Federal Court  Cour fédérale

Date: 20240528

Docket: T-311-24

Citation: 2024 FC 805

Ottawa, Ontario, May 28, 2024

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

ANTONIO UTANO and CAMERON MACDONALD

Applicants

and

THE MINISTER OF PUBLIC SAFETY OF CANADA

Respondent

ORDER AND REASONS

I. Introduction

[1] The Applicants, Mr. Antonio Utano and Mr. Cameron Macdonald, are public servants employed with Canada Revenue Agency and Health Canada, respectively. They were both previously employed by Canada Border Services Agency [CBSA]. After leaving CBSA, they had their security clearances revoked and were suspended without pay from their current public

service positions due to an internal professional standards investigation of their conduct by CBSA. While the investigation is still ongoing, CBSA produced two documents it prepared titled "Preliminary Statement of Facts" [PSFs], which it distributed to the Applicants' current employers. In the underlying application for judicial review, filed on February 16, 2024, the Applicants seek judicial review of the PSFs.

[2] The Applicants bring this motion for interim or interlocutory relief under Rule 373 of *Federal Courts Rules*, SOR/98-106 [the Rules]. The Applicants request an order:

a) Granting an interlocutory injunction suspending the PSFs until the underlying application has been heard and finally determined;

b) Granting an interlocutory injunction restraining the Respondent from further disseminating the PSFs in any form until the underlying application has been heard and finally determined;

c) Granting an interlocutory injunction putting a halt to the investigation being conducted into the Applicants by the Respondent until the underlying application has been heard and finally determined;

d) Granting a writ of *mandamus* ordering CBSA to appoint an independent third party investigator to undertake an investigation *de novo* of the allegations being investigated;

e) Directing the Respondent to release an un-redacted copy of the initiating complaint and Preliminary Misconduct Report prepared by the non-party, 10558308 Canada Inc., operating as Botler AI, to leadership and accompanying exhibits;

f) Directing that the Applicants are not required to give an undertaking for damages pursuant to Rule 373(2) of the Rules; and

g) Granting such further and other relief as counsel for the Applicants may advise and this Court may permit.

[3] The Respondent contests the motion for injunctive relief. It brings its own motion to strike the Applicants' Notice of Application, without leave to amend. It further seeks its costs of the proceeding or, in the alternative, asks that costs be assessed in accordance with column III under the table of Tariff B of the Rules.

[4] For the reasons that follow, I grant the Respondent's motion to dismiss. The Applicants' application for judicial review is premature as there is an available grievance process they have yet to exhaust. There are no exceptional circumstances warranting this Court to overstep its jurisdictional boundaries to intervene. In light of this disposition, the Applicants' motion is moot and their underlying application for judicial review must be dismissed.

II. Background

[5] While the parties disagree over aspects of the timeline and disclosure of relevant documents, the key facts necessary to determine these motions are not in dispute.

[6] Mr. Macdonald is an assistant deputy minister at Health Canada. Mr. Utano is a director general at the Canada Revenue Agency. They previously worked together at CBSA, holding senior positions in the Border Technology and Innovation Directory as director general and executive director (and, later, acting director general), respectively. While at CBSA, they were responsible for the initial execution and technical delivery of the ArriveCAN travel application

[ArriveCAN]. This app was developed by CBSA to address deficiencies with the paper application process for entry into Canada that came to a head during the COVID-19 pandemic. ArriveCAN has fallen under significant public scrutiny due to allegations of significant breaches of standard procurement practices and overspending.

[7] The parties agree that CBSA's investigation into the Applicants stems from a complaint CBSA received from Botler AI, an external Montreal-based company. The Applicants were first introduced to Botler AI while working on a feasibility study for an artificial intelligence-based application for harassment complaints at CBSA. On October 28, 2022, Botler AI sent a complaint to CBSA alleging serious misconduct by the Applicants. It offered to share its findings with CBSA in exchange for a contract. On November 27, 2022, Botler AI provided CBSA with a document that it authored titled, "CBSA Preliminary Misconduct Report," together with accompanying exhibits.

[8] In response to Botler AI's complaint, CBSA initiated its internal investigation of the Applicants. In January 2023, due to the allegations of criminal wrongdoings, CBSA formally referred the matter to the Royal Canadian Mounted Police [RCMP]. CBSA further confirmed that it would halt its own investigation so as to not interfere with that of the RCMP.

[9] On October 27, 2023, Mr. Utano informed CBSA via email that he and Mr. Macdonald planned to appear before the Standing Committee on Government Operations and Estimates [OGGO] and give testimony that contradicted that given by their former CBSA superiors on

October 24, 2023. The Applicants provided testimony on the development and implementation of ArriveCAN to OGGO on November 7, 2023.

