IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bagri v. Quesnel (City),* 2022 BCSC 2003

Date: 20221117
Docket: S2260982
Registry: Prince George

Between:

Kewal Bagri, Steve Sager, Heather Sager, Nanine Bjornson, Teresa Whittet, Paula Redden, Candice Halliday, Robert Ross, Krystal Rawles and Deanna Dunphy

Plaintiffs

And

Corporation of the City of Quesnel, Byron Johnson, City Manager and His Majesty the King in Right of the Province of British Columbia

Defendants

Before: The Honourable Justice N. Smith

(via videoconference)

Reasons for Judgment

Counsel for the Plaintiffs/Application Respondents:	S.E. Whitehead N. Beatty
Counsel for the Defendants/Applicants, Corporation of the City of Quesnel and Byron Johnson, City Manager:	L. Tsang K. Draskovic
Counsel for the Defendant/Applicant, His Majesty the King in Right of the Province of British Columbia:	A. Choi
Place and Dates of Hearing:	Prince George, B.C. October 20-21, 2022
Place and Date of Judgment:	Prince George, B.C. November 17, 2022

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INTRODUCTION

[1] The plaintiffs are former employees of the defendant City of Quesnel (the "city") who were dismissed for failing to comply with a city policy requiring all employees to be vaccinated against COVID-19. They allege that the vaccination requirement is an infringement of bodily integrity contrary to the *Canadian Charter of Rights and Freedoms* [*Charter*] and that the vaccines are neither necessary, safe, nor effective. They seek damages from the defendant city and the defendant Province of British Columbia (the "province"), including aggravated and punitive damages and damages under the *Charter*.

[2] On these applications, each defendant applies for an order striking the amended notice of civil claim (the "amended NOCC") and dismissing the action because it discloses no reasonable claim. The Court is not being asked to rule on the merits of the plaintiffs' allegations or the public policy issues they raise.

[3] The city says the Court has no jurisdiction in the matter because the plaintiffs were unionized employees whose dismissal is within the exclusive jurisdiction of a grievance arbitration board appointed under the relevant collective agreements and the British Columbia *Labour Relations Code*, R.S.B.C. 1996, c. 244 (the "*Code*"). I was told that their union has in fact filed a series of grievances, and the first arbitration hearing was scheduled to take place before these reasons could be issued. The plaintiffs respond that both the vaccination policy and this action deal with issues of general public importance that go beyond the employment context.

[4] Meanwhile, the province says it was not the plaintiffs' employer and cannot be held responsible for their dismissal. The plaintiffs say the city acted as an agent of the province, which "pressured" the city into adopting the mandatory vaccination policy.

[5] The facts alleged in the amended NOCC are interspersed with statements more properly described as matters of argument, but the essential material facts alleged, which must be accepted as true for purposes of this application, include:

- The city is a municipality incorporated under the *Local Government Act*, R.S.B.C. 2015, c. 1.

- The plaintiffs were all city employees and, as of January 2022, had worked for the city for periods ranging from 4 months to 34 years.

- Each plaintiff is a member of one of two locals of the Canadian Union of Public Employees (CUPE) that have collective agreements with the city.

- On October 12, 2021, Byron Johnson, city manager, sent a memo to employees stating that although the city was not then requiring employees to be vaccinated, "it is possible that we may be compelled to do so in the future given the low vaccination numbers in the North."

- On November 1, 2021, the province announced a proof of vaccination policy for public sector employees.

- On November 5, 2021, Mr. Johnson informed city council that the city was "imposing a vaccination mandate for employees, volunteers, and contractors." He stated that employees who did not provide proof of full vaccination by January 3, 2022 would be terminated on January 28, 2022.

- On the same day, the city announced the policy in a news release, stating that: "As an employer, the City feels it is important to act in alignment with the provincial mandate that all BC public sector employees must be vaccinated, and the Provincial Health Officer's recommendation that all large employers put similar policies in place."

- On November 22, 2021, Mr. Johnson published a document setting out the mandatory vaccination policy, including statements to the effect that it was intended to protect not only individual employees and coworkers, but also their families and the general public.

- The plaintiffs were all placed on involuntary, unpaid leave of absence effective January 10, 2022 and terminated on February 7, 2022.

- No alternatives to vaccination, such as weekly testing or remote work, were offered.

- The vaccination requirement is not expressly included in the collective agreements. (The plaintiffs also allege it is not directly or indirectly implied, but I find that to be a matter of interpretation and argument rather than material fact.)

