SCC Court File No.: 41081

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

THE HONOURABLE MAXIME BERNIER

APPLICANT
(Appellant)

- and -

ATTORNEY GENERAL OF CANADA

RESPONDENT
(Respondent)

REPLY
(THE HONOURABLE MAXIME BERNIER, APPLICANT)
(Pursuant to Rule 28 of the *Rules of the Supreme Court of Canada*)

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The Respondent's Contentions and Brief Responses

1. The Respondent's Responses contain factual inaccuracies and misleading statements, which only serve to distract from the significant legal issues this case raises. At its core the proposed appeal is about whether the mootness test as currently framed in *Borowski* ought to be expanded or updated to account for the circumstances of emergency orders and similar types of executive legislation.

2. Before turning to that legal issue, the Applicant will address a few of the more problematic factual statements made by the Respondent to demonstrate that the Record in this matter is ideal for addressing the issues of public importance squarely before the Court.

Applicant's "Underlying Facts" Are Accurate

3. The Respondent states that it "generally agrees with the facts as set out by the Applicant", but it "does not agree" with the "underlying facts" as presented at para. 2 of the Applicant's Memorandum of Argument. In other words, the Respondent takes issue with the context in which the legal issues in this case arise. Part of this context which the Respondent takes issue with is that Canadian courts have not adjudicated the issues raised in the courts below. These facts are capable of judicial notice and more importantly it is open to the Respondent to refute the Applicant's assertions in that paragraph with references to jurisprudence. The Respondent has not provided examples of such cases because they do not exist.

4. Similarly, the Respondent has failed to provide an example in Canadian history where the federal government has previously prohibited a class of Canadians who were not facing criminal charges from leaving Canada because no such example exists.

5. The Respondent states it "does not agree" with the Applicant's assertion that "the federal government publicly threatened to reinstate the travel vaccine mandate without hesitation should it decide it was necessary", and it says that the "the possibility that similar vaccine mandates could be reintroduced was dismissed as speculative"[1]. This statement is highly misleading. The Respondent's threat to reintroduce the vaccine mandates was discussed by the lower court[2] and is

[1] Respondent's Response, at para. 19.
[2] Application Judge's decision, at para. 20.

referenced clearly in the Record.[3] Specifically, on June 14, 2022, the Treasury Board of Canada Secretariat and Transport Canada's News Release entitled, "Suspension of the vaccine mandates for domestic travellers, transportation workers and federal employees", stated:

> The Government of Canada **will not hesitate** to make adjustments based on the latest public health advice and science to keep Canadians safe. This could include an up-to-date vaccination mandate at the border, the **reimposition of** public service and **transport vaccination mandates**, and the introduction of vaccination mandates in federally regulated workplaces in the fall, if needed.[4]

Use of the term "Emergency Orders"

6. The Respondent asserts that the Applicant's use of the terms "emergency power" and "emergency orders" is misleading as they have not been defined.[5] As a point of clarification, emergency orders are Orders-In-Council, public health orders, or Regulations. They are made during a declared emergency by Cabinet, a Minister, or public health official, without Parliamentary or legislative debate, and where deliberation on such decision-making is often protected by privilege. A state of emergency is usually required, which implies that the situation is temporary in nature. Emergency orders of a varied nature have been made in Canada in response to COVID-19, which share the aforementioned attributes, including:

- provincial public health orders or regulations which closed or restricted businesses, churches, indoor and outdoor gatherings etc., or imposed vaccination mandates;
- federal orders which required Canadians to self-quarantine, attend a quarantine hotel, use the ArriveCan app, or comply with medical testing requirements upon return to Canada;
- federal orders which imposed vaccination mandates on Canadians wishing to travel by plane, train, or marine vessel.

7. None of those orders were subjected to parliamentary or legislative debate, unlike statutes which are passed after a long process which involves public consultation and participation.

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[3] Affidavit of Karl Harrison, sworn August 7, 2022 [Leave to Appeal Application, Tab 3I], at Exhibit "B".
[4] *Ibid.*, Emphasis added.
[5] Respondent's Response at para. 11.

Interim Orders Were Recurring

8. The Respondent writes that the "the vaccine mandates pursuant to Interim Orders were not of a recurring nature despite their renewal during a limited period."[6] Such an assertion is misleading and inconsistent with the facts as found by the lower court. As was found by the Application Judge, the Interim Orders which required air passengers to have taken two COVID-19 vaccines prior to boarding the aircraft came into effect on November 30, 2021, were replaced by a new Interim Order every 14 days and were maintained until June 20, 2022.[7] They recurred multiple times every two weeks for nearly six months.

The Applicant's Reply to the Legal Issues

9. The Respondent argues that the Applicant does not explain why his concerns about "evasiveness of review" and what constitutes "public interest" cannot be addressed within the existing *Borowski* test for mootness.

Borowski is Inadequate to Assist Courts in Assessing "Evasiveness of Review" of Emergency Orders

10. The shortcomings of the *Borowski* test are evident from the inconsistencies seen in recent court of appeal decisions dealing with the question of whether emergency orders are "evasive of review" for the purposes of determining the strength of that factor in the judicial economy assessment. The inconsistency in these decisions is due to the lack of guidance as to how to handle the "evasiveness of review" aspect of emergency orders.

