Federal Court  Cour fédérale

Date: 20220606

Docket: T-56-20

Citation: 2022 FC 834

Ottawa, Ontario, June 6, 2022

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

SAMEER EBADI

Plaintiff

and

HER MAJESTY THE QUEEN, JAMES DOE, JOHN DOE, JOSEPH DOE, JANE DOE, JULIE DOE, AND DAVID VIGNEAULT

Defendants

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an action by the Plaintiff against his employer the Canadian Security Intelligence Service [CSIS or the Service] for the alleged torts of intentional infliction of mental suffering, assault, and battery, and for alleged breaches of his rights under sections 2, 7 and 15 of the *Canadian Charter of Rights and Freedoms*, *Constitution Act, 1982*, Schedule B to the *Canada*

Act 1982 (UK), 1982, c. 11 [*Charter*], and for the torts of intentional infliction of mental suffering, assault, and battery. He seeks a declaration the Defendants breached his *Charter* rights and damages under section 24(1) of the *Charter*. The Plaintiff also seeks special, punitive, and aggravated damages against the Defendants, claiming that throughout the course of his employment the Defendants harassed and treated him in a prejudicial, demeaning and condescending manner amounting to religious and ethnic discrimination. He also claims he received inadequate redress with respect to a claim he made under the *Access to Information Act*, RSC 1985, c A-1 [*ATIA*].

[2] The Attorney General of Canada [AGC] moves to strike the entirety of the claim under Rule 221 of the *Federal Courts Rules,* SOR/98-106 [*Federal Courts Rules*] on the ground it is barred by the combined effect of sections 208 and 236 of the *Federal Public Sector Labour Relations Act,* SC 2003, c. 22 [*FPSLRA*]. The AGC argues the *FPSLRA* includes a complete and explicit ouster of the Court's jurisdiction to hear complaints that are grievable under section 208 of the *FPSLRA.* In the alternative, the AGC moves to strike the allegations against David Vigneault, the Director of CSIS, and allegations relating to the *ATIA*.

[3] Factual allegations were submitted both by the Plaintiff, and by co-counsel for the Plaintiff who primarily addressed affidavit evidence filed by the Chief Operating Officer [COO] of the National Council of Canadian Muslims [NCCM]. The COO of NCCM described NCCM as Canada's sole full-time, professional, independent, non-partisan, and non-profit grassroots Canadian Muslim advocacy organization, with a mandate to protect human rights and civil

liberties, challenge discrimination and Islamophobia, build mutual understanding between Canadians, and promote the public interests of Canadian Muslim communities.

[4] The Defendant filed affidavit evidence on this jurisdictional motion, namely an affidavit of the former Chief of Labour Relations at CSIS.

[5] The motion to strike is granted for the reasons that follow.

II. Facts

[6] The Plaintiff is an employee of CSIS, an agency created by the *Canadian Security Intelligence Service, Act,* RSC 1985 c. C-23 [*CSIS Act*]. He joined the Service in August 2000 as a communications analyst in the Prairie Region office. He has been on sick leave since January 2018. He is a Canadian citizen and a practicing Muslim of Middle Eastern heritage.

[7] The Defendants are the Crown, five employees of the Service, and its Director. The Plaintiff and the five CSIS employees are identified pseudonymously in accordance with subsection 18(1) of the *CSIS Act*, which makes disclosure of the identity of an employee an offence punishable by up to five years of imprisonment. If the action is not dismissed in its entirety, the Defendants says the claim against CSIS Director David Vigneault should be dismissed and paragraphs 33 and 34 of the Statement of Claim [SOC] struck because no cause of action is disclosed as against him; in response the Plaintiff indicated at the hearing he would apply for leave to amend his SOC.

A. *Statement of Claim*

[8] The Plaintiff initiated this action by a SOC filed January 15, 2020. The SOC requests the following relief:

> A. A declaration that the Defendant, Her Majesty the Queen, has breached the Plaintiff's sections 2, 7, and 15 rights under the *Charter;* and damages pursuant to s. 24(1) of the *Charter* in the amount of $250,000.00;
>
> B. General and aggravated damages, arising from the Government's breach of the *Charter,* contractual, statutory and common law duties in the amount of $250,000.00;
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> C. Past and future loss of income;
>
> D. Special damages in the amount to be determined;
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> E. Punitive damages in the amount of $250,000;
>
> F. Prejudgment and post-judgment interest; and,
>
> G. Costs of the action, on a substantial indemnity basis.

[9] The SOC sets out a fairly detailed narrative alleging incidents dating back more than 20 years to 2001, namely incidents in 2021, 2005, 2008, 2010, 2013, 2016 and 2018, which he alleges arose in the course of his twenty-year employment. He says these incidents support his claims.

[10] Notably, he did not engage the grievance procedures open to him in respect of any of these alleged incidents.

