Federal Court Cour fédérale

Date: 20230113

Docket: T-1718-21

Citation: 2023 FC 57

Ottawa, Ontario, January 13, 2023

PRESENT: The Honourable Madam Justice Rochester

BETWEEN:

JOCELYNE MURPHY AND SHERRY RAFAI FAR

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is a motion in writing under Rules 51 and 369 of the *Federal Courts Rules*, SOR/98-106 [Rules], to appeal the Order and Reasons of Associate Justice Mireille Tabib dated February 7, 2022, [Order] arising from the Respondent's motion to have the present judicial review struck.

[2] The Applicants, Jocelyne Murphy and Sherry Rafai Far, are employees of the Government of Canada, specifically Justice Canada. They are subject to the *Policy on COVID-19 Vaccination for the Core Public Administration Including the Royal Canadian Mounted Police* [Vaccination Policy], which requires them to be fully vaccinated against COVID-19, unless accommodation is warranted, and to disclose their vaccination status to their employer.

[3] The Applicants are unvaccinated. On November 1 and 2, 2021, they respectively received letters from their manager informing them that they were required to adhere to the Vaccination Policy by November 15, 2021, failing which they would be placed on administrative leave without pay until such time as they complied.

[4] On November 12, 2021, the Applicants commenced the present judicial review seeking: (i) a declaration that the Vaccination Policy is void *ab initio;* (ii) an order that they be reinstated in their positions as if there had been no interruption, including with respect to salary and benefits; and (iii) an award of damages under Article 24 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c 11 [*Charter*].

[5] The Respondent filed a motion to have the judicial review struck on the basis that it was premature because the Applicants had failed to exhaust the grievance process set out in the *Federal Public Sector Labour Relations Act*, SC 2003, c 22 [Act].

[6] In her Order, Associate Justice Tabib concluded that the grievance process provided for in the Act was not clearly precluded. As such, the application for judicial review was doomed to fail given the Applicants were required to avail themselves of the grievance process prior to applying to the Federal Court for judicial review. Furthermore, Associate Justice Tabib concluded that the Applicants had not established that exceptional circumstances existed that would justify bypassing their obligation to follow the grievance process available to them. Consequently, the application for judicial review was struck.

[7] On February 17, 2022, Ms. Murphy, only one of the two Applicants, filed the present appeal alleging that Associate Justice Tabib committed errors of fact and law. In particular, Ms. Murphy alleges that Associate Justice Tabib erred in: (i) characterizing the nature of the application; (ii) concluding that there was adequate and effective relief through the grievance process; (iii) failing to recognize that the facts as alleged demonstrated that there was not an effective right to grieve; (iv) failing to permit the Applicants to adduce additional evidence; (v) reversing the burden of proving that the grievance scheme is not available; and (vi) not finding that exceptional circumstances exist to permit the Applicants to continue their application for judicial review. Ms. Murphy also pleads that there are doubts as to Associate Justice Tabib's impartiality.

[8] For the reasons set out below, Ms. Murphy has failed to persuade me that Associate Justice Tabib erred in striking the Applicants' judicial review application. As such, this appeal of the Order is dismissed.

II. Issues

[9] The central issue on this appeal is whether Associate Justice Tabib erred in granting the Respondent's motion to strike the application for judicial review. The issues raised on this appeal in this regard may be reformulated and subdivided as follows:

1. Is Associate Justice Tabib biased?
2. Are the additional affidavits filed by Ms. Murphy on appeal admissible?
3. Did Associate Justice Tabib err in law?
4. Did Associate Justice Tabib err in her characterization of the nature of the application for judicial review?
5. Did Associate Justice Tabib err in her conclusion that the grievance process was available, adequate and effective in the circumstances of the present case?
6. Did Associate Justice Tabib err in determining that exceptional circumstances did not exist that would have justified proceeding with the judicial review?

III. Standard of Review

[10] Save for the first two issues, the applicable standard of review for an appeal under Rule 51, which relates to a discretionary order of an Associate Judge is set out in *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 [*Hospira*] at paragraphs 64, 66 and 79. Such orders are to be reviewed on the civil appellate standard (*Housen v Nikolaisen*, 2002 SCC 33) and "should only be interfered with when such decisions are incorrect in law or are based on a palpable and overriding error in regard to the facts" (*Hospira* at para 64). Questions of mixed fact and law are subject to the palpable and overriding error standard while

questions of law, and mixed questions where there is an extricable question of law, are subject to the standard of correctness (*Worldspan Marine Inc v Sargeant III*, 2021 FCA 130 at para 48).

[11] An exercise of discretion by an Associate Judge involves applying legal standards to the facts as found. For the purposes of the *Housen* framework, exercises of discretion are questions of mixed fact and law (*Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157 at para 72 [*Mahjoub*]). Such questions of mixed fact and law, including exercises of discretion, can be set aside only on the basis of palpable and overriding error unless an error on an extricable question of law or legal principle is present (*Mahjoub* at para 74). The Federal Court of Appeal explains the notion of an extricable question of law by way of the following example in *Mahjoub*:

> [74] … So, for example, if an appellate court can discern some error in law or principle underlying the first-instance court's exercise of discretion, it can reverse the exercise of discretion on account of that error. Another way of putting this is whether the discretion was "infected or tainted" by some misunderstanding of the law or legal principle: *Housen* at para. 35.

[12] Palpable and overriding is a highly deferential standard of review. "Palpable" means an error that is obvious, while "overriding" means an error that goes to the very core of the outcome of the case (*Canada v South Yukon Forest Corporation*, 2012 FCA 165 at para 46 [*South Yukon]*). When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing, rather the entire tree must fall (*South Yukon* at para 46; *Mahjoub* at para 61).

IV. The *Federal Public Sector Labour Relations Act*, SC 2003, c 22

[13] An overview of the legislative scheme is helpful. The right to grieve is available to both unionized and non-unionized employees. Pursuant to section 208 of the Act, an employee may present an individual grievance relating to any matter set out therein:

Individual Grievances	Griefs individuels
Presentation	**Présentation**
Right of employee	**Droit du fonctionnaire**
208 (1) Subject to subsections (2) to (7), an employee is entitled to present an individual grievance if he or she feels aggrieved	**208 (1)** Sous réserve des paragraphes (2) à (7), le fonctionnaire a le droit de présenter un grief individuel lorsqu'il s'estime lésé :
(a) by the interpretation or application, in respect of the employee, of	**a)** par l'interprétation ou l'application à son égard :
(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	**(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) a provision of a collective agreement or an arbitral award; or	**(ii)** soit de toute disposition d'une convention collective ou d'une décision arbitrale;
(b) as a result of any occurrence or matter affecting his or her terms and conditions of employment.	**b)** par suite de tout fait portant atteinte à ses conditions d'emploi.
Limitation	**Réserve**

(2) An employee may not present an individual grievance in respect of which an administrative procedure for redress is provided under any Act of Parliament, other than the *Canadian Human Rights Act.*

(2) Le fonctionnaire ne peut présenter de grief individuel si un recours administratif de réparation lui est ouvert sous le régime d'une autre loi fédérale, à l'exception de la *Loi canadienne sur les droits de la personne*.

Limitation

(3) Despite subsection (2), an employee may not present an individual grievance in respect of the right to equal pay for work of equal value.

Réserve

(3) Par dérogation au paragraphe (2), le fonctionnaire ne peut présenter de grief individuel relativement au droit à la parité salariale pour l'exécution de fonctions équivalentes

Limitation

(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.