STRIKING PLEADINGS UNDER RULE 9-5

[6] Rules 9-5(1) and (2) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, read:

> **Scandalous, frivolous or vexatious matters**
>
> (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence, as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.
>
> [am. B.C. Reg. 119/2010, Sch. A, s. 22.]
>
> **Admissibility of evidence**
>
> (2) No evidence is admissible on an application under subrule (1) (a).

[7] A pleading will be struck for disclosing no reasonable claim if it is "plain and obvious" that the claim has no reasonable prospect of success. The facts as pleaded are presumed to be true, unless they are "manifestly incapable of being proven." The court must err on the side of permitting a novel but arguable claim to proceed to trial: *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 at paras. 64-66.

[8] Although the court must assume material facts pleaded to be true, speculation, assumptions or bald conclusory statements are not material facts: *Kindylides v. Does*, 2020 BCCA 330 at paras. 28-34.

PRELIMINARY OBJECTION

[9] At the outset of the hearing of these applications, the city objected to the admissibility of an expert report tendered by the plaintiffs. The report was prepared by Dr. Eric Payne, a pediatric neurologist and clinical researcher in Calgary. Dr. Payne's opinion is that COVID-19 rarely causes serious illness or death in people under 70, and the vaccines are neither safe nor effective in preventing transmission of the disease.

[10] The city says the report fails to comply with the mandatory requirements of Rules 11-2 and 11-6 in order for an expert report to be admitted and is, any event, not relevant.

[11] No evidence is admissible for purposes of Rule 9-5(1)(a), but the plaintiffs say the report is submitted for purposes of Rule 9-5(1)(d), on which evidence is allowed: *Timberwolf Log Trading Ltd. v. British Columbia (Ministry of Forests, Mines and Lands)*, 2013 BCCA 24 at para. 20. They are not asking the court, at this stage, to consider the merits of Dr. Payne's opinion but say they rely on it only for the purpose of showing that the claim is not an abuse of process because some evidence to support it is available for use at a future trial.

[12] If it were necessary to consider Rule 9-5(1)(d), I would have held the report admissible, despite its technical defects, for the limited purpose that the plaintiffs rely on. However, I find there is no need to consider Rule 9-5(1)(d) because, for reasons set out below, Rule 9-5(1)(a) is determinative.

THE *LABOUR RELATIONS CODE* AND THE COLLECTIVE AGREEMENTS

[13] The *Code* provides in s. 27 that a certified union is the exclusive bargaining agent for the collective rights of a bargaining unit and has the exclusive right to bind the

bargaining unit to a collective agreement. Section 48 makes the collective agreement binding on the employer and on every employee who is included in or affected by it.

[14] Under s. 84, every collective agreement must provide that dismissal of an employee can occur only for just and reasonable cause and is subject to arbitration. The section reads:

> **84** (1) Every collective agreement must contain a provision governing dismissal or discipline of an employee bound by the agreement, and that or another provision must require that the employer have a just and reasonable cause for dismissal or discipline of an employee but this section does not prohibit the parties to a collective agreement from including in it a different provision for employment of certain employees on a probationary basis.
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> (2) Every collective agreement must contain a provision for final and conclusive settlement without stoppage of work, by arbitration or another method agreed to by the parties, of all disputes between the persons bound by the agreement respecting its interpretation, application, operation or alleged violation, including a question as to whether a matter is arbitrable
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> …

[15] Although Rule 9(5)(2) says that no evidence is admissible on an application for an order that a pleading discloses no cause of action, the court may consider the content and effect of documents that have been referred to in the pleadings: *Union Road Properties Ltd. v. British Columbia (Agricultural Land Commission)*, 2018 BCSC 1349 at para. 4. The amended NOCC refers to the collective agreements between the city and the two union locals, so those agreements may appropriately be referred to.

[16] The collective agreements covering the plaintiffs contain the provisions required by s. 84 of the *Code*. The agreement for CUPE local 1050 includes a grievance procedure that defines a grievance as “any difference or dispute between the City and any employee or the Union, or a case where the City has allegedly acted unjustly.” It further provides that:

> An employee who considers himself to be wrongfully or unjustly discharged or suspended shall be entitled to a hearing under the grievance procedure.

[17] If the grievance procedure does not resolve the matter, either party may request that the grievance be submitted to a board of arbitration. The board consists of one member nominated by the union, one nominated by the employer, and a chair either agreed to by the two nominees or appointed by the Minister of Labour. The decision of a board of arbitration is final and binding on all parties. The collective agreement for CUPE local 1050-01 has similar terms.

[18] Each collective agreement has a provision acknowledging the right of the employer to manage and control operations, subject to the grievance procedure.