[11] These alleged incidents are summarized by the Respondent, accurately in my view, as follows:

> A. He was placed under surveillance by his employer immediately following the September 11, 2001 terrorist attacks;
>
> B. In 2005, he attended a presentation by the Chief of Internal Security in which the Chief stated that persons of an ethnic background were a security threat to Canada;
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> C. He was forced to take a polygraph examination where he was asked personal questions about the breakdown of his marriage in 2005;
>
> D. He was assigned a smaller office that was a converted storage closet closer to the men's washroom in 2008;
>
> E. He was unsuccessful in his effort to be promoted to the position of Head of the Section in 2010;
>
> F. He was not given the assistance he had requested from his manager when he complained of a heavy workload in 2013, and he was chastised by his manager;
>
> G. He was chastised and threatened by his manager, the Deputy Director and the District Chief of the Prairie Office for complaining about workplace harassment;
>
> H. He was removed from a file in 2013;
>
> I. He was not granted an interview for a Foreign Administration assignment he applied for in 2016; and,
>
> J. He was subjected to insults and assaults from his co-workers while he was praying in his office between 2015 and 2018.

[12] The Plaintiff also pleads a number of allegations pertaining to his experiences with the complaint process at CSIS, under the heading "toxic culture in CSIS":

A. He spoke with the Director General for the Prairie Region in 2017 and informally complained of the harassment he suffered;

B. In 2017, he assisted another employee in filing a formal harassment complain for religious and ethnic discrimination for which an investigation was launched, but the outcome was not communicated to him;

C. In December 2017, Director General David Vigneault sent a letter to all Service employees identifying equality and the elimination of harassment and discrimination as an organizational target; and,

D. He filed a request under the *Access to Information Act*, RSC 1985, c A-1 for information pertaining to him but received no records from the Service.

[13] On January 28, 2021, the AGC filed this motion to strike the Plaintiff's claim. Both parties filed affidavits on the motion and all witnesses were cross-examined.

III. Issues

[14] The AGC raises the following issues:

A. Should the action be struck on the ground it is statute-barred on jurisdictional grounds because of section 236 of the *FPSLRA* given the breadth of the right to grieve under section 208 of the *FPSLRA*?

B. In the alternative, should the claim against Director David Vigneault and/or the alleged breach of the *Access to Information Act*, RSC 1985 c. A-1 [*ATIA*] be struck?

IV. Preliminary Issue: The *ATIA* Claims

[15] At paragraphs 33-34 of the SOC, the Plaintiff pleads CSIS "intentionally ignored its statutory disclosure obligations, including by wilfully misclassifying certain information, in an

effort to cover up its failures to correct and address rampant harassment and discrimination," and that the denial of information under the *ATIA* is part of the Service's "established strategy" to insulate itself from external accountability.

[16] The Plaintiff in his Memorandum says he does not intend to plead a breach of the *ATIA* as a separate statutory cause of action, and that the facts alleged in paragraphs 33 and 34 of the SOC are only included as context to support his request for punitive or aggravated damages.

[17] The Defendants submit and I agree that these allegations amount to an abuse of process and should be struck under Rule 221(1)(d) and (f) because the *ATIA* establishes a comprehensive scheme by which the Plaintiff may seek documents not produced to which he claims an entitlement, which should not be litigated in this proceeding but in the context of the processes set out in subsection 30(1) and 41(1) of the *ATIA*.

[18] Rule 221(1)(d) and (f) provides:

Motion to Strike	**Requête en radiation**
221 (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it	**221 (1)** À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas:
[…]	[…]
(d) may prejudice or delay the fair trial of the action,	**d)** qu'il risque de nuire à l'instruction équitable de l'action ou de la retarder;

[…]	[…]
(f) is otherwise an abuse of the process of the Court,	**f)** qu'il constitue autrement un abus de procédure.
and may order the action be dismissed or judgment entered accordingly.	Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.

[19] Subsections 30(1)(a) and (f) of *ATIA* provides:

Receipt and investigation of complaints	**Réception des plaintes et enquêtes**
30(1) Subject to this Part, the Information Commissioner shall receive and investigate complaints	**30(1)** Sous réserve des autres dispositions de la présente partie, le Commissaire à l'information reçoit les plaintes et fait enquête sur les plaintes:
(a) from persons who have been refused access to a record requested under this Part or a part thereof;	**a)** déposées par des personnes qui se sont vu refuser la communication totale ou partielle d'un document qu'elles ont demandé en vertu de la présente partie;
[…]	[…]
(f) in respect of any other matter relating to requesting or obtaining access to records under this Part.	**f)** portant sur toute autre question relative à la demande ou à l'obtention de documents en vertu de la présente partie.

[20] Subsection 41(1) of the *ATIA* provides:

Review by Federal Court – Complainant	**Révision par la Cour fédérale: plaignant**

41(1) A person who makes a complaint described in any of paragraphs 30(1)(a) to (e) and who receives a report under subsection 37(2) in respect of the complaint may, within 30 business days after the day on which the head of the government institution receives the report, apply to the Court for a review of the matter that is the subject of the complaint.	**41(1)** Le plaignant dont la plainte est visée à l'un des alinéas 30(1)a) à e) et qui reçoit le compte rendu en application du paragraphe 37(2) peut, dans les trente jours ouvrables suivant la réception par le responsable de l'institution fédérale du compte rendu, exercer devant la Cour un recours en révision des questions qui font l'objet de sa plainte.

