOCONFERENCE

**DATE OF HEARING:** MAY 18, 2022

**JUDGMENT AND REASONS:** BELL J.

**DATED:** OCTOBER 25, 2022

**APPEARANCES:**

Pranoy Chowdhury FOR THE PLAINTIFF

Raymond Lee FOR THE DEFENDANT

**SOLICITORS OF RECORD:**

Pranoy Chowdhury SELF-REPRESENTED  
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Attorney General of Canada FOR THE DEFENDANT  
Calgary, Alberta