Réserve

(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.

Limitation

(5) An employee who, in respect of any matter, avails himself or herself of a complaint procedure established by a policy of the employer may not present an individual grievance in

Réserve

(5) Le fonctionnaire qui choisit, pour une question donnée, de se prévaloir de la procédure de plainte instituée par une ligne directrice de l'employeur ne peut présenter de grief individuel à l'égard

respect of that matter if the policy expressly provides that an employee who avails himself or herself of the complaint procedure is precluded from presenting an individual grievance under this Act.	de cette question sous le régime de la présente loi si la ligne directrice prévoit expressément cette impossibilité.
Limitation	**Réserve**
(6) An employee may not present an individual grievance relating to any action taken under any instruction, direction 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.	**(6)** Le fonctionnaire ne peut présenter de grief individuel portant sur une mesure prise en vertu d'une instruction, 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.
Order to be conclusive proof	**Force probante absolue du décret**
(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.

[14] Section 236, below, has been described an ouster of the courts' jurisdiction (*Wojdan v Canada (Attorney General)*, 2021 FC 1341 at para 21 [*Wojdan*]). The right to grieve provided

for in the Act is in lieu of the rights of action an employee may have in relation to the circumstances giving rise to the dispute.

No Right of Action	Absence de droit d'action
Disputes relating to employment	**Différend lié à l'emploi**
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.
Application	**Application**
(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.
Exception	**Exception**
(3) Subsection (1) does not apply in respect of an employee of a separate agency that has not been designated under subsection 209(3) if the dispute relates to his or her termination of employment for any reason that does not relate to a breach of discipline or misconduct.	**(3)** Le paragraphe (1) ne s'applique pas au fonctionnaire d'un organisme distinct qui n'a pas été désigné au titre du paragraphe 209(3) si le différend porte sur le licenciement du fonctionnaire pour toute raison autre qu'un manquement à la discipline ou une inconduite.

V. Analysis

A. *Is Associate Justice Tabib biased?*

[15] An allegation of bias engages the very foundation of our judicial system. It calls into question not only the personal integrity of Associate Justice Tabib in this instance but generally the integrity of the entire administration of justice (*Coombs v Canada (Attorney General)*, 2014 FCA 222):

> [14] Further, the appellants repeatedly attack the integrity of the [Associate Judge], of the Judge and of the Federal Court …. The appellant's allegations are most serious, and such a step should not be undertaken lightly. Indeed, an allegation of bias engages the very foundation of our judicial system. The appellants' allegations call into question not only the personal integrity of the Prothonotary and of the Judge, but the integrity of the entire administration of justice.
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> [Citation omitted.]

[16] The Federal Court of Appeal explains that an "allegation of bias, especially an allegation of actual, as opposed to apprehended, bias, is a serious allegation as it challenges the very integrity of the adjudicator whose decision is in issue." (*Firsov v Canada (Attorney General)*, 2022 FCA 191 at para 57 [*Firsov*]).

[17] The test for determining whether there is actual bias or a reasonable apprehension of bias by a decision maker is well established. The Supreme Court in *Committee for Justice and Liberty et al v National Energy Board et al*, 1976 CanLII 2 (SCC), [1978] 1 SCR 369 [*Committee for Justice and Liberty*] at pages 394 and 395 explains:

> [T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude"
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> . . . The grounds for this apprehension must, however, be substantial . . . [and not] related to the "very sensitive or scrupulous conscience".

[18] More recently, the Federal Court of Appeal in *Firsov* has confirmed that the test is:

> [56] … .whether "an informed person, viewing the matter realistically and practically – and having thought the matter through – … [would] think that it is more likely than not that the [decision-maker], whether consciously or unconsciously, would not decide fairly": *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25 at paras. 20-21, 26.

[19] The Supreme Court in *Cojocaru v British Columbia Women's Hospital and Health Centre*, 2013 SCC 30 [*Cojocaru*] explains that the presumption of judicial impartiality is strong and cannot be easily rebutted:

> [15] Judicial decisions benefit from a presumption of integrity and impartiality — a presumption that the judge has done her job as she is sworn to do. This reflects the fact that the judge is sworn to deliver an impartial verdict between the parties, and serves the policy need for finality in judicial proceedings.
>
> . . .
>
> [20] The threshold for rebutting the presumption of judicial integrity and impartiality is high. The presumption carries considerable weight, and the law should not carelessly evoke the possibility of bias in a judge, whose authority depends upon that presumption.
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> . . .

> [22] The basic framework for assessing a claim that the judge failed to decide the case independently and impartially may be summarized as follows. The claim is procedural, focussing on whether the litigant's right to an impartial and independent trial of the issues has been violated. There is a presumption of judicial integrity and impartiality. It is a high presumption, not easily displaced. The onus is on the person challenging the judgment to rebut the presumption with cogent evidence showing that a reasonable person apprised of all the relevant circumstances would conclude that the judge failed to come to grips with the issues and decide them impartially and independently.

[20] In the matter at hand, the onus is on Ms. Murphy, the person challenging the Order, to rebut the presumption with cogent evidence showing that a reasonable person apprised of all the relevant circumstances would conclude that Associate Justice Tabib failed to come to grips with the issues and decide them impartially and independently (*Cojocaru* at para 22).

[21] Ms. Murphy alleges that the contemptuous tone Associate Justice Tabib used when describing the Applicants' arguments in paragraphs 34 through 39 of the Order, leaves much doubt as to her impartiality. The Respondent pleads that Ms. Muphy has adduced no evidence that permits one to doubt the impartiality of Associate Justice Tabib. In reply, Ms. Murphy states that she had not formally asked for the Order to be overturned on the basis of bias, but that Associate Justice Tabib lacked impartiality in her comments, her tone was contemptuous and condescending, she mischaracterized the Applicants' arguments, and that she ought to have known better.

[22] I agree with the Respondent that Ms. Murphy has failed to adduce any evidence that could meet the high threshold necessary to rebut the presumption of judicial integrity and impartiality.

[23] Furthermore, the grounds for an apprehension of bias must be substantial and not related to a sensitive conscience (*Committee for Justice and Liberty* at 395). Having reviewed the language in the Order, Ms. Murphy has failed to convince me that Associate Justice Tabib was biased. Associate Justice Tabib does refer to the Applicants' arguments on the possible inadmissibility of their grievance under subsections 208(4) and (6) of the Act as being of "questionable merit". In the analysis that follows, it is clear that Associate Justice Tabib was not impressed by nor agreed with the Applicants' arguments on that issue. This does not, however, demonstrate bias.

[24] Indeed, Ms. Murphy's point appears to conflate Associate Justice Tabib's findings on the Applicants' arguments with a finding on the Applicants as individuals. Ms. Murphy refers to Associate Justice Tabib "attacking" the Applicants at the end of paragraph 36 of the Order, when in reality Associate Justice Tabib referred to and commented on the Applicants' "claim as to a breach of the collective agreement". There is no indication that Associate Justice Tabib was attacking Ms. Murphy and Ms. Rafai Far personally, and every indication that she simply found the Applicants' argument to be without merit.

[25] The fact that a member of the Court clearly disagrees with and rejects the arguments of an applicant is not, in and of itself, bias. It is evident that Ms. Murphy disagrees with the findings of Associate Justice Tabib, however, that is not a justification for an allegation of bias. It is worth recalling the Federal Court of Appeal's teachings that allegations of bias are most serious, should not be undertaken lightly, and when made, engage the very foundation of our judicial system

(*Coombs* at para 14). I am therefore not persuaded that Associate Justice Tabib was biased or lacked impartiality.