[19] Section 89 of the *Code* provides that an arbitration board has the authority to provide a final and conclusive settlement of a dispute arising under the collective agreement, including power to:

> (a) make an order setting the monetary value of an injury or loss suffered by an employer, trade union or other person as a result of a contravention of a collective agreement, and directing a person to pay a person all or part of the amount of that monetary value,
>
> (b) order an employer to reinstate an employee dismissed in contravention of a collective agreement,
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> …

[20] Section 95 says the decision of an arbitration board is binding on the parties to the arbitration and all employees who are bound by the collective agreement and affected by the decision. Sections 99 and 100 give limited appellate jurisdiction to the provincial Labour Relations Board and the Court of Appeal:

> **Appeal jurisdiction of Labour Relations Board**
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> **99** (1) On application by a party affected by the decision or award of an arbitration board, the board may set aside the award, remit the matters referred to it back to the arbitration board, stay the proceedings before the arbitration board or substitute the decision or award of the board for the decision or award of the arbitration board, on the ground that
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> (a) a party to the arbitration has been or is likely to be denied a fair hearing, or
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> (b) the decision or award of the arbitration board is inconsistent with the principles expressed or implied in this Code or another Act dealing with labour relations.

> (2) An application to the board under subsection (1) must be made in accordance with the regulations.
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> **Appeal jurisdiction of Court of Appeal**
>
> **100** On application by a party affected by a decision or award of an arbitration board, the Court of Appeal may review the decision or award if the basis of the decision or award is a matter or issue of the general law
>
> (a) unrelated to a collective agreement, labour relations or related determinations of fact, and
>
> (b) not included in section 99 (1).

[21] However, s. 101 reads:

> **Decision final**
>
> **101** Except as provided in this Part, the decision or award of an arbitration board under this Code is final and conclusive and is not open to question or review in a court on any grounds whatsoever, and proceedings by or before an arbitration board must not be restrained by injunction, prohibition or other process or proceeding in a court and are not removable by certiorari or otherwise into a court.

AUTHORITIES AND ANALYSIS

The Claim Against the City

[22] In *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, an employee covered by a collective agreement was suspended for abusing sick leave benefits. A grievance was eventually settled, but the employee brought action seeking damages in tort and under the *Charter*. The relevant legislation contained provisions for binding arbitration. The Supreme Court of Canada upheld an order striking out the action. McLachlin J. (as she then was) said at para. 67:

> 67 I conclude that mandatory arbitration clauses such as s. 45(1) of the Ontario *Labour Relations Act* generally confer exclusive jurisdiction on labour tribunals to deal with all disputes between the parties arising from the collective agreement. The question in each case is whether the dispute, viewed with an eye to its essential character, arises from the collective agreement. This extends to *Charter* remedies, provided that the legislation empowers the arbitrator to hear the dispute and grant the remedies claimed. The exclusive jurisdiction of the arbitrator is subject to the residual discretionary power of courts of inherent jurisdiction to grant remedies not possessed by the statutory tribunal. …

[23] More recently, in *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42 [*Horrocks*], the Court dealt with an employee who was terminated because she

refused to sign an agreement, provided for in the settlement of a grievance, that she would abstain from alcohol and take addiction treatment. The employee filed a discrimination complaint with the Manitoba Human Rights Commission, where an adjudicator said she had jurisdiction.

[24] The Supreme Court of Canada said at para. 39 that where labour legislation includes a mandatory dispute resolution clause, an arbitrator empowered under that clause has the exclusive jurisdiction to decide all disputes arising from the collective agreement, subject to clearly expressed legislative intent to the contrary. Dealing with the "essential character of the dispute, the Court said at paras. 50 and 51:

> [50] In its essential character, then, Ms. Horrocks' complaint is that her employer exercised its management rights in a way that was inconsistent with their express and implicit limits. This complaint arises foursquare from the NRHA's exercise of its rights under, and from its alleged violation of, the collective agreement. While the claim invokes Ms. Horrocks' statutory rights, those rights are "too closely intertwined with collectively bargained rights to be sensibly separated" and cannot be "meaningfully adjudicated . . . except as part of a public/private package that only a labour arbitrator can deal with" (E. Shilton, "Labour Arbitration and Public Rights Claims: Forcing Square Pegs into Round Holes" (2016), 41 *Queen's L.J.* 275, at p. 309). On the authority of this Court's precedents, the inescapable conclusion is that Ms. Horrock's claim therefore falls solely to the arbitrator to adjudicate.
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> [51] … Respectfully, the [Human Rights Commission] adjudicator's error here was to do what *Weber* directs not to do, by focussing on the *legal* characterization of Ms. Horrocks' claim instead of on "whether the facts of the dispute fall within the ambit of the collective agreement" (para. 44). It is of course true that Ms. Horrocks alleges a human rights violation. But were that sufficient to displace the exclusive jurisdiction of the labour arbitrator, exclusive arbitral jurisdiction would be significantly undermined, because *every* human rights complaint would automatically fall within the jurisdiction of the human rights adjudication system. Again, what matters are the *facts* of the complaint, not the legal form in which the complaint is advanced.
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> [Emphasis in original.]

