

Federal Court



Cour fédérale

**Date: 20260127**

**Docket: T-1400-21**

**Citation: 2026 FC 118**

**Saskatoon, Saskatchewan, January 27, 2026**

**PRESENT: The Honourable Madam Justice McVeigh**

**BETWEEN:**

**YVETTE ZENTNER  
LETITIA WELLS**

**Plaintiffs**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Defendant**

**JUDGMENT AND REASONS**

I. Overview

[1] This decision concerns a motion to certify a proposed class proceeding against Indian Oil and Gas Canada [IOGC] under *Federal Courts Rules*, SOR/98-106 [the Rules], rr 334.16–334.17. The Plaintiffs bring an action in systemic negligence against IOGC, with the proposed class defined as all current and former Aboriginal employees and contractors at IOGC, excluding persons employed as executives, managers, and deputy heads.

[2] As well, this decision relates to a motion to strike the claim pursuant to Rule 221(1)(a). The Attorney General of Canada [AGC] requests an order dismissing the amended Statement of Claim in its entirety for lack of jurisdiction, without leave to amend.

[3] For the reasons below, the motion to strike the Plaintiffs' Fourth Amended Statement of Claim without leave to amend will be allowed. It is plain and obvious that this Court lacks jurisdiction over the claim. The bulk of the claim is barred by section 236 of the *Federal Public Sector Labour Relations Act*, SC 2003, c 22, s 2 [FPSLRA]. For claims relating to incidents prior to April 1, 2005, this Court defers to the grievance procedure under the *Public Service Staff Relations Act*, RSC 1985, c. P-35 [PSSRA].

[4] This is not a decision that I reach easily. I have carefully considered the circumstances, including the heartbreaking stories of the women involved in this action, the hardships that they describe, and the obstacles that they must overcome in their effort to seek justice. At the same time, I applaud the strength of the women for choosing to come forward and not stay silent. In doing so, they have given voice to experiences that many in their position might have felt unable to articulate. The outcome of this case should not be understood to reflect the credibility of these women or the significance of their concerns, but only the constraints of the legal framework in which this Court must operate.

## II. Background

[5] The Plaintiffs bring an action in systemic negligence, alleging that IOGC owed a duty to class members (1) to have reasonable policies and procedures in place and to take reasonable

steps to prevent bullying, discrimination, harassment, and intimidation; and (2) to ensure that class members had equal opportunities to advance as non-Aboriginal employees.

[6] The Plaintiffs express a preference for the use of the term “Aboriginal” as it evokes the rights that are recognized and affirmed under section 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11. As the term “Indigenous” remains aligned with international human rights and legal standards, it will be used interchangeably with “Aboriginal” within these reasons for judgment.

[7] The Plaintiffs move to certify the systemic negligence action as a class proceeding. They define the relevant class as all current and former Aboriginal employees and contractors at IOGC from November 1, 1987 (the date on which IOGC was established with separate employer authority), until the present. The class excludes persons employed by IOGC as executives, managers, and deputy heads [the Executive Division]. The precise size of the class is unknown, but the Plaintiffs surmise from the AGC’s evidence that there are 85 potential class members.

[8] The AGC moves to strike the Plaintiffs’ claim, arguing that it is plain and obvious that this Court lacks jurisdiction over the claim, largely by virtue of a statutory bar to action at section 236 of the FPSLRA. In the alternative, the AGC argues that it is plain and obvious that the claim fails to disclose a reasonable cause of action in systemic negligence.

A. *The Parties*

(a) *Indian Oil and Gas Canada*

[9] IOGC is an agency within Indigenous Services Canada [ISC]. It was established on November 1, 1987, with the purpose of fulfilling the Crown’s obligations respecting the management and regulation of oil and gas resources on First Nation reserves across Canada. It is a “separate agency” named in Schedule V of the *Financial Administration Act*, RSC 1985, c F-11. As such, the Deputy Minister of ISC is responsible for ensuring that human resources management at IOGC reflects the practices of the Treasury Board.

[10] IOGC has adopted the Treasury Board’s policy on the Prevention and Resolution of Harassment in the Workplace. Pursuant to this policy, IOGC’s management initiated a third-party assessment of its workplace environment in June 2021, conducted by TLS Enterprises. A report collecting employee perceptions of the workplace and including 78 recommendations for IOGC was published on December 10, 2021 [the TLS Report].

[11] The AGC submits that disputes arising from labour relations in the federal public service, including at IOGC, are governed entirely by statutory regimes: from 1967 to March 31, 2005, these matters were governed by the PSSRA, and since April 1, 2005, these matters have been governed by the PSSRA’s successor legislation, the FPSLRA.

[12] Section 208 of the FPSLRA and associated provisions of the *Public Service Labour Relations Regulations*, SOR/2005-79 [PSLRR] entitle present and former employees, both unionized and non-unionized, to file grievances respecting matters affecting “terms and

conditions of employment.” The grievance procedure at IOGC was established in the agency’s 1987 Personnel Management Manual and subsequently amended in 2006, 2014, 2018, and 2022.

[13] The grievance procedure provides a broad scope of remedies. Where an employee of IOGC is not satisfied with the outcome of a grievance, they may seek judicial review of the decision. If the grievance relates to a disciplinary action resulting in the employee’s termination, demotion, suspension, or financial penalty, it may be referred to the Federal Public Sector Labour Relations and Employment Board [FPSLREB] for adjudication, pursuant to paragraph 209(1)(d) of the FPSLRA.

[14] Staffing appointments at IOGC are governed by the *Public Service Employment Act*, SC 2003, c 22, ss 12, 13 [PSEA]. Complaints relating to staffing decisions may be made under the PSEA for adjudication before the FPSLREB, the Public Service Commission of Canada [PSC], or the deputy head of IOGC.

(b) *Representative plaintiffs*

[15] Letitia Wells was employed by IOGC in casual appointments as a Junior Land Administrator in 2015, 2016, 2017, and 2018. On July 9, 2018, Ms. Wells became a part-time term employee in the position of Land Administrator. Her employment in this role was extended until March 30, 2020, with the final period including acting appointment as a Surface/Subsurface Land Analyst.

[16] Ms. Wells alleges sexual harassment by IOGC’s former Executive Director, as well as a senior manager (W.E.) and a divisional director (D.K.). Further, she alleges harassment and

physical assault by a supervisor (M.C.). The allegations against these persons are assumed to be true in the context of these motions.

[17] Ms. Wells did not file grievances with IOGC respecting these complaints. Upon reporting an alleged assault by M.C. on January 7, 2020, by way of an email, Ms. Wells was provided contact information for ISC's Centre for Integrity, Values and Conflict Resolution [Centre for Integrity] and for Employee Assistance Services.

[18] Yvette Zentner was employed by IOGC from 1997 until 2024. She worked as a Land Administration Clerk between 1998 and 2000; as a Land Administrator from 2000 to 2003; as a Contracts Administrator from 2003 to 2005; as a Contracts Analyst from 2005 to 2023; and as Supervisor of Sub-Surface Contracts from 2023 to 2024.

[19] Over the course of her employment with IOGC, Ms. Zentner filed three harassment complaints. All three complaints were filed after 2015, and one of them resulted in a favourable decision for Ms. Zentner and the issuance of a letter of reprimand against W.E., the harassing employee. Ms. Zentner's most recent grievance was filed in 2024, and the process remains underway as of the time of this litigation.

[20] Ms. Zentner also made two staffing complaints: one to the PSC, and the other to the FPSLREB. The PSC determined that the former complaint did not warrant an investigation, and Ms. Zentner ultimately withdrew the latter complaint.

B. *Plaintiffs' evidence*

(1) Supporting affidavits

[21] Affidavit evidence was provided by Georgia Handel, who was employed by IOGC from November 1995 to March 2023. Between November 20, 2000, until her retirement on March 31, 2023, she worked as the Supervisor, Subsurface Land. She is the sister of proposed representative plaintiff Yvette Zentner, who worked under Ms. Handel's supervision. Over the course of her employment, Ms. Handel filed one complaint which was found not to meet the definition of harassment under IOGC's grievance policy.

[22] Melanie Daniels, who was employed by IOGC from 2002 to 2005, also gave affidavit evidence. During her employment with the agency, Ms. Daniels developed and disclosed an addiction. IOGC encouraged and arranged for Ms. Daniels to seek treatment. Upon completion of her treatment program, Ms. Daniels chose not to continue employment at IOGC, on the grounds that her manager had disclosed the addiction to other employees and external stakeholders without her consent.

(2) Expert report

[23] The Plaintiffs rely on an expert report by Dr. Amy Bombay, a professor of psychiatry and nursing at Dalhousie University. In the report, Dr. Bombay presents general opinions on the factors contributing to stress and trauma among Indigenous Canadians. The report does not include an opinion or findings specific to IOGC, apart from the inclusion of aggregated data collected and published through the broader Public Service Employee Survey [PSES].

(3) Organizational review report

[24] Discussed at paragraph 10, above, the TLS Report is an organizational review of IOGC conducted by TLS Enterprises and published on December 10, 2021. The Plaintiffs rely on the TLS Report as evidence in support of their claim. As will be discussed in further detail below, the AGC disputes the admissibility of the report on the grounds of its relevance and necessity for determining the motions before the Court.

III. Applicable Law on Certification

[25] Rule 334.16 (attached as Appendix A) sets out five criteria for certification: (a) there is a reasonable cause of action in the pleadings; (b) there is an identifiable class of two or more persons; (c) there are common questions of law and fact; (d) a class action is the preferable procedure; and (e) there is a suitable representative plaintiff.

[26] On a motion for certification, the Plaintiffs must show that it is “plain and obvious” that there is a reasonable cause of action in the pleadings and that there is “some basis in fact” for each of the other requirements (*Wenham v Canada (Attorney General)*, 2018 FCA 199 at para 31; *Hollick v Toronto (City)*, 2001 SCC 68 at para 25). All five criteria must be met for the motion to succeed. The legal requirement to satisfy the first criterion is identical to what is necessary for a motion to strike, so the two will be considered together in a combined analysis (see paragraph 167, below).

#### IV. Applicable Law on Motion to Strike

[27] Rule 221(1)(a) permits the Court to strike out all or part of a claim where, upon assuming that the material facts pleaded are true, no reasonable cause of action is disclosed by the claim (*R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 17 [*Imperial Tobacco*]). In other words, there must be no reasonable prospect of success, even when the pleadings have been read generously.

[28] The AGC's primary assertion is that there is no reasonable prospect of success for the Plaintiffs' claim, as it is statutorily barred by section 236 of the FPSLRA. The relevant sections of the FPSLRA and its predecessor legislation, the PSSRA, are attached as Appendix B.

#### V. Submissions of the Parties

[29] For the sake of producing a complete record, and to ensure that my conclusions are reached through a transparent line of reasoning, what follows is a rather lengthy recitation of the parties' arguments. At the risk of some unavoidable repetition, it is necessary to set out these submissions in detail to provide the context for my findings.

##### A. *Plaintiffs' submissions on certification*

[30] The Plaintiffs allege in the Fourth Amended Statement of Claim that systemic negligence by IOGC's Executive Division led to bullying, discrimination, harassment, intimidation, and unequal treatment of Aboriginal employees, among other things. They rely upon a definition of systemic negligence as a tort involving "carelessness in the creation, management, or operation

of a system that causes harm to individuals and to groups of individuals and that can involve both acts of omission and acts of commission” (*Francis v Ontario*, 2020 ONSC 1644 at para 465, aff’d 2021 ONCA 197).