[10] On October 30, 2023, the Professional Integrity Division [PID] of CBSA launched "Project Helios." On November 17, 2023, the PID issued a revised mandate that formally moved the investigation from a preliminary to an investigation phase, pursuant to CBSA Policy on Administrative Investigations into Alleged or Suspected Employee Misconduct. The Applicants received formal notifications of the investigation, and a general overview of the allegations made against them, on November 27, 2023.

[11] On more than one occasion, CBSA reached out to the Applicants to schedule an interview, which the Applicants ignored or denied on the primary basis of seeking further disclosure. On December 15, 2023, CBSA gave a deadline of January 5, 2024 to advise whether the Applicants would participate in the investigation, warning that the investigation would otherwise proceed without their input. As the Applicants were on medical leave, it advised that medical accommodations could be made, should the Applicants request as much with corresponding evidence. The CBSA's last contact with the Applicants to schedule an interview was in February 2024, prior to the Applicants' filing of the underlying application for judicial review.

[12] The PSFs are dated December 18 and 19, 2023. They both include a disclaimer stating that the reports are preliminary, and the investigation is ongoing: paragraph 26 of Mr. Utano's PSF and paragraph 25 of Mr. Macdonald's PSF. Each further states that the resulting

investigation report will provide a fulsome view of all evidence and it is only at that point that formal conclusions on the allegations of misconduct may be arrived at.

[13] The PSFs were released to the Applicants' current employers on December 19, 2023. Shortly thereafter, on January 11, 2024, the Applicants had their security clearances revoked and they were placed on unpaid suspension from their respective roles. It is undisputed that their suspensions were a direct result of the dissemination of the PSFs from CBSA to their current employers. The Applicants have grieved these decisions with their employers.

[14] Upon their request, the OGGO and the Auditor General of Canada also received copies of the PSFs on January 29, 2024. It is pursuant to this request that CBSA simultaneously provided the Applicants with a public or redacted copy of the PSFs, including all exhibits and supporting documentation referenced therein. Mr. Macdonald later received an un-redacted version of his PSF on February 9, 2024. Mr. Utano has not received an un-redacted version of his PSF. To this end, the Applicants have filed Access to Information and Privacy Requests [ATIPs] under the *Access to Information Act*, RSC 1985, c A-1, which have been declined or are still being processed.

[15] In February 2024, the Applicants filed complaints with the Public Sector Integrity Commissioner [the Integrity Commissioner] seeking a review of CBSA's conduct and alleging reprisal. On March 11, 2024, the Integrity Commissioner confirmed there is sufficient information to investigate whether CBSA's conduct, including the creation of the PSFs, amounts to retaliation.

[16] CBSA is currently continuing its investigation.

III. Issues

[17] There are two issues for determination: (a) whether the Court should grant the Applicants' motion for interlocutory relief; and (b) whether the Court should grant the Respondent's motion to strike.

[18] Given that the Applicants' motion for injunctive relief is premised on the underlying application for judicial review, which the Respondent seeks to strike, it makes procedural sense to deal first with the Respondent's motion.

IV. Motion to Strike

A. *Generally*

[19] Though the Rules do not expressly cover the possibility of striking a notice of application, the Court holds plenary jurisdiction to restrain the misuse of its processes: *David Bull Laboratories (Canada) Inc v Pharmacia Inc*, [1995] 1 FC 588 [*David Bull*] at 600.

[20] Notices of application for judicial review are struck only in exceptional circumstances. This is because these applications are intended to be quickly dealt with and not encumbered. In *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 [*JP Morgan*], the Federal Court of Appeal summarized the principles for striking an application for judicial review:

> [47] The Court will strike a notice of application for judicial review only where it is "so clearly improper as to be bereft of any possibility of success": *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, 1994 CanLII 3529 (FCA), [1995] 1 F.C. 588 at page 600 (C.A.). There must be a "show stopper" or a "knockout punch" – an obvious, fatal flaw striking at the root of this Court's power to entertain the application: *Rahman v. Public Service Labour Relations Board*, 2013 FCA 117 at paragraph 7; *Donaldson v. Western Grain Storage By-Products*, 2012 FCA 286 at paragraph 6; cf. *Hunt v. Carey Canada Inc.*, 1990 CanLII 90 (SCC), [1990] 2 S.C.R. 959.
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> [48] There are two justifications for such a high threshold. First, the Federal Courts' jurisdiction to strike a notice of application is founded not in the Rules but in the Courts' plenary jurisdiction to restrain the misuse or abuse of courts' processes: *David Bull*, supra at page 600; *Canada (National Revenue) v. RBC Life Insurance Company*, 2013 FCA 50. Second, applications for judicial review must be brought quickly and must proceed "without delay" and "in a summary way": *Federal Courts Act*, [R.S.C. 1985, c. F-7], subsection 18.1(2) and section 18.2. An unmeritorious motion – one that raises matters that should be advanced at the hearing on the merits – frustrates that objective.