11. This Honourable Court explained what it meant to "evade review" in *Borowski*:

> Similarly an expenditure of judicial resources is considered warranted in cases which although moot are of a recurring nature but brief duration. In order to ensure that an important question which might independently **evade review** be heard by the court, the mootness doctrine is not applied strictly. This was the situation in *International Brotherhood of Electrical Workers, Local Union 2085 v. Winnipeg Builders' Exchange*, *supra*. The issue was the validity of an interlocutory injunction prohibiting certain strike action. By the time the case reached this Court the strike had been settled. This is the usual result of the operation of a temporary injunction in labour cases. If the point was ever to be tested, it almost had to be in a case that was moot. Accordingly, this Court exercised its discretion to hear the case. … The mere fact, however, that a case raising the same point is likely to recur even frequently should not by itself be a reason for hearing an appeal which

[6] Respondent's Response, at para. 19.
[7] Application Judge's Decision, at paras. 6-9.

> is moot. It is preferable to wait and determine the point in a genuine adversarial context unless the circumstances suggest that the dispute will have always disappeared before it is ultimately resolved.[8]

12. Respectfully, the above-referenced paragraph does not guide Canadian courts in how to deal specifically with emergency orders that are time-limited in order to deal with emergency situations, and certainly does not factor in the fact that emergency orders are not subject to public participation through debate. They are made behind closed doors, and as seen in Canada, have resulted in restrictive government action against otherwise law-abiding citizens. The Applicant asks this Court to consider that *Borowski*'s current explanation of what it means to be "evasive of review" ought to be updated as it does not consider the unique and secretive circumstances of emergency orders.

13. Additionally, in the recent case of *Canadian Frontline Nurses v. Canada (Attorney General)*,[9] a decision not released until after the Applicant filed his Application for Leave to Appeal, Justice Mosley of the Federal Court of Canada agreed with the intervenor that "a public order emergency is a paradigmatic example of a matter that is evasive of review because it will almost always be over and moot by the time a challenge can be heard on the merits."[10] He wrote, "If the Court declines to hear these cases, a precedent may be established that so long as the government can revoke the declaration of an emergency before a judicial review application can be heard, the courts will have no role in reviewing the legality of such a decision."[11] This decision puts an additional spotlight on the inconsistencies in the way that Canadian courts have treated mootness in respect of challenges to time-limited emergency orders, which further bolsters the need for this Honourable Court's intervention and guidance.

Ill-Defined Basis to Justify Using Judicial Resources Where There is a Public Interest

14. *Borowski*'s guidance with respect to what the test is for whether judicial resources ought to be deployed where there is a public interest is limited to a single sentence. This Honourable Court stated: "The economics of judicial involvement are weighed against the social cost of continued uncertainty in the law."[12] Lowers courts and those bringing time-sensitive legal

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[8] *Borowski*, at p. 360, Emphasis added.
[9] *Canadian Frontline Nurses v. Canada (Attorney General)*, 2024 FC 42.
[10] *Ibid.* at para. 148.
[11] *Ibid*. at para. 149.
[12] *Borowski*, at p. 361.

challenges would benefit from further guidance as to what factors go into this assessment, such as the number of people affected, the significance of the impugned measure at issue, and the right that was alleged to have been limited. The lack of guidance in this respect leaves the door open for inconsistent decisions in respect of what cases are actually in the public interest.

15. Thus, the disparate decision is not actually the result of a principled exercise of discretion, but rather stems from a lack of proper guidance from this Court on how emergency orders ought to be treated.

There is Uncertainty in the Law

16. The Respondent's argument that the Interim Orders at issue were already reviewed by the Quebec Superior Court in *Syndicat des metallos, section locale 2008 c Procureur general du Canada* is misleading.[13] The *Metallos* decision was a labour dispute, not a constitutional challenge to Canadians' mobility rights to travel across and leave the country by air. It did not decide the novel *Charter* section 3 and 6 issues, nor did it decide whether the Interim Orders violated the *Canada Elections Act*.[14]

17. The Respondent's argument at paragraph 21 of its Response highlights the problem with how the lower courts have dealt with the issue and the uncertainty in the law. None of the cases referenced in the lower courts were faced with nor resolved the issue of whether it is constitutional, or otherwise lawful, to set up significant barriers to Canadians leaving the country. It is a red herring to point to other cases that dealt with other emergency orders, dealing with completely different issues, argued on separate grounds and say there is no uncertainty in the law. The reality is that the Orders were novel, and so are the allegations of unconstitutionality and infringements of democratic rights.

Submission on Costs

18. The Respondent has asked for costs against the Applicant should it be successful in having this Leave Application dismissed. The Applicant does not ask for costs against the Respondent, and he submits that due to the significant public interest in this case, that costs not be awarded against him if his Leave Application is denied.

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[13] Respondent's Response, at para. 20.
[14] *Canada Elections Act*, SC 2000, c. 9.

All of which is respectfully submitted this 16th day of February 2024.

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Allison Pejovic
Counsel for the Applicant

TABLE OF AUTHORITIES