[25] The Court of Appeal in *Horrocks* had said the dispute "transcended" the collective agreement because the standards for accommodating workers with alcohol or drug dependency should not vary between unionized and non-unionized employers. It said the Human Rights Commission could deal with such issues because consistency was in the overall public interest. The SCC rejected that proposition at para. 55:

> [55] … Again, this stands in opposition to *Weber*. There, the Court (at para. 60) *rejected* the suggestion that claims involving important policy questions fall outside the arbitrator's exclusive jurisdiction, stating that, even where a *Charter* issue may raise "broad policy concerns", it is "nonetheless a component of the labour dispute, and hence within the jurisdiction of the labour arbitrator." Continuing, the Court removed all room for doubt on this point: "The existence of broad policy concerns with respect to a given issue cannot preclude the labour arbitrator from deciding all facets of the labour dispute" (*ibid.*). In short, such concerns do not "transcend" the collective agreement; rather, they form part of the arbitrator's remit in adjudicating disputes thereunder.
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> [Italicized emphasis in original. Underlined emphasis added.]

[26] In determining whether the essential character of the dispute falls within the collective agreement and the exclusive jurisdiction of an arbitrator, the court must determine the extent to which it is, in substance, regulated by the legislative and contractual scheme, how closely the dispute resembles the sorts of matters which are, in substance, addressed by the legislation and collective agreement and the extent to which the court's assumption of jurisdiction would be consistent or inconsistent with that scheme: *Bruce v. Cohon*, 2017 BCCA 186 at para. 19.

[27] In *Blake v. University Health Network*, 2021 ONSC 7139, the Court in Ontario dealt with an action that, like this one, challenged the validity of an employer's mandatory vaccination policy. The Court said at paras. 11 and 12:

> [11] … The Legislature has gone to great pains to erect high walls surrounded by a deep moat to preserve and protect the labour relations environment from external incursions. The exclusive agency of the union and the exclusive jurisdiction of the arbitral dispute resolution regime mandated are but two of the most prominent elements of that edifice. …
>
> [12] The facts before me demonstrate quite persuasively that the essential character of this dispute goes to the very core of the collective bargaining agreement and relationship. Despite the different statutory schemes invoked in support of the claim – all of which an arbitrator is fully capable of taking into account in resolving the dispute – the claim calls into question the right of the employer to have enacted and enforced its vaccine policy. This clearly requires a consideration of the management rights clause of the collective agreements governing each of the unionized employees. The intersection of those management rights with bargained-for health and safety policies are also fundamental aspects of the collective agreements in place in this case. The claim disputes the right of the employer to terminate the employment of the affected employees. There are few aspects of a collective agreement more fundamental than establishing what does and does not constitute just cause for the discipline or termination of employment of an employee subject

> to it. The very foundation of the dispute *depends* on the existence of the collective agreements since, as shall be seen below, there is simply no general right to interfere with the decision of an employer to terminate the employment of an employee with or without cause.
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> [Italicized emphasis in original. Underlined emphasis added.]

[28] The plaintiffs here argue that the essential element of the dispute falls outside the collective agreement because the city adopted a public health policy aimed at protecting the broader public and the health care system, not just the workplace. They characterize it as a policy implemented for the primary purpose of "doing a social or collective good" rather than regulating relations between employer and employee. Therefore, they say it involves a deprivation of rights unconnected to employment. They also say there are public policy reasons for having this Court hear the matter in order to create binding jurisprudence on a novel issue.

[29] The plaintiffs rely on a number of cases that they say provide exceptions to the exclusive jurisdiction model discussed in *Weber*. They say one such exception applies when there are competing statutory tribunals and refer to *Regina Police Assn Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14 [*Regina Police*].

[30] In that case, a police officer resigned rather than face disciplinary action, but later attempted to withdraw his resignation. The Chief of Police refused to accept the withdrawal, and the union filed a grievance under the collective agreement. The arbitrator found she did not have jurisdiction under the collective agreement because matters of police discipline were governed by the Saskatchewan *Police Act*, *1990*, S.S. 1990-91, c. P-15.01 and the adjudicative procedures under that legislation. The Supreme Court of Canada ultimately agreed.