[31] The Plaintiffs indicate that, to successfully demonstrate systemic negligence, they must show the existence of a duty of care and a breach of that duty (*Rumley v British Columbia*, 2001 SCC 69 at para 30). Additionally, the Plaintiffs acknowledge that they must show that they sustained damages which were caused, in fact and in law, by the Defendant’s breach (*1688782 Ontario Inc v Maple Leaf Foods Inc*, 2020 SCC 35 at para 18).

[32] In this case, the Plaintiffs argue that they must prove specifically (1) that IOGC owed a duty of care to have reasonable policies and procedures in place and to take reasonable steps to prevent bullying, discrimination, harassment, and intimidation, and to ensure that class members had equal opportunities to advance in their employment as non-Aboriginal employees; and (2) that the conduct of IOGC and its agents, specifically the Executive Division, breached the foregoing duty. The Fourth Amended Statement of Claim includes allegations that IOGC had such a duty and breached it, causing damage to members of the proposed class.

[33] Evidence from Letitia Wells was presented in support of the allegations that bullying, discrimination, harassment, and intimidation occurred at IOGC and that the mechanism for addressing grievances is corrupt. Evidence from Yvette Zentner was presented to support the same allegations. The Plaintiffs maintain that the TLS Report supports the same allegations.

[34] The Plaintiffs allege that this negligence resulted in injuries to them, including (1) the systematic denial of Aboriginal sociocultural needs with respect to hiring, employment, and promotions; (2) systematic misrepresentation and concealment of avenues of recourse for Aboriginal employees; (3) systematic punishment of employees who reported concerns or complaints; and (4) bullying, discrimination, harassment, and intimidation.

B. *AGC's submissions on motion to strike*

[35] The AGC submits that this Court must determine the threshold issue of whether section 236 of the FPSLRA ousts the jurisdiction of this Court by statutorily barring the Plaintiffs' claim. If not, the AGC asks this Court to determine whether the Plaintiffs fail to plead a reasonable cause of action in systemic negligence.

[36] The AGC argues that it is plain and obvious that this Court lacks jurisdiction over the Plaintiffs' claim. In the alternative, the AGC argues that it is plain and obvious that the duty of care alleged does not exist and, even if it did, the Plaintiffs fail to plead material facts supporting the claim of systemic negligence. In either event, the AGC argues that the claim has no reasonable prospect of success and that it should therefore be struck under Rule 221(1)(a) (*Canada v Greenwood*, 2021 FCA 186 at para 95 [*Greenwood FCA*]; *Hudson v Canada*, 2022 FC 694 at paras 89, 110 [*Hudson*]; *McMillan v Canada*, 2023 FC 1752 at para 19 [*McMillan FC*]).

## (1) Section 236 of the FPSLRA

[37] The AGC argues that section 236 of the FPSLRA clearly and unambiguously provides that the grievance rights afforded to federal public service employees under the Act are “in lieu of any right of action” relating to grievable matters. As such, the AGC states that section 236 is a complete bar to the Plaintiffs’ claims after April 1, 2005, with no exception and no room for residual jurisdiction. The AGC submits that it is plain and obvious that the Plaintiffs’ claims are grievable under the FPSLRA, and that the Court’s jurisdiction is therefore ousted by section 236 (*McMillan FC* at para 24).

[38] The AGC submits that section 236 applies to all employees as defined at subsection 206(1) of the FPSLRA, which includes persons employed by IOGC. Former employees may grieve matters that arose during their employment, but the statutory bar at section 236 applies regardless of whether an employee utilized the grievance process or not. The AGC claims that this Court therefore has no jurisdiction over workplace harassment or discrimination allegations arising on or after April 1, 2005, as they relate to an “employee” within the meaning of section 206 of the FPSLRA (*Canada (Attorney General) v Santawirya*, 2019 FCA 248 at para 11).

[39] According to the AGC, no Canadian court has ever assumed jurisdiction over a labour dispute involving employees possessing grievance rights under the FPSLRA. Instead, courts have “consistently and invariably” recognized the application of section 236 as a bar to civil actions relating to grievable issues (*Adelberg v Canada*, 2023 FC 252 at para 17).

[40] In what the AGC characterises as *obiter dicta*, courts have commented on the conceivability of “residual jurisdiction” relating to section 236, limited to circumstances where evidence establishes that a grievance process is entirely “corrupt” and unfit for providing redress (*Ebadi v Canada*, 2024 FCA 39 at para 47 [*Ebadi FCA*]; *Bron v Canada (Attorney General)*, 2010 ONCA 71 at para 29 [*Bron*]; *Attorney General of Canada, on behalf of Correctional Service of Canada v Robichaud and MacKinnon*, 2013 NBCA 3 at para 10 [*Robichaud*]).

[41] The AGC notes that section 236 of the FPSLRA bars class proceedings concerning grievable matters, even where a class proceeding could be more efficient than the grievance procedure (*Bouchard c Procureure générale du Canada*, 2018 QCCS 1486, aff’d *Bouchard c Procureur générale du Canada*, 2019 QCCA 2067; *Hudson* at paras 91–105).

(a) *Plaintiffs’ claims involve grievable issues*

[42] The AGC cites jurisprudence indicating that allegations of workplace discrimination and harassment are grievable matters relating to “terms and conditions of employment” under the FPSLRA, including matters raised by “unrepresented and excluded employees” (FPSLRA, ss 208(1)(a)(i), 208(1)(b); *Ebadi FCA* at para 29, 36; *McMillan FC* at paras 29–33; *Bron* at para 15; *Hudson* at paras 103–104).

(b) *Plaintiffs’ claims are barred by the FPSLRA*

[43] The AGC submits that the representative Plaintiffs were well-informed about the recourse available to them for the grievances underlying the claim in this matter. The allegations in the claim, relating to workplace racial discrimination and harassment, fall within the meaning

of “any occurrence or matter affecting [their] terms and conditions of employment” under paragraph 208(1)(b) of the FPSLRA. The AGC argues that the Plaintiffs are therefore barred from litigating these allegations by section 236 of the FPSLRA.

[44] The AGC claims that the process has been and continues to be relied upon by IOGC employees, and no evidence was adduced that even suggests that the grievance system is “corrupt.” To support this, they note that the FPSLRA grievance process has been set out in manuals and procedures available to all IOGC employees.

[45] The representative Plaintiffs are both employees within the meaning of subsection 206(1) of the FPSLRA. The AGC therefore insists that the entirety of the claim advanced by Ms. Wells is statutorily barred, as it arose after the enactment of the FPSLRA in 2005. The same is said to be true for the main claims and evidence advanced by Ms. Zentner. The AGC submits that the allegations in Ms. Zentner’s affidavit occurring prior to 2005 should be struck for raising no cause of action against IOGC.

[46] The AGC submits that once it is established that a matter must be the subject of a grievance, that process cannot be circumvented by commencing an action, including a class proceeding. As the vast majority of the proposed class would also be “employees” within the meaning of subsection 206(1) of the FPSLRA, the AGC argues that their claims would also be statutorily barred by section 236.

[47] Subsection 236(3) of the FPSLRA provides a narrow exception applying to separate agencies, like IOGC, which have not been designated under subsection 209(3). Pursuant to this

subsection, the AGC concedes that the statutory bar at subsection 236(1) would not apply to IOGC employees disputing the circumstances of a non-disciplinary termination. In the submission of the AGC, the only proposed class members who would be permitted to proceed with this claim are therefore those alleging termination for non-disciplinary reasons on the grounds of workplace racial discrimination or harassment.

[48] The AGC purports that there are no allegations made within the Fourth Amended Statement of Claim, nor any evidence presented otherwise, that would support the application of subsection 236(3) of the FPSLRA to the present case. Consequently, the AGC argues, it would be entirely speculative to conclude that a putative subclass of plaintiffs fits within that narrow exception.

(c) *Residual jurisdiction*

[49] According to the AGC, no court has ever intervened in a labour dispute involving employees who possess grievance rights. The AGC submits that the jurisprudence on residual jurisdiction circumventing the operation of section 236 of the FPSLRA is limited to *obiter dicta* in several cases (*Bron* at para 29; *Robichaud* at para 10; *Ebadi v Canada*, 2022 FC 834 at paras 51, 59, 63–64 [*Ebadi FC*]; *Ebadi FCA* at paras 2, 46–48).

[50] Aspects of the claim against IOGC which relate to staffing decisions are grievable under the PSEA where they relate to individual complaints, or under the FPSLRA where they relate to allegations of systemic discrimination (*Dubé v Canada*, 2006 FC 796 at paras 41–42; *Johal v Canada Revenue Agency*, 2009 FCA 176 at paras 6, 38–40).

[51] The PSEA complaint process, alongside the limitation provision at subsection 208(2) of the FPSLRA, forms part of Parliament's comprehensive scheme for resolving employment disputes. The AGC concludes that there is no "gap" permitting this Court to exercise jurisdiction over claims that fall under either the PSEA or the FPSLRA.

[52] Additionally, the AGC states that the report of Dr. Bombay provides neither relevant nor necessary evidence. The report summarizes general research on experiences and outcomes of Indigenous Canadians. There is no direct evidence, analysis, or opinion within the report that is specific to IOGC, its employees, the FPSLRA grievance process, or the PSEA complaint process. If the Court admits any part of the report is admissible evidence, the AGC insists that it should be given little weight.

[53] The AGC claims that the affidavits of Georgia Handel and Melanie Daniels do not assist the Court in determining the application of section 236 of the FPSLRA. Their evidence allegedly fails to prove the Plaintiffs' allegations that IOGC failed to have methods of accommodating Indigenous employees or failed to provide equal opportunities for promotion of Indigenous and non-Indigenous employees.

[54] The AGC advises that it is not necessary for this Court to determine whether residual jurisdiction exists in relation to section 236 of the FPSLRA because the Plaintiffs bear the initial onus of adducing evidence demonstrating that the case fits within the narrow circumstances permitting this Court to exercise its discretion to assume jurisdiction. The AGC argues that this onus has not been met in this case, and reading section 236 contextually in its ordinary sense

reveals that grievable matters cannot be pursued through the courts. As such, the AGC argues that it is plain and obvious that this Court does not have jurisdiction, so the claim must fail.

(d) *Claims prior to 2005*

[55] The AGC submits that federal public servants have no absolute right to pursue litigation relating to their employment. As the Federal Court of Appeal has noted, “permitting parallel access to the courts would jeopardize the comprehensive scheme for labour disputes meant to provide specialized, expedient resolutions” (*Ebadi FCA* at para 27; see also *Chaudhry v Canada*, 2008 FC 356 at para 25, aff’d 2008 FCA 417).

[56] Generally, courts must defer to the statutory labour regime governing employment in the federal public sector, even if the available remedies under the statutory regime are not identical to what would be available through litigation (*Vaughan v Canada*, 2005 SCC 11 at paras 14–15, 33–42 [*Vaughan*]).

[57] In *Vaughan*, the majority of the Supreme Court of Canada observed that a “whistle-blower” exception involving individualized conflicts indicating that departmental procedure is insufficient could warrant an exception to the presumption of deference to the statutory regime. However, since then, the AGC submits that the enactment of the FPSLRA and the *Public Servants Disclosure Protection Act*, SC 2005, c 46 [PSDPA] “patched” this exception and provided a mechanism for public servants to safely disclose workplace wrongdoings (*Vaughan* at para 37; *Ebadi FCA* at para 28).

[58] The Federal Court of Appeal opined in *Ebadi FCA* that residual jurisdiction may be exercised by the Federal Court in matters brought by non-unionized employees when internal grievance mechanisms are incapable of providing effective redress (*Ebadi FCA* at paras 26, 28, 47, 58). However, the AGC observes that such residual jurisdiction is reserved for “exceptional cases,” and that the Plaintiffs bear the onus of establishing that the Court should assume and exercise jurisdiction (*Wojdan v Canada*, 2021 FC 1341 at para 22; *McMillan FC* at para 40).