[21] In my respectful view, had I not struck the entire SOC for want of jurisdiction, it would be appropriate for the Court to and I would strike paragraphs 33 and 34 from the SOC. In my respectful view, the *ATIA* contains a comprehensive and complete code setting out what if any remedies an applicant may pursue if dissatisfied with the result, including a complaint to the Information Commissioner and ultimately a *de novo* proceeding by judicial review in this Court. The Plaintiff does not plead nor is there any evidence he followed any part of this statutory scheme, although he evinces dissatisfaction with the result. In particular there is neither any allegation nor evidence the Plaintiff complained to the Information Commissioner. In my respectful view, to permit these pleadings to stand would permit a collateral attack on a decision which may or not have been made under the *ATIA*. That with respect would constitute an abuse of the processes of this Court.

V. Relevant legislation

[22] Section 208 of the *FPSLRA* outlines the "vast" scope of grievance remedies available to the Plaintiff. It allows an employee to grieve where they "feel" aggrieved in terms of their terms and conditions of employment:

Right of an 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	**(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

than the *Canadian Human Rights Act.*

Loi canadienne sur les droits de la personne.

Limitation

Réserve

(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.

(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

Réserve

(4) An employee may not present an individual grievance relating to the interpretation or application, in respect of the employee, of a provision of a collective agreement or an arbitral award unless the employee has the approval of and is represented by the bargaining agent for the bargaining unit to which the collective agreement or arbitral award applies.

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

Limitation

Réserve

(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 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

(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 de cette question sous le régime de la présente loi si la ligne directrice prévoit expressément cette impossibilité.

individual grievance under this Act.	
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.
[Emphasis added]	[Je souligne]

[23] Subsection 236 of the *FPSLRA* establishes that the right to grieve under section 208 bars access to the Courts in an action like this:

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.
[Emphasis added]	[Je souligne]

[24] Rule 174 and Rule 221 of the *Federal Courts Rules*, SOR/98-106 provides:

Pleadings in Action	**Actes de procédure**
Material Facts	**Exposé des faits**
174 Every pleading shall contain a concise statement of the material facts on which the party relies, but shall not include evidence by which those facts are to be proved.	**174** Tout acte de procédure contient un exposé concis des faits substantiels sur lesquels la partie se fonde; il ne comprend pas les moyens de preuve à l'appui de ces faits.
Striking Out Pleadings	**Radiation d'actes de procédure**
Motion to Strike	**Requête en radiation**
221 (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck	**221 (1)** À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de

out, with or without leave to amend, on the ground that it	procédure, avec ou sans autorisation de le modifier, au motif, selon le cas:
(a) discloses no reasonable cause of action or defence, as the case may be,	**a)** qu'il ne révèle aucune cause d'action ou de défense valable;
(b) is immaterial or redundant,	**b)** qu'il n'est pas pertinent ou qu'il est redondant;
(c) is scandalous, frivolous or vexatious,	**c)** qu'il est scandaleux, frivole ou vexatoire;
(d) may prejudice or delay the fair trial of the action,	**d)** qu'il risque de nuire à l'instruction équitable de l'action ou de la retarder;
(e) constitutes a departure from a previous pleading, or	**e)** qu'il diverge d'un acte de procédure antérieur;
(f) is otherwise an abuse of the process of the Court,	**f)** qu'il constitue autrement un abus de procédure.
and may order the action be dismissed or judgment entered accordingly.	Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.
Evidence	**Preuve**
(2) No evidence shall be heard on a motion for an order under paragraph (1)(a).	**(2)** Aucune preuve n'est admissible dans le cadre d'une requête invoquant le motif visé à l'alinéa (1)a).

[25] The relevant provisions of the *Canadian Charter of Rights and Freedoms, Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 [Charter] state:

Fundamental freedoms	**Libertés fondamentales**
2 Everyone has the following fundamental freedoms:	**2** Chacun a les libertés fondamentales suivantes :

(a) freedom of conscience and religion;	**a)** liberté de conscience et de religion;
(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;	**b)** liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;
(c) freedom of peaceful assembly; and	**c)** liberté de réunion pacifique;
(d) freedom of association.	**d)** liberté d'association.
Life, liberty, and security of person	**Vie, liberté et sécurité**
7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	**7** Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.
Equality before and under law and equal protection and benefit of law	**Égalité devant la loi, égalité de bénéfice et protection égale de la loi**
15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	**15 (1)** La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

VI. Legal test on a motion to strike on jurisdictional grounds

[26] As discussed below, the legal test applicable on this motion to strike on jurisdictional grounds is whether it is plain and obvious, assuming the facts pleaded are true or provable, that this Court lacks jurisdiction over the Plaintiff's claim. The *Federal Courts Rules* do not contain a specific provision for striking a claim on the basis the Federal Court lacks jurisdiction. Indeed, the Defendants do not need to and quite properly do not cite to Rule 221 or its subsections in their submissions.

[27] The "plain and obvious" test is established by the Supreme Court of Canada in *R v Imperial Tobacco*, 2011 SCC 42 at para 17 [*Imperial Tobacco*]. It is applicable motions to strike for want of jurisdiction:

> [17] The parties agree on the test applicable on a motion to strike for not disclosing a reasonable cause of action under r. 19(24)(a) of the B.C. *Supreme Court Rules*. This Court has reiterated the test on many occasions. A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 15; *Hunt v. Carey Canada Inc.*, 1990 CanLII 90 (SCC), [1990] 2 S.C.R. 959, at p. 980. Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial: see, generally, *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83; *Odhavji Estate*; *Hunt*; *Attorney General of Canada v. Inuit Tapirisat of Canada*, 1980 CanLII 21 (SCC), [1980] 2 S.C.R. 735.

[28] In *Apotex v Ambrose*, 2017 FC 487 at para 38, Justice Manson confirmed the reasoning in *Charlie v Vuntut Gwitchin First Nation*, 2002 FCT 344:

> [38] […] The history of the test for a motion to strike under Rule 221(1) was canvassed, in 2002, by Prothonotary Hargrave in the decision *Charlie v Vuntut Gwitchin First Nation*, 2002 FCT 344 [*Vuntut*]. In finding that the plain and obvious test, where the standard is beyond a doubt, is appropriate, he stated:

> [18] While some jurisdictional issues ought not to be decided until trial, when all of the facts on the question are before the Court, in other instances jurisdiction may be decided in a summary way. In such an instance it is the usual plain, obvious and beyond doubt test which applies in striking out for want of jurisdiction. Of course, to reach that conclusion, one must initially test jurisdiction on the basis of *Miida Electronics Inc v Mitsui OSK Lines Ltd and ITO-International Terminal Operators Ltd*, 1986 CanLII 91 (SCC), [1986] 1 SCR 752.

> [39] I concur. The plain and obvious test is the correct test to use when determining whether a claim should be struck because the Federal Court lacks jurisdiction.

[29] See also, the application of the "plain and obvious test" on a motion to strike for want of jurisdiction in *Hodgson v Ermineskin Band*, 102 ACWS (3d) 2 (FCA); *Chase v Canada*, 2004 FC 273 at para 6 [*Chase*], and *Green v Canada (Border Services Agency)*, 2018 FC 414 at para 5 [*Green*].

[30] In addition, per *Chase* and unlike the situation under Rules 221(1)(a) and 221(2), evidence is admissible on a motion to strike based on jurisdiction:

> [6] On a motion to strike, the material facts in a statement of claim must be taken as true. Although Rule 221(2) provides that no evidence can be adduced on a motion for an order under paragraph (1)(a), <u>where an objection is taken to its jurisdiction, the Court must be satisfied that there are jurisdictional facts or allegations of such facts supporting an attribution of jurisdiction. Evidence is therefore admissible on a motion contesting the jurisdiction of this Court</u> [citations omitted, emphasis added].

VII. <u>Analysis</u>

A. *Should the action be struck on the ground that it is statute-barred on jurisdictional grounds by section 236 of the FPSLRA given the breadth of the right to grieve under section 208 of the FPSLRA?*

(1) Summary of Parties' Positions

[31] The parties' submissions turn on their respective interpretations of the decision of the Ontario Court of Appeal [ONCA] in *Bron v Canada (Attorney General)*, 2010 ONCA 71 [*Bron*] and subsequent jurisprudence in this Court. Mr. Bron, a federal public servant, claimed he was harassed by his employer, Transport Canada, in retaliation to his whistle-blowing activity. The causes of action were exclusively in tort, and counsel for Mr. Bron relied on a line of cases creating a "whistle-blower exception" to the general rule that courts should defer to the grievance procedure where the complaint in issue may be advanced under that procedure.

[32] Importantly, in *Bron* the ONCA found the Ontario Courts had no jurisdiction because section 236 of the *FPSLRA* ousts the jurisdiction:

> [29] Parliament can, subject to constitutional limitations that are not raised here, confer exclusive jurisdiction to determine certain disputes on a forum other than the courts. It will take clear language to achieve that result. Section 236 is clear and unequivocal. Subject to the exception identified in s. 236(3), which has no application here, s. 236(1) declares that the right granted under the legislation to grieve any work related dispute is "in lieu of any right of action" that the employee may have in respect of the same matter. Section 236(2) expressly declares that the exclusivity of the grievance process identified in s. 236(1) operates whether or not the employee actually presents a grievance and "whether or not the grievance could be referred to adjudication". The result of the language used in s. 236(1) and (2) is that a court no longer has any residual discretion to entertain a claim that is otherwise grievable under the legislation on the basis of an employee's inability to access third-party adjudication. While the residual discretion may exist if the grievance process could not provide an appropriate

> remedy, there is no suggestion in this case that it could not: see *Vaughan*, at para. 30. Assuming that to be the case, disputes that are grievable under the legislation must be determined using the grievance procedure.
>
> [Emphasis added]

[33] As discussed in more detail below, the judgment in *Bron* has been cited and applied in several Federal Court decisions. In my respectful view, *Bron* establishes the governing jurisprudence applicable in the case at bar.

[34] The AGC submits in accordance with *Bron* and cases following it in this Court, that section 236 of the *FPSLRA* constitutes a clear and complete ouster of the court's jurisdiction for any complaint that could have been the subject of a grievance under section 208. This includes all the Plaintiff's complaints set out above – except in respect of the *ATIA* and the complaint against the Defendant Director Vigneault.