[31] The *Regina Police* case is an application of, rather than an exception to, *Weber*. The issue was which of two statutory tribunals had exclusive jurisdiction, based on the governing legislation and the essential character of the dispute. It provides no authority for the Court taking jurisdiction:

> 34 The underlying rationale for the approach to determining jurisdiction set out in *Weber*, *supra*, was based, in part, on the recognition that it would do violence to a comprehensive statutory scheme, designed to govern all aspects of the relationship between parties in a labour relations setting, to allow disputes to be heard in a forum other than that specified in the scheme: see, e.g., *St. Anne Nackawic*, *supra*, at p. 721; *Weber*, at para. 46. Consistent with this rationale, McLachlin J. advocated a more liberal interpretation of the scheme governing the relationship between the parties, emphasizing that a dispute could arise either expressly or inferentially from that scheme. While in *Weber* the statutory scheme in issue was the *Labour Relations Act*, R.S.O. 1990, c. L.2, in my view the same rationale applies in the case at bar. Here, the legislature has shown its intention to have all matters relating to discipline governed by *The Police Act* and Regulations. It has attempted to provide a comprehensive scheme for both the investigation and adjudication of such disputes. As a result, we must avoid formalistic interpretations of the provisions that would deny the Commission jurisdiction where it was clearly the intention of the legislature that the Commission hear the dispute.

[32] Although the issue in the case was which of two statutory tribunals had jurisdiction, the Court made clear at para. 39 that the same analysis applies where the jurisdictional choice is between a statutory tribunal and the Court:

> 39 To summarize, the underlying rationale of the decision in *Weber*, *supra*, is to ensure that jurisdictional issues are decided in a manner that is consistent with the statutory schemes governing the parties. The analysis applies whether the choice of forums is between the courts and a statutorily created adjudicative body, or between two statutorily created bodies. The key question in each case is whether the essential character of a dispute, in its factual context, arises either expressly or inferentially from a statutory scheme. In determining this question, a liberal interpretation of the legislation is required to ensure that a scheme is not offended by the conferral of jurisdiction on a forum not intended by the legislature.

[33] Another exception that the plaintiffs rely on is where the dispute centres on a resort to the criminal process: *McNeil v. Brewers Retail Inc.*, 2008 ONCA 405. In *McNeil*, an employee was charged with theft, based on information provided by the employer. In providing information to the police, the employer had omitted portions that were exculpatory and the employee sued for malicious prosecution. The Court found that the tort of malicious prosecution was not a matter that, in its essential character, arose from the employment relationship.

[34] The amended NOCC here includes allegations that requiring vaccination without consent constitutes an assault under s. 265 of the *Criminal Code*, R.S.C. 1985, c. C-46, and that the city has failed in its duty under s. 217.1 of the *Criminal Code*, which requires anyone with authority to direct how another person does work to take reasonable steps to prevent bodily harm to that person.

[35] I have some difficulty understanding how the plaintiffs can claim to have been assaulted or suffered bodily harm by vaccinations they refused to have. The city argued that no civil liability can arise from a breach of the *Criminal Code* and counsel for the plaintiffs conceded, at least in the alternative, that allegations relating to the *Criminal Code* could be struck. More importantly, the amended NOCC does not allege the existence of any criminal proceedings relevant to this action. Indeed, para. 23 of Part 2 of the amended NOCC specifically states that any criminal investigation is unlikely.

[36] The plaintiffs also rely on *R. v. 974649 Ontario Inc.*, 2001 SCC 81, as authority for an exception to *Weber* where parliamentary intention would be abrogated by not preserving the original intention of Parliament.

[37] With respect, I fail to see the relevance of that case. The issue there was whether a justice of the peace conducting a trial under the Ontario *Provincial Offences Act*, R.S.O. 1990, c. P.33, had the power to order costs against the Crown for a breach of the *Charter* by failing to disclose documents. To the extent the case is relevant, it actually supports the city's position. The Court said at para. 35 and 36:

> 35 This concern leads to the third possible approach to defining "power to grant the remedy sought". This approach answers the question of whether a court or tribunal has the power to issue the remedy sought by focusing on its function and structure. On this view, it is not necessary that the court or tribunal have the power to grant the precise remedy sought or even a remedy of the same "type". Although these factors may weigh heavily in the analysis, they are not determinative. The paramount question remains whether the court or tribunal, by virtue of its function and structure, is an appropriate forum for ordering the *Charter* remedy in issue. If so, it can reasonably be inferred, in the absence of any contrary indication, that the legislature intended the court or tribunal to have this remedy at its disposal when confronted with *Charter* violations that arise in the course of its proceedings.