B. *Are the additional affidavits filed by Ms. Murphy on appeal admissible?*

[26] There are two elements to the issue of additional evidence in the context of this appeal. First, Ms. Murphy submits that Associate Justice Tabib breached procedural fairness by ignoring the Applicants' request to adduce further evidence and refusing to permit the Applicants to respond to the Respondent's affidavit in reply. Second, Ms. Murphy submitted additional evidence on appeal, in the form of two affidavits with attached documentation.

[27] I turn now to the first of the two issues, being the events at the hearing before Associate Justice Tabib. By way of background, the Respondent's motion to strike was filed on November 26, 2021. The Applicants' response was filed on December 10, 2021, with the Respondent's reply filed on December 17, 2021. The Respondent's reply included an affidavit attaching the grievances filed by the Applicants on December 6, 2021. The matter was heard on January 17, 2022. At the hearing before Associate Justice Tabib, she heard representations from both parties as to whether the Court should authorize the filing of the Respondent's affidavit in reply. Finding that the affidavit was relevant to the issues before the Court and noting the lack of prejudice to the Applicants, the Associate Judge allowed the Respondent's request for the affidavit to form part of the record.

[28] In her submissions in the present appeal, Ms. Murphy argues that during the hearing, once the Associate Judge had allowed the Respondent to file its affidavit, Ms. Murphy requested

to file new evidence that was not available at the time she filed her response. Ms. Murphy alleges that Associate Justice Tabib did not respond to the Applicants' request and failed to permit them to respond to the Respondent's evidence (Ms. Murphy's Reply at para 13). Ms. Murphy does not provide any indication as to when during the hearing this request was made nor was a transcript of the hearing included.

[29] Ms. Murphy submits that the failure by Associate Justice Tabib to permit the Applicants to file additional evidence is a flagrant breach of procedural fairness with respect to a major issue in the case (Ms. Murphy's Reply at para 14). Ms. Murphy states that she is not contesting the Associate Judge's decision on the admissibility of the Respondent's evidence, however, on the basis of procedural fairness, the Associate Judge ought to have allowed the Applicants to file their evidence (Ms. Murphy's Reply at paras 15-16).

[30] Having listened to the recording of the entire hearing before Associate Justice Tabib, there is a disconnect between what Ms. Murphy alleges took place at the hearing and what in fact took place. While the Respondent's informal motion on its affidavit was being debated, the points raised by the Applicants centred on why the Court ought to refuse the filing of the affidavit. In particular, the Applicants argued that: (i) the Respondent's motion to strike was brought prematurely and too quickly; (ii) the grievances are confidential; and (iii) allowing the grievances into the record risks colouring the file, confusing the Court, and detracting from their position that they are only contesting the legality of the Vaccination Policy. During the debate on the Respondent's affidavit, the Applicants did not make an informal request to file further evidence.

[31] Later in the hearing, in the context of the Applicants' arguments on whether an adequate and effective grievance process was available, Associate Justice Tabib pressed Ms. Murphy as to the relevance of a 3rd Level grievance decision pertaining to Bernard Desgagné, an employee at Public Services and Procurement Canada, appended to the Affidavit of Mr. Desgagné. The Associate Judge enquired for what purpose the decision was being adduced and whether it was the Applicants' position that it was binding, a precedent, or whether the Court is to presume that all decision makers will behave in the same manner as this one with respect to subsection 208(6) of the Act.

[32] Ms. Murphy sought to argue that the Respondent is using subsection 208(6) of the Act to exclude grievances, using the grievance decision of Mr. Desgagné as evidence of this. In that context, and upon being questioned by the Associate Judge, Ms. Murphy argues that if they had been authorized to file further evidence they would be able to show that subsection 208(6) of the Act was being used to exclude grievances. She expresses her frustrations that she has at least 12 other decisions evidencing the fact that the grievance process is actually ineffective but they are not in the record. She states that they thought about seeking to adduce those decisions into evidence but decided not to because they did not want to delay the hearing. Ms. Murphy states that she was concerned that if she had filed additional evidence then more time would be requested to file evidence in response and the hearing would be delayed. Ms. Murphy states that she had wanted to adduce the evidence because it shows that, in reality there is no grievance process available because of subsection 208(6) of the Act.

[33] Ms. Murphy then mentions that if the Court is open to it, then she would be prepared to file more evidence, but at that moment the Associate Judge takes her back to the initial question being whether the other grievance decisions bind this Court or does the Court have to be guided by such a decision. The Associate Judge states that even if there are 100 grievance decisions like the one in the record, the decision in evidence nevertheless refers to an additional level of grievance. The Associate Judge enquires where there has then been a judicial review, an arbitration, a decision by a member of this Court or any authority that binds her. She then sought the Applicants' position in law as to the effect of the decision in the record and subsection 208(6) of the Act and then the debate moved on.

[34] I find Ms. Murphy's allegation that there was a breach of procedural fairness unfounded. Nor do I find that Associate Justice Tabib erred by failing to permit the Applicants to file further evidence. I cannot discern from the exchanges a clear request by the Applicants at the hearing to file further evidence. While Ms. Murphy raised the existence of other grievance decisions in order to support her argument, at no point in time, in my view, did she clearly make an informal motion to file further evidence.

[35] In addition, the decision to refrain from adducing further evidence in advance of the hearing was a conscious decision on the part of the Applicants. Ms. Murphy repeatedly stated that they chose not to seek to file such evidence in order to avoid the risk of the hearing being delayed. This was a litigation choice by the Applicants. As such, Ms. Murphy cannot now allege a breach of procedural fairness on the part of Associate Justice Tabib because the Applicants

elected in advance to avoid seeking to file additional evidence and then expressed frustration at the hearing because it was not before the Court for the Associate Judge to consider.

[36] I turn now to the second issue, being the additional evidence that Ms. Murphy seeks to adduce in the present appeal. This evidence is comprised of two affidavits with attached documentation.

[37] Before addressing the contents of the additional evidence, it bears mention that the two affidavits were included in Ms. Murphy's motion record and the submissions appear to simply assume that the additional evidence is properly in the record. No informal request is made in the Memorandum for the Court to admit the two affidavits. The additional evidence is referred to in numerous places in the Memorandum without clearly highlighting that it is new (paras 10(l), 52 and 66 of the Memorandum of Fact and Law). Moreover, Ms. Murphy references the contents of the additional evidence and submits that the facts contained therein must be presumed to be true (para 10(l) of the Memorandum of Fact and Law). The justification provided for including the additional evidence at this stage appears to be that, (i) if the Respondent had not brought the motion to strike prematurely then the additional evidence would have been in the Applicants' response to the motion and; (ii) the Respondent had its affidavit accepted before Associate Justice Tabib and now the Applicants wish to provide evidence in response (at paras 59 through 63). Ms. Murphy also states that in any event she meets the criteria found in *Canada v General Electric Capital Canada Inc*, 2010 FCA 290 without elaborating further.

[38] The Respondent pleads in its response that the two affidavits are not properly before the Court. It is only in her reply that Ms. Murphy fully engages with the issue of whether the two affidavits ought to be admitted on appeal.