[35] On the other hand, the Plaintiff argues - on the strength of the same excerpt - that *Bron* maintains the court's residual discretion to hear a claim when a grievance procedure does not provide an adequate remedy. Further, the Court may assume jurisdiction over claims that, in the usual course, may be barred by section 236, where there is a gap in the statutory scheme, where the events produce a difficulty unforeseen by the scheme, or where "no adequate alternative remedy already exists," as set out in *Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v Canadian Pacific Ltd.*, [1996] 2 SCR 495 at para 8 [*Brotherhood*].

[36] The Plaintiff also submits that because his challenge is to CSIS' grievance and harassment processes themselves, his claim is not barred by section 236 of the *FPSLRA*. The Plaintiff relies on *Canada v Greenwood*, 2021 FCA 186 [*Greenwood*], and the authorities cited therein (*Merrifield v Canada (Attorney General)*, 2009 ONCA 127 [*Merrifield*], *Sulz v Minister of Public Safety*, 2006 BCCA 582 [*Sulz*] and *Attorney General of Canada v Smith*, 2007 NBCA 58 [*Smith*]) in support of this submission. In particular, the Plaintiff says that harassment complaints are excluded from the general statutory grievance procedure and are processed on a "parallel track" that does not provide complainants with an opportunity for an independent third-party adjudication.

(2) Section 208 captures allegations of harassment and discrimination

[37] In my respectful view, while the Plaintiff's interpretation of *Bron* may be correct about a residual discretion, this proposition does not advance his case. I agree *Bron* did not involve a challenge to the grievance process itself. I also agree the bar under section 236 applies only to disputes that are grievable under section 208 of the *FPSLRA*. In my view, however, because the Plaintiff's allegations in this case were all grievable under section 208, they are therefore barred by section 236, even though he chose not to grieve any of them, as determined by subsection 236(2). I agree with the conclusion in *Bron* at para 29, that disputes that are grievable under the legislation must be determined using the grievance procedure.

[38] The Plaintiff's allegations at paragraphs 17-27 of the SOC relate to threats, harassments and discrimination that he experienced while working at CSIS. These are captured by paragraph 208(1)(b) and may all be grieved, but were not. This Court has already established the right to

grieve in section 208 encompasses any matter relating to terms and conditions of employment, including threats, discrimination, harassment and harm to reputation: *Nosistel v Canada*, 2018 FC 618 at para 66 [*Nosistel*], *Price v Canada*, 2016 FC 649 at paras 26-31 [*Price*] and *Green* at para 16.

[39] In *Nosistel*, Justice Gascon described as "vast" the range of conflicts related to "conditions of employment" that may be subject to the grievance process set out in section 208 of the *FPSLRA*:

> [66] The case law teaches that the range of conflicts related to "conditions of employment" that may be subject to the grievance process set out in section 208 of the PSLRA is vast (*Bron v Canada (Attorney General)*, 2010 ONCA 71 at paras 15, 30). Thus, the Court of Appeal of Quebec found that the notion of grievance is very broad and includes any matter that the employee feels causes harm or damage to his or her conditions of employment or work, including, but not limited to, disputes related to harassment, threats, intimidation or harm to reputation (*Cyr v Radermaker*, 2010 QCCA 389 at para 20; *Barber v JT*, 2016 QCCA 1194 [*Barber*] at para 38; *Goulet v Mondoux*, 2010 QCCA 468 at para 6). The definition of "conditions of employment" may include: 1) instructions on work force adjustment for positions considered to be "excluded" from a collective agreement, because they are an integral part of the employee's contract of employment (*Appleby-Ostroff v Canada (Attorney General)*, 2011 FCA 84 at paras 26, 30); 2) the advantages or services the employer provides to its employees, such as consultations under the *Policy on Employee Assistance Program* (*Barber* at para 38); or 3) the public servant's reliability status, as it may be an essential condition of employment to hold certain positions in the core public administration (*Varin v Canada (Public Works and Government Services Canada)*, 2016 FC 213 at para 2).
>
> [67] In short, it is established that the internal grievance process applies to any circumstance or issue that affects the terms or "conditions" of employment, and that this may include cases of discrimination, bad faith or harassment based on labour relations (*Green v Canada (Border Services Agency)*, 2018 FC 414 at paras 11–16; *Gagnon* at para 16). Of course, Ms. Nosistel is alleging violations of procedural fairness in the process of assessing and

> investigating her complaints of psychological harassment but, far from being divorced from the conditions of her employment, her complaints are directly and intimately tied to them. Given the broad wording of section 208, I do not see how the Grievances are not related to Ms. Nosistel's conditions of employment.
>
> [Emphasis added]

[40] In *Price* at paragraphs 26-31, the Court per Justice Fothergill held subsection 208(1) must be read broadly including where the matter giving rise to the grievance arose during the course of the individual's employment, where the individual was aggrieved as an employee:

> [26] The Federal Court of Appeal has held that s 90(1) of the former *Public Service Staff Relations Act*, the predecessor to s 208(1) of the current PSLRA, must be read so as to include any person who feels "aggrieved as an employee" (*R v Lavoie* (1977), [1978] 1 FC 778 at para 10, [1977] 2 ACWS 81 (Fed CA) [*Lavoie*]). Although *Lavoie* concerned an alleged disciplinary dismissal, this Court has interpreted the decision as preserving the right of former employees to grieve where "the matter giving rise to the grievance arose during the course of the individual's employment, where the individual was aggrieved as an employee" (*Salie v Canada (Attorney General),* 2013 FC 122 at para 61 [*Salie*]).

[41] And see also *Green,* where Justice Leblanc, as he was then, held section 208 includes situations of discrimination in the workplace, and allegations of bad faith, malice, and harassment, at paras 14 and 16:

> [14] The grievance process is internal, relates to any occurrence or matter affecting the terms or conditions of employment, and proceeds according to established rules and procedures (*Bron* at para 14); this includes <u>situations of discrimination in the workplace</u> (see *Chamberlain v Canada (Attorney General)*, 2012 FC 1027 [*Chamberlain*] and *Stringer v Canada (Attorney General)*, 2013 FC 735). The role of this Court in claims subject to the grievance process is limited to judicial review (*Robichaud* at para 11; see also *Price v Canada (Attorney General),* 2016 FC 649 at para 14 [*Price*]). […]

> [16] And as was the case in *Price*, the grievance process found in the Act provides the only forum in which the Plaintiff may seek relief against her employer, even in respect of allegations of bad faith, malice, harassment and discrimination (*Price* at para 33; *Bron* at para 7; *Chamberlain* at para 72). Again, as subsection 236(2) clearly contemplates, the Court shall defer to the grievance process 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.
>
> [Emphasis added]

[42] To the same effect are the recent conclusions of Justice Fothergill in *Hudson v HMQ*, 2022 FC 694 at paragraphs 103 to 105:

> [103] Allegations of gender-based harassment, discrimination, and even assault may be grieved under s 208 of the *FPSLRA*. *Jane Doe v Canada (Attorney General),* 2018 FCA 183 [*Jane Doe*] concerned a grievance brought by an employee of the Canada Border Services Agency who alleged that her employer had failed to provide her with a harassment-free workplace. The employee claimed she had endured prolonged sexual harassment, including an admitted sexual assault by a co-worker. The Board upheld the grievance, finding that the employer had failed to provide a harassment-free workplace, but did not award compensation. The Federal Court of Appeal granted the application for judicial review, holding that the Board had unreasonably denied the employee compensation for pain and suffering (*Jane Doe* at para 44; see also *Doro v Canada Revenue Agency*, 2019 FPSLREB 6).
>
> [104] Provincial superior courts have also recognized that sexual or gender-based harassment and discrimination are grievable, and have generally declined to exercise any residual jurisdiction they may have in favour of the applicable labour relations scheme (see, for example, *A(K) v Ottawa (City) (2006)*, 80 OR (3d) 161; *Greenlaw v Scott*, 2020 ONSC 2028).
>
> [105] The motion for certification must therefore be dismissed on jurisdictional grounds alone. This conclusion applies equally to members of the proposed class whose claims arose before 2005. The Plaintiffs have not demonstrated that the circumstances of those class members constitute "exceptional cases", or that there is a gap in labour adjudication that causes a "real deprivation of ultimate remedy" (*Weber* at para 57; *Vaughan* at paras 22, 39).

[43] With respect, the Plaintiff's argument that *Green* is distinguishable because it did not involve *Charter* remedies is of no merit; it has already be raised and rejected by this Court. In *Green,* Justice Leblanc, as he was then, concluded *Charter* infringements may be addressed through the grievance process under the *FPSLRA*:

> [10] The Plaintiff's claim that section 24 of the *Charter* allows her to seek remedy from this Court cannot be accepted for two reasons. First, the Statement of Claim contains no *Charter* breach allegations. She cannot obtain a remedy under section 24 if her rights and freedoms guaranteed under the *Charter* have not been infringed. Second, even if she had alleged infringement to her *Charter* rights, the infringing actions, having occurred in the course of her employment, can be addressed through the grievance process.
>
> [11] Section 236 of the Act grants federal employees "to seek redress by way of grievance for any dispute relating to his or her terms or conditions of employment". However, the right to seek redress by way of a grievance pre-empts any right of action the employee may have that could be subject to a grievance, regardless of whether the employee exercises their right of grievance.
>
> [Emphasis added]

[44] To the same effect is the Supreme Court of Canada's holding in *Weber v Ontario Hydro,* [1995] 2 SCR 929 at paras 49 and 60 [*Weber*] that decision-makers under the grievance process have jurisdiction to interpret and award damages under the *Charter.*

(3) Challenges to the Harassment Policy may be grieved under section 208

[45] The remainder of the Plaintiff's allegations (at paras 28-34 of the SOC) relate to the operation of the CSIS (1) Grievance Policy, (2) Safe, Healthy and Respectful Workplace Policy [Harassment Policy], and the (3) Resolution of Harassment Complaint Procedure. These are

policies implemented by the Defendants in furtherance of the *FPSLRA* and as such, fall under subparagraph 208(1)(a)(i).

[46] At various points throughout the hearing, counsel and co-counsel for the Plaintiff described the operation of these policies together with the *FPSLRA* as being "futile," "broken," "untrustworthy," and a "façade" used by the Service. In their written Memorandum, counsel for the Plaintiff alleged:

> 7. There is objective evidence that CSIS' grievance and harassment complaint processes are unfair and incapable of providing Sameer with a remedy. Section 236 of the *FPSLRA* simply cannot apply to block *Charter* claims and intentional torts when the internal grievance policies offered in lieu of an action are dependent upon the goodwill of a management who have created and perpetuated a cultural of systemic racism, Islamophobia, harassment and reprisal. CSIS internal grievance and harassment complaint policies are inadequate because CSIS managers do not take the process seriously or act fairly – and employees do not use it to resolve disputes.

[47] Respectfully, these allegations are without merit. The fact is the Plaintiff at no time in his twenty-year career filed a complaint under either the Harassment Policy or Grievance Procedure. He cannot now litigate in this Court the adequacy of procedures he himself chose never to follow. As the *FPSLRA* puts it in subsections 236(1) and (2), the bar to court litigation in subsection 236(1) applies whether or not an 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:

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.
[Emphasis added]	[Je souligne]

[48] In my view, the Plaintiff also had recourse to challenge the Harassment Policy and Grievance Procedure under the *FPSLRA.* Put simply, the "vast" scope of the grievance remedy in section 208 is the complete answer to his submissions. Since harassment in the course of employment is a condition of employment as discussed above, it follows these Policies constitute "instruments made by the employer that deals with…the conditions of employment" for the purpose a grievance as per subparagraph 208(1)(a)(i).

[49] In accordance with the analysis in *Green*, the Plaintiff could have challenged the Harassment Policy and Grievance Procedure themselves under sections 208 and 236 of the *FPSRLA*. In addition and in my respectful view, the statutory bar to court litigation set out in

subsection 236(2) pre-empts any cause of action in this Court notwithstanding there is no access to third party-adjudication.

[50] Here, the ONCA's reasoning in *Bron* is again relevant:

> [32] Finally, the appellant argues that a superior court must maintain an inherent jurisdiction despite whatever language may be used in s. 236. He relies on *Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v. Canadian Pacific Ltd.*, 1996 CanLII 215 (SCC), [1996] 2 S.C.R. 495, [1996] S.C.J. No. 42, at para. 8. As I read that case, it stands for the proposition that a superior court has inherent jurisdiction to provide a remedy where the relevant statutory scheme does not speak to the circumstances at hand. In other words, the court's inherent jurisdiction can fill remedial lacunae in legislation. There is no legislative gap here. Section 236 speaks directly to workplace complaints that are grievable under the legislation. For those complaints, even when there is no access to third- party adjudication, the grievance procedure operates "in lieu of any right of action",
>
> [Emphasis added]

[51] In my view, the pleadings and evidence in this case do not point to a lacunae or legislative gap in the *FPSLRA* requiring remediation. All the matters alleged in the SOC and evidence adduced as outlined above could have been grieved. Therefore, by virtue of section 236 of the *FPSLRA* this Court is without jurisdiction to adjudicate litigation in relation thereto. This situation is the same whether the Plaintiff's complaints are reviewed individually or in the aggregate.

[52] The Plaintiff also submitted that harassment claims cannot actually be grieved under CSIS policies and procedures. Further, he submitted CSIS's grievance process is not available to

employees who may pursue complaints under the CSIS Harassment Policy. In this connection he pointed to the Grievance Policy which provides:

> 1.2.2 This policy is not applicable in cases where alternative recourse, through the following policies and procedures, is available: …
>
> > e) resolution of complaints of harassment - refer to "CSIS Procedures: Resolution of Harassment Complaints"

[53] The Plaintiff submits:

> 69. In keeping the harassment process and grievance process on two tracks, CSIS keeps harassment complaints completely internal and shielded from scrutiny from anyone outside CSIS. The Harassment Policy does not provide for a complainant to seek independent adjudication. A harassment complaint, after being filed with management, is internally reviewed, and sent to an "investigator" (whose findings cannot be subject to a grievance). CSIS management (the Assistant Director, Human Resources – the "ADH") makes the ultimate decision on whether allegations of harassment are founded (rather than the management appointed Investigator) and, if so, whether discipline will be imposed on the harasser.
>
> 70. Only respondents who have disciplinary action imposed upon them may then grieve the ADH's decision under the harassment policy. The complainant has no right to grieve a harassment decision and, once the process is internally complete, has absolutely no recourse under CSIS policies to any further process or grievance at all. The effect is that if CSIS management decides not to discipline a harasser, the complainant has no opportunity to grieve that decision. A CSIS employee that management wishes to protect, regardless of his or her harassing conduct, is rendered immune from consequences. This leaves the integrity and outcome of the harassment complaint process up to the whims of CSIS management, who, in this case, are also the perpetrators of harm against Sameer.

[54] The AGC agrees the Service Grievance Procedure does not apply in the case of the conclusions of an investigator. But that is not the end of the matter. The AGC points to the provisions of the Harassment Policy which involve an investigation by an investigator itself:

> 5. FORMAL RESOLUTION PROCESS
>
> 5.1 When dealing with an allegation of harassment, through the formal process, the principles of procedural fairness will apply.
>
> 5.2 Should an employee file a grievance in which allegations of harassment are raised, the file is first addressed as a harassment complaint. A grievance and a harassment complaint cannot run concurrently for the same situation. If a complaint on the same issue is or has been dealt with through the grievance process, the formal complaint of harassment will not proceed any further and the file will be closed.
>
> 5.3 If harassment is based on one of the grounds of discrimination prohibited under the Canadian Human Rights Act, individuals may wish to file a complaint with the Canadian Human Rights Commission.
>
> …
>
> 5.19 The investigator's conclusion(s) cannot be subject to a grievance.

[55] In this connection, the Service's Grievance Policy provides:

> 1.2.2 This policy is not applicable in cases where alternative recourse, through the following policies and procedures, is available: …
>
> > e) resolution of complaints of harassment - refer to "CSIS Procedures: Resolution of Harassment Complaints"

[56] There are several objections to the Plaintiff's submission. First, at no time did the Plaintiff engage the formal Harassment Policy complaint procedures. He had that choice but chose not to exercise it. I do not see how he may engage it now.

[57] In addition, as the AGC notes, it is only the investigator's conclusion(s) under the Harassment Policy that may not be subject to a grievance, by virtue of the article 5.19 of the Harassment Policy quoted above. AGC submits and I find that under the Harassment Policy it is up to CSIS management to accept or reject the investigator's conclusions. It is also up to management to determine what if any remedies to impose.

[58] Therefore, the AGC asserted and I agree that a CSIS employee such as the Plaintiff may grieve (1) the manner in which the investigation was conducted (as the Court found in *Shoan v Canada (Attorney General),* 2016 FC 1003 per Justice Zinn), (2) management's decision to accept or reject the investigator's report, and (3) management's decision in relation to remedy. This list is not intended to be exhaustive; it deals only with matters arising in the present litigation. In my respectful view, these findings concerning the scope and range of grievable matters in relation to the Harassment Policy answer the Plaintiff's objections to the Defendants' motion to strike. I therefore find the Court has no jurisdiction over the matters raised by the Plaintiff in this action by virtue of section 236 of the *FPSLRA*. Therefore, the Plaintiff's action will be struck in its entirety.

[59] Moreover, I am not persuaded the circumstances of this case require me to engage any residual powers the Court may retain. In this connection, the AGC also submits, and I agree the affidavit of Dr. Hasan, Chief Operating Officer of the National Council of Canadian Muslims [NCCM], should be given little weight, which includes her statement that "As a practicing Muslim, and with knowledge of the information I have reviewed in this affidavit, I would not have trusted an internal CSIS process for reporting or remediating workplace discrimination and

harassment. Simply put, the pervasive and publicly acknowledged discrimination and harassment of Muslims within CSIS, a complete lack of Muslim (or any other visible minority) representation within senior management, a reporting and internal grievance process that required a person raising concerns about harassment or discrimination to go through his or her own management, and concerns about retribution or retaliation for making complaints would cast serious doubt over the potential effectiveness and fairness of any CSIS internal process."

[60] I make this finding because Dr. Hasan is not properly qualified as expert evidence, did not read the additional affidavits in this proceeding, and has no direct knowledge of the Service's workplace culture.

[61] I have also reviewed the other evidence filed by the Plaintiff and Dr. Hasan, including a number of electronic newspaper clippings, the CSIS Code of Conduct, various Parliamentary papers and other available material. I am not persuaded the record supports the Plaintiff's and NCCM's submissions that the operation of CSIS Grievance Procedure and or Harassment Policy in the context of the *FPSLRA* are "futile," "broken," "untrustworthy," or a "façade."

[62] In this connection, one statement emphasized by the Plaintiff was that of CSIS Director Vigneault who said: "I've said publicly and I've said privately to our employees that yes systemic racism does exist here, and yes there is a level of harassment and fear of reprisal within the organization." In my respectful view this statement neither alone nor in conjunction with the rest of the record constitutes an admission that CSIS is systemically racist, or that the Plaintiff is or was unable to obtain relief by way of grieving or complaining about the matters he alleges.

[63] More particularly, I am not persuaded the statement by Director David Vigneault, taken either by itself or in combination with the record, supports the proposition this Court should exercise any residual discretion it might have to accept jurisdiction over this action notwithstanding the combined effect of sections 208 and 236 of the *FPSLRA*.

VIII. Conclusion

[64] In my respectful view, it is plain and obvious the Plaintiff's claim will fail for want of jurisdiction, given the statutory framework of the *FPSLRA* and in particular the provisions of sections 208 and 236. The motion of the AGC will be granted and the Plaintiff's claim will be struck in its entirety. In the circumstances, I see no merit in granting leave to amend, which request was not made in writing but notably only at the last minute during argument.

IX. Costs

[65] The parties agreed that a lump sum all-inclusive award of costs in the amount of $5,000.00 should be paid by the unsuccessful party to the successful party. I agree this is reasonable, and I will so Order.

JUDGMENT in T-56-20

THIS COURT'S JUDGMENT is that:

1. This action is struck for want of jurisdiction, without leave to amend.
2. The Plaintiff shall pay to the Defendants their costs in the all inclusive lump sum amount of $5,000.00.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-56-20
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PLACE OF HEARING:	HELD BY WAY OF VIDEOCONFERENCE
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APPEARANCES:

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James Gorham Sean Gaudet	FOR THE DEFENDANTS

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