[21] This high threshold that must be met to strike an application is often described as the "doomed to fail" threshold: see e.g., *Wenham v Canada (Attorney General)*, 2018 FCA 199 [*Wenham*] at para 33.

[22] The case law reveals certain circumstances where an application in Federal Court may be "doomed to fail." This includes where the notice of application fails to state a cognizable administrative law claim which can be brought in the Federal Court; the Federal Court is not able to deal with the administrative law claim by virtue of the *Federal Courts Act*, RSC 1985, c F-7 or some other legal principle; and the Federal Court cannot grant the relief sought: *JP Morgan* at para 66. Possible other bars include *res judicata*, issue estoppel, abuse of process, the existence of another available and adequate forum for relief, and mootness: *Wenham* at para 36.

[23] The burden rests on the respondent bringing the motion to strike to identify an obvious and fatal flaw in the notice of application, i.e., "one apparent on the face of it:" *JP Morgan* at para 52. A flaw that can be shown only with the assistance of an affidavit is not obvious.

B. *Premature judicial review applications*

[24] One ground for striking a notice of application for judicial review is where that application is premature. Such is the case where parties have not exhausted the adequate, effective remedial recourses that exist elsewhere or at another time; for example, where Parliament has set up specialized schemes to resolve the underlying issues at hand. "Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted:" *Canada (Border Services Agency) v C.B. Powell Limited*, 2010 FCA 61 [*C.B. Powell*] at para 31.

[25] The Federal Court of Appeal explained that premature applications should be struck as judicial review remedies are remedies of last resort, and improper or premature recourse to judicial review can frustrate Parliamentary intent and cause increased costs and delays: *JP Morgan* at para 85; *C.B. Powell* at para 32; *Wilson v Atomic Energy of Canada Limited*, 2015 FCA 17 [*Wilson*] at paras 31–32.

[26] To grant a motion to strike based on prematurity, the Court must be "certain" that (1) there is recourse elsewhere, now or later; (2) the recourse is adequate and effective; and (3) the circumstances pleaded are not the sort of unusual or exceptional circumstances recognized by the case law or analogous thereto: *JP Morgan* at para 91.

[27] The leading case on the objection against premature judicial reviews is *C.B. Powell*. There, the Federal Court of Appeal at paragraph 33 explained the rarity of finding an exceptional circumstance warranting judicial intervention in an ongoing administrative process:

> Courts across Canada have enforced the general principle of non-interference with ongoing administrative processes vigorously. This is shown by the narrowness of the "exceptional circumstances" exception. Little need be said about this exception, as the parties in this appeal did not contend that there were any exceptional circumstances permitting early recourse to the courts. Suffice to say, the authorities show that very few circumstances qualify as "exceptional" and the threshold for exceptionality is high: see, generally, D. J. M. Brown and J.M. Evans, Judicial Review of Administrative Action in Canada (loose-leaf) (Toronto: Canvasback, 1998), at paragraphs 3:2200, 3:2300 and 3:4000 and David J. Mullan, Administrative Law (Toronto: Irwin Law, 2001), at pages 485–494. Exceptional circumstances are best illustrated by the very few modern cases where courts have granted prohibition or injunction against administrative decision makers before or during their proceedings. Concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be granted: see Harelkin, above; Okwuobi, above, at paragraphs 38–55; University of Toronto v. C.U.E.W., Local 2 (1988), 1988 CanLII 4757 (ON SC), 65 O.R. (2d) 268 (Div. Ct.). As I shall soon demonstrate, the presence of so-called jurisdictional issues is not an exceptional circumstance justifying early recourse to courts.

[28] In *Wilson*, the Federal Court of Appeal went on to explain at paragraph 33 what qualifies as an exceptional circumstance, noting that many of those circumstances mirror those where prohibition lies:

> The force and pervasiveness of the general rule against premature judicial reviews and the need to discourage premature forays to reviewing courts means that the exceptions to the general rule are most rare and preliminary motions to strike are regularly entertained. As *C.B. Powell*, above, explained, the recognized exceptions reflect particular constellations of fact found in the

> decided cases. They are rare cases where the public law values do not sound loudly in the particular circumstances, the public law values are offset by competing public law values, or both. For example, there are rare cases where the effect of an interlocutory decision on the applicant is so immediate and drastic that the Court's concern about the rule of law is aroused: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraphs 27–30. In these cases—often cases where prohibition is available—the values underlying the general rule against premature judicial reviews take on less importance.