[39] This is a motion for appeal in writing. The responding party, the Respondent, was entitled to know and respond to all the substantive arguments that Ms. Murphy is relying on, as there is no further opportunity to make submissions. Ms. Murphy was obliged to put her best foot forward. As to Ms. Murphy's Reply, Justice Anne L. Mactavish explains in *Deegan v Canada (Attorney General),* 2019 FC 960, at paragraph 121 the principles applicable to a reply:

> [121] It is a well-established principle that new arguments are not the proper subject of Reply. The purpose of a Reply is to respond to matters raised by the opposing party, not to produce new arguments or new evidence that should have been raised in first instance. Proper Reply is limited to issues that a party had no opportunity to deal with, or which could not reasonably have been anticipated.

[40] While thin, I nevertheless consider that Ms. Murphy has raised the issue sufficiently that this Court will consider her arguments in reply. I will therefore proceed to outline the contents of the additional evidence and consider the parties' submissions thereon.

[41] The first affidavit is an affidavit from Ms. Murphy sworn on February 16, 2022 [Murphy Affidavit]. Appended to the Murphy Affidavit are exchanges between Ms. Murphy and the Department of Justice wherein they declined Ms. Murphy's request to skip grievance Levels 1 and 2, and proceed directly to Level 3. The exchanges evidence Ms. Murphy's frustration with that decision, which she characterizes as being taken in bad faith in order to delay the process. These exchanges took place over the course of a month commencing on December 9, 2021. Also

appended to the Murphy Affidavit are Ms. Murphy's two grievance decisions, namely, the Level 1 decision dated December 23, 2021, and the Level 2 decision dated January 28, 2022. Both decisions rejected the grievance on the basis that Ms. Murphy had not complied with the Vaccination Policy.

[42] The second affidavit is an affidavit from Bernard Desgagné sworn on February 16, 2022, to which he appends a series of grievance decisions [Desgagné Affidavit]. An affidavit by Mr. Desgagné was also filed in the initial response to the Respondent's motion, attaching his 3rd Level grievance decision that formed the subject of the exchanges between the Associate Judge and Ms. Murphy that are described above. There are ten decisions appended as Exhibit A to the Desgagné Affidavit. They are listed below, indicating: (i) the department or agency of the decision maker and the employee; and (ii) the level and date of the decision, and where the decision refers to an earlier decision, the earlier decision is also listed:

- Public Services and Procurement Canada – 3rd Level on November 23, 2021; 4th Level on December 24, 2022;
- National Defence – 3rd Level on November 26, 2021;
- Canada Revenue Agency – 2nd Level on January 10, 2022;
- Health Canada – 3rd Level on January 25, 2022;
- Public Services and Procurement Canada – 3rd Level on November 23, 2021; 4th Level on December 23, 2021;
- Public Services and Procurement Canada – 2nd Level on December 21, 2021; Final Level on January 18, 2022;

- Public Services and Procurement Canada – 3rd Level on November 25, 2021; 4th Level on December 23, 2021;
- Public Services and Procurement Canada – 3rd Level on January 12, 2022;
- Public Services and Procurement Canada – 3rd Level on December 10, 2021; 4th Level on December 24, 2021;
- Service Canada – Final Level on January 7, 2022.

[43] Exhibit B to the Desgagné Affidavit concerns a referral to arbitration of a grievance of an employee at the Canada Revenue Agency. The individual's Level 2 decision dated January 10, 2022, was included in Exhibit A. The letter raises, among other things, that the employee had failed to present his grievance to the final level and the grievance does not relate to a disciplinary measure, such that it was the position of Public Services and Procurement Canada that it was premature to have the matter referred to an arbitrator.

[44] Additional evidence on an appeal from an Associate Judge's order is not the norm, rather it is the exception. As confirmed by Justice Catherine M. Kane in *David Suzuki Foundation v Canada (Health)*, 2018 FC 379 [*David Suzuki*] an appeal of an Associate Judge's Order is to be decided on the basis of what was before the Associate Judge and that it is only in exceptional circumstances that new evidence may be admitted on appeal (at para 36; see also *Onischuk v Canada (Revenue Agency)*, 2021 FC 486 at para 13).

[45] New evidence may be exceptionally admitted where: (1) it could not have been made available earlier; (2) its admission will serve the interests of justice; (3) the evidence will assist

the Court; and (4) its admission will not severely prejudice the other side (*David Suzuki* at para 37; *Dermaspark Products Inc v Prestige MD Clinic*, 2022 FC 1550 at para 17 [*Dermaspark*]; *Master Tech Inc v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 681 at para 14). Evidence will assist the Court where it affects the outcome or has an impact on the merits of the appeal (*David Suzuki* at para 38; *Dermaspark* at para 17).

[46] The Respondent relies on *David Suzuki* and pleads that the two affidavits do not meet the criteria for admissibility. As to the Desgagné Affidavit, the Respondent submits that the attached decisions do not assist the Court, affect the outcome of the appeal and, constitute hearsay. The Respondent pleads that the fact that other public servants have filed grievances does not impact on the finding by the Associate Judge that the Applicants have an adequate and effective grievance process available to them. Moreover, the decision makers are not bound by each other's decisions, consider different issues, and no Final Level decision from the Department of Justice has been submitted.

[47] As to the Murphy Affidavit, the Respondent submits that it does not assist the Court, is not in the interests of justice, and has no impact on the outcome of the appeal. The Respondent pleads that the documents attached with respect to Ms. Murphy's grievance actually confirm that the deadlines and the procedures contained in the collective bargaining agreement are being followed and are not yet exhausted.

[48] In her Reply, Ms. Murphy pleads that all the documents attached to the two affidavits, save for one, post-date the filing of her response to the motion to strike on December 10, 2021.

She pleads that all the decisions are from grievance files relating to the Vaccination Policy and thus there is no surprise or prejudice. Ms. Murphy submits that they are highly relevant because: (i) the Court has previously found the Applicants' grievance as filed to be relevant; (ii) it is only in the resulting decisions can one evaluate whether the process is efficient and useful; and (iii) the decisions show that the process is not effective because the grievors are being told to go see their members of parliament or are informed that the matter cannot be addressed on the basis of subsections 208(4) and (6) of the Act or their equivalent.

[49] Ms. Murphy submits that the decisions are not hearsay, and that she is obliged to file the decisions of others because the employer is voluntarily delaying the process and is acting in bad faith by forcing her to go through inappropriate levels of the grievance process.

[50] Ms. Murphy further submits that it is in the interests of justice to admit the additional evidence on the basis that Associate Justice Tabib breached procedural fairness by failing to permit the Applicants to file the evidence. This argument has been dealt with in the first part of this section of this order.

[51] Having considered the additional evidence and the submissions of the parties, I find the evidence falls short of satisfying the circumstances detailed above for the exceptional admission of new evidence (*David Suzuki* at para 37).

[52] As to when the evidence became available, much of the material was not available at the time the Applicants filed their response to the motion to strike on December 10, 2021. While a

number of the decisions were available by the hearing on January 17, 2022, I find that a portion of the material was not available by that time. The strength of Ms. Murphy's argument on this point, however, is undercut somewhat by the fact that at the hearing she stated numerous times that the decision to not adduce the evidence in hand, specifically more than 12 decisions, was made strategically because they did not wish to risk delaying the hearing.

[53] I also find merit in Ms. Murphy's argument that the Respondent would not be prejudiced by the admission of the additional evidence.

[54] The problematic issue for the additional evidence is whether it will assist the Court, in the sense that it could have an impact on the merits of the appeal.