[59] To illustrate the point, the AGC notes that in *Hudson*, a proposed class action against Correctional Service Canada, the plaintiffs presented both fact and expert evidence supporting arguments that the internal grievance process was corrupt. Justice Simon Fothergill nevertheless found that the plaintiffs had failed to discharge their onus and declined to exercise residual jurisdiction over the matter (*Hudson* at paras 11–24, 78, 91–93, 105).

[60] In this case, the AGC argues that the Plaintiffs similarly have not met their onus of showing that this Court should assume exceptional jurisdiction in relation to any pre-2005 claims. The AGC argues that no evidence has been presented to establish that any of the available recourse procedures were incapable of effectively providing redress.

(2) No duty of care grounding negligence action

[61] In addition to the claim being statutorily barred by section 236 of the FPSLRA, and the assumption of residual jurisdiction discouraged from the principles arising from the *Vaughan* line of jurisprudence, the AGC asserts that the claim fails to disclose a reasonable cause of action in systemic negligence. The AGC argues that a private law duty of care owed by an employer to

maintain a workplace free from harassment and discrimination does not exist, and even if it did, the AGC says that the Plaintiffs have not adduced sufficient evidence in support of their claim.

[62] The AGC argues that employers do not generally owe their employees a duty of care to prevent discrimination, bullying, harassment, and intimidation during and after employment, nor to guarantee career advancement. Additionally, the AGC says that the Crown's public duties regarding the prevention and redress of workplace racial discrimination and harassment cannot be taken to form the basis of a private law duty of care. Rather, the existence of a novel duty of care must be determined by applying the two-stage *Anns/Cooper* framework (*Nelson (City) v Marchi*, 2021 SCC 41 at paras 17–18 [*Nelson*]).

[63] Further, the AGC notes that no private law duty of care respecting the prevention of workplace discrimination and harassment has been recognized as owed by the Crown to individual public servants. The AGC submits that *Greenwood FCA* is not applicable to this case, because members of the Royal Canadian Mounted Police [RCMP] had a different grievance regime and were not entitled to the grievance procedure under the FPSLRA in that case (*Greenwood FCA* at paras 26–27, 156–157).

[64] Since the duty of care alleged by the Plaintiffs has not been previously recognized in Canadian law, the AGC submits that the Court must apply the *Anns/Cooper* framework. At the first stage, the Court must consider whether a *prima facie* duty of care exists between the parties, based on the foreseeability of the alleged harm and the proximity in the relationship. At the second stage, the Court must consider whether there are residual policy concerns negating the

existence of a duty of care, such as its effects on other legal obligations, the legal system, and society (*Nelson* at para 18).

[65] The AGC argues that the Plaintiffs' negligence claim fails at the second stage. Generally, the AGC submits, courts have been unwilling to permit negligence claims in the employment context. In one case concerning a non-unionized workplace, the Court of Appeal for Ontario held that it is neither necessary nor desirable to import negligence principles into the workplace, finding that an employer did not owe employees a duty of care to ensure "a safe and harassment-free environment without verbal abuse, intimidation, or assault" (*Piresferreira v Ayotte*, 2010 ONCA 384 at paras 32, 55–63 [*Piresferreira*]).

[66] The AGC states that in the federal public service, efficient workplace relations may be undermined when courts compete with the existing administrative schemes governing employment relations. While the AGC notes that this point has already been expressed with respect to the lack of jurisdiction, it also gives rise to a policy concern negating the recognition of a duty of care at the second stage of the *Anns/Cooper* test (*Vaughan* at paras 37, 39; *Ebadi FCA* at para 27; *Piresferreira* at para 62; *Greenwood FCA* at paras 156–157, 164).

[67] Jurisprudence from the Supreme Court indicates that allegations of workplace discrimination do not give rise to a private law right of action in tort. Instead, the AGC submits, such claims are properly pursued under human rights legislation (*Seneca College v Bhadauria*, 1981 CanLII 29 (SCC); *Honda Canada Inc v Keays*, 2008 SCC 39 at paras 63–64).

[68] The AGC states that Canadian courts have resisted the introduction of negligence principles into workplace relationships for the purpose of promoting efficient labour relations and judicial economy by avoiding concurrent civil claims. Therefore, the AGC concludes, the Plaintiffs' negligence claim must fail at the second stage of the *Anns/Cooper* test.

[69] On a motion to strike, it must be plain and obvious upon a generous reading of the pleadings, assuming that alleged facts are true, that no cause of action is disclosed. At the same time, the AGC reminds this Court that conclusory statements and bald assertions are not material facts (*McMillan FC* at paras 16–18).

[70] The Plaintiffs allege systemic negligence on behalf of all Indigenous employees and contractors of IOGC, excluding members of the Executive Division, from IOGC's inception in November 1987 to the present day. However, the AGC argues that the material facts pleaded relate only to the individual experiences of the proposed representative plaintiffs.

[71] The Fourth Amended Statement of Claim makes broad assertions about systemic discrimination, harassment, and bullying against class members. However, the AGC argues that these allegations are not supported by material facts and ought to be struck. The Plaintiffs may not successfully plead that class members' identification as Indigenous was a determining factor in hiring or promotional practices or discrimination, harassment, or bullying without providing material facts proving it. In the absence of material facts, the AGC submits that the systemic negligence claim fails to disclose a cause of action and should be struck without leave to amend.

C. *Plaintiffs' submissions on motion to strike*

[72] The Plaintiffs submit that section 236 of the FPSLRA does not oust the jurisdiction of the Court. Further, the Plaintiffs argue that the AGC's Notice of Motion states that the Court's jurisdiction is ousted by the operation of section 236 of the FPSLRA, but also refers to the PSEA without explaining why the latter piece of legislation is relevant.

[73] The Plaintiff presents that the AGC bears the onus of proving to the Court that it is plain and obvious that the pleading discloses no reasonable cause of action, assuming that the alleged facts are true (*Suss v Canada*, 2024 FC 137 at para 3).

[74] As well, the Plaintiff indicates that under Rule 221(2), no evidence is admissible on an application made pursuant to Rule 221(1)(a). There is a narrow exception allowing evidence which proves that there are necessary and efficacious alternative processes to litigation which oust the Court's jurisdiction, as such a determination "cannot be made in a factual vacuum" (*Greenwood FCA* at para 95).

[75] In *Greenwood FCA*, the Plaintiffs submit that the Federal Court of Appeal upheld the certification of a class proceeding in which certain RCMP members' individual claims were barred by the FPSLRA. The Plaintiffs say the Court of Appeal followed the Supreme Court's reasoning that there is no absolute rule precluding judicial consideration of workplace claims made by the federal public servants and found that an exception to the statutory bar arises where an organization's grievance mechanisms are "incapable of providing effective redress" (*Greenwood FCA* at paras 95–96, 110, 130, 196).

[76] In *Ebadi FCA*, the Federal Court of Appeal reiterated that the Federal Court retains residual discretion over claims otherwise barred by section 236 of the FPSLRA when internal mechanisms cannot provide effective redress. To this end, the Plaintiffs submit that this Court may consider evidence showing that IOGC’s grievance process is “broken” or “futile” or “untrustworthy” (*Ebadi FCA* at paras 47, 49).

[77] The Plaintiffs submit that *Greenwood FCA* and *Ebadi FCA* are binding precedents which apply in the circumstances of this case and warrant the exercise of the Court’s residual discretion to permit the matter to proceed.

[78] Further, the Plaintiffs argue that evidence relating to the mere availability of alternative mechanisms for redress does not help answer the question of jurisdiction (*Thomas v Canada (Attorney General)*, 2024 FC 655 at para 30 [*Thomas*]).

(1) FPSLRA does not apply to a subclass of claims

[79] The Plaintiffs submit that the FPSLRA came into force on April 1, 2005, replacing the PSSRA. Section 91 of the PSSRA previously entitled public servants to grieve interpretation and application of provisions or actual occurrences affecting terms and conditions of employment, unless a procedure for redress was provided for administratively or by an Act of Parliament. The Plaintiffs note that there was no section like section 236 of the FPSLRA present in the PSSRA.

[80] The Plaintiffs further note that the term “employee” as defined at subsection 2(1) of the PSSRA did not include contractors, persons working less than one-third of the normal period of

other persons doing similar work, persons employed on a casual basis, or persons employed for a term of under three months.

[81] As well, the Plaintiffs say that section 92 of the PSSRA was an exceptional provision for grievances relating to a disciplinary action resulting in termination of employment, suspension, or financial penalty. Further, they note that section 208 of the FPSLRA provides similar entitlements and limitations as section 91 of the PSSRA to employees, who are defined in substantially the same manner in Part 2 of the newer legislation, at subsection 206(1). The Plaintiffs observe that the FPSLRA introduced the statutory bar at section 236, which applies regardless of whether an employee presented a grievance and regardless of whether the grievance could be referred to adjudication.

[82] With this context, the Plaintiffs argue that it is plain and obvious that section 236 of the FPSLRA does not apply to claims by class members (1) that arose prior to April 1, 2005, when section 236 came into effect; (2) that fall under the PSEA; and (3) that are made by casual employees or contractors, and some part-time employees (citing FPSLRA, ss 206(1)(c), 208(2)).

[83] The Plaintiffs say that certain complaints by Ms. Handel and Ms. Daniels are not restricted by section 236 of the FPSLRA, as they occurred before 2005. They say that the AGC has therefore failed to show that it is plain and obvious that section 236 bars all potential claims of class members.

(2) A patchwork of schemes governed grievances

[84] The Plaintiffs argue that the AGC’s evidence demonstrates that there was a “patchwork” of grievance schemes and processes that were potentially available, which the Plaintiffs assert was un navigable for employees, effectively rendering the processes broken and insufficient. The Plaintiffs say it is not clear which mechanism, if any, would be available to provide redress for any given issue faced by class members.

[85] The AGC relies on affidavit evidence of John Kung, who was employed with Crown-Indigenous Relations and Northern Affairs Canada but did not work directly at IOGC. The Plaintiffs argue that this means he has no personal knowledge of matters involving IOGC. The Plaintiffs submit that Mr. Kung’s evidence should be given limited weight.

[86] The Plaintiffs raise concerns about Mr. Kung’s evidence that five different versions of the grievance procedure have been in place at IOGC since its inception in 1987. Mr. Kung generally describes the grievance process as involving three stages, but specifies that the version between 2018 and 2022 included only two stages. The Plaintiffs say that during this period, the second of these two stages was adjudication by the Executive Director, which could not be skipped. The relevance of this argument pertains to Ms. Wells’ allegations of sexual harassment against one of IOGC’s former employees in that role.

[87] Further, the Plaintiffs say that Mr. Kung fails to explain in his evidence that section 209 of the FPSLRA limits referral of grievances for adjudication to a narrow set of cases involving disciplinary actions resulting in termination, demotion, suspension, or financial penalty.

[88] Mr. Kung describes alternate avenues of recourse under the *Work Place Harassment and Violence Prevention Regulations*, SOR/2020-130 [WPHVPR], *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA], PSDPA, and PSEA. The Plaintiffs say it is difficult to reconcile Mr. Kung's assertion that IOGC employees must follow the statutory grievance process with the fact that he describes several statutes other than the FPSLRA which provide recourse for grievances. Further, the Plaintiffs say that Mr. Kung does not explain the role of ISC's Centre for Integrity in his evidence.