[29] The Federal Court of Appeal has since repeatedly cautioned courts against adopting a "less stringent criterion" for finding exceptional circumstances that "would only encourage premature forays into courts" and "compromise the rigour of the principle of non-interference:" *Dugré v Canada (Attorney General)*, 2021 FCA 8 [*Dugré*] at para 37; see also *Herbert v Canada (Attorney General)*, 2022 FCA 11 [*Herbert*] at paras 12–15. For example, "hardship to the applicant" is not a criterion that courts ought to assess in determining whether exceptional circumstances exist: *Herbert* at para 16.

C. *Analysis*

[30] The Respondent submits that the Applicants' underlying application for judicial review should be struck because it is premature. It raises two key submissions to this regard: (1) that the PSFs are "preliminary" in nature and not final; and (2) that the Applicants have failed to exhaust the available alternative remedies before pursuing judicial review.

(1) Preliminary issue: the admissibility of affidavit evidence

[31] As a general rule, affidavits are not admissible to support or oppose a motion to strike a notice of application for judicial review: *JP Morgan* at paras 51–52. This is because these applications must be heard summarily and without delay, affidavits are not necessary as the alleged facts are presumed to be true, and any "fatal flaw" that the Respondent relies on to justify granting a motion to strike must be sufficiently obvious without the necessity of affidavit evidence.

[32] There are exceptions. For example, documents referred to and incorporated by reference in a notice of application may be appended to an affidavit for the assistance of the Court: *JP Morgan* at para 54. The guiding principle is that affidavit evidence may be permitted where it furthers the interests of justice and does not undercut the justifications provided above warranting against its admission: *JP Morgan* at para 53.

[33] In the case at bar, both parties filed evidence on the motion to strike.

[34] The Respondent filed a single affidavit, from Ms. Julie Nunez, containing nine exhibits. These mostly pertain to the Applicants' grievance rights pursuant to section 208 of the *Federal Public Sector Labour Relations Act*, SC 2003, c 22 [FPSLRA].

[35] The Applicants filed two affidavits, from Mr. Macdonald and Mr. Utano, respectively. Contained within these affidavits are 25 exhibits, including emails from CBSA, letters from the

Government of Canada regarding the Applicants' failed or extended ATIPs, and various excerpts of testimony from OGGO meetings.

[36] The Respondent's affidavits are unobjectionable. The impugned decisions, the PSFs, were referred to and incorporated by reference in the notice of application. The notices of investigation and allegation similarly were incorporated by reference.

[37] The rest of the Respondent's affidavit evidence relates to explaining the adequacy of the grievance process. The Applicants submit that this evidence is not admissible, arguing that the Supreme Court's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] precludes recognizing an exception for admitting affidavit evidence relating to jurisdictional issues.

[38] I disagree. *Vavilov* at paragraphs 65–66 established that jurisdictional questions should no longer be recognized as a distinct category attracting correctness review; it did not comment on the admissibility of affidavit evidence relating to jurisdictional issues on motions to strike. Although the Applicants submit that *mutatis mutandis* applies to find the same reasons that the concept of jurisdiction was set aside in *Vavilov* apply here (i.e., that the concept of "jurisdiction" is inherently "slippery"), I find that the Supreme Court in *Vavilov* was concerned with judicial intervention when an administrative body's jurisdiction was at issue. Here, it is the Court's own jurisdiction which is raised. As was recently held by Justice Manson, the Court may consider affidavit evidence on motions to strike where the issues are not resolvable in a factual vacuum, including issues of jurisdiction: *Tait v Canada (Royal Canadian Mounted Police)*, 2024 FC 217 at para 27; see also *Picard v Canada (Attorney General)*, 2019 CanLII 97266 (FC) (Court File

T-1803-18) at para 17. As this Court is tasked with assessing the adequacy of the alternative remedies raised, I find the Respondent's evidence to this regard going to this issue is admissible.

[39] In contrast, this Court cannot admit the Applicants' affidavit evidence. It is well established that the notice of application must set out the "complete and concise statement of the grounds intended to be argued:" *JP Morgan* at para 38, citing paragraphs 301(d) and (e) of the Rules. The Federal Court of Appeal further explained at paragraph 52 of *JP Morgan*:

> […] 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.
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> [emphasis added.]

[40] Therefore, with the exception of documents incorporated by reference such as the notice of the investigation, the Court cannot admit the Applicants' affidavit evidence.

[41] The Respondent further raised the issue of parliamentary privilege to preclude the admissibility of the Applicants' evidence, specifically the excerpts from the OGGO meetings: *Guergis v Novak et al*, 2022 ONSC 3829 at paras 65–78. As I already found this evidence inadmissible on the basis of the general rule against affidavit evidence, I need not explore this ground of objection.

(2) Prematurity

[42] While the parties agree that CBSA's investigation is still ongoing, they disagree over the characterization of the PSFs, whether there is adequate and effective recourse through the grievance process, and whether exceptional circumstances exist that warrant this Court's premature intervention. I will deal with each in turn.

(a) *Are the PSFs final decisions?*

[43] The Applicants submit that the PSFs were intentionally designed to give the impression of conclusiveness, despite their label as preliminary. They submit that the PSFs are therefore being treated as final decisions rather than draft investigative reports, having caused "extraordinary punitive consequences and significant reputational damage." Thus, the Federal Court has discretion to intervene.

[44] The Respondent submits that, true to its name, the PSFs are "preliminary" in nature, and therefore cannot be the subject of any application for judicial review, barring exceptional circumstances. It emphasizes that the PSFs themselves contain disclaimers that state that any conclusions reached within the PSFs are not final and are subject to change in the course of the ongoing investigation.

[45] The PSFs have undoubtedly had a detrimental effect on the Applicants, as their dissemination to the Applicants' employers directly led to them losing their security clearance and being suspended without pay. Having read the PSFs, I understand the Applicants' concerns regarding their careers, reputations, dignity, and livelihoods as a result of their dissemination.

[46] Notwithstanding the above, I disagree that the PSFs may be considered "final" merely because they have been acted upon and caused harm to the Applicants. While it is incumbent upon the Court to look beyond the form of the decision and undertake a meaningful evaluation of whether the decision meets the requirements of finality, I find that the PSFs are indeed not final decisions but interim. The Respondent has not made any final decisions on the allegations contained within the PSFs, and the investigation has yet to run its course.

[47] It is important to note that while the Applicants left CBSA, their ultimate employer as federal public servants remains the Treasury Board, which governs all aspects of the "core public administration:" *Financial Administration Act*, RSC 1985, c. F-11 s. 11(1). It is therefore not obviously inappropriate for CBSA to share its preliminary findings within this core public administration, and doing so does not indicate that it treated the PSFs as final. The PSFs even provide a similar rationale for their dissemination with the Applicants' employers as "affected stakeholders," pursuant to Article 4.1.7 of the Policy on Government Security's Directive on Security Management.

[48] The Applicants' application for judicial review is therefore premature, and may only be heard if there is no available recourse elsewhere or there are exceptional circumstances.

(b) *Can the PSFs be grieved?*

[49] In the alternative, the Applicants submit that there are no internal grievance mechanisms that would allow them to obtain the redress sought in the underlying application for judicial review, i.e., an evaluation of the PSFs. They submit that the PSFs are "only tangential to the

investigation," and grieving requires a final decision or finding be made. Thus, they argue that since they may only file a grievance upon the completion of the investigation, there is no means for them to grieve the PSFs.

[50] The Respondent submits that the Applicants can and must grieve the PSFs before seeking judicial intervention. It points to the FPSLRA, which governs labour relations in the federal public service. As the Applicants are employed as federal public servants at the executive level (i.e., not represented by the bargaining agent), they fall under the definition of an employee under subsection 206(1) of the FPSLRA. The Respondent submits that section 208 of the FPSLRA, pertaining to individual grievances, is extremely broad and permits the Applicants to bring a grievance related to CBSA's investigation and creation of the PSFs: see *Ebadi v Canada*, 2024 FCA 39 [*Ebadi*] at paragraph 30, citing *Hudson v Canada*, 2022 FC 694 at para 102. It additionally emphasizes section 236, which ousts the Court's jurisdiction on matters that are grievable:

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	(2) Le paragraphe (1) s'applique que le fonctionnaire se prévale ou

right to present a grievance in any particular case and whether or not the grievance could be referred to adjudication.	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.

[51] I find that the Applicants may indeed grieve the PSFs and that this grievance process must be exhausted before they can seek relief in this Court. The Applicants have already grieved their suspensions and revocation of their security clearance to their respective employers. They have further successfully requested an investigation into CBSA's conduct, including its creation of the PSFs, by the Integrity Commissioner, which is currently underway

[52] As has been repeated in the case law, courts must respect and defer to the schemes established by Parliament for dealing with labour disputes: *Vaughan v Canada*, 2005 SCC 11 at paras 38–39; *Weber v Ontario Hydro*, [1995] 2 SCR 929 at para 57. The Federal Court of Appeal in *Ebadi* recently confirmed the breadth of section 208 of the FPSLRA as making grievable almost all employment-related matters in the federal public sector, even where the plaintiffs allege that their claims are not ordinary workplace disputes. At paragraph 41, it further confirmed that an investigation process, including the manner in which the investigation was

conducted “and what management did with the report, including any remedy,” is grievable under the FPSLRA: see also *Gupta v Canada (Attorney General)*, 2021 FCA 202 at para 8.

[53] I find that the same is true here, where the Applicants’ dispute is over the conduct of CBSA’s investigation into the allegations of their federal public sector workplace misconduct. By the operation of sections 208 and 236 of the FPSLRA, I find that the Applicants must exhaust the grievance mechanisms before they may come to this Court. This is true even if the Applicants must wait until the investigation is completed to file a grievance; so long as there is an available grievance mechanism, the Applicants must avail themselves of it first.

[54] To the extent that the Applicants raise the issue that the grievance process is biased, in that the Applicants must grieve to the CBSA where they allege the CBSA withheld the PSFs and notice of the investigation, that issue is without merit. There is no evidence before me to suggest that the available grievance process is not adequate and effective.

(c) *Are there exceptional circumstances warranting premature intervention?*

[55] Absent exceptional circumstances, applications for judicial review may be brought only after the administrative decision-maker has made its final decision. “At that time, administrative decisions made at the outset of administrative proceedings or during administrative proceedings can be the subject of challenge along with the final decision:” *Forner v Professional Institute of the Public Service of Canada*, 2016 FCA 35 at para 13.

[56] Citing this Court in *Air Canada v Lorenz*, [2000] 1 FC 494, the Applicants submit that the Court must consider six factors in determining whether exceptional circumstances exist that would compel this Court to overstep its jurisdiction and prematurely intervene: hardship to the Applicant(s), waste, delay, fragmentation, strength of the case, and the statutory context; see also *Douglas v Canada (Attorney General)*, 2014 FC 299 at para 129. They submit that all the factors are met in the case at bar.

[57] In particular, the Applicants submit that the Respondent's ongoing investigation and creation of the PSFs violates the rule of law, which takes priority over the general rule against premature judicial review: *Wilson* at para 33. They argue that CBSA's investigation is fatally flawed in that it is rife with procedural issues, conflicts of interest, failure to comply with internal requirements, and bias. They say that allowing the flawed process to continue will prolong and worsen their damages, while leading to a final resolution that will be equally flawed and of little value. It is submitted that to prevent the wasteful and inefficient use of judicial resources, the Court ought to exercise its discretion to intervene at this stage of the proceedings: *Robinson v Canada (Attorney General)*, 2019 FC 876 [*Robinson*] at para 95, citing Rule 3; *Bedwell Bay Construction Ltd v Ball*, 2022 BCSC 559 at para 45.

[58] Chief among the Applicants' complaints is that CBSA breached the *Public Servants Disclosure Protection Act*, SC 2005, c 46 [PSDPA], specifically subsection 27(3) which requires officials conducting investigations to ensure the individual under review is afforded a full and ample opportunity to answer any allegation. To support their position, the Applicants reference *Chapman v Canada (Attorney General)*, 2019 FC 975 [*Chapman*], where I reviewed allegations of unfairness in an investigation conducted under the PSDPA. They also reference decisions

from the Ontario Superior Court, namely *Sudbury and District Health Unit v Ontario Nurses' Association*, 2023 ONSC 2419 at para 15, citing *Gage v Ontario (Attorney General)*, 1992 CanLII 8517 (ON SCDC) [*Gage*] at para 61:

> The court has exercised its discretion to judicially review an interlocutory decision in situations where there is real unfairness through a denial of natural justice and/or where a remedy later would not cure the unfairness. For example, in *Gage v Ontario (Attorney General)*, the Court exercised its discretion to hear a judicial review, finding that the underlying decision was so unfair that it represented an exceptional circumstance. In that case, Gage, a police constable, was not notified for ten months about the decision to forward allegations against him to a Board of Inquiry, despite a requirement that he be advised "forthwith." The court noted that "if there is a prospect of real unfairness through denial of natural justice or otherwise, a superior court may always exercise its inherent supervisory jurisdiction to put an end to the injustice before all the alternative remedies are exhausted…the unfairness in this case is so obvious that it would be inappropriate to put the officer through a trial before a tribunal that lost jurisdiction through a denial of natural justice.
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> [citations omitted]

[59] The Respondent submits that there are no exceptional circumstances warranting this Court's premature intervention. It highlights the fact that there have been no cases to date where the Court found that a matter is grievable under the FPSLRA but that there are exceptional circumstances to warrant exercising its jurisdiction.

[60] I too find that there are no extraordinary circumstances before me that would warrant intervention at this stage of the proceedings.

[61] I agree with the Respondent that, in following the Federal Court of Appeal's authoritative direction in *C.B. Powell*, allegations of procedural fairness do not amount to exceptional

circumstances: *C.B. Powell* at para 33. Similar grounds of bias, damage to reputation, and procedural fairness were dismissed by the Federal Court of Appeal in *Dugré* at paragraph 48 as not reaching the level of exceptionality required to permit premature intervention on a preliminary decision. "In short, the non-availability of interlocutory relief is next to absolute:" *Dugré* at para 37.

[62] This is not *Chapman*. As Justice McHaffie held in *McCarthy v Canada (Attorney General)*, 2020 FC 930 at paragraph 39, nothing in *Chapman* overrides the principle that grievability of the issues raised, including procedural fairness under an investigation, precludes judicial review. Further, the investigation of the Applicants is not under the PSDPA, but under CBSA's Code of Conduct and the Treasury Board's Values and Ethics Code. And unlike the applicant in *Chapman*, the Applicants received particulars of the allegations made against them, despite their qualms over the amount of disclosure provided. It is important to note that the disclosure the Applicants may receive may change during the course of the investigation, as the CBSA even noted to the Applicants in its requests for an interview that they would receive further information upon such interviews. This is more reason for the Court to withhold intervention at this stage of the proceedings.

[63] Even if I were to accept that issues of procedural fairness and conflict of interest amount to exceptional circumstances, and that the Federal Court as a statutory court has the authority to intervene, I find that there is insufficient evidence on the record before me to establish that such breaches occurred. The Applicants principally rely on the chronology of the investigation to support their broad assertions of bias and deliberate harm against them by the Respondent, repeating often that the timing of the investigation is "suspicious." Respectfully, this is not

enough to ground their allegations. It is therefore not "so obvious" that unfairness occurred nor that the ongoing process is so deeply flawed, that it would be inappropriate or inefficient to require the Applicants to go through the grievance process available to them: *Gage* at para 63; *Robinson* at para 95; *Lourenco v Hegedus*, 2017 ONSC 3872 at para 6.

[64] More importantly, I find that this is not a circumstance where the consequences to the Applicants are so "immediate and drastic" that the rule of law is called into question nor that a writ of prohibition is justified: *Wilson* at para 33. After the investigation has run its course and the Applicants have exhausted the available grievance mechanisms, they may launch an application for judicial review advancing the same grounds raised in this application and any other relevant, admissible grounds. At that point, the Court would have the full benefit of the completed investigation's findings suffused "with expertise, legitimate policy judgments and valuable regulatory experience:" *C.B. Powell* at para 32.

[65] I note that just because I did not find exceptional circumstances here does not mean that there can never be exceptional circumstances where the FPSLRA applies. Applicants do, however, have a very high bar to meet to demonstrate that the Court should intervene.

D. *Conclusion*

[66] I grant the Respondent's motion to strike. The Applicant's application is premature as the PSFs are not final and they have yet to exhaust the available grievance process. There are no exceptional circumstances warranting this Court's early intervention.

[67] As I am striking the Applicants' underlying application for judicial review, it is unnecessary to assess the Applicants' motion for injunctive relief. However, I will make a few brief remarks, as I would have dismissed the Applicants' motion in any event.

V. Motion for Injunctive Relief

A. *Generally*

[68] Interlocutory injunctions are an extraordinary, equitable remedy: *Halcrow v Kapawe'no First Nation*, 2020 FC 1069, at paragraph 20. Their purpose is to preserve the rights of the parties so that courts may enforce them in the event that the action ultimately succeeds.

[69] The general test for injunctive relief was set out by the Supreme Court in *RJR* -- *MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR*]. It requires an applicant to demonstrate that: (1) there is a serious question to be tried; (2) they will suffer irreparable harm if the injunction is not granted; and (3) the balance of convenience favours granting the injunction. The test is conjunctive; an applicant must satisfy each element of the test to succeed. Failure to demonstrate one element of the test is sufficient to disentitle an applicant's motion for an injunction.

[70] In *R v Canadian Broadcasting Corp*, 2018 SCC 5 [*CBC*], the Supreme Court heightened the threshold for the first stage of the test from a serious question to be tried to a strong *prima facie* case, in circumstances where the order is for a mandatory injunction as opposed to a prohibitive one. The former requires a party to perform a specific act whereas the latter requires a party to refrain from a specific act: *CBC* at para 16.

B. *Analysis*

[71] I find that the Applicants seek prohibitory injunctions, i.e., restraining the Respondent from performing certain acts such as continuing to disseminate or otherwise rely on the PSFs and pausing their ongoing investigation. Given the low threshold for establishing a serious issue to be tried, I am satisfied that the Applicants would have met this bar.

[72] Where the Applicants would have failed, however, is in demonstrating that they will face irreparable harm if the requested injunctions are not granted.

[73] Irreparable harm is harm or injury that cannot be adequately compensated or remedied by any monetary award or damages that may be awarded following a decision on the merits: *RJR* at 340-341. This Court has held that applicants bear the burden of presenting "clear and convincing evidence" of irreparable harm: *Thompson v Canada (Public Safety and Emergency Preparedness)*, 2009 FC 1296 at para 82.

[74] The Applicants submit that the way in which CBSA has conducted itself, namely through its design and dissemination of the PSFs, has resulted in the revocation of their security clearances and their suspensions without pay. This has led to their continued suffering of significantly emotional trauma. They further allege that given the significant media exposure the ArriveCAN application and the alleged procurement irregularities have received, the release of the PSFs and the continuation of CBSA's investigation as currently being conducted "will effectively destroy the Applicants' careers and livelihood."

[75] I am not convinced that the Applicants' submissions amount to demonstrating irreparable harm. There is undoubtedly a link between the dissemination of the PSFs and the Applicants' resulting loss of security clearance and suspension. However, it is unclear what relief the injunction would offer the Applicants given that the PSFs have already been distributed to their employers and the OGGO. Any alleged harm flowing from the PSFs appears to have already significantly materialized.

[76] I agree with the Respondent that the Applicants fail to meet their evidentiary burden of establishing irreparable harm, save from making broad assertions that they are suffering emotional and reputational damages. The Federal Court of Appeal has reiterated that assumptions, speculations, hypotheticals, and arguable assertions unsupported by the evidence carry no weight: *Sheldon M. Chumir Foundation for Ethics in Leadership v Canada (National Revenue)*, 2023 FCA 242 at para 7. Under this part of the *RJR* test, applicants must demonstrate that they will *continue* to suffer irreparable harm should the injunction not be granted. Here, the Applicants only provided evidence of alleged harm owing to past events with no clear or convincing evidence that this harm will continue in the absence of the requested injunctions.

[77] Even if irreparable harm were established, I would have found that the balance of convenience favours not granting the injunction. The Court may consider a number of different factors in considering the balance of convenience. This includes the adequacy of damages as a remedy if the injunction is denied, preserving the *status quo*, etc. The purpose of this prong of the test is to determine who would suffer greater harm from the effects of this motion.

[78] I find that the Respondents would suffer greater harm if the injunction is granted than the Applicants who would be largely in the same position, whether or not the injunction is granted.

[79] The Applicants submit that there is no basis to insist that the "flawed, procedurally unfair [i]nvestigation continue at breakneck speed, tramping the rights of the Applicants, while these related proceedings are also underway." Respectfully, I disagree. The underlying application for judicial review is tasked with evaluating the PSFs, including whether they were generated in a flawed, procedurally unfair manner. It would have been premature and, in any event, inappropriate for this Court to grant the requested relief on the basis of a finding that the Court has yet to make.

[80] The Applicants' request for an order of *mandamus* is not properly advanced. This Court stated in *Farhadi v Canada (Citizenship and Immigration)*, 2014 FC 926 at paragraph 28 that: "[m]andamus is an extraordinary, discretionary remedy and it is trite law that while it will be issued to compel the performance of a legal duty, it cannot dictate the result to be reached."

[81] Here, the Applicants request an order of *mandamus* to compel CBSA to appoint an independent third party investigator to undertake an investigation *de novo* of the allegations being investigated. I find that this request goes beyond the Court's jurisdiction, as there is no legal duty of CBSA that it has failed to undertake, such that the Court can compel its performance.

[82] The Applicants' other requests for relief lack any support in the legislation or jurisprudence, and accordingly would not be granted.

[83] As such, though the Applicants' motion is moot given my conclusion on the Respondent's motion to strike, I would not have granted any of the requested relief.

VI. Conclusion

[84] Barring exceptional circumstances, courts must allow an administrative proceeding to run its course before intervening. The threshold for exceptionality is very high, and the Applicants have failed to meet it.

[85] The motion to strike is granted: the Application is struck, without leave to amend. The Applicants' motion is dismissed. The underlying application is dismissed.

[86] The Respondent's request for its costs is appropriate.

ORDER in T-311-24

THIS COURT ORDERS that:

1. The Respondent's motion is allowed;

2. The Application for Judicial Review is struck, without leave to amend;

3. The Applicants' motion is dismissed; and

4. The Respondent is entitled to its costs of the application for judicial review and these motions calculated in accordance with column III under the table of Tariff B of the Rules.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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