[55] Ms. Murphy pleads that most of the grievance decisions show that no matter the level of grievance the sole solution is to speak to your member of parliament and that subsections 208(4) and (6) of the Act, or their equivalents, serve to block the grievances. I disagree. Of the twelve decisions, two of which are Ms. Murphy's and ten relate to other public servants, only five reference the equivalent of subsections 208(4) and (6) of the Act, and four of the five decisions emanate from the same decision maker, Lucie Seguin of Public Services and Procurement Canada.

[56] As to the reference to the Member of Parliament, in the decisions pertaining to Mr. Desgagné, the decision maker states that they are not in a position to answer Mr. Desgagné's questions about the basis for imposing the Vaccination Policy, and suggests he consults his

federal Member of Parliament and follow up with his union for the information he seeks. It is not clear from the decisions what questions Mr. Desgagné had asked.

[57] Of particular note, neither of Ms. Murphy's decisions reference either subsection 208(6) of the Act or indicate that she should consult with her Member of Parliament. Rather the decisions are brief and conclude that the Vaccination Policy applies and that Ms. Murphy failed to adhere to it. Consequently, her grievance and her request for corrective measures were rejected.

[58] The focus must be on whether the additional evidence impacts this Court's assessment of whether the Associate Judge erred in concluding that there was an adequate and effective grievance process available and that no exceptional circumstances existed that would justify allowing the judicial review to nevertheless proceed. In my view, taking into account the additional evidence, the concerns expressed by Associate Justice Tabib as to the impact, or lack thereof, of grievances filed by other public services on the present proceedings remain. The Associate Judge concluded that the evidence before her with respect to the 3rd Level decision on Mr. Desgagné's grievance did not establish that the grievance process is clearly precluded (Order at paras 38-39). I do not consider that the additional decisions serve to demonstrate that Associate Justice Tabib committed a palpable and overriding error in this regard.

[59] If anything, the decisions serve to demonstrate that the grievance process is ongoing and functioning. Their relevance is also tangential at best given they emanate from different departments and agencies, differ in varying degrees as to their content and reasoning (save for

the ones from Public Services and Procurement Canada), range from Levels 2 through 4, and are not from the Department of Justice, save for the two decisions pertaining to Ms. Murphy. As to Ms. Murphy's decisions, they do not impact the outcome of this appeal, as they do not assist Ms. Murphy in demonstrating that the Associate Judge committed a palpable and overriding error in finding that the Applicants have access to the grievance process.

[60] Furthermore, I find that the additional evidence, particularly the two decisions relating to Ms. Murphy, does not sufficiently change the facts as they were before Associate Justice Tabib. She was satisfied that the Applicants had access to the grievance process under section 208 of the Act, and this additional evidence further supports that. Evidence which points in the same direction as the existing record falls short of the threshold required to admit new evidence (*David Suzuki* at para 52).

[61] I pause to express a similar sentiment to the one expressed by Associate Justice Tabib in the Order:

> [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.

[62] All the decisions tendered reject the grievances of the public servants, on various grounds. Ms. Murphy pleads that this demonstrates that the grievance process is not effective. She submits that the law and the evidence show that *prima facie* the individual grievance process

does not in fact exist. I disagree. While the results of the initial levels of the grievances are no doubt disappointing to the grievors and run contrary to what they were seeking from the process, this, in and of itself, does not mean there is no effective grievance process in place.

[63] Turning now to the interests of justice. In addition to her arguments with respect to what took place at the hearing, Ms. Muphy submits that it is also in the interests of justice to permit the evidence because it demonstrates that the employer is acting in bad faith and delaying the process by requiring her to complete inappropriate levels of the grievance process. Having reviewed the exchanges, it is clear that Ms. Murphy's perspective is that she should not have had to complete grievance Levels 1 and 2 prior to proceeding to Level 3. The employer disagreed and did not consent to permitting her to skip those levels.

[64] An allegation of bad faith is a serious allegation. I find that bad faith is not apparent from the correspondence tendered. It is evident from the exchanges that Ms. Murphy is frustrated, finds the decision unacceptable, and has clearly stated that she considers that the employer is acting in bad faith. The position from the employer in response to Ms. Murphy's correspondence is that the approach for all employees of the Department of Justice who have grieved with respect to the Vaccination Policy is to hear the grievance at each level of the grievance process. I also note that the correspondence as included excludes certain responses from the employer that appear to be part of the email thread. Accordingly, I am not persuaded that the interests of justice require that this evidence be accepted on appeal. In addition, I also do not consider that the evidence would impact the appeal in any way.

[65] In conclusion, the additional evidence does not meet the test for admission. Taking all the factors into account, I do not find this is one of the exceptional cases in which new evidence may be admitted on appeal. While there are certain factors of the test, namely the availability of the evidence and the lack of prejudice to the Respondent, that weigh in Ms. Murphy's favour, I find that the additional evidence ultimately does not assist the Court. It would not be conclusive of an issue on appeal or have an impact on the determination of the appeal (*David Suzuki* at para 38).

C. *Did Associate Justice Tabib err in law?*

[66] Ms. Murphy alleges that Associate Justice Tabib erred in law. As a preliminary point, I therefore consider whether she correctly identified the applicable law and jurisprudence.

[67] I find that Associate Justice Tabib correctly identified: (i) the relevant provisions under the Act; (ii) the applicable jurisprudence with respect to the Court's power to strike a notice of application; and (iii) the applicable jurisprudence with respect to commencing proceedings prior to having exhausted alternative administrative remedies, in particular grievance procedures.

[68] Ms. Murphy pleads at paragraph 29 and following of her Memorandum of Fact and Law that the Associate Judge committed an error of law in the manner in which she approached sections 208(1)-(6) and 236. Ms. Murphy submits that the jurisprudence relied upon by Associate Justice Tabib is not applicable, but does not propose jurisprudence that she considers applicable. She does, however, appear to quote a generalized paragraph for the proposition that there must always be a forum in which to assert rights when necessary. The quoted paragraph states that it is paragraph 99, and the reference is *Payette c Canada (Revenu national)*,

2022 CF 74 at para 99 [*Payette*]. The judgment in *Payette* ends at paragraph 27, the language quoted is not found in the judgment, and a more general search with certain language from the quote did not uncover the case from which it came. In any event, I have not been persuaded that the Associate Judge erred in identifying the applicable jurisprudence.

[69] In my view, for the most part, the arguments raised by Ms. Murphy are more properly reviewable on a palpable and overriding error standard. Associate Justice Tabib's findings are responsive to the Applicants' argument that they should be able to seek the assistance of the Court on the basis that their grievance is limited by subsections 208(4) and (6) of the Act. Indeed, Ms. Murphy's submissions on appeal in this respect presuppose that a recourse does not in fact exist for the Applicants by virtue of these two provisions, however, Associate Justice Tabib found otherwise. Consequently, those findings will be reviewed in section V.E. of this judgment below.

[70] In light of Ms. Murphy's arguments, however, there are two legal principles that are appropriate to consider in the present section. First, the question of the potential relevance of subsections 208(4) and (6) in a judicial review brought prior to the completion of the statutory grievance procedure set out in the Act. Associate Justice Tabib, in her Order, reviewed the jurisprudence on the importance of protecting the integrity and effectiveness of the grievance process under the Act:

> [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 CanLII 215 (SCC), [1996] 2 SCR 495 at paras 8 and 10).

[71] Associate Justice Tabib then noted that Parliament had found it appropriate to impose certain limitations on the rights found in section 208 of the Act, namely those in subsections 208(2) through (7). She stated that these limitations are an inherent part of the grievance process. She concluded that interpreting these limitations and their application in the context of a particular grievance falls exclusively to the grievance authority:

> [25] … 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.