> This approach, as I shall discuss in greater detail, is implicit in *Mills* and affirmed in *Weber* and *Mooring*.
>
> 36 Parliament and the provincial legislatures premise legislation on the fact that courts and tribunals operate within a legal system governed by the constitutional rights and norms entrenched by the *Charter*. The "functional and structural" approach reflects this premise. It rests on the theory that where Parliament or a legislature confers on a court or tribunal a function that engages *Charter* issues, and furnishes it with procedures and processes capable of fairly and justly resolving these incidental *Charter* issues, then it must be presumed that the legislature intended the court or tribunal to exercise this power.
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> [Emphasis in original.]

[38] The broad authority given to arbitrators under the *Code*, combined with the strong privative clause, indicate a clear legislative intention to grant arbitrators exclusive jurisdiction to award all remedies arising from what is alleged to be an unreasonable dismissal.

[39] The plaintiffs submit that a court can take jurisdiction where a plaintiff has no expectation of fair treatment in a grievance process where their political beliefs and activities are in issue. They rely on *Merrifield v. Canada (Attorney General)*, [2008] O.J. No. 2730 (S.C.J.).

[40] In *Merrifield*, a member of the Royal Canadian Mounted Police sought damages for harassment by his superiors arising from his political participation. A motions judge dismissed an application to strike the claim and that decision was upheld by the Ontario Court of Appeal at 2009 ONCA 127.

[41] The motions judge referred to previous cases finding that the RCMP's internal grievance procedure lacked independent third-party adjudication or a requirement for oral hearings, and that it was not a comprehensive or exclusive scheme: *Merrifield* at paras. 34 and 39. She added at para. 46:

> [46] There is another issue that compels me to determine that the plaintiff ought not to be forced to engage in the grievance process. Understandably, he has no expectation that he will be treated fairly in the grievance process. From his perspective, all of the evidence is to the contrary. Based on what he has pleaded, I can understand his skepticism. This situation infuses my decision that his claim in this court should proceed without any resort to the grievance process.

[42] Counsel for the plaintiffs stated that his clients similarly have no expectation they will be treated fairly in a grievance process given “the animosity that has been demonstrated to unvaccinated persons in Canada.” The amended NOCC contains no such allegation or any material facts supporting one, nor have any of the plaintiffs stated that alleged concern in affidavits.

[43] I view *Merrifield* as a decision based on the court’s specific finding of the essential nature of the dispute and a lack of exclusive jurisdiction in the statutory tribunal. Here, the arbitration process under the *Code* includes the third-party adjudication and procedural safeguards that were found to be missing in *Merrifield*. Its exclusive jurisdiction is also clear in the governing statute.

[44] The plaintiffs also rely on the court’s residual jurisdiction where a remedy is required that the arbitrator is not empowered to grant or the remedy would be otherwise inadequate: *Goldman v. Fraser Valley Aboriginal Children and Family Services*, 2020 BCCA 300 at para. 33. In *Goldman*, the Court held that a unionized employee could proceed with an action for wrongful dismissal, but the decision turned on the fact that the collective agreement was not yet in existence at the date of the plaintiff’s dismissal. There was therefore no arbitration procedure on which she could rely on, and the Labour Relations Board had no jurisdiction. That situation is not in any way comparable to the facts of this case, where a collective agreement with the required arbitration provisions was in place at the relevant time.

[45] The plaintiffs also refer to *Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v. Canadian Pacific Limited*, [1996] 2 S.C.R. 495, where Court was able to grant an interim injunction pending the hearing of a grievance under a collective agreement because there was no provision for such an injunction in the *Canada Labour Code*, R.S.C., 1985, c. L-2. I similarly find that distinguishable because s. 89 of the *Code* provides broad authority for an arbitration board to grant the remedies sought by the plaintiffs.

[46] The plaintiffs argue that they are raising serious and novel questions of law that are of general importance and beyond the jurisdiction of an arbitration board.

Those issues include the legality of vaccination requirements instituted by employers, the constitutionality of such requirements if they are imposed by government, and the necessity or efficacy of vaccines.

[47] The residual jurisdiction referred to in *Weber* and other cases relates to available remedies. If the dispute, in its essential character, falls within the jurisdiction of a tribunal that has the power to grant an effective remedy, the court cannot assume jurisdiction simply because the plaintiff has chosen to raise additional issues that the tribunal does not need to consider and may be beyond its jurisdiction.