[89] The AGC also relies on an affidavit of Drew Heavens, a public servant at the Office of the Chief Human Resources Officer of the Treasury Board Secretariat, who the Plaintiffs also allege to have little direct knowledge of IOGC. While Mr. Heavens states that he was advised that IOGC employees must follow the Treasury Board Harassment Policy or the FPSLRA, he identifies additional recourse mechanisms under the PSEA, WPHVPR, *Canada Labour Code*, RSC 1985, c L-2 [CLC], *Government Employees Compensation Act*, RSC 1985, c G-5 [GECA], PSDPA, and through ISC's Centre for Integrity.

[90] The AGC further relies on an affidavit of Kimberley Jessome, a lawyer employed with the PSC. Ms. Jessome states in her evidence that PSC is an independent agency that conducts investigations and audits pursuant to the PSEA. The Plaintiffs dispute the independence of the PSC, on the grounds that the authority to initiate investigations is only granted to deputy heads. As the deputy head of IOGC, the Chief Executive Officer [CEO] therefore controls the ability to investigate allegations of dishonesty, improper action or inaction, bias, and favouritism in the internal appointment process. Ms. Jessome admitted that the PSC conducts its investigations at

the behest of the deputy head, reports its findings only to the deputy head, and leaves the discretion to implement corrective actions in the hands of the deputy head.

[91] The Plaintiffs note that these three affiants are in the Ottawa area and argue that they therefore have no knowledge respecting the handling of grievances at IOGC, which is located on Tsuut'ina Nation near Calgary. The Plaintiffs say that the AGC's evidence on how the patchwork of statutory and informal schemes presents potential recourse to class members is confused, because Mr. Heavens states that employees must follow Treasury Board guidelines or the FPSLRA process while simultaneously stating that recourse relating to internal appointments processes fall under the PSEA and are not subject to the process under the FPSLRA.

[92] The Plaintiffs reiterate their argument that the mere availability of alternative grievance mechanisms in the abstract does not answer the question of jurisdiction (citing *Thomas* at para 30). If the documented procedures, rules and processes truly protected employees from the types of harms alleged in the claim, then the Plaintiffs say that the class members would never have experienced the harms that they did.

[93] The TLS Report addressed confusion regarding grievance processes and observed that IOGC employees believed that there was a lack of clarity on which process applied in which situation. The Plaintiffs allege that this evidence is inconsistent with Mr. Heavens' statement that employees were obligated to follow either the Treasury Board policy or the FPSLRA.

(3) Notice and procedural requirements

[94] Subsection 65(1) of the PSLRR requires IOGC to:

notify ... each of its employees of the names or titles of the persons whose decision on a grievance constitutes a level in the individual grievance process and the name or title, as well as the contact information, of the employee's immediate supervisor or local officer-in-charge to whom an individual grievance may be presented.

[95] The Plaintiffs submit that IOGC was further obligated, under subsections 65(2)–(3) of the PSLRR, to post copies of that notice in “conspicuous places where they are most likely to come to the attention of its employees” unless an alternative method was approved.

[96] Additionally, the Plaintiffs submit that IOGC's human resources department was responsible for raising awareness and providing information and advice to employees pertaining to their grievance rights and the means of navigating the grievance process.

[97] While the AGC alleges that the Plaintiffs were well-informed of the recourse available for grievances, the Plaintiffs say that the opposite is true.

[98] The TLS Report indicated that there were several avenues for addressing harassment complaints, grievances, or disputes, and that IOGC staff were uncertain as to which would be appropriate for a given situation. The Plaintiffs argue that this is evidence that the grievance processes at IOGC were broken, futile, and untrustworthy.

[99] The Plaintiffs allege that IOGC shielded itself from legitimate complaints by offering little to no direction to class members regarding how to pursue a grievance. They argue that the human resources department operated for the benefit of management rather than class members

and other IOGC employees, and they direct the Court to consider the evidence in the TLS Report and the affidavits of Ms. Zentner and Ms. Handel in this respect.

[100] IOGC's alleged failure to inform employees of a mandatory dispute resolution system is presented by the Plaintiffs as evidence supporting the claim that the grievance system was ineffective, thereby authorizing this Court to exercise its residual jurisdiction.

[101] The Plaintiffs submit that the AGC cannot rely on section 236 of the FPSLRA to deny jurisdiction in circumstances where IOGC failed to meet its regulatory obligations to inform employees about the grievance processes. They suggest that IOGC intentionally obscured the processes required to pursue grievances.

(4) Grievance process was demonstrably ineffective

[102] The Plaintiffs maintain that the Court has residual jurisdiction over portions of the claim ordinarily barred by section 236 of the FPSLRA, as they argue that the evidence demonstrates that IOGC's grievance process was ineffective to the point of being broken and unworkable.

[103] The Plaintiffs say that the TLS Report establishes that the degree of judicial scrutiny afforded by litigation is warranted to hold IOGC accountable and that jurisdiction over the claim should therefore be assumed by this Court.

[104] The alleged issues with the internal grievance mechanisms are twofold: (1) they were unavailable to class members, and (2) they lacked effectiveness when they were used.

(a) *Not available to class members*

[105] The Plaintiffs assert that the harassment policies included at Exhibits “A” to “C” of the Heavens affidavit do not specify the operative grievance mechanism under the FPSLRA. They repeat the claim that IOGC did not take care to inform its employees of the applicable FPSLRA process. The alleged effect is that the processes were not available to class members.

[106] The TLS Report states that there was a harassment prevention policy prior to January 2021 which few IOGC employees reported being aware of, and which was not perceived by employees as beneficial. The report conveys that IOGC’s human resources personnel knew of only one harassment complaint, occurring in 2014, which went to the CEO for a formal investigation.

[107] The Plaintiffs argue that Ms. Handel’s affidavit evidence shows that sexual harassment of herself and other young female Aboriginal employees was mishandled by management at IOGC. The complainants were advised that their harasser was given a new position. The harasser’s employment was later terminated because of his further misconduct. The Plaintiffs say that IOGC did not or could not address concerns about inappropriate behaviour, and members of the Executive Division did not advise employees how to file grievances or complaints.

(b) *Proof of inefficacy*

[108] The TLS Report indicates that interviewees believed that IOGC management, up to and including the CEO, did not take allegations of racist and discriminatory comments seriously. The Plaintiffs present this as evidence of the corrupt grievance process at IOGC, since acts of

harassment needed to be reported to the perpetrators of those acts. This made employees reluctant or fearful of making complaints.

[109] The Plaintiffs argue that the CEO's inappropriate influence on the grievance process is illustrated through the December 2018 change in the grievance procedure from a three-step to a two-step process where the CEO's evaluation of a grievance was the final and unavoidable step in the process. Between December 2018 and November 2022, the CEO was responsible for reviewing all IOGC grievances escalated to that stage.

[110] As a casual employee from 2015 to 2018, Ms. Wells was not entitled to grieve under section 208 of the FPSLRA. Ms. Wells alleges experiencing sexual harassment by the CEO from September 2018 to 2019, who was at that time the unavoidable last step in adjudicating those grievances and other incidents described in affidavit evidence. Ms. Wells alleged that the assault against her in January 2020 by M.C. was reported in an email, but it was never acted upon. The Plaintiffs present this as further evidence that the FPSLRA offered no meaningful recourse.

[111] In her affidavit evidence, Ms. Zentner described what she viewed as dishonest hiring practices at IOGC dating back to 1998, when a manager's non-Aboriginal friend was allegedly hired into a position created for Aboriginal staff. The Plaintiffs submit this as evidence that the Executive Division's actions fostered mistrust among IOGC's Aboriginal employees.

[112] Ms. Zentner also gave evidence of concerns that she raised about being denied training which had been available to others in 2016. She wrote an email to the Assistant Deputy Minister, who advised that IOGC would be organizing in-house training. No such training occurred. The

Plaintiffs submit that this is further evidence that “nothing happened when grievances were raised.”

[113] Ms. Zentner raised concerns about harassment from D.K. and W.E., which she says were dismissed. After an investigation, W.E. was found to have engaged in harassment, was placed on leave for one year, and then transferred to a different department in the federal public service one year after returning to IOGC. The Plaintiffs argue that this supports the TLS Report’s finding that IOGC and the Executive Division did not take actions to address employee concerns about harassment.

[114] The Plaintiffs argue that the AGC cannot rely on the FPSLRA to deny the claim since IOGC failed to advise employees of the grievance process, did not use or follow the process, and between 2018 and 2022 reduced it to two steps, terminating in an in-house review by the Executive Director. The Plaintiffs argue that contrary to the AGC’s submissions, there is enough evidence between their affidavits and TLS Report to establish that it is not plain and obvious that there was an adequate and effective grievance system under the FPSLRA.

(5) Determining jurisdiction should be deferred

[115] The Plaintiffs say that any concerns regarding gaps in the evidence may be addressed through additional evidence that will be produced by IOGC during the discovery process. They say that this Court is not required to determine jurisdiction at this preliminary stage and may defer making a finding as to jurisdiction until all evidence has been adduced (*Hodgson v*

*Ermineskin Indian Band No. 942*, 2000 CanLII 15066 (FC) at para 10, *aff'd Hodgson v Ermineskin Indian Band No. 942*, 2000 CanLII 16686 (FCA) at paras 4–6).

[116] As a result, the Plaintiffs say that this Court does not need to be certain about whether it is appropriate to retain jurisdiction over the claim at this stage. But, they say, the Court must be certain that it is plain and obvious that no jurisdiction exists if it decides to strike the claim on this ground. At this stage, the Plaintiffs argue that they need only adduce “some evidence” to question the Court’s lack of jurisdiction, which they submit has been met.

D. *AGC’s reply submissions on motion to strike*

[117] The AGC notes that the Supreme Court has urged a cultural shift in civil litigation, emphasizing the importance of resolving legal disputes promptly and before a full trial where possible (*Hryniak v Mauldin*, 2014 SCC 7 at para 2; *Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19 at paras 18–19). These considerations apply with special force to class proceedings, and motions to strike play an important role in this respect (*Mohr v National Hockey League*, 2022 FCA 145 at para 49). In this case, the AGC asserts that there is no merit to this Court assuming jurisdiction and that a decision on jurisdiction is warranted at this stage.

[118] This Court has consistently declined jurisdiction in similar class proceedings alleging harassment and discrimination in the federal public sector. The AGC argues that jurisdiction should be determined at the threshold stage in this case as well (*Hudson* at paras 10, 197; *Thompson v Canada*, 2024 FC 1064 at para 146 [*Thompson*]). The guiding jurisprudence, the FPSLRA, and the PSEA all preclude this Court assuming jurisdiction.

(1) No jurisdiction over claims before April 1, 2005

[119] For claims prior to the enactment of the FPSLRA, the AGC argues that there is a legal presumption of deference to the statutory grievance regime established in the PSSRA (*Weber v Ontario Hydro*, 1995 CanLII 108 (SCC) at paras 57–58 [*Weber*]; *Vaughan* at paras 1–2, 54). Where the grievance process is completed without adjudication, grievors may seek judicial review (*Vaughan v Canada*, 2003 FCA 76 at para 136 [*Vaughan FCA*]; *Canada (Attorney General) v Assh*, 2005 FC 734 at paras 11–12).

[120] The AGC submits that there is no evidence compelling this Court to assume exceptional jurisdiction on claims arising before April 1, 2005. In this period, the Plaintiffs identified the employment concerns of Ms. Handel and Ms. Daniels, neither of whom pursued their grievances under the process available through the PSSRA. The AGC argues that the Plaintiffs’ evidence therefore turns on these affiants’ individual circumstances and does not demonstrate that the grievance and complaints processes were generally incapable of providing effective redress.

[121] The AGC emphasizes the fact that both Ms. Handel and Ms. Daniels could have grieved their concerns under the PSSRA. If they were unsatisfied with the result, the AGC submits that they could then have pursued judicial review.