[72] Effectively, the Associate Judge concluded that the Applicants could not use the possibility that subsections 208(4) and (6) may apply to their grievance as a justification for avoiding the grievance process in the Act and proceed directly to the Court (Order at paras 26-29). She found that where there is no uncertainty as to the availability of the grievance process under subsection 208(1) of the Act, an issue as to the admissibility of the grievance in light of the exceptions does not provide one with privileged access to the courts so that issues for which Parliament has explicitly precluded recourse can be debated (Order at paras 26 and 28).

[73] I agree with Associate Justice Tabib. The fact that certain limitations are present in section 208 of the Act that may apply to a particular grievance does not render the grievance process inadequate or ineffective such that this Court ought to exercise its inherent jurisdiction to consider the merits of a judicial review prior to the completion of the statutory grievance procedure. It is the grievance authority who must first determine the extent to which, if any, the limitations in section 208 apply to an individual grievance.

[74] Generally speaking, if a grievor is not content with the outcome of the final available level of grievance, they may then seek judicial review in this Court (*Moodie v Canada (National Defence)*, 2010 FCA 6 at paras 3, 10). It is settled law that a grievor must exhaust all adequate remedial recourses in the administrative process before filing an application for judicial review with the courts (*Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61 at para 30 [*CB Powell*]). Justice David Stratas was clear: “absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course” (*CB Powell* at para 31). The limitations contained in subsections 208(2) through (6) of the Act are not

exceptional circumstances, rather they are part of the larger administrative process provided for in the Act.

[75] Ms. Murphy seeks to present the possible application of the limitations in section 208 of the Act as having the effect that a right to grieve does not exist. She pleads that if one of the limitations applies, then the right to grieve does not exist and the recourse to the courts remains, despite the language in section 236 of the Act. This position is problematic for three reasons. First, as noted above, it is not for this Court to be the first to determine the extent to which the limitations may apply to any particular individual grievance – that is the purview of the grievance authority. Second, it runs counter to the larger and well-established principle that grievability precludes judicial review (*CB Powell* at paras 30-33; *McCarthy v Canada (Attorney General)*, 2020 FC 930 at paras 40-43 and the cases citied therein [*McCarthy*]). Third, it runs counter to the language in section 236 of the Act and the manner in which that section has been interpreted by the courts (*Bron v Canada (Attorney General)*, 2010 ONCA 71 at paras 14-15; *McCarthy* at para 31; *Gupta v Canada (Attorney General)*, 2021 FCA 202 at para 7 [*Gupta*]; *Wojdan* at paras 18, 21).

[76] Ms. Murphy submits that the authorities relied on by Associate Justice Tabib, which include the majority of the authorities cited above, did not consider the limitations contained in subsections 208(2) through (6) of the Act. I do not consider that this is sufficient justification to depart from established authority that the presence of the privative clause in the Act indicates that it is Parliament's intent that workplace disputes first be decided through the grievance procedure (*Gupta* at para 13). Although in the context of an interlocutory injunction, I am guided

by the comments of Justice Simon Fothergill in *Wojdan*, in that if this Court were to permit Ms. Murphy's application for judicial review to proceed without first permitting a grievance authority to render a determination on Ms. Murphy's grievance, including any questions of admissibility, then:

> [31] … this would have the effect of undermining the labour grievance process enacted by Parliament. The Court would be pre-empting the primary role of labour adjudicators in determining questions that pertain to the application of the Vaccination Policy, the extent to which it may be said to infringe employees' rights, whether any infringement can be justified on the grounds of public health, and if not, whether the Applicants are entitled to financial or other compensation. Premature judicial intervention would not be complementary to fundamental principles of labour relations, but destructive of them.

[77] To conclude on the first issue, the fact that the limitations contained in subsections 208(2) through (6) may result in an individual grievance being inadmissible does not render the grievance process inadequate or ineffective such that it permits an applicant to bring a judicial review prior to completing the statutory grievance process.

[78] Turning now to the second issue, being who bears the burden of establishing that the grievance process is clearly not available. As noted above, Associate Justice Tabib found that the application of the limitations in subsections 208(2) through (6) of the Act in the context of a particular grievance falls exclusively to the grievance authority. In the event that she was wrong, however, Associate Justice Tabib also considered the issue of the grievance being inadmissible by operation of subsection 208(4) or (6) of the Act. Although I concluded that the fact that limitations contained in subsections 208(2) through 208(6) of the Act may apply to an individual grievance does not render the grievance process inadequate or ineffective such that it permits

recourse to the courts notwithstanding the doctrine of exhaustion, I will nevertheless consider Ms. Murphy's arguments as to the burden of proof.

[79] Ms. Murphy submits that Associate Justice Tabib erred by reversing the burden of proof in the context of her analysis of subsections 208(4) and (6) of the Act as they potentially apply to the Applicants' grievance. The Associate Judge found that once the Respondent had established that the Applicants are employees to whom the statutory grievance process under section 208 of the Act is available, it then fell to the Applicants to demonstrate that the process is clearly not available to them by reason of subsections 208(4) and (6) (Order at paras 29, 31 – 33). Ms. Murphy alleges that the Associate Judge erred in law and the burden is on the Respondent to demonstrate that the Applicants could continue with their grievance despite the operation of subsections 208(4) and (6) of the Act. She does not cite any jurisprudence that supports her position on the burden of demonstrating that the process is not available.

[80] Ms. Murphy has failed to persuade me that Associate Justice Tabib erred with respect to her finding that it is the Applicants who bore the burden of demonstrating that the statutory grievance process was clearly not available to them on the basis of subsections 208(4) and/or (6) of the Act. I agree with Associate Justice Tabib that once the Respondent had discharged its burden of establishing that the Applicants are employees to whom the grievance process under section 208 of the Act is available, then it is for the Applicants to demonstrate why, in their particular circumstances, the grievance process is not available. Like Associate Justice Tabib, I am also guided by the Federal Court of Appeal in *Lebrasseur v Canada*, 2007 FCA 330, at paragraph 19, who concluded that the onus is on an applicant to establish the facts that would

permit the Court to exercise its residual discretion despite the existence of a statutory grievance procedure.

[81] Recently, in the context of a motion to strike and a motion for certification of a class action, Justice Fothergill in *Hudson v Canada*, 2022 FC 694 concluded that the onus is on an applicant to establish that the internal recourse mechanisms are compromised such that the Court has jurisdiction:

> [93] The pleadings and evidence of the Plaintiffs do not establish that the internal recourse procedures available to female employees of CSC are, in all circumstances, in every workplace, and at all times, "corrupt" and incapable of providing effective redress. As the Federal Court of Appeal held in *Lebrasseur*, the onus is on a plaintiff to demonstrate that the integrity of internal recourse mechanisms is compromised based on the evidence presented in a particular case (at para 19). Based on the limited evidence presented in support of the motion for certification, it is simply not possible for all members of the broadly-defined classes to meet this threshold.
>
> (See also *Wodjan* at para 22.)

[82] Ms. Murphy states that at the very least the issue of the availability of the grievance process is debatable and as such it should have been left to the hearing on the merits rather than be dismissed at this stage. I disagree, as the Applicants bore the onus of establishing the Court's jurisdiction, which Associate Justice Tabib found they failed to do. Thus, the result is that the pleading be struck - not that they get another kick at the can during a hearing on the merits.