[48] The plaintiffs may be correct that some or all of the issues they seek to raise need to be litigated, but it is still necessary that issues come before the court in an action properly framed to raise them.

[49] The plaintiffs have chosen to bring this action in their individual capacities, based on their status as former city employees. They do not claim standing to represent anyone else, as they would, for example, as representative plaintiffs in a certified class action or as purely public interest litigants. Although the amended NOCC refers to broader constitutional, social, scientific and political issues, all of the damages claimed by the individual plaintiffs flow directly from their loss of employment.

[50] Sweeping statements in the amended NOCC about matters such as alleged unconstitutional infringement of bodily integrity or alleged dangers of the vaccines cannot obscure the need for a determination of whether, having regard to the relevant facts and law, the plaintiffs' failure or refusal to be vaccinated provided the employer with just and reasonable cause for dismissal within the meaning of the collective agreements.

[51] That in turn requires consideration of the scope of management rights under the collective agreements, including whether and to what extent the employer may institute new conditions of employment in response to circumstances not foreseen at

the time the collective agreements were negotiated. Even one of the plaintiffs' central arguments—that a policy purporting to be for protection of the general public falls outside the workplace issues covered by the collective agreements—requires interpretation of the scope of the collective agreements and management rights under them.

[52] I agree with and adopt the comments of the Ontario Court in *Blake* that those issues go to the very core of the collective bargaining agreement because there are few aspects of a collective agreement more fundamental than establishing what does and does not constitute just cause for dismissal. As in *Horrocks* at para. 50, the broader general rights and policy issues the plaintiffs seek to raise are "too closely intertwined with collectively bargained rights to be sensibly separated."

[53] The allegations in the amended NOCC and the losses the plaintiffs say they have suffered all flow from the employment relationship and its termination. The amended NOCC acknowledges that the employment relationship was governed by collective agreements.

[54] I find that this dispute in its essential character arises from the plaintiffs' loss of employment and raises issues that, as a matter of law, fall squarely within the exclusive jurisdiction of an arbitration board under the collective agreements and the *Code*.

[55] Because the plaintiffs ask the court to adjudicate a matter over which it has no jurisdiction, their claim cannot be said to have any prospect of success. I therefore must conclude that the amended NOCC discloses no reasonable claim against the city within the meaning of Rule 9-5(1)(a).

The Claim Against the Province

[56] Having concluded that this action, in its essential character, arises from the termination of the plaintiffs' employment, I must also conclude it also discloses no reasonable claim against the province.

[57] The amended NOCC does not allege the existence of any employment relationship between the province and the plaintiffs. It does not allege that the province played any direct role in the dismissal of the individual plaintiffs or any basis on which it could have done so.

[58] The amended NOCC alleges that the province pressured or directed the city to implement the mandatory vaccination policy. The relevant paragraphs of the amended NOCC include:

> 5. Moreover, the Province pressured British Columbia businesses to implement the Mandate on their employees, as an overall objective of protecting the British Columbia public, and not just individual workplaces and employees. The City of Quesnel, along with countless other businesses, took this erroneous direction from the Province, and implemented the illegal, unconstitutional and damaging Mandate on its employees.
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> …
>
> 32. On 5 November 2021, a News Release issued by Linda McIntyre, Communications Clerk, stated the City had decided to align its actions with those of the provincial government by imposing a vaccine mandate on employees, volunteers, and contractors: "As an employer, the City feels it is important to act in alignment with the provincial mandate that all BC public sector employees must be vaccinated, and the Provincial Health Officer's recommendation that all large employers put similar policies in place."
>
> 33. The City was effectively directed by the Province to implement the Mandate, and acquiesced to the Province's public health jurisdiction. The Mandate was thereby implemented to further the Province's objectives to protect the healthcare system and overall community health of British Columbia. The Province's officials and lawmakers repeatedly emphasized the need for its citizens to vaccinate, while not mandating vaccines for the Province as a whole. In effect, the Province relied on employers to implement vaccine mandates to increase rates of vaccination in the province as a whole, without having to resort to an overall provincial vaccination mandate.
>
> 34. On 22 November 2021, Mr. Johnson published a document titled "COVID-19 Mandatory Vaccination Policy" requiring all current and prospective City employees, volunteers, and contractors to be fully vaccinated against Covid-19. This date exactly coincides with the Province's date of 22 November 2021, where public sector employees that had not disclosed their vaccination status would be considered unvaccinated.
>
> 35. In effect, the City of Quesnel implemented the Province's proof of vaccination policy, which was to impact British Columbians, of all ages,

> demographics and geographical locations, regardless of where they were employed.

[59] The allegations about pressure or direction by the province are entirely conclusory, with no factual allegation of any specific conduct by the province toward the city that amounted to such pressure or direction. Nor does the amended NOCC allege any basis on which the city was bound to comply with any provincial direction on how to deal with its own employees.

[60] At most, the amended NOCC alleges that the city made a policy decision to enact a requirement for its employees that was consistent with what the province had enacted for its own employees. Whether it could do so in a manner consistent with the terms of the collective agreements is the very issue that must be considered in the arbitration process.

[61] The amended NOCC also alleges in para. 27, that the city was acting as agent for the province:

> The City is an agent of the Crown by virtue of its status as an incorporated municipal entity under the *Local Government Act* (BC). The Minister of Municipal Affairs is accountable to the public for the activities and actions of municipalities in British Columbia.

[62] The law of agency is not a single legal concept. There are different types of agency which can arise out of different factual scenarios. The pleader must plead the facts carefully and precisely so as to fit within the type of agency that the pleader seeks to establish: *Hodgins v. British Columbia*, 2022 BCSC 1152 at paras. 26 and 27.

[63] The amended NOCC does not allege any facts to establish an agency relationship under which the province assumes any role in or responsibility for the city's management of its own workforce.

[64] Even if it was acceptable to allege a general, all-purpose agency relationship, any such suggestion is inconsistent with the plain words of the statute that the amended NOCC refers to. Section 1 of the *Local Government Act* reads:

> **1** The purposes of this Act are
>
> (a) to provide a legal framework and foundation for the establishment and continuation of local governments to represent the interests and respond to the needs of their communities,
>
> (b) to provide local governments with the powers, duties and functions necessary for fulfilling their purposes, and
>
> (c) to provide local governments with the flexibility to respond to the different needs and changing circumstances of their communities.

[65] A related statute, the *Community Charter*, S.B.C. 2003, c. 26, states:

> **1** (1) Municipalities and their councils are recognized as an order of government within their jurisdiction that
>
> (a) is democratically elected, autonomous, responsible and accountable,
>
> (b) is established and continued by the will of the residents of their communities, and
>
> (c) provides for the municipal purposes of their communities.
>
> (2) In relation to subsection (1), the Provincial government recognizes that municipalities require
>
> (a) adequate powers and discretion to address existing and future community needs,
>
> (b) authority to determine the public interest of their communities, within a legislative framework that supports balance and certainty in relation to the differing interests of their communities,
>
> (c) the ability to draw on financial and other resources that are adequate to support community needs,
>
> (d) authority to determine the levels of municipal expenditures and taxation that are appropriate for their purposes, and
>
> (e) authority to provide effective management and delivery of services in a manner that is responsive to community needs.

[66] Notwithstanding those general introductory statements, the governing legislation could make municipalities agents of the province for specific purposes, but the plaintiffs point to no provisions that do so.

[67] The plaintiffs clearly wish to challenge the provincial policies and recommendations which they say have impacted employees of “countless other businesses.” There is probably a cause of action and form of proceeding that would

allow them to do so, but an action in which they claim damages arising out of their loss of employment with the city is not one that properly raises those issues.

[68] I therefore also conclude under Rule 9-5(1)(a) that the plaintiffs have raised no reasonable claim against the province.

SUMMARY AND ORDER

[69] I find that the amended NOCC discloses no cause of action against either the city or the province, and must be struck out pursuant to Rule 9-5(1)(a).

[70] Rule 9-5(1) gives the court discretion to stay an action or allow amendments to the pleadings as alternatives to dismissing the action. Although no party sought to rely on those alternatives, I have considered whether it would be possible to stay the action and give the plaintiffs an opportunity to amend the claim in way that raises, at least against the province, the broad policy and constitutional issues they seek to raise. However, I conclude that the way those issues are raised in this action ties them so closely to the employment relationship and its termination that it would not be possible to meaningfully separate them. The plaintiffs, or others who share their views, will have to raise those issues in a different proceeding.

[71] The plaintiffs' claim as against the city and the province is dismissed with costs.

[72] Mr. Johnson, the city manager, was also named as a defendant in this action. The amended NOCC deletes the claims made against him in his personal capacity and purports to delete his name from the style of cause. However, the removal or addition of a party requires an application and order under Rule 6-2(7)(a) of the *Supreme Court Civil Rules*. As Mr. Johnson was not properly removed as a party, the action is also dismissed against him and he is also entitled to costs, if and to the extent he has any costs separate from or additional to the those of the city.

"N. Smith J."