[122] The AGC notes that Ms. Handel chose not to file a grievance due to her “perceived lack of psychological safety and anxiety about speaking up.” This, the AGC says, is not evidence that the grievance system was incapable of providing effective redress.

[123] Ms. Daniels alleges that factors within IOGC contributed to her addiction and that there was no addictions policy available. The AGC answers that IOGC always had a confidential Employee and Family Assistance Program available with a unique Aboriginal substance abuse counselling program involving elders, spiritual healers, and Aboriginal treatment facilities. The evidence shows that Ms. Daniels reported her addiction to IOGC, that she underwent addiction treatment through the program provided by IOGC, and that she resigned from her position with IOGC upon completion of that program. She did not file a complaint or grievance with IOGC while she was employed or after she left.

[124] In oral argument, the AGC referred to the cross-examination of Ms. Handel to demonstrate that, as a supervisor at IOGC, she was aware of staffing practices and recourses available to her, as well as who she should have contacted if she was unsure about how to proceed.

[125] The AGC concludes that there is no evidence that the grievance and complaint processes available to Ms. Handel, Ms. Daniels, or other putative class members before April 1, 2005, were incapable of providing effective redress.

(2) No jurisdiction over claims after April 1, 2005

[126] The AGC repeats that the claims of the representative Plaintiffs and the bulk of the proposed class are barred by section 236 of the FPSLRA, and that no residual jurisdiction exists. If residual jurisdiction does exist, the AGC argues that the Plaintiffs have not met the onus of

presenting compelling evidence showing that it must be exercised in this case (*Thompson* at para 127; *Dongmo c Canada*, 2025 CAF 106 at para 8).

[127] The AGC claims that neither *Greenwood FCA* nor *Ebadi FCA* bind this Court in assuming jurisdiction because neither of these cases, nor *Thomas*, assist the Plaintiffs. The AGC tells this Court that *Thomas* reaffirmed the principles of judicial deference to statutory employment and labour recourse regimes from *Weber* and *Vaughan*, and stands for the point that jurisdiction should not be assumed unless the evidence adduced by the Plaintiffs shows that adherence to the statutory process would result in a “real deprivation of ultimate remedy” (*Thomas* at para 30; *Hudson* at para 74; *Weber* at para 57, citing *St Anne Nackawic Pulp & Paper Co v Canadian Paper Workers Union, Local 219*, 1986 CanLII 71 (SCC), [1986] 1 SCR 704 at 723).

[128] The AGC says that Federal Court of Appeal’s decision in *McMillan v Canada*, 2024 FCA 199 [*McMillan FCA*] is also neither binding in this matter nor helpful for the Plaintiffs. The plaintiff in that case conceded that this Court did not have jurisdiction over claims falling under the FPSLRA, and the Court declined to assume residual jurisdiction (*McMillan FCA* at paras 45–46, 138–150).

[129] The AGC argues that the Plaintiffs have not discharged their onus of providing evidence compelling this court to exercise highly exceptional residual jurisdiction. They argue that the grievance processes at IOGC were unavailable to class members and lacked effective redress when they were used but, the AGC argues, neither of these claims is supported by the evidence.

(a) *Lack of familiarity*

[130] The AGC submits that a lack of familiarity with the available recourse mechanisms cannot be taken as constituting an exceptional circumstance which would warrant this Court's exercise of residual jurisdiction over the matter. Moreover, the AGC adduced evidence showing that the representative plaintiffs were both aware of the grievance process during and after their employment with IOGC.

[131] The record shows six complaints filed by Ms. Zentner. The AGC says there is no evidence that IOGC intentionally obscured the processes. In oral submissions, the AGC drew attention to Ms. Zentner's admissions relating to four complaints:

Q Ms. Zentner, we've just reviewed four complaints that you've acknowledged that you have filed against IOGC with both the Centre for Integrity and with the Public Service Commission?

A Okay.

Q And I just want to confirm with you that these complaints that you filed all deal with, like, you know, either harassment and discrimination or a staffing complaint?

A Yes.

Q Okay. And that, like, you know, just to confirm, you initiated these complaints yourself?

A Yes.

Q Okay. So based on these four complaints that you filed, would you agree with me that you're familiar with IOGC's harassment and staffing complaints process?

A I'm familiar to what I had to research for myself, and I would just look at the -- or try to find the next step. It's very difficult to navigate IOGC procedures. And I think they make it difficult for a reason 'cause they don't want you to file anything.

Q But, nonetheless, you filed, like, you know, these complaints?

A Yeah, I sure did.

[132] Ms. Wells, too, acknowledged awareness of the relevant process and admitted under cross-examination to making a deliberate choice not to use it:

Q All right. I just want to clarify something, though. Did Mr. Picard explain to you what the complaint process was at the Centre [for Integrity]? Did he go through –

A He did.

Q -- with you the steps?

A He did. He told me what I would have to do to process and going through, yes, he did. And I told him I was discouraged...

Q All right. So based in terms of your perceptions at the time in terms of your discussion with Mr. Picard, you would agree with me that based on those perceptions, that you chose not to file any complaints about IOGC with the Centre at the time?

A Yes. Because I felt it was a dead end. It was falling on deaf ears.

[133] The AGC argues that the mere existence of these mechanisms, without evidence of awareness or use of them, is sufficient to statutorily bar the Plaintiffs from commencing an action. An employee's lack of familiarity with an available grievance process is not an exceptional circumstance that would permit this Court to override a statutory bar to action (*Thompson v Kolotinsky*, 2023 ONSC 1588 at paras 19–31).

[134] Nevertheless, the AGC argues that the representative plaintiffs were aware of the mechanisms available to them, and that Ms. Zentner has repeatedly made use of them.

(b) *Lack of effective redress*

[135] In the AGC’s estimation, three distinct concerns are raised by the Plaintiffs relating to the effectiveness of IOGC’s grievance process: (1) it was changed to a two-step process between 2018 and 2022; (2) the FPSLRA’s provisions which limit the referability of individual grievances to the FPSLREB; and (3) the availability of alternative recourse mechanisms around 2021, when employee perceptions of IOGC workplace conditions were captured in the TLS Report. The AGC argues that none of these three concerns reaches the threshold of “compelling” evidence showing that the recourse available to proposed class members lacked effective redress (citing *Thompson* at para 127).

[136] On the first point, the AGC states that the two-step grievance process in place at IOGC between 2018 and 2022 was permissible. Section 64 of the PSLRR provides that “an individual grievance process must consist of a maximum of three levels” (emphasis added). As the two-step process complied with this provision, the basic structure of the process between 2018 and 2022 was lawful. Additionally, the AGC says that other informal conflict resolution services were still available at IOGC, such as through the Centre for Integrity.

[137] The Plaintiffs allege that the two-step process at IOGC was ineffective since the Executive Director and CEO was the “unavoidable last step” for any grievances presented between 2018 and 2022. The Plaintiffs claim that concerns that the CEO engaged in harassment (such as the allegations made by Ms. Wells) show that the process was ineffective. IOGC denies these allegations, and the AGC asserts that there is no evidence that this two-step process was ineffective.

[138] The AGC says that alternate recourse was available to grievors concerned with the fairness of the process, such as Ms. Wells, regarding her allegation against the CEO. Specifically, the 2018 IOGC Grievance Procedure required the waiver of any level in the procedure where the adjudicator at that level was the subject of a discrimination or sexual harassment complaint. In such circumstances, the Deputy Minister of ISC was authorized to perform the relevant functions. The AGC asserts that the grievance process was not ineffective; rather, it was directly responsive to this concern.

[139] On the second point, the AGC notes that the Plaintiffs appear to challenge the statutory limitation on the referability of individual grievances to the FPSLREB. Under paragraph 209(1)(b) of the FPSLRA, an employee of IOGC would be entitled to have their grievance referred to adjudication before the FPSLREB if it relates to a “disciplinary action resulting in termination, demotion, suspension or financial penalty.” A grievance which cannot be referred to adjudication before the FPSLREB may nevertheless be subject to judicial review.

[140] Other recourse was available to IOGC employees, including confidential disclosure under the PSDPA and engagement with the Centre for Integrity. As discussed at paragraphs 131–132, above, the evidence shows that Ms. Wells was informed about how to bring a complaint to the Centre, as was Ms. Zentner.

[141] On the third point, the AGC submits that the TLS Report is comprised of an aggregation of individual employee perspectives rather than factual evidence. The AGC claims that the report therefore cannot be relied upon for the truth of its contents to meet an evidentiary burden, but only to provide background information for the sake of contextualizing other evidence (*Bigeagle*

*v Canada*, 2023 FCA 128 at paras 44, 46 [*BigEagle FCA*]; *Greenwood FCA* at paras 96–97; *McMillan FCA* at paras 122–128).

[142] The AGC argues that the Plaintiffs may not rely upon the TLS Report to fill in evidentiary gaps regarding the argument that the redress available through the grievance process was ineffective. The AGC says there is no evidence in the Plaintiffs’ affidavits directly addressing the range of recourse regimes available, nor evidence establishing that proposed class members did not have access to recourse regimes capable of providing effective redress for employment-related disputes, including allegations of workplace harassment and discrimination. Instead, the AGC claims, the evidence shows that the representative Plaintiffs were informed of the redress available to them, and where they chose to do so, they accessed the redress for their individual concerns. The AGC concludes that the Plaintiffs do not provide evidence relevant to the broader class as they are required to (*Hudson* at para 81).

[143] The AGC argues that the Plaintiffs’ allegations discussed at paragraphs 107, 111–112, above, are not supported by the evidence and have no bearing on the question of whether this Court has or ought to exercise residual jurisdiction.

(3) No jurisdiction for claims under the PSEA

[144] The AGC claims that the Plaintiffs incorrectly assert that this Court has jurisdiction over claims falling under the PSEA. Where claims are not grievable under the FPSLRA, but recourse relating to individual staffing complaints is available under the PSEA, the AGC maintains that this Court must decline jurisdiction.

[145] A complaint may be grievable under the FPSLRA even if it relates to a staffing decision, such as in cases where allegedly discriminatory treatment results in denial of a promotion. In other words, complaints arising from systemic concerns about staffing must be pursued under the FPSLRA rather than the PSEA, and such claims are barred from litigation under section 236 of the former (*Ebadi FC* at paras 1, 11; *Ebadi FCA* at paras 2, 4–5, 30; *Thompson* at paras 117–119).

[146] In this case, the AGC argues that the Plaintiffs' allegations of discrimination are not limited to individual staffing decisions within the purview of the PSEA, but more generally relate to the conditions of employment. Such allegations are grievable complaints, and the AGC submits that this Court's jurisdiction is therefore ousted by section 236 of the FPSLRA.

[147] Alternatively, the AGC submits that even if these allegations were framed purely as complaints relating to individual staffing matters, redress available under the PSEA would preclude this Court's assumption of jurisdiction to adjudicate the claims. Subsection 208(2) of the FPSLRA provides that where an administrative procedure for redress is available under another Act of Parliament, that procedure must be followed by a complainant. It permits grievances only where no other statutory regime exists.

[148] For staffing matters where redress is available under the PSEA, the AGC notes that the *Weber* and *Vaughan* line of jurisprudence dictates that this Court's jurisdiction is ousted unless the claimant adduces evidence demonstrating that the statutory procedure is corrupt or that following it would result in a "real deprivation of ultimate remedy" (*Weber* at para 57). The AGC submits that individual complaints of employees who did not obtain a position in a

selection process are properly adjudicated under section 77 of the PSEA (*Vaughan FCA* at paras 7, 20; *Thompson* at paras 111–117; *Welcome v Canada*, 2024 FC 443).

[149] The Plaintiffs adduce no evidence respecting the PSEA, while, in contrast, the AGC states that it provided evidence that Ms. Zentner accessed recourse under both the PSEA and FPSLRA.

[150] The AGC submits that courts must defer to Parliament’s choice to provide non-judicial recourse for labour and employment disputes in the federal public sector. Consequently, the AGC argues that this Court should defer to those processes and decline to exercise residual discretion in this case.

[151] The AGC concedes that some categories of employees, including casual employees and students, do not have the right to grieve under the FPSLRA and would not have had a right to grieve under its predecessor PSSRA. However, the AGC claims that other avenues of recourse are available to those employees, including through the CHRA, PSEA, and GECA.

## VI. Analysis

### A. *Admissibility and role of report evidence*

[152] As a preliminary issue, I must address the AGC’s challenge respecting the admissibility of the TLS Report and Dr. Bombay’s expert report and the role of these reports as evidence in these motions (at paragraphs 52, 141–142, above).

[153] Ordinarily, no evidence may be heard on a motion to strike, pursuant to Rule 221(2). However, evidence is permitted where a party raises an issue of jurisdiction, for the limited purpose of determining whether the suggested alternate administrative processes are efficacious (*Greenwood FCA* at para 95; see also *Berenguer v Sata Internacional - Azores Airlines, SA*, 2023 FCA 176 at para 26).

[154] Evidence in reports may be relied upon in a certification motion for the purpose of contextualizing uncontentious facts, determining whether references made in the statement of claim are accurately reflected, and for providing “some basis in fact” for the last four certification criteria. However, the Federal Court of Appeal has held that report evidence cannot be used to “fill in the existing gaps or the blanks in the pleadings” because it is “not the role of the motion judge to comb through the reports in order to particularize broad allegations” supporting the cause of action (*BigEagle FCA* at para 44).

[155] The AGC correctly notes that information in reports is usually not collected in a manner suitable for the purposes of civil litigation, since it is without regard to the rules of evidence. Information included in reports is not given under oath or affirmation, there is no opportunity for cross-examination. For these reasons, information contained in reports is generally considered hearsay (*BigEagle FCA* at para 46).

[156] When assessing evidence at the certification stage, a motions judge must conduct more than a superficial analysis but less than a determination of the merits (*Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 at para 103 [*Pro-Sys*]).

[157] The Plaintiffs argue that IOGC's participation in the PSES process is a sufficient reason for this Court to infer both that the data in Dr. Bombay's report are reliable, and that the report therefore provides "evidence of the perceptions of discrimination" in the federal public service. The AGC counters that the PSES does not disaggregate employee data specific to IOGC. Further, as there is no demographic breakdown of the data within, the AGC submits that it is not possible to know whether individuals reporting their perceptions of harassment in the PSES identified as Indigenous or non-Indigenous. I echo the concerns of the AGC.

[158] Moreover, the Plaintiffs repeatedly argue that the TLS Report provides direct evidence of discrimination at IOGC (at paragraphs 93, 98–99, 103, 106, 108, 113–114, above). While the contents of the report provide details that are relevant to understanding the workplace environment and organizational culture at IOGC, I find that it cannot be relied upon as direct evidence of the grievance process.

[159] The TLS Report's review of conflict resolution at IOGC is based upon the feelings, perceptions, and preferences expressed by employees. It states that many employees prefer to avoid confrontation, and do not feel that management possessed the necessary skills and training to resolve conflicts effectively. In some of the most relevant places, the report's findings are flawed. The entirety of its findings on IOGC's grievance process are as follows:

There is an IOGC Policy of filing grievances, although many staff are unaware of how to do that or are reluctant to do that. Some fear retaliation; some assume it will accomplish nothing, and it is simply too hard to go through the process alone, with no support. They felt that the grievance process is difficult to navigate even with proper support.

The CEO has the final say in a grievance. There is no recourse. In fact, all roads lead to the CEO.

[160] To conclude that there is “no recourse” in a final level grievance decision is simply incorrect. Where the CEO is directly implicated in a complaint, the evidence shows that ISC’s Deputy Minister may adjudicate the grievance. Moreover, a final level decision may be judicially reviewed.

[161] As another example, in discussing the availability of filing complaints with the Canadian Human Rights Commission, the TLS Report asks whether or why IOGC “[w]ould ... not prefer to resolve it in house?” While such analysis may be appropriate in the context of a report created for the purpose of promoting organizational reform, it is not sufficient in judicial proceedings.

[162] Both the TLS Report and Dr. Bombay’s report are admissible for the limited purpose established by the jurisprudence and not for the truth of their contents. That is to say, the reports are admissible for the purpose of contextualizing the facts pleaded and providing “some basis in fact” for the latter four of the five certification criteria under Rule 334.16(1) (*Greenwood FCA* at para 95). I must reject the Plaintiffs’ counterarguments that there are no hearsay issues with the TLS Report, and that the TLS Report itself or the implementation of its recommendations constitute an admission of systemic negligence by IOGC.

[163] The remaining question is whether these reports are also admissible for determining whether this Court has jurisdiction over the claim. From the facts that IOGC participates in the PSES process and has implemented at least some of the recommendations provided in the TLS Report, the Plaintiffs invite this Court to infer that the grievance procedure must be ineffective.

[164] I note that IOGC updated its grievance procedure in 2022, some time after the release of the TLS Report in December 2021. At a minimum, therefore, the TLS Report cannot prove on its own that the current version of the grievance procedure is incapable of providing effective redress to putative class members. Nor, for that matter, does the evolution of the grievance process over the decades of IOGC’s continued operation indicate that the process was at some point fundamentally flawed, as suggested by the Plaintiffs (at paragraph 86, above). The inference suggested by the Plaintiffs is therefore not acceptable.

[165] Bearing in mind the fact that it cannot be relied upon to establish material facts by itself, Dr. Bombay’s expert report and the TLS Report will be considered as evidence for the purpose of determining whether this Court should assume jurisdiction only to the extent that they contextualize the pleadings (*McMillan FCA* at para 125).

B. *First certification criterion and motion to strike*

[166] The parties agree on the legal principles that are applicable on a motion to strike. That is, assuming the facts pleaded are true, it must be plain and obvious that a claim has no reasonable prospect of success for it to be struck under Rule 221(1)(a) (*McMillan FC* at paras 16–18, citing *Imperial Tobacco* at para 47).

[167] The Federal Court of Appeal has observed that this test is “essentially the same” as the test for the cause of action criterion at paragraph 334.16(1)(a) of the Rules (*Jensen v Samsung Electronics Co Ltd*, 2023 FCA 89 at para 15). Accordingly, the analysis of the first certification criterion and the motion to strike will be merged in these reasons for judgment.

(1) The Court’s jurisdiction is ousted by the FPSLRA and limited by the PSSRA

[168] The term “employee” is defined at subsection 206(1) of the FPSLRA, in a manner that is substantially similar to the definition at subsection 2(1) of the PSSRA.

[169] There is no question that Ms. Zentner, Ms. Handel, and Ms. Daniels were each an “employee” within the meaning of the applicable legislation. Ms. Wells was casually employed between 2015 and 2018 and was therefore excluded from the meaning of “employee” by virtue of paragraph (e) of the definition. From July 2018 onward, however, she fell squarely within the definition of “employee” under the FPSLRA.

(a) *Essential character of the dispute*

[170] The essential character of the allegations in this case relate to IOGC’s inability to provide a safe and harassment-free workplace. As stated by the Federal Court of Appeal in *Ebadi FCA*, these are properly understood as “disputes relating to ... terms or conditions of employment” and are therefore grievable matters under subsection 91(1)(b) of the PSSRA and subsection 208(1) FPSLRA (*Ebadi FCA* at para 37).

[171] Courts have recognized that allegations ranging from harassment and discrimination to assault can be grieved under subsection 208(1) of the FPSLRA (*Hudson* at paras 103–105, citing *Jane Doe v Canada (Attorney General)*, 2018 FCA 183; see also *Ebadi FCA* at para 29).

(b) *Section 236 of the FPSLRA*

[172] The AGC, in line with the jurisprudence, correctly argues that subsection 236(1) of the FPSLRA provides a clear and unequivocal ouster of this Court’s jurisdiction.

[173] Subsection 236(2) of the FPSLRA provides that the right to sue is barred “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.” The fact that three of the four affiants relied upon by the Plaintiffs did not file grievances does not therefore mean that the statutory bar to this action is not operative.

[174] I find that the AGC successfully establishes that the bulk of the allegations underlying the Fourth Amended Statement of Claim are statutorily barred by the operation of section 236 of the FPSLRA.

[175] Where a defendant establishes that a pleading fails to disclose a reasonable cause of action for a lack of jurisdiction arising from subsection 236(1) of the FPSLRA, the onus shifts to a plaintiff to show that their claim falls within an exception to the rule (*Davis v Canada (Royal Canadian Mounted Police)*, 2024 FCA 115 at para 74 [*Davis*]).

(c) *Residual jurisdiction over PSSRA claims*

[176] The Plaintiffs argue that a subset of claims arose between November 1, 1987, and March 31, 2005. Such claims predate the FPSLRA and are not subject to the strict statutory bar to litigation provided at section 236 of that legislation.

[177] In *Vaughan*, the Supreme Court found that courts retained a residual jurisdiction over grievable issues under section 91 of the PSSRA (*Vaughan* at paras 2, 17, 29, 39). Section 236 of the FPSLRA was enacted by Parliament to foreclose the ability of courts to exercise such residual jurisdiction (see *Lightbody v Canada*, 2025 FC 1433 at paras 38–39 [*Lightbody*]).

[178] The jurisprudence that has emerged since then suggests that courts continue to retain the ability to exercise residual jurisdiction over exceptional cases where the grievance process is “corrupt” or “incapable of providing effective redress” (*Greenwood FCA* at para 130; *Davis* at para 88; *Ebadi FCA* at para 47; *Robichaud* at para 10).

[179] In this context, the Plaintiffs assert that a “substantial body” of the claims occurred prior to the enactment of the FPSLRA. Specifically, however, they only ask this Court to consider the experiences of Ms. Handel and Ms. Daniels (at paragraph 83, above), neither of whom pursued redress under the PSSRA. Without evidence of a single grievance filed in this period, it is not possible to conclude that the grievance process was incapable of providing effective redress between November 1, 1987, and March 31, 2005.

[180] The Plaintiffs’ remaining arguments in favour of this Court exercising residual jurisdiction appear to consider the entirety of the proposed class period, including those which are barred by section 236 of the FPSLRA.

(d) *Residual jurisdiction across entire class period*

[181] The Plaintiffs bear the burden of proving that their claims fall within an exception warranting the exercise of the Court’s residual jurisdiction. In the AGC’s submission, the

Plaintiffs are required to “present compelling evidence demonstrating that there are systemic deficiencies in the internal recourse mechanisms available” (*Thompson* at para 127). In other words, as the Supreme Court stated at paragraph 57 of *Weber*, there must be a “real deprivation of ultimate remedy” to justify the exercise of residual jurisdiction. To this end, the Plaintiffs must demonstrate that the grievance process at IOGC is corrupt or incapable of providing effective redress. However, I find that the Plaintiffs have not done so successfully.

[182] I accept the AGC’s argument (at paragraphs 136–138, above) that the existence of the use of a two-step grievance procedure between 2018–2022 was compliant with section 64 of the PSLRR and is not on its own proof of an ineffective grievance process.

[183] An employee who chooses not to follow the grievance procedure cannot challenge the adequacy of the process that they have not used. Fear of reprisal or retaliation is not a sufficient basis for this Court to exercise residual jurisdiction (*Ebadi FCA* at para 58; *Lightbody* at para 122, citing *Hudson* at paras 100–103). Accordingly, the experiences of Ms. Wells, Ms. Handel, and Ms. Daniels cannot establish the adequacy or inadequacy of the grievance mechanisms in place as there is no evidence that can be weighed to evaluate its functioning whatsoever.

[184] The Plaintiffs refer to several instances where informal written complaints were communicated to persons who may have played some role in the grievance process had it been initiated. Examples include Ms. Zentner’s complaint about not receiving training that others had received (at paragraph 112, above), and Ms. Wells’ email regarding an allegation of assault by another employee (at paragraphs 17, 110, above). The Plaintiffs assert that IOGC’s failure to act on such complaints demonstrates the futility of the grievance process. This cannot be accepted

for the very same reason: without any use of the grievance procedure by an aggrieved employee, its efficacy cannot be assessed.

[185] The Plaintiffs' mistrust of IOGC's management leads to the argument that the grievance process is corrupt since the adjudicative process is handled internally (at paragraph 108, above). The fact that members of the Executive Division are responsible for determining the merits of a grievance does not make the process inherently corrupt. There is recourse to hold an adjudicator accountable for final decision on a grievance through judicial review (*Ebadi FCA* at para 59; *Davis* at para 102).

[186] The Federal Court of Appeal has explained that a lack of third-party adjudication does not give rise to an exception that warrants the exercise of the Court's residual discretion:

The lack of third-party adjudication does not, in and of itself, allow a court to exercise its discretion to hear a claim: this is because subsection 236(2) states that the exclusivity of the grievance process identified in subsection 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 these two provisions is that courts no longer have any residual jurisdiction to entertain claims that are otherwise grievable ... on the basis of an employee's inability to access third-party adjudication ...

(*Davis* at para 91, emphasis added)

[187] In this case, as in *Lightbody*, the Plaintiffs rely on personal experience evidence in conjunction with reports which may plausibly establish that a workplace was tainted by a culture of racism, harassment, and discrimination. However, this evidence does not permit the Court to extrapolate that the grievance procedure relied upon by the organization was incapable of

providing redress to grievors for specific instances of harassment or discrimination (*Lightbody* at paras 117, 130).

[188] For all claims arising after April 1, 2005, the FPSLRA requires employees challenging systemic workplace issues to use the grievance framework. If a grievor is dissatisfied with the final decision, the appropriate recourse is judicial review of that decision, not a civil action for damages (*Davis* at para 102).

[189] To constitute an exception to section 91 of the PSSRA, the claims arising prior to April 2005 still require employees to prove that the organization’s grievance procedure did not provide redress. Otherwise, the Court should follow the general rule of deference to the statutory regime under the PSSRA (*Vaughan* at paras 39, 51).

[190] The Plaintiffs allege that IOGC failed to provide clear notice of the grievance process, in violation of sections 65 and 66 of the PSLRR (at paragraphs 94–95, above). The evidence of the four affiants associated with the proposed class, however, shows that each of them was informed and aware of the process. A regulatory breach arising from a failure to sufficiently promulgate details of the grievance procedure constitutes a serious administrative oversight, but it does not rise to the threshold of proving that there was a “real deprivation of ultimate remedy” where grievances were pursued by employees.

[191] The Plaintiffs characterize the interplay between the FPSLRA, PSEA, CHRA, PSDPA, and CLC, among others, as creating a confusing and unworkable “patchwork” so complex that it effectively prevents class members from accessing justice (at paragraphs 84–90, 92–93, above). I

cannot accept this argument. In the first place, it is undermined by the fact that Ms. Zentner has herself properly pursued grievances relating to harassment under the FPSLRA and complaints relating to staffing appointments under the PSEA.

[192] Contrary to this argument, the existence of a wide range of legislation demonstrates Parliament's intent to provide specialized and expert forums for different facets of the employment relationship. There is, so to speak, a specific door for employees to knock on whether a claim involves harassment (WPHVPR), discrimination (CHRA), or workplace safety (CLC). The fact that there are many doors does not mean that the building is locked. As long as a remedy exists within this statutory architecture, this Court must defer to the administrative regime set in place by Parliament.

[193] Finally, I accept that the Plaintiffs' direct evidence on operations at IOGC should carry greater weight than the affidavit evidence relied upon by the AGC. However, I do not accept that the AGC's evidence on the policies and systems in place at IOGC cannot be trusted simply because, as senior civil servants, the affiants who gave that evidence live and work in Ottawa, as the Plaintiffs argued (at paragraph 91, above).

[194] I reject the Plaintiffs' argument that evidence included in the AGC's affidavit evidence is "confused" because it distinguishes between recourse available for grievances relating to the terms and condition of employment under the FPSLRA and recourse available for complaints respecting hiring and promotion decisions under the PSEA (also at paragraph 91, above). This distinction is a clear statement of the law.

(e) *Deferral of determination on jurisdiction*

[195] The Plaintiffs indicate that a determination of jurisdiction at preliminary stage is not necessary and argue that such a decision should be deferred until more evidence is available to the Court (at paragraphs 115–116, above).

[196] However, since the AGC met the burden of establishing that judicial deference to the grievance process is owed or statutorily required under the PSSRA and FPSLRA, respectively, and the Plaintiffs have failed to meet their burden of showing that residual jurisdiction should be exercised in this case, a finding on the Court’s lack of jurisdiction over the claim is appropriate in this case (see *Lightbody* at para 131).

(f) *Conclusion on jurisdictional limitations*

[197] For these reasons, I conclude that it is plain and obvious that this Court lacks jurisdiction over the claim. This Court’s interference with the statutory procedures for grievances and staffing complaints under the existing and prior legislative schemes provided by Parliament is not justified.

[198] It is not necessary to consider the AGC’s alternative argument in support of the motion to strike. I note, however, that courts have admonished litigants for “dressing up” grievances as actions in negligence (*Ebadi FCA* at para 27, citing *Vaughan* at paras 37, 40, 42).

## (2) Disposition of motion to strike

[199] For the foregoing reasons, I find that the motion to strike the Fourth Amended Statement of Claim should be allowed.

[200] In striking a claim, leave to amend is denied only where it is plain and obvious that defects in the pleadings cannot be cured by amendment (*Bell Canada v Millenium Funding, Inc.*, 2025 FCA 153 at para 30, citing *Simon v Canada*, 2011 FCA 6 at paras 8, 15).

[201] The Plaintiffs filed their original statement of claim on September 14, 2021. Amended versions were filed on May 31, 2022, March 3, 2023, March 30, 2023, and February 27, 2025. I cannot see how a further amendment to the pleadings will be sufficient to overcome the jurisdictional challenge set out by the AGC. It is therefore plain and obvious that the defects in the claim will not be cured by further amendment. Leave to amend will be denied.

## VII. Conclusion

[202] In finding that this Court lacks jurisdiction over claims subject to section 236 of the FPSLRA, and that the Plaintiffs have not demonstrated that the circumstances of this case warrant the exercise of residual jurisdiction over potential claims within the scope of the PSSRA, I find that it is plain and obvious that the pleadings fail to disclose a reasonable cause of action.

[203] Consequently, the first requirement for certification under Rule 334(1)(a) is not met. As the test for certification is conjunctive, meaning that all five criteria must be met, I find that the motion for certification cannot succeed.

[204] The motion for certification will be dismissed and the motion striking the statement of claim will be allowed, without leave to amend.

[205] No costs will be awarded in this matter, as prescribed by Rule 334.39(1).

**JUDGMENT in T-1400-21**

**THIS COURT'S JUDGMENT is that:**

1. The Defendant's motion to strike the Fourth Amended Statement of Claim is granted, without leave to amend.
2. The Plaintiffs' motion for certification is dismissed.
3. No costs are awarded.

"Glennys L. McVeigh"  
\_\_\_\_\_  
Judge

**Appendix A**  
**Rule for Certification**

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

**Conditions**

**334.16 (1)** Subject to subsection (3), a judge shall, by order, certify a proceeding as a class proceeding if

- (a) the pleadings disclose a reasonable cause of action;
- (b) there is an identifiable class of two or more persons;
- (c) the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members;
- (d) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and
- (e) there is a representative plaintiff or applicant who
  - (i) would fairly and adequately represent the interests of the class,
  - (ii) has prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members as to how the proceeding is progressing,
  - (iii) does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other class members, and

**Conditions**

**334.16 (1)** Sous réserve du paragraphe (3), le juge autorise une instance comme recours collectif si les conditions suivantes sont réunies :

- a) les actes de procédure révèlent une cause d'action valable;
- b) il existe un groupe identifiable formé d'au moins deux personnes;
- c) les réclamations des membres du groupe soulèvent des points de droit ou de fait communs, que ceux-ci prédominent ou non sur ceux qui ne concernent qu'un membre;
- d) le recours collectif est le meilleur moyen de régler, de façon juste et efficace, les points de droit ou de fait communs;
- e) il existe un représentant demandeur qui :
  - (i) représenterait de façon équitable et adéquate les intérêts du groupe,
  - (ii) a élaboré un plan qui propose une méthode efficace pour poursuivre l'instance au nom du groupe et tenir les membres du groupe informés de son déroulement,
  - (iii) n'a pas de conflit d'intérêts avec d'autres membres du groupe en ce qui concerne les points de droit ou de fait communs,
  - (iv) communique un sommaire des conventions relatives aux honoraires

(iv) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record.

et débours qui sont intervenues entre lui et l'avocat inscrit au dossier.

### **Matters to be considered**

(2) All relevant matters shall be considered in a determination of whether a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact, including whether

(a) the questions of law or fact common to the class members predominate over any questions affecting only individual members;

(b) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate proceedings;

(c) the class proceeding would involve claims that are or have been the subject of any other proceeding;

(d) other means of resolving the claims are less practical or less efficient; and

(e) the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

### **Subclasses**

(3) If the judge determines that a class includes a subclass whose members have claims that raise common questions of law or fact that are not shared by all of the class members so that the protection of the interests of the subclass members

### **Facteurs pris en compte**

(2) Pour décider si le recours collectif est le meilleur moyen de régler les points de droit ou de fait communs de façon juste et efficace, tous les facteurs pertinents sont pris en compte, notamment les suivants :

a) la prédominance des points de droit ou de fait communs sur ceux qui ne concernent que certains membres;

b) la proportion de membres du groupe qui ont un intérêt légitime à poursuivre des instances séparées;

c) le fait que le recours collectif porte ou non sur des réclamations qui ont fait ou qui font l'objet d'autres instances;

d) l'aspect pratique ou l'efficacité moindres des autres moyens de régler les réclamations;

e) les difficultés accrues engendrées par la gestion du recours collectif par rapport à celles associées à la gestion d'autres mesures de redressement.

### **Sous-groupe**

(3) Si le juge constate qu'il existe au sein du groupe un sous-groupe de membres dont les réclamations soulèvent des points de droit ou de fait communs que ne partagent pas tous les membres du groupe de sorte que la protection des intérêts des membres

requires that they be separately represented, the judge shall not certify the proceeding as a class proceeding unless there is a representative plaintiff or applicant who

- (a)** would fairly and adequately represent the interests of the subclass;
- (b)** has prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members as to how the proceeding is progressing;
- (c)** does not have, on the common questions of law or fact for the subclass, an interest that is in conflict with the interests of other subclass members; and
- (d)** provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record.

du sous-groupe exige qu'ils aient un représentant distinct, il n'autorise l'instance comme recours collectif que s'il existe un représentant demandeur qui :

- a)** représenterait de façon équitable et adéquate les intérêts du sous-groupe;
- b)** a élaboré un plan qui propose une méthode efficace pour poursuivre l'instance au nom du sous-groupe et tenir les membres de celui-ci informés de son déroulement;
- c)** n'a pas de conflit d'intérêts avec d'autres membres du sous-groupe en ce qui concerne les points de droit ou de fait communs;
- d)** communique un sommaire des conventions relatives aux honoraires et débours qui sont intervenues entre lui et l'avocat inscrit au dossier.

**Appendix B**  
**Labour Relations Legislation**

***Federal Public Sector Labour Relations Act, SC 2003, c 22, s 2:***

**Definitions**

**206 (1)** The following definitions apply in this Part.

***employee*** means a person employed in the public service, other than

(a) a person appointed by the Governor in Council under an Act of Parliament to a statutory position described in that Act;

(b) a person locally engaged outside Canada;

(c) a person not ordinarily required to work more than one third of the normal period for persons doing similar work;

(d) a person who is an *officer* as defined in subsection 2(1) of the *Royal Canadian Mounted Police Act*;

(e) a person employed on a casual basis;

(f) a person employed on a term basis, unless the term of employment is for a period of three months or more or the person has been so employed for a period of three months or more;

(g) a member as defined in subsection 2(1) of the *Royal Canadian Mounted Police Act* who occupies a managerial or confidential position; or

(h) a person who is employed under a program designated by the employer as a student employment program.

...

**Définitions**

**206 (1)** Les définitions qui suivent s'appliquent à la présente partie.

***fonctionnaire*** Personne employée dans la fonction publique, à l'exclusion de toute personne :

a) nommée par le gouverneur en conseil, en vertu d'une loi fédérale, à un poste prévu par cette loi;

b) recrutée sur place à l'étranger;

c) qui n'est pas ordinairement astreinte à travailler plus du tiers du temps normalement exigé des personnes exécutant des tâches semblables;

d) qui est un *officier*, au sens du paragraphe 2(1) de la *Loi sur la Gendarmerie royale du Canada*;

e) employée à titre occasionnel;

f) employée pour une durée déterminée de moins de trois mois ou ayant travaillé à ce titre pendant moins de trois mois;

g) qui est un *membre*, au sens du paragraphe 2(1) de la *Loi sur la Gendarmerie royale du Canada*, et qui occupe un poste de direction ou de confiance;

h) employée dans le cadre d'un programme désigné par l'employeur comme un programme d'embauche des étudiants.

...

### Former employees

(2) Every reference in this Part to an employee includes a former employee for the purposes of any provisions of this Part respecting grievances with respect to

(a) any disciplinary action resulting in suspension, or any termination of employment, under paragraph 12(1)(c), (d) or (e) of the *Financial Administration Act*; or

(b) in the case of a separate agency, any disciplinary action resulting in suspension, or any termination of employment, under paragraph 12(2)(c) or (d) of the *Financial Administration Act* or under any provision of any Act of Parliament, or any regulation, order or other instrument made under the authority of an Act of Parliament, respecting the powers or functions of the separate agency.

### Right of employee

**208 (1)** Subject to subsections (2) to (7), an employee is entitled to present an individual grievance if he or she feels aggrieved

(a) by the interpretation or application, in respect of the employee, of

(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

(ii) a provision of a collective agreement or an arbitral award; or

(b) as a result of any occurrence or matter affecting his or her terms and

### Application aux anciens fonctionnaires

(2) Les dispositions de la présente partie relatives aux griefs s'appliquent par ailleurs aux anciens fonctionnaires en ce qui concerne :

a) les mesures disciplinaires portant suspension, ou les licenciements, visés aux alinéas 12(1)c), d) ou e) de la *Loi sur la gestion des finances publiques*;

b) dans le cas d'un organisme distinct, les mesures disciplinaires portant suspension, ou les licenciements, visés aux alinéas 12(2)c) ou d) de cette loi ou à toute loi fédérale ou à tout texte d'application de celle-ci, concernant les attributions de l'organisme.

### Droit du fonctionnaire

**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) par l'interprétation ou l'application à son égard :

(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) soit de toute disposition d'une convention collective ou d'une décision arbitrale;

b) par suite de tout fait portant atteinte à

conditions of employment.

ses conditions d'emploi.

### **Limitation**

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

### **Réserve**

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

### **Disputes relating to employment**

**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.

### **Différend lié à l'emploi**

**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**

(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.

### **Application**

(2) Le paragraphe (1) s'applique que le fonctionnaire se prévale ou non de son droit de présenter un grief et qu'il soit possible ou non de soumettre le grief à l'arbitrage.

### **Exception**

(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.

### **Exception**

(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.

**Public Service Staff Relations Act, RSC 1985, c. P-35****Definitions****2(1)**

...

**“employee”** means a person employed in the Public Service, other than

(a) a person appointed by the Governor in Council under an Act of Parliament to a statutory position described in that Act,

(b) a person locally engaged outside Canada,

(c) a person whose compensation for the performance of the regular duties of the position or office of the person consists of fees of office, or is related to the revenue of the office in which the person is employed,

(d) a person not ordinarily required to work more than one third of the normal period for persons doing similar work,

(e) a person who is a member or special constable of the Royal Canadian Mounted Police or who is employed by that Force under terms and conditions substantially the same as those of a member thereof,

(f) a person employed in the Canadian Security Intelligence Service who does not perform duties of a clerical or secretarial nature,

(g) a person employed on a casual basis,

(h) a person employed on a term basis, unless the term of employment is for a period of three months or more or the person has been so employed for a

**Définitions****2 (1)**

...

**fonctionnaire** Personne employée dans la fonction publique, même si elle a cessé d’y travailler par suite d’une grève ou par suite d’un licenciement contraire à la présente loi ou à une autre loi fédérale, mais à l’exclusion des personnes :

a) nommées par le gouverneur en conseil, en vertu d’une loi fédérale, à un poste prévu par cette loi;

b) recrutées sur place à l’étranger;

c) dont la rétribution pour l’exercice des fonctions normales de leur poste ou de leur charge consiste en honoraires ou dépend des recettes du bureau où elles sont employées;

d) qui ne sont pas ordinairement astreintes à travailler plus du tiers du temps normalement exigé des personnes exécutant des tâches semblables;

e) qui sont membres, ou gendarmes auxiliaires, de la Gendarmerie royale du Canada, ou y sont employées sensiblement aux mêmes conditions que les membres de la Gendarmerie;

f) employées par le Service canadien du renseignement de sécurité et n’exerçant pas des fonctions de commis ou de secrétaire;

g) employées à titre occasionnel;

h) employées pour une durée déterminée de moins de trois mois ou ayant travaillé à ce titre pendant moins de trois mois;

period of three months or more,

(i) a person employed by or under the Board,

(j) a person who occupies a managerial or confidential position,

(k) a person who is employed in a portion of the public service of Canada specified in Part I of Schedule I under a program designated by the Treasury Board as a student employment program,

(l) a person who is employed in the Parks Canada Agency established by the *Parks Canada Agency Act* under a program designated by the Agency as a student employment program,

(m) a person who is employed by the Canada Customs and Revenue Agency under a program designated by the Agency as a student employment program, or

(n) a person who is employed by the Canadian Food Inspection Agency established by the *Canadian Food Inspection Agency Act* under a program designated by the Agency as a student employment program,

and, for the purposes of this definition, a person does not cease to be employed in the Public Service by reason only that the person ceases to work as a result of a strike or by reason only of the termination of employment of that person contrary to this Act or any other Act of Parliament;

i) employées par la Commission ou relevant de son autorité;

j) occupant un poste de direction ou de confiance;

k) employées dans un secteur de l'administration publique fédérale spécifié à la partie I de l'annexe I en vertu d'un programme désigné par le Conseil du Trésor comme un programme d'embauche des étudiants;

l) employées par l'Agence Parcs Canada, constituée par la *Loi sur l'Agence Parcs Canada*, en vertu d'un programme désigné par l'Agence comme un programme d'embauche des étudiants;

m) employées par l'Agence des douanes et du revenu du Canada en vertu d'un programme désigné par l'Agence comme un programme d'embauche des étudiants;

n) employées par l'Agence canadienne d'inspection des aliments, constituée par la *Loi sur l'Agence canadienne d'inspection des aliments*, en vertu d'un programme désigné par l'Agence comme un programme d'embauche des étudiants.

## Right of employee

**91 (1)** Where any employee feels aggrieved

## Droit du fonctionnaire

**91 (1)** Sous réserve du paragraphe (2) et si aucun autre recours administratif de

(a) by the interpretation or application, in respect of the employee, of

(i) a provision of a statute, or of a regulation, by-law, direction or other instrument made or issued by the employer, dealing with terms and conditions of employment, or

(ii) a provision of a collective agreement or an arbitral award, or

(b) as a result of any occurrence or matter affecting the terms and conditions of employment of the employee, other than a provision described in subparagraph (a)(i) or (ii),

in respect of which no administrative procedure for redress is provided in or under an Act of Parliament, the employee is entitled, subject to subsection (2), to present the grievance at each of the levels, up to and including the final level, in the grievance process provided for by this Act.

### **Limitation**

(2) An employee is not entitled to present any 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, or any grievance relating to any action taken pursuant to an instruction, direction or regulation given or made as described in section 113.

### **Right to be represented by employee organization**

(3) An employee who is not included in a bargaining unit for which an employee organization has been certified as bargaining agent may seek the assistance of

réparation ne lui est ouvert sous le régime d'une loi fédérale, le fonctionnaire a le droit de présenter un grief à tous les paliers de la procédure prévue à cette fin par la présente loi, lorsqu'il s'estime lésé :

a) par l'interprétation ou l'application à son égard :

(i) soit d'une disposition législative, d'un règlement — administratif ou autre —, d'une instruction ou d'un autre acte pris par l'employeur concernant les conditions d'emploi,

(ii) soit d'une disposition d'une convention collective ou d'une décision arbitrale;

b) par suite de tout fait autre que ceux mentionnés aux sous-alinéas a)(i) ou (ii) et portant atteinte à ses conditions d'emploi.

### **Restrictions**

(2) Le fonctionnaire n'est pas admis à présenter de grief portant sur une mesure prise en vertu d'une directive, d'une instruction ou d'un règlement conforme à l'article 113. Par ailleurs, il ne peut déposer de grief touchant à l'interprétation ou à l'application à son égard d'une 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.

### **Droit d'être représenté par une organisation syndicale**

(3) Le fonctionnaire ne faisant pas partie d'une unité de négociation pour laquelle

and, if the employee chooses, may be represented by any employee organization in the presentation or reference to adjudication of a grievance.

**Idem**

(4) No employee who is included in a bargaining unit for which an employee organization has been certified as bargaining agent may be represented by any employee organization, other than the employee organization certified as bargaining agent, in the presentation or reference to adjudication of a grievance.

une organisation syndicale a été accréditée peut demander l'aide de n'importe quelle organisation syndicale et, s'il le désire, être représenté par celle-ci à l'occasion du dépôt d'un grief ou de son renvoi à l'arbitrage.

**Idem**

(4) Le fonctionnaire faisant partie d'une unité de négociation pour laquelle une organisation syndicale a été accréditée ne peut être représenté par une autre organisation syndicale à l'occasion du dépôt d'un grief ou de son renvoi à l'arbitrage.

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

**DOCKET:** T-1400-21

**STYLE OF CAUSE:** YVETTE ZENTNER, LETITIA WELLS v THE  
ATTORNEY GENERAL OF CANADA

**PLACE OF HEARING:** EDMONTON, ALBERTA

**DATE OF HEARING:** NOVEMBER 4, 2025

**JUDGMENT AND REASONS:** MCVEIGH J.

**DATED:** JANUARY 27, 2026

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