[83] Also entwined with this issue is Ms. Murphy's submission that Associate Justice Tabib erred by not presuming that the Applicants' evidence was true. In particular, Ms. Murphy pleads

that their affidavits and the evidence that the grievance process was not adequate or effective in light of the limitations contained in subsections 208(4) and (6) should have been taken as true.

[84] The Respondent submits that it is the facts as alleged in the Notice of Application that should be taken as true, and not everything that the Applicants advanced in their responding record and their oral submissions.

[85] I agree with the Respondent that it is the facts contained in the Notice of Application that are to be taken to be true. The Federal Court of Appeal in *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 explains that generally affidavits are not admissible on motions to strike, and highlights from the perspective of an applicant why:

> [52] … As for an applicant responding to a motion to strike an application, the starting point is that in such a motion the facts alleged in the notice of application are taken to be true: *Chrysler Canada Inc. v. Canada*, 2008 FC 727 at paragraph 20, aff'd on appeal, 2008 FC 1049. This obviates the need for an affidavit supplying facts. Further, an applicant must state "complete" grounds in its notice of application. Both the Court and opposing parties are entitled to assume that the notice of application includes everything substantial that is required to grant the relief sought. An affidavit cannot be admitted to supplement or buttress the notice of application.
>
> [Emphasis added.]

[86] It is clear that on a motion to strike an application for judicial review, the facts asserted by the applicant in its Notice of Application must be presumed to be true (*Prairies Tubulars (2015) Inc v Canada (Border Services Agency)*, 2018 FC 991 at para 26 and the cases cited therein). This presumption does not extend to the arguments that an applicant may make or any evidence they may submit in response to a motion to strike the Notice of Application.

Concluding otherwise would run counter to the teaching of the Federal Court of Appeal in *JP Morgan* and have the effect of rendering such motions to strike incapable of success, thereby hampering the Court's power to restrain the misuse or abuse of its process (*JP Morgan* at para 48).

[87] Ms. Murphy pleads that it was not for the Applicants, in this Notice of Application, to anticipate every motion that the Respondent could eventually. Accordingly, once they received the Respondent's motion to strike, then the issue of the grievance process became relevant and they responded. She alleges that Associate Justice Tabib erred by not presuming the Applicants' response and evidence to be true.

[88] I am not persuaded by Ms. Murphy's argument. The onus was on the Applicants to state the complete grounds in their Notice of Application, and the Court was entitled to assume that it contained everything substantial that was required to grant the relief sought (*JP Morgan* at para 52). The contents of the Notice of Application are to be taken as true. Associate Justice Tabib properly took the Applicants' arguments and evidence in response to the motion to strike into account in her Order, however, she was not obliged to presume them to be true. Consequently, I find that Associate Justice Tabib did not commit a reviewable error as alleged by Ms. Murphy.

D. *Did Associate Justice Tabib err in her characterization of the nature of the application for judicial review?*

[89] The Vaccination Policy was issued by the Treasury Board of Canada on October 6, 2021. As a result, the Applicants separately communicated with their managers, who had informed them of the steps to take and the applicable deadlines in order to adhere to the Vaccination Policy. The Applicants did not ultimately comply with the Vaccination Policy. On November 1 and 2, 2021, the Applicants each received letters from their managers informing them that they had until November 15, 2021, to comply with the Vaccination Policy, failing which, they would be placed on administrative leave without pay until such time as they comply.

[90] On November 12, 2021, the Applicants filed the present application for judicial review. On November 15, 2021, they were placed on administrative leave. On December 6, 2021, the Applicants filed a grievance in accordance with the process provided for in the collective agreement. Associate Justice Tabib found that the grievance filed by the Applicants was essentially seeking the same remedies as set out in the application for judicial review, save for a general declaration that the Vaccination Policy is unlawful.

[91] As to the Notice of Application, Associate Justice Tabib noted that the analysis entailed determining the nature and extent of the administrative process at issue and then identifying the true nature of the present application. She considered the circumstances, the nature of the impugned decision, and the remedies sought. She noted that in their Notice of Application, the Applicants are seeking to have the Vaccination Policy declared void *ab initio* and be awarded the

remedies resulting from such a declaration, including the retroactive reinstatement of their rights, including salary and benefits, and *Charter* damages. The Associate Judge concluded that:

> [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.

[92] Accordingly, the Associate Judge then continued in her analysis finding that 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.

[93] Ms. Murphy submits that Associate Justice Tabib erred in her appreciation of the essential character of the application. She argues that the nature of the application is declaratory, seeking a declaration that the Vaccination Policy is invalid. She relies on *Moresby Explorers Ltd v Canada (Attorney General)*, 2007 FCA 273 which states 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." (at para 24). She submits that the Notice of Application clearly highlights that a declaration as to the legality of the Vaccination Policy was the primary remedy sought, and the Applicants filed their application for judicial review before they were put on administrative leave. Ms. Murphy pleads that at the hearing, she made clear to Associate Justice Tabib that the other relief they were claiming, which pertains to the Applicants' reinstatement, was simply accessory to the declaration of invalidity, and even offered to drop a portion of the claim in order

to enable it to survive. Ms. Murphy submits that this error tainted the remainder of Associate Justice Tabib's analysis of the motion to strike.

[94] The Respondent submits that the Associate Judge appropriately concluded that the real nature of the application was aimed at a policy that impacted the conditions of the Applicants' employment, which resulted in their placement on administrative leave without pay. The Respondent argues that the fact that the Associate Judge took the circumstances, the nature of the impugned decision, and the remedies sought into account demonstrates that she gained a realistic appreciation of the applications' essential character in line with the jurisprudence (*JP Morgan* at paras 49-50).

[95] The Respondent submits that the fact that the Applicants had yet to be placed on leave does not assist Ms. Murphy in her appeal, and in fact further demonstrates that the reasons the Applicants were contesting the Vaccination Policy is because of its application vis-à-vis them. The Respondent notes that the Vaccination Policy entered into force on October 6, 2021, and yet the Applicants waited until the last business day before they were put on administrative leave, November 12, 2021, to file their application for judicial review. This is after they were officially notified that the Vaccination Policy would apply to them on November 1 and 2, 2021, and the application sought remedies with respect to their employment relationship. The Respondent therefore argues that the application was predominately related to the employment relationship as it pertains to the Applicants.

[96] In reply, Ms. Murphy submits that the Respondent is speculating and seeking to attribute an intention to the application based on when they filed their application. Instead, she submits that the Applicants were reasonably waiting until the last minute to file their judicial review in the hopes that the Federal Government would revoke the Vaccination Policy in the same manner that the Government of Quebec did when they revoked a decision concerning the vaccination status of health care workers in the province.

[97] I am not convinced that Associate Justice Tabib committed a palpable and overriding error in her determination of the application's essential character. On appeal, Ms. Murphy seeks to have the legality of the Vaccination Policy wholly divorced from the context in which the Applicants came to this Court seeking judicial review and the remedies they sought relating to their conditions of employment.

[98] The Federal Court of Appeal instructs that one properly applies the law when one looks to the true nature of the dispute rather than an applicant's own characterization of the alleged wrong (*Moodie v Canada (National Defence)*, 2010 FCA 6 at para 7). A judge must look beyond the words used, the facts alleged, and the remedy sought, so as to ensure themselves that the proceedings are "not a disguised attempt to reach before the Federal Court a result otherwise unreachable in that Court." (*Canada v Roitman*, 2006 FCA 266 at para 16 [*Roitman*]). Similarly, an applicant is not permitted to frame their application with a degree of artificiality to circumvent the application of a statute (*Vaughan v Canada*, 2005 SCC 11 at para 11; *Roitman* at para 16). As confirmed recently by Justice Patrick Gleeson, "a grievor cannot avoid legislatively prescribed

[processes] and procedures through artful drafting where the issue raised engage matters subject to those prescribed processes" (*Burlacu v Canada (Attorney General)*, 2022 FC 1177 at para 10).

[99] Based on the record before her, Associate Justice Tabib was entitled to conclude that the essential character of the application is a dispute concerning a policy which affects the terms and conditions of the Applicants' employment. In my view, the Associate Judge made no palpable and overriding error in coming to this conclusion.

E. *Did Associate Justice Tabib err in her conclusion that the grievance process was available, adequate and effective in the circumstances of the present case?*

[100] A number of arguments raised by Ms. Murphy with respect to this issue have already been addressed in the context of the above sections.

[101] In summary, Ms. Murphy submits that the Respondent's arguments in the context of this appeal amount to an assertion that all matters relating to employment conditions must first go through the administrative process until it has been exhausted. She relies on *CB Powell* and asserts that only the "available" and "effective" administrative remedies must be exhausted first (at para 31). She alleges that the evidence *prima facie* demonstrates that the grievance process does not in fact exist in the case of the Applicants by virtue of subsections 208(4) and (6) of the Act. She describes this point as the crux of the present litigation. She further submits that the act of going through the grievance levels, possibly taking years before arriving before the Federal Court, is contrary to the spirit of the Federal Court of Appeal's judgment in *CB Powell* on the basis that such a process would not be effective.

[102] The Respondent submits that Ms. Murphy has not identified a reviewable error. On the contrary, the Respondent submits that Associate Justice Tabib relied on established jurisprudence and properly determined that the grievance process was available to the Applicants with respect to the essential nature of their claim, and thus the grievance process must be exhausted prior to commencing proceedings in this Court.

[103] Associate Justice Tabib concluded, on the record before her, that the Respondent had satisfied her that the Applicants are employees to whom an adequate and effective grievance process is available pursuant to subsection 208(1) of the Act. I have not been persuaded by Ms. Murphy that Associate Justice Tabib committed a palpable and overriding error in coming to that conclusion. While Ms. Murphy submits that the grievance process does not in fact exist in the case of the Applicants, she has failed to convince me that the Associate Judge erred in finding otherwise based on the record before her.

[104] A good portion of Ms. Murphy's argument on appeal is premised on the potential impact of subsections 208(4) and (6) of the Act on the Applicants' grievance and relies on "the evidence", which is more often than not simply referred to as such without pinpointing. I have previously concluded in sections V.B. and V.C. of this judgment above that: (i) the additional evidence is not admissible in the context of this appeal; and (ii) it is for the grievance authority to first determine the extent to which, if any, the limitations contained in subsections 208(2) through (6) of the Act apply to any particular individual grievance, respectively. Bearing that in mind, I am unable to conclude how Ms. Murphy's argument on appeal could succeed.

[105] Although I did address the issue of the burden of proof as raised by Ms. Murphy, predominantly in the context of her arguments on subsections 208(4) and (6) of the Act, given my findings above, I do not consider it necessary to venture into the possible application of either subsection 208(4) or 208(6) to Ms. Murphy's situation. To do so in the present case, in my view, risks pre-empting the primary role of the grievance authority to determine those questions as they pertain to the Applicants' grievances.

F. *Did Associate Justice Tabib err in determining that exceptional circumstances did not exist that would have justified proceeding with the judicial review?*

[106] The doctrine of exhaustion of administrative remedies does permit certain exceptions, however, the number of circumstances that allow for this doctrine to be set aside are very few given that the threshold for exceptionality is high (*CB Powell* at para 33; *Nosistel v Canada (Attorney General)*, 2018 FC 618 at para 53).

[107] Associate Justice Tabib, relying on the Federal Court of Appeal's decision in *CB Powell*, concluded that Ms. Murphy had not demonstrated that exceptional circumstances exist that would justify bypassing the obligation to follow the grievance procedure. The Associate Judge considered the issues of urgency and irreparable harm, but found that they did not establish that exceptional circumstances exist. She noted that similar arguments, urgency and irreparable harm, had been recently rejected in the context of the motions for interlocutory injunctions in relation to mandatory vaccination policies in *Wojdan* and in *Lavergne-Poitras v Canada (Attorney General)*, 2021 FC 1232.

[108] Ms. Murphy submits that Associate Justice Tabib erred in her analysis of her submissions on exceptional circumstances, in particular in relation to raising the issue of the balance of convenience based on paragraph 42 of *Strickland v Canada (Attorney General)*, 2015 SCC 37 [*Strickland*]. Ms. Murphy further submits that the Associate Judge erred by importing the criteria for an injunction into her analysis.

[109] The Respondent submits that the Associate Judge correctly understood that the criteria in paragraph 42 of *Strickland* relate to whether an adequate alternative remedy exists and not whether exceptional circumstances exist. The Respondent further submits that the Associate Judge did not apply the criteria from the test for an injunction. Rather, she evaluated whether the factors raised by the Applicants were exceptional. The Respondent notes that the Applicants had in fact raised: (i) urgency on the basis of the number of public servants involved; (ii) the impact to their physical integrity in an irreversible manner; and (iii) the financial, moral and psychological damage.

[110] I am not persuaded that Associate Justice Tabib erred in her analysis of the Applicants' arguments on exceptional circumstances. Rather, I find her analysis was responsive to the factors raised by the Applicants, which included factors that may be described as urgency and irreparable harm. I am also not convinced that Associate Justice Tabib misunderstood or misapplied paragraph 42 of the Supreme Court's decision in *Strickland*.

[111] Ultimately, Associate Justice Tabib did not accept the Applicants' submissions that exceptional circumstances exist that would justify this Court agreeing to hear the application.

Ms. Murphy has failed to convince me that Associate Justice Tabib committed a reviewable error in coming to this conclusion.

VI. Conclusion

[112] For the foregoing reasons, this motion to appeal the Order and Reasons of Associate Justice Tabib dated February 7, 2022, is dismissed.

[113] The Respondent seeks costs. Considering the facts of the matter, and my discretion pursuant to Rule 400 of the Rules, costs in the amount of $750.00 shall be awarded to the Respondent. Given that it is Ms. Murphy who brought the present motion to appeal, the cost award applies to her and not Ms. Rafai Far.

JUDGMENT in T-1718-21

THIS COURT'S JUDGMENT is that:

1. The present motion is dismissed; and

2. Costs in the amount of $750.00 are awarded to the Respondent.

"Vanessa Rochester"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1718-21
STYLE OF CAUSE:	JOCELYNE MURPHY ET AL v ATTORNEY GENERAL OF CANADA

MOTION IN WRITING CONSIDERED IN OTTAWA, ONTARIO PURSUANT TO RULE 369 OF *THE FEDERAL COURTS RULES*

JUDGMENT AND REASONS:	ROCHESTER J.
DATED:	JANUARY 13, 2023

WRITTEN REPRESENTATIONS BY:

Jocelyne Murphy	FOR THE APPLICANT (SELF-REPRESENTED)
Gregory Tzemenakis Pierre Marc Champagne Alexandre Toso Sarah Chênevert-Beaudoin	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Me Jocelyne Murphy Beauharnois, Quebec	FOR THE APPLICANT
Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT